

[3] The defendant concedes that the plaintiff was a good worker and that there were no issues with his job performance. In the only performance review the plaintiff received (at the beginning of 2017) he was described as follows: highly competent, works independently, always working, steady, usually looking for a better way to do things, very dependable, will stay to complete a task on time, works well with others, will work in other departments if needed, no issue with following the company rules, has improved. The review concluded that he was a very solid steady worker and that while his attitude is sometimes challenging and he can be difficult at times, overall he deserved a pay increase. The review was signed by his supervisor, Steve Sandras and the general manager, Joe Beliski, both of whom testified at the trial on behalf of the defence.

March 7, 2019 Incident

[4] The plaintiff and four defence witnesses testified about the incident on March 7, 2019 which led to the termination of the plaintiff's employment.

Plaintiff's Evidence

[5] The plaintiff became upset because 4 units that he had spent time assembling were missing from his workstation. He saw a junior apprentice, John Paul Rodriguez, mounting the units who told him that Chris Wilson had given them to him and told him to mount them. The plaintiff denied being aggressive with Mr. Rodriguez who did not testify. The plaintiff and Mr. Wilson then had an angry exchange. The plaintiff testified that he told Mr. Wilson that he was not his supervisor, that he could donate his own parts if he wanted to finish a job and to stay away from his site. He said that Mr. Wilson was swearing and very angry but that the plaintiff did not threaten him in any way. He denied raising his voice.

Chris Wilson's Evidence

[6] Mr. Wilson testified that he was in effect, a lead hand so that he had some supervisory responsibilities. He testified that the plaintiff approached him screaming, yelling, pointing, and waving his arms. He confirmed that both of them were angry and as things escalated, voices got loud. He testified that at no time was the plaintiff in physical contact with him and did not threaten him. After the exchange with the plaintiff, Mr. Wilson went to complain to the supervisor, Steve Sandras.

Steve Sandras's Evidence

[7] Mr. Sandras gave the following testimony. Mr. Wilson told him that he was very upset, that the plaintiff was screaming and yelling at him and that if the plaintiff came back to work, he would leave the company. Mr. Sandras did not agree that the plaintiff had ownership in seeing the job to the end or that the units should not have been given to Mr. Rodriguez to mount.

[8] Mr. Sandras telephoned the manager of human resources, Frank Ricci, who not present in the workplace that day. He then spoke to the general manager, Joe Beliski. He was advised to send the plaintiff home. He and another supervisor came to the plaintiff's workstation. Mr. Sandras told the plaintiff that he must leave because he was involved in two incidents. He told the

plaintiff this 3 or 4 times. The plaintiff was yelling, very upset and was walking back and forth with a bar in his hands. The plaintiff refused to leave and asked to speak to Mr. Beliski.

Plaintiff's Evidence

[9] The plaintiff testified that when Mr. Sandras told him he was involved in two incidents, he asked what incidents because it was not explained. He denied having a bar in his hand. He asked to meet with Mr. Ricci and when advised that he was not there, asked to meet with Mr. Beliski. A short meeting then took place in the meeting room with the plaintiff, Mr. Sandras and Mr. Beliski. Mr. Beliski said that he had been involved in two incidents and must leave right away. The plaintiff asked what incidents and why was he not told at the time. He asked what he was accused of. Mr. Beliski just said leave the company and they were going to investigate. The plaintiff asked: "Are you going to investigate without my presence?" He did not refuse to leave but wanted them to investigate then and there. Mr. Beliski said he was going to have to call the police. Reflexively, the plaintiff said "go ahead" but he did not mean it. He went back to his workstation to tidy up which he always did before leaving.

Joe Beliski's Evidence

[10] Mr. Beliski gave the following testimony. He could not recall if the plaintiff was advised in the meeting room of what he was being accused. Mr. Beliski was not aware on March 7, 2019 what the second incident was and did not know if the plaintiff had ever been spoken to about it or received any discipline in regard thereto. He could not recall if the plaintiff expressed any concerns about being excluded from the investigation. After the plaintiff left the meeting room and returned to his workstation, Mr. Beliski called Mr. Ricci. He then attended at the plaintiff's workstation. The plaintiff was pacing around and looking very agitated. He told the plaintiff that he had yet not called the police and gave him a last chance to go home on his own. The plaintiff said to call the police. Mr. Beliski first testified that he told the police the plaintiff was very agitated and did not know how he was going to react. When his attention was directed to the police record of the call-in information, he then conceded that he had told the police that the plaintiff was not violent or threatening but meant "at that time."

