

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:)	
)	
Alissa Churchill)	
)	Katherine Chau, for the Plaintiff
Plaintiff)	
)	
– and –)	
)	
Aero Auction Sales Inc. and Michael Duns)	No one appearing, for the Defendant, Aero
)	Auction Sales Inc.
Defendants)	
)	No one appearing for the Defendant,
)	Michael Duns
)	
)	
)	
)	HEARD: July 18, 2019

2019 ONSC 4766 (CanLII)

RULING ON DEFAULT JUDGMENT MOTION

CHARNEY J.:

Introduction

- [1] The plaintiff, Alissa Churchill (Churchill), brings this motion pursuant to Rule 19.05 of the Rules of Civil Procedure for an order of default judgment and an order imposing personal liability against the defendant Michael Duns (Duns) as an oppression remedy pursuant to s. 248 of the Ontario *Business Corporations Act*, R.S.O. 1990, c. B.16 (the OBCA).

- [2] Churchill was employed by the corporate defendant, Aero Auction Sales Inc. (Aero) from July 2009 until her termination on March 12, 2016. Duns is the sole director and President of Aero. Aero is a company that specializes in conducting vehicle and heavy equipment auction sales.

- [3] From 2009 until November 26, 2015, Churchill and Duns were in a common law relationship. They have three children together.

- [4] Churchill alleges that on March 9, 2016, Duns wrongfully terminated her employment with Aero and withheld her wages. The termination was unrelated to her work, but directly related to their separation. Churchill alleges that she was not paid the wages owing to her and, as a result, she became a creditor of Aero.
- [5] Aero ceased operation in 2017, and all of its assets were transferred to a related company.
- [6] The issues on this motion are:
- a. Is personal liability against Duns an appropriate remedy under s. 248(3) (j) of the OBCA?
 - b. If the answer to (a) is yes, what are the measure of damages for wrongful dismissal in this case?

Procedural History

- [7] On April 22, 2016, Churchill issued a Statement of Claim against Aero for \$256,355.87 for unpaid wages, unpaid vacation pay, damages for wrongful dismissal and aggravated and punitive damages.
- [8] On May 25, 2016, Aero served a Statement of Defence.
- [9] The parties exchanged affidavits of documents and on February 7, 2017 Churchill's lawyers conducted examinations for discovery of Aero via an examination of Duns. Aero never scheduled examinations for discovery of Churchill.
- [10] In October 2017, Churchill discovered that Aero had ceased operations and all of its assets were transferred to a related company, leaving it without assets to respond to a possible judgment in this action. Churchill brought a motion to amend her Statement of Claim to add a claim for personal liability against Duns. No responding material were served, and an Order was made on April 5, 2018, granting Churchill leave to amend the Statement of Claim.
- [11] The Amended Statement of Claim was issued on April 12, 2018.
- [12] Churchill's lawyers were unable to personally serve Duns with the Amended Statement of Claim and brought a motion for substituted service. On December 19, 2018 the motion for substituted service was granted, and Duns was served in accordance with that Order on December 26, 2018.
- [13] On February 22, 2019, Duns was noted in default by the Registrar for failing to deliver a Statement of Defence within the prescribed time.

Facts

- [14] Pursuant to Rule 19.02(1)(a) of the Rules of Civil Procedure, a defendant who is noted in default is deemed to admit the truth of all allegations made in the claim. Plaintiff's pleading of law or mixed fact and law are not binding on the court as admissions: *Nikore v. Jarmain Investment Management Inc.*, 2009 CanLII 46655 (ON SC), at para. 19.
- [15] Accordingly, the following allegations of fact from the Amended Statement of Claim are deemed to be true:
- (a) Duns is the sole director and President of Aero Auction;
 - (b) Churchill was employed by Aero Auction from July 2009 until her termination on March 12, 2016;
 - (c) during her tenure, Churchill and Aero Auction never agreed to a written employment contract;
 - (d) As Vice President of Administration, Churchill was responsible for overseeing and supervising employees with respect to the administration of the Company's bank accounts, human resources and payroll;
 - (e) Churchill earned a salary of \$90,000 until her salary was reduced to \$60,000 by the Company in or around September 2015 as a temporary measure to help the Company through the off-season;
 - (f) as of the date of termination, Churchill was thirty-six (36) years old;
 - (g) Churchill was in a common law relationship with Duns from 2009 until November 26, 2015 (the "Date of Separation") and they have three children together;
 - (h) after the Date of Separation, Churchill's working relationship with Duns became increasingly hostile which culminated in a number of changes to the terms and conditions of Churchill's employment prior to her termination;
 - (i) on February 29, 2016, Duns unilaterally removed Churchill's title as Vice-President, took away her direct reports, advised that she was not to report to anyone but him and that she was not to contact anyone in the Company other than by email and with Duns copied on all communications. Duns also asked Churchill to return her company vehicle in exchange for an older vehicle.
 - (j) on March 2, 2016, Duns asked Churchill to return the company credit card as she would no longer be involved in the day to day operations of the Company. Later that day, Duns also asked Churchill to return the company gas card;

