IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Cottrill v. Utopia Day Spas and Salons Ltd.*
2017 BCSC 704

Date: 20170501
Docket: S156415
Registry: Vancouver

Between:

Jennifer Cottrill

Plaintiff

And

Utopia Day Spas and Salons Ltd.

Defendant

Before: The Honourable Madam Justice W.J. Harris

Reasons for Judgment

Counsel for Plaintiff:	R.B. Johnson
Counsel for Defendant:	R. Mahil
Place and Date of Trial:	Vancouver, B.C. June 6 to 10, 2016 September 23, 2016
Place and Date of Judgment:	Vancouver, B.C. May 1, 2017

Introduction

[1] The plaintiff, Jennifer Cottrill, seeks damages for wrongful dismissal. She was hired by the defendant company, Utopia Day Spas and Salons Ltd., as a skincare therapist and commenced employment on May 3, 2004 at the company's Langley spa location. She worked on a full time basis at the spa for approximately 11 years before she was dismissed from her employment for cause.

[2] The plaintiff was 21 when she was hired by the company. She had a child in 2005 while employed with the company. She is a single mother. She had attended Fraser Academy for secondary school due to a learning disability. After graduation, the plaintiff took one year of training as an esthetician at the Blanche MacDonald Center, after which she was certified as an esthetician. She worked for a short time at another spa in Vancouver and in Langley before working at the company's spa.

[3] The defendant company is a day spa and salon that operates several locations in Langley, North Vancouver, and Vancouver. Mr. Abu-Ulba is the president and chief executive officer of the company. During trial, Mr. Abu-Ulba described the administration of the spa as including a general manager for each location and department head for each service area and, in addition, a regional manager and executive staff.

[4] During the time that the plaintiff was employed at the spa, the management team for the Langley location consisted of Julie Fell, Amy Atchinson, Leisa Dawiskiba, Mandy Gill, and Dora Bonarek.

[5] Ms. Fell is the regional manager of the company and the daughter of Mr. Abu-Ulba. Her role is to oversee the operations of the spas. In 2004, she was the general manager of the Langley location. While acting in that capacity, she hired the plaintiff. By 2015, she was the regional manager and reported to the president. The store managers report to her.

[6] Ms. Atchinson was the company's general manager of the Langley location. She was responsible for general operations of the spa including maintaining a

positive environment for guests and staff. She testified that she did not supervise staff directly as that was left to the department heads. She said that the department heads were directed to have monthly goal setting meetings with the employees they supervised.

[7] Ms. Bonarek was the Skin Care department head and the direct supervisor of the plaintiff until she left the spa in January of 2015. Ms. Gill became the department head in February of 2015. She was previously a co-worker with the plaintiff in the Skin Care Department. Ms. Dawiskiba was the director of the company's Skin Care Department.

[8] The company's position is that the plaintiff was terminated for cause and was not wrongfully dismissed. In the alternative, it submits that the plaintiff was given three months' notice which is over and above the notice requirements set out in the employment contract that governed the plaintiff's employment. It also submits that the plaintiff failed to mitigate her losses.

Background

The Company

[9] The defendant company provides a variety of services at its locations including skincare, massage, hair styling, and make up. There is also a retail component to the company focussed on the sale of spa related products.

[10] During trial, Mr. Abu-Ulba testified to the high standards which the company had established for its employees. At the same time, he emphasized that the philosophy of the company was to give employees a chance to "fall forward" and learn from mistakes and also to celebrate an employee's "small wins". He referred to the company taking pride in being fair to the staff. He stated that he recognized that the success of his staff was a measure of the success of his business, as the company would not be successful without them. He said that he pushes hard so that the employees will succeed.

[11] Mr. Abu-Ulba testified that he would often bring in motivational speakers to assist employees with improving their performance. In that regard, he gave evidence regarding a U.S.-based motivational program, Inspiring Champions, that his management staff is required to attend. The managers attended the full nine month course and other employees are invited to attend the three day condensed course, which is partially paid for by the company. He said that he believes employees in his business have to have “drive” to succeed and, if they do, they will succeed.

The Plaintiff’s Employment

[12] In April of 2004, the plaintiff was interviewed for a position by Ms. Fell. She was subsequently called back for a “practical interview” in a group setting, in which she and other applicants were asked to perform skincare services on staff. She later received a telephone call from Ms. Fell in which Ms. Fell told her that she had been successful and that her first day would be on May 3, 2004.

[13] On the first day, she went through an orientation program, which included meeting with various representatives of the company and signing a written contract of employment.

[14] Under the terms of the contract, she was paid $8.00 per hour or commission, whichever was greater. The base hourly rate was changed subsequently to $10.50 per hour in May of 2010 and then later to $15.00 per hour.

[15] During her employment, the plaintiff worked in the Skin Care Department at the spa and her duties included skin treatments such as facials, pedicures, and body wrap treatments. The plaintiff received training from the company on the protocols for various spa services. Employees were not permitted to perform services until they had undertaken company training in that service.

[16] The plaintiff ultimately became a trainer in June of 2013 for one of the skincare services at the spa. She received a higher pay rate when she was training new employees or those who did not have training in the particular service.

[17] The plaintiff's employment was continuous with the exception of a period she was off for maternity leave.

[18] The plaintiff's employment income varied over the years. For 2012, her T4 income was reported at $25,008; for 2014, it was $28,585; and her income for the period of 2015 in which she was employed was $14,144.

[19] In 2014, the plaintiff and the other employees were asked to sign a new employment contract. They were told, by letter from Ms. Fell dated July 28, 2014, that "there is no change to the terms and conditions of your employment as a result of the revision to the contract" and that the employer had to update the document to "reflect the current applicable legislation". At the time the revised contract was presented, the plaintiff did not receive any bonus or other item of value and her compensation and benefits remained the same. The plaintiff testified that she signed the contract on the basis of what was said in the accompanying letter and because she did not feel she had any alternative but to sign it. Ms. Atchinson testified that she went through the revised contract with the plaintiff and explained to her what had changed.

[20] The plaintiff testified that she considers herself to be a very good esthetician and that she loved her job. She received positive feedback at various times over the years, including from Mr. Abu-Ulba. She provided services to family members of Mr. Abu-Ulba in 2015.

[21] The plaintiff acknowledged that she received a number of client complaints as happens in this industry. She also acknowledged that she received written and verbal warnings from management about performance issues over the years, particularly not handing in call back sheets (confirming she had called back new clients after their service) and practice sheets (confirming her knowledge of the protocol for a particular service) on time. The plaintiff testified that she did not have enough time to do the call back sheets and practice sheets during the work day and

often took them home to complete. She noted, however, that she had never been suspended or otherwise disciplined for any of these incidents.

Performance Review System

[22] The plaintiff confirmed that during her employment, employees at the spa were obliged to attend regular goal setting meetings with their department head. Ms. Bonarek met with the plaintiff on a regular basis to review how she could improve her performance including, for example, increasing her retail sales, the amount of revenue generated from services, and her request rates. During these meetings, the plaintiff was asked to complete company "professional goals" forms in which she was to outline how she planned to achieve the goals she set for herself.

[23] Ms. Fell confirmed that the purpose of the monthly meetings between department heads and employees was to review their performance in services, retail sales (or home care), and request rate. She also stated that the meetings were to review overall performance related to following procedures and protocols, punctuality, team work, and related duties.

[24] In 2005, the company introduced a new compensation and evaluation system known as the "level system". Employees were given the option of continuing with the existing compensation formula or being compensated under the new level system.

[25] The system had four levels: bronze, silver, gold, and platinum. Mr. Abu-Ulba described the program as a "success road map" which provided criteria for employees to reach and move to the next level. He stated that the compensation system was tied to the level system in the sense that each level had its own compensation structure. He said that not everyone started at the bronze level; that it depends on their certification and experience.

[26] Ms. Fell also testified that the system allowed employees to know what was expected of them and how to get to the next level. She said that there was a base rate with an hourly rate which increased at each level. She testified that it was

mandatory for employees to move into the level system for performance standards but had a choice to stay on the prior compensation structure.

[27] When the plaintiff returned from her maternity leave in 2006, she was placed by the company onto the level system in respect of performance expectations, although she elected to remain on the existing compensation structure. She was initially placed by the company into the bronze level and was subsequently moved to the platinum level in 2010. The plaintiff testified that she was told by Ms. Bonarek that the performance level system did not apply to her.

[28] Mr. Abu-Ulba and Ms. Fell testified that while they did not discuss the level system with the plaintiff and did not know if the plaintiff attended meetings at which it was introduced, they believed that the plaintiff would have become aware of it when she returned from maternity leave. Ms. Fell's evidence was that the plaintiff was initially measured based on the bronze level but testified that this was changed in 2010 when she was raised to the platinum level. Ms. Fell acknowledged that the plaintiff was moved directly from the bronze level to the platinum — which required the plaintiff to increase her revenue from services from $3600 to $7000 in one month. Ms. Fell said that the plaintiff was not moved gradually as she was "always meant to be measured" at the platinum level and that people that remained on commission were to be measured at the platinum level.

[29] Ms. Atchinson also testified that there was a written performance criteria document for the level system which would have been provided to the plaintiff, although she did not give it to her directly.

