

CANADA / JUDGMENT

Cho v. Café La Foret Ltd.

2022 BCSC 1560

COURT

Supreme Court of British Columbia

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2022 BCSC 1560 Cho v. Café La Foret Ltd.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Cho v. Café La Foret Ltd.,

2022 BCSC 1560

Date: 20220902

Docket: S233799

Registry: New Westminster

Between:

Song Hwan Cho

Plaintiff

And

Café La Foret Ltd.

Defendant

Before: The Honourable Justice Shergill

Reasons for Judgment

Counsel for the Plaintiff:

J. Wu

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Place and Dates of Hearing:

New Westminster, B.C.

October 19-22, 2021, and

March 7-11, 2022

Place and Date of Judgment:

New Westminster, B.C.

September 2, 2022

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I. Overview

- [1] This is a wrongful dismissal and breach of contract action brought by the plaintiff, Song Hwan Cho ("Mr. Cho"). Mr. Cho is in his early 60's. At the time of the events in question, he was employed as a Head Baker by the defendant, Café La Foret Ltd. ("La Foret" or "Employer"), located in Burnaby, B.C.
- [2] Mr. Cho was terminated without notice in November 2020. It is alleged by the defendant that it had just cause to do so, as Mr. Cho had sexually harassed and bullied another employee, Nam Gyeong Lee (the "complainant"). Ms. Lee was Mr. Cho's subordinate and worked alongside him in the La Foret kitchen. Mr. Cho denies all allegations, and seeks \$52,000 in damages in lieu of ten month's notice, and \$100,000 in punitive/aggravated damages for the manner of his termination.

II. Issues

- [3] The following issues are raised by the parties:
1. Did Mr. Cho commit misconduct by:
 - a) sexually harassing and bullying Ms. Lee;
 - b) abusing his position of authority; and
 - c) refusing to show remorse and participate in reconciliatory efforts by the Employer?
 2. If Mr. Cho did commit the alleged misconduct, was it sufficient to justify termination of Mr. Cho without notice or pay in lieu of notice?

If the Employer did not have just cause to terminate Mr. Cho's employment, then what damages is the plaintiff entitled to? Should Mr. Cho's reasonable notice be reduced by reason of his failure to mitigate the damages arising from his loss of employment? Does the manner in which the Employer terminated Mr. Cho's employment warrant an award for aggravated and/or punitive damages, and if so, how much?

- [4] Though the plaintiff alleged in his Notice of Civil Claim that the Employer had defamed him, this issue was abandoned at trial.

III. Agreed Facts

- [5] The following facts are agreed to by the parties.
- [6] The plaintiff, Mr. Cho worked at La Foret from December 1, 2017 to November 30, 2018 and from April 1, 2019 to November 9, 2020. On neither occasion was his employment subject to a written contract.
- [7] La Foret paid Mr. Cho a salary from December 1, 2017 until August 31, 2018. His salary varied slightly from month to month:
- a) In December 2017, he was paid \$4,800 for 160 hours of work in the month, which is the equivalent of \$30.00 an hour plus 4% vacation pay.
 - b) In January 2018, he was paid \$3,808 for 160 hours of work in the month, which is the equivalent of \$23.80 an hour and inclusive of the 4% vacation pay.
 - c) For each month from February until April 2018, he was paid \$4,000 for 160 hours of work in the month, which is the equivalent of \$25 an hour and inclusive of the 4% vacation pay; and
 - d) For each month from May until August 2018, he was paid \$4,250 for 160 hours of work in the month, which is the equivalent of \$26.56 an hour and inclusive of the 4% vacation pay.
- [8] From September 1, 2018 until November 30, 2018, La Foret paid Mr. Cho \$25 an hour plus 4% percent vacation pay.
- [9] On December 1, 2018, Mr. Cho left his employment at La Foret to take employment at Inno Bakery.
- [10] On April 1, 2019, Mr. Cho was again hired as an employee at La Foret.
- [11] La Foret paid Mr. Cho an hourly wage of \$28.00 plus 4% vacation pay, effective April 1, 2019.
- [12] On June 1, 2019, La Foret increased Mr. Cho's wage to \$28.50 an hour plus 4% vacation pay.
- [13] On October 16, 2019, La Foret increased Mr. Cho's wage to \$29.00 an hour plus 4% vacation pay.
- [14] On December 31, 2019, La Foret paid Mr. Cho a bonus of \$1,000.00.
- [15] On April 30, 2020, La Foret paid Mr. Cho a bonus of \$1,000.00.
- [16] On June 1, 2020, La Foret increased Mr. Cho's wage to \$30.00 an hour plus 4% vacation pay.
- [17] On August 15, 2020, La Foret paid Mr. Cho a bonus of \$1,000.00.
- [18] From December 1, 2017 to November 30, 2018 and from April 1, 2019 to November 9, 2020, Mr. Cho worked as La Foret's Head Baker.
- [19] As Head Baker, Mr. Cho's responsibilities included:
- a) Training bakery employees;
 - b) Recommending discipline of bakery employees;

