IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *TeBaerts v. Penta Builders Group Inc.,*
2015 BCSC 2008

Date: 20151103
Docket: S149613
Registry: Vancouver

Between:

Karena TeBaerts

Plaintiff

And

Penta Builders Group Inc.

Defendant

Before: The Honourable Madam Justice Fleming

Reasons for Judgment

Counsel for the Plaintiff:	R.B. Johnson
Counsel for the Defendant:	D.S. Boyle
Place and Date of Trial/Hearing:	Vancouver, B.C. June 23 - 26, 2015
Place and Date of Judgment:	Vancouver, B.C. November 3, 2015

Introduction

[1] On November 27, 2014 the plaintiff, Karena TeBaerts, was summarily dismissed from her employment as a project consultant and account manager with the defendant Penta Builders Group Inc. ("Penta"). At the time of her dismissal Ms. TeBaerts had been a full time employee for approximately 11 years.

[2] Penta is in the business of building homes as well as real estate development. Barry Cavanaugh is Penta's president, sole director and sole shareholder. He was Ms. TeBaerts' immediate supervisor. Penta also employed the plaintiff's brother, Danny TeBaerts as a carpenter and her father, Gus TeBaerts as one of its senior project managers, along with Mr. Cavanaugh's daughters, Chelsea Kavanagh and Ashley Gaetz and her husband, Marty Gaetz. Both daughters worked in the office with the plaintiff. Chelsea was responsible for accounts payable and receivable and Ashley was the office manager. Marty was employed as a site supervisor. I will refer to the various family members by their first names to avoid confusion.

[3] In this action, Ms. TeBaerts sues for wrongful dismissal, stating the defendant did not have cause to dismiss her. She seeks general damages as well as "additional" and punitive damages for the callous and insensitive manner in which she says she was dismissed, arguing the defendant failed to discharge its duty of good faith and fair dealing. Further she claims Penta committed the tort of breach of privacy by accessing a personal email exchange on her work email account, contrary to the provisions of the *Privacy Act*, R.S.B.C. 1996, c. 373. She asks to be compensated for the breach of her privacy.

[4] Penta takes the position that Ms. TeBaerts was terminated for cause and is not entitled to damages of any kind. In addition to her work as a project consultant and account manager, the plaintiff managed the defendant's computer system, which included organizing files on its computer server/Dropbox. In the week prior to her dismissal the plaintiff deleted some files from the server related to two building projects and engaged in an email exchange with her mother regarding other

employment prospects for her father Gus. Based on these events, Penta provides the following three reasons for dismissing the plaintiff:

a. she intentionally deleted some files stored on Penta's server with malicious intent, namely, to prevent Marty from continuing to do his job effectively because she thought he behaved atrociously toward her brother earlier that week and was being rewarded for his negative behaviour;
b. she was not being forthright and honest in her explanations for the deletions;
c. she was assisting her mother in finding other work for her father Gus, the second most important person in the company.

Issues

[5] The following issues arise in this proceeding:

a) Has Penta established that it had cause to dismiss Ms. TeBaerts without notice?

b) If not, what is the reasonable notice period to which Ms. TeBaerts was entitled?

c) If Penta did not have cause to dismiss Ms. TeBaerts, is she entitled to awards of additional and punitive damages?

d) Did Penta commit the tort of breach of privacy?

e) If so, what damages should be awarded to Ms. TeBaerts as compensation for the invasion of her privacy?

Background

[6] Ms. TeBaerts is 32 years old. After graduating from high school in Richmond she attended Kwantlen College intending to complete an arts degree. Her course work included accounting, computer science and some psychology. She worked for a bank from 2000 to 2004. Her job with Penta began in January 2004. She later completed some interior design courses offered by BCIT, but did not obtain a diploma or degree.

[7] Ms. TeBaerts was first hired by Penta as an accounts payable clerk. Her role changed over time. In or about 2005 she became the account manager and began providing design services or project consulting. From then onward her job title was that of Project Consultant/Account Manager. Her main responsibilities are identified in her notice of civil claim as follows:

- Administration of projects including processing sales contracts and Change Work Orders;
- Developing project colour schemes and specification packages;
- Performing job costing and budgeting;
- Coordinating marketing efforts including showhome/sales centre design and set up;
- Managing full cycle accounting for eight of the Defendant's companies;
- Performing GST/HST processing and accounts receivable functions;
- Payroll, workers' compensation, human resources and employee benefits administration; and
- Other duties as required.

[8] Ms. TeBaerts' other duties, as noted above, included managing Penta's computer system. She ensured the accounting software was up to date. She initiated the installation of a server system and a Dropbox. The purpose of the server and the Dropbox was to facilitate the sharing of information and to make the content of files regarding Penta's building projects easily accessible, particularly offsite. Ms. TeBaerts organized and maintained the files on the server and Dropbox.

[9] In addition to owning and operating Penta, Mr. Cavanaugh along with his daughters and his wife owned another company called Oaktree Farms Ltd. ("Oaktree"). Ms. TeBaerts was aware Penta built homes on properties owned by other companies, including Oaktree. Ms. TeBaerts did the accounting for Oaktree as well as design work for houses being built by Penta for Oaktree. Not long before November 2014, Penta had completed the construction of four homes for Oaktree located on Gary Street in Richmond. The plaintiff had put together the design specifications for those homes. In November 2014, Penta was building two other

homes for Oaktree located on Richmond Street. Gus was the project manager for those projects, Marty the site supervisor and Danny one of the carpenters/labourers.

Summary of the Evidence

The Plaintiff's Work History with the Defendant

[10] Ms. TeBaerts described herself as a hardworking and highly organized employee with a particular passion for the design work she did for Penta. The company did not have a performance review process, or any policies regarding employee conduct, or computer use. The plaintiff was never disciplined during her employment with Penta. Instead, Penta provided Ms. TeBaerts with various pay increases. During her last few years with Penta, she also received two bonuses of $10,000 each year in or about July and December along with the other managers. Those bonuses were sometimes accompanied by letters of appreciation. In 2014 she received the usual bonus in July of $10,000 and as well as an additional $10,000 special bonus in recognition of her hard work and loyalty. Mr. Cavanaugh gave her a hand written card of thanks with the special bonus. Ms. TeBaerts was one of a few people that were a part of a successorship plan for Penta in the event something happened to Mr. Cavanaugh.

[11] Although he did not dispute Ms. TeBaerts was a valued employee who performed well and had never been disciplined, Mr. Cavanagh gave some evidence about her failure to return to work on schedule from a holiday she took a number of years ago. Mr. Cavanaugh suggested the plaintiff was dishonest at the time about why her return was delayed. His testimony on the issue was somewhat vague and uncertain. He thought she said she could not fly back because of an ear infection but a Facebook post showed her "having fun in the sun". The plaintiff acknowledged she was late in returning by two days but denied every claiming there was a medical explanation. She said at the time she apologized to Mr. Cavanagh for her actions, inviting him to fire her if he wished. Instead she went back to work without any action being taken by Penta.

The Work Environment

[12] The plaintiff testified she regarded Mr. Cavanaugh as a generous but demanding employer with extremely high expectations. In cross-examination the plaintiff described the work environment as male dominated, explaining she found the older men she worked with did not always respect her knowledge of construction given that she was a young woman. She also identified some bullying or harassment that had occurred amongst Penta staff that she said went unaddressed. In particular, she mentioned that for a number of years she received the unwanted attention of a male employee who was responsible for cleaning the office and job sites. He would vacuum her initials into the carpet at the office and leave her flowers. If she did not acknowledge him, he would follow her to job sites and call her names in front of other people. According to Ms. TeBaerts nothing was ever done about his behaviour although she complained; instead it was simply laughed at. Mr. Cavanaugh testified he knew the employee "liked my girls" but did not recall events "exactly" as plaintiff described. He offered no other account however, and acknowledged he had no reason to doubt Ms. TeBaerts' evidence on this point.

[13] Ms. TeBaerts did not dispute that she viewed Mr. Cavanaugh's son in law Marty as unpleasant if not abusive to other staff. She said she and Chelsea would discuss his negative conduct and how he was not made to answer for it. The two of them shared a joke where they would make a sweeping motion with their hands as if to say his behaviour was simply swept under the rug. The plaintiff's dislike of Marty was mutual. He complained in his evidence she was disrespectful to him in the workplace. He also disliked her brother Danny. As a site supervisor, Marty was Danny's boss on job sites where they both worked. Marty complained Danny would not follow his directions.

[14] Ms. TeBaerts identified both Chelsea and Ashley as close friends. She said they often talked about personal matters with one another. She testified Ashley and Chelsea had told her during the time leading up to her dismissal that Marty was struggling and really unhappy. Ashley denied telling the plaintiff such things about Marty. She testified that when her oldest child was born in or about February 2013,

she had stopped her friendship with Ms. TeBaerts, acknowledging they had spent a great deal of time together outside the office up to then. The plaintiff was not cross-examined on this point.

Marty Quits Penta

[15] Around the time of the plaintiff's termination, Ashley and Marty were starting to build their own home, through Penta, referred to as Caravel. Ms. TeBaerts had been helping Ashley with the design work.

