Court of Queen's Bench of Alberta

Citation: Watkins v Willow Park Golf Course Ltd, 2017 ABQB 541

Date: 20170907
Docket: 1201 14009
Registry: Calgary

Between:

Ralph Watkins

Plaintiff

- and -

Willow Park Golf Course Ltd.

Defendant

Reasons for Judgment
of the
Honourable Madam Justice M. H. Hollins

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[1] The Plaintiff, Ralph Watkins, was an employee of the Defendant, Willow Park Golf Course Ltd, from approximately January 1, 1999 to the date of the termination of his employment on October 28, 2011. The Defendant terminated the Plaintiff's employment on that date for cause, including verbal and sexual harassment.

[2] The Plaintiff says that his termination was unwarranted, particularly in light of the Defendant's alleged failure to properly investigate the complainant's claims or allow him a meaningful opportunity to respond to those claims. Further, the Plaintiff says that even if his behaviour was offensive, it was condoned by the Defendant. The Defendant maintains that the Plaintiff's conduct was so egregious that it warranted summary termination without the need for investigation or the possibility of rehabilitation. Alternatively, the Defendant says that it did conduct a sufficient investigation to provide it with cause for termination.

[3] For reasons set out more fully herein, I find that the Plaintiff's conduct warrants the summary termination of his employment. The Defendant did not conduct an adequate investigation of the complaints received about the Plaintiff but, had it done so, the result would have been no different. The admissions made by the Plaintiff or allegations otherwise proven in the course of the trial were sufficient to justify the termination of his employment.

Background of the Parties

[4] The Plaintiff was 61 years of age at the time of his termination. He was the Defendant's Golf Course Superintendent for the duration of his employment, almost 13 years. He had approximately 7 full time and another 30 or more seasonal employees reporting to him.

[5] The Defendant company had seven owners in 2011, all of whom were also directors. The owners rotated through positions on a Management Committee composed of a President, Vice-President and Secretary-Treasurer. In 2011, Malcolm Lyle was the President of the Defendant company and the head of the Management Committee.

[6] Andrea Li had been a seasonal member of the grounds crew since 2005. She took a maternity leave in 2006, returning in 2007 at which time she was promoted to a full time (year-round) position on the grounds crew. She reported directly to the Plaintiff throughout her employment with the Defendant.

[7] In or by 2011, the Plaintiff developed romantic feelings for Ms. Li. The Defendant says this resulted in the Plaintiff extending a number of benefits to Ms. Li, either without the Defendant's approval or at a minimum, in a way that created disharmony in the Plaintiff's department. When Ms. Li made it clear to the Plaintiff that she had no romantic feelings for him and wanted their relationship to be only professional, the Plaintiff began to vacillate between continuing to try to woo her and becoming increasingly aggressive and abusive to her. Examples of this are explored in more detail herein.

The Employment Contract

[8] The contract of employment between the Plaintiff and Defendant was unwritten but a contract nonetheless. It is presumed to contain certain terms, including the Defendant's agreement that it will not terminate the Plaintiff's employment without legal cause. As the Plaintiff's employment and termination were admitted, the Defendant bears the burden of proving cause for termination on a balance of probabilities.

The Alleged Cause for Termination

[9] The Defendant says that it terminated the Plaintiff on three grounds; the verbal and sexual harassment of Ms. Li, the Plaintiff's insubordination in refusing to demote or fire her and his other unprofessional behaviour.

[10] At the outset of the trial, the Defendant made an application to amend its pleadings to add specific incidents of misconduct based on after-acquired cause for termination.

[11] I denied this application in respect of new specific allegations regarding alleged computer misuse and the Plaintiff's alleged mistreatment of another employee, William Stanley. While an employer can certainly legally rely on after-acquired cause for termination, the Defendant

provided no Affidavit evidence whatsoever to support the new allegations nor any reason for failing to plead these particulars prior to trial, notwithstanding that the Plaintiff was terminated almost 6 years ago. The evidentiary threshold for amendments is low but it is not non-existent. I further found that it would be prejudicial to the Plaintiff to have to meet these new allegations when he had no document or oral discovery on the new facts alleged.

[12] The one proviso to that ruling was with respect to evidence about the Plaintiff's treatment of another of his employees, Alana Kent. Ms. Kent had written a letter of complaint about the Plaintiff which appeared in the Defendant's original document production and in the Agreed Trial Exhibits. If known to the Defendant at the time of termination, the treatment of Ms. Kent would not actually be after-acquired cause and could therefore fall within the existing allegations of unprofessional behaviour. Further, as the letter from Ms. Kent had been produced in the normal course, I did not have the same concerns about an evidentiary foundation nor about the Plaintiff's ability to recognize and prepare to defend himself against these allegations and in fact, Ms. Kent was thoroughly cross-examined at trial.

[13] I said that I would hear whatever evidence was led about Ms. Kent's allegations against the Plaintiff and rule on its admissibility in due course. The treatment of her evidence is found later in these Reasons.

[14] Because of the nature of the allegations leading to the Plaintiff's termination, it is necessary to review the facts in some detail.

The Plaintiff's Infatuation with Ms. Li

[15] In the spring of 2011, particularly in May and June of 2011, the Plaintiff began to develop romantic feelings for Ms. Li. He testified that he and Ms. Li took trips to Banff and Drumheller, together with one or more of his grandchildren and Ms. Li's young daughter. He invited her on a trip to Winnipeg, Manitoba to play a golf course there and to show her some of his "old haunts". The Plaintiff testified that she was paying him attention and he thought his affections were reciprocated.

[16] The Plaintiff promoted Ms. Li to the position of Assistant Superintendent. The timing of this promotion was not clear. I accept that it was precipitated by the Defendant's decision in the fall of 2010 to revitalize its sand traps as the existing Assistant Superintendent, Brian Denomme, was going to be spending his time primarily on that project and so his role in overseeing the grounds crew needed to be backfilled.

[17] The Plaintiff gave Ms. Li the title of "Assistant Superintendent", along with a business card bearing this title and an annual raise in salary effective May 27, 2011. The Plaintiff wrote a letter of recommendation for Ms. Li dated May 18, 2011 that said she had held the title for three years prior, which was an exaggeration at best as it was supported by no evidence and was contrary to most. On cross-examination, the Plaintiff admitted that these things were done around the time that he was developing feelings for Ms. Li.

[18] Also in the spring of 2011, the Plaintiff also allowed Ms. Li to move a desk into the office that he already shared with Mr. Denomme and gave her a parking space beside his in the front of the grounds office building, perks enjoyed by no one other than the Plaintiff at that time. While the Plaintiff was undoubtedly authorized, at least implicitly, to make these kinds of

arrangements amongst his direct reports, the effect was to create bad feelings among the other employees with whom Ms. Li worked.

