IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Manak v. Workers' Compensation Board of British Columbia,* 2018 BCSC 182

Date: 20180207
Docket: S114202
Registry: Vancouver

Between:

Taranjeet Manak

Plaintiff

And

WorkSafe BC (The Workers' Compensation Board of British Columbia)

Defendant

Before: The Honourable Mr. Justice Branch

Reasons for Judgment

Counsel for the Plaintiff:	K. Ho, A. Konikowski, A/S
Counsel for the Defendant:	M. Campbell, A. Eyer, A/S
Place and Dates of Trial:	Vancouver, B.C. December 11-15, 22, 2017
Place and Date of Judgment:	Vancouver, B.C. February 7, 2018

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I. INTRODUCTION

[1] This is a wrongful dismissal action. The plaintiff was dismissed for cause for alleged breaches of the defendant's confidentiality standards. The defendant did offer the plaintiff 24 hours to consider retirement instead. She elected that option and signed a release which gave her the benefit of a retiring allowance worth about four months' salary. The parties agreed that if the plaintiff had been dismissed without cause, she would be entitled to 18 months' salary.

[2] As such, it is necessary to consider whether she was in fact properly dismissed for cause, and whether the release is enforceable.

II. FACTS

[3] The plaintiff is now 61 years old. She was employed by the defendant for her entire 36 year working life, most recently serving as the Client Services Manager in the Hearing Loss Section of the defendant's Long Term Disability Department. She had become manager of the section in 2009. This was her first time as a manager. The defendant's workplace is largely unionized, but managers are excluded from the bargaining unit.

[4] The plaintiff also had responsibility for staff claims – claims by WorkSafe BC employees under WorkSafe BC's own legislation. This was a highly sensitive position. Although claims assessment functions were normally performed by a bargaining unit employee, the sensitivity and confidentiality surrounding staff claims meant that these files had to be carefully controlled by a manager with limited staff assistance. For example, the plaintiff herself gave evidence of an incident in which she disclosed information about a staff claim in a management meeting. Her director, Kevin Molnar, cautioned her to not disclose any information about staff claims, even to other managers on the management team, without a business purpose, given the sensitivity of such claims.

[5] The plaintiff's position as a manager also meant that she was an "ethics advisor". Ethics advisors operate as resources for employees for all matters relating

to ethical conduct and the Standards of Conduct discussed further below. The plaintiff acknowledged that this additional responsibility meant that she was expected to set an example for her staff. The plaintiff received regular ethics training, and was regularly advised that a breach of the Standards of Conduct could result in disciplinary action, up to and including termination. She also had to make an annual ethics declaration acknowledging this reality.

[6] As a manager, she attended the regular management meetings that Mr. Molnar held with his team, which included the managers of several departments and human resources staff. These meetings included discussions of confidential staffing, discipline, and technological issues, as well as other strategic management matters. Mr. Molnar and other human resources staff testified as to the importance of any human resources information discussed at these meetings remaining confidential. The witnesses described the potentially damaging effects of this information being leaked to bargaining unit employees, which effects included the potential for discord between management and staff, the potential upset to members of the bargaining unit, the potential negative impact on arbitration or grievance processes, and the potential negative impact on the general relationship between management and the union.

[7] The plaintiff and the plaintiff's Hearing Loss Section were under pressure during her tenure as a manager. The two separate roles the plaintiff was required to perform were difficult to manage. There had also been recent technological changes that did not mesh well with pre-existing protocols in her section. There were two dismissals from her section during her tenure, one for excessive internet usage and another for improper access of family members' files. There was also a broader ongoing discussion throughout the department about potential structural changes, a so-called "end-to-end review".

[8] The plaintiff admits that she was under considerable stress during the relevant period. Based on the evidence before me, it seems that the plaintiff may

have been somewhat out of her depth. It is also clear that she wanted very much to be liked by her employees, which is not always a feature of good management.

[9] Two of these employees, Shauna Kuss and Janice Jackson, testified at trial.

[10] Ms. Kuss worked for the defendant for about 28 years. At the relevant time, she was a team assistant in the plaintiff's section. She liked the plaintiff as a person, but had concerns about her judgment as a result of a series of incidents. Ms. Kuss had a friend, David Ho, who was a manager in another section. She had an informal conversation with him in which she voiced her concerns simply in order to "vent". These concerns, as expressed to Mr. Ho, or as expounded upon in subsequent investigations, included the following:

a) Ms. Kuss reported at the time that the plaintiff told her about a planned disciplinary meeting with an employee, JN, before it had actually taken place. (At trial, Ms. Kuss could no longer recall the discussions relating to JN's suspension or termination, but she confirmed that a written summary prepared at the relevant time was accurate, and had been reviewed by her at the time).

b) Ms. Kuss testified at trial, and reported at the time, about the plaintiff providing advance knowledge of the planned termination of another employee, JV, prior to JV herself being so advised. Ms. Kuss came into the plaintiff's office one morning, and was told by the plaintiff that she was to become the plaintiff's new team assistant for staff claims. When Ms. Kuss asked why, the plaintiff told her that Ms. Kuss could not tell anyone because the plaintiff herself could get fired, but that JV was going to be fired that day. The plaintiff told her that the reason JV was being terminated was that she had accessed her father and boyfriend's claims files 100-150 times. Ms. Kuss recalled the plaintiff telling her that she felt stressed about the pending termination. Ms. Kuss was shocked that the plaintiff had told her this information. She testified how upsetting it was when she ran into JV at the cafeteria later that day, knowing that JV was

about to lose her job. She was sufficiently upset that she went to discuss the disclosure with Ms. Jackson. She said something along the following lines to Ms. Jackson: "Holy crap, I know something that could get [the plaintiff] fired. She told me that she is going to fire [JV] today. She said not to tell anyone or she would get fired."

c) Ms. Kuss testified at trial, and reported at the time, that the plaintiff also shared information about staff claims casually, and without a business purpose. She said it was a running joke in the department that employees should not get injured at work because everyone would know about their injury. Ms. Kuss gave a specific example of a claim by a staff member with the first name B in Prince George, who was having surgery, and whom the plaintiff referred to as an "asshole". She also testified to an incident where the plaintiff was leaving for a meeting with a staff claimant when she disclosed to a group outside her office that the staff claimant was threating to go to Global TV because his claim had been denied (the "Global TV Incident");

d) She testified that the plaintiff would regularly start conversations with the phrase "Don't tell anyone because I could get fired, but …". Such topics included management issues.

[11] Ms. Kuss did not file a formal complaint. However, Mr. Ho took the statements made by Ms. Kuss seriously, and commenced more formal steps that eventually lead to the plaintiff's dismissal.

[12] After Mr. Ho reported on Ms. Kuss' revelations to the plaintiff's superior, Mr. Molnar, Mr. Molnar determined that he needed to hear the information directly from Ms. Kuss. The meeting with Ms. Kuss took place on April 7, 2011, with Mr. Molnar and a human resources manager, Jennifer Martin, present. Both testified as to Ms. Kuss' reluctance to provide further information within the now more formal investigation process. Ms. Kuss broke down crying and told them she did not want to get the plaintiff in trouble. Mr. Molnar was nonetheless able to generally confirm the

information outlined above. The information was also reduced to writing, and the accuracy of that information was confirmed by Ms. Kuss. For her part, Ms. Martin was taken aback by the level of detail that Ms. Kuss knew as a junior person in the department, information that would or should have only been known to a few persons, and which was all accurate.

[13] On April 11, 2011, the plaintiff was summoned to a meeting with Mr. Molnar and Ms. Martin so that they could give her an opportunity to respond about the information they had learned from Ms. Kuss.

[14] Mr. Molnar started the meeting by asking the plaintiff about her relationship with her staff. She said that it was good, and that there were no issues. He then asked the plaintiff whether she was aware of WorkSafe BC's Standards of Conduct (the "Standards"), the Undertaking of Secrecy and her annual Ethics Declaration. She said she was.