[16] On Wednesday, November 19, 2014, Ms. TeBaerts learned that Marty had quit Penta. She testified that her father informed her that after quitting, Marty went to the job site where her brother Danny was working and "started a fight" with him. Ms. TeBaerts understood that Marty was verbally abusive to Danny and threatening although no physical altercation occurred. There is no dispute a confrontation occurred between the two men, initiated by Marty after quitting his job. Mr. Cavanaugh indicated he became aware of the "site incident" between Marty and Danny before meeting with Marty the following morning. Although he testified he did not tolerate bullying on the job site, Mr. Cavanaugh also said verbal fights happen quite often and they are typically handled by the project manager. The project manager in this instance was Gus, Danny's father. Mr. Cavanaugh testified he did not take any action to address the conflict between Danny and Marty, stating he was not asked to get involved. He also said he may have told Marty to apologize to Danny, even if he felt justified. Mr. Cavanaugh acknowledged Gus was upset about the incident when they discussed it at some point.

[17] On Thursday November 20, 2014 at 11:30 am Ashley sent Ms. TeBaerts an email that reads:

> Hey,
>
> Marty quit Penta today. So we are going to be doing more of our own thing and not using Penta anymore. So not sure what we are going to do but I am just following his lead. It's time for us to make changes ….

[18] Her email follows one from the plaintiff to Ashley at 10:32 a.m. that simply reads: “<meeting.ics>”. The plaintiff indicated her message was an outlook request sent in response to an earlier request from Ashley for a meeting regarding the Caravel project they both had in the calendar, by way of explanation for the subject line in the email from Ashley to the plaintiff: “Re: Caravel Design Meeting”.

[19] Ms. TeBaerts testified that Ashley had been talking for a long time about Marty and her taking the houses being built by Penta for Oaktree and doing “their own thing”. The plaintiff said she therefore understood Ashley’s email to mean they were proceeding with that plan.

[20] In her evidence Ashley denied ever discussing such a plan with Ms. TeBaerts. She said “doing more of our own thing” was a reference to not using Penta to build Caravel as opposed to the Richmond Street houses. During his testimony, Marty was asked if there had been any discussion about him taking over and building houses for Oaktree to which he replied, “No, Oaktree is owned by the women in the family”. He also denied he was ever employed by Oaktree and Mr. Cavanaugh denied Oaktree had its own employees, although Penta’s admissions include the fact that Mr. Gaetz resigned from Penta on November 19, 2014 and *Oaktree* on November 21, 2014.

[21] The parties agree that Ashley’s reference to Marty quitting “today” in her email of November 20, 2014 is incorrect. He quit on November 19, 2014. His own evidence was that morning he texted Ashley and told her to let her father know that this was his last day with Penta. Mr. Cavanaugh testified Ashley sent him an email to that effect on November 19, 2014. There is no evidence as to why Marty ended his employment so abruptly and without the basic courtesy of informing Mr. Cavanaugh directly.

[22] After receiving Ashley’s email on November 19, 2014, Mr. Cavanaugh said he tried repeatedly to reach Marty by phone. Marty eventually called him around 5 p.m. and they arranged to meet the following morning. Marty testified that during their phone call Mr. Cavanaugh tried to talk him out of quitting and offered to let him

continue working on the Richmond Street homes for Penta without the involvement of Danny or the plaintiff. Mr. Gaetz said he agreed to sleep on it but he had no real intention of staying on with Penta. Marty said he was tired of being the owner's son-in-law. He was frustrated about being unable to manage some of the people on the job site, including Danny and the delay in receiving design specifications from the plaintiff. Mr. Cavanaugh was not critical of the plaintiff in this regard, described her as having a fairly full plate. He also said he was very concerned about the plaintiff's father Gus being "extremely overloaded" already, suggesting losing Marty would make that worse.

[23] The next morning on November 20, 2014, Mr. Cavanaugh and Marty met as planned met and, according to Marty they continued the discussion about him working on the Richmond Street projects for Penta without Danny and the plaintiff. Mr. Cavanaugh described these as Marty's stipulations for staying "on board" and testified they also discussed the "site incident" involving Danny. According to Mr. Cavanaugh, he agreed that Marty could hire his own designer and asked him to talk to the plaintiff and gather as much information as he could and go from there. Marty's evidence was Mr. Cavanaugh asked him to relieve the plaintiff of her responsibilities for the design work on the Oaktree projects. According to Mr. Cavanaugh at the conclusion of the meeting Marty was going to continue to be employed by Penta.

[24] After meeting with Mr. Cavanaugh, Marty arrived outside Penta's office around noon, just as the plaintiff was leaving for an appointment. He indicated he wanted to speak with her. She asked if it could wait. He said no. The two of them then went into the office. According to both the plaintiff and Marty, he asked her if she had the exterior specifications completed for the Richmond Street houses. She informed him she did not but could finish them that afternoon. Ms. TeBaerts testified at that point, Marty used harsh language and told her he was done, he no longer needed her "specs" for "his houses", and he was bringing in a new designer. The plaintiff testified she asked him to confirm multiple times that he did not need any of the specifications she had done to date, or for her to do any more work and he did.

[25] Marty's testimony on this issue was different. He said he told her he needed and would take whatever work she had already finished, but she was not required to do anything more. He said he did not believe he told her he would be hiring another designer, indicating he was trying to be nice and he assumed she would not take that news well. He denied ever saying he did not need the work she had already done.

[26] Both the plaintiff, Marty and Chelsea testified she was in the office at the time of their conversation. Her evidence was very similar to Marty's. According to Chelsea, after Ms. TeBaerts offered to complete the specifications that afternoon, Marty said words to the effect of, "I'll take what you have and you're out", to which the plaintiff responded with, "That is the best news I have heard all day". Neither Chelsea nor Marty suggested he told the plaintiff about the plan apparently formulated with Mr. Cavanaugh shortly beforehand for him to stay on with Penta. Chelsea denied that the plaintiff asked Marty to confirm that he did not need the work she had already done on the Richmond Street houses. Chelsea also testified there was no discussion about Marty hiring another designer to do the work.

[27] At 1:19 p.m. not long after meeting with Marty, however, Ms. TeBaerts replied to Ashley's earlier email:

> Yah no problem. He just told me that he's hiring someone else to do the specs for his houses. Just let me know if you need anything personally for Caravel, I'd be happy to help you it on the weekends if you need it.

[28] There is no explanation for how the plaintiff would know at that point that another designer was being hired, if Marty had not told her this during their meeting. Furthermore, Ashley's only response to the plaintiff's email referring to and distinguishing "his houses" from Caravel was: "Thank you! It was time for a change and no better time than now".

The Plaintiff Deletes Files and Suggests a Recruiter to Her Mother

[29] On the morning of November 21, 2014, the plaintiff deleted some of Penta's files relating to the Richmond Street projects from the company server. There is no dispute about which files she deleted, or that they were fully restored the same day.

[30] The plaintiff testified that she deleted the files because she understood from her communications with Ashley and Marty the Richmond Street houses were no longer Penta projects and therefore the files were no longer required. In addition, Marty had told her he did not need the work she had already done. She explained that deleting unnecessary files was a regular part of the work she did to maintain and organize the server. She also specified that all of the documents in the deleted files were available in hard copy within the office and the major documents were also stored on some of the computers in the office. Certainly, Mr. Cavanaugh and her father both kept all such documents on their own computers. Mr. Cavanaugh did not deny that all of the documents stored on the deleted files could be found within the office, but both he and Chelsea in particular testified it would be time consuming to do so.

[31] At 8:05 a.m. on November 21, 2014, the plaintiff received an email sent from her parents' email address attaching a link to a website called sheltermodular.com/careers/, which read: "this is the job I found for dad. Ma". Ms. TeBaerts testified she had no doubt the email was from her mother. According to the plaintiff, her mother had been encouraging her father to find other employment, but he refused to discuss the matter. Her mother was concerned because Gus worked very long hours, was highly stressed, and was suffering from high blood pressure. The plaintiff stated her mother regarded Penta as a toxic work environment, but had made a "rule" that they were not talk about the business in front of Gus. The plaintiff described her father as extremely loyal to Mr. Cavanaugh. Ms. TeBaerts testified she herself had never discussed with her father the idea of looking for another job or provided him with any job postings. I accept the email was in fact from her mother.

[32] At 11:16 a.m. Ms. TeBaerts responded to her mother's email":

> It doesn't pay very much... You might want to consider reaching out to a recruiter. I think I might do that.
>
> Dad said Marty fired Tim this morning too and Tim got in trouble for it of course. He's on quite the rampage. I went in and deleted all of the other design work I had done for "his" houses so he can't use it or refer to it.

[33] Tim was also employed by Penta and had been working on the Richmond Street houses.

[34] At 11:25 a.m., in response to a further email from her mother, the plaintiff wrote:

> Chelsea said Marty wants to meet with Dad today because he respects him. I told Chelsea that's a joke and that nobody, including Dad, respects Marty and that Marty is not his favorite person at the moment. I did that because she has a tendency to pass along information like that … Marty's getting rewarded for his asshole behaviour as per usual and it's ridiculous.

[35] In a letter to Penta's counsel dated April 23, 2015, the plaintiff explained what she meant by Marty being rewarded for his bad behaviour as follows:

> In the days before Ms. TeBaerts sent this email, she was made aware, through numerous conversations with Chelsea and Ashley, that Marty wanted to work less, thought he should be earning more money, felt disrespected by co-workers, was frustrated with how Barry ran Penta and therefore wanted to either start his own company or seek employment elsewhere.