[19] Perhaps the most problematic concession was that Ms. Li was allowed to come in approximately 1½ hours later than the other grounds crew employees. While the reason for this was wholly understandable (the unavailability of child care that early in the morning), the evidence conflicted on whether she actually did make up the time later each day and it incontrovertibly cultivated the discontent of her co-workers.

[20] In mid-June, 2011, the Plaintiff and Ms. Li attended a social function together at the golf course; the "9 Hole Wine & Dine", described by witnesses as being exactly as billed. Again, while there was certainly nothing wrong with this, it was an anomaly that raised eyebrows. While their golfing together was not a breach of any policy – indeed Mr. Denomme testified that the course encouraged its employees to golf the course – Mr. Denomme said that he and the Plaintiff had never golfed together notwithstanding working together for many years. In fact, there was no evidence that the Plaintiff had ever golfed with any of the other employees who testified at trial. Golfing with Ms. Li was not itself a problem but I consider it further evidence of the Plaintiff's non-professional interest in her.

[21] In fact, in cross-examination, the Plaintiff said that after Mr. Denomme saw them golfing together on another occasion around that same time, the Plaintiff admitted to Mr. Denomme that he was hoping to have a relationship with Ms. Li. In the same portion of his cross-examination, he admitted being "smitten" and "in love" with Ms. Li, although he denied hoping for a sexual relationship with her.

[22] Ms. Li had no reciprocal romantic interest in the Plaintiff, who was not only her immediate superior at work but was 32 years her senior. When she realized his intentions, she tried repeatedly to communicate to him that she was not interested in a romantic relationship with him and wanted their relationship to remain professional. The Plaintiff admitted that by the summer of 2011, he knew that his feelings for Ms. Li were not reciprocated. He initially described this as a mutual decision to "not see each other" but in cross-examination admitted that he had hoped for a different result, but understood that she was not interested in a relationship with him.

[23] For example, on the trip to Drumheller on the May long weekend, he apparently tried to hold Ms. Li's hand and was rebuffed. He identified a string of text messages in which he admits "I just wanted 2 hold your hand" in response to her text which read "...I miss understood [sic] your actions completely! I understand now all along you had a different agenda. That hurts me. Sorry Ralph we won't be going to Winnipeg with you, I feel completely embarrassed." The Plaintiff described her actions in cancelling their plans to travel to Winnipeg as having "rejected him".

[24] While the Plaintiff testified that he accepted Ms. Li's rejections of him and thereafter treated her professionally and on par with his other subordinate employees, the objective evidence said otherwise.

[25] For example, in a text message exchange that the Plaintiff said was in July of 2011, Ms. Li reiterates that she enjoys spending time with him but that she does not "want to go further than that right now in my life" to which he responds:

> Remember im a man
> I get it tho wrong time
> reality is a tough
> my fault I thought I saw signs...
> Rejection is already hard 2 take but I understand.

[26] Ms. Li's testimony was that, although she was slow to recognize the change in the Plaintiff's feelings towards her, she knew the extent of his feelings by July, 2011, which certainly accords with the Plaintiff's testimony about the foregoing text message. While Ms. Li had a great deal of respect for the Plaintiff as her boss and her mentor (indeed, continued to laud his mentorship even at trial), she was unequivocally not interested in an overly-personal or romantic relationship with the Plaintiff.

[27] At some point in the summer of 2011, Ms. Li actually went to the Plaintiff's home in hopes of convincing him to stop trying to communicate with her on a personal basis outside of work. She described herself as "frustrated" by this point in time because she was completely dependent on this job as a single mother. She still respected the Plaintiff in a professional capacity but really needed him to respect the boundaries of their professional relationship. She would not actually enter his home on this visit but spoke to him from outside his door, specifically asking him not to text or email her outside of work or for purposes other than work.

[28] The Plaintiff denied this event although he admitted that she did come to his house after a heated argument between them about Ms. Li bringing a male photographer whom she had met at Stampede onto the golf course. I suspect, although it is not necessary to my decision, that this was the same visit made by Ms. Li to the Plaintiff's house that she described above. If it is not, I accept Ms. Li's testimony about the conversation above. Indeed, the Plaintiff admitted to receiving and understanding the gist of her request to stop the personal texts and emails.

[29] I also note that the Plaintiff's reaction to the photographer Ms. Li met at Stampede seemed wildly disproportionate to the event, even accepting that Ms. Li was required to have his permission to hire a photographer. While the Plaintiff denied that he overreacted because of jealousy, it was he who raised the issue first in his testimony, saying that Ms. Li had gone out with friends during Stampede and when he did not hear from her, he was worried about her. The idea that his admitted and expressly angry reaction to Ms. Li bringing this fellow around the golf course was only because she had not obtained his authorization beforehand did not seem plausible.

[30] While the exact sequence of communications throughout the summer of 2011 is difficult to reconstruct perfectly, there is no question that by July of 2011, the Plaintiff knew that Ms. Li had no interest in a relationship with him outside their working relationship and that she was expressly asking him to respect that boundary. Unfortunately, he did not.

[31] There were many examples of repeated text messages from the Plaintiff to Ms. Li to which she did not respond at all, which seems to have spurred him on to continue texting in hopes of a reply. The Plaintiff admitted sending the following text messages in July, 2011 after attending a golf tournament:

Imdrunk
R u sleeping
Im lost
Sorry I was tryin 2 walk home
Oh o
Drank 2 much but I tried 2 get home trouble love u I think 4 will be ok sorry
Good morning want 2 go 4 coffee

[32] Ms. Li's testimony, which accords with the Plaintiff's testimony about this, is that she woke to find all of the foregoing text messages in the morning which had been sent by the Plaintiff over the course of the night before. The Plaintiff admitted sending these texts but said they were sent as a friend and that even now, he sees nothing wrong with them. Drunken texts sent in the middle of the night professing one's love are not merely friendly, particularly given the history of these two to that point. Ms. Li described herself as very frustrated by these particular messages as she had been trying to distance herself from the Plaintiff and ensure that their relationship was strictly professional.

[33] In addition to the text messages which Ms. Li said continued through and after the summer of 2011, several email messages were put into evidence, including one dated August 21, 2011 in which the Plaintiff berates himself for being "a fool, living in a dream world" and hoping they can still be friends and another dated August 25, 2011 wistfully reminding her of their cancelled Winnipeg trip and saying "When you came in this morning, WOW, you looked great made my day, week too thanks". These are not the communications of a person who is respecting an express request from his employee to cease personal conversations outside work. It is also apparent from the communications generally in July and August, 2011, that the Plaintiff clearly understood that he had, on occasion, stepped out of line in his behaviour towards Ms. Li. He would apologize, only to repeat the conduct again.