- c) Assisting in the recruitment of bakery employees;
- d) Participating in the interviewing of prospective bakery employees; and
- e) Supervising bakery employees.

[20] Nam Gyeong Lee ("Ms. Lee") is an employee of La Foret.

[21] Ms. Lee worked with Mr. Cho from April 1, 2019 to November 9, 2020.

[22] Between April 1, 2019 and November 9, 2020, Ms. Lee reported directly to Mr. Cho. She was his subordinate in the bakery.

[23] Mr. Cho worked his last shift at La Foret on November 9, 2020.

[24] Mr. Cho did not receive a termination letter.

[25] La Foret does not have a written policy related to bullying and harassment, including sexual harassment.

[26] Mr. Cho worked in La Foret's bakery area which is part of its larger kitchen.

[27] Ms. Lee also worked in La Foret's bakery area which is part of its larger kitchen.

[28] The bakery area in La Foret's kitchen is monitored by a closed-circuit television.

[29] La Foret never issued Mr. Cho with discipline, including a written warning or suspension.

[30] Dong-Hyuk Kwak ("Mr. Kwak") is La Foret's General Manager.

[31] Mr. Kwak supervised Mr. Cho.

[32] Mr. Kwak has the authority to investigate alleged employee misconduct.

[33] Mr. Kwak sent Mr. Cho an email on November 15, 2020, attaching a document named "Affidavit for Chef Jo v.5.docx" (the "Affidavit").

[34] Mr. Cho emailed Mr. Kwak on November 17, 2020, to communicate his refusal to sign the Affidavit.

[35] On November 17, 2020, La Foret sent Service Canada a Record of Employment for Mr. Cho with serial number W78199177 ("ROE #1").

[36] On November 18, 2020, La Foret issued another Record of Employment for Mr. Cho with serial number W78225983 to amend or replace ROE #1 ("ROE #2").

[37] On November 19, 2020, Ms. Lee made a complaint against Mr. Cho to the Burnaby Royal Canadian Mounted Police (the "RCMP").

[38] The RCMP investigation of Mr. Cho remains active.