[36] The letter lists various examples of Marty's destructive behaviour in the workplace that the plaintiff is said to have observed and suggests that if another employee had engaged in such conduct, disciplinary measures would have presumably occurred. The plaintiff then writes that she used the term "again" in the email to her mother because his misconduct was not new behaviour and yet he was never disciplined. Instead, in her view, he was rewarded with promotions and higher salaries negotiated by Ashley. The plaintiff regarded his reward in this instance as being "allowed" to resign from his position with Penta, while retaining management of the Oaktree homes only, thus reducing his workload while maintaining Penta resources at his disposal (including staff) and likely increasing his level of compensation.

[37] At 12:42 p.m. on November 21, 2014, Ashley sent an email to the plaintiff that included Mr. Cavanaugh, asking her to restore the deleted files or provide them to her by email:

> Hi Karena,
>
> I noticed the Richmond street files on the server have been removed. I would like to get these so I can have them for my records please. Can you put them back on so I can transfer today or email them to me. I understand this is Penta's server but give me a chance to at least get this whole thing organized as it is frustrating, as it is that now I have to start from scratch on this spec as nothing we talked about was documented. I know you and Marty have personal issues but this is my company too and it effects me as well.

[38] Ashley could not explain why she referred to the Penta server and getting the "whole thing organized", if there was no plan for the Richmond Street houses to be built by her husband without Penta. At the time, Ashley was on a maternity leave. She said she regularly went onto the server to look at the Oaktree files and the specifications and noticed files were missing that morning. She testified she assumed the plaintiff deleted them because of her anger towards Marty.

[39] At 1:01 p.m. on November 21, 2014, the plaintiff contacted the defendant's IT contractor and asked that the deleted files be restored. At 5:07 p.m. she was informed that they had been recovered. In his evidence, the contractor described the retrieval of the files as routine.

[40] Mr. Cavanaugh responded to Ashley's email to the plaintiff at 1:23 p.m.: "Good point. I assumed that you took file after altercation between Karena + Marty yesterday." Two minutes later he sent a further email that read:

> Hi Karena. Where is this file. I'm not going to get into the middle of yours + Marty's issues but Ashley is correct so let's have an amiable transfer of information. Thank you.

[41] Ashley replied at 2:05 p.m.:

> Thank you dad, but I don't want to play any games here, I know there was no need to delete these files for any other reason than the personal conflict you have with Marty. I need the digital plans and it the spec information that was already in the folder for reference too please. Oaktree is a division run out of the Penta office and we all need to work together professionally. Karena you

> do not decide what files are on the Penta server or not. I am a Penta employee and can access this server and all its folders as I wish and Oaktree is my company. If myself or another owner of the Oaktree company wish to remove these files from the Penta server then we will do so. I appreciate your cooperation and expect that this oversight can be dealt with professionally and our professional relationship can continue as smoothly as it has always been.

[42] At 6:54 p.m. the plaintiff responded:

> Hi Ashley and Barry,
>
> Firstly I would like to clarify that Marty and I did not have an altercation yesterday, he simply let me know that he would be hiring someone to do the specifications for his houses from this point forward; which I told him was perfectly understandable seeming as how delayed I am in providing him the information he needs most of the time anyways. It was a very civil encounter actually given the circumstances.
>
> Despite how I feel about his conduct over the years, I have never once let my personal feelings for Marty affect our professional, working relationship and this is the case here as well. I made an assumption when I was cleaning up the server, as I do regularly so that it stays organized and relevant, that these files were not needed anymore as it was my understanding that 1) Penta would no longer be involved with the construction of Oaktree homes, 2) that someone else was being brought in to do the specifications and 3) Marty has repeatedly said he never uses the files on the server anyways. Despite what you have implied, my actions were not vindictive in nature especially since the information that was saved there is duplicated in many other forms - you've said yourself that you have to save it on Marty's computer for him all the time so I thought you would have copies. Ashley I have all the working specs and design notes for the Richmond St houses readily available, all you had to was ask for them. Most of the new Richmond St spec is not even on the server yet, it's in a file folder on my desk. The files for Garry Street were just moved to the Past Projects folder - they still contain all their information. You're absolutely right that however you want to use Penta's resources is none of my concern and I don't endeavour to "control" the files on the server. The folders have been restored and if you want to keep them there it makes no difference to me.
>
> I'm certainly taken aback by the tone of your email especially after I reached out to you on a personal level and offered to help you on my own time if you needed assistance with the specifications, or anything during this transition. I'm not interested in "playing games" and if I was, I wouldn't have offered to help in the first place. In fact, I've always supported and encouraged you and tried to help make your projects as successful as possible. To be completely honest, I am incredibly saddened that one person's destructive behaviour is doing so much unnecessary damage amongst a group of people that have been extensively loyal to each other and who have worked together for as long as we all have.

> Ashley if you want me to prepare a package for you of all the quotations and specifications that I have thus far for Richmond St I would be more than happy to do that. I understand that you are in a difficult situation and you are trying to do what's best for you.

[43] In her direct examination, the plaintiff confirmed the accuracy of all of the reasons she provided to Mr. Cavanaugh and Ashley for deleting the files. With reference to what she said in her email to her mother earlier that day, she testified Marty was no longer an employee of Penta and she did not want him giving her work to another designer. She insisted she was protecting Penta's work product as well as her own by deleting the files so as to prevent him from having access to them. The plaintiff acknowledged she did not mention these concerns to Mr. Cavanaugh and Ms. Gaetz in her email to them. Because they were his close family members, she said she was trying to "balance the dynamics" and "be delicate". Ms. TeBaerts was adamant she did not intend to be deceptive.

[44] Mr. Cavanaugh gave evidence that he felt betrayed and disappointed by the plaintiff's email to Ashley and him. Part of his disappointment was that it was well known within the office that he did not like to be bothered in the evening with work matters. He testified that he saw her explanation for deleting the emails as dishonest and inaccurate. He questioned how she could possibly have concluded Penta was no longer involved in building the Oaktree homes, meaning the Richmond Street houses. He suggested this was impossible given that Penta was the builder on record; he had signed all of the credit applications for the materials and the warranty issues. Mr. Cavanaugh also testified whatever designer was brought in to do the specifications instead of the plaintiff would have been provided with all of the information Penta already had. Mr. Cavanaugh was not asked to comment on his daughter's earlier emails to the plaintiff, nor the plaintiff's evidence that she had deleted other files in the past when Penta had stopped building prior to completion.

[45] Marty testified that after finding out all "his files" had been deleted he quit Penta again on November 21, 2014.

[46] November 22, 2014 was a Saturday. Mr. Cavanaugh said he and his wife went to visit Chelsea in the morning. He testified that he told Chelsea how frustrated he was "with the whole sequence of events" on Friday and as a result, he had been thinking of "winding the whole thing down", meaning Penta. Chelsea described her father as "very distraught". In her direct examination, she clearly stated he talked about how all the people he trusted had broken that trust. During cross-examination she indicated she did not mean people plural and her father mentioned the plaintiff in particular.

[47] However, Mr. Cavanaugh testified that on Friday afternoon or evening he sent an email to several people including the plaintiff, Gus, Ashley and Marty which was never disclosed. Mr. Cavanaugh indicated he urged them to set aside their differences and to try and get along. He expressed disappointment that the only person who responded to him was Gus.

Accessing the Plaintiff's Email Exchange with Her Mother

[48] Chelsea's further evidence is that late Saturday morning she went to the office to catch up on her work. She was concerned that people might be fired or quit or be fired on Monday morning given what her father had said, so she wanted to be prepared in case she was left on her own in the office. She said she moved between her desk and the plaintiff's, using the plaintiff's computer to access old payroll tax reports. While doing so, she said she checked the plaintiff's email account to see if her father had responded to the plaintiff's email from the night before. According to Chelsea, the plaintiff's computer was on and not locked. No password was required. In the plaintiff's inbox she found the email exchange between the plaintiff and her mother set out above. At that point she called Ashley and read it to her. Chelsea testified they decided not to tell their father right away because he had called a family meeting and they did not want to add to his burden before then.

[49] At his examination for discovery, Mr. Cavanaugh testified that he was the one who went to the office that day, accessed the plaintiff's computer and found the

email exchange between the plaintiff and her mother. At trial, he said that he lied at his discovery when he gave that evidence in order to protect Chelsea.

[50] Mr. Cavanaugh and his wife, both daughters and Marty were at the family meeting. Mr. Cavanaugh said he essentially repeated what he had told Chelsea that morning. He intended to slowly lay off people and wind up Penta as projects completed. Chelsea said during the meeting she showed her father the plaintiff's email exchange with her mother on her phone. Mr. Cavanaugh's evidence was somewhat different. He stated Chelsea forwarded the email exchange to him after the meeting. He said he was devastated when he read it. He indicated he then realized the plaintiff's real reason for deleting the files was to get back at Marty. I note however he had expressed that view in his earlier emails to the plaintiff. He also said his frustration broke and he realized it was not plausible to wind down the company; he was committed to various projects and long-term employees.

The Defendant's Response to the Plaintiff

[51] Mr. Cavanaugh confirmed he never discussed with the plaintiff either the email exchange with her mother or the reasons she provided for deleting the files, stating she had already explained herself very clearly. He said his decision to terminate the plaintiff was not easy to make because he was concerned about Gus' reaction, but he concluded he could not "go back" given her "blatant lying". In cross-examination, Mr. Cavanaugh confirmed that based on the plaintiff's email to her mother, he regarded her as sabotaging Penta's operations.

