

IN THE SUPREME COURT OF NOVA SCOTIA

APPEAL DIVISION

Clarke, C.J.N.S., Matthews and Freeman, JJ.A.

Cite as: Household Financial Corporation v. Conrad, 1992 NSCA 38

B E T W E E N:

HOUSEHOLD FINANCIAL CORPORATION and HOUSEHOLD TRUST COMPANY) David A. Graves) for appellants
- and -)
CYNTHIA CONRAD) A. Douglas Tupper and) Lyle I. Sutherland) for respondent
respondent)
) Appeal Heard:) November 13, 1992)) Judgment Delivered:) December 8, 1992))

THE COURT: Appeal dismissed with costs per reasons for judgment of Freeman, J.A.; Clarke, C.J.N.S., and Matthews, J.A., concurring.

FREEMAN, J.A.:

The message sent by the trial judge was that when employers treat employees as shabbily

as the appellant treated the respondent, they must be prepared to pay.

Mr. Justice Robert MacDonald of the trial division awarded \$5,000 punitive damages, special damages and nine months' pay in lieu of notice to Cynthia Conrad, a five-year employee of Household Financial Corporation, whom he found had been dismissed without notice and without cause.

He found that Ms. Conrad was a "personable, efficient and ambitious young employee" who had received a number of promotions and letters of high commendation from superiors and had never been reprimanded. The Halifax branch of Household Finance in which she worked, however, was rated "unsatisfactory" in company audits.

Ms. Conrad was fired without warning or any previous indication of the employer's displeasure the day before she was to move from Halifax to Ottawa, where she had been transferred by the company. She had cancelled her lease in Halifax, entered into a new one in Ottawa, sold her car and shipped her belongings. Having burned her bridges, she felt compelled to move. Her boss, Russell Dale Webb, had tried to persuade her not to accept the transfer because he did not wish to lose her services. A few days before her transfer he presented her with a going away gift at an employees' social function. He told her she would be missed, and kissed her on the cheek. The day before she was to leave he called her into his office and told her she was fired. He gave no reasons.

The company had previously agreed to pay her \$750 for moving expenses. It was not paid.

When her counsel later received a letter purporting to give reasons, it accused her of "a flagrant disregard for the most basic of security measures." She testified she still did not understand what she had done wrong. MacDonald, J. found the allegations to be without foundation.

Mr. Justice MacDonald found the circumstances of Ms. Conrad's dismissal "precipitous and uncalled for."

"It almost appears that they acted on the ground that a victim had to be produced. Moreover, it sent the plaintiff off, having been

discharged because of a matter related to a criminal act; this left her in a very awkward and vulnerable position. In Ottawa, she made exhaustive efforts to obtain employment, but she was always faced with the fact that she had no explanation for her separation from her job with the defendants under suspicious circumstances."

The events giving rise to her dismissal involved a theft of \$1,850 from the inactive account of an American customer, which had been frozen. The account could only be reactivated by someone with the authority to do so. Ms. Conrad had such authority. Someone using her computer password removed the freeze from the account and stole a total of \$1,850 from it by a series of four withdrawals. A stamp bearing Ms. Conrad's employee number was used to validate two of the withdrawal slips. At least one of the withdrawals occurred while Ms. Conrad was on vacation in Edmonton with her parents. The identity of the thief was never discovered.

Employees were required to sign off their computer terminals every time they left their desks; this happened twenty to fifty times a day. Each time the computer was signed on the password had to be punched in. Careless practice with respect to signing off the computers was noted in the audit reports, but no employee had ever been disciplined for it.

Mr. Justice MacDonald stated;

"On being questioned by her superior on return from vacation in late June of 1991, the plaintiff admitted that she could possibly have failed to 'sign off' her computer on occasions, but she stated that she had no recollection of ever failing to 'sign off'.

Evidence has revealed that computer desks were only a few feet apart, and that behind the plaintiff's desk were some filing cabinets to which all employees had access. The 'passwords' were made up of three figures and three letters. In my opinion, based on the evidence I heard, any person with average eye sight and reasonable memory, standing to the rear of a computer which was being signed on and off 20 to 50 times a day, could very easily have picked up the 'password' for a number of these computers. This, I believe, is what occurred.

The defendants were firm in their belief that the thefts had occurred during periods when the plaintiff had carelessly omitted to sign off her computer. This would mean that on four different

dates, between and including May 29 and June 10th,(1991,) the thief 'borrowed' the plaintiff's computer during periods when it was unattended and not 'signed off'. On at least one of the latter dates, the plaintiff was away on vacation., There is absolutely no evidence to support such a theory, excepting only that the plaintiff's computer was used.

(With respect, the evidence does not establish use of the appellant's computer, only her password. There was evidence that a password could be used on any of the numerous computer terminals in the office.)

