

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:)
)
 Marta Piresferreira and Judy Scott) John H. Yach, for the Plaintiffs
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 Plaintiffs)
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- and -)
)
)
 Richard Ayotte and Bell Mobility Inc.) Alison Dewar, for Ayotte
) Julie Thibault, for Bell Mobility
)
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 Defendants)
)
)
) **HEARD:** March 17, 18, 20, 25-28,
) 31, April 1-2, June 2-3, 2008

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REASONS FOR JUDGMENT

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Nature of Proceedings

[1] Marta Piresferreira (“Piresferreira”) is 64 years of age. Since 1988, Piresferreira had been residing with her partner, Judy Scott (“Scott”). In 1996, Piresferreira commenced employment with Bell Mobility Inc. (“Bell Mobility”) in the area of sales. Commencing in 1997, Piresferreira’s supervisor was Richard Ayotte (“Ayotte”). During an argument on May 12, 2005, Ayotte assaulted Piresferreira. Immediately following the assault, Ayotte threatened to issue a performance improvement plan (“PIP”) for Piresferreira and shortly thereafter did so. Piresferreira reported the assault to her Human Resources (“HR”) representative at Bell Mobility. Ayotte received a minor disciplinary reproach. Ayotte and Bell Mobility moved immediately to impose the PIP, including an onerous schedule of frequent meetings with Ayotte. Piresferreira went on sick leave and then long-term disability due to the depression and anxiety that she experienced after these events. She has not returned to work.

[2] In her Amended Amended Statement of Claim, Piresferreira seeks damages against Ayotte and Bell Mobility for assault and battery; negligence; loss of past and future income; breach of contract; intentional or negligent infliction of emotional distress, mental suffering, nervous shock and/or psycho-traumatic disability; and special damages. In addition, she seeks damages (including aggravated and/or punitive damages) against Bell Mobility for wrongful or constructive dismissal. Scott seeks damages under s. 61 of the *Family Law Act*, R.S.O. 1990, c. F. 3.

[3] In submissions following the trial, Piresferreira’s counsel asked for:

- \$50,000 as general damages for assault and battery, emotional distress and mental suffering;
- \$20,767 for the loss in value of Piresferreira’s pension;

- \$282,042 for past loss of income;
- \$10,552 for past loss of car allowance (\$500 per month);
- \$216,156 for future loss of income (to age 65.08);
- \$7,904 for future loss of car allowance;
- \$5,122.52 for special damages; and
- \$20,000 for Scott's *Family Law Act* claim.

Factual Background

[4] Piresferreira was born on July 2, 1944 in Brazil. After completing high school and working as a secretary in Brazil, she immigrated to Canada in 1965. Piresferreira worked at the Brazilian Embassy for 21 years in the area of accounting, administration and public service. She then moved to Rogers Communications as an account manager selling cellular phones and pagers to the federal government and other corporate clients. Piresferreira's sales performance at Rogers was excellent. She overachieved her targets many years and received recognition for her success.

[5] In 1996, Piresferreira moved to Bell Mobility in the capacity of an account manager in their Enterprise division, selling cellular, pager and eventually data transmission capabilities to large institutions, including the federal government. Her duties were the same as those at Rogers and her accounts were similar. They included some federal and provincial government departments and Crown corporations and some hospitals and universities. After a number of years, Piresferreira's accounts became strictly federal government departments, agencies or Crown corporations.

[6] From 1996 to 2005, there were on average six account managers in the Ottawa Bell Mobility office. Initially, they were managed out of the Montreal office. In January 1997, Ayotte became the sales manager in the Ottawa office. He, in turn, reported to the General Manager of Enterprise Sales for the Eastern Region, who was located in Montreal. In 2004 and 2005, that person was Antoine Shiu ("Shiu").

[7] Shiu came to Ottawa approximately once every two weeks, at which time he attended team meetings and met with Ayotte. Before the events relative to this litigation, Shiu had spoken to Piresferreira on approximately ten occasions – usually in the context of regional or team meetings.

[8] Ayotte’s performance reviews were conducted by Shiu. Ayotte would provide all relevant financial figures and describe his management style. Shiu would review the document and add his own comments. The only independent input Shiu had regarding Ayotte’s management style was from his personal observations when he visited the Ottawa office, complaints received from others at the Ottawa office, or problems raised by customers of the Ottawa office.

[9] Shiu personally observed Ayotte raising his voice to make a point. He also heard him swear, using such terms as “Jesus Christ” and “hell”. None of Ayotte’s subordinates formally complained to Shiu about Ayotte before the incident with Piresferreira. Nevertheless, Shiu knew that Ayotte’s manner could be inappropriately aggressive and intimidating.

[10] The six account managers who were on Ayotte’s sales team and who reported to him in 2004-2005 were Piresferreira, Tony Stockwood (“Stockwood”), Terry Lipovski (“Lipovski”), Josette St-Aubin (“St-Aubin”), Charles Poulin (“Poulin”) and Claudio Cattai (“Cattai”). Sabine Munier (“Munier”) was the sales coordinator who assisted all of the account managers. Ayotte described the duties of the account managers as being to represent Bell Mobility in a professional manner, to meet or exceed individual targets, to handle all customer issues that might arise within their accounts, to complete paperwork and other administrative tasks on time and accurately, to understand Bell Mobility’s competition, to become familiar with new technology as it was being introduced to the market and to sell to his or her clients all possible services that Bell Mobility had available. The account managers were compensated based in great measure on the activation of new lines by clients.

[11] Ayotte described the duties of the sales manager as being to designate the territories or mix of accounts that would be assigned to each account manager, to distribute team objectives given by Bell Mobility, to assist the account managers in their day to day activities, to coach individual account managers who were having difficulties, and to represent individual account managers or the team as a

whole in regard to issues at Bell Mobility that were affecting their ability to meet their targets. I find that Ayotte put a lot of pressure on his team to perform.

[12] Ayotte's evidence as to the procedure he followed if an account manager was not meeting his or her targets was that initially, he would verbally suggest what the account manager needed to do to address the problem; if the problem continued, he would refer to it in the account manager's semi-annual written performance reviews; and finally, if the problem persisted and Ayotte's verbal lessons were not being applied, he would consider issuing a PIP. He had only contemplated using this tool on one occasion prior to May 12, 2005. The purpose of a written warning was to make sure that the individual understood exactly the deficiencies and the actions that were required to correct them. According to Ayotte, a PIP was only sent with the blessing of the regional sales manager and after consultation with the HR department.

[13] Ayotte had weekly meetings with his entire sales team and weekly, and then bi-weekly, meetings with individual account managers. The purpose of the team meetings was to do training, discuss common issues such as pricing, and do presentations on a product or application. Ayotte described the meetings as being collegial gatherings where everyone could provide his or her input. The account managers who testified, including Piresferreira, described the team meetings in less neutral terms. Ayotte used some of those meetings to berate the team if there were problems or if targets were not being met. It was not uncommon for him to yell and swear at the group and bang his fist on the table to make a point. Ayotte described Piresferreira as being quite passive at the team meetings and as not contributing many independent ideas or suggestions. Piresferreira described herself as contributing to the meetings when she could, but at times feeling sidelined.

[14] Ayotte used the individual meetings to assure himself that the account manager had concrete plans that should result in consistent sales into the future. He provided feedback, ideas and advice. If an account manager was resistant to his advice, he considered that evidence that the account manager was not a team player.

[15] Ayotte and his team performed very well from 1997 to 2006 (when Ayotte eventually left Bell Mobility), being the top team in the region in five of the nine years. Ayotte attributed this success to the strong work done by all members

of his team. Ayotte described Piresferreira's contribution to the team effort as being good until approximately 2004, when Piresferreira started to have difficulty meeting her targets. He attributed that to her not being able to adapt to new applications and technologies, such as BlackBerries – downplaying the extent to which external factors, and his own behaviour, had contributed to her difficulties.

[16] At Bell Mobility, regular performance reviews occurred mid year and then at year end. The account manager completed a form regarding his/her perception of his/her performance over the previous year. Ayotte and the account manager would meet to discuss all of the categories on the form. Both would then add their comments and sign the form. No one aside from Ayotte saw the entire performance review forms for each account manager at the Ottawa office. Shiu had access to the forms, but there was no evidence that he personally reviewed these documents.

[17] From 1996 to 2003 (with the exception of 2000), Piresferreira received excellent performance reviews. She achieved and exceeded her targets and she was rewarded with bonuses and trips. Comments made about her performance included:

- Very good team player, capacity to learn fast, very professional (1996)
- Excellent at building relationships, team player, excellent work ethics, excellent rapport with clients, enthusiastic, cheery attitude (1997)
- Exceeded all cellular and paging objectives, overcame objections and turned them into sales, implemented plans to acquire new business by introducing new features and benefits and establishing new relationships (1998)
- Overachieved on all objectives, maintained excellent appointment ratio, low deactivation churn, maintained strong relationship with clients, team player, positive attitude, self motivated, “like a machine” (1999)
- Exceed objectives in regard to total revenue, great work ethic (2000)
- Work ethic and dedication to the job “still tops on the team”, met or exceeded her targets, RIM sales the top in Bell Mobility Enterprise sales, did great job of finding and developing RIM business within her accounts (2001)
- Exceeded most of her objectives and met the rest, works hard and has very strong relationship with her clients (2002)

- Performed over plan, one of the first reps to take on new data applications and discuss them with clients (2003)

[18] During the period from 1996 to 2003, the only deficiencies about which Ayotte (or his predecessor Poirier) regularly commented related to paperwork and presentations. Some of the comments were:

- Could improve on accuracy and timeliness of paperwork (1996)
- Improve paperwork, timely reports (1997)
- Continues to struggle with doing presentations (1998)
- Must put a very strong effort in improving her administrative skills, must put a lot more emphasis on reports, business cases and e-mails plus their content (1999)
- Reports and administration are not properly completed on occasion (2000)
- At times she still struggles with administrative tasks, but she has made some great improvement (2002)
- My suggestion would be for her to enrol in a public speaking and presentation preparation courses to help her achieve her goal of becoming a senior representative (2003)

[19] Ayotte believed that Piresferreira had to improve her presentation skills in order to better present new products to her customers. According to Piresferreira, she rarely made presentations to customers and did not need to be proficient at this skill. Mostly she explained new products and services in small group meetings around a board table, and she was very comfortable in this setting.

[20] Up until 2000, Piresferreira's work focused on selling cellular lines. Thereafter, the business became more complex and incorporated selling data transmission options.

[21] Piresferreira's performance review for 2000 was not as positive as in earlier years. Piresferreira attributed her not meeting all of her objectives to her clients' nervousness over Y2K and changes in technology that resulted in clients upgrading equipment but not acquiring new equipment. Piresferreira's results rebounded in 2001 and she was once again a noted leader in sales, despite the chilling effect of 9/11 on government spending.

[22] In 2002, Ayotte nominated Piresferreira to be a Senior Sales Representative – someone who was seen as an overachiever who went above and beyond what was expected and someone who acted as a role model to other account managers. Ayotte argued her case with senior management but was not successful. Despite that, Piresferreira continued to excel in 2003.

[23] Piresferreira encountered significant difficulties in 2004, missing a number of her financial objectives. I accept Piresferreira's evidence that the downturn was attributable to three key reasons. First, Bell Mobility introduced a new billing platform which resulted in invoices being delayed and being confusing to both Bell Mobility staff and clients. Clients would not pay the invoices until they had seen and understood them. Second, the sponsorship scandal at the federal government resulted in government departments refraining from buying their usual quota of products. Amongst the Ottawa Bell Mobility sales representatives, Piresferreira was hit the hardest by this development because the federal government made up her entire territory. Third, one of Piresferreira's biggest accounts was lost during a tendering process due to an oversight on the part of Ayotte and others at Bell Mobility. That error affected over 2000 cellular activations that Piresferreira would have had and therefore impacted negatively and significantly on her results in 2004. All of these problems were beyond Piresferreira's control. Despite that, her targets were not reduced for the year.

[24] In regard to the billing problems, it is worthy of note that neither Ayotte, nor anyone else higher up on the management ladder at Bell Mobility, took any responsibility for the bureaucratic problems associated with the introduction of a new billing system. It was left to the individual account managers to seek help on individual files from the billing resource personnel and from the customer service representatives. Piresferreira sought Ayotte's assistance in tackling the billing problems. Ayotte believed that Piresferreira was bringing too many problems to his attention, rather than attempting to solve them herself with the resources available to her. Piresferreira was of the view that the problems should have been dealt with on a more generic basis so that she, and the other account managers, could focus their energy on sales.

[25] The lost contract involved the provision of cellular and BlackBerry services to several government departments, two of which (Public Works and Government Services Canada and the Canada Customs and Revenue Agency) had been customers of Piresferreira. Piresferreira, Ayotte and others worked on the

tender package. Piresferreira then left on a previously approved holiday. It was Ayotte's responsibility to oversee the final product comprising the Bell Mobility proposal to the government. Ayotte did not proofread the final package and the document was submitted with a minor error regarding a mandatory feature dealing with hours of customer service. Bell Mobility lost the contract, despite having submitted the lowest bid. It appealed to the Trade Tribunal but the appeal was rejected in the fall 2004.

[26] Piresferreira's poor results in 2004 were reflected in both her mid term and year end performance reviews. In the July 16, 2004 review, Ayotte and Piresferreira made the following comments:

Ayotte's Comments:

Mid Year Review – Marta is very frustrated with her results YTD. She needs to dissect where the shortfall is and design a plan of attack to go after this shortfall. Her corporate business is still quite healthy even under the state of the federal Government slowdown. Her objective is based on past performance, of which EPP was a big part of it. Marta needs to look at each account & set out an attack with an EPP twist. Her drive to success will get her going in the proper direction. Don't lose hope.

Piresferreira's Comments:

Mid Year Review – I know this year has been a challenging year in my territory. Within all of the Government for that matter. Although I have built strong relationships within my top 15 accounts the realities of the market and the instability, freezes and elections, has changed the way Government does business and that certainly has impacted my business and have contributed to my negative results within my objectives, which is not reflective on my high quotas. I will continue to do my utmost to reach my objectives. I am hoping the 2nd semester will definitely bring better results.

[27] According to Ayotte, during the course of 2004, he tried to make suggestions to Piresferreira as to how she could potentially improve her sales; however, Piresferreira was not particularly receptive. Piresferreira did not find Ayotte's input helpful. She considered herself very capable in developing relationships with the key people in the various departments, identifying new applications that could be of assistance to the department, and explaining those options to her clients. She believed that her poor results were caused by issues beyond her control; they were not caused by her not working hard or not being effective at the job she did. I accept her evidence in this regard.

[28] Ayotte expected the account managers to take ownership of any problems with their accounts and to exhaust all possible resources (such as technical people, customer service representatives and agents) before seeking help from him. Ayotte repeated this several times during his testimony. At the same time, he claimed that he had been there to help when all else failed. Ayotte's assessment was that the issues coming across his desk from Piresferreira were more than those raised by the rest of the team put together. He considered this a waste of his time. Piresferreira testified that she tried to solve as many problems with her accounts as she possibly could before seeking Ayotte's help; however, there were issues – such as all of the problems associated with the new billing platform – that required the attention of those higher up in the Bell Mobility hierarchy. It was a waste of time for her, and other account managers, to try to deal with their clients' frustration with the new billing system when a solution crafted at head office might serve all of their needs and let them get back to their core function of selling Bell Mobility products. Piresferreira denied that she had been overly needy in seeking Ayotte's help. By 2004, it was unpleasant when she had to speak to Ayotte because he would yell and/or swear at her and tell her she did not know what she was doing. She attempted to avoid him by doing as much as possible outside of the office.

[29] During 2004, Piresferreira asked Ayotte if her quotas could be reduced or if she could get some clients other than federal government departments or agencies; neither request was granted. Her poor results continued as reflected in the 2004 year end performance review signed on January 18, 2005. Although Piresferreira exceed her RIM and sales course objectives and met her net revenue, client satisfaction and some market management objectives, she did not meet a number of other sales objectives.

Ayotte's Comments:

- Year End Review – Marta had a very disappointing year. She has had a lot of trouble accepting these results and at times has been quite controversial when help was offered or suggestions were made. She often gets emotional when things are not going right and as a result may make some of her peers uncomfortable. She needs to get a grip on her situation and work on it in a calm manner.
- In her attempt to inform people in problem situations, she is forgetting that she needs to take ownership of these problems and follow them through rather than pass them on.
- In 2005, she must become strategic in the direction that she wants to approach her accounts. I will work with her in achieving this objective. Marta has been a top

performer in the past and I am quite confident she can do it again; however hard work will be required to do so.

Piresferreira's Comments:

- Year End Review – I know this year has been a challenging year. I will continue to work harder and smarter to reach my objectives. I count on and will ask Rick for the help I need to get there. It is a task which I always like to do on my own, but I believe I should utilize others more in 2005.

[30] On December 16, 2004, Shiu and Ayotte sent the following letter to the account managers, including Piresferreira:

Since the beginning of the billing platform change, starting with customer education all the way to the last invoice sent, your contribution and continuing efforts have allowed us to maintain a solid business relationship with our customers.

We still have some work ahead of us in order to regain stability in our working conditions and we are fully aware that this transition period has been extremely demanding and still requires a lot of time, energy and availability. You have taken the challenge while maintaining a high level of quality and impressive professionalism.

We realize that your amazing collaboration with the support team has had a direct influence in the progress we have made in one of the biggest challenges Bell Mobility has seen in years.

Rick and I would like to thank you for the difference you've made so far

...

[31] According to Shiu, he did not see Piresferreira's 2004 Performance Review prior to the commencement of this litigation; nevertheless, he testified that Ayotte had summarized the content of the document with him during their year end meetings sometime in January or February 2005. Shiu testified that he and Ayotte discussed the lack of a strategy on Piresferreira's part to show sustainable results on a going forward basis, the lack of accountability on her part in managing client situations, and the emotional nature of her responses to feedback. According to Shiu, he instructed Ayotte to monitor Piresferreira's performance during the first quarter of 2005, and to consider issuing a PIP to ensure that Piresferreira developed some concrete strategies to ensure her successful meeting of targets into the future.

[32] According to Ayotte, after delivering Piresferreira's performance review, he waited for her to put into effect his suggestions. His testimony was that by March, he had concluded that she was not following through with the necessary steps. Her paperwork, which had always been a problem, had not improved – nor had her ability to do presentations. According to Ayotte, at that time he was concerned about Piresferreira's funnel (*i.e.* specific prospects); it was dangerously low. His evidence was that he made suggestions to Piresferreira about preparing strategic reports, but she did not do so, and in his opinion took no steps to address the inadequate funnel. As a result, he had no alternative but to formalize his concerns through issuing a PIP. Interestingly, Ayotte only printed the form showing Piresferreira's funnel on May 12, 2005. Bell Mobility was not able to produce information or documentation about her funnel prior to that date.