[52] The plaintiff continued to work as usual from November 24, 2014 until she was terminated on November 27, 2014. Having heard nothing further from Mr. Cavanaugh and the deleted files having been fully restored, she said she assumed it was business as usual. During that time she performed important accounting duties including preparing the year end. Mr. Cavanaugh could not explain why he would allow her to carry on in such a way if he thought she had engaged in sabotage, stating, "I had my reasons for doing it that way". In cross-examination, he also stated he probably would have terminated the plaintiff's

employment if all she did was assist her father in finding another job. He agreed, however, he never asked Gus if the plaintiff had helped him look for another job or if he was involved in the email exchange between the plaintiff and her mother.

[53] The plaintiff testified that around 3 p.m. on November 27, 2014, Mr. Cavanaugh asked her to meet with him in the boardroom. She said the meeting lasted less than five minutes. Mr. Cavanaugh read from three pieces of paper, telling her she was being terminated effective immediately and providing a version of the three reasons set out above. The plaintiff said she was confused and asked him to explain. She also said she asked him whether he had any supporting documents. He told her he could not provide her with any evidence, to pack up her things and go. The plaintiff was given three letters at the time of termination. The first set out her immediate termination. The second was without prejudice. It outlined the reasons for the termination and contained an offer. The third was a release form.

The Plaintiff's Post Dismissal Statement

[54] Following her dismissal the plaintiff applied for employment insurance. She completed a questionnaire regarding her dismissal that reads in part as follows:

> 1. What reason best describes why you were dismissed/suspended?
>
>   My employer accused me of some form of misconduct other than what has been mentioned above.
>
> 2. Please describe fully the final incident of misconduct (including date of occurrence) that resulted in your dismissal/suspension.
>
>   On the morning of November 20th I was instructed that Penta would no longer be involved in a project called Richmond St. Later that afternoon I removed the project files from Penta's Dropbox which is a normal action given that only current and relevant projects belong in the Dropbox. Later I was questioned by a fellow employee as to where the files were and asked to reinstate them which I did immediately and no information was lost. I also provided this employee with an explanation as to why the files were deleted. I received no disciplinary actions from my supervisor regarding this and assumed since the data was restored that everything was fine. On November 27th my employment was terminated citing just cause for deleting company data, providing a misleading response when questioned about the deletion and for encouraging an employee to seek employment elsewhere. Two of these reasons are simply untrue and none of the reasons are just cause. Based on my employment length of almost 11 years with this company with a blemish free record, I believe

that I was wrongfully dismissed and therefore have sought legal counsel in filing a suit against my former employer.

3. Did the employer have a policy and/or practice for employees about this type of misconduct?

   No.

Credibility

[55] In order to resolve the significant conflicts in the evidence, I must make findings of credibility. *Bradshaw v. Stenner*, 2010 BCSC 1398, aff'd 2012 BCCA 296, sets out a very helpful approach for assessing the credibility of witnesses:

> [186] Credibility involves an assessment of the trustworthiness of a witness' testimony based upon the veracity or sincerity of a witness and the accuracy of the evidence that witness provides. The art of assessment involves examination of various factors such the ability and opportunity to observe events, the firmness of his memory, the ability to resist influence of interest to modify his recollection, whether the witness' evidence harmonizes with the independent evidence that has been accepted, whether the witness changes his testimony during direct and cross-examination, whether the witness' testimony seems unreasonable, impossible, or unlikely, whether the witness has a motive to lie, and the demeanour of the witness generally. Ultimately, the validity of the evidence depends on whether the evidence is consistent with the probabilities affecting the case as a whole and shown to be in existence at the time. (Citations removed)

[56] In this case there is very little in the way of independent evidence. Documentary evidence, mainly in the form of email communications, however provides an important yardstick for comparison to the testimony of various witnesses.

[57] On the whole I found the plaintiff to be a credible witness. Her evidence was internally and externally consistent. It was also consistent with most of the documentary evidence. It was clear to me she sought to provide accurate and complete answers. There was nothing exaggerated or dramatic in her presentation. Although I am not able to accept all of her testimony, as discussed below, where the evidence she gave conflicts with that of the witnesses for Penta, I generally prefer her version of events.

[58] I have concerns about the credibility of the defendants' witnesses. I note the significant opportunity and motivation for them to solidify a common version of events prior to trial. Mr. Cavanaugh, Chelsea, Ashley and Marty are close family members who also share very strong financial ties. Marty now owns and operates his own business. He testified his company has dealings with some of Mr. Cavanaugh's other company's and Mr. Cavanaugh has expressed an interest in investing in Marty's projects. In addition to attending the family meeting that occurred shortly before Mr. Cavanaugh decided to dismiss the plaintiff, Ashley, Marty, Chelsea and Mr. Cavanaugh have dinner together every Sunday along with other family members, almost without fail. Chelsea testified she has discussed the events leading to the plaintiff's dismissal with the other witnesses for the defendant.

[59] In addition to these concerns, other problems with Mr. Cavanaugh's credibility were apparent. He admitted to lying in his discovery evidence. He testified at discovery that he searched the plaintiff's work place computer and discovered the email exchange between the plaintiff and her mother. At trial, both he and Chelsea said it was Chelsea who did this, which I accept. Mr. Cavanaugh's evidence also revealed a failure to disclose relevant emails including a message from Chelsea "forwarding" the email exchange between the plaintiff and her mother (which would have made it clear who conducted the search of the plaintiff's computer) and the email he sent to the plaintiff, Marty, Ashley and Gus late in the day on Friday November 21, 2014 urging people to get along. Choosing to lie under oath and to not disclose relevant documents makes it clear Mr. Cavanaugh is prepared to tailor evidence to suit his own purposes. His credibility is also negatively affected by inconsistencies in his evidence. For example, Mr. Cavanaugh said he was devastated when he learned about the plaintiff's email exchange with her mother because he then realized she had "blatantly" lied to Ashley and him about why she deleted the files. However, he also testified he thought she was lying as soon as he read her explanatory email. Further, it is clear from earlier emails to Ashley and the plaintiff that he was of the view the plaintiff had deleted the files because of issues with Marty as soon as he learned of the deletions. I have therefore determined I must approach Mr. Cavanaugh's evidence with considerable caution.

[60] I also have concerns about the other witnesses for the defendant. Ashley's evidence on key points was not convincing. Her denial of any discussions with the plaintiff about Marty's unhappiness at work and the couple's plan for him to complete the Richmond Street projects through Oaktree, as well as the fact there was such a plan was inconsistent with the email communication between Ashley and the plaintiff and the plaintiff's evidence which I accept. It was apparent to me she was not being truthful when confronted about the discrepancies between her testimony and the content of those emails. She could not provide a plausible explanation. Marty's testimony was also not straightforward on some important points. I cannot accept his account of the conversation he had with the plaintiff, in which he "fired" her from the Oaktree projects. The suggestion he likely would not have advised the plaintiff he was hiring another designer to avoid hurting her feelings struck me as implausible, given his obvious and acknowledged dislike of the plaintiff, his unapologetic approach to his altercation with Danny, and his somewhat angry presentation. Chelsea presented as the most sincere of the defendant's witnesses. She also seemed the most uncomfortable giving evidence and appeared to feel torn by the loyalty she feels toward her family and her obligation to tell the truth. I accept most, but not all, of her evidence. I have a particular concern about what she said she heard of the conversation between the plaintiff and Marty, in light of the weight of influence upon her, the documentary evidence and the probabilities affecting the case.

Findings of Fact

[61] Bearing in mind my assessment of the credibility of the witnesses and the documentary evidence, I find the following facts:

[62] Ashley had discussed with the plaintiff how unhappy Marty was particular in relation to working for Penta. In addition Ashley had talked to the plaintiff about the plan she and Marty had for him to build the Richmond Street houses through Oaktree. After quitting Penta on the morning of November 19, 2014, Marty went to the job site and engaged in an altercation with Danny. The plaintiff learned of the altercation that same day from her father Gus. She understood Marty had verbally

abused Danny and been threatening. Based in part on her earlier conversations with Ashley and the email Ashley sent to the plaintiff on November 20, 2014, the plaintiff reasonably concluded Ashley and Marty were proceeding with their plan for him to build the Richmond Street homes through Oaktree. Despite Marty's evidence to the contrary, the defendant's admission makes it clear that Marty was an employee of Oaktree for some period of time until quitting on November 21, 2014. The defendant also admitted Marty quit Penta on November 19, 2014, whether or not there was plan developed between he and Mr. Cavanaugh to rehire him in a more limited role. I reject the evidence of Mr. Cavanaugh that it was not possible for Penta to stop being the builder on record etc., and therefore it was unreasonable for the plaintiff to conclude that Penta was no longer going to be involved in those projects. I accept the uncontradicted evidence of the plaintiff that Penta had stopped working on other projects prior to completion. Aware of Marty's altercation with Danny, Mr. Cavanaugh chose to take no action because it was not in his interest to discipline Marty. Instead he either allowed or asked Marty to relieve the plaintiff of her duties as the designer/project consultant on the Richmond Street houses, knowing full well the difficult dynamics between them. When Marty spoke to the plaintiff at the office, I have no doubt he advised her that another designer was being hired. That was one of the main reasons for meeting with her. Further, there is no other explanation for how she could have learned he was doing so by the time she replied to Ashley's email shortly after their meeting.

[63] I also accept that Marty did not tell the plaintiff that he needed all the work she had done to date, meaning the specifications saved in the files on the server/Dropbox she subsequently deleted. It makes little sense for him to have asked for that work, given Ashley's ongoing access to Penta's server. Further, the plaintiff's April letter indicates she was aware the plan was for Marty to continue to have access to Penta resources. It may be that what he was asking for was the work she had already completed but had not yet placed on the server, that being the only material he would not otherwise have had access to at that time. However, her email to Ashley and Mr. Cavanaugh states that material was available in a folder on her

desk. In any event there are no allegations of misconduct against the plaintiff regarding that material.