The evidence strongly suggests to me that the perpetrator of the thefts surreptitiously obtained the plaintiff's password and used it on four different occasions when conditions suited his or her unlawful acts.

As to the plaintiff admitting that it was possible that she failed to sign off on an occasion some weeks previous, how could there be any other answer, considering the hundreds of times she did sign off over a limited period. If I am correct in finding that her 'password' was stolen, how could she, in these circumstances, be aware of it?

Not only was there no evidence of 'flagrant disregard' of the rules by the plaintiff, there was no evidence to implicate any action or omission on the plaintiff's part being involved in the thefts.

As to the use of the plaintiff's personal stamp, there was no evidence produced before me that satisfies me that the stamp was to be kept under lock and key. The plaintiff quite frankly admitted that she kept it in her drawer and knew of no rule which prohibited this. The evidence was supported by other witnesses and rebutted by none.

The onus is on the defendants to produce evidence of 'cause'. In my opinion, no such evidence was led, and the defence fails. The plaintiff was discharged without notice, or pay in lieu of notice."

Mr. Justice MacDonald expressed awareness of the difficulties associated with the award of punitive damages in cases of wrongful dismissal. He cited **Vorvis v. Insurance Corporation of British Columbia**, [1989] 1 S.C.R. 1085, in which the Supreme Court of Canada introduced the "actionable wrong" concept with respect to aggravated, exemplary and punitive

damages in wrongful dismissal cases. McIntyre, J., writing for the majority, stated at p. 1089:

"Punishment may not be imposed in a civilized community without a justification in law. The only basis for the imposition of such punishment must be a finding of the commission of an actionable wrong which caused the injury complained of by the plaintiff. This would be consistent with the approach of Weatherson J.A. in **Brown v. Waterloo Regional Board of Commissioners of Police** {(1983), 150 D.L.R. (3d) 729} and it has found approval in the *Restatement on the Law of Contracts 2d* in the United States, as noted with approval by Craig, J.A. at p. 49 where he referred in the Court of Appeal to s. 355, which provides:

' Punitive damages are not recoverable for a breach of contract unless the conduct constituting the breach is also a tort for which punitive damages are recoverable.'"

Until the introduction of the actionable wrong concept damages beyond reasonable notice were effectively blocked by **Addis v. Gramophone Co.**, [1909] A.C. 488 (H.L.), which stood for the proposition that damages in wrongful dismissal cases are limited to the earnings lost during the period of notice to which the employee is entitled and cannot include damages for the manner of dismissal, for injured feelings, or for loss sustained from the fact that the dismissal makes it more difficult for the plaintiff to obtain other employment; and **Peso Silver Mines Ltd. (N.P.L.) v. Cropper**, [1966] S.C.R. 673 which was authority for refusing damages for loss of reputation.

The actionable wrong concept was not fully expanded upon in **Vorvis** because the wrong complained of was found by the majority of the court to have occurred within the framework of the employment contract. Except in unusual circumstances, an actionable wrong is a tort occurring beyond the confines of the contract.

Unless there is agreement to the contrary, both parties to a contract of employment contemplate that it can be terminated for cause or on reasonable notice. Their expectations of one another are governed by the contract. Within the employment relationship, the express or implied terms of the contract govern in lieu of common law duties owed by one person to

another.

Once one of the parties goes beyond the terms of the contract the laws of tort apply. As McIntyre, J. stated in **Vorvis**:

"In tort cases, claims where a plaintiff asserts injury and damage caused by the defendant, the situation is different. The defendant in such a case is under a legal duty to use care not to injure his neighbour, and the neighbour has in law a right not to be injured and an additional right to compensation where injury occurs. The injured party is entitled to be made whole. The compensation he is entitled to receive depends upon the nature and extent of his injuries and not upon any private arrangement made with the tortfeasor."

Ms. Conrad contracted with her employer that it should have the right to dismiss her for cause or upon reasonable notice. If that had occurred she could have had no complaint. She did not, however, contract to be treated as a scapegoat for the employer's lax management practices, nor to be fired under an unjustified cloud of suspicion for criminal activity for which she could in no way have had responsibility. She did not contract to be fired on the day before she was to move to another city at her employer's request. She was not directly accused of theft, but her unexplained dismissal without notice following an investigation of a criminal occurrence could only have had a defamatory effect upon her.

In its callous treatment of Ms. Conrad the employer went beyond the confines of the employment contract and breached its duty to use care not to injure her. To the extent that it did so it cannot shelter behind the provisions of the contract. It is liable under the contract to pay her for a reasonable period of notice. It is liable upon its actionable wrong to pay her damages to make her whole. It is liable, because its conduct toward her was reprehensible, to be punished by way of punitive or exemplary damages. I would agree with the trial judge that the circumstances call for punitive damages as a warning to other employers not to abuse their relatively advantageous positions over their employees.