Termination of Employment

[30] Mr. Abu-Ulba testified that when Ms. Bonarek left the company in early 2015, the senior management team looked to individuals within the department to replace her. At that time, he was informed by Ms. Fell and Ms. Atchinson that three employees, including the plaintiff, were underperforming. He said that this triggered him to take a more in depth review of her personnel file. He said he was "absolutely

shocked and offended and hurt" that despite her years of experience, training, and warnings, she was not meeting her goals and criteria.

[31] On learning of the issues, Mr. Abu-Ulba and the senior managers held a number of meetings to discuss the plaintiff. Mr. Abu-Ulba testified that he decided that she should be given "one more chance" but that there had to be consequences for her underperformance. He testified that he instructed that she be given a "termination notice", but that she be given three months to improve during which she had to show two "successful" months.

[32] Mr. Abu-Ulba, Ms. Fell, and Ms. Atchinson all acknowledged that they did not personally supervise the plaintiff and that this was the responsibility of her department head, Ms. Bonarek. Mr. Abu-Ulba described her as a manager who was a good trainer and coach and adhered to the "philosophy of the small wins". He said that none of the management staff had reported any concerns to him about the plaintiff prior to Ms. Bonarek's departure. When asked why he reviewed the plaintiff's personnel file, Mr. Abu-Ulba said that it was part of his job once he learned of it, and he felt there needed to be consequences for her underperformance.

[33] Ms. Fell also testified that Ms. Bonarek had not raised any concerns about the plaintiff with her prior to Ms. Bonarek's departure. She described the management style of Ms. Bonarek as being consistent with the company's vision: she was caring and transparent with staff and she always had an open door and adopted a team approach. She described Ms. Bonarek as an excellent trainer. Ms. Fell said that she was not aware of the severity of the plaintiff's performance shortfalls until January of 2015 when Ms. Bonarek left and they were reviewing the staff to replace her. She testified that when she and Ms. Atchinson reviewed the yearly financial performance spreadsheet maintained for each employee, they concluded that although Ms. Bonarek had been "nurturing", she was "protective" of the staff.

[34] Ms. Fell described her review of the plaintiff's yearly financial performance spreadsheet, as well as her personnel file, and testified that they disclosed a lack of

effort and commitment by the plaintiff. She said that the plaintiff had "spikes" in her performance that showed that she was capable of reaching targets. She said that the magnitude of her shortcomings disclosed a choice not to perform. Ms. Fell testified that the plaintiff's repeated failure to hand in her practice sheets on time spoke to her "disrespectful attitude". She said that she was not as concerned about customer complaints but was concerned about the pattern of complacency demonstrated by the warnings for lack of call backs to new guests and not handing in practice sheets after training on new services.

[35] Ms. Atchinson also said that she did not review the plaintiff's performance until January of 2015, and that supervision of employees was left to the department heads. She testified that although she did not supervise the plaintiff, from her observations of the plaintiff in the hallways and staff room, "she did not seem to have a sense of urgency" and that "she was very laid back, relaxed, and complacent".

[36] After discussions with Mr. Abu-Ulba and Ms. Fell, on March 13, 2015, Ms. Atchinson and Ms. Dawiskiba arranged a meeting with the plaintiff. At the meeting they gave her a letter advising of her performance deficiencies and stating that she had three months to improve or she would be terminated from employment on June 12, 2015 (the "March letter"). The March letter provided:

> March 13, 2015
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> Jennifer Cottrill
> Skin Care Therapist
>
> Re: Performance Meeting
>
> Dear Jennifer:
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> I write to document our concerns raised with you on our meeting with myself and Leisa on March 13, 2015. As you know, it is our impression that your performance and behavior is not indicative of your capabilities. You have been a partner with Spa Utopia (SU) - Langley for 10 years and upon review of your performance in 2014 you are not meeting the performance requirements for your position. The following items were discussed with you:
>
> 1. Attitude - lack of enthusiasm and complacency.
> 2. Not following policies and procedures as a technician as laid out by SU, including but not limited to call backs.

3. Performance - The performance requirements per year for your position is equivalent to the Platinum level.

   Platinum Level Requirements
   Services - $7100 per/mth or $86,520 per/yr
   Retail Sales - $2232 per mth or $26,784 per/yr
   Request Rate - 30% monthly

4. Your performance for 2014 after 10 years of employment as a skin care therapist.

Expected performance based on hours worked in 2014	
Expected services - $59,610	Actual services - $52,060
Expected Retail Sales - $18,453	Actual retail sales - $9098
Expected average request rate-30%	Actual average request rate-25%

5. Some performance indicators for where you stand after 10 years:

   Total NEW Spa Guests seen in 2014: 177
   Total Guests seen in 2014: 678 of which 33 returned to you; 645 guests did not return to you.
   Your performance indicators reveal that there were 645 missed opportunities to bring your guest back to see you, which appears to be related to making a connection with the guest and not utilizing the business building tools available to you.

6. We see that you provide excellent guest care and this is paramount to building your business and contributing to the Spa Utopia brand; yet after 10 years your numbers are not sustainable for business. We ask that you review yourself as a business within our business. We have entered into a partnership and right now we do not feel this partnership is providing any benefits to our business.

The Expectations set and agreed by all parties in our meeting are as follows;

1. Monthly Coaching Sessions beginning March 20, 2015 with Mandy. Mandy has created a plan and is here to facilitate and coach you to improve your numbers, skills and potential. Marked improvement is required and the commitment/motivation and work will need to come from you. You will be held accountable by management for the commitments you make during this coaching.
2. Immediate changes in attitude, behavior and motivation must be observed.
3. Call backs must be turned in weekly as per the SU protocol.
4. *2 Successful months as per criteria*. [added in writing]

Jennifer, we look forward to seeing immediate marked improvement to the above areas as well as all of Spa Utopia Health and Wellness Center policies and procedures as outlined in your employment agreement with us. This letter will go on you file as documentation of our meeting. If improvement is not seen to the satisfaction of management, your position will be terminated with cause June 12, 2015. If at any time during this 3 month period

> management feels that your commitment and effort is not producing results to your satisfaction, termination may occur prior to June 12, 2015.
>
> I, [Jennifer Cottrill] agree and understand fully that marked improvement needs to be observed effective immediately including but not limited to the items listed in this letter. I also understand that I could be dismissed with in or at the end of the 3 month timeline if my work performance hasn't improved to the satisfaction of the management of Spa Utopia Health and Wellness Center.
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> …
>
> [Emphasis added.]

[37] Ms. Atchinson testified that, at the meeting with the plaintiff, they told her that she was capable of doing better and wanted to set her up for success, but that they needed to see immediate improvement in her attitude and behaviour and to see more motivation. She had to turn in her call backs every week. They informed her that they needed to see "two out of three successful months" after the meeting or her last day would be June 12, 2015— although the termination could take place prior to that date.

[38] The plaintiff testified that she cried through the entire March meeting and had to go home early as she was so upset. Her appointments were transferred to other staff members. She was asked to sign the March letter, which she did as she felt she had to, even though she did not agree with what was said about her performance.

[39] Following this meeting, the plaintiff was provided with three, one hour coaching sessions with Ms. Gill, the new department head. Ms. Gill testified that during the coaching sessions, an action plan was developed by the plaintiff in which she set her own goals, but Ms. Gill would ask "probing questions". Ms. Gill said that she asked the plaintiff in the first meeting if she understood the consequences and that the plaintiff became very emotional.

[40] Ms. Gill testified that the plaintiff did well with the action plan and did "really well with her call backs in the three month period", but that the plaintiff had an "indifferent" and "nonchalant attitude". She said that the plaintiff focussed on retail in the coaching and that, after the last session, she was short by $122. In cross-

examination, Ms. Gill acknowledged that the plaintiff met the criteria on the performance spread sheet for March/April and for April/May; that she was showing improvement; and that she was actively participating in setting goals and attending the sessions. Ms. Gill also acknowledged that she did not look at the plaintiff's performance numbers for May/June and did not know what those numbers were. Ms. Gill did not maintain notes at the time as to what was said during the coaching sessions.

[41] Ms. Gill reported to Ms. Atchinson after each coaching session and Ms. Atchinson advised her how to motivate the plaintiff. Ultimately, Ms. Gill reported to Ms. Atchinson that the plaintiff was "indifferent and lacked enthusiasm" during the sessions.

[42] The plaintiff testified that she worked very hard to improve during these three months, as she wanted to stay with the company. She testified that she did significantly improve her performance: increasing the amount of service revenue, retail sales, and the number of requests during this period. She also increased the number of her new guests. She referred to the company's yearly financial performance spreadsheet that confirmed her increased performance and showed that she met the criteria for March/April and April/May of 2015.

[43] Notwithstanding having met the criteria, the performance spreadsheet states that she was not "successful" in March/April and April/May. Ms. Atchinson said that after the final coaching session, based on the information from Ms. Gill on the plaintiff's "affect" at the coaching sessions including her attitude, complacency, and lack of motivation, it was "very, very clear that her performance was not going to improve".

[44] In cross-examination, Ms. Atchinson said that she did not know whether the performance spread sheet showing her numbers in May/June was provided to the plaintiff but the plaintiff could have accessed it. She said that she reviewed the plaintiff's numbers for this period but she did not recall the numbers. Ms. Atchinson

agreed that the plaintiff had improved according to the criteria in the last two months and that the plaintiff provided “excellent guest care” in 2015. She maintained that the plaintiff’s demeanour was complacent but acknowledged that she did not do anything about this or take steps when she observed this in the hallway.