[33] Shiu's evidence was that normally, when issuing a PIP, a sales manager would speak to his/her superior about the need for a PIP, what the PIP should say, and how it should be presented. The sales manager would then seek the HR department's assistance in drafting the PIP. The sales manager would then present the PIP in accordance with the recommendations of both.

[34] Ayotte could not recall if or when he would have had such a conversation with Shiu in regard to Piresferreira. Shiu's evidence was that the conversation occurred in April 2005 at which time he warned Ayotte to consult HR before moving forward with a PIP. There is a May 4, 2005 email from Marie-Josée Bertrand to Ayotte, copied to Valerie Sylvestre ("Sylvestre") of HR enclosing a sample PIP. According to Ayotte, he had asked for this document because he had only done one PIP before and was not sure how to proceed with one for Piresferreira. There is no reference in the email to the sample PIP being required for Piresferreira, though that was Ayotte's evidence.

[35] No documentary evidence was adduced to support the contention of Ayotte and Shiu that, early in 2005, Ayotte told Shiu about significant deficiencies on Piresferreira's part and Shiu instructed Ayotte to issue a PIP. Prior to May 12, 2005, Ayotte had not been keeping a written record of Piresferreira's shortcomings. I conclude that if Ayotte actually spoke to Shiu about issuing a PIP for Piresferreira in April 2005, he did so to be prepared should Piresferreira's performance not improve; he did not do so with any sense of urgency that a PIP needed to be issued immediately.

[36] Ayotte succeeded in getting the targets for Piresferreira, Stockwood and Poulin reduced somewhat in 2005 as a result of the loss of the major government contract. He wanted the three to work as a team in regard to the federal government and work aggressively to attract new business. His evidence was that Piresferreira did not live up to his expectations in this regard. I disagree.

[37] By mid 2005, Piresferreira's sales results were starting to improve again. Her net activations were at 123% and her net revenue at 92% of objectives. Interestingly, at the end of the second quarter of 2005, Stockwood and Poulin, who also had a significant number of federal government clients, were below Piresferreira in terms of meeting their revenue objectives and only slightly ahead of Piresferreira in terms of their activation results. She was ahead of both in regard to RIM business.

Environment in the Ottawa Bell Mobility Office Prior to May 12, 2005

[38] Ayotte described himself as a hands-on manager. When meeting with his sales team at weekly meetings or with individual account managers, he was forceful in expressing what he expected of them. When he told them to do something, he expected it to be done, with no questions or reservations. At the same time, Ayotte expected account managers to take responsibility for their own success and development. That meant, if an account manager was having a problem with a client or group of clients, the account manager had to do everything possible to fix the problem before asking for assistance from Ayotte – even if the problem might be one affecting a number of account managers. If Ayotte decided that he needed to deal with a problem on behalf of his account managers, he did so aggressively and expected his account managers to buy in to his proposed solution.

[39] Ayotte acknowledged that he was “dynamic” and “outspoken” and “a bit colourful”. He used language that was not the norm in a workplace. He swore at people and said “Jesus Christ” a lot. If he wanted to get someone's attention, he raised his voice or yelled at them. He acknowledged that there were situations where he would have yelled at the team and would have yelled at individuals, including Piresferreira. He considered raising his voice an acceptable and effective strategy to get people motivated and to get them to do what he wanted. At trial, he had difficulty articulating other strategies in this regard.

[40] Ayotte acknowledged that he had never given much thought as to whether the way he was interacting with his account managers, such as Piresferreira, might not be good for them or for the work environment. Under cross-examination, Ayotte agreed that his style could be intimidating, it did not provide good role modeling to other employees, and it did not encourage other employees to handle themselves in a calm and professional fashion. Ayotte acknowledged that he could have handled himself differently; nevertheless, since in his mind his yelling and swearing was not an every day event, he did not believe that he was contributing to a hostile work environment. In his mind, his aggressive style was effective, and that was what counted.

[41] Piresferreira described Ayotte as being particularly stressed during 2004 and early 2005. Her evidence was that he would raise his voice and at times scream and swear at everyone in the office, but that he was particularly aggressive with her. She recounted how he would yell at her for reasons she did not understand and how, if she went to him to discuss a problem, he would frequently swear at her using such phrases as “fuck” or “God damn it” and would tell her to take care of her own accounts.

[42] Ayotte acknowledged that his relationship with Piresferreira became strained in 2004 in the sense that, from his perspective, it was not a partnership any more. According to him, he tried to make suggestions to her about strategies to improve her performance, but she was unreceptive and thought that he was picking on her. In his words, he considered his interactions with her “an exercise in futility”. Ayotte acknowledged that he would raise his voice with Piresferreira when he became frustrated and disappointed in her for not accepting his suggestions. Piresferreira would tell him that he was picking on her and would tell him not to yell at her. This did not deter Ayotte, as he believed that it was his right to raise his voice or yell at Piresferreira until she accepted his suggestion or point of view.

[43] It was reported to Piresferreira by a colleague that, when he was at a restaurant with some of her co-workers, Ayotte had made derogatory comments about her. Piresferreira spoke to Ayotte about this incident, but to no effect. She spoke to Munier, who in turn reported to Piresferreira that she had asked Ayotte to stop yelling at Piresferreira. According to Piresferreira, nothing changed.

[44] John Villeneuve (“Villeneuve”), a former Bell Mobility employee who had worked in the Ottawa office from 1997 to 2006, but not as an account manager under Ayotte, testified about how aggressive Ayotte was with his subordinates, yelling and swearing at them, sometimes in a joking way, but also in a serious way. It was clear to Villeneuve that, as a result of Ayotte’s volatile temper and aggressive manner, some of Ayotte’s subordinates were nervous about having to raise issues with him.

[45] Three other members of Ayotte’s team, namely Stockwood, St-Aubin and Munier all testified about their perceptions of the work environment at the Ottawa Bell Mobility office during the period leading up to May 12, 2005.

[46] Stockwood, who has been at Bell Mobility for 17 years and is now the senior sales manager for the Ottawa area, was a friend as well as an associate of Ayotte’s in May 2005 and has maintained a relationship with Ayotte after Ayotte retired from Bell Mobility. Ayotte’s management style worked for Stockwood. According to Stockwood, Ayotte gave the account managers a lot of rope and trusted them to get the job done. It did not particularly bother Stockwood that Ayotte used “fuck”, “hell” and other swear words when interacting with his staff. Stockwood did not comment on Ayotte’s relationship with Piresferreira aside from observing that Ayotte had to spend quite a bit of time helping Piresferreira with her accounts.

[47] St-Aubin was an account manager from September 2001 to March 2008. She offered the most biased and unbalanced testimony of anyone during the trial. For reasons that were not apparent, she displayed almost a visceral dislike for Piresferreira.

[48] St-Aubin described Ayotte’s relationship with his sales team as being pushy, but playful. He had high expectations but, in her view, he supported his sales staff in reaching those expectations. If things were not going well, Ayotte would become agitated at team sales meetings, raising his voice, swearing, and banging his fist on the table. His language included “fuck”, “bastard” and “Jesus Christ”. Normally he did not yell and swear at individuals during those group meetings, though on occasion he swore at Piresferreira. As well, when Ayotte was meeting individually with Piresferreira in his office, on occasion he raised his voice, and on occasion their interaction escalated so that they were both yelling at each other. In St-Aubin’s view, there was always a tension between Ayotte and

Piresferreira and she attributed that to Piresferreira not assuming responsibility for problems on her client files.

[49] Although St-Aubin testified that she considered the environment in the workplace to have been nice, she acknowledged that initially she had been offended by Ayotte's behaviour in the boardroom. She also found it a new experience to be working with a group of men who were loud and who swore during meetings. St-Aubin had explained to Ayotte what she thought was proper business behaviour, and he had undertaken to tone matters down. According to St-Aubin, Ayotte tried to monitor himself a bit more, but with limited success. She simply accepted his behaviour and put it down to his being passionate about the work and emotional in how he communicated. Although St-Aubin described a work environment where yelling, swearing, berating others, and slamming one's fist on the table were common-place events, she was not prepared to describe it as a hostile work environment. I note that before St. Aubin's arrival, Piresferreira had been the only female account manager on the team.

[50] St-Aubin described Piresferreira as being a nervous, sensitive person who often seemed upset and on edge. In St-Aubin's view, Piresferreira was having a difficult time adjusting to a new way of doing business. St-Aubin was highly critical of Piresferreira for not taking responsibility for problems, but instead blaming others and going to Ayotte for solutions instead of creating solutions herself. St-Aubin placed herself on a pedestal as not requiring much extra assistance from Ayotte (aside from when she was going through a difficult divorce) and as having a particularly persuasive manner with Ayotte that benefited all of the sales team.

[51] Munier has been with Bell Mobility for 14 years and for most of those years has been the sales coordinator for the Enterprise group in Ottawa. According to Munier, Ayotte had a good relationship with his team. He had an open door policy and was available to see account managers if they had problems. Munier heard Ayotte raise his voice frequently, but not daily, when he wanted to make his point or was not satisfied with a situation. Ayotte's favourite swear words were "Jesus Christ" and "hell". Munier recollected that Ayotte raised his voice to Piresferreira in the same way as he did with others, but on the whole, Munier thought that Ayotte had a good working relationship with Piresferreira.

[52] That being said, Munier acknowledged that she considered Piresferreira to be a sensitive person. She was aware that Piresferreira was bothered by Ayotte's yelling and swearing at her. Piresferreira expressed to Munier that she did not think that Ayotte thought as well of her as he did of other account managers and that this was possibly because she was a woman. According to Munier, Ayotte approached Munier to ask her advice on how he could communicate more effectively with Piresferreira, and Munier advised him to use a softer approach because Piresferreira did not respond well to his yelling at her. Munier was of the view that Piresferreira did not deal well with criticism – regardless of how it was delivered. She, along with Ayotte, described Piresferreira as being a very vocal person who would be loud if impatient or frustrated.

[53] Munier came across as another person feeling anger toward Piresferreira, but the cause of her anger was not clear. She went out of her way to be supportive of Ayotte and was not very supportive or understanding of Piresferreira's situation. According to Munier, prior to the incident, the sales team had been close and had functioned effectively. After the incident, the morale in the sales staff deteriorated, and eventually some of its members looked for work elsewhere. Munier claimed never to have felt personally threatened in the work environment.

[54] I find that Piresferreira was a driven, hard-working employee who year after year tackled her work with energy, commitment and high expectations of herself. She was competitive, both in terms of wanting to exceed the objectives she and others set for her, but also in terms of wanting to be a leader amongst the sales staff at the Bell Mobility office in Ottawa. She was fiercely dedicated to providing high quality service to her clientele, and that devotion was reflected in her longevity and success in her field. She was known for having excellent relationships with her customers, many of whom had followed her from Rogers to Bell Mobility.

[55] Piresferreira's persistence was also evident in how she interacted with co-workers and with her managers at Bell Mobility. She was tenacious in serving her clients and trying to get all the assistance she needed from Ayotte and the Bell Mobility agents in order to do so.

[56] I find that Ayotte and Piresferreira had a manageable working relationship prior to 2004, and Piresferreira considered him a capable manager up

until that year, though she was cautious around him and felt vulnerable as a lesbian woman in an environment that she felt was hostile to gays.

[57] I find that, commencing in 2004, Ayotte became more verbally abusive with everyone in the Ottawa Bell Mobility office, but particularly with Piresferreira. I find that she did not make a formal complaint about his behaviour because she felt vulnerable to discharge as a result of her age and the highly competitive environment in which she was working. She believed that two other women who had complained had left the Ottawa Bell Mobility office as a result of Ayotte's personality and behaviour.

Background to May 12, 2005 Incident

[58] Industry Canada was one of Piresferreira's major clients. In the spring of 2005, Piresferreira learned that the BlackBerries used by many civil servants and Minister's offices, and for which Bell Mobility were supplying the lines, were not functioning in Washington. Piresferreira brought this problem to the attention of Ayotte and the Bell Mobility technical staff. When Piresferreira's efforts with the technical staff did not result in a resolution, Ayotte went to Montreal to discuss the problem with management. Eventually Bell Mobility arranged for technical staff from Research in Motion ("RIM") to become involved.

[59] On Monday, May 9, 2005, Ayotte advised Munier and the three federal government account managers that he had arranged for RIM representatives to be in Ottawa on May 12th and 13th to meet with any clients who were having problems with their BlackBerries in Washington. Munier and the account managers were told to make appointments for the RIM representatives to meet the clients. Piresferreira's evidence was that she made several telephone calls to her contact at Industry Canada about this issue, the last being made on May 9th or 10th when she left voicemail. When she did not get a response, Piresferreira sent an email on May 12th asking her contact to let her know the clients who were having problems with their BlackBerries and Piresferreira would bring the RIM representative the following day to deal with them. Piresferreira's contact responded later in the day saying that she had been away the previous day and could not make the concerned staff available on May 13th. She raised some questions about what the process would entail. Piresferreira responded immediately asking for the client's availability and advising that Bell Mobility would fix the problem at her convenience. Piresferreira's evidence was that the emails that she had sent to Industry Canada on her BlackBerry, all dated May 12, 2005, were simply the last in a series of communications relating to this issue. The others had been deleted prior to the incidents of May 12th.

Incident of May 12, 2005

[60] On Thursday, May 12, 2005, Piresferreira arrived at the Bell Mobility Ottawa office at approximately 8:45 a.m. for a staff meeting with Marie Ginette Lepage ("Lepage"), the Senior Associate Director of Marketing, who was there to review promotions for the next quarter. Piresferreira attended the meeting, along with Ayotte, the other account managers, and various agents. Following the

meeting, when Lepage was meeting with Ayotte in his office, Piresferreira approached Ayotte's office to advise him that she had not been able to get an appointment with Industry Canada BlackBerry users so that the RIM representative could fix the problem the following day.

[61] I find that Ayotte became extremely angry with Piresferreira. He yelled and swore at her, saying that she did not know what she was doing and that she was not doing her job. He said something to the effect that he had told the account managers of the scheduled meeting a week before and he was going to have egg on his face if the RIM representatives could not meet with the affected clients. Piresferreira felt uncomfortable. She apologized and left. Lepage described Piresferreira as appearing "comme un petit chien battu". Lepage found Ayotte's behaviour completely inappropriate for an organization like Bell Mobility. I agree.

[62] Piresferreira subsequently went out for breakfast with some colleagues. They were joined by Lepage. Piresferreira approached her and apologized for the earlier scene.

[63] Piresferreira returned to the office. As she was getting out of the elevator, she ran into Ayotte. Ayotte started yelling at her and saying that she was not doing her job. He acknowledged that he could have said something to the effect: "...you don't know what the fuck you are talking about". He asked why it was that he had been able to reach the Industry Canada contact by telephone and to arrange an appointment for the RIM representative the following day. Piresferreira said that she had proof that she had done everything that she could have done in order to get the appointment, and she wanted to show that to him so that he would not accuse her of not doing her job. Ayotte kept walking, telling her that he was not interested and did not want to see her email. Throughout this whole encounter Ayotte was yelling at Piresferreira. Piresferreira persisted in saying that she wanted him to look at the email, and Ayotte repeated a number of times that he was not interested. Ayotte's evidence was that it did not matter what she showed him, it would not convince him that she had done her job, considering he had been able to make arrangements for the appointment at Industry Canada.

[64] Piresferreira had her BlackBerry in her hand near her waist and was looking for an email to show Ayotte. They were both walking in the direction of the Bell Mobility office. Piresferreira found the email that she had been looking

for and asked Ayotte to look at it. Ayotte repeated that he was not interested and told Piresferreira to get away from him. Both continued to say the same thing to the other. After they had entered the Bell Mobility premises, Ayotte stopped, turned around and glared at Piresferreira. Piresferreira attempted to show Ayotte the email on her BlackBerry and asked him to please have the decency to look at it. She held the BlackBerry out to him. The BlackBerry would have been a couple of feet away from Ayotte at the time. Ayotte pushed Piresferreira on her left shoulder, telling her to get away from him. The push carried enough force that Piresferreira was pushed approximately a foot. Piresferreira took a step backward and balanced herself against a filing cabinet. Ayotte proceeded to walk to his office and sit at his desk. In his words, he was really “hot” and was “very, very frustrated” at that point.

[65] Although Ayotte’s evidence on discovery was that he felt threatened by Piresferreira holding the BlackBerry out to him to see, I reject this evidence outright. I find that at no time did Ayotte feel threatened in the least by Piresferreira. He was angry and frustrated with her, he firmly believed that she had not tried hard enough to make the appropriate arrangements with Industry Canada, and there was nothing that she could say or show to him that would change his mind. He was yelling at her and then he pushed her out of anger and frustration – not out of any fear on his part.

[66] Piresferreira was shaken. She felt violated. She followed Ayotte to his office. From his door, she told him that he should not have done that. Ayotte told her “to get the hell out of his office”, that he had not done anything. He recalled telling her that he was in the process of preparing a PIP for her. She recalls his saying that he was putting her on probation. Nothing turns on the terminology used; the message was the same.

[67] Piresferreira went to her desk and started to cry. She tried to gather her things to leave the office. Two colleagues asked her what had happened. They took her downstairs to have a coffee so that she could calm down. She became more upset retelling what had happened. She returned upstairs, collected her things and went home.

[68] Piresferreira was extremely upset the rest of the day. A colleague suggested that she should call her HR representative. Piresferreira went online to get the telephone number and unfortunately spent the next few days leaving voice

mail messages for a person who ultimately informed her that he was the HR representative for Bell Canada, not Bell Mobility. She only reached the appropriate Bell Mobility person (Sylvestre) the following week.

[69] *After* the incident with Piresferreira on May 12, 2005, Ayotte prepared a PIP in regard to Piresferreira. I reject Ayotte's evidence that at any time prior to May 12, 2005, he had begun preparation of a PIP for Piresferreira or had made any notes in anticipation of preparing such a document. At no time prior to May 12, 2005 had he ever warned Piresferreira that her performance was such that he would have to consider issuing a PIP. At no time did he document her file in any respect in regard to any shortcomings in her performance, aside from the chronic annual observations that she was weak with her paperwork and her presentations.

[70] I find that Ayotte chose the strategy of preparing a PIP for Piresferreira on May 12, 2005 as a way of warding off any complaint she might otherwise have considered making in regard to his conduct on that day. Ayotte's strategy was the best defence is a strong offence.

[71] At 3:49 p.m. on May 12th, Ayotte emailed the draft PIP to Sylvestre, the HR consultant responsible for the Ottawa Bell Mobility Office. His email read:

Valerie

You were copied on an email that Marie-Josée Bertrand sent me on May 4th. I have one of my reps who has not meeting their expected performance. I have included a letter that I would like to present to this employee. I biggest concern is the high probability of this rep going on sick leave as soon as this type of plan is presented. Do you have any suggestions on how I can minimize the possibility of this happening. As well please get back to me with your approval so that I can proceed. I would like to do so tomorrow afternoon to give the employee he weekend to reflect on it. ... [as written]

[72] Ayotte could come up with no credible reason why giving negative feedback to Piresferreira, if done in normal circumstances, would have resulted in her going on sick leave. In the past, she had not reacted in this fashion when her performance reviews in 2000 and 2004 had been below the norm. On Tuesday, May 17, 2005, Sylvestre responded to Ayotte, advising that the draft PIP was fine.