McIntyre explained the distinctions between aggravated and punitive damages at pp. 1098-1099 of **Vorvis**:

"Punitive damages, as the name would indicate, are designed to punish. In this, they constitute an exception to the general common law rule that damages are designed to compensate the injured, not to punish the wrongdoer. Aggravated damages will frequently cover conduct which could also be the subject of punitive damages, but the role of aggravated damages remains compensatory. The distinction is clearly set out in *Waddams, The Law of Damages* (2nd ed. 1983) at p. 562, para. 979, in these words;

'An exception exists to the general rule that damages are compensatory. This is the case of an award made for the purpose, not of compensating the plaintiff, but of punishing the defendant. Such awards have been called exemplary, vindictive, penal, punitive, aggravated and retributory, but the expressions in common modern use to describe damages going beyond compensatory are exemplary and punitive damages. . . . The expression "aggravated" damages" though it has sometimes been used interchangeably with punitive or exemplary damages, has more frequently in recent times been contrasted with exemplary damages. In this contrasting sense, aggravated damages describes an award that aims at compensation, but takes full account of the intangible injuries, such as distress and humiliation, that may have been caused by the defendant's insulting behaviour. The expressions vindictive, penal and retributory have dropped out of common use.'

After introducing the principle of actionable wrong, McIntyre, J., discussed the exceptional character of punitive damages. He stated on p. 1107 that:

"...Punitive damages may only be awarded in respect of conduct which is of such nature as to be deserving of punishment because of its harsh, vindictive, reprehensible and malicious nature. I do not suggest that I have exhausted the adjectives which could describe the conduct capable of characterizing a punitive award, but in any case where such an award is made the conduct must be extreme in its nature and such that by any reasonable standard it is deserving of full condemnation and punishment."

He cited with approval **Warner v. Arsenault** (1982), 53 N.S.R. (2d) 146 (N.S.S.C.A.D.) in which the late Mr. Justice Pace of this court stated at p. 152:

"Exemplary or punitive damages may be awarded where the defendant's conduct is such as to merit punishment. This may be exemplified by malice, fraud or cruelty as well as other abusive or insolent acts toward the victim. The purpose of the award is to vindicate the strength of the law and to demonstrate to the offender that the law will not tolerate conduct which wilfully disregards the rights of others."

Mr. Justice Pace was not commenting on punitive damages in the context of an actionable wrong.

Mr. Justice MacDonald did not make a finding of an actionable wrong, although he stated that "to create the shadow of wrongful conduct in a criminal setting might very well be an 'actionable wrong'. Rather he relied on the judgment of the minority in **Vorvis** to find that the right to award punitive damages is not precluded by contract in circumstances as extreme as the present case.

The judgment of the majority did not deny the existence of such a right. McIntyre, J., stated at p. 1107:

"In my view, while it may be very unusual to do so, punitive damages may be awarded in cases of breach of contract. It would seem to me, however, that it will be rare to find a contractual breach which would be appropriate for such an award."

In the present case, however, where an actionable wrong has clearly occurred, I would prefer to follow the majority's main line of reasoning.

Mr. Justice MacDonald stated:

"In the case before me, as different from **Vorvis** where offensive conduct preceded the dismissal, the reprehensible and in the circumstances, the damaging conduct of the defendant resulted in injury to the plaintiff long after her discharge. She was in the impossible situation of not being able to explain to potential employers why she had lost her job with the defendant, an inability from which only inadequacy, incompetency or worse could be inferred."

Since **Vorvis** there have been a number of cases in which courts have awarded punitive damages in wrongful dismissal cases. Those similar on their facts to the present case include **Trask v. Terra Nova Motors Ltd.** (1991), 89 Nfld. & P.E.I. 130; and the unreported cases of

Johnson v. Famous Players Inc. (Dec. 13, 1992--Man. Q.B.) and **Francis v. Canadian Imperial Bank of Commerce** (Jan. 27, 1992--Ont. C.J.--G.D.).

I would dismiss the appeal. The notice period found by the trial judge was reasonable. The appellant went beyond the protection of its contract and breached its duty of care not to harm the respondent. The circumstances were extreme and punitive damages were justified. The special damages were not appealed. I would award the respondent her costs on the appeal which I would fix at \$1000 plus disbursements.

Freeman, J.A.

Concurred in: Clarke, C.J.N.S.

Matthews, J.A.

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**HOUSEHOLD FINANCIAL CORPORATION and
HOUSEHOLD TRUST COMPANY**

appellants

- and -

CYNTHIA CONRAD

respondent

) **REASONS FOR**
)
) **JUDGMENT BY:**
) **FREEMAN, J.A.**
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