[64] I find that when the plaintiff deleted the files related to the Richmond Street projects, Marty was no longer a Penta employee, or that any "rehiring" agreed to at the meeting between Marty and Mr. Cavanaugh on November 20, 2014, was a fact unknown to the plaintiff. It is very clear to me the plaintiff would not have deleted the files if she thought the Richmond Street houses remained Penta projects. Ms. TeBaerts was a loyal employee and her father Gus would have remained the project manager responsible for the building of those homes. In other words, I fully accept she thought Penta no longer needed the files. Deletion of any material contained in those files that should have been contained in other past project files, such as those for Gary Street would have been inadvertent.

[65] I accept that the plaintiff deleted the files for most of the other reasons set out in her email to Ashley and Mr. Cavanaugh. As the person responsible for maintaining and organizing the files on the server and Dropbox, the plaintiff was in the best position to decide what ought to be stored where or deleted. I accept she had previously deleted files for projects Penta did not complete. Other files were moved from current to past files after the project completed, but the home remained under warranty. The plaintiff was highly structured, if not preoccupied with the organization of the files on the server and Dropbox. I am not inclined to accept the plaintiff's third reason for deleting the files: because Marty repeatedly stated he did not use the server anyway. While it seems clear Mr. Cavanaugh and Gus had to be repeatedly encouraged to use the server, I am not satisfied this was true of Marty.

[66] The plaintiff's first email response to her mother on November 21, 2014 establishes she also deleted the files to prevent Marty from using or referring to the work she had done for the Richmond Street houses through Penta's server/Dropbox. I have no doubt she was very upset by Marty's attack on her brother and frustrated that despite his misconduct he was retaining the benefit of continuing to work on the Richmond Street projects. The plaintiff's second email response to her mother and

her April letter show she was also responding to what she saw as Marty's history of uncensored misconduct: "Marty is getting rewarded for his asshole behaviour as per usual and it's ridiculous".

[67] I accept the plaintiff's evidence that she did not intend to be dishonest or deceitful when she chose not to include in her explanation for deleting the files any reference to preventing Marty from having access to her work. Although the result is an incomplete explanation, there are obvious and understandable difficulties involved in her speaking frankly to Mr. Cavanaugh and Ashley about Marty.

[68] I do not accept Mr. Cavanaugh's testimony that he was devastated by the content of the plaintiff's email to her mother. It is clear to me that upon first learning of the deleted files, he assumed the plaintiff did so because of issues she had with Marty. The undisclosed email he sent to several people including Marty on November 21, 2014 shows what was really upsetting Mr. Cavanaugh was the level of conflict and dysfunction that marked the relationships between employees, including his family members.

[69] I readily accept the plaintiff's evidence that apart from suggesting her mother contact a recruiter in response to her mother's email attaching a job posting, she had taken no steps to assist or encourage her father to find another job, nor discussed the matter with him.

Has Penta established that it had cause to dismiss Ms. TeBaerts without notice?

Legal Framework

[70] The defendant bears the onus of proving there was just cause to dismiss the plaintiff. The legal principles governing when an employer may terminate employment for cause are not in dispute. The onus upon the defendant is a heavy one. To establish cause for dismissal without notice to the plaintiff, the defendant must prove her conduct was seriously incompatible with her duties, going to the root of the contract with the result being the employment relationship was rendered too fractured to expect the defendant to provide a second chance: *Leung v. Doppler*

Industries Inc., [1995] B.C.J. No. 690, aff'd [1997] B.C.J. No. 382 (C.A.). The test for cause is objective, viewed through the lens of a reasonable employer taking into account all relevant circumstances: *Roe v. British Columbia Ferry Services Ltd*., 2015 BCCA 1 at para. 35.

[71] In *McKinley v. BC Tel,* 2001 SCC 38, the Supreme Court of Canada prescribed a contextual approach for determining the existence of cause and the need for proportionality. The proportionality principle requires that an appropriate balance be struck between the employee's conduct and the sanction imposed by the employer. Mr. Justice Iacobucci described the approach as follows at paras. 51, 53 and 57:

> 51 … I conclude that a contextual approach to assessing whether an employee's dishonesty provides just cause for dismissal emerges from the case law on point. In certain contexts, applying this approach might lead to a strict outcome. Where theft, misappropriation or serious fraud is found, the decisions considered here establish that cause for termination exists…This principle necessarily rests on an examination of the nature and circumstances of the misconduct. Absent such an analysis, it would be impossible for a court to conclude that the dishonesty was severely fraudulent in nature and thus, that it sufficed to justify dismissal without notice.
>
> …
>
> 53 Underlying the approach I propose is the principle of proportionality. An effective balance must be struck between the severity of an employee's misconduct and the sanction imposed. The importance of this balance is better understood by considering the sense of identity and self-worth individuals frequently derive from their employment …
>
> …
>
> 57 Based on the foregoing considerations, I favour an analytical framework that examines each case on its own particular facts and circumstances, and considers the nature and seriousness of the dishonesty in order to assess whether it is reconcilable with sustaining the employment relationship. …

[72] Although its contextual approach is of general application, the issue in *McKinley* was what constitutes dishonest conduct giving rise to just cause.

> 56 … Absent an analysis of the surrounding circumstances of the alleged misconduct, its level of seriousness, and the extent to which it impacted upon the employment relationship, dismissal on a ground as morally disreputable as "dishonesty" might well have an overly harsh and far-reaching impact for employees. In addition, allowing termination for cause wherever an

> employee's conduct can be labelled "dishonest" would further unjustly augment the power employers wield within the employment relationship.

[73] Following *McKinley*, Mr. Justice Goepel in *Steel v. Coast Capital Savings Credit Union*, 2015 BCCA 127, commented in his reasons for the majority, an employer no longer has an absolute right to dismiss an employee based on a single act of dishonesty but may be justified if the misconduct is sufficiently serious to cause an irreparable breakdown in the employment relationship. Numerous authorities that have held the employer must, as part of the contextual analysis, consider the suitability of alternative disciplinary measures to dismissal (See: *George v. Cowichan Bay*, 2015 BCSC 513 at paras. 114 -118).

Parties Positions on the Issue of Cause

[74] The plaintiff submits there was no just cause for her dismissal. She denies deleting some of Penta's files related to the Richmond Street out of malice or lying about why she did so. She argues the explanation she provided to Mr. Cavanaugh and Ashley was accurate and submits it would be unjust for the defendant to be permitted to dismiss her for cause based on evidence obtained in breach of her right to privacy contained in the email exchange with her mother. In any event, given the family relationships involved here, she asserts she simply could not be blunt about her concerns regarding Marty's conduct when attempting to explain her actions to his father-in-law and his wife. She argues the contextual approach requires the court to consider her exemplary service for 11 years, the absence of any policies to direct her work or conduct, and the circumstances preceding her dismissal, among them the immediate steps she took to restore the deleted materials. The plaintiff denies the defendants other allegation that she was counselling or assisting Gus to find other employment. In any event, she points out there was no policy in place that would prohibit her from doing so. In her submission, the defendant has not established she disregarded the essential conditions of her employment or that a continuing employment relationship was not viable.

[75] The defendant takes the position it was justified in dismissing the plaintiff for cause. The defendant says the evidence establishes the plaintiff intentionally deleted

files from the Penta server out of malice toward Marty Gaetz and her wish to prevent him from using or accessing them. Despite its admission to the contrary, the defendant submits Mr. Gaetz was its employee at the time. The plaintiff was then dishonest about her reasons for the deletions. The defendant argues that the plaintiff's claims that she was protecting Penta by deleting the files and she was cleaning up the server based on her understanding they were no longer necessary are entirely unreasonable. It submits the plaintiff occupied a position of great trust within the company. She had considerable autonomy with respect to Penta's computer records and was privy to much important and confidential information. These are factors to consider in determining the essential conditions of the employment contract. Further, her actions destroyed not only Mr. Cavanaugh's trust in her, but the harmony necessary for the running of a small company with few office employees. Penta also argues the plaintiff breached the duty of loyalty and good faith she owed to the company by advising her mother to seek a recruiter for her father, submitting she carries the same burden as an employer not to discriminate based on family relationships. The defendant's position is there was no alternative to dismissal in this case, given the seriousness of the plaintiff's misconduct and its impact.

Analysis

[76] Was Ms. TeBaerts wrongfully dismissed? *McKinley* provides that the court must engage in a broad contextual analysis to determine whether cause has been established and the employer's actions are proportionate to the conduct in question. For the reasons that follow, I conclude that the defendant did not have just cause to dismiss Ms. TeBaerts.

[77] The defendant's first two grounds for dismissing the plaintiff summarily are that she deleted the files with malicious intent, and she was not forthright and honest in her explanation about the reasons for the deletions. In its written submissions, the defendant urged the court to find the plaintiff deleted the files because of her dislike of Marty and her feelings of anger and jealousy. I have already found that the plaintiff's frustration and upset over Marty's uncensored conduct was one factor that

led her to delete the files. However, there were other reasons for her decision; most importantly her belief Penta no longer needed the files because Marty had quit his job with Penta and the Richmond Street projects were to be completed by Marty through Oaktree. Absent her feelings about Marty, I expect the plaintiff may still have deleted the files, but perhaps less expeditiously, given her proactive approach to the organization of files on the server.

