

Wallace v. United Grain Growers Ltd., [1997] 3 S.C.R. 701

Jack Wallace

Appellant

v.

United Grain Growers Limited

Respondent

Indexed as: Wallace v. United Grain Growers Ltd.

File No.: 24986.

1997: May 22; 1997: October 30.

Present: Lamer C.J. and La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin, Iacobucci and Major JJ.

on appeal from the court of appeal for manitoba

Bankruptcy -- Property of bankrupt -- Salary, wages or other remuneration -- Undischarged bankrupt bringing action for wrongful dismissal -- Whether damages for wrongful dismissal included in "salary, wages or other remuneration" -- Bankruptcy Act, R.S.C., 1985, c. B-3, s. 68(1).

Civil procedure -- Wrongful dismissal -- Undischarged bankrupt seeking damages for wrongful dismissal -- Whether undischarged bankrupt can bring action for wrongful dismissal in his own name.

Employment law -- Wrongful dismissal -- Employee summarily discharged seeking damages for wrongful dismissal -- Trial judge awarding employee damages based on 24-month notice period and aggravated damages -- Whether Court of Appeal erred in reducing reasonable notice period to 15 months -- Whether Court of Appeal erred in overturning aggravated damages award -- Whether action can be brought for "bad faith discharge" -- Whether employee entitled to punitive damages.

In 1972 a printing company wholly owned by the respondent decided to update its operations and seek a larger volume of commercial printing work. The appellant, W, met L, the marketing manager of the company's publishing and printing divisions, to discuss the possibility of employment. W had the type of experience L sought, having worked approximately 25 years for a competitor that used a particular type of press. W explained to L that as he was 45 years of age, if he were to leave his current employer he would require a guarantee of job security. He also sought several assurances from L regarding fair treatment and remuneration. He received such assurances and was told by L that if he performed as expected, he could continue to work for the company until retirement. W was hired and enjoyed great success at the company; he was the top salesperson for each of the years he spent in its employ. In 1986 he was summarily discharged without explanation. W issued a statement of claim alleging wrongful dismissal. In its statement of defence, the respondent alleged that W had been dismissed for cause. This allegation was maintained until the trial commenced. The termination of W's employment and the allegations of cause created emotional difficulties for him and he was forced to seek psychiatric help. His attempts to find similar employment were largely unsuccessful. Prior to his dismissal, W made a voluntary assignment into personal bankruptcy, and remained an undischarged bankrupt when he commenced his action against the respondent. The trial judge struck out his claim for damages for breach of contract, holding that a claim for damages for wrongful

dismissal based on lack of notice vests in the trustee in bankruptcy, and concluded that the action in that regard was a nullity from the outset. W's attempt to appeal the trial judge's ruling was stayed by the Court of Appeal pending completion of the trial. The trial resumed and subject to the outcome of the appeal on the bankruptcy issue, W was awarded damages for wrongful dismissal based on a 24-month notice period and \$15,000 in aggravated damages resulting from mental distress in both tort and contract. The trial judge refused to award punitive damages. The Court of Appeal reversed the trial judge's findings with respect to W's capacity to maintain an action for breach of contract, concluding that W had the right to continue his action for wrongful dismissal in his own name in the absence of the trustee. It also allowed the respondent's cross-appeal. It reduced the reasonable notice period to 15 months, on the basis that the trial judge may have allowed an element of aggravated damages to creep into his assessment and that recent awards in such cases had been getting too high, and overturned the award of aggravated damages.

Held (La Forest, L'Heureux-Dubé and McLachlin JJ. dissenting in part on the appeal): The appeal should be allowed in part and the cross-appeal dismissed.

Per Lamer C.J. and Sopinka, Gonthier, Cory, Iacobucci and Major JJ.: W can maintain an action for wrongful dismissal in his own name. While under the *Bankruptcy Act*, an undischarged bankrupt has no capacity to deal with his or her property and no distinction is made with respect to whether that property was acquired before or after the assignment in bankruptcy, s. 68(1) carves out an exception to this general rule where the property in question can be characterized as "salary, wages or other remuneration". To remain true to the spirit of the Act, this exception must include an award of damages for wrongful dismissal. The measure of such damages is the salary that the employee would have earned had the employee worked during the period of

notice to which he or she was entitled. The fact that this sum is awarded as damages at trial in no way alters the fundamental character of the money. Several courts have interpreted the phrase “salary, wages or other remuneration” broadly. The public policy considerations that inform the section offer further support for interpreting it broadly.

The trial judge’s award of damages in the amount of 24 months’ salary in lieu of notice should be restored. In light of W’s advanced age, his 14-year tenure as the company’s top salesman and his limited prospects for re-employment, a lengthy period of notice is warranted. Another factor to be considered is whether the dismissed employee was induced to leave previous secure employment. Although the trial judge did not make specific reference to the inducement factor in his analysis of reasonable notice, in the circumstances of this case the inducements made, in particular the guarantee of job security, are factors which support his decision to award damages at the high end of the scale.

Bad faith conduct in the manner of dismissal is another factor that is properly compensated for by an addition to the notice period. The contract of employment has many characteristics that set it apart from the ordinary commercial contract. Individual employees on the whole lack both the bargaining power and the information necessary to achieve more favourable contract provisions than those offered by the employer, particularly with regard to tenure. This power imbalance is not limited to the employment contract itself, but informs virtually all facets of the employment relationship. The point at which the employment relationship ruptures is the time when the employee is most vulnerable and hence most in need of protection. In recognition of this need, the law ought to encourage conduct that minimizes the damage and dislocation (both economic and personal) that result from dismissal. To ensure that employees receive adequate protection, employers ought to be held to an obligation of

good faith and fair dealing in the manner of dismissal, breach of which will be compensated for by adding to the length of the notice period. While the obligation of good faith and fair dealing is incapable of precise definition, at a minimum in the course of dismissal employers ought to be candid, reasonable, honest and forthright with their employees and should refrain from engaging in conduct that is unfair or is in bad faith by being, for example, untruthful, misleading or unduly insensitive.

While a dismissed employee is not entitled to compensation for injuries flowing from the fact of the dismissal itself, where an employee can establish that an employer engaged in bad faith conduct or unfair dealing in the course of dismissal, injuries such as humiliation, embarrassment and damage to one's sense of self-worth and self-esteem might all be worthy of compensation depending upon the circumstances of the case. Often the intangible injuries caused by bad faith conduct or unfair dealing on dismissal will lead to difficulties in finding alternative employment, a tangible loss which the Court of Appeal rightly recognized as warranting an addition to the notice period. However, the intangible injuries are sufficient to merit compensation in and of themselves. Bad faith conduct which affects employment prospects may be worthy of considerably more compensation than that which does not, but in both cases damage has resulted that should be compensable. The trial judge documented several examples of bad faith conduct on the part of the respondent. While the award of the equivalent of 24 months' salary in lieu of notice is at the high end of the scale, it is not unreasonable when all the relevant factors are taken into account and there is accordingly no reason to interfere.

There is no reason to interfere with the conclusion of the courts below that there was insufficient evidence to support W's claim that he had a fixed-term contract for employment until retirement.

With respect to damages for mental distress, the Court of Appeal was correct in concluding that there was insufficient evidence to support a finding that the respondent's actions constituted a separate actionable wrong either in tort or in contract. In circumstances where the manner of dismissal has caused mental distress but falls short of an independent actionable wrong, however, the employee is not without recourse. The trial judge has discretion in such circumstances to extend the period of reasonable notice to which an employee is entitled.

W is unable to sue in either tort or contract for "bad faith discharge". The Court should not imply into the employment contract a term that the employee would not be fired except for cause or legitimate business reasons. The law has long recognized the mutual right of both employers and employees to terminate an employment contract at any time provided there are no express provisions to the contrary. A requirement of "good faith" reasons for dismissal would be overly intrusive and inconsistent with established principles of employment law. Similarly, the tort of breach of a good faith and fair dealing obligation with regard to dismissals has not yet been recognized by Canadian courts. Such radical shifts in the law are better left to the legislatures.

The courts below were correct in finding that there is no foundation for an award of punitive damages.

Per La Forest, L'Heureux-Dubé and McLachlin JJ. (dissenting in part on the appeal): W's action was not precluded by his bankruptcy. Damages in lieu of reasonable notice constitute "salary, wages or other remuneration" for the purposes of bankruptcy legislation and hence are recoverable. Moreover, damages for breach of the implied obligation of good faith are recoverable because of the personal nature of the cause of action.

To determine the period of reasonable notice in a wrongful dismissal action, the court examines the characteristics of the particular employment relationship relevant to the employee's prospects of finding a similar position. The manner of dismissal should only be considered where it impacts on the difficulty of finding replacement employment, and absent this connection, damages for the manner of termination must be based on some other cause of action. The fact that some courts in the past have considered factors unrelated to prospects of re-employment in determining the notice period has rendered the law uncertain and unpredictable. To continue on this path would only increase that uncertainty and unpredictability. The law affords other remedies for employer misconduct in the manner of dismissal not affecting prospects of re-employment, and has now developed to the point that to these traditional actions may be added breach of an implied contractual term to act in good faith in dismissing an employee. Recognition of an implied term in the employment contract of good faith in relation to the dismissal of employees is supported by previous decisions, academic commentary and related developments in other areas of contract law. To the extent that recognition of such a term may be seen as a new development, it falls within the scope of the incremental step-by-step revision approved in *Watkins* and *Salituro*.

The trial judge fixed the period of reasonable notice at 24 months on the basis of a careful assessment of W's prospects of re-employment, and there is no reason to interfere in his assessment. The trial judge's award for the damages claimed by W for mental distress and loss of reputation should also be upheld. These are general damages flowing directly from the employer's breach of the implied term of good faith and fair dealing and are therefore compensable.

There is no reason to interfere with the trial judge's conclusion that the respondent did not engage in sufficiently harsh, vindictive, reprehensible and malicious conduct to merit an award representing punitive damages.

Cases Cited

By Iacobucci J.

Distinguished: *Cohen v. Mitchell* (1890), 25 Q.B.D. 262; *Neilson v. Vancouver Hockey Club Ltd.*, [1988] 4 W.W.R. 410, leave to appeal refused, [1988] 2 S.C.R. viii; **not followed:** *Addis v. Gramophone Co.*, [1909] A.C. 488; *Peso Silver Mines Ltd. (N.P.L.) v. Cropper*, [1966] S.C.R. 673; *Ansari v. British Columbia Hydro and Power Authority* (1986), 2 B.C.L.R. (2d) 33; *Wadden v. Guaranty Trust Co. of Canada*, [1987] 2 W.W.R. 739; **referred to:** *Vorvis v. Insurance Corporation of British Columbia*, [1989] 1 S.C.R. 1085, aff'g (1984), 9 D.L.R. (4th) 40; *Pilon v. Peugeot Canada Ltd.* (1980), 114 D.L.R. (3d) 378; *Re Holley* (1986), 59 C.B.R. (N.S.) 17; *Ranch des Prairies Ltée v. Bank of Montreal* (1988), 53 Man. R. (2d) 308; *Re Pascoe*, [1944] 1 Ch. 219; *Wyssling (Trustee of) v. Latreille Estate* (1990), 78 C.B.R. (N.S.) 114; *McNamara v. Pagecorp Inc.* (1989), 76 C.B.R. (N.S.) 97; *Long v. Brisson*, [1992] 5 W.W.R. 185; *Bailey v. Thurston & Co.*, [1903] 1 K.B. 137; *Lough v. Digital Equipment of Canada Ltd.* (1986), 57 O.R. (2d) 456; *Sylvester v. British Columbia*, [1997] 2 S.C.R. 315; *Re Ali* (1987), 62 C.B.R. (N.S.) 64; *Re Giroux* (1983), 45 C.B.R. (N.S.) 245; *Re Greening* (1989), 73 C.B.R. (N.S.) 24; *Marzetti v. Marzetti*, [1994] 2 S.C.R. 765; *Jarvis v. Swans Tours Ltd.*, [1973] 1 Q.B. 233; *Farber v. Royal Trust Co.*, [1997] 1 S.C.R. 846; *Bardal v. Globe & Mail Ltd.* (1960), 24 D.L.R. (2d) 140; *Machtinger v. HOJ Industries Ltd.*, [1992] 1 S.C.R. 986; *Gillespie v. Bulkley Valley Forest Industries Ltd.*, [1975] 1 W.W.R. 607; *Corbin v. Standard Life Assurance Co.* (1995), 15 C.C.E.L. (2d) 71;