[15] The Standards set out the defendant's requirements and expectations regarding confidential information. It states that employees are required to respect the confidentiality of all information they acquire by reason of their employment with the defendant. Employees are prohibited from disclosing confidential information to fellow employees except as required by law or as required in the performance of their duties. The Standards are buttressed by s. 95 of the *Workers Compensation Act*, R.S.B.C. 1996, c. 492, which states as follows:

> **Secrecy**
>
> **95** (1) Officers of the Board and persons authorized to make examinations or inquiries under this Part must not divulge or allow to be divulged, except in the performance of their duties or under the authority of the Board, information obtained by them or which has come to their knowledge in making or in connection with an examination or inquiry under this Part.
>
> (1.1) If information in a claim file, or in any other material pertaining to the claim of an injured or disabled worker, is disclosed for the purposes of this Act by an officer or employee of the Board to a person other than the worker, that person must not disclose the information except
>
> (a) if anyone whom the information is about has identified the information and consented, in the manner required by the Board, to its disclosure,

> (b) in compliance with an enactment of British Columbia or Canada,
>
> (c) in compliance with a subpoena, warrant or order issued or made by a court, tribunal, person or body with jurisdiction to compel the production of information, or
>
> (d) for the purpose of preparing a submission or argument for a proceeding under this Part, Part 3 or Part 4.
>
> (1.2) No court, tribunal or other body may admit into evidence any information that is disclosed in violation of subsection (1.1).
>
> (2) Every person who violates subsection (1) or (1.1) commits an offence against this Part.
>
> (3) The workers' advisers, the employers' advisers and their staff must have access at any reasonable time to the complete claims files of the Board and any other material pertaining to the claim of an injured or disabled worker; but the information contained in those files must be treated as confidential to the same extent as it is so treated by the Board.

[16] At the April 11, 2011 meeting, the plaintiff was next asked by Mr. Molnar whether she had:

a) disclosed details surrounding the suspension and later termination of JN to her staff or other WorkSafe employees, either prior to or after the suspension and termination had occurred;

b) disclosed details surrounding the termination of JV to her staff or other WorkSafe employees prior to or after the termination occurred;

c) discussed information regarding the claims of two Nurse Advisors employed by WorkSafe;

d) disclosed that a staff claimant had threatened to report the handling of his unresolved claim to Global TV when his claim was disallowed.

[17] The plaintiff responded negatively to all of the allegations. At trial, the plaintiff took the position that there was a lack of specificity to these inquiries. However, absent disclosure of the identity of the complainant, I find that the concerns were raised with reasonable specificity. The plaintiff should have been in a position to disclose the truth without knowing precisely who had raised the concerns. The defendant says that they were concerned about disclosing the identity of the

complainants unless necessary, given that it was possible that the investigation would result in a decision short of dismissal, in which case the complainants and the plaintiff would have to continue to work together. The defendant also notes that, given the flat denial made by the plaintiff to all allegations, there was little opportunity or opening to examine in greater detail events the plaintiff advised simply did not occur at all.

[18] Mr. Molnar then left the meeting for a short period. Ms. Martin remained behind with the plaintiff. The plaintiff asked what would happen next. Ms. Martin told her that Mr. Molnar would be back shortly. The plaintiff then provided Ms. Martin with an array of detail about her staff being upset due to technology issues, departmental end-to-end reviews, resource shortages, and a lack of trust in management. The plaintiff explained that certain staff had not accepted her management direction, and were upset. The plaintiff says that she mentioned this new detail because she suspected that employees might be saying things about her that were untrue, given the atmosphere in the office. Ms. Martin said that the plaintiff should tell all this new information to Mr. Molnar when he returned. When Mr. Molnar returned, the plaintiff advised Mr. Molnar of her perspective concerning the difficult atmosphere in the office, and of her concern that untrue things might have been said about her. I note that this new information was inconsistent with the earlier answers she had given about her good relationship with staff.

[19] At the end of the meeting, Mr. Molnar told the plaintiff to leave the premises and that she would remain at home with pay until contacted further. He said that the defendant would conduct an investigation.

[20] The plaintiff was escorted from the building by Ms. Martin, and was told that she would be contacted regarding next steps in a few days.

[21] After the meeting with the plaintiff, Ms. Martin and Mr. Molnar considered next steps. They determined that, given the discrepancy between Ms. Kuss' evidence and the plaintiff's evidence, they needed to speak to another employee. Ms. Martin was tasked with continuing the investigation, and she met with Ms. Jackson.

[22] Ms. Jackson was also a long term employee, and has recently retired. At the relevant time, she was a hearing loss officer within the plaintiff's section. She had previously been an assistant for staff claims. Under questioning in April 12 and 14, 2011 meetings with Ms. Martin, she revealed concerns about the plaintiff's conduct, concerns which she reiterated at trial. Specifically, Ms. Jackson reported that:

a) The plaintiff told her about the suspension of JN the day after JN had been sent home, and told her that the suspension was for excessive internet use. This made her uncomfortable as she felt it was information she should not have known.

b) The plaintiff told her about the later firing of JN before the dismissal occurred, and that the firing was for the same reason as the suspension. The plaintiff told Ms. Jackson she was worried about having to be involved in the termination. The plaintiff used a phrase like "Don't tell anyone but …" before making this disclosure. Ms. Jackson felt badly about knowing this information. She recalled watching JN being called away to her termination meeting, coming back to her desk to collect her things, and crying. Ms. Jackson wanted to go to JN to give her some comfort, but knew she could not do so without acknowledging that she knew what was going on.

c) She supported Ms. Kuss' account about Ms. Kuss coming to her office very upset that the plaintiff had told Ms. Kuss about the planned JV firing.

d) The plaintiff disclosed information to Ms. Jackson about staff claims, sometimes offering information about the employee's position or office location that would allow identification if one simply went on the office's Outlook system. She recalled a specific incident involving a nurse advisor who had a problem with scents or air quality.

e) Ms. Jackson also confirmed the Global TV Incident.

[23] Ms. Martin testified that Ms. Jackson was also very reluctant to speak ill of the plaintiff, and was only more forthcoming during her second interview.

[24] Given the consistency between the information provided by Ms. Kuss and Ms. Jackson, Ms. Martin decided that meeting with additional employees was unnecessary.

[25] On April 15, 2011, there was a call between the plaintiff and Ms. Martin during which Ms. Martin updated the plaintiff on the status of the investigation. During this call, the plaintiff amended her initial statement by admitting that she actually may have voiced a concern over the possibility of a claim being reported to Global TV in circumstances where the comments could be overheard by staff. At trial, the plaintiff confirmed that she provided information about this staff claimant's position and the fact that he was not working at the time. She suggested that it was an inadvertent slip made due to the stress of her staff trying to talk to her about other matters, and that she needed to make it clear to them that she was too busy to attend to their issues.

[26] Ms. Martin testified that she asked the plaintiff during this call if she had any further comments to make about the other incidents that she had been asked questions about, and that the plaintiff advised that she did not.

[27] During this period the plaintiff met with a friend of hers and discussed the concerns that had been raised about her conduct. Her friend said she had the name of a lawyer that the plaintiff could call if necessary. Her friend said that typically she could expect to get 18 months to 3 years' severance. The plaintiff also did some of her own research on the internet, which she determined was consistent with the information that she could receive up to three years in severance. She also spoke with her husband and daughter. The plaintiff was clearly aware that there was a risk of termination in light of the allegations.

[28] On April 18 and 19, 2011, Ms. Martin met with Ms. Kuss and Ms. Jackson to confirm the accuracy of written evidence summaries she had prepared. Both

confirmed that they were accurate at the time, and they also reconfirmed their accuracy at trial.

[29] An internal meeting was then held at which Ms. Martin presented the results of her investigation to a management team consisting of herself, Mr. Molnar, and three others. Mr. Molnar indicated that he felt the plaintiff had breached his trust, and he felt he could no longer work with her. They did consider whether she could be moved to another position. However, the conclusion was that, because of the breach of trust, she could no longer be employed by the defendant in any capacity.

[30] On April 18, 2011, the plaintiff was contacted by telephone by Ms. Martin and was told to attend a meeting the following day. At about 3:30 p.m. on April 19, 2011, the plaintiff attended at the defendant's offices and met with Mr. Molnar and Ed Chin, a Senior Human Resources Advisor. Mr. Molnar said the defendant had completed its investigation. Mr. Molnar read from a prepared script through which he advised that the defendant had concluded that:

a) the plaintiff had breached the Standards regarding confidentiality of information;

b) the plaintiff had not responded accurately when questioned about her conduct;

c) the plaintiff was found to be untrustworthy and not to be credible, and therefore Mr. Molnar could no longer work with her; and

d) WorkSafe BC had therefore decided to terminate the plaintiff's employment for just cause and without any severance;

e) however, given that the plaintiff had worked at WorkSafe BC for 36 years, he was offering her the option to retire. She would have until 5:00 the next day to decide whether to do so, and if she decided to, she would have to sign a release.

[31] Mr. Molnar then presented the plaintiff with the necessary documentation and left the room, leaving the plaintiff with Mr. Chin.

[32] The plaintiff asked for particulars of the findings of the investigation which had led to her termination so that she could defend herself. The defendant indicated that the plaintiff had no right to access further information.