[34] Ms. Li testified that the Plaintiff asked her if she watched pornography. The Plaintiff initially denied this, then said he did not recall and eventually admitted that he did ask her this question once but in the manner of "just friends talking". Like much of his testimony, the Plaintiff seemed to vacillate between denial and admission of parts of the allegations. Whether this was the extent of the conversation about pornography or not, it is simply not appropriate for a senior employee to ask his junior direct report about her taste for or in pornography. His explanation that she was "not innocent" in such matters and had "been around", based solely on the fact that she had given birth to a child, was indicative of his general attitude that he had done nothing wrong and that this was acceptable workplace interaction.

[35] There was also an allegation made by Ms. Li in her testimony that the Plaintiff had effectively trapped her against the photocopier in their shared office space and rubbed himself against her buttocks. This event had not been put to the Plaintiff in his cross-examination. Under the rule in ***Browne v Dunn***, the Defendant's failure to put this incident to the Plaintiff during cross-examination may limit the Defendant's ability to rely on this evidence.

[36] While the Plaintiff did not seek to be recalled to give his evidence on this alleged event, I am not convinced that he has an obligation to do so although he assumes some risk in that decision. I am at liberty to consider Ms. Li's evidence about the incident, notwithstanding the lack of cross-examination of the Plaintiff. However, while I accept without reservation that it happened, I agree with the Plaintiff that in the absence of his testimony, I cannot know whether

the contact was accidental or purposeful. Therefore, I do not attach any significance to this particular allegation.

The Plaintiff's Increasing Aggressiveness Towards Ms. Li

[37] By late summer, the Plaintiff described the atmosphere between he and Ms. Li as having a "little tension". However, Ms. Li and the other employees who worked in the golf course department clearly felt more than a little tension as the relationship between the Plaintiff and Ms. Li continued to deteriorate.

[38] The Plaintiff testified that in late October, 2011, Ms. Li approached him about attending an industry conference in Las Vegas and he told her that the course would not be sending her. His own evidence was that things got heated between them quickly, she called him an "asshole" and he called her a "cunt" or "fucking cunt" in response. I note that the Plaintiff said in some portions of his testimony that he said she was "acting like a cunt", which he thought was less problematic somehow but I fail to see any import to that distinction even if his testimony were believed over hers.

[39] He admitted that this was verbal aggression but characterized this as "man talk" or "locker room talk"; an example of when "men are men". In his evidence in chief, he said that he forgot all about it and never apologized to Ms. Li. The unmistakable impression left by his testimony was that he felt his language and demeanour with Ms. Li was justified. This accords with Mr. Denomme's evidence that he confronted the Plaintiff after hearing about this incident and the Plaintiff admitted using that language because he felt that it was accurate.

[40] Ms. Li testified that the Plaintiff called her a "cunt" or "fucking cunt" on three separate occasions while the Plaintiff admits to only one of these. This is illustrative of the Plaintiff's legal difficulty with this claim; it is not necessary to determine whether he called Ms. Li a "cunt" or "fucking cunt" one time or three times. In an employment relationship where a manager is expected to be professional with his staff, one such use of this language is too many.

[41] The Plaintiff admitted to heated conversations with Ms. Li over her request that he not continue to pursue a relationship with her as well as other heated conversations with her regarding her work performance. Given the Plaintiff's admissions that he commonly swore at and yelled at employees (which he demonstrated in court), I infer that these "heated conversations" with Ms. Li would likely have involved loud and aggressive demeanour towards her. Further, he acknowledged that other employees like Mr. Denomme overheard these arguments, specifically the argument above regarding Las Vegas and also the argument over Ms. Li bringing a photographer onto the course.

[42] Mr. Denomme, like other employees, was frustrated with both the preferential treatment Ms. Li had received and with the increasing confrontations between the two. Mr. Denomme's impression was that, as the relationship between Ms. Li and the Plaintiff became more volatile, Ms. Li could do nothing right and that the Plaintiff was yelling at her virtually every day and constantly calling for her over the radio. Ms. Tamara Benner, the course horticulturalist, who worked alongside Ms. Li and reported to the Plaintiff, also testified that the Plaintiff would call for Ms. Li over the radio several times an hour.

Other "Unprofessional Behaviour"

[43] The Plaintiff admitted cursing at other employees "not regularly but it happens" and also that he was more aggressive generally with Mr. Denomme and Ms. Li as he expected more of them. Mr. Denomme echoed this, saying that he could recall numerous times over the years that the Plaintiff had argued with and yelled with closed fists at various of his employees and that the crew was generally intimidated by the Plaintiff.

[44] Quite simply, this is unacceptable for a management-level employee such as the Plaintiff. While management training might have been a prudent thing for the Defendant to have provided to all its senior staff, I do not accept that a manager in this day and age needs training in order to refrain from yelling, berating and cursing at his staff. It is not, as described by the Plaintiff, an "old fashioned" style of management, it is a failure to manage.

[45] Alana Kent was a seasonal employee of the Defendant in the summer of 2011. Her family were members of the golf club and it was not uncommon for the Defendant to hire the children of members as seasonal labourers.

[46] As described by Ms. Kent, Ms. Benner, Mr. Denomme and the Plaintiff, there was a protocol to the effect that all the grounds crew employees would leave at the same time ie. no employee would be left behind. In late August, 2011 – one of Ms. Kent's last days of work before returning to university – Ms. Kent was inadvertently left behind when the rest of the crew left for the day. Ms. Kent sent a text message to Ms. Benner complaining about this and apparently blaming Ms. Li for the mistake. Mr. Denomme took responsibility for the oversight, apologized to Ms. Kent and also explained all of this to the Plaintiff.

[47] Notwithstanding Mr. Denomme's explanation and for reasons that were never fully explained, the Plaintiff called Ms. Kent into his office and, according to her evidence, berated her, screamed at her until he was red in the face, swore repeatedly at her and leveled a number of personal attacks against her and her family members to the effect that they were lazy. He fired her on the spot, notwithstanding that she only had a few days left in her summer employment.

[48] His evidence, not significantly different, was that her attitude was poor so he yelled at her from approximately 5 yards away and fired her. He admitted saying that he thought members' children were problematic employees but denied saying anything about her mother and equivocated on whether he specifically mentioned Ms. Kent's younger sister. He admitted telling her to "shut up" but denies swearing at her.

[49] To the extent that their evidence differs, I prefer the evidence of Ms. Kent. This is because for her, this was an extremely significant event. At trial, she was clearly still very upset about this meeting and recalled it clearly as one of the most humiliating experiences of her life. The Plaintiff had general recollections about the meeting but, by his own description, it was not out of character for him to yell or swear at employees he felt had made a mistake. This meeting would not have been etched in his memory the way it was for Ms. Kent.