[73] Interestingly, Ayotte did not notify Shiu or HR about the events of May 12th. His evidence was that he did not think the incident of May 12th was a

big deal, and therefore it did not merit reporting. Another reason he offered for not telling Shiu about the assault was because, according to him, as a manager, he did not have a duty to self-report. He believed that Piresferreira had provoked the incident, and he did not believe that Piresferreira would pursue it. As well, at no time between May 12th and May 19th did Ayotte advise Shiu that he was planning to present Piresferreira with a PIP.

[74] Piresferreira was extremely upset and disoriented for the rest of the day on May 12, 2005. She kept crying and trembling and repeating that she did not understand why it had happened. Despite this, on Friday May 13th, Piresferreira honoured a commitment she had previously made to meet with a client in Petawawa to close a deal. She did not go back into the office on that day.

[75] Scott recommended that Piresferreira send an email to Ayotte suggesting they meet outside the office to discuss what had happened and to sort out some way of working together and repairing the damage that had been done to their relationship. The hope was that Ayotte would take the opportunity to apologize to Piresferreira. On Friday evening, Piresferreira sent the following email to Ayotte:

Rick:

We owe it to each other to work together. I understand we are all under pressure, but it is not acceptable that you scream at me, it is not acceptable that you threaten to put me on probation for no reason, and it is certainly not acceptable that you shoved me in the corridor yesterday afternoon. When I return after my few days off, I would like us to sit down together outside the office and come to an agreement to work as a team.

I was in Petawawa today for a meeting about the Blackberry implementation. It went very well. I will be back in the office next Thursday.

[76] Piresferreira wanted to meet Ayotte outside of the office to ensure that he would not yell at her. Ayotte never responded to this email. Piresferreira became increasingly upset and distraught. She remained fixated on the assault and unable to see a way through her distress.

Events Following the Incident

[77] On Saturday morning, Piresferreira went to her gym with a friend. Ayotte, also a member there, tapped her on the shoulder and said “How is it going

Marta?” He did not take the opportunity to apologize to her. Piresferreira was too shaken to stay at the gym and went home.

[78] Over the weekend, Piresferreira was very stressed. She cried a lot, could not sleep, and talked repeatedly to Scott about what had happened. The following week, Piresferreira took her scheduled holidays on Monday, Tuesday and Wednesday, returning to the office on Thursday.

[79] When Piresferreira returned to the office on Thursday May 19, 2005, she expected Ayotte to apologize to her. He tapped her on the shoulder as if nothing had happened and asked if she was ready to meet with him. She followed him to his office, expecting the apology. Instead he presented her with the PIP and asked her to review and sign it. The document had two dates: May 12, 2005 and May 13, 2005.

[80] The PIP reminded Piresferreira that, at the time of her performance review on January 18, 2005, she had been told that she needed to take ownership of customer problems and find a resolution rather than pass them on to other people to resolve, and she needed to be more strategic in the way she approached her accounts. Ayotte pointed out that her funnel was low, she had not produced some documentation earlier requested of her, she was not open to his suggestions about improvements, and she was defensive when he raised issues with her. Piresferreira was told that improvement had to be made in all of these areas in order to bring her performance to a standard that would meet job requirements. Specific topics were reviewed under the headings: Work Ethic, Responsibilities, Measures of Success. Under “Responsibilities” Ayotte listed the following:

Responsibilities

- To increase your funnel to drive your corporate gross activation results to meet your annual target of 1,639. To accomplish this you will require a minimum number of 250 prospected lines at all times. With this amount, we are assuming that you will close 55% of these. These opportunities must be entered into salesforce.com as the opportunities arise. This level must be in place within 60 days, and maintained on an ongoing basis.
- You must present to me within two weeks a detailed action plan by product group, by account including contacts and expected business to be derived through these action plans for each account that you have.
- You are to provide me a report by 8:30 every morning describing your activities that took place the previous day. This report must give details of objectives and results of activities and follow up that is required. These

activities should be to drive the corporate gross activation funnel and results. We will meet every Monday morning at 10:00 and every Thursday at 9:00 AM to review your progress and provide whatever support can be given to meet your required results.

[81] Piresferreira was advised that an overall review of her progress would occur on August 12, 2005. She was warned that in the event that her performance did not improve to a fully acceptable level, further disciplinary action up to and including dismissal would result.

[82] Piresferreira briefly looked through the document. Piresferreira disagreed with many aspects of the PIP, and she told Ayotte that. She refused to sign the document and left the office.

[83] Shortly before or shortly after the May 19th meeting between Ayotte and Piresferreira, Piresferreira had obtained Sylvestre's name from another contact she had at Bell Mobility. On May 20, 2005, Piresferreira lodged a formal complaint against Ayotte with Sylvestre. She explained about Ayotte having screamed at her in the presence of Lepage, how when he later saw her near the elevator he had again screamed at her saying that she was not doing her job and again this was in the presence of another employee, how she had followed Ayotte into the office trying to show him the email from Industry Canada and Ayotte had shoved her saying he did not want to see anything, how when she followed him to his office and told him that that was uncalled for he again screamed at her saying he was putting her under probation, how Ayotte had lost control, how she had written to him asking if they could meet to discuss the situation and he had not responded, and finally how when she next saw Ayotte at the office he had presented her with a PIP. She closed the note by saying: "Valerie, this is where I need advice from HR. Am I expected to go to work and perform my duties in these circumstances? How should I proceed?"

[84] Piresferreira did not email Sylvestre earlier because she was hoping that Ayotte would apologize and they would figure out how to continue working together. Unbeknownst to Piresferreira, Ayotte had already contacted Sylvestre about the PIP on May 12th without advising Sylvestre about his assault of Piresferreira.

[85] On May 20, 2005, Sylvestre advised Ayotte of Piresferreira's complaint and told him to inform Shiu. Sylvestre also told Shiu about the

complaint. Shiu spoke to Ayotte. It is unclear who initiated the call and whether Shiu first learned of the assault from Sylvestre or from Ayotte. Shiu asked Ayotte for a description of what had happened on May 12, 2005. Ayotte recounted to him that Piresferreira had not followed his instructions regarding the BlackBerry situation, he had had to fix matters on his own with Piresferreira's clients, he had criticized Piresferreira as a result, she had insisted that he see an email she had sent, he had become frustrated, and he had pushed her. In essence Ayotte's version was that Piresferreira had provoked him into yelling at her and pushing her due to her failure to do what was expected of her and due to her persistence in trying to show Ayotte an email.

[86] At no time did Shiu ever contact Piresferreira to learn her version of events or to find out how she was. Shiu did not know until after this litigation had commenced that, earlier in the day on May 12, 2005, Ayotte had yelled and sworn at Piresferreira in the presence of third parties, telling her she did not know what she was doing. As well, when Ayotte first reported the assault to Shiu, Ayotte did not tell Shiu that the next time he saw Piresferreira he presented her with the PIP. Shiu only learned of this on May 24, 2005, after he had had further conversations with Ayotte and Sylvestre. Even once Shiu learned that immediately after the assault, Ayotte had threatened Piresferreira with a PIP and then had presented her with one at their next meeting, Shiu did not contact Piresferreira to apologize for what she had experienced.

[87] Over the following week, Shiu and Sylvestre discussed how to deal with the situation.

[88] Piresferreira did not hear from Sylvestre over the long weekend. On May 23, 2005, Piresferreira emailed Sylvestre to advise that she would be working from home and/or attending offsite meetings on Tuesday May 24th. She would also be consulting her doctor concerning the effects on her health of Ayotte's verbal abuse and physical assault. She asked for details regarding sick leave in case her doctor recommended a period away from work. Piresferreira also advised that she would seek legal advice concerning her employment status at Bell Mobility. She asked for copies of her employment agreement and job description and Bell Mobility's policy manuals regarding harassment and discrimination.

[89] At some point Ayotte and Shiu had a conversation, the outcome of which was that Shiu would come to Ottawa to speak to Piresferreira. Ayotte

claimed that, during that conversation, he told Shiu that he would apologize to Piresferreira at that time. I reject this evidence. On May 24, 2005, Ayotte left Piresferreira a voicemail message asking her where she was and saying that he needed to speak with her. He did not say that he wished to apologize to her. Piresferreira did not respond, but instead emailed Sylvestre saying that she did not think, at this point, that she and Ayotte could have a constructive conversation. Later that day, Sylvestre responded by email, providing Piresferreira with information regarding her sick leave benefits, her employment contract, her job description and Bell Mobility's non-harassment, non-discrimination and accommodation policies. She went on to say:

As discussed on Friday, May 20th, I will provide you with a response to your complaint by the end of today. As well, I have scheduled a meeting between you, Rick Ayotte and Antoine Shiu for tomorrow morning May 25th at 9h30 **to review the performance improvement plan.** [emphasis added]

[90] On May 24, 2005, Sylvestre emailed Ayotte and Shiu advising that a meeting had been scheduled with Piresferreira the following morning and the purpose of the meeting was to review the PIP with Piresferreira. No mention was made of any apology.

[91] In the afternoon of May 24th, after not hearing further from Sylvestre in regard to her complaint against Ayotte, Piresferreira sent an email to Sylvestre stating that she would be on sick leave as of May 25th and would be unable to attend any meeting. She provided a sick leave certificate from her family doctor, Dr. Diane Bamford ("Bamford") dated May 24, 2005, covering the period from May 25th to June 30th. The reason for the leave was indicated as being: "stress leave due to anxiety – dealing with work harassment."

[92] On May 24, 2005, Sylvestre sent to Piresferreira (with a copy to Shiu) a letter relating to the complaint against Ayotte. She stated:

Re: Complaint against Richard Ayotte
Marta,

This is to confirm the reception of your complaint against Richard Ayotte on May 20th, 2005 concerning an altercation that would have involved yelling and pushing.

After reviewing the information you provided to me, I discussed the allegations that you put forward with Richard Ayotte. Mr. Ayotte confirmed that he acted inappropriately towards you and regretted having pushed you and yelled after you.

Considering that these were unacceptable behaviours, especially for a manager, the following actions have been taken:

- Schedule a meeting to allow Richard Ayotte to offer formal apologies to you, which you have declined to attend.
- Written disciplinary warning will be given to Richard Ayotte for unacceptable behaviour in the workplace.
- Richard Ayotte will be asked to attend two courses on “Effective communication at work: and “Resolving conflict: The art of handling interpersonal tension”.

We trust that the actions taken and outlined above and the sincere regrets of Richard Ayotte regarding his behaviours are the right responses to the gravity of the complaint.

We, therefore, consider this case closed.

Sincerely,

Valerie Sylvestre
Human Resources

cc. Antoine Shiu

[93] In fact, Ayotte had taken the two courses online sometime in the past. Each course took approximately four hours of a person’s time and could be done at any time. Ayotte did not consider it appropriate for him to go through the exercise a second time.

[94] At no time prior to the commencement of litigation in this case on August 11, 2005, did Sylvestre, Shiu, or anyone from Bell Mobility HR or management call Piresferreira to obtain further information about the incident of May 12, 2005, to ask her how she was doing, to offer an apology in regard to what had happened, to discuss the work environment at the Ottawa Bell Mobility Office, to discuss how it would be possible for Piresferreira to return to that work

environment, or to discuss whether it would be possible for her to ever work again with Ayotte.

[95] On May 25, 2005, Shiu delivered the following letter to Ayotte at a meeting in Montreal:

Re: Disciplinary Warning – Unacceptable behaviours

Richard,

We have received an official complaint on May 20th, 2005 regarding an altercation that would have occurred between Marta Piresferreira and yourself on May 12th, 2005. This altercation involved you yelling and pushing Ms. Piresferreira. The complaint has been reviewed with you and you have acknowledged that these actions did occur.

The above behaviours are totally unacceptable and will not be tolerated in the workplace. Furthermore, as a manager of employees, you are expected to demonstrate the leadership attributes relative to your position while preserving the respect and dignity of your employees.

Please note that as an employer, Bell Mobility has the obligation to insure the physical and psychological integrity of its employees. As a result, and considering that these were unacceptable behaviours, especially for a people manager, the following actions will be taken:

- You are asked to offer apologies to Marta Piresferreira
- This written disciplinary warning will be in your file
- You will attend a Monitored Response Procedure through Bell Mobility's retained Human Resource Consulting firm Warren Shepell.

Once again, Bell Mobility will not tolerate these behaviours in the workplace. If another incident of unacceptable behaviour does occur, you will be subject to further disciplinary action, up to and including termination.

We trust that you will make every effort to prevent this situation to occur again.

Sincerely,

Antoine Shiu
General Manager – Enterprise

cc. Valerie Sylvestre

Interestingly, this letter made no reference to the two courses which Sylvestre had told Piresferreira that Ayotte would be required to take. Ayotte was never required to take those two courses.

[96] On June 2, 2005, Bell Mobility referred Ayotte to a counsellor through the Monitored Referral Procedure under Bell Mobility's Employee Assistance Program with Warren Shepell. The concerns of Bell Mobility were identified as being: (1) inappropriate physical contact with an employee in a tense situation, and (2) need for a more varied approach in verbal communication. Ayotte attended for one session with Ginette Cheff ("Cheff") who has her Masters in Counselling and ten years experience as a counsellor. She did a brief assessment to determine if there were any risk indicators identified by Ayotte. He told her about what had happened between himself and Piresferreira. Ayotte stated that he had felt threatened and had acted in self defence. He advised that there was no history of any kind of abuse at work or at home. He stated that he did not feel the need to engage in an anger management program. Cheff took everything Ayotte stated at face value and concluded that he did not require continued support at that time. Subsequently her supervisor instructed her to call Ayotte and to suggest a follow-up session. She did so and Ayotte declined the offer. Cheff advised Shiu that Ayotte had come in for one session and he did not feel he needed to pursue counselling further. Shiu on behalf of Bell Mobility left matters at that.

[97] Piresferreira's emotional state deteriorated further after Ayotte ignored her email, offered no apology and then presented her with the PIP on May 19th. When Sylvestre wrote to Piresferreira on May 24th saying that the complaint had been investigated and the matter closed, and an appointment had been scheduled to review the PIP, Piresferreira felt completely betrayed. Piresferreira became lethargic and depressed. She cried a lot, her sleep was disturbed, she became preoccupied with what had happened, and she had negative and at times suicidal ideations. She lost her self-confidence, she lost her capacity to enjoy family and friends, and she lost her ability to get any satisfaction out of activities she had enjoyed previously.

[98] Piresferreira never returned to work after May 19, 2005. By reason of depression and anxiety, she has been found to be unable to return to Bell Mobility or to perform the duties of any occupation for which she is or could be qualified.

[99] On August 11, 2005, Piresferreira commenced this litigation.

[100] On September 27, 2005, Bell Mobility's lawyers proposed that, if Piresferreira returned to work, someone from the Bell Mobility HR department would meet with Piresferreira and Ayotte in an effort to work through their differences so that Piresferreira could once again report to Ayotte. As an alternative, Bell Mobility was ready to implement a system of Piresferreira reporting directly to Shiu instead of Ayotte. Piresferreira declined this offer of accommodation.

[101] On March 9, 2006, Bell Mobility's lawyers advised that Ayotte had been "relocated within the Bell family" and that Piresferreira could therefore return to the Ottawa Bell Mobility office without fear of having to work with Ayotte. The information provided to Piresferreira at that time by former colleagues was that Ayotte was still at the Ottawa Bell Mobility office in the same capacity that he had been in at the time of the assault. This was confirmed at trial. On March 15, 2006, Piresferreira's lawyers responded that Ayotte was still working at Bell Mobility in the same capacity and that Bell Mobility had utterly failed to provide a safe workplace for Piresferreira. In fact, the workplace was a poisoned one to which Piresferreira would not return.

[102] On September 11, 2006, Bell Mobility's lawyers advised that, after ten years of service at Bell Mobility, Ayotte would be retiring effective September 30, 2006. Again, they proposed that Piresferreira return to work and indicated that Bell Mobility was prepared to discuss any further accommodation that Piresferreira might feel was required. Piresferreira's lawyers responded on September 19, 2005 advising that Piresferreira would not return to work at Bell Mobility because, by virtue of the assault and Bell's response to it, the work environment was a poisoned one for Piresferreira. In any event, Piresferreira declined this form of accommodation because she did not feel capable of returning to work.

[103] On September 21, 2006, Bell Mobility's lawyers responded that it considered Piresferreira to have resigned from Bell Mobility effective September 19, 2006. Bell Mobility issued a Record of Employment stating that Piresferreira had resigned for personal reasons. A copy of that Record of Employment was never provided to Piresferreira.

Piresferreira's Physical Health

Grave's Disease

[104] Until mid-2004, Piresferreira was healthy, aside from the occasional cold, flu or athletic injury associated with her being a competitive runner. By June 2004, Piresferreira was experiencing a racing heart and had consulted her family doctor in that regard. She was not suffering from either depression or anxiety then. It was determined that there were no cardiac reasons for her symptoms. In June 2004, Piresferreira was diagnosed with Grave's disease (hyperthyroidism) by her family doctor and was referred to an internal medicine specialist, Dr. Binny Kuriakose ("Kuriakose").

[105] Kuriakose explained that Grave's disease is an auto-immune condition that leads to the thyroid producing an excess amount of the hormone thyroxin. This in turn can lead to such symptoms as excess heat, anxiety, a rapid heart beat, changes in blood pressure, fatigue, irritability, insomnia, restlessness, weight loss, excessive sweating, diarrhea and erratic behaviour. That being said, Grave's disease is not diagnosed through its external symptoms which can be associated with a myriad of other conditions, diseases and circumstances. It is diagnosed through laboratory testing which provides much more exact evidence of its presence.

[106] Grave's disease can be treated in two ways: (1) through a dose of radioactive iodine which destroys the thyroid and makes the patient dependant on medication to replace the thyroid hormone; or (2) through medications, and more particularly PTU, which keeps the production of thyroxin within acceptable limits. Piresferreira chose this second course of treatment, and she started taking PTU in August 2004.

[107] By March 2005, Piresferreira's laboratory tests were within the normal range, and Kuriakose discontinued PTU on March 3, 2005. At the time, Piresferreira reported feeling well, aside from mild symptoms of palpitations. On May 3, 2005, Piresferreira reported the presence of palpitations and easy sweating, and her laboratory tests showed that her thyroid was overactive again. Kuriakose recommenced PTU treatment. On June 9, 2005, Kuriakose reduced the PTU dosage because Piresferreira's laboratory tests had improved. On July 14, 2005, he discontinued PTU because the test results were normal. Kuriakose recommenced PTU treatment on September 28, 2005 because once again Piresferreira's laboratory results showed that she was experiencing hyperthyroidism. Piresferreira

was also reporting symptoms at the time. Although by September 13, 2006, Piresferreira's laboratory tests were normal, Kuriakose maintained her on a low dose of PTU until after her October tests also were normal. At that point, Piresferreira discontinued use of PTU. Her subsequent thyroid tests have been normal.