[45] Ms. Fell testified that she was informed by Ms. Atchinson that the plaintiff was not successful during the three months, at which point she and Mr. Abu-Ulba “reviewed the coaching package and the numbers” and decided that if the plaintiff was not going to do it in three months, she would never do it and “moved forward and terminated her employment”. She testified that the plaintiff was not dismissed for not handing in practice sheets and doing call backs but for the “bad attitude” that was reflected in her file.

[46] In reviewing the yearly financial performance spreadsheet from March to June of 2016, Mr. Abu-Ulba acknowledged in cross-examination that, with respect to homecare, services, requests, and new guests, the plaintiff performed at the highest level she had to that point in time. He agreed that she met the criteria for the last two months and had improved in certain respects, but said that she had to be successful on the basis of the platinum criteria— which standard, he said, she had agreed to. He said her being $122 off her retail target was significant. When asked why the yearly financial performance spreadsheet setting out her performance during the period she was given to improve did not contain information for May/June, he acknowledged that they were not recorded and did not know why. He said that as she did not have three successful months, he had “no choice but to let her go”.

[47] Mr. Abu-Ulba testified that when he was told by his managers that the plaintiff did not improve, he told them that, in that case, they “must stick to the letter”.

[48] On June 12, 2015, Ms. Dawiskiba and Ms. Atchinson met with the plaintiff. They told her that it was her last day. She was not given a letter confirming the dismissal and was not paid any severance. Mr. Abu-Ulba said there was no

additional letter given to her in June of 2015 as they believed she understood that the March letter was her termination notice.

[49] The plaintiff testified that she went “numb” during the meeting and could not take anything in.

[50] Since her termination, the plaintiff retrained as an Executive Office Administrator. She took a course through Sprott Shaw College commencing in November of 2015.

Issues

1. Did the defendant have cause to terminate the plaintiff?

2. If the defendant did not have cause to summarily terminate the plaintiff’s employment, what was the period of notice to which the plaintiff was entitled?

3. Is the plaintiff entitled to aggravate or punitive damages?

Credibility

[51] In *Bradshaw v. Stenner*, 2010 BCSC 1398, aff'd 2012 BCCA 296, Madam Justice Dillon reviewed the factors to be considered in assessing credibility:

> 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 the witness provides (*Raymond v. Bosanquet (Township)* (1919), 59 S.C.R. 452, 50 D.L.R. 560 (S.C.C.)). The art of assessment involves examination of various factors such as the ability and opportunity to observe events, the firmness of his memory, the ability to resist the influence of interest to modify his recollection, whether the witness' evidence harmonizes with 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 a witness has a motive to lie, and the demeanour of a witness generally (*Wallace v. Davis*, [1926] 31 O.W.N. 202 (Ont.H.C.); *Farnya v. Chorny*, [1952] 2 D.L.R. 354 (B.C.C.A.) [*Farnya*]; *R. v. S.(R.D.),* [1997] 3 S.C.R. 484 at para.128 (S.C.C.)). 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 (*Farnya* at para. 356).

[52] I found the plaintiff to be a credible witness who generally responded in a straight forward manner in the questions asked of her. She was a self-effacing individual who acknowledged her shortcoming as well as her positive attributes as an employee. The company did not dispute the plaintiff's honesty during the period of her employment.

[53] The witnesses called by the company were also generally credible, although, at times, I found there was a marked similarity in certain of their evidence (e.g. in relation to plaintiff's attitude and the protective quality of Ms. Bonarek's supervisory style).

[54] Where there were material conflicts in the evidence, I have addressed them in the course of my reasons.

Discussion

1. Cause for Termination

[55] The principles which should guide the court in determining whether there is cause for the dismissal of an employee were established by the Supreme Court of Canada in *McKinley v. BC Tel,* 2001 SCC 38. In *McKinley*, the Court emphasized that a contextual approach must be taken when examining if an employer has cause for termination. This requires that the court engage in a contextual analysis of all of the relevant facts and circumstances. The Court also emphasized that the purpose of the contextual analysis is to determine whether the misconduct is such that it has led to a breakdown in the employment relationship or is otherwise irreconcilable with the continuation of that relationship. Underlying the contextual approach, the Court said, is the principle of proportionality.

[56] The principle of proportionality was described by Mr. Justice Iacobucci at paras. 53 and 54:

> 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, a concept that was explored in *Reference Re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313, where Dickson C.J. (writing in dissent) stated at p. 368:
>
> > Work is one of the most fundamental aspects in a person's life, providing the individual with a means of financial support and, as importantly, a contributory role in society. A person's employment is an essential component of his or her sense of identity, self-worth and emotional well-being.
>
> This passage was subsequently cited with approval by this Court in *Machtinger v. HOJ Industries Ltd.*, [1992] 1 S.C.R. 986, at p. 1002, and in [*Wallace v. United Grain Growers Ltd.,* [1997] 3 S.C.R. 701], at para. 95. In *Wallace*, the majority added to this notion by stating that not only is work itself fundamental to an individual's identity, but "the manner in which employment can be terminated is equally important".
>
> 54 Given this recognition of the integral nature of work to the lives and identities of individuals in our society, care must be taken in fashioning rules and principles of law which would enable the employment relationship to be terminated without notice. The importance of this is underscored by the power imbalance that this Court has recognized as ingrained in most facets of the employment relationship. In *Wallace*, both the majority and dissenting opinions recognized that such relationships are typically characterized by unequal bargaining power, which places employees in a vulnerable position vis-à-vis their employers. It was further acknowledged that such vulnerability remains in place, and becomes especially acute, at the time of dismissal.

[57] Accordingly, the Court articulated a contextual analysis that directs the court to examine the relevant facts and circumstances underlying the dismissal to determine the existence of cause and underscored the need for proportionality in striking the balance between the employee's conduct and the sanction imposed. As noted by Mr. Justice Skolrood in *George v. Cowichan Tribes*, 2015 BCSC 513, the principle of proportionality seeks to balance the interests of employers and employees:

> 114 The requirement for proportionality and balance protects the interests of both employees and employers. From the employee perspective, it tempers the power imbalance that often exists in an employment relationship and provides employees with some assurance that their employment cannot be terminated at the whim of an employer. At the same time, it recognizes that the financial well-being of employers can be harmed through the misconduct of employees and it acknowledges the right of employers to take appropriate action to address such misconduct.

[58] Our Court of Appeal, in applying *McKinley*, noted that 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. The employer bears the burden of proving there was just cause for dismissal on a balance of probabilities: *McKinley* at para. 36.

[59] In cases concerning cause for an alleged failure to meet performance standards, an employer must show that it has established reasonable, objective standards of performance; the employee has failed to meet those standards; the employee has had warning that his employment is in jeopardy if he or she does not meet the standards; and the employee was provided with reasonable time to correct the situation: *Brown v. Sears Ltd.,* [1988] N.S.J. No. 475 (T.D) at para. 32; *Hennessy v. Excell Railing Systems Ltd.*, 2005 BCSC 734 at para. 12 citing from *Boulet v. Federated Co-operatives Ltd.,* 2001 MBQB 174 aff'd 2002 MBCA 114; and *Bomford v. Wayden Transportation Systems Inc.*, 2010 BCSC 1506 at para. 6.

[60] In *Bomford,* Mr. Justice Macaulay summarized the legal test for dismissal based on substandard performance as follows:

> [5] In order to dismiss an employee summarily, where the employer believes the employee's performance is substandard, the employer must provide the employee with a clear warning which specifically informs the employee that his or her job is in jeopardy. The employer cannot employ oblique language when warning the employee that his or her employment may be terminated. It is not sufficient for the employer to merely criticize the employee's performance or simply urge improvement.
>
> [6] In addition, although neither counsel referred to the decision, a convenient synthesizing of the requirement to warn is found in *Hennessy v. Excell Railing Systems Ltd.*, 2005 BCSC 734. There, the court, at para. 12, held that the employer must show:
>
> > (a) it has established a reasonable objective standard of performance,
> >
> > (b) the employee has failed to meet those standards,
> >
> > (c) the employee has had warnings that he or she has failed to meet those standards and the employee's position will be in jeopardy if he or she continues to fail to meet them; and

> (d) the employee has been given reasonable time to correct the situation.
>
> . . .
>
> [7] In short, a warning that the employee's job is at stake if performance does not improve is not in and of itself sufficient to satisfy the requirement to warn. A warning can only be considered sufficient as to the final two requirements listed above if the employer meaningfully assists the employee to improve. See *Rieta v. North American Air Travel Insurance Agents Ltd.*, 1996 CanLII 2374 (BC S.C.) at para 39, and cases referred to therein.
>
> [Emphasis added.]

[61] As noted by Mr. Justice Low in *Rowe v. Keg Restaurants,* [1996] B.C.J. No. 13 (S.C.), the threshold test for cause based on performance issues is serious or gross incompetence as the conduct must amount to a repudiation of the employment contract. In that decision, Mr. Justice Low cited with approval the following statement of the law from *Stewart v. Intercity Pack Ltd.*, [1988] B.C.J. No. 2442 at 138 (S.C.):

> … He cannot be dismissed summarily because he does not live up to expectations. The threshold test is incompetence. It must be proved to be serious or gross incompetence because in law the conduct of the employee must amount to a repudiation by him of his contract of employment. The law also appears to require that the employee be warned that his job is in jeopardy and be given a reasonable chance to improve (see *The Law of Dismissal in Canada* (Toronto: Canada Law Book, 1985) by M.A. Levitt at 105-108).