Bishop v. Carleton Co-operative Ltd. (1996), 21 C.C.E.L. (2d) 1; *Jackson v. Makeup Lab Inc.* (1989), 27 C.C.E.L. 317; *Murphy v. Rolland Inc.* (1991), 39 C.C.E.L. 86; *Craig v. Interland Window Mfg. Ltd.* (1993), 47 C.C.E.L. 57; *Makhija v. Lakefield Research* (1983), 14 C.C.E.L. 131, aff'd (1986), 14 C.C.E.L. xxxi; *Mutch v. Norman Wade Co.* (1987), 17 B.C.L.R. (2d) 185; *Robertson v. Weavexx Corp.* (1997), 25 C.C.E.L. (2d) 264; *Lojstrup v. British Columbia Buildings Corp.* (1989), 34 B.C.L.R. (2d) 357; *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038; *Reference Re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313; *Eyers v. City Buick Cadillac Ltd.* (1984), 6 C.C.E.L. 234, rev'd in part (1986), 13 O.A.C. 66; *Jivrag v. City of Calgary* (1986), 13 C.C.E.L. 120, rev'd in part (1987), 18 C.C.E.L. xxx; *Hudson v. Giant Yellowknife Mines Ltd.* (1992), 44 C.C.E.L. 109; *Hall v. Giant Yellowknife Mines Ltd.* (1992), 44 C.C.E.L. 101; *Trask v. Terra Nova Motors Ltd.* (1995), 9 C.C.E.L. (2d) 157; *MacDonald v. Royal Canadian Legion* (1995), 12 C.C.E.L. (2d) 211; *Dunning v. Royal Bank* (1996), 23 C.C.E.L. (2d) 71; *Deildal v. Tod Mountain Development Ltd.* (1997), 91 B.C.A.C. 214; *Gillman v. Saan Stores Ltd.* (1992), 45 C.C.E.L. 9; *McCarey v. Associated Newspapers Ltd. (No. 2)*, [1965] 2 Q.B. 86; *Bartrop v. Canadian Broadcasting Corp.* (1978), 25 N.S.R. (2d) 637, leave to appeal refused, [1978] 1 S.C.R. vi; *Stumpf v. Globe Holdings Ltd.* (1982), 22 Alta. L.R. (2d) 55.

By McLachlin J. (dissenting in part on the appeal)

Bardal v. Globe & Mail Ltd. (1960), 24 D.L.R. (2d) 140; *Machtinger v. HOJ Industries Ltd.*, [1992] 1 S.C.R. 986; *Vorvis v. Insurance Corporation of British Columbia*, [1989] 1 S.C.R. 1085; *Brown v. Waterloo Regional Board of Commissioners of Police* (1983), 43 O.R. (2d) 113, aff'g in part (1982), 37 O.R. (2d) 277; *Addis v. Gramophone Co.*, [1909] A.C. 488; *Peso Silver Mines Ltd. (N.P.L.) v. Cropper*, [1966] S.C.R. 673, aff'g (1965), 56 D.L.R. (2d) 117; *Canadian Pacific Hotels Ltd. v. Bank of*

Montreal, [1987] 1 S.C.R. 711; *Deildal v. Tod Mountain Development Ltd.* (1997), 91 B.C.A.C. 214; *Whelan v. Waitaki Meats Ltd.*, [1991] 2 N.Z.L.R. 74; *Ogilvy & Mather (New Zealand) Ltd. v. Turner*, [1994] 1 N.Z.L.R. 641; *Carrick v. Cooper Canada Ltd.* (1983), 2 C.C.E.L. 87; *Bernardin v. Alitalia Air Lines* (1993), 50 C.C.E.L. 156; *Cohnstaedt v. University of Regina*, [1989] 1 S.C.R. 1011; *Greenberg v. Meffert* (1985), 50 O.R. (2d) 755, leave to appeal refused, [1985] 2 S.C.R. ix; *Truckers Garage Inc. v. Krell* (1993), 3 C.C.E.L. (2d) 157; *Doyle v. London Life Insurance Co.* (1985), 23 D.L.R. (4th) 443, leave to appeal refused, [1986] 1 S.C.R. x; *Shiloff v. R.* (1994), 6 C.C.E.L. (2d) 177; *Houle v. Canadian National Bank*, [1990] 3 S.C.R. 122; *Watkins v. Olafson*, [1989] 2 S.C.R. 750; *R. v. Salituro*, [1991] 3 S.C.R. 654; *Re Holley* (1986), 59 C.B.R. (N.S.) 17.

Statutes and Regulations Cited

Bankruptcy Act, R.S.C., 1985, c. B-3, ss. 2 “property”, 67(1) [am. 1992, c. 27, s. 33], 68(1) [rep. & sub. *idem.*, s. 34], 71(2), 99(1).

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APPEAL and CROSS-APPEAL from a judgment of the Manitoba Court of Appeal (1995), 102 Man. R. (2d) 161, 93 W.A.C. 161, [1995] 9 W.W.R. 153, 34 C.B.R. (3d) 153, 14 C.C.E.L. (2d) 41, 95 C.L.L.C. ¶210-046, [1995] M.J. No. 344 (QL) and (1995), 107 Man. R. (2d) 227, 109 W.A.C. 227, [1995] M.J. No. 482 (QL), allowing the appeal and cross-appeal from a decision of the Court of Queen's Bench (1993), 87 Man. R. (2d) 161, [1993] 7 W.W.R. 525, 49 C.C.E.L. 71, [1993] M.J. No. 365 (QL), which awarded the appellant damages for wrongful dismissal. Appeal allowed in part, La Forest, L'Heureux-Dubé and McLachlin JJ. dissenting in part. Cross-appeal dismissed.

Stacey Reginald Ball and *George J. Orle, Q.C.*, for the appellant.

John M. Scurfield, Q.C., and *Richard W. Schwartz*, for the respondent.

The judgment of Lamer C.J. and Sopinka, Gonthier, Cory, Iacobucci and Major JJ. was delivered by

1 IACOBUCCI.J. -- This case involves both an appeal and a cross-appeal. The appeal is largely concerned with issues of compensation in a wrongful dismissal action, specifically, the existence of a fixed-term contract, the right to damages for mental distress, whether or not one can sue for “bad faith discharge”, and the appropriate length of the period of reasonable notice. The cross-appeal raises an issue of bankruptcy law, namely, whether an undischarged bankrupt can maintain an action for wrongful dismissal in his or her own name.

1. Facts

2 In 1972, Public Press, a wholly owned subsidiary of the respondent, United Grain Growers Ltd. (“UGG”), decided to update its operations and seek a larger volume of commercial printing work. Don Logan was the marketing manager of the company’s publishing and printing divisions at that time. For Logan, the key to achieving this increase in volume was to hire someone with an existing record of sales on a specialized piece of equipment known as a “Web” press.

3 In April 1972, the appellant, Jack Wallace, met Logan to discuss the possibility of employment. Wallace had the type of experience that Logan sought, having worked approximately 25 years for a competitor that used the “Web” press. Wallace had become concerned over the unfair manner in which he and others were being treated by their employer. However, he expressed some reservation about jeopardizing his secure position at the company. Wallace explained to Logan that as he was 45 years of age, if he were to leave his current employer he would require a guarantee of job security. He also sought several assurances from Logan regarding fair treatment and remuneration. He received such assurances and was told by Logan that if he performed as expected, he could continue to work for Public Press until retirement.

4 Wallace commenced employment with Public Press in June of 1972. He
enjoyed great success at the company and was the top salesperson for each of the years
he spent in its employ.

5 On August 22, 1986, Wallace was summarily discharged by Public Press's
sales manager Leonard Domerecki. Domerecki offered no explanation for his actions.
In the days before the dismissal both Domerecki and UGG's general manager had
complimented Wallace on his work.

6 By letter of August 29, 1986, Domerecki advised Wallace that the main
reason for his termination was his inability to perform his duties satisfactorily.
Wallace's statement of claim alleging wrongful dismissal was issued on October 23,
1986. In its statement of defence, the respondent alleged that Wallace had been
dismissed for cause. This allegation was maintained for over two years and was only
withdrawn when the trial commenced on December 12, 1988.

7 At the time of his dismissal Wallace was almost 59 years old. He had been
employed by Public Press for 14 years. The termination of his employment and the
allegations of cause created emotional difficulties for Wallace and he was forced to seek
psychiatric help. His attempts to find similar employment were largely unsuccessful.

8 On September 26, 1985, Wallace made a voluntary assignment into personal
bankruptcy. When he commenced his action against the respondent, Wallace remained
an undischarged bankrupt. After Wallace had completed his case at trial, UGG moved
to amend its statement of defence to assert that as an undischarged bankrupt, Wallace
lacked the capacity to commence or continue the proceedings. UGG requested that

Wallace's claim for damages for failure to provide reasonable notice of termination be struck out.

9 The trial judge granted leave to amend the statement of defence and then struck out Wallace's claim for damages for breach of contract. He held that the action in that regard was a nullity from the outset. Wallace's attempt to appeal that ruling was stayed by the Manitoba Court of Appeal pending completion of the trial. The trial resumed and subject to the outcome of the appeal on the bankruptcy issue, Wallace was awarded damages for wrongful dismissal based on a 24-month notice period and aggravated damages.

10 The Manitoba Court of Appeal reversed the findings of the trial judge with respect to the appellant's capacity to maintain an action for breach of contract. It also allowed the respondent's cross-appeal, substituting a judgment in favour of the appellant based on a 15-month reasonable notice period, and overturned the award of aggravated damages. This Court granted leave to appeal on May 9, 1996.

2. Relevant Statutory Provisions

11 *Bankruptcy Act*, R.S.C., 1985, c. B-3

2. In this Act,

...

“property” includes money, goods, things in action, land and every description of property, whether real or personal, legal or equitable, and whether situated in Canada or elsewhere, and includes obligations, easements and every description of estate, interest and profit, present or future, vested or contingent, in, arising out of or incident to property;

67. (1) The property of a bankrupt divisible among his creditors shall . . . comprise

(c) all property wherever situated of the bankrupt at the date of his bankruptcy or that may be acquired by or devolve on him before his discharge, and

(d) such powers in or over or in respect of the property as might have been exercised by the bankrupt for his own benefit.

68. (1) Notwithstanding subsection 67(1), where a bankrupt

(a) is in receipt of, or is entitled to receive, any money as salary, wages or other remuneration from a person employing the bankrupt. . . .

the trustee may, on the trustee's own initiative or, if directed by the inspectors or the creditors, shall, make an application to the court for an order directing the payment to the trustee of such part of the money as the court may determine, having regard to the family responsibilities and personal situation of the bankrupt.

99. (1) All transactions by a bankrupt with any person dealing with him in good faith and for value in respect of property acquired by the bankrupt after the bankruptcy, if completed before any intervention by the trustee, are valid against the trustee, and any estate or interest in the property that by virtue of this Act is vested in the trustee shall determine and pass in such manner and to such extent as may be required for giving effect to any such transaction.

3. Judicial History

A. *Manitoba Court of Queen's Bench* (1992), 82 Man. R. (2d) 253

12 Lockwood J. granted leave to amend the statement of defence to allow UGG to raise the issue of the appellant's status as an undischarged bankrupt. After reviewing the relevant authorities, he struck out Wallace's claim for damages for breach of contract, holding that a claim for damages for wrongful dismissal based on lack of notice vests in the trustee in bankruptcy. He concluded that the action in that regard was a nullity from the outset. Neither party disputed Wallace's right to maintain his claims for

mental distress, loss of reputation and punitive damages. Lockwood J. noted that these claims are personal in nature and do not vest in the trustee.

B. Manitoba Court of Appeal (1993), 85 Man. R. (2d) 40

13 The court stayed the appellant's appeal concerning Lockwood J.'s interlocutory order pending completion of the trial.

C. Manitoba Court of Queen's Bench (1993), 87 Man. R. (2d) 161

14 The appellant contended that he had negotiated a fixed-term contract with UGG that guaranteed him security of tenure until retirement, subject only to termination for just cause. Lockwood J. rejected that argument. In his view, the making of a fixed-term contract would occur rarely, if at all. He described such a contract as being special in nature so as to require very explicit terms. He concluded that the evidence about the meeting between Logan and Wallace prior to Wallace's being hired was not sufficient to merit a finding that the parties had entered a fixed-term contract. Further, he found that in any event, such a contract would be inconsistent with UGG's employment policy and that any change in company policy would require the endorsement of the personnel manager, the general manager or the president of UGG. A change in the company's employment policy was neither sought nor granted.

15 In determining the appropriate period of reasonable notice, Lockwood J. took into account a number of factors including the appellant's length of service, his age, the nature of his employment, the history of the employment relationship, his qualifications, and the availability of similar employment. In addition he noted the difficulty that Wallace was experiencing in finding alternate employment. He attributed that difficulty

in large measure to the evidence of word having circulated in the trade that Wallace “must have done something reprehensible” to have been dismissed by UGG. At p. 170 Lockwood J. concluded:

Taking the above factors into account, and particularly the fact that the peremptory dismissal and the subsequent actions of the [respondent] made other employment in [Wallace’s] field virtually unavailable, I conclude that an award at the top of the scale in such cases is warranted. I, therefore, fix 24 months as the period of reasonable notice.