[108] Dr. Peter Kerr ("Kerr"), an experienced psychiatrist and psychoanalyst, conducted an independent medical examination of Piresferreira for Medisys, her disability provider. Kerr met with Piresferreira on August 5, 2005. He diagnosed her as suffering primarily from Graves Disease which he believed was sub-clinical at the time, but he also diagnosed her as having an adjustment disorder with anxiety which he considered secondary to the Grave's Disease. Kerr knew at the time of the assessment that Kuriakose had diagnosed Piresferreira with Grave's Disease and had treated her with PTU. Kerr knew that Piresferreira had discontinued the medication after her blood analysis had returned to normal. Kerr recommended that Piresferreira recommence medication to deal with the Grave's Disease.

[109] In Kerr's view, although Piresferreira had some depressed feelings in August 2005, she did not qualify for a diagnosis of major or clinical depression because she was not suffering from a prolonged period of lowering of mood, loss of self-confidence, a sense of guilt, or suicidal ideation. Nevertheless, her excessive reaction when she saw Ayotte at the gym, her phobia about returning to work, her insomnia, her concentration problems, and her restlessness all pointed to an anxiety disorder. Kerr testified that if Piresferreira continued to have residual psychiatric symptoms after her thyroxin levels had been normalized, a psychiatrist would have to consider what else was causing the persistent symptomatology. In August 2005, Kerr believed that even if Piresferreira fully recovered from Grave's Disease, it was possible that she would not be able to go back to work due to anxiety.

[110] Kerr was clear in stating that he did not consider Piresferreira to be a malingerer. He found her to be very frank and forthright.

[111] I find that in April and early May 2005 and then again in August 2005 when Piresferreira saw Kerr, she was suffering from hyperthyroidism and was exhibiting some symptoms that can be secondary to that condition: namely, a rapid heartbeat at bedtime, some insomnia, and some fatigue. That being said, I also

find that in August 2005, when Kerr interviewed Piresferreira, she was also suffering from signs of anxiety emanating from the incident of May 12, 2005 and the reaction of Ayotte and Bell Mobility to the events of that day.

Acoustic Neuroma

[112] In the fall of 2007, Piresferreira was diagnosed with an acoustic neuroma, which is a benign tumour in the ear. As confirmed by Dr. Brien Benoit, the fact that Piresferreira has a benign acoustic neuroma does not play any role in Piresferreira's depression and anxiety. It is Piresferreira's intention to have the tumour removed once this litigation is over.

Cardiac Issues

[113] In 2004 and then again in 2005, Piresferreira was investigated at the Ottawa Heart Institute in regard to irregular heart beats and palpitations. On both occasions, it was determined that Piresferreira's symptoms did not relate to any cardiac issues.

Piresferreira's Mental Health

[114] Prior to May 2005, Piresferreira had never suffered from depression or anxiety and had never consulted anyone – including her family doctor – in regard to such symptoms.

[115] On May 17, 2005, Piresferreira saw her family doctor, Bamford, as a result of the palpitations she was experiencing. Although Piresferreira indicated that she was under stress, she did not discuss with Bamford work-related issues. Her reason was that she did not have time to do so and was primarily concerned about heart palpitations.

[116] On May 24, 2005, Piresferreira again saw Bamford and explained to her the situation at her workplace. It was at this point that Bamford provided her with a sick leave certificate, indicating that she was on stress leave due to the anxiety she was experiencing in relation to workplace harassment. Bamford prescribed Ativan and later Clonazepam to deal with Piresferreira's symptoms of anxiety and depression, including palpitations, insomnia and weight loss. Bamford renewed Piresferreira's sick leave certificates on June 30, 2005 and again on July 19, 2005 for the period up to January 2, 2006. As well, she referred Piresferreira to a clinical psychologist, Dr. Jan Heney ("Heney") and a psychiatrist, Dr. Denise Basson ("Basson").

Dr. Jan Heney

[117] Heney was qualified to provide expert evidence on the diagnosis and treatment of psychological conditions including depression, anxiety and post traumatic stress disorder ("PTSD").

[118] Through listening to Piresferreira's story and observing Piresferreira, Heney formed the opinion that Piresferreira was experiencing anxiety and depression arising from the abuse she had experienced at the Bell Mobility office

and the company's inadequate response to that abuse. Piresferreira was dwelling on thoughts about the assault and what she experienced as the betrayal by Bell Mobility in not protecting her. When Piresferreira saw Ayotte, she would have an extreme panic reaction. Although Heney believed that some mental health professionals would diagnose Piresferreira as suffering from a major depression with anxiety, she believed that the more helpful diagnosis was PTSD resulting from the assault, which she experienced as a threat to her personal integrity, and from Bell Mobility's response to the circumstances. The symptoms that lead Heney to diagnose PTSD, rather than depression with anxiety, were: (1) the hyper-arousal triggered by Piresferreira seeing Ayotte; (2) her avoidance of situations reminiscent of the trauma; and (3) intrusive memories about the assault and the events that followed that preoccupied her.

[119] In Heney's opinion, Piresferreira's symptoms were not caused by her sales being down in 2004 and her receiving a poor performance review early in 2005. Heney has seen many clients in such circumstances and such people do not present as Piresferreira did. She was firm in stating that Piresferreira's symptoms related to the assault and what she perceived as a betrayal and an injustice on the part of Bell Mobility. I accept Heney's evidence in this regard.

[120] Since November 2005, Heney has seen Piresferreira once a month and at times more frequently. She has used cognitive behavioural therapy in an effort to change Piresferreira's thoughts. She has provided her with strategies for anxiety reduction and with relaxation techniques. She has worked with Piresferreira to contain the intrusive thoughts and feelings relating to them. Throughout this therapy, Piresferreira has been highly motivated and willing to apply any strategy offered by Heney.

[121] In Heney's opinion, for the entire period when she has been counselling Piresferreira, Piresferreira has been unable to return to the workplace in any capacity due to the severity of the depression and anxiety that she has been experiencing. It would have been next to impossible for Piresferreira to return to the Bell Mobility workplace due to her reactions associated with PTSD.

[122] As time went on, Piresferreira had other stressors to cope with, including an accident in which Scott was seriously injured, the death of friends, and the diagnosis of a non-malignant tumour in her ear. It was challenging for Piresferreira to cope with these additional stressors, considering her PTSD;

nevertheless, she did cope with those remarkably well. This was another reason why Heney diagnosed Piresferreira as suffering from PTSD arising from the incidents at Bell Mobility.

[123] According to Heney, one of the factors which has made progress in therapy particularly difficult was this litigation. Having to deal with issues relating to this case would trigger the thoughts and feelings that produced the anxiety in the first place. Heney is hopeful that, once this litigation is over, Piresferreira will be able to make progress and regain a sense of well-being.

Dr. Denise Basson

[124] Basson has spent the last 14 years working as a psychiatrist in a clinical setting, diagnosing and treating patients who suffer from depression and/or anxiety. She has a particular interest in workplace stress. Basson was qualified to give expert opinion evidence on the diagnosis and treatment of depression and anxiety disorders, including the causes of such conditions. I found her evidence highly relevant and compelling.

[125] From July 2006 to September 2007, when she relocated to British Columbia, Basson was Piresferreira's treating psychiatrist. The factual assumptions upon which Basson based her opinion regarding Piresferreira's psychiatric diagnosis and prognosis and her opinion on Piresferreira's ability to return to gainful employment are consistent with the factual findings I have made. More specifically, Basson assumed the following factual framework:

- Prior to May 2005, Piresferreira had not suffered from any significant psychiatric illness.
- In 2004, Piresferreira was diagnosed with Grave's disease. She was under a specialist's care and her situation had stabilized.
- There was a history of work-related stresses for Piresferreira which included a difficult year in 2004 for everyone at the Ottawa Bell Mobility office, reduced sales for Piresferreira in 2004, a supervisor (Ayotte) who was rough around the edges and who was verbally abusive with Piresferreira.
- Prior to May 2005, Piresferreira had been able to cope with workplace stressors.

- On May 12, 2005, there was an altercation between Ayotte and Piresferreira as a result of a cancelled meeting during which time Ayotte pushed Piresferreira. This left Piresferreira feeling quite shocked and physically violated.
- Prior to the assault, there had been an escalation of verbal abuse on the part of Ayotte.
- Initially, Piresferreira took steps to resolve the issue of the assault.
- Upon Piresferreira's return after having been away for three days, she attended a meeting with Ayotte so that matters could be resolved – only to be presented with a PIP, which she refused to sign.
- Piresferreira attempted to resolve the issue with the assistance of her HR department on May 20th. HR responded a few days later by email saying that Ayotte would receive some anger management training and HR was closing the file.
- Piresferreira developed significant symptoms of depression and anxiety, which included:
 - feeling overwhelmed, anxious, angry, hurt, sad and betrayed by her employer;
 - ruminating about being worthless;
 - disturbed sleep, low energy;
 - low appetite, weight loss;
 - difficulty concentrating and focusing;
 - poor memory;
 - preoccupation with work-related incidents;
 - loss of pleasure in things she used to enjoy;
 - withdrawing socially;
 - withdrawing from physical exertion and training;
 - panic reactions when discussing work-related issues or when thinking about meeting Ayotte.

[126] Dr. Basson diagnosed Piresferreira as having a major depressive disorder. In Basson's opinion, the stressor which triggered Piresferreira's depression and anxiety was the physical assault by Ayotte, followed by his failure to apologize to her and then Bell Mobility's failure to apologize and take concrete steps to remove Ayotte from a position of authority and supervision over Piresferreira. I accept this evidence.

[127] Initially Basson treated Piresferreira with medications to regularize her sleep, reduce her anxiety and reduce her depression. Piresferreira was compliant in regard to her anti-depressants, but on occasion would stop taking the anxiety medication if she were feeling better – something Basson considered quite normal. Basson recommended a therapy program which included seeing Heney regularly, following a routine of healthy eating and regular physical activity, learning new ways of dealing with stressors in her life and when ready doing some volunteer work to replace the meaning in her life that she had found in her work.

[128] During Basson's treatment of Piresferreira, her condition did not improve to the extent that there was a sustained reduction of symptoms. Medication reduced Piresferreira's anxiety and improved her sleep; however, with any acute stress, there would be a worsening of her anxiety and sleep disorder. There was never any sustained improvement in Piresferreira's mood from a functional perspective, though there was some symptom improvement during those occasions when Piresferreira was working as a volunteer.

[129] It was Basson's opinion that, throughout the course of her treatment, Piresferreira was totally disabled from paid employment. Piresferreira's symptoms never improved to the degree required for her to take on the added stress of returning to a work environment. The acute stressors in the work environment had caused the onset of Piresferreira's depression and the lack of resolution of those stressors maintained the depression. There was a significant risk that if work stressors were added to Piresferreira's life, that could result in a relapse. Basson explained that a patient should have at least one year of well-being before that patient is gradually reintegrated into society through volunteer work, then, if successful, part-time work and then, if suitable, full-time work. There is a danger that a too rapid reintegration into the workplace can trigger an acute relapse – especially with an older person. The older one gets, the less resilience one has to stress, and healing becomes more challenging.

[130] Basson recommended that Piresferreira: (1) stay on medication for at least two years following the remission of all her depressive symptoms – something that has not happened to date; (2) have on-going therapy with a clinical psychologist with expertise in depression and stress – something that is continuing with Heney; (3) not return to the workforce for at least one year following the termination of all legal proceedings to give herself the chance to reintegrate into society and a more active life before adding the additional stressors associated with the workplace; (4) reintegrate into the workplace only after a sustained period of well-being of from six months to one year and then only gradually through part-time work that is closely monitored; (5) reintegrate into a work environment that is supportive and that is appropriate to Piresferreira's skill sets without the need to retrain; and (6) not work for Bell Mobility which Piresferreira associates with her illness.

[131] From November 2006 forward, Basson discussed with Piresferreira the possibility of her seeking some part-time work in order to gradually reintegrate into the workforce and give her life a focus other than her illness, her disability, and her legal battle with Ayotte and Bell Mobility. Piresferreira was ambivalent about returning to work, at times telling Basson that she was not sure that she wanted to return to work while at the same time saying that she missed her work and was dismayed at ending her career on such a low note. Basson's evidence was that it was not unusual for individuals who were psychiatrically disabled as a result of work-related stresses to be reluctant to return to work – especially where there was on-going litigation about their disability and a fear that by returning to work, the person would be undermining the seriousness of the harm that had been done to them at the workplace.

[132] I find that, following the May 12, 2005 incident, Piresferreira developed symptoms consistent with PTSD and a major depressive disorder with anxiety. Nothing turns on which diagnosis better captures those symptoms. Suffice it to say that those symptoms have resulted in Piresferreira being incapable of returning to her position at Bell Mobility or in fact entering any work environment. Her emotional status is such that she has been and continues to be unable to cope with the normal stresses inherent in any work environment. I find that Piresferreira's symptoms of depression and anxiety, which have prevented her from returning to the work environment, are directly attributable to: (1) the verbal abuse she experienced from Ayotte on May 12, 2005 in the context of escalating verbal abuse over a period of time; (2) Ayotte's assault of her on May 12, 2005; (3)

Ayotte and Bell Mobility's inappropriate use of a PIP following the May 12, 2005 assault; (4) the failure of Ayotte and Bell Mobility to ever apologize for what had happened; (5) Bell Mobility's inadequate response to the events of May 12, 2005; and (6) the failure of Bell Mobility to provide a safe work environment (from the point of view of Piresferreira's mental health) to which Piresferreira could return.

Impact on Piresferreira's Lifestyle

[133] In addition to the evidence of Piresferreira herself, Scott, Piresferreira's partner of 16 years, provided much of the evidence regarding Piresferreira's physical and emotional health and her lifestyle following May 12, 2005. I accept Scott's evidence unqualifiedly. Scott provided this evidence in a direct, straight-forward, balanced fashion, and the evidence was not subject to any significant challenge under cross-examination. The evidence of Piresferreira and Scott is consistent with the observations of both Heney and Basson.

[134] Piresferreira's health prior to the May 12th incident was good, with the sole exception of the hyperthyroidism, which she was handling well. Piresferreira was self-confident, gregarious, and fun-loving. She was proud of her achievements as an immigrant to Canada. She loved to be with family and friends. She loved her pastimes – most notably running, walking her dog, cooking and coaching. She was happy and energized.

[135] Piresferreira enjoyed her job and her connections with clients. She was an energetic and enthusiastic account manager who was competitive with herself and others and who was not afraid of challenges. Prior to May 12, 2005, Ayotte's treatment of her took its toll, but she had coped with her discomfort around him by spending most of her time out of the office.

[136] Piresferreira is a serious athlete who in the past has competed internationally as a runner. Prior to the assault, Piresferreira was in the habit of working out five or more days a week. Normally, she would go to the track three times a week and on the other days do weight training or a road run. Following the assault, Piresferreira did not stop her training completely, but it took all of her energy to get herself to a training session, and then she might not be able to train for days thereafter. When she did train, it was not as satisfying as before. That being said, she has tried to go to the gym three times a week to maintain her training.

[137] Since May 2005, Piresferreira has tried to coach track and field two evenings a week for one to two hours, as she had been in the habit of doing before the incident. Due to her health issues, there are times when she is unable to maintain this routine. Piresferreira ran in two races in 2005 and one in 2007; otherwise, she has not participated in meets to the extent that she normally would have done.

[138] Piresferreira has undertaken some volunteer activities – helping out a young woman she met in hospital and helping an elderly couple get to doctors' appointments, out for a walk and shopping. She has not felt capable of undertaking any paid work.

Impact on Scott

[139] Scott and Piresferreira met in 1984 at the Pan-American track and field championship in which they both competed. Scott was attracted to Piresferreira due to her outgoing, fun-loving, athletic and strong nature. They shared a passion for running and that formed part of the cement of their relationship. After the assault, Piresferreira's personality and energy levels changed to such an extent that it created a distance in their relationship.

[140] Scott retired at 50 to become a full-time writer of fiction and non-fiction. Piresferreira was supportive of Scott's efforts and prior to the assault would read and comment on her work. Scott found this very helpful. Since the assault, Piresferreira has not been able to help Scott in the same way. She has been unable to sustain her concentration and organize her thoughts as she had been able to do in the past.

[141] Prior to the assault, Piresferreira and Scott would socialize with family and friends in their home or elsewhere at least twice a week. They were particularly close to Scott's son and his partner, with whom they shared a love of the cinema and with whom Piresferreira shared a love of hockey. Piresferreira and Scott would go regularly to plays and films and frequently ate out. In addition Piresferreira socialized with other athletes. After the assault, Piresferreira lost her energy for socializing and lost her capacity to enjoy the company of family and friends as she had previously. As a result both Scott and Piresferreira socialized less.

[142] From 1992 to 1999, Scott and Piresferreira shared household duties such as cooking, yard work and cleaning. Piresferreira did the dusting and Scott did the laundry. Starting in 1999, they got a cleaning service, but both continued to do light housekeeping. After the assault, Scott had to take over more and more of the functions as Piresferreira had neither the energy nor the concentration to do them. More specifically, Scott has taken over most of the cooking.

[143] There was a break in this pattern starting in June 2006 when Scott was seriously injured when hit by a car. Her injuries included a compound fracture of the left elbow, a crushed right ankle and foot, a collapsed lung and several broken ribs. She was hospitalized for three weeks, and then incapacitated when she first returned home. Piresferreira and Scott's son were with Scott at the hospital on a daily basis. After Scott returned home, she had daily housekeeping help for weeks. Piresferreira did the grocery shopping and cooking until Scott was able to stand. By 2007, Scott had recovered to the extent that she was able to run a five-kilometre race.

[144] Prior to the assault, Piresferreira had a dog that she looked after and that she took on her runs. Following the assault, Piresferreira has not been able to enjoy her dog in the same way and no longer regularly takes him on walks.

[145] In summary, prior to the assault, Piresferreira was a strong, independent woman with whom Scott had an equal partnership involving mutual enjoyment, respect and support. The two complemented each other. Since the assault, the relationship has become imbalanced due to Piresferreira's emotional fragility. Scott cannot turn to her in the same way for support and Piresferreira turns to Scott more than before for emotional support. It breaks Scott's heart to see Piresferreira so diminished. Scott lives with the fear that Piresferreira will not be able to recover her past strength and love of life.

Assault and Battery

Have the torts of assault and battery been proven?