IV. Credibility and Reliability

- [39] A total of six witnesses testified in the trial. Of them, only the plaintiff and Ms. Lee were witness to the contact that forms the substance of the sexual harassment allegation. The remaining four witnesses were called by the defence to establish the surrounding circumstances, the remaining grounds for just cause, and damages. These witnesses were: Ms. Lee's husband, Young-Min (Carl) Kim; co-worker Jae Chan Yang; Ms. Park; and Mr. Kwak.
- [40] With the exception of Mr. Kim, testimony of all of the witnesses was provided through the assistance of a Korean interpreter. The parties and witnesses also exchanged written communications in Korean, such as text messages, which were translated into English using a certified translator. There is no dispute as to the accuracy of the interpretation of the viva voce testimony of the witnesses, or the accuracy of the translations of the documents.
- [41] Credibility and reliability of Mr. Cho and Ms. Lee are central to the resolution of issues in this trial.
- [42] Credibility and reliability are related but distinct concepts. Reliability relates to the accuracy of the testimony of a witness. It engages consideration of the ability of a witness to accurately observe, recall, and recount the events in issue. Credibility centers on the honesty of the witness. It involves an assessment of the trustworthiness of their evidence, based on their veracity or sincerity: *Bradshaw v. Stenner*, 2010 BCSC 1398 at para. 186, *aff'd* 2012 BCCA 296, leave to appeal *ref'd* [2012] S.C.C.A. No. 392.
- [43] A witness who is not telling the truth is not providing reliable evidence. However, the reverse is not the case - a credible witness may still give unreliable evidence. Sometimes an honest witness will be trying their best to tell the truth and will believe the truth of what they are relating, but nevertheless be mistaken in their recollection: *R. v. H.C.*, 2009 ONCA 56 at paras. 41 and 53.
- [44] The relevant principles to be applied when assessing the credibility of interested witnesses are discussed in *Faryna v. Chorny* (1951), [1952] 2 D.L.R. 354 at 357 (B.C.C.A.), and *Bradshaw* at para. 186. I have applied those principles here when considering the testimony of the parties and other witnesses.

V. Just Cause

- [45] To succeed in an action for wrongful dismissal and breach of contract, the plaintiff must first establish that he was employed for an indefinite term by the defendant, and that he was dismissed without termination notice: *McKinley v. BC Tel*, 2001 SCC 38 at para. 36.
- [46] The onus then shifts to the defendant, who must show on a balance of probabilities, that there was just cause for the dismissal: *McKinley*, para. 36.

- [47] To establish just cause, the defendant must prove that the plaintiff's misconduct was fundamentally inconsistent with his employment obligations, such that it gave rise to a breakdown in the employment relationship: McKinley, at para. 48.
- [48] The defendant must establish that the discharge was proportionate to the plaintiff's misconduct: McKinley at para. 53.
- [49] The inquiry is factual, and requires the court to undertake a contextual examination of the nature and circumstances of the misconduct: Dowling v. Ontario (Workplace Safety & Insurance Board) (2004), 246 D.L.R. (4th) 65 (Ont. C.A.) at para. 49, leave to appeal ref'd [2005] S.C.C.A. No. 25 (S.C.C.).
- [50] Not all misconduct justifies dismissal. The proper approach is to compare the impact of the misconduct on the employment relationship itself, having regard to the totality of the circumstances. The inquiry should focus on the nature and severity of the misconduct, in relation to the impact it has had on the employment relationship: Steel v. Coast Capital Savings Credit Union, 2015 BCCA 127 at paras. 28-29, leave to appeal ref'd [2015] S.C.C.A. No. 127 (S.C.C.).
- [51] In Dowling, the Court noted that application of the McKinley framework entails following a three-step approach:
- [50] Application of the standard consists of:
1. determining the nature and extent of the misconduct;
 2. considering the surrounding circumstances; and
 3. deciding whether dismissal is warranted (i.e. whether dismissal is a proportional response).
- [51] The first step is largely self-explanatory but it bears noting that an employer is entitled to rely on after discovered wrongdoing, so long as the later discovered acts occurred pre-termination. See Lake Ontario Portland Cement Co. v. Groner, [1961] S.C.R. 553.
- [52] The second step, in my view, is intended to be a consideration of the employee within the employment relationship. Thus, the particular circumstances of both the employee and the employer must be considered. In relation to the employee, one would consider factors such as age, employment history, seniority, role and responsibilities. In relation to the employer, one would consider such things as the type of business or activity in which the employer is engaged, any relevant employer policies or practices, the employee's position within the organization, and the degree of trust reposed in the employee.
- [53] The third step is an assessment of whether the misconduct is reconcilable with sustaining the employment relationship. This requires a consideration of the proved dishonest acts, within the employment context, to determine whether the misconduct is sufficiently serious that it would give rise to a breakdown in the employment relationship.