16 In addition to his claim for wages in lieu of notice, Wallace sought damages for mental distress and made claims in both contract and tort. The claim in contract included damages for mental distress, loss of reputation and prestige and punitive damages. Citing *Vorvis v. Insurance Corporation of British Columbia*, [1989] 1 S.C.R. 1085, Lockwood J. determined that Wallace’s entitlement to an award under this head of damages turned on whether UGG’s conduct constituted a separate actionable wrong. He noted that although there was no fixed-term contract, Wallace had been given a guarantee of security provided he gave UGG no cause to dismiss him. Relying on *Pilon v. Peugeot Canada Ltd.* (1980), 114 D.L.R. (3d) 378 (Ont. H.C.), Lockwood J. concluded that it must have been in the contemplation of UGG that if Wallace was dismissed without cause or warning, he would probably suffer mental distress. This was an implied term of the contract and therefore the dismissal constituted a separate actionable wrong worthy of compensation.

17 Regarding the claim in tort, the appellant sought damages for negligence including punitive damages or, alternatively, aggravated damages for wilful or negligent infliction of harassment and oppression. This claim was based on the statements of Anderson J.A. in the British Columbia Court of Appeal in *Vorvis* (1984), 9 D.L.R. (4th) 40, at pp. 54-55. Lockwood J. began his analysis by reviewing the evidence concerning

mental distress and found that although Wallace's assignment into personal bankruptcy must have caused him an increasing degree of stress, the dismissal itself constituted the "major component" in his depression (at p. 176). Turning to the part of the claim concerning wilful or negligent infliction of harassment, he accepted the evidence of Domerecki that it was UGG's intention to "play hardball" with Wallace, that UGG did not have any reason to dismiss him and that the reason given in Domerecki's letter of August 29, 1986 was not true. He also noted the late withdrawal of the allegations of cause. Lockwood J. held that the behaviour of the respondent ought to lead to compensation for mental distress by way of aggravated damages.

18 Lockwood J. was of the view that since the majority of the Supreme Court of Canada in *Vorvis* failed to comment on the statements of Anderson J.A. in the Court of Appeal regarding the claim in tort, it could be implied that in the proper circumstances, such a claim might qualify as a separate actionable wrong from the breach itself. In his opinion, the requisite circumstances existed in this case. He concluded at p. 177:

I find that it was reasonably foreseeable that mental distress would result from the manner in which the dismissal was handled and also by the decision to play hardball with the [appellant]. That decision resulted in the [respondent] maintaining the plea of just cause for some two years and four months, during which time the [appellant] undoubtedly suffered further mental distress. There was, consequently, a negligent breach of the duty of care warranting compensation by way of aggravated damages.

19 In light of the circumstances and having found that the defendant was liable for aggravated damages resulting from mental distress in both tort and contract, Lockwood J. fixed the award at \$15,000.

20 With respect to the appellant’s claim for punitive damages, Lockwood J. relied on the decision in *Vorvis, supra*, and concluded that conduct warranting an award of such damages would have to be of a “harsh, vindictive, reprehensible and malicious nature” (p. 179). In his view, the conduct complained of in this case was not sufficient to constitute an actionable wrong, nor was it of such an extreme nature as to merit condemnation by an award of such damages in either tort or contract.

D. Manitoba Court of Appeal (1995), 102 Man. R. (2d) 161

21 Having disposed of two issues which do not arise on this appeal, Scott C.J.M., writing for a unanimous court, turned to the question of whether Wallace’s status as an undischarged bankrupt rendered him incapable of bringing an action for breach of contract. Scott C.J.M. began his analysis by reviewing those sections of the *Bankruptcy Act* (ss. 2, 67 and 71(2)) that provide for the automatic vesting of “property” in the trustee upon bankruptcy. He recognized that one exception to these provisions is s. 68, which continues the historical exemption of wages from property that vests in the trustee. The appellant argued that an action for wrongful dismissal was analogous to “wages or other remuneration” within the meaning of s. 68 and was therefore statutorily exempt property. However, Scott C.J.M. examined the competing case law on this point and found the authorities against Wallace’s position more convincing. He concluded that s. 68 had no application in the circumstances and that as Wallace’s claim for wrongful dismissal constituted property within the meaning of the Act, it came under the control of the trustee.

22 Scott C.J.M. acknowledged that Lockwood J. had reached a similar conclusion on this issue. However, in contrast to the opinion of the learned trial judge,

he was of the view that this conclusion did not dispose of the question of Wallace's capacity to bring a claim in contract.

23 The appellant relied on *Cohen v. Mitchell* (1890), 25 Q.B.D. 262, in which the English Court of Appeal drew a distinction between property owned at the date of bankruptcy and after-acquired property. It was stated that after-acquired property does not automatically vest in the trustee in such a way as to prevent the bankrupt from maintaining an action. Rather, he or she retains the ability to bring the action unless the trustee intervenes. Scott C.J.M. noted that this case has been applied numerous times in Canada. However, he was of the view that *Cohen* and the cases which have followed it are primarily concerned with preventing third parties from losing property that they purchased from the bankrupt in good faith and for value to the trustee in bankruptcy. Section 99(1) of the *Bankruptcy Act*, he stated, gives statutory expression to this common law principle, but neither the cases nor the statutory provisions directly address the rights as between the bankrupt and the trustee. At p. 175 he wrote:

As a logical corollary to this it follows, it seems to me, that the third-party beneficiary of such protection [the respondent in the present case] should not be able to set up as against the undischarged bankrupt the title of the trustee when the trustee has not become involved.

24 According to Scott C.J.M., the real issue was simply whether the appellant could maintain his action pertaining to after-acquired property when the trustee failed to take any interest in the litigation. To determine this issue he embarked on a review of the early case law that preceded *Cohen* and found that the courts have long recognized the authority of a bankrupt to maintain an action to protect property, and that this was later extended to proceedings for damages. However, the bankrupt possessed this power subject to the discretion of the trustee to intervene. Scott C.J.M. noted that the common

law had developed this “common sense” principle despite the constant presence of both English and Canadian legislation which provided that all present and future property passed to the assignees (trustees) on bankruptcy. Scott C.J.M. rejected two recent authorities to the contrary, stating that neither involved after-acquired property nor did they make reference to *Cohen*.

25 In the opinion of Scott C.J.M., Lockwood J. had confused the issues of whether the trustee could maintain the action for wrongful dismissal, which he clearly could, with the bankrupt’s right to do so when the trustee chose not to intervene. Scott C.J.M. concluded as follows at p. 177:

The principle that title to after-acquired property vests in the trustee, but the bankrupt has the power and authority to maintain an action with respect thereto unless and until the trustee intervenes, is so well established it could be argued that the [respondent], as opposed to the trustee, has no status to raise the issue. But this need not be decided; it is sufficient to say that Lockwood, J., was quite wrong in his conclusion. Wallace had the right to continue in his own name his action for wrongful dismissal in the absence of the trustee.

26 Regarding the issue of a fixed-term contract, Scott C.J.M. ruled that the trial judge had been correct in finding that there was no fixed-term contract to the age of retirement. In his view, it is rare that general expressions of inducement such as those found by the trial judge are intended or accepted as sufficient to create a binding legal obligation. In addition, he concurred with Lockwood J.’s view regarding the special nature of such a contract, holding that it would require explicit terms and would most certainly be in writing.

27 In considering the notice period to which the appellant was entitled, Scott C.J.M. acknowledged that the manner of dismissal and the circumstances surrounding

it may be relevant in determining the appropriate notice period where the prospects for the dismissed employee's future employment are affected. However, he doubted that it would be appropriate to consider its impact by way of a separate addition to the appropriate notice period. Rather, he concluded, it is one of the numerous factors to be considered.

28 In light of the indefinite terms of Wallace's employment, his position and work history with the company as well as his age and prospects for future employment, Scott C.J.M. concurred with the trial judge's finding that damages ought to be at the high end of the scale. Nevertheless, he held that the award of 24 months was indicative of an element of aggravated damages having crept into the trial judge's determination. Scott C.J.M. noted the recent tendency for awards to climb beyond the level indicated by previous authorities and concluded that 15 months was the appropriate period of notice.

29 Turning to Wallace's claim for mental distress, Scott C.J.M. noted that historically, courts have refused to award damages under this head in breach of contract actions. However, he acknowledged that some exceptions have arisen, namely, in cases where either freedom from mental distress or enjoyment was the actual matter contracted for. In his view, the exception that has been carved out for these "holiday" cases and "peace of mind" cases should not be extended further to allow recovery in circumstances where it was "reasonably foreseeable" that dismissal would cause mental distress. Rather, relying on the decision in *Vorvis, supra*, he concluded that any damages beyond compensation for breach of contract for failure to give reasonable notice "must be founded on a separately actionable course of conduct" (p. 184). In addition he noted that the concept of foreseeability and the notion of determining whether mental suffering would reasonably have been within the contemplation of the parties at the time the

employment contract was entered are negated by the necessity of having an independent wrong.

30 At p. 184, Scott C.J.M. concluded as follows:

Here the trial judge applied the reasonably foreseeable test. He clearly erred in doing so. His conclusion that there was a “negligent breach of the duty of care warranting compensation by way of aggravated damages” cannot stand since there was no finding, and no evidence to support one, that the actions of UGG were such as to constitute an independent cause of action.

31 Similarly, Scott C.J.M. rejected the trial judge’s conclusion that fair treatment was an implied term of the contract. In his view, conduct that falls short of being independently actionable in accordance with *Vorvis* cannot take on that status simply by labelling it an implied term of the contract and reasoning that the parties must have contemplated that mental distress would result if the employee was dismissed in circumstances which, although not independently actionable, were nonetheless harsh. This reasoning, Scott C.J.M. found, “is simply the ‘reasonably foreseeable’ doctrine, not adopted by the majority in *Vorvis*, in another name” (p. 185).

32 In response to Wallace’s argument that there exists a separate independent cause of action in tort called “bad faith discharge”, Scott C.J.M. noted the absence of persuasive authority for this proposition. He held that such a tort has not yet been recognized by Canadian courts.

33 Scott C.J.M. also rejected the argument that UGG was liable for the intentional infliction of mental suffering. An examination of the reasons for judgment of Lockwood J. revealed no finding that UGG had deliberately attempted to inflict

mental suffering upon Wallace. Accordingly, Scott C.J.M. found that the claim lacked any factual foundation.

34 Turning to the issue of punitive damages, Scott C.J.M. dismissed Wallace's argument that the trial judge had erred in refusing to award such damages. He could find no basis for interfering with Lockwood J.'s conclusion that the respondent's conduct was not of such an extreme nature as to justify this type of award. Furthermore, the respondent's conduct did not amount to an independent actionable wrong which, according to the majority judgment in *Vorvis, supra*, is a necessary element in cases deserving of an award of punitive damages.

4. Issues

35 The cross-appeal raises one issue: can an undischarged bankrupt bring an action for wrongful dismissal?

36 The appeal raises five issues:

- a. Was there a fixed-term contract?
- b. Did the Court of Appeal err in overturning the trial judge's award for aggravated damages resulting from mental distress?
- c. Can the appellant sue in either contract or tort for "bad faith discharge"?
- d. Is the appellant entitled to punitive damages?

- e. Did the Court of Appeal err in reducing the appellant's reasonable notice damages from 24 to 15 months?

37 Because the cross-appeal involves the threshold issue of whether the appellant's action can be brought at all, I will address it first.

5. Analysis

A. Capacity to Bring Action as an Undischarged Bankrupt

38 The parties agreed that the claim for mental distress, loss of reputation and punitive damages is one that is personal in nature. Such a cause of action does not become the property of the trustee in bankruptcy and thus may be pursued by Wallace in his own right: *Re Holley* (1986), 59 C.B.R. (N.S.) 17 (Ont. C.A.). However, the part of Wallace's action for wrongful dismissal that is based on lack of notice is a claim for breach of contract. Whether or not he can maintain this claim is the issue that the parties seek to resolve in the cross-appeal.

39 The Court of Appeal concluded that, although title to after-acquired property vests in the trustee in bankruptcy, the bankrupt maintains the authority to bring an action with respect thereto unless the trustee intervenes. Therefore, they reasoned, as the trustee in the present case took no interest in the litigation, Wallace was entitled to maintain his action for wrongful dismissal despite his status as an undischarged bankrupt. Although I believe that the Court of Appeal arrived at the correct result, I cannot agree, with respect, with its reasons.