[146] Assault is an act intending to cause harmful or offensive contact with the person of another, or an imminent apprehension of such a contact and the other is thereby put in such imminent apprehension. Battery is an act intending to cause a harmful or offensive contact with another person, or an imminent apprehension of such a contact, and a harmful or offensive contact results. The tortfeasor's

action must have been intentional in the sense of his desiring to produce the consequences that follow from his act; however, the tortfeasor need not have intended to cause injury – only the contact or the imminent apprehension of contact.¹

[147] Both torts are intended to preserve the integrity of the person. The tort of battery is a form of trespass against the person and is aimed at protecting the personal autonomy of the individual. Its purpose is to recognize the right of each person to control his or her body and who touches it, and to permit damages where this right is violated. The compensation stems not from fault, but from the violation of the right to personal autonomy.²

[148] Harmful contact is any physical impairment of the condition of another's body. Offensive contact is contact that offends a reasonable sense of personal dignity. In the case of battery, in that the foundation of the tort of battery is a violation of personal autonomy, all contact outside the exceptional category of contact that is generally accepted or expected in the course of ordinary life, is *prima facie* offensive.³

[149] There is no dispute that Ayotte pushed or shoved Piresferreira. He intended to do so. He wanted Piresferreira to stop talking to him, to stop trying to show him an email, to leave him alone, and to go away. Ayotte did not intend to cause Piresferreira any significant physical injury or significant emotional distress, but he did intend to make physical contact with her body and to move her body away from him. He succeeded in that intention. In pushing Piresferreira, Ayotte was both reckless and negligent in terms of the injury that could have been caused to Piresferreira by his actions.

[150] During Ayotte's evidence, he frequently raised the suggestion that either he had been provoked by Piresferreira to push her or he had acted in self-defence when he had pushed her. Had he acted in self-defence, he would not be liable for the torts of assault and battery. Had he acted under provocation, the damages for which he is liable might be reduced. I categorically reject the suggestion that Ayotte acted either in self-defence or under provocation.

¹ Alan M. Linden, *Canadian Tort Law*, 3rd ed. (Toronto: Butterworths, 1982) at 38, 42.

² *Non-Marine Underwriters, Lloyds' of London v. Scalera*, [2000] 1 S.C.R. 551 at paras. 10 and 22.

³ *Ibid.* at para. 18.

[151] The message Ayotte initially tried to convey during his testimony was that he, and not Piresferreira, had been the victim in the circumstances. Piresferreira had not done her job as he had expected – she had let him down. He was going to look bad in the eyes of the RIM representatives because of Piresferreira. She was constantly disappointing him. She would not listen to him and take his directions. She had provoked his yelling and swearing by being so incompetent. She had provoked the assault by insisting that he give her the opportunity to defend herself against his allegations, by persisting in asking him to look at the email, by following him into the office, and by not letting him have the last word. He had tried to disengage. He had told her that he was not interested in what she had to say. He had told her to go away. He had kept walking to his office. She should not have followed him and should not have kept talking to him.

[152] Under cross-examination, Ayotte reluctantly agreed that he was not proud of what he had done, that the incident was unfortunate and that it should not have happened. Even in the apology which he offered Piresferreira during the trial – the first apology that he had ever offered to her – his language was qualified. He simply talked about his behaviour being incorrect and the incident being unfortunate.

[153] Provocation which falls short of an assault or battery is not a defence to the torts of assault and battery, though it may be taken into account to reduce a plaintiff's damages.⁴ To be considered provocation, the conduct of the plaintiff must be such as to cause the defendant to lose his power of self-control and must have occurred at the time or shortly before the assault.⁵ I do not consider Piresferreira's actions in trying to report to Ayotte on the communications that she had had with Industry Canada and in trying to show him an email trail, provoked the assault as that term is understood under the law. Piresferreira was doing what any reasonable person would have done who was being yelled at and demeaned for not having done her job: she was trying to explain that she had done what had been asked of her. A manager should not lose self-control just because an employee is forcefully asserting her right to defend herself against strongly-worded allegations of her not doing her job.

[154] As well, I find that at no time was Ayotte in fear for his personal safety or integrity so that his act of pushing Piresferreira was done in self-defence.

⁴ Lewis N. Klar et al., *Remedies in Tort*, looseleaf Vol. 1 (Toronto: Carswell, 2008) at 2-32.

⁵ *Miska v. Sivec* (1959), 18 D.L.R. (2d) 363 (Ont. C.A.).

His act was done purely in anger and frustration and represented his lack of control, nothing else.

[155] Liability for damages arising out of the torts of assault and battery is not confined to intended or foreseeable consequences. Where a tortfeasor intended to inflict a harmful or offensive contact, he will be liable for the results of that contact, even though they are unintended and unforeseeable.⁶ Consequently, Ayotte cannot hide behind the fact that he did not intend to injure Piresferreira in any way and the injuries arising out of his assault and battery of her on May 12, 2005 exceeded all reasonable expectations and intended or foreseeable consequences.

To what extent were Piresferreira's injuries caused by Ayotte's assault and battery?

[156] The real question is the extent to which Piresferreira's symptoms of PTSD, anxiety and depression that arose following the May 12, 2005 incident and continued to trial were caused by Ayotte's assault and battery of Piresferreira.

[157] It is trite law that a tortfeasor must take his victim as he finds her.⁷

[158] When the assault occurred, Piresferreira was 60 years old. Although she was generally in good physical and emotional health, for a number of reasons she was vulnerable.

[159] First, Piresferreira was working in a male-dominated environment, where the tone was rough and ready and swearing and raised voices were the norm. Piresferreira was a sensitive person who did not respond well to being yelled at or sworn at. Second, Piresferreira was the oldest account manager and the only one whose first language was neither English nor French. She was living in a long-term lesbian relationship and did not feel comfortable acknowledging her lifestyle due to disrespectful comments about gays that she had heard from her colleagues, including Ayotte. These factors tended to isolate Piresferreira in the work setting. Third, Piresferreira felt that Ayotte did not respect her in the same way that he respected the other account managers, and the reality was – as witnessed by others in the office – Ayotte seemed to have a harder time dealing with Piresferreira than

⁶ *Bettel et al. v. Yim* (1978), 20 O.R. (2d) 617 (Co. Ct.) at paras. 23-24; *Linden*, *supra* note 1 at 41.

⁷ *Athey v. Leonati*, [1996] 3 S.C.R. 458 at para. 34; *Bender v. Best*, [1993] B.C.J. No. 578 (S.C.) at para. 38, citing *Marconato v. Franklin*, [1974] 6 W.W.R. 676 (B.C.S.C.); *Mizzi v. Hopkins*, [2003] O.J. No. 1671 at para. 49 (C.A.).

he did with anyone else. Fourth, Piresferreira was the only account representative that had only federal government clients at a time when there were systemic reasons why government business was down. She was just coming off a particularly bad year. All of these factors contributed to Piresferreira having and feeling some vulnerabilities before the assault of May 12, 2005.

[160] Furthermore, Piresferreira was a very hard worker who prided herself in working tirelessly for her clients and faithfully and energetically for Bell Mobility. She was frustrated and dismayed that her personal results in 2004 were well below her norm and were below company objectives. The three main reasons for the poor results had been beyond Piresferreira's control. Despite the ramifications of these factors continuing into 2005, Piresferreira was trying her best to rebound and was making some progress. It was important to her that her efforts in this regard be recognized by Ayotte and Bell Mobility.

[161] It was in this context that the events of May 12, 2005 occurred. These factors help to explain why Piresferreira appeared "comme un chien battu" on the morning of May 12, 2005 – prior to the assault – and why the assault itself had such an impact on Piresferreira's emotional health. The assault occurring at this point in time started a chain of events that collectively resulted in the deterioration of Piresferreira's emotional health and resulted in her disability. Included in that chain of events was Ayotte's failure to apologize for the assault, Bell Mobility's failure to apologize for the assault, Ayotte's immediate and inappropriate imposition of a PIP and Bell Mobility's collaboration in this regard, Bell Mobility's failure to adequately investigate the incidents of May 12, 2005, Bell Mobility's failure to adequately address the risk to Piresferreira of her continuing under Ayotte's supervision, Bell Mobility's failure to adequately discipline Ayotte for the assault, Bell Mobility's on-going expectation for Piresferreira to return to the same work environment without meaningful steps being taken to ensure a "safe" environment for her, and Bell Mobility's meritless allegation that Piresferreira orchestrated the constructive dismissal scenario because she could not accept that her performance at work was below standard.

[162] I find that, if the assault had not occurred, Piresferreira would not have developed the debilitating symptoms of PTSD, anxiety and/or depression that rendered her incapable of pursuing any gainful employment and of carrying on her personal life as she had done in the past.⁸ There is no question that the on-going

⁸ *Athey v. Leonati, ibid.* at paras. 13-17.

stress associated with this litigation has aggravated and likely prolonged Piresferreira's anxiety and depression. However, the litigation emanates from the original assault and would not be happening were it not for the assault. It is part of the chain of events caused by the assault.⁹

[163] There remains the question whether, had the assault not occurred, Piresferreira would have been able to maintain the income at Bell Mobility upon which her damages claim for economic loss is based. This relates to "the crumbling skull" issue. I will deal with this issue under the heading of damages.

Is Bell Mobility vicariously liable for Ayotte's assault and battery?

[164] Employers are vicariously liable for unauthorized acts so connected with authorized acts that they may be regarded as modes, even if improper modes, of performing an authorized act.¹⁰ Bell Mobility placed Ayotte in a supervisory role in regard to Piresferreira. Ayotte assigned sales territory to Piresferreira and established expectations for her successful performance of her job. Ayotte had the right and responsibility of giving directions to Piresferreira which she was expected to follow. Piresferreira had to report to Ayotte on a regular basis. Ayotte conducted Piresferreira's performance reviews. Ayotte was the person responsible to issue any PIPs to Piresferreira on Bell Mobility's behalf. Ayotte reported to his superiors about Piresferreira's performance. Ayotte managed the Ottawa Bell Mobility office where Piresferreira worked. She was subject to all of his management decisions.

[165] The interactions between Ayotte and Piresferreira on May 12, 2005 all related to directions that Ayotte had given Piresferreira in regard to the refresh of government BlackBerries. The interactions of Ayotte and Piresferreira immediately prior to the assault and battery were integral to the process of Ayotte managing, supervising and disciplining Piresferreira in the ordinary course of both of them doing their work for Bell Mobility. The assault and battery flowed in a seamless way as part of the authorized interchange. In this way, this case is not dissimilar from *Jennings v. Canadian Northern Railway*, [1925] B.C.J. No. 12 (C.A.) and *Osz (next friend of) v. Calgary (City)*, [1987] A.J. No. 1752 (Q.B.).

⁹ *Bender v. Best*, *supra* note 7 at para. 32; *Meuser v. Sall*, [1987] B.C.J. No. 1147 (S.C.) at 3.

¹⁰ *Bazley v. Curry*, [1999] 2 S.C.R. 534 at para. 10.

[166] In any event, broader policy considerations support the vicarious liability of Bell Mobility.

[167] Bell Mobility had placed Ayotte in charge of the Ottawa Bell Mobility office. His supervisor, Shiu, was located in Montreal. Although Shiu visited the Ottawa office regularly, he entrusted Ayotte with the day-to-day management of that office and supervision of the account managers. Bell Mobility allowed Ayotte to set the tone and environment within that office. Shiu was aware that Ayotte yelled and swore at account managers from time to time. Shiu was aware that Ayotte had a short fuse in this respect. Shiu was aware that the Ottawa office had not performed as well in 2004 as it normally did and that Ayotte was frustrated by that. Shiu was aware that Ayotte would be pushing his account managers particularly hard in 2005 to recoup from the poor 2004 results. That was in the interest of Shiu and Bell Mobility. Shiu knew that Ayotte could be aggressive with his account managers in a way that was not constructive. I note the following statement in Shiu's 2004 performance review of Ayotte:

...Richard needs to actively have a more positive impact on his group and his peers by not stating the obvious but enrolling his colleagues to develop solutions. In some instances, it is a matter of selecting other words, in some other situations it's addressing situations and not individuals.

[168] Bell Mobility set up a reporting arrangement whereby its information regarding the account managers' work, Ayotte's relationship with the account managers, and the environment at the Ottawa office, all came from Ayotte. Shiu did not meet privately with the account managers to seek their input on how they were being managed or to gain a better understanding of any tensions relating to the Ottawa office or Ayotte's management of the office. In entrusting this level of control to Ayotte, Bell Mobility had to assume responsibility for how Ayotte managed the Ottawa office and dealt with the personnel there. The fact that Ayotte's verbal abuse and physical assault of Piresferreira was an improper way for Ayotte to be managing, supervising or disciplining Piresferreira does not relieve Bell Mobility from vicarious liability for the assault and battery. Bell Mobility entrusted the supervisory role to Ayotte and is responsible when Ayotte did not handle that role properly.

Intentional Infliction of Emotional Distress, Mental Suffering, Nervous Shock and/or Psycho-traumatic Disability

Is Ayotte Liable for the Intentional Infliction of Emotional Distress?

[169] The elements of the tort of intentional infliction of emotional distress are: (1) flagrant or outrageous conduct; (2) calculated to produce harm; and (3) resulting in a visible and provable illness.¹¹

[170] In regard to the first element, I find that Ayotte's threat of placing Piresferreira on probation or on a PIP immediately after he had assaulted her and then his delivering a PIP to her the first time she returned to the office – without first having assumed responsibility for his abusive behaviour – was flagrant and outrageous. This is especially so when at the same time he did not advise the HR department or Shiu about the assault and when he attempted to sow in their minds a seed of distrust in regard to Piresferreira by warning that she might go on sick leave if presented with a PIP. His actions were aimed at intimidating Piresferreira and at minimizing any negative fallout for him should she choose to file a complaint about his behaviour.

[171] With respect to the second element, conduct will be considered “calculated to produce harm” where the actor desires to produce the consequences that follow from the act or the consequences are known to be substantially certain to follow.¹² It has also been held to include conduct amounting to reckless disregard as to whether or not shock would ensue as a result of the conduct.¹³ Ayotte's counsel acknowledged that reckless disregard can amount to the requisite level of intention to satisfy the requirements of this tort. I am satisfied that Ayotte showed reckless disregard for Piresferreira's emotional well-being when he yelled and swore at her, assaulted her, immediately threatened probation or a PIP, refused to apologize for his conduct, delivered the PIP to her at the first opportunity, mislead Sylvestre and Shiu as to his conduct on May 12th and attempted to bias them against Piresferreira in advance of her filing a complaint against him. I am satisfied that, in this sense, Ayotte's conduct was “calculated to produce harm” even though he did not actually intend for her to suffer the injury she did.

[172] In regard to the third element, I have already explained how Ayotte's conduct caused or materially contributed to Piresferreira developing PTSD or a major depressive disorder with anxiety.

¹¹ *Prinzo v. Baycrest Centre for Geriatric Care*, [2002] O.J. No. 2712 (C.A.) at para. 43.

¹² *Ibid.* at para. 45.

¹³ *Rahemtulla v. Vanfed Credit Union*, [1984] 51 B.C.L.R. 200 (S.C.).

Is Bell Mobility Liable for the Intentional Infliction of Emotional Distress?

[173] In the context of the information available to it, largely from Ayotte, I have not been persuaded that Bell Mobility intentionally inflicted emotional harm on Piresferreira. It did take steps to discipline Ayotte, even if inadequate. It had been misinformed by Ayotte and did not fully understand what had transpired on May 12th, though it could have had a better understanding if it had done a more thorough investigation. It provided Piresferreira with timely information about her benefits. I do not consider Bell Mobility's conduct flagrant or outrageous, nor do I consider that it was calculated to produce harm.

[174] The only question remains as to whether Bell Mobility should be vicariously liable for Ayotte's intentional infliction of emotional distress. For the same reasons explained in regard to the torts of assault and battery, I conclude that Bell Mobility is vicariously liable for Ayotte's intentional tort of inflicting emotional distress on Piresferreira.

Negligent Infliction of Emotional Distress, Mental Suffering, Nervous Shock and/or Psycho-traumatic Disability

[175] To succeed in her claim based on the negligent infliction of emotional distress, Piresferreira must prove that: (1) Ayotte/Bell Mobility owed Piresferreira a duty of care; (2) the behaviour of Ayotte/Bell Mobility breached the applicable standard of care; (3) Piresferreira sustained damage in the nature of a visible and provable illness; and (4) the damage was caused in fact and in law by Ayotte/Bell Mobility's breach.¹⁴

Did Ayotte/Bell Mobility owe Piresferreira a duty of care?

[176] Bell Mobility as Piresferreira's employer and Ayotte as her immediate supervisor owed Piresferreira a duty of care. That duty included the duty to ensure that Piresferreira was working in a safe and harassment-free environment without verbal abuse, intimidation or physical assault, all in accordance with Bell Mobility's Code of Business Conduct.

Did Ayotte/Bell Mobility breach the standard of care?

¹⁴ *Mustapha v. Culligan of Canada Ltd.*, [2008] S.C.J. No. 27 at para. 3.

[177] Ayotte breached the standard of care he owed to Piresferreira. Over a prolonged period of time, but particularly during 2004 and 2005, he yelled and swore at her as part of his management style. In the year preceding the events of May 12, 2005, the frequency of these verbal outbursts toward Piresferreira had increased. On the morning of May 12, 2005, Ayotte yelled and swore at Piresferreira in the presence of Lepage, telling her that she was not doing her job. Piresferreira responded by being apologetic. This was demeaning and humiliating to Piresferreira. She appeared at the time “comme un chien battu”. This was apparent to Lepage and should have been apparent to Ayotte. Despite this, when Ayotte subsequently saw Piresferreira in the corridor near the elevator, he again yelled and swore at her and intimidated her, saying that she did not know what she was doing and was not doing her job. Ayotte berated Piresferreira in a public setting with no consideration as to who might hear his outburst. Ayotte refused to listen to Piresferreira’s explanation. Eventually, he physically assaulted her. After she followed him into his office seeking an apology, not only did he not apologize but he added insult to injury by stating that he would be placing her on probation or issuing a PIP. None of these actions on Ayotte’s part met the standard of care expected of him as a manager of personnel. None conformed with Bell Mobility’s expectations as set out in its Code of Business Conduct. It was reasonably foreseeable to Ayotte that every aspect of this behaviour was likely to cause Piresferreira anxiety, stress and emotional upset.

[178] Sylvestre and Shiu did not live up to the standard of care applicable to Piresferreira’s HR consultant and Ayotte’s supervisor, respectively. Shiu acknowledged that Bell Mobility could not tolerate the aggressive and assaultive behaviour exhibited by Ayotte, that Ayotte needed to apologize to Piresferreira and that Ayotte needed to recognize the seriousness of what he had done. The evidence shows that Bell Mobility did not act in accordance with these mandates.

[179] After Sylvestre received Piresferreira’s formal complaint, she discussed the complaint with Ayotte and Shiu, but she never called Piresferreira to discuss further what had happened. After Sylvestre received Ayotte’s acknowledgement that he had yelled at and pushed Piresferreira, neither she nor Shiu contacted Piresferreira to express Bell Mobility’s concern as to how Piresferreira had been treated, to apologize on Bell Mobility’s part, and to see how she was doing. Instead, Bell Mobility conveyed the message to Piresferreira that their priority was the PIP – not Ayotte’s behaviour. The disciplinary measures which Bell Mobility told Piresferreira it would impose on Ayotte were

inappropriately mild and ignored Ayotte's failure to apologize to Piresferreira, his use of a PIP to intimidate Piresferreira and his failure to report to Shiu and HR the assault and the immediate imposition of a PIP. Neither Sylvestre nor Shiu contacted Piresferreira to get her input on what steps could be taken to ensure her feeling physically and emotionally safe at her workplace in the future.