[33] The plaintiff inquired about the amount of time she had to consider her options. Mr. Chin did not respond to this request. At trial, Mr. Chin indicated that the reason why only 24 hours was provided was based on the seriousness of the charges, and the fact that the defendant felt that the plaintiff's employment needed to come to an end one way or the other immediately. They felt they could not continue to have her on their payroll as an employee.

[34] The plaintiff was informed by Mr. Chin that if she signed a release and her departure was characterized as voluntary she could, at the time of departure, take early retirement and would then be entitled to a lump sum retirement benefit that would not be available in the case of a pure dismissal for cause.

[35] There is a discrepancy in the evidence as to what was said about legal advice during this meeting. Mr. Chin's evidence was that the plaintiff told him that she had received advice from a labour lawyer, and that "my lawyer told me that I could get up to three years" for her termination. Mr. Chin also testified that the plaintiff said "my lawyer said at the end of the day my lawyer can get [the investigatory documents] anyway". He recorded this information in his notes after the meeting, which notes were entered at trial. Mr. Chin recalled that he told the plaintiff that "that's good you have legal advice; we have legal advice too." Mr. Chin's evidence was that these comments stuck out for him. His practice was to tell departing employees to get legal advice. He testified that this was on his list of things to tell the plaintiff, but she made the comments above before he could get to it. In approximately 40 termination meetings, this was the first time that this had happened, so it was significant to him. Mr. Chin also testified that it made sense to him at the time that the plaintiff had already received legal advice, given that she was aware of the nature of the issues

that had been raised, and she had been home for about a week. Both Mr. Chin and Mr. Molnar recall Mr. Chin telling the management team (Ms. Martin, Mr. Molnar and Carol McCallum) in a debriefing that occurred immediately after the termination meeting that the plaintiff had advised Mr. Chin that she had already received legal advice.

[36] In contrast, the plaintiff's evidence in direct was that she may have said something like, "if I get a lawyer ...". She maintained that she would not have said she had already seen a lawyer, because she had not done so. She did agree that she was "rambling" however.

[37] While the plaintiff was upset at the start of the meeting, Mr. Chin testified that she calmed down significantly over the course of the meeting. Mr. Chin testified that the plaintiff indicated at the end of the meeting that the she felt that "the universe is opening up to me now" and that they parted on friendly and professional terms. The plaintiff agreed that Mr. Chin was compassionate and kind during the meeting, and that this allowed her to get her emotions out of her system. She agreed it was possible that she had made the statement attributed to her.

[38] The plaintiff and Mr. Chin exchanged email correspondence about her options over the evening. The plaintiff did again raise the issue of the one day she had to make her decision, but again Mr. Chin did not respond. The plaintiff initially suggested that there had been a further direct phone call with Mr. Chin in which she raised the timing issue again, and that Mr. Chin had said the deadline was fixed. However, on cross-examination, using the paper trail in the documents, the plaintiff admitted that this conversation never occurred.

[39] In her email correspondence she stated:

> … literally feel that I have been undermined/caught by the system, .. but I'm doing much better already...I have many options open to me and I will certainly continue to pursue them. Perhaps I'll get to work with people who actually like their jobs ..
>
> the universe has opened up many things to me and I'm very excited about it.. sad to leave in such a way .. after 36 years, but excited for new beginnings..

[40] The plaintiff admitted that she had already made up her mind to accept the offer by the next morning, and she did not use the full 24-hour period made available to her. The plaintiff called Barb Messenger, Manager of Employee Benefits, at around 8:30 a.m. the next day, and said that she had decided to retire and take the package. Ms. Messenger followed up with an email to the plaintiff with the documents necessary to start her regular pension benefits, which would be available to the plaintiff no matter which option she selected. (After some confused testimony, the plaintiff eventually accepted that she understood at the time that this was so.) The pension application was processed with dispatch.

[41] Later that day, the plaintiff dropped off the documents necessary to accept the settlement under which she would receive the "long service retiring allowance", including the release. The plaintiff understood that she was agreeing not to bring a claim of the type now before the court.

[42] The plaintiff agreed that the defendant employees involved in her dismissal were respectful, helpful and polite, particularly Ms. Chin and Ms. Messenger.

[43] In the middle of May 2011, she met with a former WorkSafe manager. She told him that she had been accused of disclosing confidential information, but she did not disclose the details of the allegations. She says he suggested to her that she had been treated unjustly, and that she should take legal action. She decided to do so.

[44] The plaintiff had her retirement party in early June 2011, at which time she had already decided to take legal action against the defendant. Her Notice of Civil Claim was filed on June 22, 2011.

[45] The plaintiff testified that, since that time, she has experienced substantial emotional distress by reason of her dismissal. She says she has been treated by her family physician on an ongoing basis for emotional distress resulting from her dismissal. The plaintiff has been undergoing counselling.

III. ISSUES

[46] There are four issues that need to be determined:

a) Was the plaintiff dismissed with just cause?

b) Is the release enforceable?

c) If the answer to both (a) and (b) is no, what are the reasonable contractual damages?

d) Is the plaintiff entitled to aggravated or punitive damages?

IV. DISCUSSION AND ANALYSIS

A. Just Cause

The Legal Principles

[47] The defendant bears the burden of establishing that it had just cause for the plaintiff's termination.

[48] Just cause is behaviour that is seriously incompatible with the employee's duties. It is conduct which goes to the root of the contract and fundamentally strikes at the heart of the employment relationship. The test is an objective one, viewed through the lens of a reasonable employer taking account of all relevant circumstances: *Panton v. Everywoman's Health Centre Society (1988)*, 2000 BCCA 621 at para. 28; *Roe v. British Columbia Ferry Services Ltd.,* 2015 BCCA 1 at para. 35; *Van den Boogaard v. Vancouver Pile Driving Ltd.*, 2013 BCSC 2105 at para. 7.

[49] Both the circumstances surrounding the alleged misconduct and the degree of misconduct must be carefully examined. The analysis requires a contextual approach including an examination of the category of misconduct and its possible consequences, all of the circumstances surrounding the misconduct, the nature of the particular employment contract and the status of the employee: *McKinley v. BC Tel*, 2001 SCC 38 at paras. 33-34, 51. It is incumbent upon the employer, as part of

the contextual analysis, to consider the suitability of alternative disciplinary measures to dismissal: *George v. Cowichan Tribes*, 2015 BCSC 513 at para. 115.

The Present Case

[50] The plaintiff says that the defendant has failed to discharge its burden in proving the allegations against the plaintiff.

[51] This is not strictly correct in relation to the Global TV Incident at a minimum. The plaintiff accepts that this incident occurred. If none of the other allegations discussed below were made out, the issue would be whether this incident alone was sufficient to justify dismissal.

[52] The assessment of the remaining allegations of confidentiality breaches depends on an assessment of credibility: *Faryna v. Chorny*, [1952] 2 D.L.R. 354 at 357.

[53] Notably, plaintiff's counsel agreed in final argument that she did not seek to attack Ms. Jackson's credibility. The most the plaintiff could say about Ms. Jackson was that the plaintiff did not recall the incidents that Ms. Jackson relayed, other than the Global TV Incident.

[54] This concession was logical, as I also found Ms. Jackson to be a very compelling witness. It was clear that she was reluctant to be critical of the plaintiff. There is little evidence that she had any "axe to grind" with the plaintiff. Her evidence of being particularly uncomfortable about having advance knowledge of her colleague's dismissal certainly appeared genuine.

[55] The lack of an attack on Ms. Jackson's credibility also builds support for Ms. Kuss' evidence, particularly regarding the early disclosure of JV's termination. Given the lack of an attack on Ms. Jackson's credibility, I must accept Ms. Jackson's evidence that Ms. Kuss did indeed come into Ms. Jackson's office before the JV termination announcement had been made, and that Ms. Kuss expressed concern that she had such information. At a bare minimum, this evidence belies any

suggestion that Ms. Kuss made up having this knowledge after the fact. The only scenario remaining is that Ms. Kuss made up a story about the plaintiff advising her of the pending JV dismissal before the dismissal occurred, upon actually learning about it from some other source. I find this highly unlikely. There was no suggestion from the plaintiff as to who else would reasonably have provided such early and sensitive information to a lower level staff assistant such as Ms. Kuss.