[78] To the extent the plaintiff's goal of prevent Marty from benefiting or using the files was a factor in her decision to delete them, she made an error in judgment that I find was driven largely by a sense of unfairness rather than spite or malice. Some of the dynamics of the workplace at the time she deleted the files were unfortunate. Mr. Cavanaugh took at best a hands' off approach to Marty and his altercation with Danny. Given his awareness of the "site incident" involving Marty and Danny and the poor relationship between Marty and the plaintiff, it strikes me as insensitive if not careless of Mr. Cavanaugh to allow Marty to "fire" the plaintiff as a designer from the Richmond Street projects. I accept the plaintiff's evidence that in addition to not addressing Marty's present and past conduct, past bullying, namely the harassment she suffered from a male employee over a prolonged period had gone unacknowledged and unaddressed, despite Penta's obligation to take steps to protect its employees from harassment in the workplace.

[79] Mr. Cavanaugh emphasized in his testimony it was the plaintiff's failure to "come clean" about deleting the files out of malice toward Marty that really undermined his trust in her. However, in its submissions Penta emphasized both her dishonesty and her intentional deletion of the records. Penta argued the plaintiff's duty of loyalty and good faith was intensified by the position of trust she occupied as a manager and the person responsible for organizing the files on the company server/Dropbox. There is no doubt an employee's position of authority and trust is a factor to consider when determining the essential conditions of the employment contract: *Poirier v. Wal-Mart Canada Corp.,* 2006 BCSC 1138 at para. 56. In *Steel* the trial judge found the defendant had just cause to terminate the plaintiff's employment because she had accessed confidential computer documents in breach

of the company's privacy policy (2013 BCSC 527). The plaintiff was found to occupy a position that required the complete trust of her employer given she worked unsupervised with respect to her unfettered access to all documents on the computer system including the private and personal files of other employees. At para. 25 the decision provides:

> In addition, employees who work with greater autonomy are held to a higher standard of trust. The greater the autonomy the employee enjoys, the more fundamental trust becomes to the employment relationship, see Godden v. CAE Electronics Ltd., 2002 BCSC 132.

[80] The defendant suggests deleting files in retaliation for the Marty/Danny incident is far more serious than the conduct of the plaintiff in *Steel*. I do not agree. I have found Ms. TeBaerts removed files from the server for a number of reasons, including a reasonably held belief they were no longer needed by Penta. To the extent she was motivated to do so by negative feelings toward Marty, I have found she made an error in judgment. I have accepted her evidence that she did not intend to be dishonest by not referring to those feelings in explaining why she removed the files to Mr. Cavanaugh and Ashley, with the result being she provided a less than complete explanation. While it is true the plaintiff organized the computer files unsupervised and occupied a position of trust given that role and many of her other responsibilities, I do not regard her conduct as amounting to a breach of trust.

[81] The plaintiff's autonomy in relation to the computer system was really born of necessity. The evidence suggests she initiated Penta's use of a server/Dropbox system and developed the knowledge and skill required to manage it effectively. Organizing the server and the Dropbox was not inherent to her other roles but her aptitude for it was a benefit to Penta. Much unlike the defendant in Steel, Penta had no policies or procedures regarding computer use including organizing or removing files kept on the server/Dropbox. Nor were the plaintiff's action motivated by personal gain. The absence of personal financial gain is also a factor to consider is assessing whether an employee was wrongfully dismissed *Litster v. British Columbia Ferry Corp.*, 2003 BCSC 557.

[82] Viewed from the perspective of a reasonable employer taking account of all the relevant circumstances, I conclude Penta has not established the plaintiff's removal of files related to the Richmond Street projects from the company's server and her explanation for doing so constitutes conduct that was seriously incompatible with the plaintiff's duties, going to the root of the contract with the result being the employment relationship was rendered too fractured to expect the defendant to provide a second chance. In other words Penta has not established cause to dismiss the plaintiff summarily for malice or dishonesty in relation to her deletion of files from the company's server.

[83] I reach the same conclusion with respect to the plaintiff suggesting her mother consider retaining a recruiter for Gus, in response to a potential job posting her mother sent to her during their email exchange. I have accepted the plaintiff's evidence that her mother wanted Gus to find another job because she was concerned about his very heavy work load, his level of stress and health issues but the plaintiff herself had never discussed with Gus searching for other employment. To the extent the plaintiff's duty of loyalty and good faith to Penta may have prevented her from actively encouraging a highly valuable fellow employee from leaving the company. I find the plaintiff did not come close to breaching this duty.

[84] I regard Penta's decision to summarily dismiss the plaintiff as significantly disproportionate to her conduct.

[85] In addition to the contextual analysis of the plaintiff's conduct, my conclusion on proportionality is informed by:

a) the defendant's decision not to investigate its concerns about the plaintiff's conduct, including discussing those concerns with her or Gus, or to consider any disciplinary measures short of dismissal;

b) the plaintiff's long term employment with Penta;

c) her unblemished employment record;

d) the defendant's recent recognition of her valuable contribution to the company (through performance bonuses and a special bonus); and

e) the continuation of the employment relationship and the plaintiff's engagement in critical accounting tasks, for several days after the events Mr. Cavanaugh suggests destroyed his trust in the plaintiff occurred.

Reasonable Notice

[86] Having failed to establish that it had cause to terminate the plaintiff's employment, Penta was obligated to provide her with reasonable notice or pay in lieu of notice. The plaintiff submits 14 months is appropriate. The defendant suggests a range between six and ten months, with a contingency applied for the possibility the plaintiff will find employment before the end of the notice period. The defendant does not argue however the plaintiff has failed in her duty to mitigate.

[87] The court's task is to decide what is objectively reasonable in the circumstances of the case. The factors to be considered are well known and include employment function, age, length of service, and the availability of alternative employment. See *Honda Canada Inc. v. Keays*, 2008 SCC 39 at para. 28 and *Bardal v. Globe & Mail Ltd.,* (1960), 24 D.L.R. (2d) 140 (Ont. H.C.). No one factor should be given disproportionate weight (*Honda*, para. 32). Our Court of Appeal has cautioned against a formulaic approach to their application: *Kerfoot v. Weyerhaeuser Company Limited*, 2013 BCCA 330 at paras. 46-47.

[88] In support of a range of six to ten months the defendant relies upon these authorities:

- *Panton v. Everywoman's Health Centre Society,* 2001 BCSC 1384: an administrator at an abortion clinic received 8 months' notice after 9 years of employment. She was a high school graduate with no post-secondary education.

- *Bader v. Canada Trust Co.* [1980] B.C.J. No. 518 (S.C): a mortgage administrator received 9 months' notice after 9.5 years of service. The administrator began his employment as an "office boy", but worked his way up to administrator.

- *Levesque v. Sherwood Credit Union*, 2000 SKQB 286: a senior mortgage collection officer received 6 months' notice after 10 years of employment.

- *Mackin v Jim Pattison Industries Ltd.,* [1982] B.C.W.L.D. 223 (S.C): the plaintiff program director of a radio station received 6 months' notice for 7 years of service.

- *Birch v. London Drugs Ltd.*, 2003 BCSC 1253, aff'd 2004 BCCA 618: the plaintiff was employed in a variety of positions "slightly above entry level" for 10 years and received 30 weeks' notice.

- *Gareau v. Oracle Corp. Canada,* [1997] O.J. No. 4136 (Ont. Gen. Div.): the plaintiff director of marketing services received 10 months extended to 12 months' notice after 6 years of service.

[89] The plaintiff relies upon several cases involving employees in their 30's and 40's with the same or similar length of service, who were dismissed from management positions, in support of her position that 14 months' notice is reasonable:

- *Brougham v. Carrier-Sekani Tribal Council,* [1998] B.C.J. No. 2319 (S.C): the 35 year old plaintiff was employed first as a receptionist and then as a general manager for Carrier Sekani Tribal Council for 12 years and received 15 months' notice.

- *Adams v. Fairmont Hotels & Resorts Inc.,* 2009 BCSC 681: the 41 year old plaintiff held a variety of executive positions at the Fairmont Whistler over 12 years of service. She was awarded 15 months' notice.

- *Hanni v. Western Road Rail Systems*, 2002 BCSC 402: the 41 year old plaintiff was dismissed after 12 years of service and awarded 15 months' notice. She had a high school education and held the second most senior position in the company. The industry had a high unemployment rate.

- *McKeough v. H.B. Nickerson & Sons Ltd*., [1986] N.S.J. No. 113 (CA): the Court of Appeal upheld the trial judgment awarding 18 months' notice.

- *Johnson v. Famous Players Inc.,* [1991] M.J. No. 625*:* after 11 years of employment, the 32 year old plaintiff received 18 months' notice, less the amount received from other employment during that period.

[90] The defendant made no submissions about the application of the *Bardal* factors to the facts of this case.

[91] The plaintiff submits the notice period should reflect the availability of similar employment having regard to her training and qualifications. Ms. TeBaerts only ever performed project consulting, design and account management duties at Penta. She has no formal qualifications in accounting or design, although she completed some course work. The plaintiff has remained unemployed since she was fired. She provided a summary of her job search over the past many months that included documents related to the multiple positions she has sought. Penta adduced no evidence to suggest suitable employment is readily available. I am satisfied Ms. TeBaerts has and continues to search diligently for similar employment. I accept it will be more difficult for her to find a comparable position given her lack of formal training relative to her various duties as a project consultant and account manager with Penta. This is a particularly relevant factor here along with the length of uninterrupted service. She is however relatively young and this too is an important factor.