[50] Ms. Kent was seriously upset with this meeting, as both she and Mr. Denomme, who saw her shortly thereafter, testified. Ms. Kent wrote a letter to the Defendant, describing her treatment by the Plaintiff at this meeting. Although it is not clear how the letter was transmitted or to whom, it was definitely given to at least one of the Directors, Joe Hlavey and was also left for the Plaintiff in his mailbox in the clubhouse. Mr. Jon Fisher, the Defendant's General Manager, also recalled receiving the letter and discussing it with Mr. Hlavey.

[51] Ms. Kent's testimony was that she had made copies for the Board, the Plaintiff, Ms. Li, Ms. Benner and Mr. Denomme. Mr. Fisher believed that all the owner/directors received a copy. While Mr. Lyle said that he had not seen the letter before, he did say in cross-examination that he had known about the problems around Ms. Kent's termination. I find that the Defendant, through any or all of these channels, was aware of this incident at the time of the Plaintiff's termination.

[52] Although not expressly pleaded as a cause for termination, this incident certainly falls within the grounds for termination listed in the termination letter and the Statement of Defence that the Plaintiff lacked professionalism. Given that the letter itself was available to the Plaintiff as part of the discovery process and given my finding above that the incident was known to the Defendant at the time of the Plaintiff's termination, I am invoking the proviso described earlier in these Reasons and enunciated during the trial; namely, I find it open to this Court to consider this incident as relevant to the Defendant's plea of cause for termination.

The Effect on Other Staff

[53] Another factor relevant to the Plaintiff's termination was the effect that the worsening relationship between Ms. Li and the Plaintiff was having on the other staff. Over the course of the months prior to the Plaintiff's termination, Mr. Lyle had received complaints directly from Ms. Benner and Mr. Denomme that the relationship between Ms. Li and the Plaintiff was volatile and disruptive. Ms. Benner, along with two other members of the grounds crew, Klaus Rothe (the grounds foreman) and Mr. Sylvestre (the mechanic) all testified that the dynamic between the Plaintiff and Ms. Li was frustrating and upsetting to them. Mr. Rothe had actually told Mr. Lyle that either Ms. Li had to leave or he would leave.

[54] Mr. Denomme in particular felt caught in the middle. Earlier in 2011, the Plaintiff confided in Mr. Denomme that he cared for Ms. Li, that he wanted to spend time with her and was lonely. While the Plaintiff denied talking to Mr. Denomme regularly about his affections for Ms. Li, I find that he did indeed do so. Mr. Denomme's second-hand account was consistent with the Plaintiff's own admissions about his feelings for Ms. Li. Mr. Denomme's testimony on other issues was also consistent with the evidence of many witnesses at the trial and he presented as having a good recollection of these matters and being forthright.

[55] Notwithstanding the Plaintiff's denials, I also preferred Mr. Denomme's testimony that in September of 2011, the Plaintiff told Mr. Denomme that he had been told to fire Ms. Li but did not have the heart to do it himself. He asked Mr. Denomme to do it, which Mr. Denomme understandably refused to do. While this finding does not obviate my finding later in these Reasons that the direction to fire or demote Ms. Li was too equivocal to ground a finding of insubordination, it is again illustrative of the Plaintiff's ongoing personal feelings towards Ms. Li and his willingness to foist this inappropriate relationship on other of his employees, seemingly oblivious to their discomfort.

[56] In July, 2011, Ms. Benner complained to Mr. Lyle about the relationship between the Plaintiff and Ms. Li. Mr. Denomme's evidence was that he had also complained directly to Mr. Lyle that the Plaintiff was more focussed on Ms. Li than on his own job, that he had witnessed Ms. Li growing increasingly afraid of the Plaintiff and that all the other grounds crew employees were so frustrated with the situation that they were threatening to leave. Mr. Denomme pleaded with Mr. Lyle to talk to the Management Committee, although it does not appear this happened until the October 24, 2011 meeting described later herein.

[57] Mr. Fisher, who clearly had the ear of the owner/directors, had also heard complaints from Ms. Benner, Mr. Sylvestre and Mr. Denomme about the Plaintiff's relationship with and treatment of Ms. Li, which was causing tension and stress within the grounds crew dynamics, concerns he passed along to both Mr. Ken Bowie (another owner/director) and Mr. Lyle.

[58] I find that, even apart from the direct complaints later made by Ms. Li to the Management Committee, there were numerous other employees complaining to the Management Committee as well, alleging unprofessional behaviour. Not only did these complaints support the Defendant's decision to terminate the Plaintiff's employment in an effort to restore some harmony to the department, all of these employees' complaints would have corroborated Ms. Li's allegations to the Management Committee, once they received her Letter.

The Direction to Demote or Fire Ms. Li (Insubordination)

[59] Sometime in the summer of 2011, one of the owner/directors (likely Ms. Carpenter, given her evidence) saw on the course website that Ms. Li was calling herself the "Assistant Superintendent" and reported this to Mr. Lyle.

[60] On September 16, 2011, Mr. Lyle met with the Plaintiff. It was at this time that Mr. Lyle began to question the nature of the Plaintiff's relationship with Ms. Li. Ms. Benner had disclosed to him that there was some relationship between the Plaintiff and Ms. Li and that it was causing tension in the workplace for the other employees, which may have been a reference to the Las Vegas argument overheard by Ms. Benner. Mr. Lyle said he asked the Plaintiff directly if he was in a relationship with Ms. Li and the Plaintiff admitted to having had aspirations in that regard but that nothing had come of it. Mr. Lyle expressly told the Plaintiff that Ms. Li could not be the "Assistant Superintendent" as Mr. Denomme already held that position and there was no need for another.

[61] The Plaintiff says that Mr. Lyle told him to terminate Ms. Li's employment. Mr. Lyle said he told the Plaintiff to "reclassify" her, presumably by stripping her of the "Assistant Superintendent" title and related perks and effectively demoting her. I was not impressed with Mr. Lyle's testimony on this point. His evidence left the distinct impression that he was not particularly concerned with Ms. Li's welfare. He conceded that the Plaintiff would generally have authority to do the hiring and firing for his own department. He also conceded that the Plaintiff did ask him to defer decisions about Ms. Li's future employment until after the 2011 winter season and importantly, that he heard but did not respond to that request.

[62] There is some authority to the effect that the refusal to follow an order that is unlawful or unreasonable may not be insubordinate (***Karmel v Calgary Jewish Academy***, 2015 ABQB 731 at para 16). However here I do not need to consider that argument. The direction from Mr. Lyle was not clear and unequivocal and in fact, remained the subject of discussion as late as October 24, 2011 as reviewed below. Given the Plaintiff's authority and his repeated requests to reconsider the fate of Ms. Li's employment or defer the decision to the spring of 2012, which requests were met with silence, I do not find that the Plaintiff's failure to terminate or reclassify Ms. Li amounts to insubordination.

Involvement of the Management Committee

[63] The Management Committee's oversight of the Plaintiff was, to say the least, "hands off". However, they did become increasingly involved towards the fall of 2011 as things between the Plaintiff and Ms. Li, and with the other grounds crew employees, became more strained.