[180] Instead, Sylvestre and Shiu approached the circumstances as an exercise in damage control from Bell Mobility and Ayotte's perspective, with inadequate regard for the impact this stance would have on Piresferreira. Although Ayotte was asked to speak to an employee assistance counsellor about anger management, he was given the power to decide if he needed any further anger management counselling. No further measures were introduced to ensure that the work environment at the Ottawa Bell Mobility office became a safer work environment from the point of view of Piresferreira's physical and emotional well-being. Instead, the case against Ayotte was summarily closed and Bell Mobility attempted to move ahead aggressively with the PIP. Sylvestre and Shiu realized, or should have realized, that this lop-sided and inadequate response to ongoing verbal abuse, intimidation and a physical assault would cause Piresferreira additional anxiety, stress and emotional upset.

[181] Furthermore, Sylvestre misrepresented the facts to Piresferreira in her letter to Piresferreira of May 24, 2005. She stated that she had scheduled a meeting to allow Ayotte to offer formal apologies to Piresferreira but Piresferreira had declined to attend. To her knowledge, no such meeting had been arranged, and in fact earlier the same day she had told Piresferreira that the purpose of the scheduled meeting was to review the PIP. Again, Shiu and Sylvestre realized or should have realized that Sylvestre's May 24, 2005 letter to Piresferreira – which was Bell Mobility's formal response to her complaint – would cause Piresferreira further emotional upset by stating an erroneous criticism of Piresferreira. Sylvestre had already been advised that Piresferreira was away on stress leave due to anxiety dealing with work harassment.

Did Piresferreira sustain damage?

[182] The concept of damage includes psychological injury that is “serious and prolonged and rises above the ordinary annoyances, anxieties and fears that people living in society routinely, if sometimes reluctantly, accept”.¹⁵ Piresferreira

¹⁵ *Ibid.* at para 9.

suffered serious and prolonged injury in the form of PTSD or a major depressive disorder that rendered her completely disabled from pursuing gainful employment.

Did Ayotte/Bell Mobility's breach cause Piresferreira's injury in fact and in law?

[183] Ayotte's verbal abuse, intimidation and physical assault of Piresferreira, coupled with his refusal to assume responsibility for his behaviour and his inappropriate use of the PIP, caused or materially contributed to her anxiety and depression. I find that, in the absence of Ayotte's assault, intimidation and verbal abuse on May 12th, his refusal to assume responsibility for his behaviour and his inappropriate use of the PIP, Piresferreira would not have suffered the incapacitating anxiety and depression that she has suffered since May 12, 2005.

[184] I am satisfied that Piresferreira's Grave's Disease, when active and untreated, increased her level of anxiety. However, in the years prior to and following the May 12, 2005 incident, Piresferreira was under the watchful eye of Kuriakose and was having her blood tested regularly. Whenever the Grave's Disease became active, Kuriakose treated Piresferreira so that any symptoms caused by that disease disappeared. I accept the evidence of Kuriakose and Kerr that Piresferreira's ongoing anxiety and depression, which continued after she was properly treated for hyperthyroidism, cannot be attributed to Grave's Disease.

[185] As well, I reject the argument advanced on behalf of Ayotte and Bell Mobility that Piresferreira's poor performance reviews for 2004 and the fact that she was presented with a PIP (as distinct from how and when that was done) were the real causes of her depression and anxiety. Piresferreira had gotten through rough years in the past, without becoming morbidly anxious or depressed. When she received the under-average performance review in 2000, she had simply tried harder and had risen to the challenge in 2001 and subsequent years. In 2005, as reflected in her numbers, Piresferreira was making progress getting over the setbacks of 2004. Although receiving a PIP would have been a distressing event for Piresferreira, had it been presented in an appropriate fashion, I have no doubt that she would have responded by working all the harder to meet her targets. In this case, however, the PIP was delivered at a totally inappropriate time (after the assault) and for a totally inappropriate purpose (to ward off a complaint about the

assault). Unquestionably this negligent use of a PIP greatly contributed to Piresferreira's symptoms and resulting disability.

[186] Finally, I reject the argument advanced on behalf of Ayotte and Bell Mobility that, even if none of the events leading up to and following May 12, 2005 that form the subject matter of this litigation had happened, Piresferreira would have developed debilitating symptoms of anxiety or depression arising out of the serious injuries sustained by Scott as a result of the accident. Although I doubt that Piresferreira would have been able to meet her financial objectives during the period following Scott's accident, this unfortunate event would have been a temporary set-back, and not one that would have effectively brought her career to an end. I will deal with the accident when discussing damages.

[187] The next question is whether the damages sustained by Piresferreira were too remote at law to be recoverable from Ayotte and/or Bell Mobility. This takes me to the recent Supreme Court of Canada case of *Mustapha v. Culligan of Canada Ltd.*, *supra* note 14 where McLachlin C.J. made the following observations:

The remoteness inquiry asks whether “the harm [is] too unrelated to the wrongful conduct to hold the defendant fairly liable” (Linden and Feldthusen, at p. 360). ...

...The degree of probability that would satisfy the reasonable foreseeability requirement was described in *The Wagon Mount (No. 2)* as a “real risk”, i.e. “one which would occur to the mind of a reasonable man in the position of the defendant ... and which he would not brush aside as far-fetched” (*Overseas Tankship (U.K.) Ltd. v. Miller Steamship Co. Pty.*, [1967] A.C. 617, at p. 643).

... the law of tort imposes an obligation to compensate for any harm done on the basis of *reasonable* foresight, not as insurance. The law of negligence seeks to impose a result that is fair to both plaintiffs and defendants, and that is socially useful. In this quest, it draws the line for compensability of damage, not at perfection, but as reasonable foreseeability. Once a plaintiff establishes the foreseeability that a mental injury would occur in a person of ordinary fortitude, by contrast, the defendant must take the plaintiff as it finds him for purposes of damage. ...

... in those cases where it is proved that the defendant had actual knowledge of the plaintiff's particular sensibilities, the ordinary fortitude requirement need not be applied strictly. If the evidence demonstrates that the defendant knew that the

plaintiff was of less than ordinary fortitude, the plaintiff's injury may have been reasonably foreseeable to the defendant. ...

It follows that in order to show that the damage suffered is not too remote to be viewed as legally caused by [the defendant's] negligence, [the plaintiff] must show that it was foreseeable that a person of ordinary fortitude would suffer serious injury [as a result of the defendant's negligent behaviour].

[188] In my view, it is reasonably foreseeable that a person of ordinary fortitude would suffer serious psychological injury if that person was regularly yelled and sworn at by her manager/supervisor/boss, was told by the manager/supervisor/boss that she did not know what she was doing, was not given the opportunity to explain her actions or defend herself, was pushed by the manager/supervisor/boss who at the time was clearly angry and out of control, and was immediately told that she would be put on probation or issued a PIP.

[189] It is also appropriate to add, however, that Piresferreira was not a stranger to Ayotte. He had information about her that he would not have had about a stranger who may have been affected by his negligence, as was the case in *Mustapha v. Culligan of Canada Ltd., supra*. Ayotte knew that Piresferreira was a 60-year old female, a devoted Bell Mobility employee, a very hard worker, someone who strove to achieve and was used to performing well in her position, someone who in most years had received excellent performance reviews, someone who had struggled in the previous year for three reasons beyond her control, someone whom he had already been told was sensitive and did not take well to being yelled and sworn at, and someone whom he knew could be emotional.

[190] Knowing all of this about Piresferreira, Ayotte cannot argue that it was not reasonably foreseeable by him that his actions would cause Piresferreira serious psychological injury. In fact, in his note to Sylvestre dated May 12, 2005 in which he attached his draft PIP for Piresferreira, he stated that his biggest concern was the high probability that Piresferreira would go on sick leave as soon as he presented a PIP to her. He stated this at a time when the implied message to Sylvestre was that he would be presenting a PIP to Piresferreira in an appropriate fashion (and without first having assaulted her). Clearly it was foreseeable to Ayotte that the combination of yelling and swearing at Piresferreira, assaulting her, threatening her with a PIP, and then presenting her with the PIP without any acknowledgement of or apology for the assault would cause Piresferreira serious psychological injury.

[191] I find that Ayotte and Bell Mobility are liable for negligent infliction of emotional distress, mental suffering and psycho-traumatic disability. In the case of Bell Mobility, it is liable in its own right due to the actions of Shiu and Sylvestre, but it is also liable due to vicarious liability for Ayotte's actions for the reasons explained under the heading of Assault and Battery.

Damages for Assault, Battery, Intentional and Negligent Infliction of Emotional Distress, Mental Suffering and/or Psycho-traumatic Disability

General Damages

[192] Piresferreira is seeking \$50,000 in general damages from Ayotte and Bell Mobility jointly and severally relating to the assault, battery and intentional and negligent infliction of emotional distress, mental suffering and/or psycho-traumatic disability. Bell Mobility submits that if any general damages are to be awarded for the assault, the damages should be in the range of \$500 to \$1,000. Ayotte submits that an appropriate amount would be \$5,000.

[193] I have been referred to numerous cases where general damages have been awarded for assault and battery. The damages awarded ranged from \$400 to \$11,000. In none of the cases did the assault and battery cause or materially contribute to the victim suffering long-term psychological ramifications resulting in an inability to return to any gainful employment and to enjoy usual social, recreational and family activities.¹⁶

[194] The cases to which I have been referred in regard to the intentional or negligent infliction of emotional harm, mental suffering and/or psycho-traumatic disability have involved assessments of general damages in the range of \$15,000 to \$150,000.

- *Prinzo v. Baycrest Centre for Geriatric Care*, *supra* note 11: \$15,000 for emotional upset, increased blood pressure, weight spike, increased symptoms of diabetes, loss of self-esteem, distress on a disabling basis for months.

¹⁶ *Landry v. Patterson* (1978), 22 O.R. (2d) 335 (C.A.); *Misiner v. L.J. Trabert Ltd.*, [1982] N.S.J. No. 391 (S.C.); *Collins v. Ewart*, [1984] 27 A.C.W.S. (2d) 77 (Ont. Prov. Ct.); *Mahal v. Young* (1986), 36 C.C.L.T. 143 (B.C.S.C.); *Boothman v. Canada*, [1993] F.C.J. 400 (T.D.); *Panizovski v. Gunovski*, [1997] O.J. No. 4889 (Gen. Div.); *Tannous v. Donaghue*, [1998] O.J. 2311 (C.A.); *F.P. v. Korolek*, [2002] B.C.J. No. 2641 (Prov. T.); *Santamaria v. James*, [2004] O.J. No. 744 (S.C.); *Plouffe v. Roy*, [2007] O.J. No. 3453 (S.C.J.);

- *Bogden v. Purolator Courier Ltd.*, (1996), 19 C.C.E.L. 77 (Q.B.) aff'd on this point 1997 WL 1934061 (Alta C.A.): \$20,000 for nervousness, agitation, insomnia, increased blood pressure, debilitating back spasms, rampant psoriasis for six months with on-going depression for three to four years.
- *Amaral(Litigation Guardian of) v. Canadian Musical Reproduction Rights Agency Ltd.*, [2007] O.J. No. 4266 (Sup. Ct.): \$150,000 for full-scale depression, breakdown and intermittent hospitalization lasting for six years with no end in sight, had causation been established.

[195] Since May 2005, Piresferreira has suffered from disabling symptoms of depression and anxiety that have not noticeably ameliorated over time. It is uncertain if and when she will ever be in a position to return to gainful employment. This has been devastating for a person who defined herself very much through her work and took great pride in her successes in the workplace. Piresferreira's depression and anxiety have also reduced the pleasure she can experience in all other aspects of her life. I assess general damages at \$50,000, subject to my comments below on contingencies.

Loss of Past and Future Income

(a) Piresferreira's Income Until May 2005

[196] Piresferreira's compensation at Bell Mobility from 2002 to May 2005 was as reflected in the following chart:

	2002	2003	2004	2005
Annual salary	\$ 55,000	\$ 56,500	\$ 58,000	\$ 58,900 (annualized)
Sales bonus	\$ 71,029	\$ 67,465	\$ 24,645	\$ 13,904 (until May 2005)
Total compensation	\$126,029	\$123,965	\$ 82,645	N/A

[197] Piresferreira's average income from Bell Mobility during the three years prior to 2005 was \$110,880. Her average sales bonus was \$54,380. Piresferreira was also entitled to a car allowance of \$586 per month and group benefits, including health care coverage.

(b) Piresferreira's Income from May 2005 Forward

[198] For the first 26 weeks, Piresferreira was in receipt of benefits under Bell Mobility's short-term disability plan. From May 25 to July 20, 2005, Piresferreira received 100% of her basic salary, her car allowance and her group benefits. From July 20, 2005 to November 22, 2005, Piresferreira received 80% of her basic salary or \$47,120 annually, the car allowance and the group benefits. These short-term disability benefits were paid by Bell Mobility. From November 22 to December 7, 2005, Piresferreira received vacation pay from Bell Mobility, as she was required to do under the terms of Manulife's disability plan. Since December 7, 2005, Piresferreira has been in receipt of long-term disability benefits equal to two-thirds of her base salary of \$58,900 or \$39,267 annually. Effective September 2005, Piresferreira has also been entitled to receive CPP disability benefits, but these are paid directly to Manulife to offset its payments to Piresferreira.¹⁷ Bell Mobility terminated Piresferreira's employment effective September 19, 2006.

(c) Actuarial Calculations

[199] Guy Martel ("Martel"), an actuary, provided calculations regarding Piresferreira's past and future loss of income. No issue was taken with the financial assumptions made by Martel in his report regarding Piresferreira's actual income from 2002 to 2007 and what her actual income will be in the future, looking at her anticipated pension benefits commencing when she turns 65 in July 2009. To the extent that Piresferreira recovers damages for loss of past or future income for a period when she has been in receipt of long-term disability payments from Manulife, she must reimburse Manulife for the disability payments. Consequently, her disability payments were not included in the calculation of the income she actually has or will receive. The only slight difference in Martel's assumptions from my findings is that Martel assumed Piresferreira's car allowance was \$500 per month and I have found it to have been \$586 per month. No issue was taken with Martel's actuarial assumptions.

[200] Martel ran two scenarios as to the income Piresferreira would have earned had she continued to work for Bell Mobility until her 65th birthday. Both scenarios assume that Piresferreira's base salary of \$58,900, which she was receiving in 2005, would not have increased prior to her retirement – a

¹⁷ See Exhibit 25.

conservative assumption. The first scenario has the additional assumption that Piresferreira would have earned a sales bonus of \$25,000 annually. The second scenario assumed that her sales bonus would be \$50,000 annually. Prior to 2005, Piresferreira had been in the habit of earning sales bonuses well in excess of \$50,000.¹⁸ In 2004, which had been her poorest year on record due to reasons beyond her control, her sales bonus was just under \$25,000.

[201] Martel’s conclusions are as follows:

	Past loss of income (incl. of car allowance plus PJI until 3/22/08)	Future loss of income (incl. of car allowance, pension loss)	Total
Scenario one	\$ 215,928	\$ 183,221	\$ 399,149
Scenario two	\$ 284,768	\$ 216,156	\$ 500,924

[202] I consider a sales bonus of \$50,000 to be more realistic than \$25,000. I find that 2004 was an aberration with three significant negative factors making it impossible for Piresferreira to meet her targets. It is highly unlikely that any such toxic combination of external factors would have created such a negative sales environment for Piresferreira between 2005 and 2009. No evidence of the existence of such challenges for the Ottawa Bell Mobility office was adduced at trial. I will deal with contingencies separately, once an overall calculation of loss of income has been done. I assess Piresferreira’s past and future loss of income at \$500,924, subject to comments below regarding contingencies.

Contingencies

[203] As Major J. stated in *Athey v. Leonati*, *supra* note 7, at para. 32:

...The essential purpose and most basic principle of tort law is that the plaintiff must be placed in the position he or she would have been in absent the defendant’s negligence (the “original position”). However, the plaintiff is not to be placed in a position better than his or her original one. It is therefore necessary not only to determine the plaintiff’s position after the tort but also to assess what the “original position” would have been. It is the difference between these positions, the “original position” and the “injured position”, which is the plaintiff’s loss.

¹⁸ See the chart at para. 214 above.

[204] The original position includes any current condition that would have evolved in any event, either from conditions that predated the accident (quiescent or active) or from events which occurred after the accident (whether tortious or non-tortious).

[205] In my view, there were no conditions that predated May 12, 2005 that created a substantial possibility that Piresferreira would not have been able to function in the future as she had been in the past¹⁹ aside from: (1) her hyperthyroidism; and (2) her sensitive nature and feelings of vulnerability and isolation in the rough and tumble world of corporate sales. By May 2005, Piresferreira was being followed regularly by Kuriakose and was familiar with the symptoms of hyperthyroidism. Although Piresferreira may have had periods when her hyperthyroidism was not being adequately controlled, I conclude that these would have been short-lived and would not have caused any significant reduction in her functioning.

[206] Considering Piresferreira's age and other stressors in her life, the day to day stresses and conflicts inherent in her work environment may have had an increasing impact on Piresferreira's ability to function as effectively as she has in the past. I do not assign much weight to this contingency considering Piresferreira had worked for close to 20 years in this environment and had enjoyed a high level of success.

[207] There are events, however, that occurred after May 12, 2005 that created a substantial possibility that Piresferreira might not have been able to devote the same time, energy and focus to her work as she had done prior to May 12, 2005, especially considering her age. On June 7, 2006, Scott was seriously injured when she was hit by a car while running. She was hospitalized for three weeks and then underwent a lengthy recovery period. This was very distressing to Piresferreira, and she devoted considerable time and energy to supporting Scott during this difficult period. As well, in the years since May 2005, close friends have died and others became ill. Piresferreira had additional health concerns as a result of the acoustic neuroma and would have been away from work after its surgical removal. In addition to impacting on her psychological well-being, these events or issues reduced the time, focus and energy which Piresferreira would have

¹⁹ *Schrump v. Koot* (1977), 18 O.R. (3d) 337 (C.A.).

been able to bring to her work. They also meant that there would have been periods of time when she was not available for work.

[208] Furthermore, I find that Piresferreira was experiencing more challenges adjusting to the new realities in her industry. Due possibly to her age and other factors creating stress in her life, she was less resilient to set-backs and criticisms about her work and fought some of the changes that management wanted to impose on her. Her chronic difficulties in preparing paperwork were increasing in significance from a management perspective but she was slow to change her ways in this regard.