- (k) on March 4, 2016, Churchill attended the Company's office to exchange her company vehicle and to return the company credit card and gas card in accordance with Duns' instructions;
- (l) on March 7, 2016, Duns informed Churchill that she was no longer authorized to log into the company bank accounts and that the Company would release wire payments from the Edmonton office;
- (m) on March 8, 2016, Duns threatened to withhold Churchill's wages from payroll if she did not answer his queries about their household expenditures;
- (n) subsequently, on March 9, 2016, Duns instructed Churchill to release various wire transfers, including the Company's payroll. At this time, Churchill realized that Duns had followed through with his threat and she was not part of payroll despite having worked the entire pay period;
- (o) given the above changes to her employment and Duns' request for her to return company property, Churchill sent Duns an email on March 12, 2016 asking if her employment with Aero Auction was terminated. In response, Duns stated that she was "*considered having quit*";
- (p) Aero Auction terminated Alissa's employment without cause and failed to provide Alissa with any notice or pay in lieu of notice;
- (q) the Company failed to pay Alissa for unpaid wages of \$2,582.51 for the pay period of February 21, 2016 to March 11, 2016 and for accrued vacation pay of \$13,776.36;
- (r) as of March 9, 2016, Churchill was a creditor of Aero Auction and therefore;
- (s) subsequently, Duns allowed the Company to cease operations and facilitated the transfer of assets to a new company.

[16] Rule 19.05(2) provides that a motion for judgment under subrule (1) shall be supported by evidence given by affidavit if the claim is for unliquidated damages. Accordingly, the facts deemed to be true from the Statement of Claim have been supplemented by an affidavit sworn by the plaintiff on April 24, 2019. In that affidavit Churchill testifies that she and Duns were engaged in a highly acrimonious family law dispute concerning custody and access to the children, and spousal and child support. As a result of this family law dispute her working relationship with Duns became increasingly hostile and this ultimately led to her termination of employment.

- [17] The affidavit also details the unilateral changes that Duns made to the terms and conditions of Churchill's employment before she was finally terminated without cause. These details parallel to the allegations made in the Statement of Claim.

Default Judgment

- [18] Rule 19.06 provides that a plaintiff is not entitled to judgment on a motion for judgment merely because the facts alleged in the statement of claim are deemed to be admitted, unless the facts entitle the plaintiff to judgment. In other words, the deemed admissions of fact, together with any facts adduced at the hearing, must entitle the plaintiff to judgment on the claim as a matter of law. To the extent that the plaintiff claims unliquidated damages, the court must be persuaded, based on the deemed admissions and other evidence adduced, that the quantum of damages claimed is fair and appropriate in the circumstances.

OBCA

- [19] In this case the first legal question is whether there are sufficient facts and evidence to support the claim that the imposition of personal liability against Duns is an appropriate remedy under s. 248(3)(j) of the OBCA.
- [20] Sections 245 – 248 of the OBCA provide a scheme for relief for certain persons against a corporation and its directors for any act or omission that is oppressive, unfairly prejudicial, or unfairly disregards the interests of that person.
- [21] The plaintiff relies on the following sections of the OBCA:

Oppression remedy

248 (1) A complainant...may apply to the court for an order under this section.