The October 24, 2011 Meeting

[64] Mr. Lyle called a special meeting of the Management Committee on October 24, 2011, frustrated that the Plaintiff had not yet complied with the direction to terminate or reclassify Ms. Li and also because he was now aware of further information that indicated some relationship between the Plaintiff and Ms. Li that went beyond co-workers.

[65] The Management Committee had the Plaintiff attend this meeting to explain himself and once again, he defended his decision to promote Ms. Li and suggested "changing her role" instead of terminating her. At this same meeting, the Management Committee asked the Plaintiff, then 61 years of age, about his retirement plans. Although the Plaintiff suggested at trial that there had been a concerted effort to force him out and replace him with Mr. Denomme, the evidence did not establish any such plan and in fact, is irrelevant since the Defendant expressly terminated the Plaintiff in any event.

October 26, 2011

[66] October 26, 2011 was an eventful day. Ms. Li had come to work with a letter she intended to give to the Directors outlining the problems she was having with the Plaintiff and his treatment of her (the "Letter"). She had prepared the Letter at the suggestion of Mr. Denomme, in whom she had confided. The Letter claimed that she was being sexually harassed by the Plaintiff and repeatedly explained that she did not feel safe at work. She claimed that after she rejected the Plaintiff's advances, he harassed her continually. Her specific complaints, which accord with the evidence reviewed above, were as follows:

> Ralph follows me around the course, stares at me, verbally abuses me, constantly criticises me, belittles me, scares me, call me foul names, constantly monitors me, and bullies me on a regular basis. I have received a constant stream of inappropriate text messages. He has become increasingly irrational, increasingly hostile, increasingly verbally aggressive and increasingly intrusive. Ralph is obsessed with me and unable to deal with me in a rational professional manner. His bullying behaviour increases daily.

[67] Ms. Li explained in the Letter that she has been reluctant to come forward because of fear of retaliation, namely losing her job or damaging her reputation in the industry. She also mentioned having consulted with a lawyer but stated her preference to have the Defendant address the situation directly. She did not ask for the Defendant to terminate the Plaintiff but repeatedly stressed her need to feel and be safe at work.

[68] Ms. Jean Stenhouse, who was in the office on the morning of October 26, 2011, testified that Ms. Li was visibly upset that morning as she photocopied the Letter. Ms. Stenhouse communicated this to Mr. Lyle that morning, before the Management Committee met to discuss the Letter.

[69] After leaving the Letter in the office for distribution to the Directors, Ms. Li went out onto the golf course to work. She testified that the Plaintiff was "stalking" her that day, following

her and Ms. Benner around the course in an unusual manner without explanation, demanding that she meet with him and yelling at her because he felt ignored. She pleaded with Ms. Benner, who confirmed this, not to leave her alone with the Plaintiff.

[70] The Plaintiff denied following Ms. Li that day, saying that he was just doing his normal job which always involved some supervision of employees on the course. He did admit to yelling at Ms. Li when she met him as he was angry that she had not responded more quickly.

[71] Eventually, Ms. Li became convinced that the Plaintiff had ill intentions towards her and her fear for her own safety led her to leave the course and head for the clubhouse. She was very upset at that point and ran into Mr. Fisher, with whom she had a lengthy and tearful conversation. Mr. Fisher said she was very upset and visibly frightened as she told him about her concerns for her safety, her perceived retaliation by the Plaintiff for her rejection of him and her fear of losing her job.

[72] Mr. Fisher was concerned for Ms. Li and extremely disappointed in hearing her account. He told her to go home, that she would be paid and they would look into things and contact her. Mr. Fisher then called Mr. Lyle, who came into the clubhouse to meet with him and heard the details of the aforementioned conversation between Mr. Fisher and Ms. Li. After reading the Letter, Mr. Lyle also spoke with Mr. Denomme who confirmed the arguments between Ms. Li and the Plaintiff which had been overheard by others.

[73] It was clear that Ms. Li was hyper-sensitive (and she admitted this) to the Plaintiff's actions on that day as she was afraid that he had already seen her Letter and was angry with her for making the accusations therein. The Plaintiff was adamant in his testimony that he had not seen the Letter that morning and in fact did not see it until his meeting with the Management Committee meeting the next day, a fact which I accept as true. The testimony of the Plaintiff and all the Directors who attended that meeting the next day was consistent with him receiving the Letter at that meeting and not before.

[74] Ms. Li's recollection of events of October 26, 2011 must be considered in view of her fear that the Plaintiff was looking to retaliate against her specifically for the Letter, which was not the case. However, even viewed objectively and relying on the Plaintiff's own testimony about that day, it appears to simply be more of the same unacceptable behaviour; disproportionate monitoring of Ms. Li, unreasonable requests for her to check in and aggressive, yelling, angry behaviour when he felt ignored.

[75] The Plaintiff repeatedly stated that he had to monitor Ms. Li closely because of her poor work performance. I found this inconsistency interesting, namely the Plaintiff's argument that Ms. Li was such a poor employee that she required constant personal supervision despite his having promoted her only months before, a promotion he insisted was earned and was not a sign of his personal interest in Ms. Li.

[76] Mr. Lyle presented the Letter to the Board of Directors at a previously-scheduled meeting on the afternoon of October 26, 2011. Their collective reaction may fairly be described as shock and dismay. They agreed that the situation required immediate attention and resolved to ask the Plaintiff for his resignation. Ms. Carpenter tried to access some online resources regarding severance pay as well.

The October 27, 2011 Meeting

[77] The Plaintiff was asked to and did attend a meeting of the Management Committee on the morning of October 27, 2011. He was given Ms. Li's Letter to read and he denied the allegations. He recalled saying "these are not true". This denial was recorded by Ms. Carpenter in the Minutes and admitted by the Plaintiff in examination in chief, although I accept that the Plaintiff was never provided with a copy of the Minutes after the meeting nor with a copy of Ms. Li's Letter to keep.

[78] Although the Minutes also record the Plaintiff as admitting he had been "abrupt" with Ms. Li and various other explanations (he was trying to be her friend, she was upset about not being able to go to Vegas), the Plaintiff could not recall making any of those comments. This is consistent with his testimony at trial where he continued to deny any bullying, hostility or inappropriate communications with Ms. Li, notwithstanding his own testimony on these events.

[79] The meeting with the Management Committee lasted about one hour. The Plaintiff says that Mr. Hlavey pointed at him about 10 minutes into this meeting and said "you have to resign". The Plaintiff responded that his 13 years of employment at the golf course must "be worth something" and the conversation turned to the settlement offer made by the Defendant for the payment of $25,000 (gross) which the Plaintiff initially accepted.