[56] This brings us to a more direct assessment of Ms. Kuss' credibility. As noted, the evidence of Ms. Jackson itself is supportive of Ms. Kuss' credibility. Further, Ms. Jackson's evidence that the plaintiff discussed JN's suspension and termination with her provides support for Ms. Kuss' evidence that similar information about JV could be expected to have come from the plaintiff. If the plaintiff had been willing to disclose that type of information once, it is more reasonable to accept that she would have done so again. I also find that Ms. Kuss' reported expression of shock and surprise to Ms. Jackson about the disclosure is supportive of Ms. Kuss' credibility. Ms. Jackson's evidence of Ms. Kuss' shock makes it less likely that Ms. Kuss' disclosure was the result of a Machiavellian scheme to deflect blame from the true perpetrator of the disclosure. Finally, the fact that Ms. Kuss' initial discussion of her concerns was made casually to a friend rather than through a more formal complaint process makes a Machiavellian scheme less likely, as does the evidence of her reluctance to disclose too much information when the more formal assessment process began. To suggest that Ms. Kuss was engaged in a carefully designed campaign to oust the plaintiff is simply not supported by the evidence. In terms of motivation, the plaintiff suggested that Ms. Kuss may have been upset about a denied vacation request. However, Ms. Kuss squarely denied that allegation, and testified clearly and credibly about how she and her job-sharing colleague were generally able to resolve vacation overlap issues without managerial involvement. In any event, taking steps to secure the plaintiff's dismissal through a series of meetings, all over a denied vacation request, suggests a horribly Machiavellian nature that I was not able to devine from Ms. Kuss' testimony.

[57] The plaintiff raises the fact that the notes indicate that Ms. Kuss asked Mr. Molnar and Ms. Martin to attribute information she had provided in the course of the interview to another employee, a friend of Ms. Kuss. Ms. Kuss did not recall making this statement, and suggested that she would not have done so. The specificity of the note makes Ms. Kuss' denial difficult to accept. This does reflect on her credibility, but not enough to completely dispose of her general evidence, particularly where supported by Ms. Jackson. It also may be somewhat understandable that Ms. Kuss would have made such an inappropriate request, in that she was a junior employee involved in a process that was well outside of her experience, or her initial intentions, and she was clearly very upset at being involved at all.

[58] I note as well that the plaintiff failed to put squarely to Ms. Kuss or Ms. Jackson that they schemed individually or together to fabricate evidence to damage the plaintiff, facilitating my ability to rely on their version of events over any contrary version: *Browne v. Dunn,* (1893) 6 R. 67 (H.L.).

[59] As for the plaintiff's credibility, at trial she often reverted to saying that she could not recall making the alleged statements, rather than providing outright denials. However, on a few occasions, she responded somewhat more directly that she "could not" or "would not" have made the statements, and did sometimes offer denials. However, her recollections were less crisp and detailed than those of the employees. While that could be the result of her employees having conspired to create a detailed web of lies, with the plaintiff not recalling events because they simply did not occur, I have concluded that the employees were generally credible. This leaves me with the employees' specific credible evidence weighed against the plaintiff's vague responses.

[60] My conclusion on relative credibility is also supported by the conclusion I reach below about the plaintiff's credibility in relation to the alleged statements about legal advice at the termination meeting, which are discussed further below in the context of the release. In short, I find that her denials about the nature of the

discussion of legal advice at the termination meeting are not credible, further damaging her general credibility.

[61] Therefore, to the extent that the evidence of the plaintiff and the evidence of the employees conflicts, I prefer the evidence of the employees.

[62] Hence, I find that the plaintiff did breach confidentiality standards by disclosing the pending dismissals of JN and JV to subordinates before the dismissals occurred. I also find that she inappropriately discussed staff claims, including the admitted Global TV Incident. Although she never directly disclosed claim numbers or the full identity of staff claimants, she did provide enough information to identify certain staff claimants.

Does the Impugned Conduct Qualify as Just Cause?

[63] The plaintiff argues that even if all of the allegations are proven, the defendant has nonetheless failed to establish that she engaged in conduct which fundamentally strikes at the heart of the employment relationship. The plaintiff argues that the following factors should be considered:

a) the defendant admitted that a violation of the Code does not automatically lead to termination or even discipline;

b) the breaches were relatively minor;

c) the defendant has not proved any actual harm stemming from the disclosure of the confidential information in question;

d) there is no evidence that the plaintiff disclosed confidential information for any improper purpose or for reasons of personal gain;

e) the plaintiff has no history of discipline, and in particular any discipline with respect to the defendant's policy on confidentiality;

f) the plaintiff was a new manager at the time of the alleged breaches and had received no training with regard to human resources or labour relations;

g) the plaintiff received a positive performance evaluation from Mr. Molnar only three months prior to her termination;

h) the defendant failed to consider the considerable stress the plaintiff was undergoing during the time of the alleged breaches given: (i) her mother's illness; and (ii) the fact that the Hearing Loss Department was undergoing difficult changes which were out of the plaintiff's control; and

i) the defendant failed to discipline or investigate the complainant, Ms. Kuss, notwithstanding her admission to the defendant that she had engaged in the same conduct accused of the plaintiff.

[64] The plaintiff also notes that the possibility of inadvertent disclosure is acknowledged in the Standards of Conduct themselves:

> **Good Faith or Inadvertence**
>
> > If an employee has violated this policy in good faith or unknowingly through inadvertence, those factors are taken into consideration in determining if discipline is imposed and the disciplinary sanction warranted.

The Case Law

[65] The plaintiff relies primarily on the following cases in support of her position that the alleged breaches did not merit dismissal.

[66] In *Petit v. Insurance Corp. of British Columbia,* [1995] B.C.J. No. 1521 (S.C.), the plaintiff was a long-time worker in a supervisory role who used his privileged access to personal information in order to uncover the driving history of a driver whom he had seen driving a defendant company vehicle erratically. The plaintiff at first tried to conceal his actions when asked directly about the breach, but subsequently sought to rectify that misrepresentation. The court ruled in favour of

the employee, finding that while his actions were ill-advised and "foolish" his intentions were not improper and not dishonest. The court found that the plaintiff did not think that anything he was doing was in breach of the defendant's code of ethics. The court highlighted that the plaintiff promptly tried to rectify his mistake:

> [54] I find the applicable law does not require me to consider the plaintiff's conduct in isolation at a given point in time but rather to consider whether the plaintiff's actions, taken in their entirety and in context, constitute a fundamental breach of the contract of employment.
>
> [55] Here it is common ground the plaintiff lied but he did not maintain that lie. If such had been his course of conduct, it is conceded by counsel for the plaintiff this action must fail. That was not his course of action. I have accepted his evidence that shortly after the meeting in question he attempted to find Mr. Ringham at the Claims Centre to tell him the truth and, when he could not do so, his intention remained to communicate with him at the earliest reasonable opportunity to deliver a letter telling the truth and with the expectation of further conversation with him taking place. There was no reliance to its detriment by the defendant upon the falsehoods before they were fully corrected.

[67] In *Clendenning v. Lowndes Lambert*, 2000 BCCA 644, the defendant dismissed the plaintiff for cause, primarily because the plaintiff signed a blank mortgage application form and offer to purchase, and faxed it to someone else to complete. The trial court concluded that this was an isolated incident, and was at worst an error in judgment. The trial judge also found no fraudulent intent. The Court of Appeal found no basis to interfere with that finding. As such, it was open to the trial judge to find that the plaintiff's conduct did not reveal a character incompatible with continued employment.

[68] In *Lau v. Bank of Canada,* 2015 BCSC 1639, var'd 2017 BCCA 253 (on the issue of aggravated damages), the Court found that a long-term employee who was terminated for tracking sales incorrectly had not engaged in misconduct sufficient to warrant termination. The court found that Mr. Lau was unaware that by taking an admitted shortcut and mislabelling the funds, they would be recorded as new funds. The court also noted that Mr. Lau had expressed remorse and apologized for not recording the sales properly.

[69] In *Nishina v. Azuma Foods (Canada) Co., Ltd.*, 2010 BCSC 502 at paras. 238-242, the court found that the cumulative effect of a series of issues did not support dismissal. These allegations included raising her voice in a meeting with another employee (but the court found that she had good reason to be angry), refusing to attend a meeting with a superior (but the court found that she had a conflicting work obligation and was willing to meet with the superior on another day), and removing documents (but the court found there was no evidence of the removal of confidential information).