(2) Where, upon an application under subsection (1), the court is satisfied that in respect of a corporation or any of its affiliates,

(a) any act or omission of the corporation or any of its affiliates effects or threatens to effect a result;

(b) the business or affairs of the corporation or any of its affiliates are, have been or are threatened to be carried on or conducted in a manner;
or

(c) the powers of the directors of the corporation or any of its affiliates are, have been or are threatened to be exercised in a manner,

that is oppressive or unfairly prejudicial to or that unfairly disregards the interests of any security holder, creditor, director or officer of the corporation, the court may make an order to rectify the matters complained of.

[22] “Complainant”, in addition to being a current or former shareholder, director or officer of the company is defined in s. 245(c) of the OBCA to include “any other person who, in the discretion of the court, is a proper person to make an application under this Part.”

[23] Should a court find that the corporation’s and/or its directors’ actions were oppressive in relation to a “complainant”, s. 248(3) of the OBCA provides the court with broad discretion to make any order “it thinks fit”, including:

(j) an order compensating an aggrieved person

[24] It is well established that a creditor of a corporation has status to bring an application as a complainant, and a former employee who is owed wages may qualify as a creditor. In *Downtown Eatery (1993) Ltd. v. Ontario* (2001), 2001 CanLII 8538 (ON CA), 54 O.R. (3d) 161 (C.A.) the Ontario Court of Appeal found that a former employee was entitled to an OBCA oppression remedy for damages for wrongful dismissal against the directors of a corporation that had ceased operation and transferred all of its assets to another corporation.

[25] Similarly, in *El Ashiri v. Pembroke Residence Ltd.*, 2015 ONSC 1172, the plaintiffs were both former employees of the corporate defendant. They were dismissed from their employment and sued for lost wages and punitive damages. They brought an oppression claim under s. 248 of the OBCA to make the sole director of the corporate defendant personally liable for their unpaid wages. Boswell J. held that the former employees were proper complainants under s. 248 of the OBCA. He held, at para. 23:

I am satisfied, on the basis of the affidavits filed by the plaintiffs, that Mr. Dewji operated his hotels – and treated the staff - in a manner that was oppressive to the plaintiffs. They are proper complainants within the meaning of s. 248 of the OBCA. Their expectations of payment for services rendered were eminently reasonable. I am satisfied that Mr. Dewji’s conduct, as the sole director and officer of the defendant corporations, was oppressive, high-handed, callous and unfairly prejudicial to the rights and interests of the plaintiffs. He was the sole controlling director and officer of the corporations. He benefitted, whether directly or indirectly from the labours of the plaintiffs. Their labour and efforts enabled the hotels to remain open and viable.

- [26] In *Unique Lighting v. Green Services*, 2019 ONSC 4438, at para. 65, Stribopoulos J summarized the law with regard to the sort of improper conduct falling short of fraud that will justify piercing the corporate veil under s. 248 of the OBCA:

Under s. 248(2) of the *Business Corporations Act*, a claim of oppression by a creditor can result in a piercing of the corporate veil and the officers of a company being held liable for the debt owed to creditor. Importantly, courts have only taken that step when it is shown that the officers of a company depleted its assets to render it immune from judgment in favour of a creditor: see *Far East Food Products Ltd v 1104742 Ontario Ltd*, [2009] O.J. No. 1153 (Sup. Ct.); *Gignac, Sutts and Woodall Construction Co. v. Harris*, 1997 CanLII 12437 (ON SC), [1997] O.J. No. 3084 (Gen. Div.); *SCI Systems, Inc v. Gornitzki Thompson & Little Co*, 1997 CanLII 12436 (ON SC), [1997] O.J. No. 2115 (Gen. Div.), varied on other grounds 1998 CanLII 17741 (ON SCDC), [1998] O.J. No. 2299 (Div. Ct.); *Downtown Eatery (1993) Ltd. v. Ontario* (2001), 2001 CanLII 8538 (ON CA), 54 O.R. (3d) 161 (C.A.); *Sidaplex-Plastic Suppliers Inc. v. Elta Group Inc.* (1998), 1998 CanLII 5847 (ON CA), 40 O.R. (3d) 563 (C.A.). (Emphasis added)