[62] A failure to meet minimum performance standards does not necessarily justify dismissal with cause. Mere dissatisfaction with an employee's job performance does not justify dismissal. For example, in *Stewart*, our court held that a summary dismissal of a salesman was not for cause even though his sales record was substantially below that of the lowest performer among the sales team. Similarly, in *Chawrun v. Bell Mobility Inc.,* 2013 BCSC 102, the court held that a failure to meet quotas or targets may not be sufficient if it cannot be shown that the failure was caused by incompetence. The court in that case found that the defendants had not established cause as there was no objective evidence that plaintiff's quota was reasonable or attainable.

[63] Here, the company submits that the plaintiff was terminated for cause and relies on the plaintiff's alleged performance issues as the cause for the termination. It contends that the plaintiff was aware during her employment of the performance measures relating to service sales, retails sales, name request rate, and overall performance, including "attitude, maintaining protocols, duties, punctuality and presentability", and that her failure to meet those measures was fundamentally inconsistent with her obligations to the company. The company submits that the plaintiff failed to meet the performance standards, especially in the final three months, despite being given an opportunity to do so and that cause therefore existed to terminate her employment.

[64] The company relies on the March letter and the meeting as the warning to the plaintiff that her job was in jeopardy. The company submits that this meeting and letter satisfy the criteria set out in the decision of Munroe J. in *Manning v. Surrey Memorial,* [1975] B.C.J. No. 243 (S.C.) that the plaintiff "ought to have received proper warning that his job was in jeopardy and have been given a reasonable opportunity thereafter to have corrected the deficiencies". The defendant relies on subsequent cases in which this decision has been followed including: *Bomford, Woolley v. Ash Temple Ltd.*, 27 A.C.W.S. (3d) 67 (B.C.S.C.), *Rieta v. North American Air Travel Insurance Agents Ltd.*, [1996] B.C.J. No. 816 (S.C.), and *Lewis v. M3 Steel (Kamloops) Ltd.,* 2006 BCSC 681. The company contends that the three months and coaching sessions were sufficient to discharge their burden to give the plaintiff a reasonable opportunity and assistance for improvement.

[65] The plaintiff responds that if there were performance issues prior to the March letter and meeting, they were effectively condoned by the defendant and that they therefore cannot now be the basis of her termination for cause. Essentially, the plaintiff argues that her performance was substantially similar through her 11 years of service and that it would be unfair to allow the defendant to rely on her performance during those years to support cause. The plaintiff contends that a continuing work relationship was viable and there is no evidence that she disregarded any essential condition of her employment.

[66] The plaintiff submits that in the period after the March letter, she was "set up to fail" and was not given a meaningful opportunity to improve. The plaintiff refers to the decision of *Brake v. PJ-M2R Restaurant Inc.*, 2016 ONSC 1795 in which the court held that the plaintiff was not given any clear and reasonable opportunity to correct the alleged performance issues because she had been placed in an impossible situation; she was "set up to fail from the beginning". The plaintiff submits that the same can be said in this case for the three month period following the March letter and meeting.

[67] For the reasons that follow, I find on the whole of the evidence that the company has failed to establish that it had cause to dismiss the plaintiff. I will discuss my reasons in the context of the time prior to the March letter and the three month period that followed.

Period prior to March 13, 2015 letter

[68] During most of the plaintiff's 11 years with the company, she was under the direct supervision of Ms. Bonarek, who, based on the testimony of Mr. Abu-Ulba, Ms. Fell, and Ms. Atchinson, was an effective and competent manager. Ms. Bonarek was not called to give evidence and there was no explanation provided as to why she was not called. However, there was evidence in the form of Ms. Bonarek's written notes. From some of the notes, it is evident that Ms. Bonarek raised concerns with the plaintiff about such matters as not calling clients back to encourage further bookings and not handing in practice study sheets. I find that the last warning received by the plaintiff about following up with clients was in January of 2012, three years before her termination, and there were no warnings from Ms. Bonarek in 2011 and only one warning in 2010, about not placing follow up calls to clients. I also find that the last warning in evidence regarding failure to follow company treatment protocols for clients was from 2008. There was one note in 2013 about the plaintiff needing to bring in an extra pair of cuticle nippers.

[69] There was also evidence of a few client complaints over the plaintiff's tenure with the company relating to services she performed. However, I note that the

evidence of the company was that client complaints about treatments are not uncommon in the industry. Mr. Abu-Ulba acknowledged that such complaints are certainly not rare in the service industry and, in my view, the complaints were not treated as indicative of a serious performance issue.

[70] When the warnings and complaints are considered in context, they do not support the conclusion that the plaintiff had serious performance issues which would justify her dismissal for cause prior to the March letter and meeting. The plaintiff had not been advised in 2013, 2014 or early 2015 that her employment was in jeopardy. I do not consider the plaintiff's performance "grossly deficient" or the likelihood of discharge "obvious" such that a warning was not required: *Hennessy* at para. 12.

[71] While there were meetings held between the plaintiff and her department head to establish goals with a view to increase sales, as there were with the other employees at the spa, I note that the last meeting notes in evidence was from 2012. In the previous years, there are only professional goal forms for a few of the months from 2004 to 2012. I accept the evidence of the plaintiff that Ms. Bonarek stopped holding the meetings prior to her leaving the company in January of 2015. In any event, I find that the professional goal forms do not substantiate the company's position that the plaintiff was being held to the platinum standard commencing in 2010, as the goals which were established by the plaintiff in these goal setting meetings were well below the platinum standard. While the company may have nominally set her platinum level, I find that the evidence does not support the conclusion that the plaintiff was told that she had to comply with platinum standards or face termination of her employment.

[72] In that regard, it was the evidence of the company that it relied almost exclusively on Ms. Bonarek to oversee the plaintiff. Mr. Abu-Ulba, Ms. Fell, and Ms. Atchinson all acknowledged that they did not supervise the plaintiff nor did they personally explained the performance level system to her. The evidence from Ms. Bonarek's notes does not support the conclusion that she advised the plaintiff that her employment was in jeopardy if she did not meet the platinum standard. For example, the yearly performance review spread sheets for 2012 and 2014 (the 2013

sheet was not located) contain positive comments from Ms. Bonarek about the plaintiff's performance. In 2012, Ms. Bonarek included the following statement:

> Your request dropped down. Don't worry though. Just focus on your [retail] Good Job you doubled last month [retail] ! :) Congrats Jenn ! Dora

[73] In 2014, the yearly performance spread sheet contains the following statement:

> Jennifer the highest HC this year! Congratulations great job! Call backs are need teh [sic] same as Requests got already - great numbers!

[74] I accept the evidence of the plaintiff that prior to March 12, 2015, she believed that she was doing "great" in her job, that she was improving her numbers, and had demonstrated her interest in the job by taking extra training to become a trainer.

[75] I would add that, while I interpret the performance levels described in the "Esthetics Department Performance Criteria, Compensation and Benefit Package" as being designed to incentivize higher performance, there is no indication in this material that failure to sustain the standards of one level would result in termination of employment. Indeed, the silver, gold, and platinum level descriptions all contain sections entitled "Moving Between Levels" which contemplate the ability to move down to a lower level in the event that the criteria are not met on a regular basis. One such section under the gold level reads:

> Gold Level - if the esthetician is unsuccessful after minimum time period (15 months), she/he will remain in current level until she/he has met 11 successful criteria months. There is no maximum time period. There cannot be 4 consecutive unsuccessful criteria months or the esthetician will be placed back into Silver Level and must begin again to accumulate 6 successful criteria months to move up again.

[76] The company suggests that the ability to move through levels was only in respect of employees that had transferred onto the new compensation system and that employees not on the compensation system were to be held to the platinum level for performance. However, I find this argument somewhat disingenuous when there is no evidence from the company that this was explained to the plaintiff.

[77] I would also add that I do not accept the company's submission that it can rely on the past performance issues of the plaintiff to support that it had cause for dismissal "without anything new". The company asserts that there was no condonation, as that principle was articulated in the oft cited decision in *McIntrye v. Hocken,* (1889) 16 O.A.R. 498 (C.A.) at 501-502, because "while Ms. Bonarek had knowledge of the plaintiff's retail service, service numbers, and name request rate, other members of the management team did not".

[78] Senior representatives of the company had access to the information on employee performance, including the monthly and yearly spread sheets outlining whether and to what extent employees were meeting the performance criteria. I find that it is inconceivable that such information would not have been reviewed by the senior management staff at the Langley location on a regular basis given the nature of the spa business whose success, as Mr. Abu-Ulba explained, was dependent on the performance of its employees. The organizational structure of the company contemplated that Ms. Bonarek, who was at the lowest level of management, would be supervised by more senior members of management. Even accepting that the senior management relied on Ms. Bonarek for the day-to-day supervision of the plaintiff, they cannot afterwards seek to avoid the consequences of having delegated such authority. They are effectively bound by the supervisory decisions made by Ms. Bonarek on behalf of the company.

Period after the March 13, 2015 letter

[79] The issue then remains whether the company has established that it had cause to terminate the employment of the plaintiff after the March letter. As noted, the plaintiff, relying on the decision in *Brake*, submits that she was set up to fail as the company had already made their decision to terminate her prior to the March letter and meeting.