[70] In *Smith v. Pacific Coast Terminals Co. Ltd.*, 2016 BCSC 1876, aff'd 2017 BCCA 197, the court found that there was no just cause for dismissal arising from allegations which included the plaintiff having recommended a raise for his (undisclosed) girlfriend, storing pornography on a work computer, and disclosing a board resolution to an individual outside the company. The court stated:

> [269] Although there is conduct that the defendant has demonstrated that is not acceptable, I find that objectively the proven conduct in the circumstances of this employment relationship falls short of justifying summary termination. Pacific Coast has demonstrated inappropriate conduct by Mr. Smith that has occurred in the past as well as shortly before his termination. I have to consider the nature and character of that conduct and its impact on the ongoing employment relationship. I have taken into consideration that on the issue of trust, the most significant conduct, participation in a recommendation for his girlfriend's raise, occurred almost 7 years before his employment was terminated. I think that it is also relevant that the breach of company policy against storing pornography appears to have occurred in a different corporate culture about 10 years before his termination. I also consider that the conduct of the plaintiff in disclosing the potash resolution was more a mistake or sloppiness than dishonest or untrustworthy conduct.
>
> [270] Although I do not suggest that the conduct that I have found occurred and have summarized is acceptable for a senior employee in a position of trust, I have concluded, taking all the proven conduct into account, and when it occurred, in light of the plaintiff's position of trust, that in all the circumstances the defendant has not persuaded me that summary termination of Mr. Smith's employment is warranted.

[71] In response, the defendant relies primarily on the following authorities.

[72] *In Steel v. Coast Capital Savings Credit Union*, 2015 BCCA 127, the plaintiff had accessed a confidential document related to employer-issued parking passes

without authorization, breaching workplace policy. The majority of the Court of Appeal found that this justified termination for just cause, notwithstanding the plaintiff's previous unblemished 21-year career with the defendant:

> [32] The trial judge found that the appellant's conduct had breached the faith inherent to the work relationship, the result of which was that the relationship had irrevocably broken down. In that regard, she found as follows:
>
> > [26] Ms. Steel occupied a position of great trust in an industry in which trust is of central importance. In her position as Helpdesk analyst Ms. Steel was given the ability to access confidential documents. The employer established clear policies and protocols known to Ms. Steel at the relevant time that were to govern access to confidential documents. One of the most important of these was that Helpdesk analysts such as Ms. Steel were not to remotely access other employees' files without first receiving specific permission to do so.
> >
> > [27] It was not practicable for Coast to monitor which documents Ms. Steel accessed and for what purpose. The employer had to trust Ms. Steel to obey its policies and to follow the protocols. It had to trust Ms. Steel to only access such documents as part of the performance of her duties and to follow the protocols when she did so. Such trust was fundamental to the employment relationship in relation to Ms. Steel's position. It was, to use the language of Iacobucci J. in McKinley, "the faith inherent to the work relationship" that was essential to this employment relationship.
> >
> > [28] Ms. Steel violated that trust in two distinct and important ways. First, she opened a confidential document in another employee's file for her own purposes, not as part of her duties and not at anyone's request. Second, she violated the protocols that were to govern situations in which remote access of such documents was undertaken. Specifically, she did not have permission to do so from the document's owner, or from anyone entitled to grant such permission.
> >
> > [29] I have concluded that in the circumstances this conduct amounted to just cause for dismissal. It follows that the action is dismissed.
>
> [33] In my view, the trial judge did not err in principle in applying the *McKinley* analysis. As the above-cited passage illustrates, she applied a contextual approach and considered whether the nature of the misconduct, which the appellant admitted was the result of a deliberate choice, was reconcilable with a continuing employment relationship.

[73] In *Roe*, the Court of Appeal overturned a decision granting a manager's wrongful dismissal claim. The manager had been dismissed for distribution of complimentary food vouchers to his daughter's volleyball team without advanced authorization. In sending the matter back for a new trial, the court stated:

> [34] The assumed facts include the following: (i) Mr. Roe held a position of trust as a senior manager at the terminal site; (ii) his responsibilities included the handling and reconciliation of large amounts of cash; (iii) he acted as a role model and mentor to the other staff at the terminal; (iv) the standards of integrity and honesty, included in the Code, were essential conditions of Mr. Roe's employment and had been clearly set out by the Employer in Mr. Roe's employment contract; (v) Mr. Roe knew that his conduct with respect to the vouchers was contrary to the Customer Recovery Plan; (vi) Mr. Roe knowingly did not seek authorization for his donations of the complimentary vouchers or notify anyone of his actions after the fact; (vii) these acts of dishonesty and misappropriation of the Employers' property were premeditated and therefore constituted deceptive behaviour; (viii) Mr. Roe had engaged in similar acts on at least one prior occasion; and (Ix) Mr. Roe's actions were in breach of the Code, of the trust reposed in him as a senior employee in a management position, and were unethical.
>
> …
>
> [36] The judge appears to have based his characterization of Mr. Roe's conduct on the "trifling" monetary value of the donated vouchers, the lack of a personal benefit to Mr. Roe, and Mr. Roe's lack of steps to attempt "to deceive or cover his tracks". With respect, I cannot agree. The value of the donations, as acknowledged by the judge, was of little consequence...
>
> [37] In reaching his finding that Mr. Roe's actions were "bordering on trifling", the judge does not appear to have applied the contextual approach, mandated bv *McKinley*, in assessing whether Mr. Roe's misconduct irreconcilably undermined the good faith obligations inherent in the employment relationship (paras. 8-11 of his reasons). That approach, in my view, would have required consideration of: (i) the high standard of conduct expected of Mr. Roe given the responsibilities and trust attached to his senior management position; (ii) the essential conditions (characterized as "core values") of integrity and honesty in his employment contract, including the requirement in the Code "to act in an honest and ethical manner *at all times*" (emphasis added); and (iii) his deliberate concealment of his actions which he later acknowledged to have been wrong and unethical. It was in this context the judge had to consider whether Mr. Roe's assumed misconduct justified his dismissal. In my respectful view, it was the judge's failure to apply this contextual approach that appears to have led him to commit a palpable and overriding error.

[74] *In Poirier v. Wal-Mart Canada Corp*., 2006 BCSC 1138, the plaintiff had worked for Wal-Mart for almost 15 years. He was dismissed for manipulating the payroll in order to have it appear that he was keeping staff salaries within budget. Poirier received no personal financial gain. The court dismissed his claim, stating:

> [56] First, an employee in a senior position of authority and trust is a factor to consider when determining the essential conditions of the employment

> contract, the duty of faith inherent to the work relationship, or the employee's obligations to his or her employer [citations omitted].
>
> …
>
> [59] Second, if in the course of an employer-initiated enquiry or investigation the employee is dishonest, unresponsive, or provides an unsatisfactory explanation, what would otherwise constitute insufficient cause, may constitute just cause in light of the employee's behaviour. In *Chisamore v. Molson Brewery of Canada Ltd.,* [1991] B.C.J. No. 3668 (S.C.) at ¶2, the Court's finding of just cause was heavily influenced by the fact that the employee failed to respond to the employer's enquiry in a truthful manner. In *Di Vito,* although the employees' misconduct did not constitute just cause, their denial of misconduct and evasive behaviour afterwards, justified dismissal *(Di Vito,* at ¶34 and 41).
>
> …
>
> [67] In some situations an employer has a duty to warn an employee about the consequences of continued misconduct, rather than dismiss him or her summarily: *Baumgartner v. Jamieson* (2004), 37 C.C.E.L. (3d) 120 at 124 and 156 (B.C.S.C.). Given the magnitude of Poirier's conduct as to payroll manipulations, and his lack of cooperation and dishonesty when asked about the matters raised in the two interviews with senior management, I find a warning by his employer was not warranted or in fact possible. For the defendant's senior managers to effectively warn him would have entailed a frank acknowledgment and appreciation by Poirier of his misconduct, motivation to take steps to remedy it, and an assurance that it would not happen again. All these things were lacking in the two meetings with senior management in which the issues of concern were discussed. The tenor of Poirier's input was that he had done nothing wrong, everyone did the same or at least knew about it, and in relation to the sick pay manipulations, he denied any involvement. His responses, to my mind, removed the efficacy of a warning or a series of disciplinary steps culminating in something less than the termination of his employment.

Conclusion on Just Cause

[75] While each case must be decided on its facts, I find the decision in *Steel* to be most helpful to my analysis of the present case, particularly as it relates to the unique position that the principle of confidentiality held in an organization such as the defendant's, an organization that was simultaneously:

a) handling sensitive personal injury claims, including claims by its own staff, the sensitivity of which is formally recognized by statute; and

b) managing staff relations issues in a heavily unionized environment during a period of institutional self-assessment and structural upheaval.

[76] As in *Steel*, the defendant "took privacy and confidentiality very seriously" (para. 21), and the plaintiff "knew that a breach of the protocols could lead to termination" (para. 23).