[209] As a result of all of these factors, there was a substantial possibility that Piresferreira would not have continued to work at Bell Mobility until age 65, as she had hoped and intended to do, either because she would have decided to retire earlier or seek a less demanding position or because she would not have been able to meet all of the objectives set for her by Bell Mobility and would have left Bell Mobility prior to July 2009 without comparable employment being available for her elsewhere.

[210] As a result of these contingencies, I will reduce general damages by 10% to reflect the possibility that for reasons unrelated to the tortious conduct of Ayotte and Bell Mobility, Piresferreira may not have been able to enjoy the emotional health and active lifestyle that she had enjoyed prior to May 12, 2005. As well, I will reduce Piresferreira's damages for loss of past and future income, (including loss of pension value and loss of car allowance) by 10% to cover both general and specific contingencies.

[211] I am not allowing a higher contingency discount, as asked by Bell Mobility, because there is the possibility that, were it not for the tortious conduct of Ayotte and Bell Mobility, Piresferreira may have earned more in the future than the conservative estimate used by Martel in his calculations.

Special Damages

[212] I allow special damages of \$5,122.52 relating to psychotherapy sessions with Heney and the cost of medications.

Conclusion Regarding Tort Damages

[213] I calculate Piresferreira's damages arising from her tort claims as being the following:

General damages		
gross amount	\$ 50,000	
less 10% contingency	<u>(\$ 5,000)</u>	
net amount	\$ 45,000	\$ 45,000
Loss of past and future income		
gross amount	\$500,924	
less 10% contingency	<u>(\$ 50,092)</u>	
net amount	\$ 450,832	\$450,832
Special damages		<u>\$ 5,123</u>
Total		\$500,955

Wrongful Dismissal

Was Piresferreira Constructively Dismissed?

[214] Piresferreira takes the position that she was constructively dismissed from her employment with Bell Mobility due to Ayotte's abusive treatment of her and Bell Mobility's refusal to adequately deal with this abuse.

[215] As was stated by Cullity J. in *Shah v. Xerox Canada Ltd.*, [1998] O.J. No. 4349 (Gen. Div.) at para. 38 (aff'd [2000] O.J. No. 849 (C.A.):

Where the conduct of management personnel is calculated to cause an employee to withdraw from the employment, it may, in my judgment, amount to constructive dismissal. The test, I believe, is objective: it is whether the conduct of the manager was such that a reasonable person in the circumstances should not be expected to persevere in the employment. As the particular circumstances are crucial, each case must be decided on its own facts. The test should not be lightly applied. An employer is entitled to be critical of the unsatisfactory work of its employees and, in general, to take such measures – disciplinary or otherwise – as it believes to be appropriate to remedy the situation. There is, however, a limit. If the employer's conduct in the particular circumstances passes so far beyond the bounds of reasonableness that the employee reasonably find continued employment to be intolerable, there will, in my view, be constructive dismissal whether or not the employee purports to resign.

[216] The question in this case, as in *Shah v. Xerox Canada Ltd.*, is not limited to whether Bell Mobility's conduct amounted to a change in a specific term of its employment contract with Piresferreira, but also included whether Bell Mobility's conduct amounted to a repudiation of the entire employment relationship.²⁰

[217] The following evidence supports a finding of constructive dismissal:

- Throughout his tenure as Piresferreira's manager, Ayotte would yell and on occasion swear at her when he became angry or frustrated. He would do this to get her attention, to emphasize a point he was making, or to display his dissatisfaction with something she had or had not done. This habit of yelling and swearing at Piresferreira gained in intensity and frequency during 2004 and 2005. It became clear not only to Piresferreira but to others in the Ottawa Bell Mobility office that Ayotte was singling out Piresferreira for particularly harsh treatment in this regard. This treatment was intimidating and hurtful to Piresferreira. This was obvious to others working in the Ottawa Bell Mobility office and would have been obvious to Ayotte. In any event, Piresferreira specifically asked him to stop yelling at her and Munier specifically told Ayotte that Piresferreira was sensitive and did not respond well to being yelled at.
- On the morning of May 12, 2005, Ayotte yelled and swore at Piresferreira and told her she was not doing her job properly – all in the presence of another Bell Mobility employee. It was obvious to that employee, and I find as well to Ayotte, that Piresferreira was upset, defeated and intimidated by this behaviour on Ayotte's part.
- Later that same morning when Piresferreira ran into Ayotte near the elevator in the public hallway, Ayotte again yelled and swore at Piresferreira and told her she was not doing her job. In doing so, he was reckless as to whether anyone else in the vicinity could hear his comments.

²⁰ See *Farber v. Royal Trust Co.*, [1997] 1 S.C.R. 846 per Gonthier J. at para. 195; *Whiting v. Winnipeg River Brokenhead Community Futures Development Corp.* (1998), 159 D.L.R. (4th) 18 (Man. C.A.); *Shah v. Xerox Canada Ltd.*, *supra* at para. 8 (Ont. C.A.).

- Ayotte refused to let Piresferreira defend herself by explaining what she had done and showing him proof of that.
- Ayotte assaulted Piresferreira.
- Ayotte refused to apologize for his behaviour.
- Ayotte added insult to injury by immediately threatening to put Piresferreira on probation and/or issue a PIP. He did so to intimidate Piresferreira along the lines that the best defence to ward off a complaint about his behaviour was a strong offence regarding Piresferreira's suitability for the job.
- Ayotte did not respond to Piresferreira's request that they meet in an effort to resolve what had happened.
- The next time Ayotte saw Piresferreira in the office, he presented her with the PIP and ignored the fact that he had been verbally and physically abusive with her.
- Pursuant to the PIP, Piresferreira would have been required to report to Ayotte daily and meet with him twice a week. Ayotte was the person who would monitor Piresferreira's success under the PIP. If Piresferreira's performance did not improve to a level fully acceptable to Ayotte, she was warned that further disciplinary action up to and including dismissal would result.
- In her formal complaint to Bell Mobility on May 20, 2005, Piresferreira asked for advice from Sylvestre, her HR consultant, as to whether she was expected to work and perform her duties in these circumstances. Neither Sylvestre, nor anyone else representing Bell Mobility, ever answered this question.
- After Sylvestre at Bell Mobility's HR department received Piresferreira's written complaint on May 20, 2005 referring to Ayotte's behaviour on May 12th and May 19th, she made no effort to contact Piresferreira to get further information about what had happened, to determine whether there had been any other incidents of

abusive behaviour at the Ottawa Bell Mobility office or to discuss with Piresferreira what steps might need to be taken to reassure her that her work environment was a safe and appropriate one. Similarly, even though Shiu acknowledged at trial that the assault on Piresferreira was a very serious incident that constituted a serious breach of trust in the employer/employee relationship, he made no effort to contact Piresferreira to explore further what had happened and what the environment at the Ottawa office was like.

- To Piresferreira's subsequent knowledge from colleagues who called to see how she was following her complaint, Bell Mobility management had not contacted anyone to inquire of the working environment at the Ottawa Bell Mobility office. That no further inquiries were made was confirmed at trial.
- Even after Sylvestre was advised by Piresferreira on May 23, 2005 that Ayotte's persistent verbal abuse and the assault had affected her physical and mental health, Sylvestre did not respond by seeking more information from Piresferreira or by ascertaining what could be done to assist Piresferreira.
- On May 24, 2005, without having provided any response to Piresferreira's complaint about Ayotte, and knowing that Piresferreira believed that her physical and mental health had been impacted by Ayotte's behaviour, Sylvestre notified Piresferreira that a meeting had been scheduled the following morning between Piresferreira, Ayotte and Shiu "to review the performance improvement plan." Piresferreira was therefore put on notice that, not only were her HR consultant and Bell Mobility generally going along with the inappropriate use of a PIP to intimidate her, but Ayotte's immediate supervisor (her ultimate supervisor) was also willingly participating in this process.
- Later on May 24, 2005, after learning that Piresferreira's doctor had placed her on sick leave and Piresferreira would not be attending the proposed meeting as a result, Sylvestre responded to Piresferreira's complaint in a way that minimized its significance. More specifically, the letter referred to "an altercation that would have involved yelling

and pushing” leaving open the possibility that the incident had had some mutuality. Sylvestre went on to state that she had discussed Piresferreira’s “allegations” with Ayotte who had confirmed that he had acted “inappropriately”. Ayotte’s behaviour was described as being “unacceptable”.

- The letter to Piresferreira conveyed the message that nothing serious or significant would be done to change the work environment in which she was expected to perform. Sylvestre stated incorrectly and insensitively that a meeting had been scheduled to allow Ayotte to formally apologize to Piresferreira which she had declined to attend. Piresferreira was never advised that the purpose of any scheduled meeting was for Ayotte to apologize. Sylvestre had specifically advised her that the purpose of the meeting was to review the PIP. Second, the only action taken against Ayotte was to provide him with a disciplinary warning about his behaviour and ask him to attend two courses. No reference was made in the letter about any other steps that would be taken at the Ottawa Bell Mobility office to prevent Ayotte from continuing to treat Piresferreira as he had done in the past all the while continuing to have absolute control over most aspects of her employment. The letter closed with the ambiguous statement that Bell Mobility trusted that the actions taken and the sincere regrets of Ayotte regarding his behaviours were the right responses “to the gravity of the complaint”. In that virtually no actions were taken and Ayotte had never expressed any regrets to Piresferreira, it is understandable that the message received by Piresferreira was that Bell Mobility did not take her complaint very seriously and was not prepared to ensure her a safe and appropriate work environment.

[218] Bell Mobility’s policy on workplace violence states: “Bell prohibits all acts of physical, verbal or written aggression committed by any employee against another employee or against anyone else. Even threats in a joking manner are considered in violation of this policy”. According to Shiu, the spirit of these policies was to make sure that there was an environment that fostered respect amongst team members so that they could get their work done for their clients in the most harmonious manner possible.

[219] I find that by May 24, 2005, Piresferreira's continued employment in the environment at the Ottawa Bell Mobility office was no longer possible. Bell Mobility was not living up to the implied term of any employment relationship that the employer will treat the employee with civility, decency, respect and dignity.²¹ Bell Mobility was not living up to its implied undertaking to Piresferreira, as part of her employment contract, that it would take reasonable steps to have all of its employees comply with its human resources policies relating to harassment and workplace violence. It was not living up to its responsibility to take reasonable steps to ensure that Piresferreira would not be subject to further physical or verbal abuse or intimidation by her manager. Ayotte's persistent verbal abuse of Piresferreira, his physical assault of her, his further intimidation of her by giving her a PIP *at the time and in the manner that he did*, Bell Mobility's inadequate response to the circumstances, and Bell Mobility's failure in any meaningful way to ensure that Piresferreira's work environment would not be so hostile or intimidating as to further injure her psychological health meant that Bell Mobility had constructively dismissed Piresferreira.

[220] Furthermore, if there had been any doubt about Piresferreira being constructively dismissed by Bell Mobility as of May 24, 2005, this was put to rest by its refusal subsequently to take seriously Piresferreira's complaints of workplace harassment and intimidation and its attempt to throw responsibility for her not being at work on her shoulders alone.

- On June 8, 2005, Bell Mobility denied that Piresferreira had experienced any kind of harassment at her workplace because she had not previously made any formal complaints about it. It did so without ever investigating whether harassment had in fact occurred. The evidence at trial was that Piresferreira, and others, had been subject to verbal abuse and intimidation by Ayotte prior to May 12, 2005.
- On June 8, 2005, Bell Mobility accused Piresferreira of orchestrating "the constructive dismissal scenario" because she could not accept that her performance at work was currently below standards. The insulting implication in this letter was that Piresferreira was augmenting the significance of Ayotte's behaviour to her in order to cover up her own

²¹ *Lloyd v. Imperial Parking Ltd.* (1996), 192 A.R. 190 (Q.B.) at para.41. Other examples of cases where verbally and physically abusive conduct by a manager include *Tremblay v. Cormorant Holsteins Ltd.*, (2003), 232 Sask. R. 258 (Q.B.) and *Stamos v. Annuity Research & Marketing Service Ltd.*, [2002] O.J. No. 1865 (Sup. Ct.).

inadequacies. There has been no evidence whatsoever at this trial to suggest that Piresferreira has been anything other than honest and sincere in her response to the events at the Ottawa Bell Mobility office. There has been no suggestion by any of the experts who have assessed Piresferreira following May 12, 2005 that she has been manipulative or malingering.

- On July 19, 2005, Bell Mobility again accused Piresferreira of claiming constructive dismissal in reaction to being put on a PIP. They went further and stated that unless Piresferreira provided them with clear evidence of verbal or physical abuse, Bell Mobility had no choice but to maintain that Piresferreira had not been constructively dismissed. Bell Mobility assumed no responsibility to conduct a proper investigation as to whether verbal and physical abuse had occurred. I consider that startling given that Ayotte had already acknowledged that he had yelled and sworn at Piresferreira and had pushed her. As well, as reflected in Ayotte's 2004 performance review, Bell Mobility had been aware that Ayotte intimidated some of his subordinates and needed to work on his communication skills as a manager.

What is the Appropriate Notice Period?

[221] In *Bardal v. The Globe and Mail Ltd.* (1960), 24 D.L.R. (2d) 140 (Ont. H.C.J.), McRuer C.J.H.C. at 145 stated:

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.

This list of factors is not exhaustive. Other factors may have to be considered when appropriate.²² No one factor should be given disproportionate weight. The particular circumstances of the individual should be the carefully considered.²³

²² See *Machtlinger v. HOJ Industries Ltd.*, [1992] 1 S.C.R. 986; *Wallace v. United Grain Growers Ltd.*, [1997] 3 S.C.R. 701; *Minott v. O'Shanter Development Co.* (1999), 42 O.R. (3d) 321 (C.A.).

[222] In assessing damages for wrongful dismissal, the Court should not apply as a starting point any general principle or rule of thumb that an employee is entitled to one month's notice for every year worked, subject to adjustments upwards or downwards. Instead, the Court should undertake a careful weighing and blending of all relevant factors before arriving at a notice period.²⁴

[223] Piresferreira takes the position that she would have been entitled to 12 months' notice.²⁵ Bell Mobility takes the position that a reasonable notice period would have been eight to ten months.

(a) Character of Employment

[224] Piresferreira was an account manager responsible for her own sales territory. She was not in a supervisory or management position. She was the frontline worker in the chain of command in the sales department at Bell Mobility. This suggests a shorter notice period. On the other hand, Piresferreira was responsible for large government contracts that were an important source of income for Bell Mobility. Within the confines of her sales territory, she had considerable independence and discretion in terms of how she approached her work.

[225] The field of sales encompasses many environments and products. Piresferreira's sales skills and experience would be transportable to a setting outside of the cellular and data transmission context. On the other hand, all of Piresferreira's training and experience over almost 20 years was in a highly specialized and technical area. Her true value would be to one of Bell Mobility's competitors, of which there are a limited number. Considering Piresferreira's age, the specific focus of her training and experience would have limited her marketability as a sales representative in other settings.

(b) Length of Service

[226] Piresferreira had worked for Bell Mobility for nine years prior to the time of constructive dismissal. This is in the mid-range in terms of length of service. She came to the company after having worked for the Brazilian Embassy

²³ *Honda Canada Inc. v. Keays*, [2008] S.C.J. No. 40 at paras. 28-32.

²⁴ *Minott v. O'Shanter Development Co.*, *ibid.* at 346.

²⁵ Originally Piresferreira sought a notice period of 15 months, including three months as *Wallace* damages. After *Honda Canada Inc. v. Keays*, the claim was reduced to one of 12 months.

for 21 years and then Rogers for ten years. She anticipated that she would see out her career at Bell Mobility. The length of service at Bell Mobility does not suggest a lengthening or shortening of the notice period, though Piresferreira's 20 years in the same field suggests a lengthening of the notice period.

(c) Age of Employee

[227] Piresferreira was almost 61 when she was constructively dismissed. Her age, and the corresponding difficulty that creates for her seeking other employment, suggests a longer notice period. I consider this a very significant factor in determining the length of notice appropriate in this case.

(d) Availability of Similar Employment

[228] No evidence was adduced as to the availability of similar employment for Piresferreira in that she has not been medically fit to seek other employment since May 2005. That being said, the fact that she came to Bell Mobility from Rogers and there was evidence that there was some movement of other personnel from Bell Mobility to other competitors, such as Telus, suggests that similar employment may have been available to someone with Piresferreira's experience and success in sales in the cellular and data transmission field. Nevertheless, Piresferreira's age would have been a major impediment in securing other employment of a similar nature.

[229] The further difficulty for Piresferreira would have been that any new employer would expect a letter of reference from her former supervisor, and Ayotte was in that role for virtually all of Piresferreira's time at Bell Mobility. Finally, the fact that 2004 was such a poor year for Piresferreira would not have facilitated her landing a new position.

(e) Conclusion Regarding Notice Period

[230] On balance, I find that Piresferreira – even if medically able to seek alternate employment – would have had difficulty obtaining similar employment. I find that a reasonable notice period for an employee in Piresferreira’s circumstances would have been 12 months.

Damages for Wrongful Dismissal

[231] An employee who is wrongfully dismissed without adequate notice (in this case constructively dismissed without any notice) is entitled to damages consisting of the salary and other benefits the employee would have earned had the employee worked during a reasonable notice period. It is irrelevant if, due to disability, the employee could not have worked during the notice period. Damages are still based on what the employee would have earned if not disabled.²⁶

Notice Period

[232] For the purpose of calculating Piresferreira’s damages for the 12-month notice period, I am assuming that Piresferreira would have earned her salary of \$58,900 plus a sales bonus of \$50,000 plus a car allowance of \$586 per month over this period. Bell Mobility paid her full salary until July 20, 2005 and then 80% of her salary until November 22, 2005. It paid all of her car allowance until December 7, 2005. My understanding of the submissions made on behalf of Piresferreira is that she is not asking Bell Mobility to pay as damages amounts which it has already directly paid to her during the notice period. Consequently, the damages she is seeking in regard to the notice period are calculated as follows:

Salary		
gross amount 52 weeks	\$ 58,900	
less eight weeks sick leave at 100%	(\$ 9,062)	
less eighteen weeks short-term disability at 80%	<u>(\$ 16,311)</u>	
net amount	\$ 33,527	\$ 33,527
Sales bonus		\$ 50,000
Car allowance		
gross amount 52 weeks	\$ 7,032	

²⁶ *Sylvester v. British Columbia*, [1997] 2 S.C.R. 315 at para.9.

less twenty weeks paid	(\$ 2,704)	
net amount	\$ 4,328	\$ 4,328
Total		\$ 87,855

Deductibility of Long-term Disability Payments

[233] Even though Piresferreira received long-term disability benefits from Manulife from December 7, 2005 to May 24, 2006 in the approximate amount of \$18,123, she submits that this sum should not be deducted from the damages otherwise payable to her in regard to the notice period.