[11] The police escorted the plaintiff off the work premises. Both Mr. Beliski and Mr. Sandras testified that on his way out, the plaintiff had to be held back by the police when he lunged towards them. This was not recorded in the police occurrence notes, the Incident Report or the termination letter. The plaintiff denied doing this. The police notes recorded "no threats made", that the plaintiff apologized for the police having to be involved and that the plaintiff left without incident.

[12] On March 13, 2019, after an investigation, although with no one from the defendant company having interviewed the plaintiff about his version of what happened, Mr. Beliski together with the owners of the company made the decision to terminate the plaintiff's employment.

March 11, 2019 Return to Workplace

[13] The plaintiff was advised by Mr. Beliski and the police not to return to the workplace until advised to do so. On Monday, March 11, 2019, having heard nothing from the defendant, the plaintiff attended at the workplace reception area to deliver a letter. The reception area is separated from the rest of the plant. He made no effort to go into the plant. He testified that he attended with the letter because they promised to investigate, and he wanted them to know his side of the story. He said that he asked the receptionist to sign the transmittal form, but she saw Mr. Beliski's name on the letter and paged him. The plaintiff testified that he did not intend to speak to Mr. Beliski and did not demand that he speak to him. He saw no one other than the receptionist and Mr. Beliski and left.

[14] Mr. Beliski testified that he felt unsafe when the plaintiff attended at the workplace on March 11, 2019, after being told not to but that this did not lead to the decision to terminate his employment.

[15] The plaintiff's letter stated that he was told to go home without being advised of the accusations against him, the alleged two incidents had still not been described to him and denied that he had acted threateningly towards anyone. He demanded a formal apology. This instilled in Mr. Beliski's mind that the plaintiff "did not get it".

Frank Ricci's Evidence- the Investigation

[16] Frank Ricci gave the following testimony. He was in the office on March 11, 2019 to do the investigation. He wanted to speak to all parties. Although he agreed that before terminating an employee for cause, the employee should be given an opportunity to respond to the allegations, he decided that it was not necessary to speak to the plaintiff. Prior to completing his Incident Report and the decision being made to terminate, he did not communicate to the plaintiff the version of the facts he had received from the various employees he interviewed or ask for his side of the story.

[17] Mr. Ricci interviewed Chris Wilson who had also been sent home on March 7, 2019, to diffuse the situation. Mr. Wilson was back at work on March 11, 2019 because, although the plaintiff had not been interviewed, Mr. Sandras had concluded that Mr. Wilson had done nothing wrong. Mr. Wilson told Mr. Ricci that he felt very uncomfortable with the way the plaintiff confronted him and feared the plaintiff would become violent. He talked about a sword collection the plaintiff had and felt he posed a threat.

[18] The fact that the plaintiff caused the police to be called caused fear in the plant. People came forward and said they were uncomfortable. Jeff Goodwin told Mr. Ricci that he had a previous run in with the plaintiff where he felt bullied and felt very uncomfortable when the police were called and while waiting for the police to come. The shipper, Jerry Arbour, said he felt upset and fearful that the police had to be called in. The plaintiff's attendance at the workplace after being told not to return caused even more panic in the building. Mr. Ricci concluded that it was clear from the plaintiff's letter that he was not taking any blame and was blaming others.

The Incident Report

[19] Mr. Ricci prepared an Incident Report dated March 11, 2019 which can be summarized as follows. The plaintiff had verbally abused JP Rodriguez for performing his work and verbally abused Chris Wilson for assigning JP to do this work. The plaintiff started to wave his hands and arms at Chris Wilson, pointing at his face and stepping closer in a threatening manner. He then refused to go home after having been told repeatedly by his supervisor and the general manager to do so, requiring the police to escort him out. Numerous workers expressed fear of potential violence from the plaintiff. Chris Wilson also feared he would bring in one of his knives which he collects and harm them. The plaintiff then showed up at the workplace to hand deliver a letter to the general manager notwithstanding having been advised not to return until contacted. This made the plant employees in the shop floor feel uneasy and anxious.