- [27] In *Wilson v. Alharayeri*, [2017] 1 SCR 1037, 2017 SCC 39, at para. 24, the Supreme Court set out the two requirements for an oppression remedy:

The two requirements of an oppression claim are equally well known. First, the complainant must “identify the expectations that he or she claims have been violated by the conduct at issue and establish that the expectations were reasonably held” (BCE, at para. 70). Second, the complainant must show that these reasonable expectations were violated by corporate conduct that was oppressive or unfairly prejudicial to or that unfairly disregarded the interests of “any security holder, creditor, director or officer,” pursuant to s. 241(2) [of the *Canada Business Corporations Act*, R.S.C. 1985, c. C-44].

- [28] In *Wilson* the Supreme Court confirmed the two-pronged test for personal liability, at paras. 47 - 48:

The first prong requires that the oppressive conduct be properly attributable to the director because he or she is implicated in the oppression... In other words, the director must have exercised — or failed to have exercised — his or her powers so as to effect the oppressive...

But this first requirement alone is an inadequate basis for holding a director personally liable. The second prong therefore requires that the imposition of personal liability be fit in all the circumstances. Fitness is necessarily an amorphous concept.

- [29] Applying these legal principles to the facts set out in the Statement of Claim and affidavit, I find that this is a proper case to pierce the corporate veil under s. 248 of the OBCA and impose personal liability on Duns.
- [30] Churchill became a creditor of Aero in March 2016 when Duns withheld Churchill's wages from Aero's payroll. Churchill brought an action to recover this debt, and Duns caused Aero to cease operations and transfer all of its assets to a related company in order to leave it without assets to respond to a possible judgment in this action. This qualifies as oppressive conduct under s. 248 of the OBCA.
- [31] Churchill had a reasonable expectation that Aero's affairs would be conducted with a view to protecting the interests of a former employee who was owed wages and benefits, see: *Downtown Eatery* and *El Ashiri*.
- [32] As the sole director of Aero, Duns may be held personally liable for the oppressive action identified. The facts deemed to be true demonstrate that Duns acted for reasons of personal animus against Churchill. These reasons were unrelated to her employment or to her entitlement to wages and benefits. Duns acted in bad faith, using his control of Aero to advance his personal financial interest, and to punish Churchill and gain leverage in their family law dispute. The conduct is directly attributable to Duns, and as the sole director, personal liability is fit and appropriate in these circumstances.

Damages

- [33] The plaintiff is owed basic wages, statutory holiday pay, vacation pay and pay in lieu of notice.
- [34] The unpaid wages amount to \$2,582 for work performed from February 21, 2016 to March 11, 2016. Accrued vacation pay amount to \$13,776.35.
- [35] In addition, since the plaintiff was fired without cause, she is entitled to damages for pay in lieu of reasonable notice, calculated in accordance with the principles set out by the Supreme Court of Canada in *Bardal v. Globe & Mail Ltd.* (1960), 1960 CanLII 294 (ON SC), 24 D.L.R. (2d) 140 (Ont. H.C.J.). These principles hold that an appropriate notice period is to be determined in consideration of factors including, but not limited to, the character of the employment, length of service, the age of the employee and the availability of other employment.
- [36] The plaintiff was 36 years of age at the time of her employment, and worked for Aero for almost 7 years. She held the position of Vice President Administration/Operations with managerial responsibilities related to administration and operations of the business. Her base salary was \$90,000 per year.
- [37] The plaintiff has provided a number of cases in which a notice period of 10 -12 months was assessed in circumstances similar to hers. She argues that, based on her age, seniority, managerial responsibilities, length of service and her ability to obtain

alternative employment, her reasonable notice entitlement is twelve months, or \$90,000 in lieu of notice. I accept this position, which is consistent with the case law provided.

Aggravated Damages

[38] The plaintiff also claims \$75,000 for aggravated damages for the manner in which the defendant terminated her employment.