- [52] The three-step analytical framework was most recently applied by Justice Tammen in *Golob v. Fort St John (City)*, 2021 BCSC 2192 at para. 53.
- [53] The McKinley framework applies to various forms of employee misconduct, including sexual harassment: *Brazeau v. International Brotherhood of Electrical Workers*, 2004 BCSC 251 ("Brazeau BCSC") at para. 174, *aff'd* 2004 BCCA 645; and *van Woerkens v. Marriott Hotels of Canada Ltd*, 2009 BCSC 73 at para. 119.

A. Positions of the Parties

- [54] There is no dispute in this case that Mr. Cho was employed under a contract of indefinite hire, and that he was dismissed without termination notice. The onus thus shifts to the defendant to show that it had just cause for dismissal.
- [55] The defendant submits that just cause is established on the following grounds:
- a) the plaintiff sexually harassed a female subordinate, taking advantage of the power imbalance between him and that employee;
 - b) the plaintiff abused his position of responsibility and authority in the bakery department at La Foret; and
 - c) to this day, the plaintiff continues to be dishonest about the highly inappropriate and improper behaviour in which he engaged - he refused to participate in the necessary reconciliatory efforts with Ms. Lee and his employer, and has shown a lack of contrition, remorse and insight into his misconduct throughout.
- (the "alleged misconduct")
- [56] The defendant submits that considered cumulatively and in context, the plaintiff's alleged misconduct has resulted in an irreparable breakdown of the employment relationship and constitutes just cause for discharge.
- [57] The plaintiff submits that the defendant has failed to prove on a balance of probability that Mr. Cho: (a) sexually harassed Ms. Lee; (b) engaged in conduct that was an abuse of his power; or (c) was dishonest during La Foret's investigation and unwilling to apologize or show contrition or remorse.
- [58] While he admits that he touched Ms. Lee on the back of her neck and her shoulder, Mr. Cho denies that the touching was sexual.
- [59] Further, the plaintiff submits that even if the allegations are proven, the surrounding circumstances indicate that the dismissal was not a proportionate response. Specifically, it is submitted that:
- a. Prior to the offensive conduct occurring, Mr. Cho was never told that the impugned conduct was unwelcome or offensive;

- b. After being told that the conduct was unwelcome, Mr. Cho did not repeat the unwelcome or offensive behaviour, and instead offered to apologize to Ms. Lee or to quit;
- c. The employer terminated Mr. Cho without giving him a warning that the conduct was inappropriate and that dismissal was a possible consequence of further similar misconduct;
- d. The employer did not have a formal, and known, sexual harassment policy, which was enforced by the employer;
- e. The employer's actions of keeping Mr. Cho's job open to him subject to him providing an affidavit admitting his guilt, suggest that the impugned conduct was condoned by the employer; and
- f. Mr. Cho's length of service and position, age, and the fact that he had been enticed to leave another job and join La Foret, created an implied or express term of employment which gave rise to additional obligations on the employer's part, such as with respect to warnings or the opportunity to respond.

[60] I now turn to the evidence of alleged misconduct.

B. Background

- [61] Mr. Cho is approximately 62 years old, and was 60 years old when his employment with La Foret ended. Mr. Cho was born and raised in South Korea. He completed his high school education in 1981, and later attended the Korean Baking School to become a baker. Mr. Cho commenced working as a baker around 1986. He was employed in a variety of roles, before becoming a Head Baker for a Best Western Premier hotel in Seoul in 2003.
- [62] In November 2008, Mr. Cho immigrated to Canada, and commenced employment with Good Morning Bakery as the Head Baker. Between 2008 and 2017, Mr. Cho changed jobs on a few occasions, including briefly owning and operating his own bakery. Around July 2017, Mr. Cho commenced working at Inno Bakery as a factory worker. He was there for only a few months before being offered a position as Head Baker at Café La Foret in December 2017.
- [63] La Foret opened in September 2017. It is owned by Ms. Yunhee Park, her husband Chang Hee Lee, and two other shareholders. Ms. Park is the Head Chef, and Mr. Lee is the representative director.
- [64] Mr. Cho's first period of employment at La Foret lasted about one year. He left La Foret around December 2018, because he found the work demanding and felt that he did not have enough support staff. Mr. Cho returned to work at Inno Bakery for about four months, before coming back to La Foret with the offer of an increased salary and resuming the Head Baker position.
- [65] Mr. Cho's second period of employment with La Foret commenced in April 2019. By that time, Ms. Lee was already employed at La Foret.