40 Section 67(1) of the *Bankruptcy Act* describes the property of a bankrupt that is divisible among his or her creditors. No distinction is made with respect to property that exists at the date of assignment into bankruptcy and property acquired after that date but prior to the date of discharge. Section 67(1) reads as follows:

67. (1) The property of a bankrupt divisible among his creditors shall . . . comprise

(c) all property wherever situated of the bankrupt at the date of his bankruptcy or that may be acquired by or devolve on him before his discharge, and

(d) such powers in or over or in respect of the property as might have been exercised by the bankrupt for his own benefit.

41 “Property” is defined in s. 2 of the Act and includes things in action which in turn include claims for breach of contract: see *Ranch des Prairies Ltée v. Bank of Montreal* (1988), 53 Man. R. (2d) 308 (C.A.).

42 Once a receiving order has been made or an assignment into bankruptcy has been filed, s. 71(2) of the Act provides that:

. . . a bankrupt ceases to have any capacity to dispose of or otherwise deal with his property, which shall, subject to this Act and to the rights of secured creditors, forthwith pass to and vest in the trustee named in the receiving order or assignment. . . .

43 The clear wording of the statute indicates that, upon assignment into bankruptcy, the bankrupt relinquishes his ability to deal with both existing and after-acquired property, all of which vests in the trustee in bankruptcy. As property has been defined under the Act to include things in action, it appears that an undischarged bankrupt has no capacity to maintain an action for breach of contract. However, the

Court of Appeal accepted the appellant's submission that the words of the Act were not meant to be read literally. The court found that judges have put a common law gloss on the plain meaning of the Act with respect to property that was acquired after the assignment in bankruptcy.

44 The Court of Appeal's reasons relied heavily upon the decision of the English Court of Appeal in *Cohen, supra*. In *Cohen*, an undischarged bankrupt was involved in the buying and selling of agricultural machinery. Some of the machinery was seized and the bankrupt sought to bring an action for wrongful conversion. The bankrupt lacked the funds with which to bring an action, and so he assigned the cause of action to a third party. In exchange for the assignment, the third party forgave the loan he had made to the bankrupt. A dispute arose between the third party and the trustee in bankruptcy with respect to who was entitled to the damages that were awarded.

45 At p. 267 Lord Esher M.R. stated:

. . . until the trustee intervenes, all transactions by a bankrupt after his bankruptcy with any person dealing with him bonâ fide and for value, in respect of his after-acquired property, whether with or without knowledge of the bankruptcy, are valid against the trustee.

46 This proposition has since found statutory expression in s. 99(1) of Canada's *Bankruptcy Act*. That section provides as follows:

99. (1) All transactions by a bankrupt with any person dealing with him in good faith and for value in respect of property acquired by the bankrupt after the bankruptcy, if completed before any intervention by the trustee, are valid against the trustee, and any estate or interest in the property that by virtue of this Act is vested in the trustee shall determine and pass in such manner and to such extent as may be required for giving effect to any such transaction.

47 The Court in *Cohen* went on to make several broad statements concerning a distinction between existing and after-acquired property. Fry L.J. made reference to the clause in his country's *Bankruptcy Act* which, similar to s. 67(1) of our Act, includes among the property vested in the trustee all property of the undischarged bankrupt, regardless of its date of acquisition. However, Fry L.J. noted the difficulty that the plain meaning of this clause creates for a bankrupt who has dealings with others and acquires rights or property while still a bankrupt. He stated that in response to this difficulty, the common law has developed a distinction between existing and after-acquired property, namely, that after-acquired property does not vest in the trustee in such a way as to prevent the bankrupt from maintaining an action. Rather, an act of intervention on the part of the trustee is required for this to occur.

48 Wallace relied upon these statements to advance his claim that the common law treats existing and after-acquired property differently and that because his cause of action arose after his assignment in bankruptcy, he could rightfully maintain an action for breach of contract in his own name. The Court of Appeal, for the most part, approved of his arguments and indeed, their decision seems to have been heavily influenced by the words of the court in *Cohen, supra*. However, as the Court of Appeal itself noted, *Cohen* and many of the cases that have followed it are concerned with the protection of third parties involved in good faith transactions for value with undischarged bankrupts.

49 In the present case, these concerns do not arise. In contrast to the facts in *Cohen*, Wallace did not become involved in any good faith transactions for value with a third party after his assignment in bankruptcy, a fact which considerably diminishes the persuasive authority of that case. I do not believe that the broad statements of *Cohen* with respect to after-acquired property extend to these very different factual

circumstances. I find support for this position in the fact that the English Court of Appeal has reached a similar conclusion. In *Re Pascoe*, [1944] 1 Ch. 219 (C.A.), the court reviewed a number of cases, of which *Cohen* was said to be the leading modern authority. In so doing, the court conclusively rejected the argument of the appellant that found favour with the Court of Appeal in the present case. Lord Greene M.R. held that these cases do not establish the proposition that after-acquired property belongs to the bankrupt until the trustee intervenes and claims it. At p. 226 he stated:

. . . the title of the trustee is only qualified by those rights given to the bankrupt by s. 47 [essentially the same as s. 99(1) of our Act], which protect transactions with third parties but do not in any way qualify the title of the trustee, save in so far as that title is liable to be impaired in cases which fall under the section.

50 The Manitoba Court of Appeal’s reasons, although informed by *Cohen*, extended beyond the specific facts of that case. After noting the influence of *Cohen* on s. 99(1) of the Act, Scott C.J.M., writing for the court, stated at p. 175:

As a logical corollary to this it follows, it seems to me, that the third-party beneficiary of such protection should not be able to set up as against the undischarged bankrupt the title of the trustee when the trustee has not become involved.

51 In my opinion, in identifying the respondent in the present case as a “third party”, the Court of Appeal has extended the meaning of that term beyond that which is accorded to it by s. 99(1). Dealing with that section of the Act, Lane J. in *Wyssling (Trustee of) v. Latreille Estate* (1990), 78 C.B.R. (N.S.) 114 (Ont. S.C.), stated at p. 127:

In my view, this section was designed to act as a shield for the benefit of third parties who might otherwise be liable to lose to the trustee property which they had purchased from the bankrupt in good faith and for value.

52 I agree with this statement and note that the principles enunciated in *Cohen* serve the same purpose. Although UGG in a general sense can be described as a third party to the relationship between Wallace and the trustee, it is not a third party in the sense in which that term is used in s. 99(1). That section appears to envision that the third party has received or purchased something of value from the bankrupt in good faith and which the third party might otherwise lose to the trustee. UGG simply does not fill that description. Therefore, with respect, the logical corollary developed by the Court of Appeal is erroneous because the respondent is not, in my view, a third party of the kind contemplated by s. 99(1).

53 Consequently, in this context, I cannot agree with the Court of Appeal's finding that the courts have developed a common sense principle which permits an undischarged bankrupt to deal with assets acquired after the assignment in bankruptcy provided the trustee has not intervened. In my opinion, the ability to deal with such assets is restricted to those situations involving good faith third-party transactions for value with an undischarged bankrupt regarding the after-acquired property of the bankrupt. The plain meaning of the Act indicates that outside of these very narrow circumstances (or the exception created by s. 68(1), which I will discuss below), the bankrupt loses the ability to deal with his or her property regardless of whether it was acquired before or after the assignment in bankruptcy.

54 This view of the question before us was correctly applied in two recent appellate court decisions. In *McNamara v. Pagecorp Inc.* (1989), 76 C.B.R. (N.S.) 97, the Ontario Court of Appeal held that an undischarged bankrupt lacked the legal capacity to bring an action in respect of property which the plaintiff and his wife had owned at the time of the bankruptcy and which had been sold back to him by the trustee prior to his being discharged.

55 At p. 98, the court stated:

The scheme of the Bankruptcy Act is that all property of the bankrupt owned at the date of bankruptcy and which is acquired by the bankrupt prior to his discharge vests in the trustee. There is no doubt that an undischarged bankrupt cannot bring [an] action to enforce property claims and we are satisfied that such is the law even where, as here, the property is allegedly sold by the trustee to the bankrupt prior to his discharge.

56 In *Long v. Brisson*, [1992] 5 W.W.R. 185, a case which also involved an undischarged bankrupt who sought to maintain an action in respect of property, the Alberta Court of Appeal cited *McNamara* and held at p. 186:

An undischarged bankrupt has no status to commence an action or other proceeding in his own name where it relates to recovery of property. That status is reserved to the trustee in bankruptcy. . . .

This is the scheme of the *Bankruptcy Act*. . . .

57 The Court of Appeal attempted to distinguish both of these cases on the basis that neither made reference to *Cohen*, *supra*, and that both appeared to deal with pre-bankruptcy assets. However, I have some difficulty with this position. My reading of the facts in *McNamara* indicates that the property over which the dispute arose was acquired after the assignment in bankruptcy and not before as was found by the Court of Appeal. But even so, in my opinion, the date of acquisition of the property is irrelevant as the Act makes no distinction on this ground. Further, the absence of any reference to *Cohen* is of no consequence in light of my statements above with respect to the limited application of that case.

58 The wording of the Act is clear. An undischarged bankrupt has no capacity to deal with his or her property and no distinction is made with respect to whether that property was acquired before or after the assignment in bankruptcy. I must therefore respectfully reject the Court of Appeal's holding that a bankrupt has the capacity to bring an action for breach of contract concerning after-acquired property unless the trustee intervenes. In my view, the bankrupt generally will not be able to deal with his or her property outside the circumstances described in s. 99(1).

59 Nevertheless, this is not sufficient to determine that Wallace's claim is a nullity because s. 68(1) of the Act carves out an additional exception to this general rule where the property in question can be characterized as “salary, wages or other remuneration”. Unlike the Court of Appeal, I believe an undischarged bankrupt can maintain an action against a former employer for damages in lieu of reasonable notice, not because of the timing of the acquisition of such property but rather, because of the nature of the property in question.

60 Section 68(1) of the Act provides as follows:

68. (1) Notwithstanding subsection 67(1), where a bankrupt
(a) is in receipt of, or is entitled to receive, any money as salary, wages or other remuneration from a person employing the bankrupt. . . .

the trustee may, on the trustee's own initiative or, if directed by the inspectors or the creditors, shall, make an application to the court for an order directing the payment to the trustee of such part of the money as the court may determine, having regard to the family responsibilities and personal situation of the bankrupt.

61 Wallace argued before the Court of Appeal that since the true nature of the proceeds from an action for wrongful dismissal is analogous to “wages or other remuneration”, they are not included among property that vests in the trustee and the

bankrupt is able to maintain the action in his or her own name. The Court of Appeal found that there was clear authority against this proposition and concluded that s. 68(1) has no application. For the reasons which follow, I do not agree with this finding.

62 The respondent contended that this Court ought to draw a distinction between the damages for breach of an employment contract and “salary, wages or other remuneration”. In support of this submission, it relied heavily upon *Neilson v. Vancouver Hockey Club Ltd.*, [1988] 4 W.W.R. 410 (B.C.C.A.), leave to appeal refused, [1988] 2 S.C.R. viii, where the plaintiff had a contract under which he was to coach the defendant's hockey team until the end of the 1985 season. He was fired in 1984 in breach of this contract. The plaintiff, having found similar employment shortly after his termination, sought to characterize his action as one for remuneration promised and not for damages for wrongful dismissal in the hope of avoiding the application of mitigation principles. At p. 412 Seaton J.A. (Aikins J.A. concurring) stated: “The general rule is that on wrongful dismissal the employee's action is for damages, not for the remuneration promised.”

63 The respondent argued that *Neilson* stands for the proposition that the proceeds from an action for wrongful dismissal are damages and not “salary, wages or other remuneration”. As such, they do not merit special protection under the Act and automatically vest in the trustee in bankruptcy. The Court of Appeal agreed.

64 However, *Neilson* was concerned with whether mitigation should be taken into account in assessing damages upon the breach of a fixed term contract of employment. This case did not involve a bankruptcy, nor was there any consideration of the meaning of “salary, wages or other remuneration” under the *Bankruptcy Act*. Therefore, in my view, the words of Seaton J.A. are not determinative of the issue before

this Court. Similarly, the additional cases relied on by the Court of Appeal undertook no examination of s. 68(1) and thus are of limited persuasive authority: see e.g. *Bailey v. Thurston & Co.*, [1903] 1 K.B. 137 (C.A.); *Lough v. Digital Equipment of Canada Ltd.* (1986), 57 O.R. (2d) 456 (H.C.).

65 As I see the matter, the underlying nature of the damages awarded in a wrongful dismissal action is clearly akin to the “wages” referred to in s. 68(1). In the absence of just cause, an employer remains free to dismiss an employee at any time provided that reasonable notice of the termination is given. In providing the employee with reasonable notice, the employer has two options: either to require the employee to continue working for the duration of that period or to give the employee pay in lieu of notice: D. Harris, *Wrongful Dismissal* (1989 (loose-leaf)), at p. 3-10. There can be no doubt that if the employer opted to require the employee to continue working during the notice period, his or her earnings during this time would constitute wages or salary under s. 68(1) of the Act. The only difference between these earnings and pay in lieu of notice is that the employee receives a lump sum payment instead of having that sum spread out over the course of the notice period. The nature of those funds remains the same and thus s. 68(1) will also apply in these circumstances.