[80] The Ontario Superior Court in *Brake* considered the circumstances of a McDonald's employee who was issued a performance improvement plan and given

three months to improve. She was fired for cause after the three month period. In rejecting the defendant's arguments on cause, the court held at para. 21 that Ms. Brake had been placed in an impossible situation such that she was "set up to fail from the beginning". The court made the following comments concerning the nature of her dismissal:

> 19 Ms. Brake was not given any clear and reasonable opportunity to correct the alleged issues that the Defendant was having with her employment performance. She was transferred to a flailing branch and expected to turn it around and perform there in excess of the standards that had been accepted of her in the past. The GAP program as implemented by the Defendant was arbitrary and unfair. There was no objective basis for the goals set; they were meaningfully more onerous than usual and in excess of those set by McDonald's generally. These extraordinary expectations were both unjustified and impossible to meet.
>
> 20 Ms. Brake was not even kept informed of her performance under the GAP program in the way the program itself stipulates. I do not see the rationale in advising an employee of her 30 day performance nearly half-way to the 60 day mark given the overall timespan involved.
>
> 21 I find that Ms. Brake was set up to fail from the beginning of the GAP program. Not even the fact that she did ultimately manage to meet the Defendant's heightened expectations could save her in the end. Well before the completion of the GAP, Ms. Brake's removal from her manager position was a foregone conclusion. Given the length of her employment and her loyal history of contributions to the organization, she was entitled to expect more assistance in overcoming her newly alleged shortcomings. I find the GAP program as implemented by the Defendant was less an instrument of help than it was a way to record Ms. Brake's anticipated inability to meet the Defendant's shifting expectations in order to justify a decision that had effectively already been made.

[81] While the decision is not on all fours with the case before me, it does emphasize the importance of the requirement that an employer give a meaningful opportunity and assistance to an employee with performance issues. Here, I find the plaintiff was not given such a fair and reasonable opportunity to meet the expectations set out in the March letter.

[82] First, while the company argues that the March letter and meeting constituted a warning to the plaintiff that her employment was in jeopardy, it was the evidence of Mr. Abu-Ulba that the March letter was meant as the "termination letter". That is why, Mr. Abu-Ulba testified, there was no need to provide a letter of termination in June of

2015. He said they believed that the plaintiff understood that the March letter was her termination notice. I take from his evidence that while he was prepared to give her an opportunity to show two successful months, he had decided that he already had cause to terminate her employment. I also take from his evidence that it would be exceedingly difficult for the plaintiff to satisfy him that she should remain with the company - given the strength of his views of the plaintiff's suitability. As noted, he testified that, based upon his review of the plaintiff's personnel file, he was "absolutely shocked and offended and hurt" by what he saw.

[83] Further, I find the March letter outlining what was required of the plaintiff to be ambiguous; it set an unreasonable and unfair standard. It stated that the plaintiff must meet the performance requirements "equivalent to the platinum level"; that "immediate changes in her attitude, behaviour, and motivation must be observed"; and that "call backs must be turned in weekly". Further, the letter stipulated that there must be a "marked improvement" to the above areas as well as to "all of the Spa Utopia Health and Wellness Center policies and procedures as outlined in your employment agreement with us." Additionally, a handwritten note included in the letter stated there must also be "two successful months as per criteria".

[84] It was not clear whether the plaintiff had to demonstrate an "immediate marked improvement" or "two successful months". Moreover, it is not clear how the plaintiff was to demonstrate "changes in her attitude, behaviour, and motivation to the satisfaction of management". Further, there is no evidence as to which of the policies and procedures contained in the 32 page manual the plaintiff was expected to show an immediate marked improvement in.

[85] In considering whether the employer provided a fair and reasonable opportunity to improve, I observe, as noted above, that the plaintiff was not previously held by the company to the platinum level. I find that this was the first time she was told that her employment was in jeopardy if she did not meet the platinum criteria and it was the first time she was spoken to about a poor attitude and lack of motivation. Indeed, in all of the documents tendered by the company concerning the

plaintiff's performance before 2015, the only direct reference to the plaintiff's attitude was a letter from Ms. Dawiskiba that stated the plaintiff "has a great energy and is very approachable" and that she "has a great deal of passion for the industry".

[86] I also observe that the company policies and procedures do not express a standard in terms of attitude and motivation. There is only a general reference in the platinum performance criteria, compensation and benefit package document to having "positive attitude" and "motivating team members". It is not described as one of the platinum "criteria" but as one of the approximately 50 "workplace expectations". The document delineates particular workplace expectations which can result in failure to successfully meet monthly criteria, but it does not expressly refer to attitude or motivation.

[87] In my view, an employer's reliance an employee's poor attitude, complacent manner, or lack of motivation as a ground for dismissal must be viewed cautiously, given the inherently subjective nature of an assessment of these attributes. It is not enough for an employer to assert that the employee has a poor attitude or a complacent manner, the employer must establish that, viewed objectively, the employee has manifested related behaviour in the workplace *and* that dismissal is a proportionate response.

[88] In this case, the evidence of the company's witnesses was that the reason they concluded that she did not have two successful months was because of her poor attitude, her complacency, and her lack of motivation, but they did not provide any particulars as to what they observed in terms of her attitude, complacency, or attitude during the March to June 2015 period. Rather, they referred to Ms. Gill having reported this to them following the coaching sessions.

[89] I am not satisfied, on the evidence, that the coaching sessions provided meaningful assistance to the plaintiff. The sessions were substantially similar to the goal setting meetings with Ms. Bonarek. The three sessions were one hour or less in duration and the plaintiff was again left to establish her own goals. Ms. Gill had only

been in the position since February of 2015 and had previously been at the same level as the plaintiff. Ms. Gill was fully aware of the concerns of management before she began the coaching. I find that she was in a difficult position. While she may have sincerely wished to help the plaintiff, she was being asked by management to make judgement on the plaintiff's attitude and motivation without having management experience and without any objective criteria for making such judgments.

[90] I find that the company's assertion that the plaintiff had a poor attitude, was complacent, and lacked motivation was almost entirely based on the impressions of Ms. Gill at the coaching meetings. Even if the plaintiff did not display the level of enthusiasm Ms. Gill may have hoped for, this does not mean that she was not bringing a professional and positive attitude to her work with clients. There is no evidence that during the March to June period there were complaints or concerns about how she dealt with clients or team members. In my view, the contention that she was complacent or lacked motivation is contradicted by her increased performance numbers during this period.

[91] In that respect, I find that the plaintiff did improve markedly. The performance spread sheets for the March/April and April/May 2015 months state that "yes" she met the platinum criteria. Her home care percentage, request rate, number of services and new guest numbers for April/May were the highest in 2015. She was only $122 off the target amount for home cares sales. I consider the marked improvement in her sales and number of customers belie the company's contention that she had a poor attitude, lacked motivation, or was complacent during the relevant period. I accept the plaintiff's evidence that she "worked her butt off" to achieve approximately $8,000 in services and $1,500 in sales in the April/May period because she wanted to continue to work with the company.

[92] I note that the April/May period is the last period recorded in the company's spread sheets pertaining to the plaintiff's performance. Although the plaintiff was to be given a three month period to meet the company's expectations, there are no

numbers in the performance spreadsheets which the company adduced which include the May/June period. Although Ms. Atchinson states that she reviewed the numbers for this period, there is no other evidence substantiating that this period was considered and she was unable to recount how the plaintiff performed in the latter period other than that she was "still under". I find that Ms. Atchinson's evidence on this point is not reliable.

[93] In that regard, I note that it was Ms. Atchinson's evidence that, based upon the information from Ms. Gill on the plaintiff's "affect" at the coaching, she concluded it was "very, very clear" that the plaintiff's performance was not going to improve. As the parties agree that the last counselling session was held on May 22, 2015 and the evidence is that Ms. Gill reported to Ms. Atchinson on the counselling sessions, I consider it likely that Ms. Atchinson proceeded to discuss her conclusion regarding the plaintiff's employment with Ms. Fell shortly thereafter, without any meaningful review of the plaintiff's performance in late May/early June.

[94] Moreover, in considering whether the employer fairly considered the plaintiff's performance prior to making the decision that June 12th would be her last day with the company, I note that there is no evidence from Ms. Atchinson or Ms. Dawiskiba that the employer provided any opportunity for the plaintiff to respond to the assessment that her attitude was poor or that she lacked motivation before making the decision that it was her last day. There is also no evidence that her performance spreadsheets were discussed with the plaintiff on or before June 12, 2015.

[95] I consider Ms. Atchinson's evidence on discovery to be telling in terms of the circumstances giving rise to the decision to terminate the plaintiff's employment. Although at trial she initially disagreed with the suggestion that the decision to terminate the plaintiff's employment was motivated, in part, by business considerations, she ultimately agreed with her discovery evidence, which was as follows:

> 745 Q But it was possible to do that, to give her another chance; right?
>
> A I don't know if it's -- it was a business decision --

746 Q Right.

A -- and it was based on performance. And the department was operating on a deficit, and some of our -- the people that have been there the longest were having the least performance, right, so you have to make decisions.

747 Q And was it a decision -- and I understand what you're saying. Was it a decision in part based on the financial performance of the company, then, and people had to be cut that were maybe --

A No.

748 Q Okay. So it wasn't a need for the company to make cuts to improve its bottom line?

A Well, it was a need to make cuts to improve the bottom line.