- [66] Ms. Lee commenced working at La Foret around January 2019, and continues to work there to date. Like Mr. Cho, Ms. Lee's preferred language for communication is Korean. Ms. Lee is 30 years old. She was born and raised in South Korea. Ms. Lee immigrated to Canada in 2017. She is a baker by profession, and during her employment at La Foret, Ms. Lee reported directly to Mr. Cho.
- [67] As Head Baker, the plaintiff's responsibilities included training and supervising bakery employees. Mr. Cho reported to Ms. Park. Though Ms. Park was Head Chef at La Foret, she would only work alongside the plaintiff in the bakery area when other bakery staff were absent or unavailable and she needed to fill in for them.
- [68] In November 2020, the defendant altered the shift schedule to reduce the number of people working in the bakery area of the kitchen. This changed from four or five employees, to two employees (the "New Schedule"). The New Schedule was meant to address COVID-19 public health orders at the time, including the need for social (physical) distancing. It was implemented on Monday, November 9, 2020, the same day that the allegation of sexual harassment arose.
- [69] Jaechan Yang is currently employed at La Foret as a chef. He has served in this role since February 2021. He commenced his employment with La Foret in January 2018, as a baker. On November 9, 2020 Mr. Yang was scheduled to work from 6:00 a.m. to 12:00 p.m., with another baker. His shift finished just as Mr. Cho and Ms. Lee's shift began. After completing his shift, Mr. Yang remained on the premises for a short time and left around 12:30 p.m. Mr. Yang did not witness any of the alleged misconduct. He spoke to Ms. Lee briefly at the start of her shift, and received a text message from her and spoke to her later that day towards the end of her shift.
- [70] The kitchen area at La Foret is monitored by closed-circuit television ("CCTV"). The CCTV camera is mounted on one end of the kitchen, where the cooking station is located, and does not record sound. The CCTV footage is in colour, though of fairly low quality. Images closer to the CCTV camera appear more clearly than those farther away. Though the entire kitchen is visible in the camera footage, it is extremely difficult to determine what is happening in the area surrounding the dishwashing station. With respect to the bakery area, the body shapes, body movements, arm movements, and colour and type of clothing are generally visible on the footage. However, hand movements and facial expressions of people depicted are more difficult to discern.
- [71] The La Foret kitchen is in the shape of a long rectangle. At one end of the kitchen is the cooking station. The dishwashing station is at the opposite end, and the bakery station is in the middle. There is an entrance into the kitchen between the bakery and cooking area. There are no physical dividers between the different sections of the kitchen. Someone standing at the cooking station or dishwashing station can easily see what is happening in the bakery section, and vice versa.

[72] Counters and sinks line one of the walls of the kitchen, and appliances are positioned along the opposite wall. There is a long open area in between, which is used for walking, standing, and working at work stations. It is a narrow space with barely enough room for two people to pass each other without touching. The bakery section has a long counter. On the wall opposite to this counter is a large refrigeration unit and other appliances.

C. Events of November 9

[73] On Monday, November 9, 2020, the first day of the New Schedule, Ms. Lee and Mr. Cho were scheduled to work together in the bakery department from 12 noon until 6:00 p.m. Their shift started right after the shift of the previous bakery team, which included Mr. Yang.

1. Ms. Lee's Evidence

[74] Ms. Lee testified that on November 9, 2020, she was worried about having to work alone with Mr. Cho for six hours. In previous shifts, they would work alone together for about 1-2 hours. On those earlier occasions, Mr. Cho would touch her without her consent. She was concerned about what would happen if they had to work a full six hour shift together. Mr. Yang testified that when Ms. Lee arrived for her shift on November 9, 2020, she expressed some discomfort to him about working alone with Mr. Cho. However, Ms. Lee did not tell Mr. Yang why she was hesitant to work with Mr. Cho.