66 In the event that an employee is wrongfully dismissed, the measure of damages for wrongful dismissal is the salary that the employee would have earned had the employee worked during the period of notice to which he or she was entitled: *Sylvester v. British Columbia*, [1997] 2 S.C.R. 315. The fact that this sum is awarded as damages at trial in no way alters the fundamental character of the money. An award of damages in a wrongful dismissal action is in reality the wages that the employer ought to have paid the employee either over the course of the period of reasonable notice or as pay in lieu of notice. Therefore, in accordance with the exception which is carved out

in s. 68(1) for “salary, wages or other remuneration”, this money is not divisible among a bankrupt's creditors and does not vest in the trustee. The right of action is the means of attaining these damages and is similarly exempt.

67 In support of this finding, I note that several courts have interpreted the phrase “salary, wages or other remuneration” broadly. It has been held to include disability benefits (*Re Ali* (1987), 62 C.B.R. (N.S.) 64 (Ont. S.C.)), severance pay (*Re Giroux* (1983), 45 C.B.R. (N.S.) 245 (Ont. S.C.), and *Re Greening* (1989), 73 C.B.R. (N.S.) 24 (N.B.Q.B.)) and income tax refunds (*Marzetti v. Marzetti*, [1994] 2 S.C.R. 765). In *Re Giroux*, Smith J. stated at p. 247:

Speaking generally, one should experience no difficulty including in the definition of salary, wages and other remuneration virtually all benefits accruing to employees. Unless the context requires a restricted meaning, any reward should normally qualify, if not as “salary, wages”, at least as “remuneration”, whether the reward takes the form of sick pay allowance, bonuses, vacation with pay or pay in lieu of notice. [Emphasis added.]

68 The public policy considerations that inform s. 68(1) of the Act offer further support for interpreting the wording of that section broadly. In *Marzetti, supra*, the Court stated at p. 801:

. . . when family needs are at issue, I prefer to err on the side of caution. In s. 68 of the *Bankruptcy Act*, Parliament has indicated that, before wages become divisible among creditors, it is appropriate to have “regard to the family responsibilities and personal situation of the bankrupt”. This demonstrates, to my mind, an overriding concern for the support of families.

69 Until alternative employment has been obtained, the wrongly dismissed employee will require funds to support him- or herself and his or her family. A damages award will satisfy this need, in essence, filling the pocket that would otherwise have been filled by salary or wages. If such an award is considered property divisible among a

bankrupt's creditors that vests in the trustee, the bankrupt and his or her family may be deprived of essential income during a time of need. In my opinion, to remain true to the spirit of the Act, the words "salary, wages or other remuneration" in s. 68(1) must include an award of damages for wrongful dismissal. The same policy rationales that exempt salary, wages and other remuneration from automatically vesting in the trustee surely must operate in the wrongful dismissal context as the function of such damages is equivalent to wages or salary earned in the course of ongoing employment. To hold otherwise would run contrary to Parliament's intention to put the needs of families ahead of those of creditors.

70 In addition, I note that the possibilities for abuse associated with this interpretation of s. 68(1) are few. Creditors and trustees are still adequately protected by virtue of the fact that s. 68(1) allows trustees by their own initiative or by the direction of the creditors to go before the court for an order directing payment to the trustee of such part of the "salary, wages or other remuneration" that the court determines is not required for the support of the bankrupt or his or her family.

71 For the above reasons, I conclude that the appellant can maintain an action for wrongful dismissal in his own name. I would therefore dismiss the cross-appeal and I now turn to the issues raised by the appeal.

B. Fixed-Term Contract

72 The appellant submitted that the courts below erred in rejecting his claim that he had a fixed-term contract for employment until retirement. The learned trial judge exhaustively reviewed all of the circumstances surrounding Wallace's hiring and concluded that there was insufficient evidence to support this claim. The Court of

Appeal accepted the facts as they were found by the trial judge and agreed with his conclusion. In light of these concurrent findings of fact, I see no palpable error or other reason to interfere with the conclusion of the courts below.

C. Damages for Mental Distress

73 Relying upon the principles enunciated in *Vorvis, supra*, the Court of Appeal held that any award of damages beyond compensation for breach of contract for failure to give reasonable notice of termination “must be founded on a separately actionable course of conduct” (p. 184). Although there has been criticism of *Vorvis* (see e.g. I. Christie et al., *Employment Law in Canada* (2nd ed. 1993), at pp. 749-50; R. B. Schai, “Aggravated Damages and the Employment Contract” (1991), 55 *Sask. L. Rev.* 345, at p. 355; J. Swan, “Extended Damages and *Vorvis v. Insurance Corporation of British Columbia*” (1990), 16 *Can. Bus. L.J.* 213) this is an accurate statement of the law. The Court of Appeal also noted that this requirement necessarily negates the trial judge’s reliance on concepts of foreseeability and matters in the contemplation of the parties. An employment contract is not one in which peace of mind is the very matter contracted for (see e.g. *Jarvis v. Swans Tours Ltd.*, [1973] 1 Q.B. 233 (C.A.)) and so, absent an independently actionable wrong, the foreseeability of mental distress or the fact that the parties contemplated its occurrence is of no consequence, subject to what I say on employer conduct below.

74 The Court of Appeal concluded that there was insufficient evidence to support a finding that the actions of UGG constituted a separate actionable wrong either in tort or in contract. I agree with these findings and see no reason to disturb them. I note, however, that in circumstances where the manner of dismissal has caused mental distress but falls short of an independent actionable wrong, the employee is not without

recourse. Rather, the trial judge has discretion in these circumstances to extend the period of reasonable notice to which an employee is entitled. Thus, although recovery for mental distress might not be available under a separate head of damages, the possibility of recovery still remains. I will be returning to this point in my discussion of reasonable notice below.

D. Bad Faith Discharge

75 The appellant urged this Court to find that he could sue UGG either in contract or in tort for “bad faith discharge”. With respect to the action in contract, he submitted that the Court should imply into the employment contract a term that the employee would not be fired except for cause or legitimate business reasons. I cannot accede to this submission. The law has long recognized the mutual right of both employers and employees to terminate an employment contract at any time provided there are no express provisions to the contrary. In *Farber v. Royal Trust Co.*, [1997] 1 S.C.R. 846, Gonthier J., speaking for the Court, summarized the general contractual principles applicable to contracts of employment as follows, at p. 858:

In the context of an indeterminate employment contract, one party can resiliate the contract unilaterally. The resiliation is considered a dismissal if it originates with the employer and a resignation if it originates with the employee. If an employer dismisses an employee without cause, the employer must give the employee reasonable notice that the contract is about to be terminated or compensation in lieu thereof.

76 A requirement of “good faith” reasons for dismissal would, in effect, contravene these principles and deprive employers of the ability to determine the composition of their workforce. In the context of the accepted theories on the employment relationship, such a law would, in my opinion, be overly intrusive and

inconsistent with established principles of employment law, and more appropriately, should be left to legislative enactment rather than judicial pronouncement.

77 I must also reject the appellant's claim that he can sue in tort for breach of a good faith and fair dealing obligation with regard to dismissals. The Court of Appeal noted the absence of persuasive authority on this point and concluded that such a tort has not yet been recognized by Canadian courts. I agree with these findings. To create such a tort in this case would therefore constitute a radical shift in the law, again a step better left to be taken by the legislatures.

78 For these reasons I conclude that the appellant is unable to sue in either tort or contract for "bad faith discharge". However, I will be returning to the subject of good faith and fair dealing in my discussion of reasonable notice below.

E. Punitive Damages

79 Punitive damages are an exception to the general rule that damages are meant to compensate the plaintiff. The purpose of such an award is the punishment of the defendant: S. M. Waddams, *The Law of Damages* (3rd ed. 1997), at p. 483. The appellant argued that the trial judge and the Court of Appeal erred in refusing to award punitive damages. I do not agree. Relying on *Vorvis, supra*, Lockwood J. found that UGG did not engage in sufficiently "harsh, vindictive, reprehensible and malicious" conduct to merit condemnation by such an award. He also noted the absence of an actionable wrong. The Court of Appeal concurred. Again, there is no reason to interfere with these findings. Consequently, I agree with the courts below that there is no foundation for an award of punitive damages.

F. Reasonable Notice

80 The Court of Appeal upheld the trial judge's findings of fact and agreed that in the circumstances of this case damages for failure to give notice ought to be at the high end of the scale. However, the court found the trial judge's award of 24 months' salary in lieu of notice to be excessive and reflective of an element of aggravated damages having crept into his determination. It overturned his award and substituted the equivalent of 15 months' salary. For the reasons which follow, I would restore the trial judge's award of damages in the amount of 24 months' salary in lieu of notice.

81 In determining what constitutes reasonable notice of termination, the courts have generally applied the principles articulated by McRuer C.J.H.C. in *Bardal v. Globe & Mail Ltd.* (1960), 24 D.L.R. (2d) 140 (Ont. H.C.), at p. 145:

There can be no catalogue laid down as to what is reasonable notice in particular classes of cases. The reasonableness of the notice must be decided with reference to each particular case, having regard to the character of the employment, the length of service of the servant, the age of the servant and the availability of similar employment, having regard to the experience, training and qualifications of the servant.

82 This Court adopted the foregoing list of factors in *Machtinger v. HOJ Industries Ltd.*, [1992] 1 S.C.R. 986, at p. 998. Applying these factors in the instant case, I concur with the trial judge's finding that in light of the appellant's advanced age, his 14-year tenure as the company's top salesman and his limited prospects for re-employment, a lengthy period of notice is warranted. I note, however, that *Bardal, supra*, does not state, nor has it been interpreted to imply, that the factors it enumerated were exhaustive: see e.g. *Gillespie v. Bulkley Valley Forest Industries Ltd.*, [1975] 1 W.W.R. 607 (B.C.C.A.); *Corbin v. Standard Life Assurance Co.* (1995), 15 C.C.E.L.

(2d) 71 (N.B.C.A.); *Bishop v. Carleton Co-operative Ltd.* (1996), 21 C.C.E.L. (2d) 1 (N.B.C.A.). Canadian courts have added several additional factors to the *Bardal* list. The application of these factors to the assessment of a dismissed employee's notice period will depend upon the particular circumstances of the case.

83 One such factor that has often been considered is whether the dismissed employee had been induced to leave previous secure employment: see e.g. *Jackson v. Makeup Lab Inc.* (1989), 27 C.C.E.L. 317 (Ont. H.C.); *Murphy v. Rolland Inc.* (1991), 39 C.C.E.L. 86 (Ont. Ct. (Gen. Div.)); *Craig v. Interland Window Mfg. Ltd.* (1993), 47 C.C.E.L. 57 (B.C.S.C.). According to one authority, many courts have sought to compensate the reliance and expectation interests of terminated employees by increasing the period of reasonable notice where the employer has induced the employee to “quit a secure, well-paying job . . . on the strength of promises of career advancement and greater responsibility, security and compensation with the new organization” (I. Christie et al., *supra*, at p. 623).

84 Several cases have specifically examined the presence of a promise of job security: see e.g. *Makhija v. Lakefield Research* (1983), 14 C.C.E.L. 131 (Ont. H.C.), affirmed by the Ontario Court of Appeal (1986), 14 C.C.E.L. xxxi; *Mutch v. Norman Wade Co.* (1987), 17 B.C.L.R. (2d) 185 (S.C.). In particular, I note that the British Columbia Court of Appeal recently adopted this approach in *Robertson v. Weavexx Corp.* (1997), 25 C.C.E.L. (2d) 264. The facts of this case were very similar to those currently before this Court. Writing for the court, Goldie J.A. stated at pp. 271-72:

Also part of the inducement to the respondent in making the move he did was, no doubt, the discussions as to long term employment. . . . As I have concluded, those discussions lacked contractual force in terms of the respondent's assertion of a fixed term contract but nevertheless, they were and are, in my opinion, significant on the issue of reasonable notice.

85 In my opinion, such inducements are properly included among the considerations which tend to lengthen the amount of notice required. I concur with the comments of Christie et al., *supra*, and recognize that there is a need to safeguard the employee's reliance and expectation interests in inducement situations. I note, however, that not all inducements will carry equal weight when determining the appropriate period of notice. The significance of the inducement in question will vary with the circumstances of the particular case and its effect, if any, on the notice period is a matter best left to the discretion of the trial judge.