[96] While the company was entitled to consider its bottom line and to reduce its compliment of employees, if it intends to allege cause it was incumbent on the company to fairly assess the employee's competence and to determine whether, given the nature and circumstances of the performance issues identified, dismissal is a just and proportionate response.

[97] As noted, I conclude that the company has not established that it had cause to dismiss the plaintiff from her employment. The employer unreasonably sought to hold the plaintiff to performance standards which it had not previously required of her and failed to provide her with a fair and reasonable assessment of her performance. I do not accept the company's assertion that it can rely on vague allegations that the plaintiff was complacent and had a poor attitude in the face of the evidence that she met the performance criteria, markedly increased her sales and services, and provided excellent guest care. I also do not accept that failing to meet the sales target by $122 is "significant" given the extent to which she improved her sales. In my view, the company gave no meaningful attention to the improvement they said they were looking for. The company also did not provide the plaintiff with an explanation as to why her attitude was deficient or why it believed it had cause for her termination. The plaintiff did not have a reasonable opportunity to respond to the conclusions reached by the company before it dismissed her. In sum, the company

has not shown that there was "serious or gross incompetence" such that it could be said that the plaintiff repudiated the contract.

2. Notice Period

[98] Given my conclusion that the company did not establish that it had cause to terminate the plaintiff's employment, she was entitled to notice of termination or payment in lieu of notice.

[99] With respect to the appropriate period of notice, the company submits that the plaintiff was given three months' notice of termination on March 13, 2015. As noted, the company claims that the March letter that served as notification of the plaintiff's performance issues was also notice of termination; that the subsequent three months after the meeting was the notice period; and that this is over and above the notice requirement set out in the plaintiff's employment contract and the *Employment Standards Act,* R.S.B.C. 1996, c.113 (the "*Act*"). In the alternative, the company submits that if the March letter did not constitute adequate notice, the terms of the employment contract provide that the plaintiff would be entitled to eight weeks' severance prescribed by the *Act.*

[100] The company refers to section 8 of the 2004 and 2014 employment agreements, which it asserts stipulate the agreed amount of notice or pay in lieu of notice to which the plaintiff is entitled. The company submits that, by incorporating the termination notice provisions of the *Act* into the employment agreements, the presumption of common law reasonable notice is effectively rebutted.

[101] The 2004 agreement contains the following severance clause:

> 8. The Employer may terminate the Employment of the Employee without cause or notice in accordance of the *Employment Standards Act* of British Columbia …

The 2014 agreement contains the following revised provision:

> 8. Termination

> 8.1 The Employer may terminate the Employment of the Employee without notice or pay in lieu of notice in the following manner in the following circumstances:
>
> (a) At any time, for cause;
>
> (b) At any time, for notice in writing or pay in lieu or notice, said notice to be in accordance with the notice requirements provided in the Act, as amended from time to time.

[102] The plaintiff submits the neither the 2004 nor the 2014 agreement governed her employment with the company. The plaintiff contends that she was hired on an oral contract of employment which was created when Ms. Fell hired her in April of 2004, the terms of which were governed by the common law. Although the plaintiff agreed that she signed a contract of employment on May 3, 2004, she maintains that because the employment agreement was given to her to sign during her orientation and without new consideration provided, it is not binding. The same argument is advanced in relation to the 2014 agreement. The plaintiff relies on the decisions in *Francis v. Canadian Imperial Bank of Commerce*, [1994] O.J. No. 2657 (O.N.C.A.), *Holland v. Hostopia.Com Inc.*, 2015 ONCA 762, *Rejdak v. Fight Network Inc.*, [2008] O.J. No. 2995 (O.N.C.J), and *Duprey v. Seanix Technology (Canada) Inc.*, 2002 BCSC 1335 in support.

[103] With regard to the first position of the company, that it provided three month notice to the plaintiff communicated to the plaintiff in the March letter, I find that the notice was deficient insofar as it did not clearly and unequivocally communicate that her employment would be terminated on June 12, 2015. Rather, it held out the prospect that her employment may not be terminated if there was a marked improvement and/or she had “two successful months”. It also provided that the contract may be terminated earlier than on June 12, 2105: “at any time” during the three month period if “management feels that your commitment and effort is not producing results to our satisfaction”.

[104] In *Kerfoot v. Weyerhaeuser Company Limited,*, 2013 BCCA 330, Madam Justice Saunders affirmed the law on the content of a notice as described in the decision of Mr. Justice Wood in *Yeager v. R.J. Hastings Agencies Ltd*., [1985] 1

W.W.R. 218 (B.C.S.C.) wherein it was held that a notice of dismissal must be "specific and unequivocal and it must be clearly communicated to the employee if it is to be effective in law" and that the "onus of proving that such a notice has been given rests upon the employer who seeks to raise it as a defence to an action for damages for wrongful dismissal".

[105] I also note the decision of Mr. Justice Ruttan in *Bader v. Canada Trust Co.*, [1980] B.C.J. No. 518 (S.C.). In that case, an employee was given notice that he would be fired unless he improved his performance of certain duties. When the employer concluded that he had not improved, his employment was terminated. The employer relied on the prior notice it had provided to the employee. Justice Ruttan rejected the position of the employer that a warning of possible dismissal constituted notice of termination:

> 6 Despite Mr. Buchanan's persuasive arguments, a warning of possible dismissal or even probable dismissal, does not constitute notice of dismissal. Therefore the notice was not effective until March 6, when he was given what amounted to 2-1/2 months' pay in lieu of further notice.

[106] In this case, I find that the March letter did not unequivocally provide three months' notice of termination and, further, that the circumstances created by the company did not allow for the plaintiff to use the alleged notice period for its intended purpose - to "let the employee arrange [their] affairs": *Deputat v. Edmonton School District No. 7*, 2008 ABCA 13 at para. 11. I, therefore, find the plaintiff's entitlement to a notice period commenced on June 12, 2015.

[107] I turn to whether the common law presumption of reasonable notice was displaced by the provisions of the 2004 and 2014 employment contracts. In the absence of an express term to the contrary, there is a common law presumption that employment contracts of indefinite duration require an employer to give reasonable notice of dismissal in the event of a termination without cause, *Kerfoot* at para. 24.

[108] Parties to an employment contract can agree on a different notice period and rebut the presumption. They can also referentially incorporate minimum notice periods from employment standards legislation, however such notice periods must

not provide for less than the statutory minimum notice periods prescribed in the *Act*. This was confirmed by Supreme Court of Canada in *Machtinger v. HOJ Industries Ltd.*, [1992] 1 S.C.R. 986, wherein Mr. Justice Iaobucci stated at 1004-1005:

> Moreover, this approach provides protection for employees in a manner that does not disproportionately burden employers. Absent considerations of unconscionability, an employer can readily make contracts with his or her employees which referentially incorporate the minimum notice periods set out in the Act or otherwise take into account later changes to the Act or to the employees' notice entitlement under the Act. Such contractual notice provisions would be sufficient to displace the presumption that the contract is terminable without cause only on reasonable notice. This point was recognized by Lysyk J. in *Suleman*, *supra*, at p. 214:
>
> > An employer who wishes to guard against being called upon to give any more notice or severance pay than legislation demands can readily draw a contractual clause which, in effect, converts the statutory floor into a ceiling. But here the employer has authored a contractual term which simply fails to comply with the law. In such circumstances, it is not evident why the employee should be placed in a worse position than if the contract had said nothing at all about notice of termination.

[109] In this case, section 8 of the 2004 contract of employment, which is the provision at issue in these proceedings, was considered by this court in *Brown v. Utopia Day Spas and Salons Ltd.*, 2014 BCSC 1400. In that case, Mr. Justice Brown considered whether section 8 satisfactorily incorporated the provisions of the *Act,* thereby limiting the amount of severance or whether it failed to do so, leaving the plaintiff entitled to common law reasonable notice. After reviewing the law, including *Machtinger* and the decision of the Court of Appeal in *University of British Columbia v. Wong*, 2006 BCCA 491, he concluded that section 8 was “valid and enforceable” and rebutted the common law presumption:

> 22 I find the termination clause is not open to reasonable interpretation other than the parties intended to incorporate the *ESA*'s statutory terms for notice and wages instead of notice. The minor grammatical errors contained in the clause do not create a material ambiguity. The word "or" could be substituted with the word "on", and the word "with", instead of "of", which shows just how fine the point of distinction becomes. So long as the parties' intentions are discernible, imperfect language that does not create ambiguity or uncertainty regarding the parties' intentions is not material. The plaintiff offers no alternative reasonable interpretation to unsettle what I find is the parties' clear intentions. The termination clause refers to the *ESA*, a reference that serves

> only one logical purpose, which is to incorporate its termination provisions into the parties' termination clause.
>
> 23 I am mindful of the Supreme Court's comments on the fundamental importance of work in a person's life and its observation that individual employees may lack the bargaining power and information necessary to achieve more favourable contract provisions when they negotiate their employment contract: *Machtinger.* The principle remains, however, that when the *ESA* is referenced in an employment contract, its provisions may rebut the common law principles that govern reasonable notice. I note the employer paid a $9,000 signing bonus, suggestive of some demand for the plaintiff's services and of some equality in bargaining power. I do not find evidence of unconscionability. I note also that the employment agreement twice sees the plaintiff confirming that she had the opportunity to seek a legal opinion to address any concerns she might have had at the time.
>
> 24 I find clause 8 of the March 9, 2007 employment agreement is valid and enforceable. It, and, by reference, s. 63 of the *ESA*, governed the defendant's obligations to the defendant when it terminated her employment. The payment the defendant has already made fully discharged its obligations under the *ESA* to the plaintiff.