[39] In *Boucher v. Wal-Mart Canada Corp.*, 2014 ONCA 419, the Court of Appeal described aggravated damages in wrongful dismissal cases as follows:

Aggravated damages are compensatory damages. They are part of breach of contract damages. They compensate a plaintiff for the additional harm suffered because of the way the contract was breached. In a wrongful dismissal claim, aggravated damages may be awarded against the employer where “the employer engages in conduct during the course of dismissal that is ‘unfair or is in bad faith’”: see *Honda Canada Inc. v. Keays*, 2008 SCC 39 (CanLII), [2008] 2 S.C.R. 362, at para. 57. However, “the normal distress and hurt feelings resulting from dismissal are not compensable.” see *Honda*, at para. 56.

[40] In *Doyle v. Zochen Inc.*, 2017 ONCA 130, the court stated:

Beginning with *Wallace v. United Grain Growers Ltd.*, 1997 CanLII 332 (SCC), [1997] 3 S.C.R. 701, at para. 95, the Supreme Court of Canada recognized that there is an obligation of good faith in the manner of dismissal of an employee and, at paras. 88 and 98, specified that damages are available where an employer engages in conduct that is “unfair or is in bad faith by being, for example, untruthful, misleading or unduly insensitive.” Initially the award, now known as moral damages, involved compensation through an addition to the period of notice. However, in *Keays v. Honda Canada Inc.*, 2008 SCC 39, [2008] 2 S.C.R. 362, at para. 59, the Court essentially did away with the distinction between aggravated damages and moral damages and held that these damages should be recognized through a fixed monetary award rather than through an extension of the notice period...

[41] In this case, Duns’ handling of Churchill’s termination was unfair and in bad faith. Duns made a false allegation that Churchill was “considered having quit” to avoid having to pay her severance for dismissing her without reasonable notice. His conduct was unfair and appears to be retaliation for the issues raised in the family law dispute. Based on the facts set out in the Statement of Claim and Churchill’s affidavit, I accept that this is a proper case for aggravated damages, and I accept that the claim for \$75,000 for aggravated damages is appropriate in this case.

Punitive Damages

- [42] Churchill also seeks \$75,000 for punitive damages for Duns' conduct in transferring the assets from Aero in order to leave Aero without assets to respond to a possible judgment in this action.
- [43] Punitive damages are an extraordinary remedy. The Supreme Court has held that they should receive "the most careful consideration" and their award "should be most cautiously exercised". Further, "conduct meriting punitive damages awards must be "harsh, vindictive, reprehensible and malicious", as well as "extreme in its nature and such that by any reasonable standard it is deserving of full condemnation and punishment": *Honda Canada Inc. v. Keays*, 2008 SCC 39, [2008] S.C.J. No. 40, at para. 68.
- [44] In *Boucher v. Wal-Mart Canada Corp.*, 2014 ONCA 419 (CanLII) the Court of Appeal stated, at para. 59:
- Punitive damage awards are not compensatory. They are meant to punish the defendant in exceptional cases where the defendant's conduct has been "malicious, oppressive and high-handed" and "represents a marked departure from the ordinary standards of decent behaviour", see *Whiten*, at para. 36.
- [45] Punitive damages are awarded only where compensatory damages are insufficient to deter. In the present case, the imposition of personal liability on Duns is, in my view, sufficient penalty for the oppressive conduct complained of. The imposition of personal liability will be sufficient to deter such conduct in the future without the need to impose an additional punishment in the form of punitive damages for the same conduct. The imposition of personal liability for oppressive conduct is meant to achieve the same purpose as punitive damages, and it is my view that it is unnecessary to impose both in this case.
- [46] For this reason the claim for punitive damages is dismissed.

Conclusion

- [47] Judgment is granted in favour of the plaintiff in the amount of \$181,358.00 comprised of \$2,582 for unpaid past wages, \$13,776.00 for accrued vacation benefits, \$90,000 for pay in lieu of reasonable notice, and \$75,000 for aggravated damages.
- [48] The plaintiff is also entitled to costs for this motion and the action on a partial indemnity basis in the amount of \$11,741.00. These costs are calculated only from the date of the amendment of the Statement of Claim to add Duns as a defendant.

Released: August 13, 2019

CITATION: Churchill v. Aero Auction Sales Inc., 2019 ONSC 4766

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