The Termination Letter

[20] The plaintiff was terminated by letter dated March 14, 2019 which apparently was delivered the day before, on March 13, 2019. The letter can be summarized as follows. On March 7, 2019, the plaintiff acted offensively toward co-workers and then refused to leave as directed which was insubordination. While waiting for the police to arrive, he paced around his workplace in a threatening manner, resulting in a number of co-workers fearing violence. He was escorted from the shop floor by two police officers, exacerbating the atmosphere of potential violence. Notwithstanding the direction not to return until management advised him to do so, he was once again insubordinate by attending at the company's reception and insisting on seeing the general manager in order to deliver a letter. The plaintiff's letter of March 8, 2019 contains a number of inaccuracies as well as two demands, neither of which was appropriate or will be complied with. His behavior was offensive, intimidating and threatening. Co-workers were and remain genuinely concerned for their safety, a concern that was exacerbated by his insistence not to leave without police escort and his return to the workplace contrary to specific instruction. Given his conduct, attitude, insubordination and especially the effect it had on other members of the workplace, his employment was terminated for cause.

Analysis

Was there Just Cause to Terminate the Plaintiff's Employment?

[21] The Supreme Court of Canada in the case of *McKinley v BC Tel*, 2001 SCC 38 (S.C.C.) has directed that a contextual approach is to be utilized in determining whether an employee's misconduct justifies dismissal without notice. At para. 33 the Court stated, "an employee's misconduct does not inherently justify dismissal without notice unless it is 'so grievous' that it intimates the employee's abandonment of the intention to remain part of the employment relationship."

[22] *McKinley* requires that consideration be given to the particular facts of the offender's behavior as well as the employee's tenure and discipline history. It refers favourably to the principle of proportionality where an effective balance is struck between the severity of an employee's misconduct and the sanction imposed.

[23] The termination letter of March 14, 2019 specified two separate grounds for dismissal without notice:

- (1) The plaintiff was acting in a threatening manner to co-workers in an attempt to intimidate them, causing them to fear he would become violent; and
- (2) The plaintiff was insubordinate by refusing to leave the workplace and then by returning to the workplace to deliver his letter.

[24] Mr. Rodriguez was not called as a witness and the plaintiff testified that his interaction with him on March 7, 2019 was restricted to the plaintiff finding out that Mr. Wilson was the one who had given Mr. Rodriguez the plaintiff's parts to mount. Mr. Rodriguez is not mentioned as one of the persons interviewed by Mr. Ricci in the course of the investigation. I am not persuaded on this evidence that the plaintiff was acting in a threatening manner to Mr. Rodriguez.

[25] There is no doubt that the plaintiff was involved in a verbal dispute with Chris Wilson. I do not find the plaintiff's evidence credible that he was as calm as he said he was, and that Mr. Wilson was the only one swearing. I find that the exchange was started by the plaintiff but as Mr. Wilson testified, Mr. Wilson was also angry and as things escalated, voices got loud. It became a mutually heated exchange. After Mr. Wilson complained to the supervisor, Steve Sandras, a discussion took place between the plaintiff and Mr. Sandras where the plaintiff was told several times to go home. This was followed by a meeting with the plaintiff, Mr. Sandras and Mr. Beliski where he was again told several times to go home and did not which required the police to escort him out.

[26] The plaintiff then returned to the reception area at the workplace on March 11, 2019, having been told not to return until told to do so. This was to deliver a letter to Mr. Beliski. The plaintiff denied demanding to speak to Mr. Beliski, testifying that the receptionist called him to come when the plaintiff asked her to sign to acknowledge receipt of the letter. There was no evidence to the contrary. The reception area was separated from the plant floor and the plaintiff left immediately after delivering his letter.