86 In the instant case, the trial judge found that UGG went to great lengths to relieve Wallace's fears about jeopardizing his existing secure employment and to entice him into joining their company. At p. 172 the trial judge stated:

The [respondent] wanted a man with the skills of the [appellant] and to get him was prepared to accommodate his demands. . . . I have found that there was no fixed-term contract. However, there was, in the assurance given to him, a guarantee of security, provided he gave the [respondent] no cause to dismiss him. [Emphasis added.]

87 In addition to the promise that he could continue to work for the company until retirement, UGG also offered several assurances with respect to fair treatment. Further, despite the fact that the company only had salary arrangements with their existing employees, they assured Wallace that they would implement a commission basis for him. Although the trial judge did not make specific reference to the inducement factor in his analysis of reasonable notice, I believe that, in the circumstances of this case, these inducements, in particular the guarantee of job security, are factors which support his decision to award damages at the high end of the scale.

88 The appellant urged this Court to recognize the ability of a dismissed employee to sue in contract or alternatively in tort for “bad faith discharge”. Although I have rejected both as avenues for recovery, by no means do I condone the behaviour of employers who subject employees to callous and insensitive treatment in their dismissal, showing no regard for their welfare. Rather, I believe that such bad faith conduct in the manner of dismissal is another factor that is properly compensated for by an addition to the notice period.

89 In *Lojstrup v. British Columbia Buildings Corp.* (1989), 34 B.C.L.R. (2d) 357, the British Columbia Court of Appeal found that *Addis v. Gramophone Co.*, [1909] A.C. 488 (H.L.), *Peso Silver Mines Ltd. (N.P.L.) v. Cropper*, [1966] S.C.R. 673, *Ansari v. British Columbia Hydro and Power Authority* (1986), 2 B.C.L.R. (2d) 33 (S.C.), and *Wadden v. Guaranty Trust Co. of Canada*, [1987] 2 W.W.R. 739 (Alta. Q.B.), preclude extending the notice period to account for manner of dismissal. Generally speaking, these cases have found that claims relating to the manner in which the discharge took place are not properly considered in an action for damages for breach of contract. Rather, it is said, damages are limited to injuries that flow from the breach itself, which in the employment context is the failure to give reasonable notice. The manner of dismissal was found not to affect these damages.

90 Although these decisions are grounded in general principles of contract law, I believe, with respect, that they have all failed to take into account the unique characteristics of the particular type of contract with which they were concerned, namely, a contract of employment. Similarly, there was not an appropriate recognition of the special relationship which these contracts govern. In my view, both are relevant considerations.

91 The contract of employment has many characteristics that set it apart from the ordinary commercial contract. Some of the views on this subject that have already been approved of in previous decisions of this Court (see e.g. *Machtinger, supra*) bear repeating. As K. Swinton noted in “Contract Law and the Employment Relationship: The Proper Forum for Reform”, in B. J. Reiter and J. Swan, eds., *Studies in Contract Law* (1980), 357, at p. 363:

. . . the terms of the employment contract rarely result from an exercise of free bargaining power in the way that the paradigm commercial exchange between two traders does. Individual employees on the whole lack both the bargaining power and the information necessary to achieve more favourable contract provisions than those offered by the employer, particularly with regard to tenure.

92 This power imbalance is not limited to the employment contract itself. Rather, it informs virtually all facets of the employment relationship. In *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038, Dickson C.J., writing for the majority of the Court, had occasion to comment on the nature of this relationship. At pp. 1051-52 he quoted with approval from P. Davies and M. Freedland, *Kahn-Freund's Labour and the Law* (3rd ed. 1983), at p. 18:

[T]he relation between an employer and an isolated employee or worker is typically a relation between a bearer of power and one who is not a bearer of power. In its inception it is an act of submission, in its operation it is a condition of subordination. . . .

93 This unequal balance of power led the majority of the Court in *Slaight Communications, supra*, to describe employees as a vulnerable group in society: see p. 1051. The vulnerability of employees is underscored by the level of importance which our society attaches to employment. As Dickson C.J. noted in *Reference Re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313, at p. 368:

Work is one of the most fundamental aspects in a person's life, providing the individual with a means of financial support and, as importantly, a contributory role in society. A person's employment is an essential component of his or her sense of identity, self-worth and emotional well-being.

94 Thus, for most people, work is one of the defining features of their lives. Accordingly, any change in a person's employment status is bound to have far-reaching repercussions. In “Aggravated Damages and the Employment Contract”, *supra*, Schai noted at p. 346 that, “[w]hen this change is involuntary, the extent of our ‘personal dislocation’ is even greater.”

95 The point at which the employment relationship ruptures is the time when the employee is most vulnerable and hence, most in need of protection. In recognition of this need, the law ought to encourage conduct that minimizes the damage and dislocation (both economic and personal) that result from dismissal. In *Machtinger, supra*, it was noted that the manner in which employment can be terminated is equally important to an individual's identity as the work itself (at p. 1002). By way of expanding upon this statement, I note that the loss of one's job is always a traumatic event. However, when termination is accompanied by acts of bad faith in the manner of discharge, the results can be especially devastating. In my opinion, to ensure that employees receive adequate protection, employers ought to be held to an obligation of good faith and fair dealing in the manner of dismissal, the breach of which will be compensated for by adding to the length of the notice period.

96 This approach finds support in the words of my colleague, Gonthier J., in *Farber, supra*. Writing for a unanimous Court he stated at p. 859:

. . . for the employment contract to be resiliated, it is not necessary for the employer to have intended to force the employee to leave his or her employment or to have been acting in bad faith when making substantial changes to the contract's essential terms. However, if the employer was acting in bad faith, this would have an impact on the damages awarded to the employee.

97 I find further support for this approach in the decisions of several cases wherein the manner of dismissal was among the factors considered in determining the notice period: *Eyers v. City Buick Cadillac Ltd.* (1984), 6 C.C.E.L. 234 (Ont. H.C.), reversed in part (1986), 13 O.A.C. 66, with no comment regarding manner of dismissal; *Jivrag v. City of Calgary* (1986), 13 C.C.E.L. 120 (Alta. Q.B.), reversed in part (1987), 18 C.C.E.L. xxx (Alta. C.A.), with no comment regarding manner of dismissal; *Hudson v. Giant Yellowknife Mines Ltd.* (1992), 44 C.C.E.L. 109 (N.W.T.S.C.); *Hall v. Giant Yellowknife Mines Ltd.* (1992), 44 C.C.E.L. 101 (N.W.T.S.C.); *Trask v. Terra Nova Motors Ltd.* (1995), 9 C.C.E.L. (2d) 157 (Nfld. C.A.); *MacDonald v. Royal Canadian Legion* (1995), 12 C.C.E.L. (2d) 211 (N.S.S.C.); *Corbin, supra*; *Dunning v. Royal Bank* (1996), 23 C.C.E.L. (2d) 71 (Ont. Ct. (Gen. Div.)); *Deildal v. Tod Mountain Development Ltd.* (1997), 91 B.C.A.C. 214.

98 The obligation of good faith and fair dealing is incapable of precise definition. However, at a minimum, I believe that in the course of dismissal employers ought to be candid, reasonable, honest and forthright with their employees and should refrain from engaging in conduct that is unfair or is in bad faith by being, for example, untruthful, misleading or unduly insensitive. In order to illustrate possible breaches of this obligation, I refer now to some examples of the conduct over which the courts expressed their disapproval in the cases cited above.

99 In *Trask, supra*, an employer maintained a wrongful accusation of involvement in a theft and communicated this accusation to other potential employers of the dismissed employee. *Jivrag, supra*, involved similar unfounded accusations of theft combined with a refusal to provide a letter of reference after the termination. In *Dunning, supra*, bad faith conduct was clearly present. Although the plaintiff's position had been eliminated, he was told by several senior executives that another position would probably be found for him and that the new assignment would necessitate a transfer. However, at the same time that the plaintiff was being reassured about his future, a senior representative of the company was contemplating his termination. When a position could not be found, the decision was made to terminate the plaintiff. This decision was not communicated to the plaintiff for over a month despite the fact that his employers knew he was in the process of selling his home in anticipation of the transfer. News of his termination was communicated to the plaintiff abruptly following the sale of his home.

100 In *Corbin, supra*, the New Brunswick Court of Appeal expressed its displeasure over the conduct of an employer who made the decision to fire the employee when he was on disability leave, suffering from a major depression. The employee advised the manager as to when he would be returning to duty and informed him that he was taking a two-week vacation. He was fired immediately upon his return to work. The facts in *MacDonald, supra*, are also illustrative of bad faith conduct. In that case, the defendant employer closed its bar for three months and laid off the plaintiff bartender. While the bar was closed, the executive committee was replaced and the new officers decided to implement a different salary structure for bartenders when the bar reopened. The employer advertised for a bartender at a rate of almost half of the plaintiff's hourly rate. The plaintiff was unaware of any change in his status, and it was

only when he saw the advertisement in the newspaper that he learned that he had been dismissed and was not to be offered reinstatement.

101 These examples by no means exhaust the list of possible types of bad faith or unfair dealing in the manner of dismissal. However, all are indicative of the type of conduct that ought to merit compensation by way of an addition to the notice period. I note that, depending upon the circumstances of the individual case, not all acts of bad faith or unfair dealing will be equally injurious and thus, the amount by which the notice period is extended will vary. Furthermore, I do not intend to advocate anything akin to an automatic claim for damages under this heading in every case of dismissal. In each case, the trial judge must examine the nature of the bad faith conduct and its impact in the circumstances.

102 The Court of Appeal in the instant case recognized the relevance of manner of dismissal in the determination of the appropriate period of reasonable notice. However, relying on *Trask, supra*, and *Gillman v. Saan Stores Ltd.* (1992), 45 C.C.E.L. 9 (Alta. Q.B.), the court found that this factor could only be considered “where it impacts on the future employment prospects of the dismissed employee” (p. 180). With respect, I believe that this is an overly restrictive view. In my opinion, the law must recognize a more expansive list of injuries which may flow from unfair treatment or bad faith in the manner of dismissal.

103 It has long been accepted that a dismissed employee is not entitled to compensation for injuries flowing from the fact of the dismissal itself: see e.g. *Addis, supra*. Thus, although the loss of a job is very often the cause of injured feelings and emotional upset, the law does not recognize these as compensable losses. However, where an employee can establish that an employer engaged in bad faith conduct or unfair

dealing in the course of dismissal, injuries such as humiliation, embarrassment and damage to one's sense of self-worth and self-esteem might all be worthy of compensation depending upon the circumstances of the case. In these situations, compensation does not flow from the fact of dismissal itself, but rather from the manner in which the dismissal was effected by the employer.

104 Often the intangible injuries caused by bad faith conduct or unfair dealing on dismissal will lead to difficulties in finding alternative employment, a tangible loss which the Court of Appeal rightly recognized as warranting an addition to the notice period. It is likely that the more unfair or in bad faith the manner of dismissal is the more this will have an effect on the ability of the dismissed employee to find new employment. However, in my view the intangible injuries are sufficient to merit compensation in and of themselves. I recognize that bad faith conduct which affects employment prospects may be worthy of considerably more compensation than that which does not, but in both cases damage has resulted that should be compensable.

105 The availability of compensation for these types of injuries has been recognized in other areas of the law. In *McCarey v. Associated Newspapers Ltd. (No.2)*, [1965] 2 Q.B. 86 (C.A.), Pearson L.J. examined the scope of recovery in an action for libel. At pp. 104-5 he stated:

Compensatory damages, in a case in which they are at large, may include several different kinds of compensation to the injured plaintiff. They may include not only actual pecuniary loss and anticipated pecuniary loss or any social disadvantages which result, or may be thought likely to result, from the wrong which has been done. They may also include the natural injury to his feelings -- the natural grief and distress which he may have felt at having been spoken of in defamatory terms, and if there has been any kind of high-handed, oppressive, insulting or contumelious behaviour by the defendant which increases the mental pain and suffering caused by the defamation and may constitute injury to the plaintiff's pride and self-confidence, those are

proper elements to be taken into account in a case where the damages are at large.

106 Pearson L.J.'s list of the elements properly compensated for in an award of this type found favour with the Nova Scotia Supreme Court, Appeal Division in *Barltrop v. Canadian Broadcasting Corp.* (1978), 25 N.S.R. (2d) 637, at pp. 661-62, leave to appeal refused, [1978] 1 S.C.R. vi. Having been asked to assess damages in an action for defamation, MacKeigan C.J.N.S., writing for a unanimous court, quoted the above cited passage with approval (see also: *Stumpf v. Globe Holdings Ltd.* (1982), 22 Alta. L.R. (2d) 55 (Q.B.), at p. 61).