[234] Whether disability payments received by an employee during the notice period from a plan established solely by the employer should be deducted from the damages payable to the employee depends on the terms of the employment contract and the intention of the parties.²⁷ In *Sylvester v. British Columbia*, *supra* note 26, the Supreme Court of Canada's latest statement on this issue, the short-term and long-term disability benefits in question were funded entirely by the employer; the employee did not make any direct *or indirect* contributions to the plan. Major J. found that the employment contract did not provide for the employee to receive both disability benefits and damages for wrongful dismissal, and no such intention could be inferred.

[235] First, the terms of the two disability plans demonstrated that they were intended to be a substitute for the employee's regular salary; the employee who received disability benefits under either plan did not also receive a salary. Secondly, the simultaneous payment of disability benefits and damages for wrongful dismissal would be inconsistent with the terms of the employment contract. The assumption underlying the payment of damages for wrongful dismissal is that the employee was working during the notice period and receiving his or her regular salary; whereas the assumption underlying disability payments is that the employee was unable to work. It would make no sense to pay damages based on the assumption that the employee would have worked in addition to paying disability benefits based on the assumption that the employee was unable to

²⁷ *Ibid.* at para. 12.

work. This suggested that the parties had not intended the employee to receive both damages and disability benefits.²⁸

[236] Major J. noted that the decision as to whether disability benefits should be deducted from damages for wrongful dismissal where the employee contributed to the disability benefits plan was not before the court in *Sylvester*. He allowed as to how there may be cases where it could be inferred that the employee and employer had the intention that the employee could receive both disability benefits and wrongful dismissal damages for the same period of time; however, in the absence of direct evidence of such intention or a reasonable inference to this effect that could be drawn from the evidence, the employee dismissed while not working and the employee dismissed while working should be treated equally.²⁹

[237] In *McNamara v. Alexander Centre Industries Ltd* (“ACI”) (2001), 53 O.R. (3d) 481 (C.A.), McNamara, the President of ACI and a 24-year veteran with the company, went on sick leave for an indefinite period. One week later, ACI dismissed him without cause. McNamara’s physician and McNamara attempted to contact ACI’s owners to report that he would be able to return to work in two weeks. ACI never responded and never provided McNamara with any severance pay. McNamara received disability benefits from London Life. Litigation ensued and McNamara was awarded damages for wrongful dismissal.

[238] MacPherson J.A. noted that a significant feature in the case distinguishing it from *Sylvester* was that the long-term disability benefits in question were paid by a third party insurer with which the employer had contracted, and not by the employer itself. Therefore, there was no concern that the employer would have to pay twice for the same period of time. Macpherson J.A. stated:

...It is one thing to be concerned, as the court was in *Sylvester*, with double recovery when all the money comes from a single source, the employer. The concern should be significantly diminished when the double recovery flows from clear entitlement to two different and legitimate recoveries (damages for wrongful dismissal and disability benefits) *and* neither payor would be responsible for paying even a penny more than it should pay pursuant to its individual obligation.

²⁸ *Sylvester v. British Columbia*, *supra* note 26 at paras. 14-17.

²⁹ *Ibid.* at para. 22.

[239] The second distinguishing feature was that the question of employment benefits was integral to the discussions regarding salary when McNamara had first been hired. The two formed the compensation package that he was prepared to accept. There was in effect a trade-off between salary and benefits (including disability benefits).

[240] Although the terms of the employment contract were not of any assistance in deciding whether disability benefits should be deducted from wrongful dismissal damages, the Court of Appeal inferred from all of the circumstances of the employment relationship that a *reasonable* employer and a *reasonable* prospective employee, if they turned their minds to what eventually happened when McNamara was dismissed, would have agreed that disability benefits should not be deducted from wrongful dismissal damages. Some factors which the Court of Appeal considered relevant were that ACI would receive a windfall if disability payments were deducted from the wrongful dismissal damages even though it had acted abominably in dismissing McNamara the moment he became disabled, and McNamara would have received no true benefit from the disability benefits after having agreed to a lesser salary in order to have those benefits when he was first hired. If the disability benefits were not deducted, McNamara would get a bonus, but he was the aggrieved party and ACI would not have to pay out any more than it would have to have paid to an employee who was not disabled when he was fired.

[241] In *Sills v. Children's Aid Society of Belleville (City)* (2001), 53 O.R. (3d) 577 (C.A.), a decision released the same day as *McNamara*, the Court of Appeal again came to the same conclusion. Sills was given 14.5 months of working notice that her employment would be terminated and was promised additional severance pay upon termination. Within two months, Sills had become profoundly depressed and was unable to work. She received disability benefits but no further salary. She was also awarded damages for wrongful dismissal based on a notice period of 16 months in addition to severance pay. The Court of Appeal determined that her disability benefits were not deductible from her damage award. One factor it considered significant was that the disability benefits were part of Sills' compensation package and part of a trade-off of salary and benefits.

[242] Simmons J. A., relying in part on the reasoning in *Cunningham v. Wheeler*, [1994] 1 S.C.R. 359 at 400-403 per Cory J., regarding the insurance exception which exempts private insurance plan payments paid for by the injured

party from the rules against double recovery in tort cases, stated at paras. 45 and 46:

Absent an express provision precluding double recovery, in my view, the principles enunciated in *Cunningham* assist in determining whether an intention that there would be double recovery in the event of a wrongful dismissal can be inferred. I consider it reasonable to assume that an employee would not willingly negotiate and pay for a benefit that would allow her employer to avoid responsibility for a wrongful act. I consider it reasonable to infer that parties would agree that an employee should retain disability benefits in addition to damages for wrongful dismissal where the employee has effectively paid for the benefits in question.

The same reasoning applies to the suggestion in *Sylvester* that a disabled employee who receives adequate notice should not be treated differently than a disabled employee who is wrongfully dismissed – an employer should not be relieved of the obligation to pay damages for a wrongful act because of a benefit plan provided by the employee. Moreover, the concern expressed in *Sylvester*, that disabled employees who are wrongfully dismissed be treated the same as working employees who are wrongfully dismissed, simply does not arise where the employee has paid for the plan that provides a disability income.

[243] In *Egan v. Alcatel Canada Inc.*, [2006] O.J. No. 34 (C.A.), Egan left a high-paying, long-term position with Bell Canada to move to Alcatel. After less than two years, without prior notice or cause, Egan was terminated and given severance equivalent to only three months notice. Shortly after the notice period expired, Egan was diagnosed with a major depressive disorder which rendered her disabled. She applied for disability benefits under the plans that she had had through Alcatel but was denied coverage because she was no longer considered an employee. Egan sought damages for wrongful dismissal plus damages for her loss of the disability benefits that would have been available to her had she received proper notice and had become disabled during that notice period.

[244] The Court of Appeal did not disturb the trial judge's finding that a reasonable notice period would have been nine months. Had Egan received such notice, she would have become disabled during the notice period. The Court of Appeal decided that Egan's damages for wrongful dismissal should be calculated as being her salary for the period following her dismissal when she would have been able to work and then her disability benefits for the remaining notice period plus the additional period (after the end of the notice period) during which she would have been entitled to receive her disability benefits under the terms of the

plan. The Court of Appeal also did not interfere with the trial judge's finding that it was not part of the contract of employment and could not be inferred that the parties' intention in the circumstances would have been that Egan was entitled to both damages for wrongful dismissal and disability benefits. The reasoning supporting this conclusion was not explored in the same fashion as it was in the two earlier Court of Appeal decisions referred to.

[245] The statement by Labrosse J.A. to the effect that the trial judge had erred in awarding Egan her full salary for the entire notice period because during part of the notice period Egan had been disabled and would not have been able to work seems at odds with the following statement by Major J. in *Sylvester*:³⁰

... an employee who is wrongfully dismissed without adequate notice of termination is entitled to damages consisting of the salary the employee would have earned had the employee worked during the notice period. The fact that an employee could not have worked during the notice period is irrelevant to the assessment of these damages. They are based on the premise that the employee would have worked during the notice period. Therefore, an employee who is wrongfully dismissed while working and an employee who is wrongfully dismissed while receiving disability benefits are both entitled to damages consisting of the salary the employee would have earned had the employee worked during the notice period.

[246] Bell Mobility's long-term disability plan is provided through Manulife. Since December 7, 2005, Manulife has been paying Piresferreira disability benefits calculated as two-thirds of her basic salary less any CPP disability benefits to which she is entitled. In addition, under the terms of the plan, the benefits payable to Piresferreira will be reduced by her earnings or payments from any employer, earnings recovered through a legally enforceable cause of action against some other person or corporation in accordance with the provisions in the Group Benefits Policy relating to third party liability. Such provisions include the requirement regarding reimbursement relating to tort damages for past or future loss of income. The benefits under both the short and long-term disability plans are taxable because Bell Mobility paid for the short-term benefits and paid the premium for the long-term benefits.

[247] Bell Mobility is asking that long-term disability benefits paid to Piresferreira be deducted from any damages awarded for wrongful dismissal. One

³⁰ *Supra* note 26 at para. 9.

of the arguments it makes in support is that Piresferreira did not contribute directly or indirectly to the cost of those benefits. Bell Mobility could easily have proven this to be the case through the production of relevant documentation or through calling a witness with knowledge of the subject. It did neither.

[248] Piresferreira submits that she contributed indirectly to the cost of long-term disability benefits because her compensation package consisted not only of her salary and sales bonuses, but also of her benefits package, over which she had some control through the Flex benefits system. Each year Piresferreira was assigned a Flex salary and a Flex credit. She had various benefit elections which she could exercise to use up her Flex credit. That portion of the Flex credit that she used was deducted from her Flex salary to determine her Adjusted Annual Salary Rate. In the example for 2002 tendered in evidence, Piresferreira had chosen a particular long-term disability plan (70% of base pay, 3% indexing) which had a cost assigned to it. The cost resulted in a deduction from her annual salary rate, according to this document. However, no evidence was tendered as to how this salary rate related to the actual salary received by Piresferreira. This document made no reference to the short-term benefits paid out by Bell Mobility.

[249] A benefits profile for Piresferreira printed in late 2004 referred to annual flex dollars, other annual employer contributions, an annual Omniflex payroll deduction and annual taxable benefits and indicates that long-term disability is at no cost to the employee. Again, no evidence was adduced to explain the meaning of this document. No reference was made in that document to short-term disability benefits.

[250] Bell Mobility failed to provide other – more relevant – documentation explaining Flex credits and failed to call any witness from Bell Mobility who could adequately explain how the Flex credit system worked. Isabelle Forest (“Forest”), who was the only personnel representative from Bell Mobility called to testify, did not know if there was any documentary evidence supporting the proposition that Bell Mobility pays the entirety of disability benefits for its employees and could not explain the Flex credit system. All Forest could say was that salary and benefits together entailed the compensation package a Bell Mobility employee received, and that is what they are told when they are hired.

[251] The long-term disability benefits were not paid by Bell Mobility; they were paid by Manulife. From the scant evidence tendered, I conclude that

Piresferreira did contribute indirectly to the cost of the long-term disability benefits both because when she was hired she was told that her benefits package formed part of the compensation she would be receiving but also because the Flex credit system provides confirmation that notionally an employee's salary is impacted by the extent to which the employee has certain benefits, and long-term disability benefits are specifically referred to as benefits under the Flex system. In my view, this distinguishes this case from *Sylvester* and brings it more in line with *McNamara* and *Sills*. In essence Piresferreira is entitled to both forms of compensation that she contracted to receive under her employment agreement with Bell Mobility: her salary and long-term disability benefits from Manulife. As well, considering Bell Mobility's very poor treatment of Piresferreira in May 2005, there is no reason why it should have the damage award it is obliged to pay to Piresferreira reduced because she had the misfortune of becoming disabled as a result of its treatment of her. Such an outcome rewards if not encourages the harsh treatment of employees at the time of dismissal.

Moral Damages

[252] In *Wallace v. United Grain Growers*, *supra* note 22, Iacobucci J. stated at paras. 95 and 98:

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....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 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.

[253] *Fidler v. Sun Life Assurance Co. of Canada*, [2006] 2 S.C.R. 3 at para. 48 provides that "as long as the promise in relation to state of mind is a part of the bargain in the reasonable contemplation of the contracting parties, mental distress

damages arising from its breach are recoverable”. *Wallace* confirms that in the employment context there exists an expectation that, in the course of dismissing an employee, an employer will act in good faith. If an employer does not do so, this may lead to foreseeable, compensable damages under the general principle regarding compensatory damages articulated in *Hadley v. Baxendale*(1854), 9 Ex. 341, 156 E.R. 145 at 151; namely, that damages are recoverable for a contractual breach if the damages are “such as may fairly and reasonably be considered either arising naturally ... from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties” when the contract was entered. (See *Fidler, supra* at para. 42, 49 and 54; *Honda Canada Inc. v. Keays, supra* note 23 at paras. 53-58.)

[254] I find that Ayotte’s conduct as Bell Mobility’s representative between May 12th and May 24th was reprehensible and showed a callous disregard for Piresferreira’s emotional health. I find that the conduct of Shiu and Sylvestre as Bell Mobility’s representatives between May 20th and May 24th was unfair and insensitive. Both relied on information from Ayotte, without affording Piresferreira the opportunity of being properly heard. Both approached their task of dealing with Piresferreira’s complaint with a bias against her planted by Ayotte’s assertion that Piresferreira was likely to go on sick leave as soon as she was presented with a PIP. They let this bias win out against a reasonable, objective and appropriate response to Ayotte’s behaviour. That is clear from their quick response of downplaying the significance of the verbal abuse and physical assault and instead focusing on the PIP. It is also clear from their expectation that Piresferreira would continue in the same setting, reporting to Ayotte on a daily basis and being subject to his complete control over her targets, her territory, her objectives and her performance reviews. At no time before Piresferreira was constructively dismissed did Bell Mobility advise Piresferreira of any concrete measures that it would take to ensure that her workplace in the future would be a safe one. The way Bell Mobility handled Piresferreira’s complaint amounted to bad faith.

[255] Bastarache J. in *Honda, supra* note 23 at para. 59 provides the following guidance as to how moral damages resulting from conduct in the manner of termination are to be determined:

Damages attributable to conduct in the manner of dismissal are always to be awarded under the *Hadley* principle. Moreover, in cases where damages are awarded, no extension of the notice period is to be used to determine the proper

amount to be paid. The amount is to be fixed according to the same principles and in the same way as in all other cases dealing with moral damages. Thus, if the employee can prove that the manner of dismissal caused mental distress that was in the contemplation of the parties, those damages will be awarded not through an arbitrary extension of the notice period, but through an award that reflects the actual damages.

[256] Here, an award of damages has already been made against Bell Mobility in regard to assault, battery, and the intentional and negligent infliction of emotional distress and mental suffering in the amount of \$45,000. I would consider this an appropriate amount for moral damages associated with Bell Mobility's breach of its employment contract with Piresferreira, if damages were payable for breach of contract.

Aggravated Damages

[257] The issue of aggravated compensatory damages being recoverable by Piresferreira for the manner in which she was constructively dismissed has already been dealt with under the claim for moral damages arising out of the breach of the employment contract and under the tort claims.

Punitive Damages

[258] *Vorvis v. Insurance Corp. of British Columbia*, [1989] 1 S.C.R. 1085 at paras. 25-27 stands for the proposition that punitive damages are recoverable in regard to a breach of contract where the defendant's conduct is "an actionable wrong" which caused the injury complained of by the plaintiff and the conduct itself was "harsh, vindictive, reprehensible and malicious" i.e. "extreme in its nature and such that by any reasonable standard it is deserving of full condemnation and punishment."

[259] *Whiten v. Pilot Insurance Co.*, [2002] 1 S.C.R. 595 at para. 79 clarifies that a failure to act in good faith under a contract in which it is contemplated that the parties will act in good faith is a breach of contract independent of and in addition to any breach of other contractual terms. It constitutes an "actionable wrong" within the *Vorvis* rule. Consequently, Bell Mobility's failure to act in good faith under its employment contract with Piresferreira entailed an independent actionable wrong.

[260] Ayotte's conduct as Bell Mobility's representative, and therefore Bell Mobility's conduct, was harsh and vindictive and deserving of punishment. I do add, however, that I do not find the behaviour of Shiu and Sylvestre, considered in isolation of the conduct of Ayotte, to have been so egregious that it would have warranted punitive damages for breach of contract. In any event, the conduct of Ayotte, Shiu and Sylvestre has already resulted in significant compensatory damages having been assessed against Bell Mobility in the context of the tort claims. In my view, no further punitive damages would be required to bring home to Bell Mobility how inappropriate the actions of its employees were at the time Piresferreira was constructively dismissed.

Conclusion Regarding Wrongful Dismissal Damages

[261] In that Piresferreira's loss of income from May 24, 2005 forward and the damages she suffered as a result of the way in which she was dismissed have already been compensated under her tort claims, no damages are ultimately payable under the wrongful dismissal claim. To have damages payable under both the contract and tort claims would amount to double recovery by Piresferreira.

Damages under the Family Law Act

[262] Under s. 61 of the *Family Law Act*, R.S.O. 1990, c. F. 3, Scott, as a same-sex partner of Piresferreira is entitled to recover damages relating to the loss of guidance, care and companionship that she might reasonably have expected to receive from Piresferreira if she had not suffered the torts which I have found she suffered at the hands of Ayotte and Bell Mobility. I have already described how Piresferreira was less able to participate in her life with Scott after the events of May 2005 as a result of the way she was treated by Ayotte and Bell Mobility. Although Piresferreira was still able to participate in some of the social, recreational, companionship and household activities that she had participated in previously, there were many that she could not do or enjoy with Scott. I assess Scott's damages at \$15,000.

Disposition

[263] Ayotte and Bell Mobility are jointly and severally liable to pay the following damages:

To Piresferreira:

General damages for assault, battery, intentional and negligent infliction of emotional distress, mental suffering, psycho-traumatic disability (\$50,000 less 10% contingency)	\$ 45,000
Loss of past and future income (\$500,924 less 10% contingency)	\$450,832
Special damages	<u>\$ 5,123</u>
Total	\$500,955

To Scott:

General damages for loss of guidance, care and companionship	\$ 15,000
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[264] Pre-judgment interest attaches to the awards of general damages and special damages commencing on June 1, 2005. Pre-judgment interest attaches to the remainder of the award from April 1, 2008 forward.

[265] If I have made any mathematical or computational errors, an appointment may be scheduled through the Trial Coordinator to speak to the issue. If the parties are unable to agree on costs, written submissions of no greater than five pages in length, exclusive of exhibits, may be made in accordance with the following timetable. Piresferreira shall have two weeks to deliver costs submissions. Ayotte and Bell Mobility shall have two weeks thereafter to deliver responding submissions. Piresferreira shall have one week thereafter to deliver brief submissions in reply.

Aitken J.

Released: December 3, 2008

COURT FILE NO.: 05-CV-31934
DATE: 2008/12/03

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:

Marta Piresferreira and Judy Scott

Plaintiffs

- and -

Richard Ayotte and Bell Mobility Inc.

Defendants

REASONS FOR JUDGMENT

Aitken J.

Released: December 3, 2008