[80] Mr. Lyle's evidence was that the offer was made to allow the Plaintiff to save his reputation but agreed that if the offer was rejected (as it later was), the Defendant intended to terminate the Plaintiff's employment in any event because: (1) the Plaintiff had refused to follow the Mr. Lyle's direction concerning Ms. Li's employment; (2) the Plaintiff had not disclosed the relationship with Ms. Li; and (3) the Management Committee was concerned with the effect of that relationship on the other employees. The termination letter presented to the Plaintiff on October 28, 2011 said as much.

Legal Test for Summary Termination

[81] There is no fixed rule as to when an employee's conduct will justify a summary termination of employment. The proper analysis is a contextual one in which the Court assesses the degree of misconduct and the surrounding circumstances of its particular case. Although ***McKinley v BC Tel***, 2001 SCC 38 was a case involving allegations of dishonesty and not harassment, the contextual approach is still applicable to this analysis (see also ***Hodgins v St. John Council for Alberta***, 2008 ABCA 173 at para 49). Determining whether misconduct in any particular case has reached a level to justify summary termination will always be fact-specific but even more so when the allegations of misconduct relate to verbal and sexual harassment.

[82] Summary dismissal will be justified when the impugned conduct violates an essential condition of the employment contract, is fundamentally or directly inconsistent with the employee's obligations to his employer or destroys the mutual faith necessary for the employment relationship (***McKinley***, *supra* at para 48).

[83] There is no real legal debate that in cases of proven harassment of a subordinate, regardless of how serious, an employer is within its rights and arguably required to act. The only question is what type of discipline is justified in view of the circumstances, including the type, duration or nature of the harassment (***Hodgins***, *supra* at para 51). In this case, I must also consider the Plaintiff's work history and the employer's investigation of the complaints.

[84] Sexual harassment was defined in ***Janzen v Platy Enterprises***, [1989] 1 SCR 1252 (at para 56) as "unwelcome conduct of a sexual nature that detrimentally affects the work environment or leads to adverse job-related consequences for the victims of the harassment." It is a major offence which may afford justification for summary dismissal (***Geluch v Rosedale Golf Association***, [2004] OJ No 2740 (Ont SCJ) at para 92).

[85] Not surprisingly, there are many cases dealing with workplace harassment in which the conduct justified immediate termination and many others where it did not.

[86] For example, in ***Geluch***, *supra*, the plaintiff had been the General Manager of the defendant's golf course for approximately 12 years and was terminated after a former employee reported instances of abusive and degrading behaviour directed at her by the plaintiff. Later, similar allegations were made by another employee. The trial judge found the dismissal to be without cause.

[87] Although it is always difficult to somehow measure the severity of one example of harassment against another, it is clear that the complainants in ***Geluch***, *supra* had experienced only a few instances of such behaviour and not sustained misconduct over a lengthy period of time. Similarly, in ***Hodgins***, *supra*, the allegations pertained to several comments made over the course of one evening.

[88] It is important that this not be taken as a statement that isolated incidents of sexual harassment will never justify summary termination of the harasser. However, in the case at bar, the Plaintiff attempted to woo Ms. Li over the course of several months and after she repeatedly rejected his overtures, he became increasingly hostile with her. She was not the random or temporary object of his inebriated affection (which would not be acceptable in any event) but was rather the target, over many months, of the admitted romantic interest and then subsequent aggression of her direct superior.

[89] In ***Brazeau v IBEW***, 2004 BCSC 251, Justice Neilson found the summary dismissal of an employee for sexual harassment was unwarranted. Although the employee's romantic pursuit of the complainant over several years was characterized as sexual harassment, Justice Neilson placed his conduct in the middle of the severity spectrum, noting that the employee was not the supervisor of the complainant and that the complainant had not demanded his removal (***Brazeau***, *supra* at para 242). As explained below, I placed significant weight on the fact that the Plaintiff here was the direct and only supervisor of Ms. Li, which is itself a distinguishing characteristic from *Brazeau*. Further, I disagree that a complainant's failure to demand the termination of a peer, much less a superior, should mitigate conduct of this type.

[90] On the other side are cases like ***Foerderer v Nova Chemicals Corp***, 2007 ABQB 349, in which Justice Topolniski upheld the summary dismissal of an employee who targeted the sole female employee within his realm with offensive and sexual language, jokes and images. She characterized his harassment as "on the middle to low-upper end of the spectrum of seriousness" (***Foerderer***, *supra* at para 205).

[91] An important factor in my deliberations was the employment relationship between the Plaintiff and Ms. Li. Not only was she economically dependent on this job, the Plaintiff was her only direct superior and the only higher-ranking employee with whom she had virtually daily contact. She considered him her mentor and he knew that he could help or hurt her career aspirations, which made this conduct all the more reprehensible.

[92] As a senior supervisor, the Plaintiff had an obligation to create and cultivate a safe and proper workplace environment for Ms. Li and his other direct reports (see ***Poliquin v Devon Canada Corp***, 2009 ABQB 216 at para 53 and ***Bannister v General Motors of Canada***, 1998 CarswellOnt 3318 at para 25). Not only did he fail to do so, he himself was the sole perpetrator of the harassment that ultimately created fear, frustration and acrimony in his department. It was not the responsibility of Ms. Li to "defend her dignity or to resist or turn away from unwanted approaches which are gender or sexually oriented. It is an abuse of power for a supervisor to condone or participate in such conduct" (***Bannister***, *supra* at para. 31).

[93] As was recognized by Mr. Jonasson, one of the Defendant Directors who testified at trial, it must have taken a great deal of courage for a young, single mother dependent on her job to write the Letter she did. And it would have taken at least that much or more courage for her to confront the Plaintiff directly, asking him to stop communicating with her in a way that suggested a personal or romantic relationship. The fact that he heard and understood her discomfort and still continued to send inappropriate messages is also a factor placing this conduct at the more serious end of verbal and sexual harassment.

[94] The Plaintiff argued that the harassment should be considered less serious because of Ms. Li's testimony that she had not wished the Plaintiff to be terminated. I do not accept that argument. It is not up to the victim of sexual harassment to determine the proper course of corporate action nor to take responsibility for the future employment prospects of the harasser. In the absence of any policy to assist her, Ms. Li did what can only be described as objectively reasonable – she tried repeatedly to deal with the Plaintiff directly and when that did not work, she pleaded with her employer to provide the safe workplace to which she was inarguably entitled.

[95] In the case of ***Leach v Canadian Blood Services***, 2001 ABQB 54 at paragraph 81, Justice Coutu said:

> In reading *Gonsalves v. Catholic Church Extension Society of Canada* (1998), 164 DLR (4th) 339 (Ont CA), I was struck by the similarity of the complainant's response in that case with that of Ms. Waine and I refer specifically to the trial judge's comments ((1996) 20 CCEL (2d) 106 (Ont. Gen. Div) at p.110):
>
> > I accept the testimony of Ms. (N) that although she considered Mr. Gonsalves a friend, she was intimidated by him, and had no idea how to deal with his unwanted advances. She lacked confidence both in herself and in her job security. Mr. Gonsalves was her boss and she felt trapped and isolated, not knowing where to turn. For these reasons she did not report her concerns to anyone, nor did she make it clear to Mr. Gonsalves that his attentions were unwelcome.