[27] Chris Wilson testified that he did not get along with the plaintiff and did not like him. He gave an ultimatum to Mr. Sandras that he was quitting if the plaintiff returned to work and testified that he was happy that the plaintiff's employment was terminated. Neither the Incident Report nor the termination letter reflects the fact that Mr. Wilson was also angry and raised his voice in the verbal exchange with the plaintiff.

[28] In my view, some of the evidence from the defence witnesses was overstated. The evidence that the plaintiff was menacing a steel pipe in his hand at his workstation while waiting for the police to arrive and that he lunged towards Mr. Sandras and Mr. Beliski while being escorted out by the police is not consistent with the other evidence. The plaintiff denied that he had a steel pipe in his hands. He was not asked on cross-examination about the lunging. Neither allegation was mentioned in the Incident Report, the termination letter or the police notes which stated, "no threats made". The Incident Report stated: "The police arrived and asked him to leave the building and

he complied.” Mr. Beliski acknowledged that the plaintiff was respectful with the police. I do not find the steel pipe and the lunging allegations credible.

[29] I also find that there was no reasonable basis for Mr. Wilson’s statement reflected in the Incident Report that he feared the plaintiff would bring “one of his knives which he collects and harm them”. Mr. Wilson was aware that it was the plaintiff’s hobby to collect antique sabers which had never been brought to the workplace. The plaintiff had never made any threats in regard to the sabers.

[30] Over the plaintiff’s 19 years of employment, there were no issues with his performance and management considered him to be a very solid, steady worker, although sometimes difficult with a sometimes-challenging attitude. There was no prior history of discipline, threats or violence. The evidence is clear that the plaintiff did not threaten, physically assault or touch anyone on March 7, 2019. I find that the plaintiff instigated a verbal altercation with Mr. Wilson on March 7, 2019 but there is no evidence that he acted offensively towards other co-workers as stated in the termination letter.

[31] There is no doubt that the plaintiff should have gone home when he was told to do so and that his failure to do so which required the police to be called was insubordination. However, this must be viewed in the context that he was asking to be informed what the two incidents were for which he was being sent home. No one told him and it is still unclear what the two incidents were that Mr. Sandras and Mr. Beliski referred to as the basis for him being sent home. The evidence from both sides was that the plaintiff was confused, upset and not acting rationally. The plaintiff was concerned that the investigation not be conducted without his involvement which regrettably is what then happened.

[32] The plaintiff’s attendance at reception on March 11, 2019 to deliver a letter and the contents of the letter itself, were ill-advised. However, this was 4 days after the March 7, 2019 incident had occurred and no one from the company had contacted him to tell him what the allegations were or to get his version of the facts. He had expressed concern when he had been told to leave the workplace on March 7, 2019 about being left out of the investigation. On March 11, 2019, he left immediately after delivering the letter and did not attempt to go into the plant. The statement in the termination letter that the plaintiff insisted on speaking to the general manager is not borne out by the evidence. According to Mr. Beliski’s evidence, the plaintiff’s attendance on March 11, 2019 was not what led to the decision to terminate his employment.

[33] I do not agree with the defence submission that everyone knew what had happened and there was no need to include the plaintiff in the investigation. While the plaintiff was aware that he had a verbal dispute over work distribution and that he failed to go home when asked to do so on March 7, 2019, he was not made aware of the particular allegations that his behaviour was threatening, offensive and intimidating, that co-workers allegedly feared violence from him and that there was a genuine concern for employees’ safety, all of which were relied upon as a basis for terminating the plaintiff’s employment.

[34] Had the plaintiff been allowed to respond to the allegations as he requested on March 7, 2019 or as part of the investigation, the employer’s decision may have been more proportional to

the misconduct which occurred. While having to call the police when he refused to leave the workplace was undoubtedly upsetting to co-workers and caused a disruption of the workplace, the plaintiff returned to his own work station after the meeting with Mr. Sandras and Mr. Beliski. He cooperated with the police when they arrived, left peaceably and there were no threats, intimidation or violence.

[35] The plaintiff relies upon a number of cases set out in his Statement of Law where conduct similar to or more serious than in this case was found not to be just cause for termination. In *Phanlouvang v. Northfield Metal Products (1994) Ltd.*, 2014 ONSC 6585, the plaintiff punched his co-worker, causing a bloody nose. Notwithstanding the assault, the court found that the employer did not have just cause to terminate the plaintiff's employment. The court emphasized the plaintiff's 16-year service, that the incident of violence was isolated and that there were other alternatives to the employer apart from immediate termination for cause.