[110] The plaintiff did not argue that this decision was wrongly decided as she focussed her submissions on the enforceability of the written contracts of employment for lack of consideration.

[111] Although I am mindful of the comment in *Machtinger* that common law notice can be rebutted provided that contractual language “clearly” specifies some other form of notice, I agree with Justice Brown that the minor grammatical errors in this provision do not create a material ambiguity. The court should strive to give effect to what the parties reasonably intended to agree to when the contract was made: *Miller v. Convergys CMG Canada Limited Partnership*, 2014 BCCA 311, leave to appeal ref’d [2014] SCCA No. 424 at para. 15. I also note that courts, since *Machtinger,* have held that a clause which incorporates the *Act* by reference can be sufficient to rebut the presumption of common law notice and limit the obligation to that found in the *Act*: *University of British Columbia v. Wong.*

[112] In any event, the decision of Justice Brown ought to be followed unless, on a *Hansard Spruce Mills* analysis, I conclude any of the exceptions to which Justice Wilson referred to in *Hansard Spruce Mills Ltd., Re*, [1954] B.C.J. No. 136 (S.C.)

apply. I conclude that none of the exceptions are applicable: there have been no subsequent decisions affecting the validity of his judgment to which I was directed; it was not demonstrated that there are relevant cases which were not considered; and the reasons of Justice Brown were not *nisi prius*. Justice Brown provided a considered decision on the issue and judicial comity supports the conclusion that section 8 of the 2004 agreement is valid and enforceable: *Zuria v. Mission Institution*, 2011 BCCA 452.

[113] That said, I will consider the plaintiff's submission that the 2004 and 2014 written employment contracts do not apply to the plaintiff for lack of consideration. The plaintiff suggests that she was employed on an oral agreement, which provided for common law notice and that it was not effectively modified by the subsequent employment contracts.

[114] I start with the general proposition that the standard principles of contract law apply in the employment setting. As noted by Madam Justice Dardi in *DeGagne v. Williams Lake (City)*, 2015 BCSC 816:

> 20 The essence of any legally enforceable contract is consensus *ad idem*; there is no contract without the required meeting of the minds. Both parties to an alleged contract must have manifestly expressed an intention to be legally bound by the agreement and the parties must be shown to have reached consensus on the essential terms of the alleged contract. The parties must have expressed those essential terms such that "their meaning can be determined with a reasonable degree of certainty" by the courts: *Frolick v. Frolick*, 2007 BCSC 84 (B.C. S.C.) at para. 30.

[115] The parties must therefore have reached an agreement on the essential terms for the employment contract to be enforceable.

[116] Here, the plaintiff asserts that an oral employment contract was formed in the telephone call in which the plaintiff was told she was "hired", while the company contends that Ms. Fell told the plaintiff that "she was successful in her interview and to come in for an orientation". I am not persuaded that, given the effluxion of time, either the plaintiff or Ms. Fell recall precisely what was said in the 2004 phone call. However, I am satisfied from their evidence, that the telephone discussion was brief

and that there was no discussion of the terms of the plaintiff's employment. Although in some circumstances, the court may imply reasonable terms to give effect to the unexpressed intentions of the parties, it must be satisfied that it is appropriate to do so. In this case, I am not satisfied there was any discussion of the essential terms of the employment relationship in the telephone call. I find the written contract of employment was executed before the plaintiff commenced her position as a skincare therapist.

[117] I accept Ms. Fell's testimony that on May 3, 2004, she followed her usual practice with the plaintiff, which was to go through all the required paper work, the company policies, and the terms of the employment contract. The plaintiff does not dispute that she was asked by Ms. Fell if she was comfortable signing the contract and whether she wanted to obtain legal advice. The plaintiff also did not dispute that Ms. Fell reviewed the contract with her, line by line.

[118] Further, in cross-examination, when the plaintiff was asked about her 2004 telephone call with Ms. Fell, she testified that she was told by Ms. Fell she "was *going to be hired* and to show upon on May 3 at the Langley location". Despite the plaintiff's suggestion that, as she had trained on the first day, she had worked prior to signing the contract, her evidence was that she did not start her work duties with the company until after she signed the contract.

[119] In my view, the instant case can be distinguished from the decision in *Francis* in which the employee had signed a full offer letter prior to signing a more restricted formal agreement and from the decision in *Holland* in which the employee had been working for nine months prior to being presented with a written agreement.

[120] The decision in *Rejdak* can also be distinguished. In that case, the evidence supported that the employer and employee had agreed to the salary, position title, and start date on the phone prior to the employee starting work and that the employee had done a full days' worth of worth before being presented with the written contract. I am not able to find that the plaintiff and the company discussed such essential terms as salary and benefits during the phone call.

[121] I find that this case is more analogous to the situation in *Bern v. Amec E & C Services Ltd.*, 2007 BCSC 856. In that case, Mr. Justice Bauman (as he then was) held that the contractual relationship between the parties did not crystallize until the plaintiff had reviewed all the terms of the written contract. He emphasized that the plaintiff did "not begin performing his duties of employment" until after the written contract had been signed. Here, I find that the plaintiff's first day was an orientation day, in which she toured the spa facilities, was advised on general procedures and policies, and reviewed the contract of employment. There is no evidence that she provided any skincare services prior to signing the agreement. I am not satisfied that she could be said to have commenced her duties as an employee prior to signing the contract.

[122] I, therefore, find that the 2004 agreement was valid and in effect during the plaintiff's employment. I find it unnecessary to consider the 2014 agreement. It has no application for want of consideration.

[123] In summary, I find that the employment of the plaintiff was governed by the 2004 agreement and that, given that no cause existed for her termination, the plaintiff is entitled under the agreement to eight weeks' severance pay, calculated on her total weekly wages earned in the last 8 weeks of her employment with the company as provided in the *Act.* I note that the common law duty of mitigation does not apply as the plaintiff is limited to the amount of severance she is entitled to under the *Act*: *Boland v. APV Canada Inc.*, [2005] O.J. No. 510 (S.C. Div. Ct.) at paras. 21-24.

3. Aggravated and Punitive Damages

[124] The plaintiff also seeks an award of aggravated damages and punitive damages in the amount of $20,000. She submits that, in the circumstances, the company acted callously and unfairly in accepting her performance for 11 years only to arbitrarily change the standard to which she was required to perform, and to then dismiss her in three months without a dismissal letter when she failed to meet those

standards. She submits that she was set up to fail and that the company breached their duty of good faith in the manner of her termination.

[125] In support of her claims, the plaintiff emphasizes the fact that the company prides itself on fairness; the company knew that the plaintiff was a single mother that had a son at home; the company knew that cause was reserved as the most serious consequences for an employee; she was given "termination notice" on March 13; she was given no notice or severance when dismissed on June 12; and Mr. Abu-Ulba was aware that assertions of cause could impact a claim for employment insurance. The plaintiff refers to the decision in *George v. Cowichan Tribes,* 2015 BCSC 513 in support of her claim.

[126] The company's position is that these claims are not supported in the evidence or in law as there was no bad faith or egregious conduct upon which to base either aggravated or punitive damages. The company rejects the plaintiff's characterization of the events and submits that she was given every opportunity that was reasonable to improve her performance.

[127] The Supreme Court of Canada has reaffirmed that both aggravated (or bad faith) damages and punitive damages can be awarded in the employment context: *Wallace v. United Grain Growers Ltd.,* [1997] 3 S.C.R. 701; *Honda Canada Inc. v. Keays,* 2008 SCC 39; *Vorvis v. Insurance Corp. of British Columbia*, [1989] 1 S.C.R. 1085; *Fidler v. Sun Life Assurance Co. of Canada,* 2006 SCC 30. However, while both heads of damages are grounded in the conduct of the employer during the termination, the distinction between the two is important - an award of aggravated damages seeks to compensate a plaintiff for actual damages suffered resulting from the manner of dismissal, while an award of punitive damages is directed at punishing an employer in the manner of dismissal. This difference was recently described by Madam Justice Warren in the decision of *Ram v. The Michael Lacombe Group Inc.,* 2017 BCSC 212:

> 112…..Aggravated damages are compensatory; punitive damages are not. While there may be some overlap in the facts relevant to establishing each of these heads of damage, each rests upon a different foundation and

> the purpose of awarding each is different. In a wrongful dismissal case, aggravated damages are awarded to compensate a plaintiff for actual damage that is caused by unfair or bad faith conduct of the employer in the manner, as distinct from the fact, of the dismissal. In contrast, the objects of punitive damages are retribution, deterrence and denunciation as opposed to compensation, and punitive damages are restricted to cases where an employer's conduct is so malicious and outrageous that it is deserving of punishment: *Vernon v. British Columbia (Liquor Distribution Branch)*, 2012 BCSC 133; *Rodrigues v. Shendon Enterprises Ltd.*, 2010 BCSC 941.
>
> [Emphasis added.]

[128] I will therefore deal with each head of damages separately.