107 In my view, there is no valid reason why the scope of compensable injuries in defamation situations should not be equally recognized in the context of wrongful dismissal from employment. The law should be mindful of the acute vulnerability of terminated employees and ensure their protection by encouraging proper conduct and preventing all injurious losses which might flow from acts of bad faith or unfair dealing on dismissal, both tangible and intangible. I note that there may be those who would say that this approach imposes an onerous obligation on employers. I would respond simply by saying that I fail to see how it can be onerous to treat people fairly, reasonably, and decently at a time of trauma and despair. In my view, the reasonable person would expect such treatment. So should the law.

108 In the case before this Court, the trial judge documented several examples of bad faith conduct on the part of UGG. He noted the abrupt manner in which Wallace was dismissed despite having received compliments on his work from his superiors only days before. He found that UGG made a conscious decision to "play hardball" with Wallace and maintained unfounded allegations of cause until the day the trial began.

Further, as a result of UGG's persistence in maintaining these allegations, “[w]ord got around, and it was rumoured in the trade that he had been involved in some wrongdoing” (p. 173). Finally, he found that the dismissal and subsequent events were largely responsible for causing Wallace's depression. Having considered the *Bardal* list of factors, he stated at p. 170:

Taking [these] factors into account, and particularly the fact that the peremptory dismissal and the subsequent actions of the defendant made other employment in his field virtually unavailable, I conclude that an award at the top of the scale in such cases is warranted.

109 I agree with the trial judge’s conclusion that the actions of UGG seriously diminished Wallace’s prospects of finding similar employment. In light of this fact, and the other circumstances of this case, I am not persuaded that the trial judge erred in awarding the equivalent of 24 months’ salary in lieu of notice. It may be that such an award is at the high end of the scale; however, taking into account all of the relevant factors, this award is not unreasonable and accordingly, I can see no reason to interfere. Therefore, for the reasons above, I would restore the order of the trial judge with respect to the appropriate period of reasonable notice and allow the appeal on this ground.

6. Conclusions and Disposition

110 I would dismiss the cross-appeal with costs and allow the appeal in part with costs here and in the courts below. I would set aside the judgment of the Manitoba Court of Appeal and restore the trial judge’s award of 24 months’ salary in lieu of notice. As explained above, the other aspects of the appellant’s claim are rejected.

The reasons of La Forest, L'Heureux-Dubé and McLachlin JJ. were delivered by

111 MCLACHLIN J. (dissenting in part) -- I have read the reasons of Justice Iacobucci. While I agree with much of his reasons, my view of the law leads me to differ both in method and in result.

112 As to method, I differ from Iacobucci J. in two respects. First, I am of the view that an award of damages for wrongful dismissal should be confined to factors relevant to the prospect of finding replacement employment. It follows that the notice period upon which such damages are based should only be increased for manner of dismissal if this impacts on the employee's prospects of re-employment. Secondly, I am of the view the law has evolved to permit recognition of an implied duty of good faith in termination of the employment.

113 These differences lead me to a different result than my colleague. I would uphold the trial judge's award of damages for wrongful dismissal based on a 24-month notice period. I would also uphold the trial judge's award of \$15,000 for mental distress on the basis of breach of the contractual obligation of good faith in dismissing an employee.

114 On the cross-appeal, I agree with Iacobucci J. that the plaintiff's action was not precluded by his bankruptcy. Damages in lieu of reasonable notice constitute "salary, wages or other remuneration" for the purposes of bankruptcy legislation and hence are recoverable. I also conclude that damages for breach of the implied obligation of good faith are recoverable because of the personal nature of the cause of action.

The Law

115 The action for wrongful dismissal is based on an implied obligation in the employment contract to give reasonable notice of an intention to terminate the relationship (or pay in lieu thereof) in the absence of just cause for dismissal: I. Christie et al., *Employment Law in Canada* (2nd ed. 1993), at p. 609. If an employer fails to provide reasonable notice of termination, the employee can bring an action for breach of the implied term. A “wrongful dismissal” action is not concerned with the wrongness or rightness of the dismissal itself. Far from making dismissal a wrong, the law entitles both employer and employee to terminate the employment relationship without cause. A wrong arises only if the employer breaches the contract by failing to give the dismissed employee reasonable notice of termination. The remedy for this breach of contract is an award of damages based on the period of notice which should have been given. The length of the notice period is based on the time reasonably required to find similar employment. The damages represent what the employee would have earned in this period. These damages place the employee in the position that he or she would have been in had the contract been performed -- the proper measure of damages for breach of contract.

116 To determine the period of reasonable notice, the court examines the characteristics of the particular employment relationship relevant to the employee’s prospects of finding a similar position including “the character of the employment, the length of service of the servant, the age of the servant and the availability of similar employment, having regard to the experience, training and qualifications of the servant”: *Bardal v. Globe & Mail Ltd.* (1960), 24 D.L.R. (2d) 140 (Ont. H.C.), at p. 145, *per* McRuer C.J.H.C., approved in *Machtinger v. HOJ Industries Ltd.*, [1992] 1 S.C.R. 986, at pp. 998-99.

117 As my colleague points out, the *Bardal* factors have not been viewed as exhaustive. Courts have introduced additional factors into the assessment process, often without articulating the policy reasons for doing so. This has led to confusion about what kinds of factors may be considered in the future. As a result, this area of the law “is often uncertain and unpredictable”: Christie et al., *supra*, at p. 611. Hence the issue on this appeal; when, if ever, can the manner of discharge impact on the notice period upon which damages for wrongful dismissal are based?

118 My colleague, Iacobucci J., holds that the manner of dismissal may be considered generally in defining the notice period for wrongful dismissal. An alternative view is that the manner of dismissal should only be considered in defining the notice period where the manner of dismissal impacts on the difficulty of finding replacement employment, and that absent this connection, damages for the manner of termination must be based on some other cause of action.

119 I prefer the second approach for the following reasons. First, this solution seems to me more consistent with the nature of the action for wrongful dismissal. Second, this approach, unlike the alternative, honours the principle that damages must be grounded in a cause of action. Third, this approach seems to me more consistent with the authorities, notably *Vorvis v. Insurance Corporation of British Columbia*, [1989] 1 S.C.R. 1085, *per* McIntyre J. Fourth, this approach will better aid certainty and predictability in the law governing damages for termination of employment. Finally, there are other equally effective ways to remedy wrongs related to the manner of dismissal which do not affect the prospect of finding replacement work. I will discuss in turn each of these reasons for preferring the second alternative.

1. *Consistency with the Nature of the Action for Wrongful Dismissal*

120 As already stated, the action for wrongful dismissal is an action for breach of an implied term in the contract of employment to give reasonable notice of termination. Reasonable notice, in turn, represents the time that may reasonably be required to find replacement employment. It follows that only factors relevant to the prospects of re-employment should be considered in determining the notice period. To include other factors is to consider matters unrelated to the breach of contract for which damages are ostensibly being awarded.

2. *Consistency with the Principle That Damages Must Be Grounded in a Cause of Action*

121 Damages, to be recoverable, must flow from an actionable and hence compensable wrong: *Brown v. Waterloo Regional Board of Commissioners of Police* (1983), 43 O.R. (2d) 113 (C.A.), aff'g in part (1982), 37 O.R. (2d) 277 (H.C.). Since the compensable wrong in wrongful dismissal actions is the failure to give reasonable notice so that the employee can find replacement employment, a successful plaintiff will only be entitled to damages flowing from that wrong.

122 It follows that the only damages recoverable in an action based on breach of the contractual duty to give reasonable notice are those related to the prospect of re-employment. Other wrongs must find their remedy elsewhere.

3. *Consistency with the Authorities*

123 This is not the first time this Court has considered the issue of whether damages related to the manner of dismissal can increase the notice period upon which damages for wrongful dismissal are based. In *Vorvis*, *supra*, this Court declined an invitation to do just this.

124 As in the case at bar, the plaintiff in *Vorvis* claimed damages for wrongful dismissal as well as damages for mental distress suffered by him as a result of his employer's callous treatment of him around the time of dismissal. The Court affirmed the long-standing principle that damages for wrongful dismissal (as opposed to other wrongs) were confined to loss flowing from the absence of reasonable notice of termination. McIntyre J. for the majority, citing *Addis v. Gramophone Co.*, [1909] A.C. 488 (H.L.), and *Peso Silver Mines Ltd. (N.P.L.) v. Cropper*, [1966] S.C.R. 673, *aff'g* (1965), 56 D.L.R. (2d) 117 (B.C.C.A.), stated (at p. 1103):

The rule long established in the *Addis* and *Peso Silver Mines* cases has generally been applied to deny [aggravated] damages, and the employer/employee relationship . . . has always been one where either party could terminate the contract of employment by due notice, and therefore the only damage which could arise would result from a failure to give such notice.

125 This said, McIntyre J. left open the possibility that aggravated damages could be awarded in a case of wrongful dismissal, "particularly where the acts complained of were also independently actionable" (p. 1103).

126 It is argued that this phrase means that the notice period on which damages for wrongful dismissal are predicated may be increased to reflect the manner of dismissal, even where it did not affect the prospects of re-employment. This submission seems to me to read a great deal into the phrase. It seems to me

more likely that McIntyre J., without closing the door on the possibility of aggravated damages in a contractual action for wrongful dismissal (for example, in a case where manner of dismissal impacts on prospects of re-employment), was of the view that generally, aggravated damages would arise only where the acts were independently actionable. This is consistent with the long-standing distinction affirmed in *Vorvis* between damages for breach of the contractual duty to give reasonable notice of termination and other independent causes of action which may give rise more generally to damages for manner of dismissal. On this view, the first source of damages is the traditional wrongful dismissal action compensating for the failure to give reasonable notice. The second source of damages are actions for independently actionable wrongs. The manner of dismissal may figure in both types of action: in the former, where it impacts on prospects of re-employment; in the latter more generally. When it does so, additional aggravated damages may be awarded if the employer's conduct was so "harsh, vindictive, reprehensible and malicious" that damages representing punishment in addition to compensation should be awarded.

127 In conclusion, it seems to me that the general principle underlying *Vorvis* is that damages for wrongful dismissal are confined to damages for breach of the implied obligation on the employer to give reasonable notice. Unless the manner of termination increased the time required to find new employment and hence the notice period, damages for manner of dismissal must be grounded in an independent cause of action.

128 The view I propose is also consistent with the language and spirit of *Bardal, supra*. Each of the *Bardal* factors indicate something about the future employment prospects of the particular employee: Christie et al., *supra*, at pp. 611-

20. The factor “availability of other employment” clearly relates to the extent of difficulty the employee can expect to confront when searching for new employment. The “characteristics of the job” are considered because of the hypothesis that employees in the higher echelon of employment positions will be less able to find alternative employment because there are fewer job openings available in these positions. Although the “length of service” is potentially considered for a number of reasons, one rationale for considering this factor is that “longer seniority-rated employees are likely to be older and therefore less able to find alternative employment”(Christie et al., *supra*, at p. 618). This also explains why the “age of the employee” is considered.

129 Finally, the view I endorse is consistent with *Vorvis* and *Bardal* read together. To extend the factors in *Bardal* to include matters unrelated to prospects of re-employment is to effectively collapse the distinction affirmed in *Vorvis* between the cause of action for breach of the contractual duty to give reasonable notice of termination and independent causes of action for other employer wrongs.

130 I conclude that the authorities support the following position. If the employer dismisses an employee in a manner that negatively affects the employee’s chances of finding alternative employment, a court may properly increase the employee’s period of reasonable notice to reflect that increased difficulty. Otherwise, the reasonable notice assessment should not be increased to compensate for employer misconduct in the manner of dismissal. Compensation for such injuries must be founded on an independent cause of action.

4. *Certainty and Predictability*

131 As earlier noted, the fact that some courts in the past have considered factors unrelated to prospects of re-employment in determining the notice period upon which damages for wrongful dismissal are based, has rendered the law “uncertain and unpredictable”: Christie et al., *supra*, at p. 611. To continue on this path by allowing conduct unrelated to the prospects of employment to affect the notice period would only increase that uncertainty and unpredictability. It would confront employers and judges seeking to establish the reasonable notice period under the contract with new and difficult questions unrelated to the wrong of failure to give reasonable notice. What sort of employer conduct is capable of increasing the notice period? How much time should be added for a particular sort of misconduct? The absence of a legal basis in the action for wrongful dismissal for the increased damages on account of manner of dismissal would make it difficult to provide principled and consistent answers to these questions.

132 Confining the factors considered in determining reasonable notice to matters impacting on the prospect of finding replacement employment will increase the predictability of wrongful dismissal law, making it easier for employers to anticipate the length of notice a particular employee is likely to receive. To require the employer to take into account undefined conduct not related to these factors in determining the length of notice is to complicate and render less precise the inquiry into the appropriate notice period.