[36] Similarly, in this case the plaintiff had 19 years' service and the incident occurred between two co-workers and was isolated. In my view the fear of violence reported in the Incident Report and relied upon in the termination letter was not justified based on what occurred. I do not agree with the defence submission that the plaintiff's letter denying events and blaming others made any lesser discipline inapplicable or impossible.

[37] In *Shakur v. Mitchell Plastics*, 2012 ONSC 1008, Mr. Shakur had six years of service as a machine operator before being terminated for slapping a co-worker in the face. The court found that there was not just cause for termination. In doing so, it relied upon there having been no prior incidents of violence by Mr. Shakur and the fact that he was an otherwise conscientious employee. Despite a lack of an apology for his behaviour, the court found that some other form of discipline, keeping in mind the principles of progressive discipline, would send the message that his behavior was unacceptable.

[38] In this case, the plaintiff was a conscientious employee and there were no prior incidents of violence. Any prior negative interactions with co-workers had not previously been brought to the plaintiff's attention or been the subject of discipline.¹ Progressive discipline for this incident such as a disciplinary letter or suspension would have sent the message that his behavior was unacceptable and given him a warning that a continuation could result in his dismissal.

[39] In *Geluch v. Rosedale Golf Assn. Ltd.*, [2004] O.J.NO.2740, the Court held:

[95] Before an employee is terminated for cause, he or she should be advised that the misconduct is a matter of serious significance and its continuation could place his or her employment in jeopardy.

¹ On November 30, 2016, a warning letter was placed on the plaintiff's file in regard to an outburst in the presence of his supervisor but no discipline was imposed.

[40] A number of cases have held that it was wrong for an employer to refrain from interviewing the plaintiff to obtain his version of events. (*Peoples v. Ontario*, 173 A.C.W.S. (3d) 165 at para 18; *Poulos v. Toronto & Region Conservation For The Living City*, [2009] OJ NO 6066; *Ludchen v. Stelcrete Industries Ltd.*, 2013 ONSC 74945 at paras 68 and 79).

[41] The defence relies upon *Render v. ThyssenKrupp Elevator (Canada) Limited*, 2019 ONSC 7460 as support for the proposition that a single act of disobedience can justify dismissal. *Render* is a decision involving sexual harassment in the workplace and does not assist on the facts of this case.

[42] In accordance with the principle set out in *McKinley, supra*, the plaintiff's misconduct was not so egregious that it can be said that he abandoned the intention to remain part of the employment relationship. The plaintiff should have been advised that his misconduct was serious and that a repetition would result in termination of this employment.

[43] Considering all the circumstances including the lack of an apology, the misconduct in this case does not justify dismissal without notice.

What is the Reasonable Notice Period at Common Law?

[44] In the submission that the appropriate notice period is 20 months, the plaintiff relies on a number of cases which found the appropriate notice period to be approximately one month per year of service. (*Davidson (DeLong) v. Craig Manufacturing Ltd.*, 2008 NBQB 302; *Cox v. Habasit*, [1994] O.J.No.4170; *Evers v. Maritime Pipe Organ Builders Ltd.*, [1984] N.B.J. No.72; *Jeewa v. Med-Chem Laboratories Ltd.*, [1998] OJ No 618; *Sletmoen v. Nafco Manufacturing Co. Ltd.*, 2017 BCSC 1726; *Vinette v. Delta Printing*, 2017 ONSC 182.)

[45] The defence submits that the appropriate notice period is 10 to 12 months and relies upon *Dawson v. FAG Bearings Ltd.*, 2008 CanLII 55459 (ON SC). In *Dawson*, the employee had 14 years of service and 10 months was found to be the appropriate notice period. The length of service in this case is 19 years, considerably longer than in *Dawson*.

[46] Taking into account the plaintiff's 54 years of age and the technically skilled nature of the position he held for over 19 years, I find 19 months to be the appropriate notice period based on the income reflected in his 2016 T4. In addition, the plaintiff shall be entitled to 10% of his base salary on account of lost benefits for the notice period.