[77] I find that the defendant has met its burden of showing just cause in this case, applying the contextual approach required by *McKinley* at para. 5. No individual incident may have been sufficient to justify dismissal. But the cumulative effect of all of the incidents found to have occurred suggests a manager out of her depth, reacting to her stress by making an array of improper disclosures, in a misguided effort to obtain support from, or simply to be liked by, her subordinates.

[78] If the plaintiff needed support, that should have been sought from people at her managerial level or above. She knew she should not be sharing such confidential information with her subordinates, hence her frequent use of the introductory phrase "I shouldn't be telling you this, but ..." This acknowledgment contrasts with the situation in *Petit*, where the court found that the plaintiff did not believe that the original confidentiality breach was a violation of the applicable code of ethics (at para. 41). Nor is it akin to *Lau*, where the plaintiff was found to be unaware that mislabelling the funds would result in them being treated as new sales (at para. 196).

[79] The plaintiff's managerial role put her in a position of trust, and required her to serve as a model for other staff: *Molloy v. EPCOR Utilities Inc.*, 2015 ABQB 356 at paras. 188, 210. She specifically agreed to be bound by the Standards of Conduct, unlike the situation in *Rahemtulla v. Vanfed Credit Union*, [1984] 3 W.W.R. 296 at 304 (B.C.S.C.). She was an ethics advisor. Her responsibility for staff claims further heightened the position of trust, being a position specifically structured to maximize confidentiality and to keep other unionized staff from knowing about their colleagues' claims. The state of the organization at the relevant time also required great sensitivity surrounding staffing issues. The breaches were serious. The plaintiff herself acknowledged in cross-examination that "of course" disclosure of a planned termination could result in dismissal. Again, this contrasts with the situation in *Petit*

where the court found that the original breach (before the misrepresentation about the breach) was not serious (at para. 57).

[80] The defendant did consider the suitability of alternative measures, but reasonably concluded that the trust relationship was simply too broken: *Poirier* at para. 67. One incident of inappropriate disclosure may have qualified as inadvertence, justifying a reduced disciplinary option. I note that in *Petit, Clendenning*, and *Lau* the allegation of misconduct was generally focussed on a single incident. Here, there was a pattern. While in *Smith* there were also a variety of issues, several were stale-dated. That was not the case here.

[81] The plaintiff's late and limited *mea culpa* to the Global TV Incident in the middle of the investigation increases the attention that must be given to her refusal to acknowledge any of the other disclosures. Her denial that she made, or would have made, such disclosures continued at trial, even after receiving full details of all the particulars of the investigation, including the identity of the witnesses.

[82] Given my finding on credibility, I have found that such disclosures did occur, which leads necessarily to a finding that she was not properly forthcoming during the investigation. Her lack of transparency during the investigation, including her outright denials, add an important and additional level of validity to the employer's trust concerns: *Molloy* at paras. 223, 225; *Di Vito v. MacDonald Dettwiler & Associates Ltd,* [1996] B.C.J. No. 1436 at paras. 35-44 (S.C.); *Poirier* at paras. 37, 65.

[83] I note as well that in *Petit*, the employee sought to rectify his mistake by disclosing the incident shortly after his initial denial. In *Lau*, there was an admission and an apology (para. 197). That did not occur here.

[84] Based on the entirety of the evidence, I find that the defendant has met its burden of establishing just cause.

B. The Release

[85] If I am wrong on the issue of just cause, there remains the issue of the release.

[86] Before analyzing the release, there is another issue of credibility that must be resolved in order to properly apply the relevant test: whether, at the termination meeting, the plaintiff did in fact represent to the defendant that she had already received legal advice.

[87] I find that she did make such a representation, in light of the following:

a) The plaintiff made no material attack on Mr. Chin's evidence on this point during cross-examination.

b) I find it incredible that Mr. Chin would make five separate written references to legal advice in his written summary of the meeting, a summary recorded just minutes after the meeting itself, without having actually been told this information by the plaintiff.

c) I also find it incredible that Mr. Chin would report on the fact that the plaintiff had already received legal advice to his managerial colleagues immediately following the meeting, unless that was the information he had been provided.

d) The plaintiff's denial in chief of such representations was undermined in cross-examination, when it became clear that she did not actually have a specific recollection of what was said. The plaintiff said that she was in shock during the meeting, making it more likely that she would have said "a lot of things" that she does not presently remember.

[88] Moving to the legal test, there is no dispute that the release covers the scope of the present claim. As such, it is the plaintiff's burden to establish a basis to set aside the release on the ground of unconscionability.

[89] As the Ontario Court of Appeal stated in *Titus v. William F. Cooke Enterprises Inc*., 2007 ONCA 573:

> [36] A party relying on the doctrine of unconscionability to set aside a transaction faces a high hurdle. A transaction may, in the eyes of one party, turn out to be foolhardy, burdensome, undesirable or improvident; however, this is not enough to cast the mantle of unconscionability over the shoulders of the other party: see Fridman, *The Law of Contract in Canada* (Fifth Edition), p. 320.

[90] The applicable test was articulated by the Alberta Court of Appeal in *Cain v. Clarica Life Insurance Co*., 2005 ABCA 437 as follows:

> [31] The tests for unconscionability at common law or in equity are not always stated the same way, or even firmly, especially in England. I have looked carefully at Canada's undoubted leading case, *Morrison v. Coast Finance Ltd.* (1965), 54 W.W.R. 257, 259 (B.C. C.A.). It was approved by the majority in *Norberg v. Wynrib,* [1992] 2 S.C.R. 226, 248, 138 N.R. 81, 98-99 (para. 30), and in *C.I.B.C. v. Ohlson* (1997), 209 A.R. 140, 146 (para 20) (Alta. C.A.). Those cases are very instructive. See also *Calgary v. N. Constr. Co.* (1985), [1986] 2 W.W.R. 426, 442-3 (Alta. C.A.); *Brewery, Bev. & S.D.W. v. Labatt's Alta. Brewery* (1996), 184 A.R. 162, 170-71 (C.A.); Adams, "Misrepresentation and Fraud", in 31 Hals. Laws, para. 854 (4th ed. 2003 reissue).
>
> [32] Those authorities discuss four elements which appear to be necessary for unconscionability. (Some cases state some of the four as exceptions to be disproved by the alleged oppressor, but nothing turns on onus in this case.) The four necessary elements are:
>
> 1. a grossly unfair and improvident transaction; and
> 2. victim's lack of independent legal advice or other suitable advice; and
> 3. overwhelming imbalance in bargaining power caused by victim's ignorance of business, illiteracy, ignorance of the language of the bargain, blindness, deafness, illness, senility, or similar disability; and
> 4. other party's knowingly taking advantage of this vulnerability.
>
> [33] No reported case has come to my attention which upset a contract in the absence of one of these four elements, let alone all of them.

[91] The plaintiff agreed that each of the four elements outlined in *Cain* are necessary conditions to setting aside the release: see also *Titus*, at paras. 38-39; *Hans v. Volvo Trucks North America Inc.*, 2011 BCSC 1574 at para. 81; *Felty v.*

Ernst & Young LLP, 2013 BCSC 815 at para. 195. As such, I adopt this structure to analyze the evidence below.

[92] Before doing so however, it is also useful to summarize the expression of the test adopted by our own Court of Appeal. In *Saliken v. Alpine Aerotech Limited Partnership*, 2016 BCSC 832, the court summarized the Court of Appeal's decisions in *Morrison v. Coast Finance Ltd.* (1965), 55 D.L.R. (2d) 710 (B.C.C.A.) and *Harry v. Kreutziger* (1978), 9 B.C.L.R. 166 (C.A.) as follows:

> [152] …The issue is whether the transaction, seen as a whole, is sufficiently divergent from community standards of commercial morality that it should be rescinded: *Harry v. Kreutziger* (1978), 9 B.C.L.R. 166 (C.A.).
>
> [153] Two factors must be present - a weakness in bargaining position on one side and a taking of unfair advantage on the other: *Gindis v. Brisbourne*, 2000 BCCA 73, citing *Morrison v. Coast Finance Ltd*. (1965), 55 D.L.R. (2d) 710 (B.C.C.A.) [*Morrison*]. In *Morrison*, the Court of Appeal set out the following test for unconscionability at 713:
>
> > ... [A] plea that a bargain is unconscionable invokes relief against an unfair advantage gained by an unconscientious use of power by a stronger party against a weaker. On such a claim the material ingredients are proof of inequality in the position of the parties arising out of the ignorance, need or distress of the weaker, which left him in the power of the stronger, and proof of substantial unfairness of the bargain obtained by the stronger. On proof of those circumstances, it creates a presumption of fraud which the stronger must repel by proving that the bargain was fair, just and reasonable: [citations omitted].