[96] With the exception of the fact that Ms. Li did tell the Plaintiff clearly and early on that she was not interested in any romantic relationship with him, these facts could sadly apply to this case as easily as to ***Gonsalves*** or to ***Leach***. A supervisor/manager is given authority over people for a reason; because it is assumed that he is competent to supervise and manage them. A person who abuses that position should not be able to use the victim's inability, failure or refusal to object more strenuously as a defence to that abuse.

[97] This dynamic was recognized in ***Janzen***, where the SCC said: "When sexual harassment occurs in the workplace, it is an abuse of both economic and sexual power. Sexual harassment is a demeaning practice, one that constitutes a profound affront to the dignity of the employees forced to endure it."

Requirement to Issue Warning Prior to Termination

[98] It should be obvious that there can be no hard and fast rule about whether an employer must issue a warning to an employee accused of harassment prior to terminating his or her employment. The greater the wrong, the less likely a warning will be required before a summary termination can be justified (***Leach***, *supra* at para 199). This is also true for less serious instances of sexual harassment (***Geluch***, *supra* para97).

[99] In ***Bannister***, *supra*, the Ontario Court of Appeal reversed the trial judge who held that the management employee accused of sexual harassment was entitled to a warning prior to termination. The Court noted that management employees had a duty to their employees to protect them from offensive conduct and also a duty to protect the corporate employer from civil claims (para 25).

[100] The Plaintiff's conduct did not mandate a warning before termination. While the Defendant could have done any number of things differently, and hopefully now does, the situation in which it found itself in October of 2011, the duty that it owed to Ms. Li and its other employees, coupled with the severity of the behaviour and the Plaintiff's complete failure to recognize that his behaviour was unacceptable, justified the Plaintiff's termination without prior warning.

Condonation

[101] The Plaintiff argues that the Defendant condoned his behaviour and therefore a warning was necessary where it might not have been otherwise (see ***Geluch***, *supra* at para 99). Condonation is something more than mere delay in acting and obviously presupposes knowledge of the misconduct on the part of the employer (***Geluch***, *supra* at para101).

[102] In the case at bar, there is simply no evidence that either the particulars of the Plaintiff's treatment of Ms. Kent or Ms. Li was known to anyone on the Board or even to other senior employees until the fall of 2011 and termination followed soon thereafter. Certainly, the Defendant knew nothing of the Plaintiff's harassment of Ms. Li or of her feelings about that until things came to a head in late October. There is no evidence to support the theory that the Defendant condoned the kind of behaviour that gave rise to the Plaintiff's termination.

Duty of the Employer to Investigate

[103] The Defendant had no policies in 2011 concerning a respectful workplace, including swearing or verbal or sexual harassment.

[104] Once the Defendant was corporately aware of Ms. Li's Letter, it did meet with the Plaintiff and give him an opportunity to read and respond to the Letter. There was also evidence that the Defendant, certainly through its President, Mr. Lyle, had confirmed with other employees that there was indeed a serious problem, although none of the employees who testified felt that they had been part of any official investigation. Further and most problematic is

the fact that no one from the Management Committee ever spoke directly with Ms. Li about her allegations. When they did finally speak with her, following the Plaintiff's termination, it was to try and effect the demotion earlier contemplated.

[105] I find that the Defendant failed to conduct an adequate investigation of Ms. Li's complaints, based on its failure to speak with her and in not allowing the Plaintiff a longer period of time to respond more meaningfully to the accusations being made against him. However, the law is that while an employer may enhance its case for summary termination by conducting a proper and thorough investigation, and thus may hurt its case by failing to do so, such a failure does not automatically obviate a justified summary termination (***Foerderer***, *supra* at paras 133-137 and ***Leach***, *supra* at para 158, citing ***Kinch v Amoco Canada Petroleum Co***, 1998 ABQB 171).

[106] The Plaintiff did not ask for time to consider the accusations in the Letter but rather denied them immediately. As Defendant's counsel points out, that blanket denial would make it difficult if not impossible for the Defendant to impose some discipline short of termination. As the Court in ***Gonsalves***, *supra* noted:

> Once the employer is satisfied that the complaints are well-founded, the denial has a significance in limiting suitable choices open to the employer. There is no opening for an apology to clear the air if employment is to be continued. It is a sad and difficult task to tell an employee, with a long service record that was previously unblemished, that he must be dismissed at an age when his reemployment potential is questionable. However, persons in a supervisory capacity must not, over time, permit their position of power to supplant good judgment and responsibility. When credible evidence stands against denial, the employer's options may be limited and its obligations to the work force may have to supervene over the interests of an otherwise valued employee. (paras 19-20)

[107] The conduct of the Plaintiff that was either admitted or proven at trial was, in my view, sufficient to justify a summary dismissal. This conduct included:

- invitations to Ms. Li to spend time with him socially
- admitted feelings of love and affection for Ms. Li, which the Plaintiff knew early on were not reciprocated
- repeated expressions of his desire for physical contact with Ms. Li
- text and email messages of a distinctly personal, intimate nature, even after Ms. Li clearly communicated her request that such communication stop
- disproportionate interest, positive and negative, in what Ms. Li was doing at any given time, including unnecessary and intrusive contact with her through her work day
- arguing with Ms. Li loud enough so that his other employees could hear them
- calling Ms. Li a "cunt" or "fucking cunt"
- bullying behaviour that began and then escalated after Ms. Li's disinterest in a relationship was acknowledged by him
- yelling at employees generally
- verbally abusing Ms. Kent when she was unnecessarily and brusquely terminated; and
- involving Mr. Denomme in his personal feelings about Ms. Li and his relationship with her

[108] In other words, had the Defendant conducted an investigation, it would have simply confirmed Ms. Li's allegations and the information coming from the other Defendant employees.

Cumulative Cause

[109] The Plaintiff argues that the Defendant did not plead cumulative cause and so is precluded from arguing that his termination can be based on the aggregate of multiple complaints regarding an employee's conduct. However, the Statement of Defence clearly listed a number of factors cited as cause for termination, all of which were made out except the claim of insubordination.

[110] While ***Lowery v Calgary (City)***, 2002 ABCA 237 did say that in that case of cumulative cause, warnings should have been given, I do not read ***Lowery*** as displacing the voluminous jurisprudence, including the later case of ***Poliquin***, *supra*, that says the question of whether an employee must receive a warning prior to termination depends on all the circumstances, particularly the severity of the misconduct.