Bad Faith/Aggravated Damages

[129] In *Honda* and *Fidler v. Sun Life Assurance of Canada*, 2006 SCC 30, the Supreme Court of Canada clarified the law concerning bad faith damages in the employment context. Damages for bad faith terminations were not to be awarded by simply extending the notice period. In *Honda*, the Court directed a return to the principles laid out in *Hadley v. Baxendale* (1854), [1843-1860] All E.R. Rep. 461, namely, that all forms of compensatory damages are recoverable for a contractual breach if the damages are "such as may fairly be considered either arising naturally… from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties": *Honda* at para. 54.

[130] Mr. Justice Bastarache summarized the discussion of aggravated damages at paras. 57-59 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).
>
> [58] The application of *Fidler* makes it unnecessary to pursue an extended analysis of the scope of any implied duty of good faith in an employment contract. *Fidler* provides that "as long as the promise in relation to state of mind is a part of the bargain in the reasonable contemplation of the contracting parties, mental distress damages arising from its breach are recoverable" (para. 48). In *Wallace*, the Court held employers "to an obligation of good faith and fair dealing in the manner of dismissal" (para. 95) and created the expectation that, in the course of dismissal, employers would

> be "candid, reasonable, honest and forthright with their employees" (para. 98). At least since that time, then, there has been expectation by both parties to the contract that employers will act in good faith in the manner of dismissal. Failure to do so can lead to foreseeable, compensable damages. As aforementioned, this Court recognized as much in *Fidler* itself, where we noted that the principle in *Hadley* "explains why an extended period of notice may have been awarded upon wrongful dismissal in employment law" (para. 54).
>
> [59] To be perfectly clear, I will conclude this analysis of our jurisprudence by saying that there is no reason to retain the distinction between "true aggravated damages" resulting from a separate cause of action and moral damages resulting from conduct in the manner of termination. Damages attributable to conduct in the manner of dismissal are always to be awarded under the Hadley principle. Moreover, in cases where damages are awarded, no extension of the notice period is to be used to determine the proper amount to be paid. The amount is to be fixed according to the same principles and in the same way as in all other cases dealing with moral damages. Thus, if the employee can prove that the manner of dismissal caused mental distress that was in the contemplation of the parties, those damages will be awarded not through an arbitrary extension of the notice period, but through an award that reflects the actual damages. Examples of conduct in dismissal resulting in compensable damages are attacking the employee's reputation by declarations made at the time of dismissal, misrepresentation regarding the reason for the decision, or dismissal meant to deprive the employee of a pension benefit or other right, permanent status for instance (see also the examples in Wallace, at paras. 99-100).
>
> [Emphasis added.]

[131] In *Wallace*, Mr. Justice Iacobucci noted that the obligation of good faith and fair dealing cannot be precisely defined:

> 98 The obligation of good faith and fair dealing is incapable of precise definition. However, at a minimum, I believe that in the course of dismissal employers ought to be candid, reasonable, honest and forthright with their employees and should refrain from engaging in conduct that is unfair or is in bad faith by being, for example, untruthful, misleading or unduly insensitive.
> …

[132] Recently, in *George v. Cowichan Tribes,* 2015 BCSC 513, Mr. Justice Skolrood applied the principles expressed in *Honda.* He upheld a claim for aggravated damages based on the implied term of an employment contract that an employer will act in good faith in the manner of dismissal. The case concerned a plaintiff that was dismissed at age 55 after 33 years of service due to allegations of misconduct. In support of an award for aggravated damages, Justice Skolrood found

that the plaintiff had not been given an opportunity to confront or respond to the allegations made against her, particularly the allegation of dishonesty, and that the employer had terminated her without any serious consideration given to her lengthy service, her exemplary record of service, and whether there were measures short of dismissal that could have been imposed.

[133] I also note the recent decision in *Osadca v. Recyclenet Corp.*, 2015 ONSC 4717 in which, in awarding the plaintiff damages for the manner of dismissal, the trial judge cited the following factors in support:

> 31 Here, the Plaintiff was terminated suddenly and unexpectedly, in his home without adequate explanation, at a time when he had consistently been receiving positive feedback and when his income had been improving. I accept he felt blindsided. I accept he felt he had been vaguely accused of dishonesty without having been given sufficient or any substantive particulars and without being given any opportunity to refute the vague and unsubstantiated insinuation of dishonesty…

[134] In this case, I find that the company was in breach of their duty of good faith in the manner they dismissed the plaintiff. The company relied upon a review of the personnel file to issue her with what was described as a “termination notice” on March of 2015 without there having been recent performance issues raised with her. The company held the plaintiff to performance standards not previously required of her and then responded to perceived deficiencies in a disproportionate manner by terminating her employment. She was promised that if she improved in two of the three months provided, she could retain her position. However, after doing just that, she was still terminated.

[135] In that regard, I find that even though the plaintiff improved significantly, such that she met the criteria for March/April and April/May, the company said that she failed because of her attitude. As noted above, the claim that she had a poor attitude is not supported by anything other than an impressionistic assessment and is contradicted by the efforts needed to increase her sales to the extent that she did.

[136] Further, I find the company was not candid about the lack of documentation concerning the plaintiff’s performance in the last month of the three-month period. As

noted above, I consider it likely that the company decided to terminate the plaintiff before the conclusion of the three months and this decision was made without meaningfully considering her last month's performance, and without giving her an opportunity to respond to concerns in relation to her attitude. The company did not fairly consider her performance in the three month period and, in so doing, breached its promise to her.

[137] The events clearly had a profound effect on the plaintiff. Not only was she lulled into believing that her performance would be fairly considered, as she testified, she cried through the entire March meeting and had to go home early she was so upset and, at the June meeting, she "went numb" and could not take anything in. In the face of the dismissal for cause, she came to believe she needed to retrain for a different career. I am satisfied that the lack of good faith and unfairness exhibited by the company in the manner of dismissal caused emotional distress to the plaintiff that was well beyond the distress from the fact of the dismissal.

[138] In considering an appropriate award of damages, I note the following comment in *Kong v. Vancouver Chinese Baptist Church*, 2015 BCSC 1328:

> [64] Damages for mental distress are modest. In *Fidler*, the Supreme Court of Canada upheld an award of $20,000 where an insured's long-term disability benefits were wrongfully terminated and not reinstated until shortly before trial, more than five years after she was terminated. Our Court of Appeal, in *C.P. v. RBC Life Insurance Company*, 2015 BCCA 30, upheld an award of $10,000 for mental distress where the defendant insurance company had, by its own admission, been "sloppy, very sloppy" in failing to process the plaintiff's residual disability claim for a number of months (para. 36).

[139] In that decision, Mr. Justice Funt awarded the plaintiff $30,000 in aggravated damages due to the circulation of unproven allegations attacking the plaintiff's social and spiritual worth, causing hurt and shame.

[140] I have also reviewed the decisions in *Vernon v. British Columbia (Housing & Social Development, Liquor Distribution Branch)*, 2012 BCSC 133, in which the plaintiff was awarded $35,000 in aggravated damages and the decision in *Ram v.*

The Michael Lacombe Group Inc. in which the plaintiff was awarded $25,000 due to allegations of theft raised by the employer during the plaintiff's termination.

[141] In my view, in light of these cases and the conduct of the company in the manner of dismissal, I award the plaintiff $15,000 in aggravated damages.

Punitive Damages

[142] Punitive damages, unlike aggravated damages, are directed toward punishment and will be awarded by a court if "there has been high-handed, malicious, arbitrary or highly reprehensible misconduct that departs to a marked degree from ordinary standards of decent behavior": *Whiten v. Pilot Insurance Co.*, 2002 SCC 18 at para. 94. The goals of punitive damages include retribution, deterrence and denunciation and an award of punitive damages is only appropriate if these objectives cannot be accomplished by compensatory damages alone.

[143] The threshold for punitive damages is high as can be seen in the decision in *Honda* where the Court reversed the trial judge's decision to award punitive damages and stated the following:

> [68] Even if I were to give deference to the trial judge on this issue, this Court has stated that punitive damages should "receive the most careful consideration and the discretion to award them should be most cautiously exercised" (*Vorvis*, at pp. 1104-5). Courts should only resort to punitive damages in exceptional cases (*Whiten*, at para. 69). The independent actionable wrong requirement is but one of many factors that merit careful consideration by the courts in allocating punitive damages. Another important thing to be considered is that conduct meriting punitive damages awards must be "harsh, vindictive, reprehensible and malicious", as well as "extreme in its nature and such that by any reasonable standard it is deserving of full condemnation and punishment" (*Vorvis*, at p. 1108). The facts of this case demonstrate no such conduct. Creating a disability program such as the one under review in this case cannot be equated with a malicious intent to discriminate against persons with a particular affliction.
>
> [Emphasis added.]

[144] While I found that the company was in breach of their obligation to act in good faith during the manner of dismissal, I do not consider the conduct to rise to the level of "harsh, vindictive, reprehensible and malicious". I also find that there is no

additional conduct on the part of the company that is distinct from the conduct that forms the basis of the claim for aggravated damages. The award for aggravated damages in this case adequately achieves the objective of retribution, deterrence and denunciation: *Veron* at para 383.

Conclusion

[145] In summary, for the reasons set out above, the plaintiff was wrongfully dismissed for cause and is entitled to eight weeks' severance, calculated on her total weekly wages earned in the last 8 weeks of her employment with the company as provided in the *Act,* and in addition, to $15,000 in aggravated damages.

[146] Costs are awarded to the plaintiff unless there are circumstances which bear of this issue of which I am not aware. In that eventuality, the parties may make arrangements for submissions through Supreme Court Scheduling.

"Harris, J."