[92] In all the circumstances I find that 12 months is a reasonable notice period.

[93] The defendant urges the court to apply a contingency to account for the possibility the plaintiff will find work before the end of the notice period. In support of

that submission, the defendant relies upon *Chang v. Northern Securities,* 2003 BCSC 1611, where the court concluded a notice period of 12 months was reasonable, leaving eight months from the date of the decision to end of the notice period. In light of that circumstance, the court reduced the plaintiff's damages by 15 percent. Similarly in *Albach v. Vortek Industries*, 2000 BCSC 1228, the court deducted two months from the 22 month notice period to take into account the contingency the plaintiff would find new employment before the end of the notice period.

[94] I am not persuaded that such a reduction is appropriate in this case. The circumstances are distinct from *Chang* and *Albach*. In both cases a significant amount of the notice period remained at the time of the decision and it was more probable the plaintiff would find employment before the expiry of those notice periods. The trial of this matter occurred approximately seven months after the plaintiff's dismissal. Ms. TeBaerts notice period runs until November 27, 2015 and a contingency is therefore inappropriate.

Pre-Dismissal Vacation Pay

[95] The plaintiff's claims for two days of vacation pay in 2014. An employee is entitled to any vacation pay accrued before the date of termination: *Orke v. Quintette Coal Ltd.*, [1992] B.C.J. No. 140 (S.C.); *Ellison v. Burnaby Hospital Society*, [1992] B.C.J. No. 858 (S.C.). Her evidence is at the time she was dismissed she determined that she had two days of unused holiday. The defendant argues those days had already been taken by the plaintiff when she accepted Mr. Cavanaugh's offer to travel to Los Angeles in September 2014 to attend a private concert hosted by his friend. The plaintiff described the concert as a public relations event and said it was hosted by Mr. Cavanaugh's business partner. The two men own a large investment property together in Palm Springs. According to the plaintiff, she attended the event on Penta's behalf and was never told that she would have to use holiday time to take the trip. Penta paid her expenses. Her boyfriend travelled with her. They left after work on September 22 and returned on September 24, 2014. The plaintiff testified that she spent several hours of the one full day of the trip

(September 23, 2014) working in the hotel room, sending emails and on the phone. Her evidence on this point is uncontradicted although Mr. Cavanaugh said there was no need for her to conduct business while she was there.

[96] Mr. Cavanaugh also testified he proceeded through the "pecking order" and both Ashley and Chelsea declined before he offered the trip to the plaintiff. He said he encouraged the "girls" to take advantage of the opportunity because the male employees already enjoyed good treatment, explaining that he takes them on expensive fishing trips and to various sporting events. He stated he insists staff use their holiday time to attend those trips and events. He saw the plaintiff's trip to Los Angeles as the same, although he did not suggest he had discussed this expectation with her, or that she was aware of this practice with other employees.

[97] Apart from taking the position the plaintiff took the trip to Los Angeles as a holiday, the defendant does not otherwise dispute her entitlement to two days of holiday pay at the time of her dismissal.

[98] In the absence of any evidence the plaintiff was notified she would be required to use her vacation time during the trip to Los Angeles and given her evidence she worked while there, I conclude the plaintiff was entitled to two days holiday pay when she was dismissed.

Other Aspects of the Plaintiff's Compensation Package

[99] The parties agree that at the time of her dismissal, the plaintiff's compensation package included the following:

a. An annual salary of $66,000;

b. two 10,000 bonuses provided in December and July each year;

c. enrolment in the defendant's flex benefits plan, and $1,750 per year with which to purchase coverages;

d. car allowance of $500 per month; and

e. three weeks annual paid vacation (6%).

[100] The plaintiff submits she is entitled to damages equivalent to all of the compensation she would have received during the notice period.

[101] However, the cases do not always allow for vacation entitlement to accrue during the notice period in addition to salary. *Bavaro v. North American Tea*, *Coffee & Herbs Trading Co. Inc.*, 2001 BCCA 149 provides that a wrongfully terminated employee is not entitled to damages that includes vacation pay during the notice period unless she had lost the opportunity to take a vacation during that period. In *Moody v. Telus,* 2003 BCSC 471, the plaintiff was awarded compensation for vacation pay in addition to his salary because he had established that he intended to bank or accrue the time to extend his term of employment. Absent these special circumstances, accrual of vacation pay during the notice period is viewed as "double indemnity" and ought not to be awarded: *Urton v. SRI Homes et al*, 2005 BCSC 1019 at para. 34 varied on other grounds 2007 BCCA 372. No such evidence was provided by the plaintiff. I conclude therefore she is not entitled to compensation for three weeks of paid vacation time in addition to her annual salary.

[102] The defendant has not disputed the plaintiff's entitlement to be compensated for the loss of her vehicle allowance and her flex benefits during the notice period.

[103] Therefore her damages include $66,000 for loss of salary, $6,000 for loss of her vehicle allowance, $1750 for her loss of benefits during the 12 month notice period, and $20,000 for loss of management bonuses she would have received in December 2014 and July 2015 for a total of $93,750. In addition she is entitled to an amount equal to two days of vacation pay which I trust the parties can agree upon.

Additional Damages

[104] The plaintiff seeks awards for bad faith damages as distinct from aggravated damages, and punitive damages, each in the amount of $15,000.

[105] Ms. TeBaerts submits the conduct of the defendant in making its allegations at the time of dismissal without giving her an opportunity to respond was callous and highhanded. She also argues the manner of the dismissal was unfair and callous.

[106] Her specific complaints are as follows:

- At no time prior to dismissing her, did the defendant raise the allegations of misconduct with her.
- Having not been informed of the allegations, she was denied the opportunity to address or respond to them.

[107] During the dismissal meeting:

- She asked for reasons for terminating her employment;
- Mr. Cavanaugh did not provide her with any of the documents that he relied upon for her dismissal;
- He alleged she had engaged in coercion and advised her she was being dismissed for deletion of files but did not inform her which files were deleted; he also alleged she lied about the deletion but provided no details.
- After advising her of the dismissal Mr. Cavanaugh provided the plaintiff with two letters; one was a without prejudice letter confirming the reasons for her dismissal; the other was not without prejudice, but providing no reasons for her dismissal.

[108] Ms. TeBaerts also relies on Mr. Cavanaugh's conduct during the litigation: lying under oath at his examination for discovery, and his failure to disclose relevant documents.

[109] The plaintiff testified about the impact of being dismissed for no reason. Describing her job as her life, she said she struggled to make sense of what had

happened. She said she was depressed for a long time, and deeply hurt by Mr. Cavanaugh's "cold, callous" behaviour toward her when dismissing her. She said not being allowed to explain herself and having her integrity questioned was particularly difficult. The plaintiff did not provide any medical evidence that the manner of the dismissal caused her psychological harm. See: *Chan v. Dencan Restaurants Inc.*, 2011 BCSC 1439 at paras. 45 - 47; *Beggs v. Westport Foods Ltd.*, 2011 BCCA 76 at para. 53.

[110] Penta submits correctly the law no longer maintains a distinction between moral or bad faith damages and aggravated damages (*Honda*, para. 59). An employer has an obligation of good faith and fair dealing in the manner of dismissal. When an employer fails to act in accordance with this obligation, an award of aggravated damages may be appropriate. The Supreme Court of Canada in *Honda* described the rule as follows:

> [57] Damages resulting from the manner of dismissal must then be available only if they result from the circumstances described in *Wallace*, namely where the employer engages in conduct during the course of dismissal that is "unfair or is in bad faith by being, for example, untruthful, misleading or unduly insensitive" (para. 98).

[111] But a plaintiff must also demonstrate the employer's unfair or bad faith conduct caused a loss that should be compensated, such as mental distress or psychological damage beyond the normal distress and hurt feelings resulting from any dismissal: *Honda* at para. 59.

[112] In this case, the plaintiff was not dealt with fairly, in so far as the defendant chose not to investigate its concerns about her conduct, in particular the allegation she was assisting or encouraging her father to find other employment, and never gave her an opportunity to respond. I also accept the dismissal had a negative impact on the plaintiff's emotional well-being. However, her evidence does not permit me to find that she suffered mental distress markedly beyond what she would have experienced from being dismissed. I conclude therefore that the plaintiff's claim for aggravated damages must be dismissed.

Punitive Damages

[113] Punitive damages are awarded for advertent wrongful acts that deserve punishment: *Honda* at para. 62. *Honda* provides the court should only resort to punitive damages in exceptional cases. The conduct at issue must be “harsh, vindictive, reprehensible and malicious”, as well as “extreme in its nature”.

[114] Although I have been critical of the manner in which the plaintiff was dismissed, I am of the view the facts of this case do not establish conduct deserving of punishment. In coming to this conclusion, I also observe that any misconduct during the course of litigation is properly addressed through an order for costs as opposed to an award for punitive damages. In *Marchen v. Dams Ford Lincoln Sales Ltd.*, 2010 BCCA 29, the Court of Appeal distinguished conduct giving rise to punitive damages as opposed to special costs:

> [67] In breach of contract cases, punitive damages flow out of egregious conduct of a defendant at the time of the breach. In this case, when dismissing the claim for moral damages, the judge held that the appellant's "conduct at the time of termination was not unfair, unfaithful, misleading or unduly insensitive". He also held that Mr. Marchen did not suffer undue distress. On these findings of fact, punitive damages are not available.
>
> …
>
> [69] The judge conflated the analysis of punitive damages and costs. Punitive damages are a remedy for breach of contract that reflects the conduct of a party at the time of the breach. Costs reflect the results and conduct of parties leading to and in the course of litigation. They are not a remedy for breach of contract.