Has the defence established that the plaintiff's mitigation efforts were unreasonable?

[47] The plaintiff's evidence is that he applied for 340 jobs and the only offers he received were for a significantly lower compensation (approximately a 30% reduction). The defence submits that the plaintiff should have accepted one of the offers he received, the earliest of which was October 23, 2019. It points out that in June 2020, the plaintiff was offered a position with Dufferin Iron & Railings as a railing assembler for between \$18-\$30/hour. The defence submits that the notice period should terminate as of October 23, 2019. The plaintiff's evidence was that the position he was offered at Dufferin Iron was to start at \$18/hour. I do not consider the positions offered to the plaintiff to be comparable to his position with the defendant.

[48] The onus of demonstrating that the plaintiff has not acted reasonably to try to mitigate his losses rests with the defendant. (*Lahani v. Canadian Standards Assn.*, 2015 ONSC 7634 at para 27) To meet its onus and prove a failure to mitigate, the employer must advance evidence of comparable positions to which the plaintiff is reasonably adapted and cannot “pick away at the plaintiff’s performance with a bald suggestion that [s]he could have done better”. (*Pettica v. Oracle Canada ULC* (2015), 254 ACWS (3d) 356 at para 20).

[49] The human resources manager, Mr. Ricci, acknowledged that the defendant did not provide information regarding any comparable positions to the plaintiff.

[50] I find that the defence has not met its onus to establish that the plaintiff has not acted reasonably to try to mitigate his losses.

Is the plaintiff entitled to aggravated and punitive damages?

[51] The plaintiff seeks \$50,000 in aggravated and punitive damages. The plaintiff relies upon the defendant’s failure to properly investigate and inform him of the allegations against him and an opportunity to respond, falsely alleging that he acted in a threatening manner, providing a very basic employment letter 10 months after his employment was terminated and the failure to return his tools.

[52] This is not a case where the employer totally and recklessly disregarded the truth in relation to the allegations against the plaintiff. While I do not agree with the defendant’s characterization of the threatening or violent nature of the plaintiff’s conduct, he nevertheless provoked an incident at work and then refused to leave when the defendant attempted to calm the situation, causing a disruption of the workplace.

[53] There was no evidence that the defendant withheld a letter of employment after it was requested. There was also no evidence that the plaintiff requested his tools. I have found that the defendant should have interviewed the plaintiff to hear his side of the story. However, this failure is less egregious than it otherwise might have been in circumstances where the plaintiff returned to the workplace, having been told not to do so, and delivered a letter in which he took no responsibility for his part in the events of March 7, 2019.

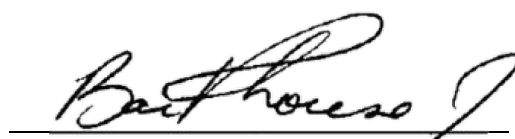
[54] I do not find the requisite unfairness or bad faith on the part of the defendant necessary for an award of aggravated and punitive damages.

Conclusion

[55] In the result:

- (1) There was not just cause to terminate the plaintiff’s employment. He is entitled to 19 months of reasonable notice and 10% of his base salary on account of lost benefits based on his 2016 T4 income of \$48,835.47.

- (2) There shall be no deduction from the period of notice on account of mitigation, the defence not having established that the plaintiff's mitigation efforts were unreasonable.
- (3) The plaintiff's claim for aggravated and punitive damages is dismissed.
- (4) The decision on costs is reserved. The plaintiff shall have 3 weeks to deliver onto Caselines a brief submission on costs. The defendant shall have 3 weeks thereafter to deliver onto Caselines a brief reply submission on costs.


Backhouse J.

Released: March 2, 2021

CITATION: Czerniawski v. Corma Inc., 2021 ONSC 1514
COURT FILE NO.: CV-19-00620190-0000
DATE: 20210302

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

ANDRZEJ CZERNIAWSKI

Plaintiff

– and –

CORMA INC.

Defendant

REASONS FOR JUDGMENT

Backhouse J.

Released: March 2, 2021