5. *The Availability of Other Remedies*

133 It is argued that employer misconduct in the manner of dismissal not affecting prospects of re-employment must be taken into account in calculating the notice period in order to avoid injustice and provide an adequate remedy to the

employee in a case such as this. The answer to this argument is that the law affords other remedies for employer misconduct in these circumstances.

134 The law of tort and contract recognizes a number of independent causes of action for misconduct in dismissing an employee. If the employer defames the employee or wilfully inflicts mental distress, the employee can sue in tort. If the employer has lured the employee from a secure position with promises of better terms, the employee may be able to sue in tort for negligent misrepresentation or for breach of an express contractual term. Finally, unfair treatment at the time of dismissal may give rise to an action for breach of an implied term in the contract of employment.

135 The law has now developed to the point that to these traditional actions may now be added another: breach of an implied contractual term to act in good faith in dismissing an employee. I agree with Iacobucci J. that an employer must act in good faith and in fair dealing when dismissing employees, and more particularly that “employers ought to be candid, reasonable, honest and forthright with their employees and should refrain from engaging in conduct that is unfair or is in bad faith by being, for example, untruthful, misleading or unduly insensitive” (para. 98). I also agree that this obligation does not extend to prohibiting employers from dismissing employees without “good faith” reasons; such an extension of employment law would be “overly intrusive and inconsistent with established principles of employment law”(para. 76). Both employer and employee remain free to terminate the contract of employment without cause. This is not inconsistent with the duty of good faith. While some courts have recognized employer obligations of good faith outside of the dismissal context (see below), this case does not require us to go beyond the context of dismissal.

136 I differ from my colleague, however, in that I see no reason why the expectation of good faith in dismissing employees that he accepts should not be viewed as an implied term of the contract of employment. To assert the duty of good faith in dismissing employees as a proposition of law, as does my colleague, is tantamount to saying that it is an obligation implied by law into the contractual relationship between employer and employee. In other words, it is an implied term of the contract.

137 Implication of this term meets the test set out by this Court in *Canadian Pacific Hotels Ltd. v. Bank of Montreal*, [1987] 1 S.C.R. 711. Le Dain J., for the majority, held that terms may be implied on the basis of custom or usage, presumed intention, and as legal incidents of a particular class or kind of contract, the nature and content of which have to be largely determined by implication. Whereas the implication of a term based on presumed intention must be necessary “to give business efficacy to a contract or as otherwise meeting the ‘officious bystander’ test as a term which the parties would say, if questioned, that they had obviously assumed” (p. 775), the implication of a term as legal incident need only be necessary in the sense that it is required by the nature of the contract rather than the presumed intentions of the particular parties.

138 This is the type of implication that is involved in the proposed obligation of good faith. As Iacobucci J. points out, employment contracts have characteristics quite distinct from other types of contracts as a result of the often unequal bargaining power typically involved in the relationship. This results in employee vulnerability -- a vulnerability that is especially acute at the time of dismissal. The nature of the relationship thereby necessitates some measure of protection for the vulnerable party. Requiring employers to treat their employees with good faith at the time of dismissal

provides this special measure of protection. It follows that an implied term is necessary in the sense required to justify implication of a contractual term by law.

139 Recognition of an implied term in the employment contract of good faith in relation to the dismissal of employees is supported by previous decisions, academic commentary and related developments in other areas of contract law. I turn first to previous decisions. The British Columbia Court of Appeal, *per* Braidwood J.A. affirmed a duty of good faith in dismissal in *Deildal v. Tod Mountain Development Ltd.* (1997), 91 B.C.A.C. 214 (although the case was ultimately decided on other grounds, as the parties had not argued the point). Deildal suffered mental distress and damage to his professional reputation and career prospects as a result of the manner of dismissal. Braidwood J.A. held that in such circumstances two actions lay: one for breach of the implied contractual term of reasonable notice of termination, the other for breach of a duty to act in good faith in dismissing the plaintiff. In support of the latter, he wrote (at para. 77):

The contract under consideration here is not a simple commercial exchange in the marketplace of goods and services. A contract of employment is typically of longer term and more personal in nature than most contracts, and involves greater mutual dependence and trust, with a correspondingly greater opportunity for harm or abuse. It is quite logical to imply that the parties to such a contract would, if they turned their minds to the issue, mutually agree that they would take reasonable steps to protect each other from such harm, or at least would not deliberately and maliciously avail themselves of an opportunity to cause it.

The decision of Gibbs J.A., dissenting, was consistent with this view.

140 In affirming an implied contractual obligation of good faith in termination of employment in *Deildal, supra*, Braidwood J.A. relied on New Zealand cases upholding such a duty: *viz. Whelan v. Waitaki Meats Ltd.*, [1991] 2 N.Z.L.R. 74 (H.C.),

approved by the New Zealand Court of Appeal in *Ogilvy & Mather (New Zealand) Ltd. v. Turner*, [1994] 1 N.Z.L.R. 641, and often followed. In *Whelan*, Gallen J. approached the possibility of implying terms into the contract by examining the particular circumstances of the employment relationship (at pp. 89-90):

In this case as I have already concluded, the plaintiff occupied a senior position with substantial responsibilities. . . . The nature and extent of his service was such that combined with the position he held, I think he was entitled to assume that he would be treated by his employer in such a manner as to enable him to retain his dignity within the community and not to have his status affected by a precipitate act open to misinterpretation. I think these matters taken together become implied terms of his contract of service with the defendant and that the defendant in the circumstances in its turn had an obligation to observe them. [Emphasis added.]

The employer having treated the plaintiff in a manner that caused “undue mental distress, anxiety, humiliation, loss of dignity and injury to his feelings” (p. 90), Gallen J. awarded damages for both the failure to provide reasonable notice and the manner of dismissal.

141 Canadian courts have frequently found aspects of an obligation of good faith in dismissing employees. Trainor J. in *Carrick v. Cooper Canada Ltd.* (1983), 2 C.C.E.L. 87 (Ont. H.C.), concluded that an employer owed a duty to an employee to treat him with concern and common decency. Similarly, Gomery J. of the Quebec Superior Court in *Bernardin v. Alitalia Air Lines* (1993), 50 C.C.E.L. 156, at pp. 162-63, held that an employer terminating the employment relationship is under a duty to do so in a manner which will not cause the employee undue anxiety. **Other courts have introduced a duty of procedural fairness in dismissal situations under the rubric of determining whether or not there is “just cause” for summary dismissal: Christie et al., *supra*, at p.**

416. Still other courts have held that where the employment contract contains express provisions conferring discretionary powers on the employer, such discretion must be exercised reasonably and in good faith; e.g. *Cohnstaedt v. University of Regina*, [1989] 1 S.C.R. 1011, at p. 1019; *Greenberg v. Meffert* (1985), 50 O.R. (2d) 755 (C.A.), at p. 764, leave to appeal refused, [1985] 2 S.C.R. ix; *Truckers Garage Inc. v. Krell* (1993), 3 C.C.E.L. (2d) 157 (Ont. C.A.), at p. 164. It has also been held that the employer owes to an employee a duty of procedural fairness which, *inter alia*, entitles the worker to be interviewed honestly and in a non-hostile fashion about her alleged deficiencies before dismissal can be invoked: *Doyle v. London Life Insurance Co.* (1985), 23 D.L.R. (4th) 443 (B.C.C.A.), leave to appeal refused, [1986] 1 S.C.R. x. See also: *Shiloff v. R.* (1994), 6 C.C.E.L. (2d) 177 (F.C.T.D.).

142 The weight of academic commentary supports the judicial imposition of a duty of good faith in dismissing employees. Christie et al., *supra*, suggest that “[t]he implied promise to treat the employee with decency and dignity in job exit situations offers the greatest potential in compensating for mental distress” (p. 750).

143 Similarly, Professor Schai (in “Aggravated Damages and the Employment Contract” (1991), 55 *Sask. L. Rev.* 345) opines that “an implied contractual condition of good faith is the best device by which the law can compensate for the psychological

injuries received in the wrongful dismissal of an employee” (p. 349). He writes (at p. 363):

An implied condition of good faith will serve two masters. Principally, it will serve as a device of compensation for persons injured by the callous and malicious treatment of their employers. Secondly, and from a perspective of aggravated damages awards, of lesser importance, is the role of deterrence.

144 To similar effect, G. England notes that implying an employer obligation of good faith would provide symmetry to this area of the law since employees already owe their employers a duty to act reasonably in the best interests of their employer: “Recent Developments in the Law of the Employment Contract: Continuing Tension Between the Rights Paradigm and the Efficiency Paradigm” (1995), 20 *Queen’s L.J.* 557.

145 Finally, implication of an implied contractual obligation of good faith in dismissing an employee is consistent with the recognition of an implied obligation of good faith and fair dealing in other areas of contract law, such as commercial contracts, insurance contracts and real estate contracts. (See S. K. O’Byrne, “Good Faith in Contractual Performance: Recent Developments” (1995), 74 *Can. Bar Rev.* 70; B. J. Reiter, “Good Faith in Contracts” (1983), 17 *Val. U. L. Rev.* 705, and E. P. Belobaba, “Good Faith in Canadian Contract Law”, in *Commercial Law: Recent Developments and Emerging Trends* (1985), 73.) It may also be noted that this Court has affirmed an implied contractual term of good faith and fair dealing under the civil law of Quebec: *Houle v. Canadian National Bank*, [1990] 3 S.C.R. 122.

146 In summary, it is my view that the law has evolved to the point of recognition of an implied contractual obligation of good faith in the contract of employment to treat the employee with good faith in dismissing him or her. To the

extent that recognition of such a term may be seen as a new development, it falls within the scope of the incremental step-by-step revision approved in *Watkins v. Olafson*, [1989] 2 S.C.R. 750, at pp. 760-61, and *R. v. Salituro*, [1991] 3 S.C.R. 654, at p. 668. The action for breach of this duty supplements the independent causes of action in contract and tort previously recognized to provide ample redress for wrongs such as those raised by the appellant without altering the traditional notice-based action for wrongful dismissal.

Application of the Law

147 After taking into account the enumerated *Bardal* factors and the fact that “the peremptory dismissal and the subsequent actions of the defendant made other employment in his field virtually unavailable” (p. 170), the trial judge fixed the period of reasonable notice at 24 months. The Court of Appeal reduced the notice period from 24 to 15 months on the basis that the trial judge may have allowed an element of aggravated damages to creep into his assessment and that recent awards in such cases had been getting too high. I do not agree. The trial judge proceeded on the basis of a careful assessment of the appellant’s prospects of re-employment. He considered no other factors. I see no reason to interfere in his assessment.

148 The appellant also claimed damages for mental distress, loss of reputation and prestige, and punitive damages. The trial judge concluded that it was the dismissal and events following thereafter that were mostly responsible for the mental anguish suffered by Mr. Wallace. These damages are compensable providing they flow from the employer’s failure to treat Mr. Wallace in good faith at the time of dismissal. The trial judge found bad faith conduct on the part of UGG in: (1) terminating Mr. Wallace in an

abrupt manner after having complimented him numerous times prior to the dismissal; and (2) UGG's decision to play hardball with Mr. Wallace by maintaining completely unfounded allegations of just cause up until the start of the trial which resulted in Mr. Wallace being essentially ostracized from the printing business. UGG thus breached the implied term of good faith and fair dealing by acting as it did at the time of dismissal. The damages claimed under the heading mental distress and loss of reputation are general damages flowing directly from the employer's breach of the implied term and are therefore compensable. Accordingly, I would uphold the trial judge's award of \$15,000 representing compensation for those additional damages.

149 I see no reason to interfere with the trial judge's conclusion that UGG did not engage in sufficiently "harsh, vindictive, reprehensible and malicious" conduct to merit an award representing punitive damages.

150 The parties agreed that the claim for mental distress and loss of reputation, viewed in tort, would be personal in nature and thus would not form part of the bankrupt's property divisible among creditors. The question arises whether an action for mental distress and loss of reputation founded on breach of an implied term of good faith in a contract is similarly personal in nature. In my view it is. The issue is not whether the action sounds in contract or tort, but whether the damages claimed are for personal loss as distinguished from proprietary loss. As affirmed in *Re Holley* (1986), 59 C.B.R. (N.S.) 17 (Ont. C.A.), at p. 35 *per* Goodman J.A., "it is not the policy of the law to convert into money for the creditors the mental or physical anguish of the debtor". I therefore conclude that the appellant is not prevented from claiming damages for breach of the implied term because he was an undischarged bankrupt at the time the action was commenced.

I would dismiss the cross-appeal and allow the appeal with costs here and in the courts below and restore the trial judge's award of 24 months' salary representing damages for wrongful dismissal and \$15,000 representing compensation for mental distress and loss of reputation.

Appeal allowed in part with costs, LA FOREST, L'HEUREUX-DUBÉ and MCLACHLIN JJ. dissenting in part. Cross-appeal dismissed with costs.

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