[115] Accordingly, I dismiss the plaintiff’s claim for punitive damages.

Breach of Privacy

[116] The plaintiff claims the defendant violated her privacy in breach of the *Privacy Act* and seeks damages of $15,000. In her amended notice of civil claim she also claims the defendant violated the *Personal Information Protection Act*, S.B.C. 2003, c. 63 [*PIPA*]. Her pleadings do not particularize what provisions of the *PIPA* were breached and no relief is sought in relation to the *PIPA*. The plaintiff made no submissions about this aspect of her claim or how the *PIPA* might apply in the

circumstances of this case. I will therefore not consider this aspect of her claim any further.

[117] Section 1 of the *Privacy Act* reads in part:

> (1) It is a tort, actionable without proof of damages, for one person, wilfully and without a claim of right, to violate the privacy of another.
>
> (2) The nature and degree of privacy to which a person is entitled in a situation or in relation to a matter is that which is reasonable in the circumstances, giving due regard to the lawful interests of others.
>
> (3) In determining whether the act or conduct of a person is a violation of another's privacy, regard must be given to the nature, incidence and occasion of the act or conduct and to any domestic or other relationship between the parties.

[118] It is apparent from s. 1(2) that the *Privacy Act* does not provide for an absolute right to privacy. The nature and degree of privacy that is protected is "that which is reasonable in the circumstances, giving due regard to the lawful interests of others". Furthermore, the court must consider if the alleged violation of the privacy was committed wilfully and without colour of right. In addition, to determine if a person has committed a breach of privacy, the "nature, incidence and occasion of the act" and the "relationship between the parties" must be considered.

[119] The case law dealing with this statutory tort is not well developed.

[120] In *Hollinsworth v. BCTV*, [1998] B.C.J. No. 2451 (C.A.), the Court of Appeal considered, however, the question of what constitutes conduct that is wilful and without claim of right referred to in s. 1(1) of the *Privacy Act*:

> [29] I turn first to the word "wilfully". In my opinion the word "wilfully" does not apply broadly to any intentional act that has the effect of violating privacy but more narrowly to an intention to do an act which the person doing the act knew or should have known would violate the privacy of another person. That was not established in this case.
>
> [30] I move now to the phrase, "without a claim of right". I adopt the meaning given by Mr. Justice Seaton to that very phrase, "without a claim of right" in Davis v. McArthur (1960), 10 D.L.R. (3d) 250:
>
> > …an honest belief in a state of facts which, if it existed, would be a legal justification or excuse …

[121] There is little discussion in the authorities under the *Privacy Act* about how the court should determine the reasonableness of an asserted right to privacy.

[122] Cases dealing with the rights of an accused under s. 8 of the *Charter of Rights* offer a great deal of analysis of when a person will be found to have a reasonable expectation of privacy. In my view, those cases offer some helpful guidance here. It is well established that statutory interpretation and the development of the common law should accord with *Charter* values. In *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130, for example, the court observed the right to privacy has been accorded constitutional protection and should be considered a Charter value in the development of the common law tort of defamation.

[123] *R. v. Cole*, 2012 SCC 53, considered when a reasonable expectation of privacy will be found to exist in relation to personal information stored on an employee's work place computer. The accused was a teacher charged with possession of child pornography. A technician performing maintenance on the accused's laptop found a hidden folder that contained naked photographs of a female student. The principal was notified and he seized the laptop. The laptop and discs which copied the photographs were then provided to the police who conducted a warrantless search. A unanimous court concluded the accused had a reasonable expectation of privacy in relation to personal information stored on the laptop and the police breached the accused's rights under s. 8 of the *Charter*. The court divided on the question of whether the unconstitutionally obtained evidence should be excluded, with the majority concluding s. 24(2) did not prohibit its admission.

[124] *Cole* and the court's earlier decision in *R. v. Edwards,* [1996] 1 S.C.R. 128 articulated a "totality of the circumstances test" for determining whether an expectation of privacy is reasonable. Both *Edwards* and *Cole* list various factors to be considered in applying the test. In *Cole*, Mr. Justice Fish specified it involves four lines of inquiry: one, examining the subject matter of the alleged search; two, determining if the claimant had a direct interest in that subject matter; three, inquiring

into any subjective expectation of privacy a claimant had in the subject matter; and four, assessing if a subjective expectation was objectively reasonable.

[125] In *R. v. Simpson,* 2015 SCC 40 at para. 47, the court emphasized the last two factors or lines of inquiry in determining whether the claimant had met the burden of proving a reasonable expectation of privacy. The question of objective reasonableness is not one of probability but instead a normative assessment of the reasonableness of the claim is required. The court asks then, should the claimant reasonably expect that his or her computer files, emails or text messages will remain private, in keeping with societal and legal norms in Canada: *R. v. Pelucco*, 2015 BCCA 370 at para. 58.

[126] In considering whether the claimant's subjective expectation of privacy was objectively reasonable in *Cole*, Fish J. wrote:

> [46] The closer the subject matter of the alleged search lies to the biographical core of personal information, the more this factor will favour a reasonable expectation of privacy. Put another way, the more personal and confidential the information, the more willing reasonable and informed Canadian will be to recognize the existence of a constitutionally protected privacy interest.

[127] *Cole* also determined that ownership of property, namely the work place computer is relevant but not determinative; the context in which personal information is placed on an employer owned computer is also significant; and workplace policies, practices and customs or "operational realities" may diminish an expectation that reasonable employees might otherwise have in their personal information.

[128] Bearing in mind the provisions of the *Privacy Act*, and the approach to the right to privacy in the *Charter* context, I conclude the totality of the circumstances should be examined to determine whether the plaintiff had a reasonable expectation of privacy in the email exchange she had with her mother using her work place email account on November 20, 2014. I am also required to bear in mind the lawful interests of Penta as well as the nature of the alleged breach and the parties'

relationship as employer and employee. Section 1(1) of the Privacy Act requires the alleged breach of privacy be intentional and without a claim of right.

[129] I come to no firm conclusion on the question of intention because I have determined the plaintiff claim for breach of privacy fails for other reasons. The plaintiff has complained quite correctly about the defendant's failure to investigate its concerns about her conduct before summarily dismissing her. Chelsea, a fellow employee was in a sense doing precisely that when she decided to open and read the email exchange between the plaintiff and her mother on the plaintiff's computer. She testified that she saw herself as protecting Penta in light of recent events. She said it did not occur to her that she may be violating the plaintiff's privacy. I accept that evidence but it is somewhat difficult to reconcile with Mr. Cavanaugh's decision to lie at his examination for discovery by stating he was the one who found the email exchange and his testimony at trial that he did so to protect Chelsea.

[130] Turning to the other considerations, the defendant owned the claimant's workplace computer. Penta had no policies regulating employees' use of computers in the work place including accessing one another's computers. Employees were permitted to use their work email accounts for personal reasons. The security measures in place to protect employees against unauthorized access can only be described as very relaxed. Although passwords were required when a computer had been "locked", it was not uncommon for employees to leave their computers unlocked and therefore accessible. Individual passwords were not closely guarded, in fact, quite the opposite. The plaintiff testified that others in the office knew her password including Chelsea. I also accept that Chelsea had used the plaintiff's computer on other occasions in the course of her duties, perhaps seeking her permission if the plaintiff was in the office but otherwise not.

[131] On November 22, 2014 Chelsea was using the plaintiff's computer to complete work tasks. Chelsea testified that she also wanted to look for a response from her father to the plaintiff's email sent the night before. Upon opening the plaintiff's email account, Chelsea discovered the exchange between the plaintiff and

her mother from November 20, 2014. Leaving aside its content, the email exchange is clearly personal given the nature of the relationship between the plaintiff and her mother. The content of the email exchange is to some extent personal, but it largely relates to events in the workplace and the plaintiff's response to those events as an employee, as well as matters of importance to the defendant namely the prospect of other employment for Gus.

[132] I have no doubt the plaintiff wished for the email exchange with her mother to remain private. She testified if asked she would not have agreed to allow access to it. In other words, it is clear she had a subjective expectation of privacy in the exchange. Bearing in mind all of the circumstances I am not satisfied her expectation was reasonable.

[133] Ownership of the computer and workplace practices pull in the direction lessening the reasonableness of any expectation of privacy in information sent or received by email excepting that Penta permitted personal use of workplace email accounts. In addition timing is a significant consideration here. Chelsea accessed the email exchange after a series of events had unfolded and Penta had concerns about Ms. TeBaerts conduct. The plaintiff had learned of Marty's decision to quit Penta and Ashley and Marty's intention to precede with the Richmond projects through Oaktree. The plaintiff had learned of Marty's altercation with Danny. Marty fired her from doing further design work on the Richmond projects. She then deleted some of Penta's files from the company's server and the deletions were quickly detected by Ashley, a fellow employee. The plaintiff took immediate steps to have the files restored. She then provided an explanation for the deletions that did not satisfy Mr. Cavanaugh.

[134] Accordingly, I conclude the defendant did not breach the plaintiff's right to privacy as set out in the *Privacy Act* and her claim for damages in this regard is dismissed.

Costs

[135] Unless there are circumstances I am not aware of, the plaintiff will have her costs.

"Fleming J."