[93] I agree with the defendant that there is no material difference between these expressions of the test. As the defendant put it: "The 'power imbalance' factor of the *Harry/Morrison* test generally equates to factors 2 and 3 of the *Cain/Titus* test, the lack of legal or other advice and an imbalance of bargaining power; the 'taking unfair advantage' factor generally equates to factors 1 and 4, a grossly unfair or improvident transaction and a taking advantage by one party."

Grossly Unfair and Improvident Transaction

[94] There is no dispute that, had the plaintiff been dismissed without cause, she would have been entitled to 18 months' notice. In this case, she was provided a retirement allowance worth about four months' notice, as well as the unquantifiable,

but nonetheless material, social and reputational benefits associated with being allowed to retire.

[95] As stated in *Hans* at para. 86*,* "The use of such strong adjectives as 'grossly' and 'imprudent' suggests that the covenant not to sue must be more than just unfair to the plaintiffs. It must be egregiously unfair."

[96] In *Cain,* the Alberta Court of Appeal held as follows:

> [41] The trial reasons seemed to suggest in places that 20 to 24, or 22 months was a proper award to the respondent, and so the approximately 9 contracted for was unfair. (See paras. 17-20.) But 22 months is not what the law would award. ....
>
> …
>
> [47] To put it another way, even if 22 months (or 19) were the correct amount, it was only a ceiling. There was little or no floor at the time of negotiating the settlement ....
>
> [48] This bargain gave the respondent certainty which he lacked before ... If the respondent had got a new equivalent job in less than 9 months, he would have made a profit. Had he arranged one at or before the day he stopped work with the appellant (as he hoped), the whole $88,000 would have been profit, not compensation.
>
> [49] Therefore, to evaluate the bargain negotiated, one would have to compare a certain 9 months (settlement) with a very uncertain amount somewhere between 0 months and 19 months (lawsuit). The sum negotiated (9 months) was about midway in that range. The settlement bargain was a prediction or bet that the respondent would get a new job about 9 months after stopping work for the appellant company. Or, one may look on it as valuing the situation as a 50% chance that he would get a new job promptly.
>
> …
>
> [51] Both sides decided not to gamble, but to compromise on a bird in the hand.
>
> [52] The whole point of a settlement is to replace an unpredictable dispute or suit with a certain contract. It does not matter that one party valued his opponent's chances in the suit lower than did the opponent himself. Parties settle because they think a suit or trial will yield less than the settlement. It is of the essence of such a settlement that each party relies on his own evaluation and takes his chances. See *Radhakrishnan v. University of Calgary Faculty Assn.* (2002), 312 A.R. 143, 2002 ABCA 182 (especially paras. 52 ff.).
>
> [53] Furthermore, litigation is uncertain and expensive. Even for the "winner", partv-partv costs rarely repay more than half of his or her legal bills. Though some case authority favors the respondent and bypasses the change of

> employer and the terms of the new employment agreement, and recognizes the full 30 years' seniority, there is other contrary authority ... Little in litigation is certain. Even if 19 months had been a proper ceiling (award in the absence of any new employment), knocking off something for a quick cash settlement might have been justifiable. So even 19 months is not necessarily a firm comparator or ceiling.
>
> [54] It is an error to look at events in hindsight, and then use them to measure a settlement contract made earlier before those facts were known. Still less to call it improvident or unfair. Least of all can one attack a settlement on the ground that one party was right all along and should not have compromised: [citations omitted].

[97] In *Titus*, the plaintiff was offered three months' notice for a without cause termination when he likely would have been entitled to ten months under the common law. The Ontario Court of Appeal held that this transaction was neither grossly unfair nor improvident, mainly on the basis that an assured three months' notice was a fair offer in a situation where the possibility of ten months' notice was far from sure (at para 41).

[98] Viewed simply against her potential financial upside in a successful wrongful dismissal suit, the benefit of the retirement allowance was certainly on the low side, being the equivalent of 4 months against the potential for 18 months. However:

a) The plaintiff herself was under the (mistaken) impression that she could be entitled to up to 36 months' compensation, yet still executed a release in return for 4 months' worth of benefits.

b) The plaintiff also received substantial non-financial benefits through the execution of the release (benefits which she took advantage of shortly thereafter through her attendance at her own retirement party).

c) The plaintiff made this compromise in a context where she would have understood that she had already admitted she had made the inappropriate disclosure of staff claim information arising out of the Global TV Incident, creating a material risk of dismissal for cause that would properly be considered by both sides as part of their risk assessments.

d) The plaintiff was also aware that there were other allegations that had been made against her in relation to other improper information disclosures. Given my finding that these allegations were in fact credible, the plaintiff should have known that there was a material risk that these additional disclosures created further risk that she could be dismissed with cause.

[99] While it is true that at this stage of the analysis, we must assume that the plaintiff was dismissed without cause, it would be grossly artificial to ignore the factual matrix surrounding her dismissal in assessing whether the bargain struck was improvident. As the court in *Cain* stated at para. 54, "Least of all can one attack a settlement on the ground that one party was right all along and should not have compromised." When all the facts and the risks are considered, I am unable to conclude that "the transaction, seen as a whole, is sufficiently divergent from community standards of commercial morality that it should be rescinded."

[100] I pause here to note that my finding that the bargain provided material benefits also addresses another argument advanced by the plaintiff during her final argument, being that there was no consideration for the release. The defendant objected to this defence, as it was not raised in the pleadings. The plaintiff candidly agreed this was so, but asked for leave to advance it. I took this request under advisement. I agree that the issue was raised too late in the day, but even had it been raised in a timelier fashion, it is clear that the provision of the retirement allowance alone would operate as consideration.

Lack of Independent Legal Advice or Other Suitable Advice

[101] There is no dispute that the plaintiff failed to obtain independent legal advice. However, I note that:

a) her friend did tell her that she would be able to provide her with a referral to counsel during the week leading up to the termination, an invitation she did not take up either before the termination, or in the 24-hour period she was given to consider the release;

b) she did have a week during which she was aware that serious charges had been levelled against her;

c) she did do some of her own legal research on the internet; and

d) she did represent to the defendant that she had legal advice, which removed the defendant's need to give the usual warning about seeking legal advice, which warning could possibly have triggered further efforts on her part.

[102] While I cannot conclude that speaking to her friend and doing internet research qualifies as "other suitable advice", the mitigating factors outlined above cause this element, while met, to not carry a particularly heavy weight in the final analysis of unconscionability.

Overwhelming Imbalance in Bargaining Power

[103] The defendant clearly had superior bargaining power, but this will be the case in almost every contract between an employer and employee. In *Downer v. Pitcher*, 2017 NLCA 13, the required imbalance of power was described as follows:

> [39] It is not any inequality of position that will do. As Coutu J. observed in *Floyd v. Couture*, every contract involves some disparity between the parties in terms of bargaining power. It must be such that it has the potential for seriously affecting the ability of the relief-seeker to make a decision as to his or her own best interests and thereby allows the other party an opportunity to take advantage of the claimant's personal or situational circumstances. That is why terms such as "overwhelming" or "substantial" or "special" have been used. While trying not to fall back into the linguistic trap I have eschewed previously, I would venture to say that what is meant by such terminology is that the inequality must relate to a special and significant disadvantage that has the potential of overcoming the ability of the claimant to engage in autonomous self-interested bargaining.

[104] The factors weighing in the plaintiff's favour in relation to the satisfaction of this element are:

a) The defendant was a large, important, quasi-governmental entity, and the plaintiff was a single employee.

b) The defendant was in a position to require a "short fuse" for execution of the release. I do not accept the defendants' evidence that there would have been material prejudice to the defendant in, for example, continuing her paid suspension for a further 24-48 hours. If they were sufficiently concerned about perceptions, they had the power to make any continued suspension "without pay". It is difficult to understand why they felt it necessary to impose such a short fuse.

c) The defendant did not allow for any negotiation. This was clearly a "take it or leave it" proposition.

[105] However, it is still important to note that:

a) the plaintiff was a manager, not a low level employee: see *Cain* at paras. 66, 71; *Henderson v. Advantage Marketing & Advertising Inc.* (1991), 35 C.C.E.L. 200 at para. 22 (B.C.S.C.);

b) the plaintiff was aware of the nature of the dismissal process, with dismissals having occurred in the past from her own section;

c) the plaintiff had several days at home during her suspension to consider the implications of the allegations being levelled against her;

d) the plaintiff had consulted with her husband and her friend before the dismissal;

e) the plaintiff had done internet research on her rights even before the termination meeting;

f) the plaintiff had access to other former managers, including presumably the one who eventually encouraged her to commence litigation after signing the release; and

g) the plaintiff was aware that she was going to have the benefit of a healthy pension, whether she signed the release or not, thereby reducing any economic pressure.