[75] Ms. Lee testified that as soon as the other two bakery employees finished their shift on November 9, the plaintiff began talking about a massage he had received a day prior. Ms. Lee was not familiar with the massage parlour the plaintiff had attended and did not refer Mr. Cho there. She had never brought up the topic of massages with the plaintiff in the past, and did not think he had any reason to be discussing it with her on that day. However, later in her direct examination Ms. Lee testified that one week prior, Mr. Cho had mentioned he was experiencing pain, and had asked staff members where they had received their massages.

[76] In discussing the massage on November 9, Mr. Cho told Ms. Lee he had pain in the back of his neck, shoulder, and sacrum. While doing this, he pointed to those parts on his own body, and may have also touched them when pointing them out. Then Mr. Cho touched Ms. Lee's upper back, both shoulders and neck area. When discussing the pain in his sacrum area, he put his hand on her right buttock and pressed it firmly twice with his hand. The CCTV footage captures Mr. Cho touching the shoulder and then upper back part of Ms. Lee's body around 12:18 p.m. Three movements are visible on the CCTV - a motion with Mr. Cho's right hand towards the area of Ms. Lee's shoulder, a tap with Mr. Cho's right hand on the left shoulder lasting about one second, and what appears to be an open-handed touch with the right hand on Ms. Lee's upper back which lasts about 1-2 seconds. During this time, Mr. Cho and Ms. Lee are standing next to each other working at the bakery station counter and Mr. Cho appears to be engaged in a conversation with Ms. Lee.

- [77] Ms. Lee testified that she was uncomfortable when the plaintiff touched her. She stepped backward or in some other manner tried to give him the impression that she was not comfortable. She kept trying to keep some distance away from him throughout the day. The CCTV does not show her stepping back, but does show her moving around the kitchen in a manner consistent with attempting to maintain some physical distance from Mr. Cho.
- [78] Ms. Lee stated that she did not use words to express her discomfort because she was worried he would take revenge by making her do some difficult tasks or stopping her from taking breaks to eat food, as he had done in the past. Indeed, later that day, Mr. Cho told her not to eat her meal and prevented her from taking any breaks. This upset her because she had not eaten and "came to work without eating". Ms. Lee's testimony that Mr. Cho prevented her from eating, was contradicted by a text message sent by Ms. Lee to Mr. Yang on the same day. In the text message, she said that Mr. Cho had told her she could go and eat. Under cross-examination Ms. Lee explained that Mr. Cho said this sarcastically, and did not mean it when he told her to go eat.
- [79] Ms. Lee stated that Mr. Cho kept continuously touching her that day. Sometime after 5:00 p.m., Ms. Lee complained to the Front Counter Manager, Jenna Jeong, that Mr. Cho kept touching her during her shift. After making this report, Ms. Lee returned to the kitchen area. On her return, Mr. Cho again complained about the pain he was having in his sacrum, and touched Ms. Lee on her right buttock. She stated that when Mr. Cho touched her buttock, she "remembered that moment very clearly" as she felt warmth in that part of her body.
- [80] Ms. Lee got angry with Mr. Cho when he touched her again (this time on the shoulder) and stopped her from having her meal. She asked him "why are you doing this to me" in a voice that was loud enough for others to hear. At this point, there were six people in the kitchen - herself, Mr. Cho, three cooking staff, and one dishwasher. The CCTV surveillance shows some kind of altercation happening between Ms. Lee and Mr. Cho at around 5:18 p.m., which catches the attention of two of the three kitchen staff that are in the area. The kitchen staff briefly pause, and then resume working. It was put to Ms. Lee that this alleged touching is not visible on the CCTV. She explained that it occurred when they were either behind some equipment, or when Mr. Cho's body was blocking the camera from seeing what he was doing.
- [81] Ms. Lee stated that after this exchange, she left the kitchen area and went to the washroom and cried. While in the washroom, she sent two consecutive text messages to Mr. Yang, as follows:

Nam Gyeong: Brother [a term used often even to a non-biologically related person who is male and older than the speaker: Translator's remark], I am sorry to bother you on your day-off but it is really stressful for me to be together with the Chef. From the moment I came to work, he kept touching me on my shoulder and the back of my neck while working together, talking about the pain from the massage he received yesterday. I tried to ignore it, but when Team Leader and

Manager asked us to eat, [he] said that we will not, how could we eat while the staff who came early in the morning have not eaten yet. Since you were not here, he was telling me not to have a meal as [they: unclear] are cheap and mean, deciding on his own and treating me rudely. In passing, I said, "Chef, I should eat when there is time in between because I came to work without eating," but he ignored me. A little while ago the team leader came and said to me, "Please go and eat," but the Chef smiled and gestured that it's alright and [I] won't be eating, and I was next to him. He is treating me badly and disregarding me. Just a little while ago, he tapped my buttock complaining about the pain on his sacrum. I don't know what to do.

5:23 PM

Nam Gyeong: When he said, "You can go and eat," I lost my temper after suppressing it for a long time and said, "Chef, why are you doing this to me," and came to the washroom. What should I do?..

5:24 PM

Mr. Yang replied:

Jaechan Yang: Are you still in the washroom?

5:26 PM

[82] Following this message from Mr. Yang, Ms. Lee testified that she then spoke to him from the washroom. During their conversation, Mr. Yang suggested that she leave work. Ms. Lee tried to calm herself down by drinking some tea in the laundry room, before leaving work. The CCTV footage was put to Ms. Lee to challenge her evidence about when she spoke to Mr. Yang. Ms. Lee admitted under cross-examination, that she was mistaken, and in fact returned to the kitchen, before leaving again to take a phone call from Mr. Yang from the washroom. This testimony was corroborated by Mr. Yang, who stated that he was worried when Ms. Lee did not immediately reply. He phoned her and put her on speaker phone so that his wife could participate in the conversation. When he asked her where she was, she told Mr. Yang she was in the washroom. However, Mr. Kwak stated that he saw Ms. Lee crying and speaking on the phone to Mr. Yang while standing outside La Foret's premises.

[83] Ms. Lee testified that she could not suppress her feelings and ended leaving work about 20 to 30 minutes early. She was very distraught and forgot that her husband (Mr. Kim) was going to pick her up from work that day. On the way to the SkyTrain station, Ms. Lee called her husband and told him that she had been sexually harassed at work. This is the first time that she had relayed to her husband that Mr. Cho had been sexually harassing her. Mr. Kim testified that when he received the phone call from Ms. Lee, he was already en route to pick her up from La Foret.

[84] Later that evening Mr. Kwak called Ms. Lee's husband and relayed through him that Mr. Cho would not be coming in to work the next day.