[111] I also respectfully note that the Court of Appeal in ***Lowery*** cited ***Atkinson v Boyd***, 1979 CarswellBC 490 (BCCA) when it said that warnings were required in cases of cumulative cause but there simply is no such reference in the *Atkinson* case (in which the employee received no warning and was still justifiably terminated for a number of work-related deficiencies in any event).

Conclusion

[112] The Plaintiff's behaviour towards Ms. Li in 2011 constituted verbal and sexual harassment of a type and level that is completely unacceptable in a professional workplace and which justifies, in fact demands, a response by the Defendant. Ms. Li was genuinely afraid to be alone with the Plaintiff. While there was no evidence that he intended her physical harm or that she was not physically safe at work, those feelings were understandable in view of his increasing aggression towards her, aggression noticed not just by Ms. Li but by other employees as well. That workplace dynamic would have been impossible to repair, particularly in a situation where the Defendant maintained that he had not harassed her at all.

[113] I have considered the uncontested fact that the Plaintiff had been employed for approximately 12 years with no evidence of any prior discipline problems or any prior warnings from management.

[114] Further, while I distinguish this from cases of actual physical assault or unwanted physical contact, the level of the Plaintiff's sexual and verbal harassment of Ms. Li is still, in my view, on the more serious end (upper middle) of the spectrum, particularly given her isolation as an employee and his obligations as her direct supervisor. In addition to this harassment of Ms. Li, there was the completely unacceptable verbal harassment of Ms. Kent and the overall failure of the Plaintiff to keep his issues with Ms. Li out of the sphere of his other subordinates, effectively poisoning the work environment for all of them.

[115] The Plaintiff's behaviour was directly inconsistent with his obligations to manage his department in a professional way and ensure a safe and respectful workplace for his subordinates. It was also inconsistent with his obligation to protect his employer from potential lawsuits arising from this precise type of conduct. For all these reasons, I find that, as per

***McKinley**, supra*, the Plaintiff's conduct was incompatible with his continued employment and that his summary termination was for just cause.

Provisional Assessment of Damages

[116] In the event that I am incorrect in finding that the Defendant had cause to terminate the Plaintiff's employment, I will provide a provisional assessment of damages.

[117] It was agreed that the Plaintiff's compensation at the time of termination was composed of an annual salary of $105,000, an annual bonus of $2,500, annual health and dental benefits of $3,337.92 ($278.16 per month), annual employer contributions towards Canada Pension Plan (CPP) of $2,306.70, use of a company vehicle and the payment of certain conference and professional fees.

[118] There was little evidence led on the Plaintiff's mitigation, other than the agreed fact that he obtained alternate, albeit lesser, seasonal employment at the Calgary Golf & Country Club (CGCC) beginning in the 2012 season and a very small amount of money from the Glencoe Golf Club. He earned income of $25,895.20 (+$187) in 2012, although there was no evidence provided to me of the months in which that income was earned. As there was evidence that the Plaintiff's employment with CGCC was seasonal, I assume that it was earned before October 31, 2012.

[119] I note that the Statement of Claim asked for 9 months' compensation in lieu of notice or $50,000 in general damages but at trial, the Plaintiff asked for a notice period of 13-15 months. The Plaintiff was in a managerial position within an industry that has few and finite such positions. He has little formal education but a wealth of industry-specific experience and some lasting and valuable connections within the golf course industry. I would have set his reasonable notice period for termination of his employment at 12 months.

[120] On the issue of benefits compensable over the notice period, neither side provided me with any authority for granting or denying some specific benefits which I expressly questioned. In particular, the Plaintiff claimed his monthly car allowance as severance but said that the vehicle was used for work purposes. If so, it is not a monetary benefit that he is entitled to during the notice period when he is not actually using that vehicle in the course of his employment.

[121] Similarly, I am not familiar with nor was I provided with any authority for the idea that an employer is obligated to calculate severance pay to include historical payments made to attend previous work-related conferences or the value of golfing privileges. Both of these are examples of things which a terminated employee may or may not have in new employment but which are true perquisites and not integral parts of an employee's compensation, absent some contractual agreement to that effect.

[122] As far as I am aware, CPP benefits are deducted at source by the employer and remitted to the government and therefore come from the employee's salary. They are not a compensable benefit over the notice period.

[123] Lastly, the Plaintiff included claims for both the medical and dental premiums paid by the Defendant while he was employed and a claim for the cost of obtaining replacement insurance. Clearly, he cannot recover both and I would have awarded the actual cost of replacement as the premiums paid during employment are, by their nature, a mere estimate of that expenditure after termination.

Aggravated and/or Punitive Damages

[124] There is nothing in this case that would have justified an award of aggravated or punitive damages against the Defendant, had liability been found. Termination that is found to be without cause, even when for unfounded allegations of harassment, does not by itself justify such an award.

[125] The threshold for an award of aggravated damages was reviewed by the Supreme Court of Canada in ***Keays v Honda Canada Inc***., 2008 SCC 39 in which it was clearly said that aggravated damages were not for cases of normal distress or hurt feelings arising from a termination, however genuinely felt. Rather, aggravated damages are awarded in reference to the employer's conduct and then only where the employer's conduct in termination is egregious, for example by being untruthful or misleading about the circumstances of termination (***Keays***, *supra* at para57)

[126] While the Defendant's investigation of Ms. Li's complaints was not adequate, it did provide the information it had to the Plaintiff and invite his response, unlike ***Geluch***, *supra* for example in which the employee was terminated without being provided any reason whatsoever. Nor was there any evidence whatsoever that the Defendant orchestrated these events with some hidden agenda to terminate the Plaintiff. Without Ms. Li's confronting the Board of Directors in the manner she did, it did not appear that the Defendant would have done anything in respect of the Plaintiff's employment. Further, there was some mutual discussion about a possible settlement, which is inconsistent, in my view, with a claim of bad faith.

[127] An award of punitive damages should be reserved for exceptional cases, when the employer's conduct has been "harsh, vindictive, reprehensible and malicious" and "extreme in its nature and such that by any reasonable standard it is deserving of full condemnation and punishment" (***Keays***, *supra* at para 68 citing ***Vorvis v Insurance Company of British Columbia***, [1989] 1 SCR 1085). It requires evidence of dishonesty, maliciousness, bad faith or unduly insensitive conduct by the employer, none of which were evident here as canvassed above.

[128] Accordingly, had I found for the Plaintiff, which I did not, I would have assessed his damages as 12 months' salary, plus a $2,500 bonus plus the amount expended on replacement health and dental benefits for the 12 months following termination, less the amounts earned over that time.

[129] If counsel cannot agree, they are free to speak to me on costs.

Heard on the 15th, 16th, 17th, 18th and 19th days of May, 2017.
Dated at the City of Calgary, Alberta, this 7th day of September, 2017.

M. H. Hollins
J.C.Q.B.A.

Appearances:

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