[106] As such, while I do find that this element is met, the mitigating factors noted reduce its weight in the overall analysis.

Knowingly Taking Advantage

[107] This is the element where the plaintiff falls shortest, given the following:

a) The plaintiff was given the opportunity to take the release home to consider it, although admittedly for a controlled period of time: *Henderson*, at para. 22.

b) The plaintiff was able to make her decision the next morning, without taking advantage of the full business day that the defendant afforded her.

c) The plaintiff already had access to a potential lawyer to whom she could consult, through her friend. Although it is possible the lawyer would not have been available to her that day, the plaintiff never tried.

d) The plaintiff in her testimony provided a considered review of her decision-making process leading towards the retirement option. She assessed her resources and the defendant's resources. She assessed the potential implications for her daughter's career with the defendant (where she was also an employee). She considered her financial needs. I did not sense panic or any absence of rational thought in her thought process over the relevant period. Her emails with the defendant over the relevant period also suggest a considered approach to her decision.

e) The plaintiff herself took steps that reduced the "knowing" element of any advantage, by asserting to Mr. Chin that she had already received legal advice before the release was required. Indeed, in the termination meeting she sought to use the fact of that purported advice to leverage better

terms for herself in terms of a greater financial benefit or the provision of additional information. That is not the type of conduct one expects from a person of whom advantage is being taken.

f) Each of the defence witnesses involved in the plaintiff's termination impressed me as being polite, responsive and concerned to make the best of a difficult situation for the plaintiff. There is no evidence that any of them sought to take advantage of any personal life stressors of which they may have been aware: *Titus* at para. 50. The plaintiff herself acknowledged their professionalism, understanding and compassion. Although one must assume at this stage of the analysis that these individuals collectively made a mistake in determining whether there was just cause for dismissal, I find that they otherwise tried to make the process as painless as possible for the plaintiff, as opposed to having any intention of making any effort to take advantage of her. The one procedural critique could be the short 24-hour period, but this does not rise to the level of taking knowing advantage.

[108] In *Miller v. Convergys CMG Canada Limited Partnership*, 2013 BCSC 1589, aff'd 2014 BCCA 311, leave to appeal ref'd [2014] S.C.C.A. No. 424, the plaintiff sought to rely on, among other factors, a 24-hour period before being required to sign an employment contract as being unconscionable. The court rejected that submission stating:

> [54] Nor do I accept the plaintiff's other submissions. An employer is not required to point out the strengths and weaknesses of an employment contract. It is sufficient that a prospective employee is given time to review a proposed employment contract on his own, in the absence of any influence by the prospective employer, and is given the opportunity to seek out any advice he may wish to obtain about the proposed contract: *Finlan v. Ritchie Bros. Auctioneers (Canada) Ltd.,* 2006 BCSC 291 at para. 36.
>
> [55] The contract expressly gave Mr. Miller 24 hours to consider its terms. It provides for an opportunity to obtain advice stating at the top of page 3:
>
> > Please read the terms and conditions set out in the letter, and the attached Schedules, carefully. If you have any questions concerning the terms of your employment with Convergys, please do not hesitate

> to discuss them with us. In addition, please feel free to seek independent legal advice concerning contract.
>
> [56] The contract is written in plain language. Mr. Miller had signed almost two identical contracts in relation to earlier positions with Convergys. He chose not to obtain independent legal advice and chose not to take advantage of the 24-hour period to read over and consider the terms of the contract. There is no evidence that the defendant pushed Mr. Miller to sign immediately or put undue pressure on him in any way.

[109] While the pressure created by a termination may be intrinsically more intense than that which exists on an initial hiring, I take some comfort from this analysis, particularly given that there was also no evidence here about the lack of any understanding of the proposed terms. As such, I find that this element has not been met.

Conclusion on Release

[110] I find that the plaintiff has not met the burden of establishing that the release was unconscionable. Specifically:

a) two of the elements from *Cain* are not satisfied;

b) while I have found that the other two elements are met, they are counterweighed with substantial mitigating factors; and

c) using the broader language from the B.C. Court of Appeal's decision in *Harry*, viewing the weight of the evidence as a whole, I am unable to conclude that the release "is sufficiently divergent from community standards of commercial morality that it should be rescinded".

C. Contractual Damages

[111] The parties agree that if the release does not apply, and the dismissal was not for just cause, the proper notice period was 18 months. This is the maximum notice period allowed under the *Employment Termination Standards,* B.C. Reg. 379/97*.* The parties agree that this equates to $152,698.50.

[112] The plaintiff also agrees that the retirement allowance of $31,322.77 must be deducted from this amount. The defendant seeks an accounting of certain small amounts earned by the plaintiff during the 18-month period, which I find would be appropriate.

[113] The plaintiff suggests that she should also be entitled to a pro-rated bonus. However, in light of the fact that, absent a dismissal, the plaintiff was likely going to face some disciplinary action, I find that it is not realistic to assume that a performance bonus would have been paid.

[114] The remaining damages question is whether the plaintiff is also entitled to compensation for pension losses as a result of the termination of her employment.

[115] The plaintiff's theory is that her pension entitlement was reduced as a result of the fact that her best five years of income was reduced by not receiving credit for the 18-month notice period she should have received. The actuary, Michael Demner, called by the plaintiff, calculated the net present value of the effect of the reduction in her pension payments, net of the pension payments that were actually received during the notice period, at $13,928.

[116] Even after certain downward adjustments made by Mr. Demner just prior to and at trial, the defendant and the actuary, Michael Cheng, take the position that three errors remain in the plaintiff's calculations:

> 1. Mr. Demner assumed an increase in income to $92,688 in 2018, rather than using the $71,282 earned in 2016. (An increase in assumed income increases the taxes payable necessary to leave the plaintiff in the same position);
>
> 2. Mr. Demner assumed a CPI increase in wages, when the evidence from Ms. Messenger was that there was a wage freeze in place; and
>
> 3. Mr. Demner's methodology assumes the purchase of an annuity, rather than the more tax efficient method of purchasing a registered fund.

[117] Once those adjustments are made, Mr. Cheng says there is no pension loss at all. In fact, the plaintiff ends up receiving a higher amount than she would have otherwise (although the defendant agreed in final argument that they were not seeking a credit for such an amount against any notice period damages).

[118] I find that:

a) There is no evidentiary basis to assume that the plaintiff would earn more during the notice period than was earned in 2016.

b) The evidence does not support any CPI increase in the plaintiff's salary.

c) The appropriate methodology should invoke the most tax efficient structure. However, it should not make any assumptions that would require a reduction in the plaintiff's RRSP room. The plaintiff should not be required to exhaust or impinge on her pre-existing rights in order to minimize the defendant's damage award. However, the evidence suggested that there may be some ability to purchase registered funds that do not reduce the plaintiff's RRSP room. This would have to be compared with the effect of an annuity purchase approach.

[119] Rather than agreeing to a specific award based on the court's findings on these three issues, the parties agreed that they would return to their actuaries for final calculations after receiving my directions on the three remaining issues. I leave those final calculations to the parties, assuming the findings on just cause and the release are not upheld on any appeal.

D. Other Potential Damages

[120] In a wrongful dismissal case, both the claim for aggravated and punitive damages require a consideration of the conduct of the defendant: *Keays v. Honda Canada Inc.*, 2008 SCC 39. Given my finding above that the defendant was generally compassionate throughout the process, I find no basis to award either type

of damages, even if I were to have concluded that the plaintiff was dismissed without just cause.

[121] Making a good faith error on just cause will not be a basis in and of itself to make such awards. I find no bad faith in the defendant's decision-making process. While the plaintiff was not given advance notice of the purpose of the first meeting, she was given a reasonable level of particulars during the meeting to allow her to explain herself: *Molloy* at para. 301. She also had, and used, the opportunity of her time at home to educate herself. The "short fuse" on the retirement offer was troublesome, but not to an extent that justifies either type of award.

[122] The defendant raised an objection that the claim for punitive damages was not plead. However, I would have granted leave to amend had I otherwise been prepared to make such an award, given that there was no material prejudice to the defendant. All of the evidence to support the punitive damages award was already being used to support the aggravated damages claim.

V. CONCLUSION

[123] For the reasons expressed above, I find that this action should be dismissed. If the parties are unable to agree on costs, they may return for further direction.

"Branch J."

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The Honourable Mr. Justice Branch