- [85] Ms. Lee returned to work on November 10, 2020 and spoke to both Ms. Park and Mr. Kwak. She gave accounts of what had transpired between her and Mr. Cho. Though Ms. Lee was still distressed, she continued working for a further week. However, her health deteriorated and she ended up in hospital due to too much stress. She was off for 1.5 weeks off before returning to work.
- [86] Ms. Lee made a complaint to the police against Mr. Cho, on November 19, 2020. She testified that she did not immediately report the incident to the police, as she was assured that Mr. Cho would provide a written apology. However, as the days went on, the apology was not forthcoming.
- [87] I have concerns regarding the reliability of Ms. Lee's evidence, and some concerns about her credibility. Though there is no dispute that Mr. Cho touched her on November 9 without her consent, Ms. Lee's evidence about the details of what transpired between them was inconsistent, confusing, and often vague. For example, she gave varying accounts about how Mr. Cho touched her, when he touched her, and what parts of her body Mr. Cho touched.
- a) In her November 9, 2020 text message sent to Mr. Yang at 5:23 p.m., Ms. Lee wrote that Mr. Cho had touched her on the shoulder and the back of her neck, and "tapped" her buttock. On November 10 she told Ms. Park that Mr. Cho had touched her on the nape of the neck and "pressed her hip twice firmly". There was a suggestion by the defence that the linguistic meaning of the word "tap" in Korean is different than in English. However, the evidence falls short of establishing that when Ms. Lee said "tap" she really meant to say "pressed firmly".
 - b) Mr. Kwak stated that when he spoke to Ms. Lee on November 9 and November 10, she provided two differing accounts. In her first account she stated that Mr. Cho touched her on the back of the neck and her side and buttocks with his finger. This account was relayed by Mr. Kwak in a November 13, 2020 email to Mr. Han, and formed the substance of the original "apology letter" that Mr. Han was asked to prepare for Mr. Cho to sign. In her second account she stated that Mr. Cho had pressed her firmly twice on the buttocks, touched her shoulder firmly as though he was massaging it, and put his hand deeply under her armpit while doing a kneading like motion.
 - c) Ms. Lee's evidence about when Mr. Cho touched her buttocks was also inconsistent. Her initial testimony that the incident occurred at 5:04 p.m., was based on her review of a message that she says she sent to Mr. Kwak in November 2020, but which Mr. Kwak stated he received in June 2021. After seeing a screen capture of the altercation that occurred between her and Mr. Cho around 5:18 p.m., Ms. Lee stated that Mr. Cho touched her buttocks at 5:18 p.m. When counsel for the plaintiff was about to play the CCTV video in the 5:18 p.m. timeframe, Ms. Lee reverted back to the 5:04 p.m. timing. It was evident during this portion of her cross-examination, that Ms. Lee was catering her testimony to conform with the exhibits, rather than recounting her independent memory of the incident.

[88] Ms. Lee's varying description of the touching as a tap, a poke, application of firm pressure, or using massage like motions, is concerning. While these are all different forms of physical contact, they can take on very different connotations, depending on the type of force that is applied, how long it is applied for, and the location where it is applied. Some of the inconsistencies in Ms. Lee's testimony can be explained by her level of distress on November 9 and 10. However, others are not easily explained, and lead to the conclusion that Ms. Lee was not always forthright with this Court regarding the alleged misconduct committed by Mr. Cho.

2. Mr. Cho's Evidence

[89] Mr. Cho does not deny touching Ms. Lee without her consent on November 9, 2020.

However, he says that the touching occurred on only one occasion that day, around 12:18 p.m., and consisted of two light taps on her shoulder.

[90] Mr. Cho testified that when he touched Ms. Lee, he was discussing a massage that he had received the day prior. He explained that this was the first time he had received a massage, and he wanted to discuss it with Ms. Lee as she had received massages several times before. He found the massage experience painful, and was curious about whether Ms. Lee had the same experience. In the course of telling Ms. Lee about the massage, Mr. Cho touched Ms. Lee on the shoulder area twice. He described it as a tap on the shoulder. He stated in his cross-examination that he did this without thinking, and did not have any sexual intentions when he touched Ms. Lee on the shoulder. The CCTV footage reveals that while the first touch could be described as a light tap, the second touch was in the form of a pat on the upper back.

[91] According to Mr. Cho, Ms. Lee did not react in any negative way when he touched her, and continued working alongside him. This is consistent with the CCTV footage, which shows that following the touching, Ms. Lee remains standing and working in the same spot for at least 30 seconds before moving away to perform other tasks. Bearing in mind Ms. Lee's testimony that she stepped back or in some other way showed her discomfort with the touching, I note that just because someone continues to work alongside a person that they say has harassed them, does not mean that the harassment did not occur or that they were consenting to the touching.

[92] Mr. Cho vehemently denied that he touched Ms. Lee's buttock at any point, or that he touched her at all after 12:18 p.m. Under cross-examination, Mr. Cho acknowledged that touching a female employee firmly on the shoulder or on the buttocks would not be permissible, but denied doing this to Ms. Lee.

[93] With respect to Ms. Lee's allegation that Mr. Cho was standing too close to her, he explained that he was not doing this intentionally or to harass her. Rather this was necessitated by the small size of the work area, which had very little room for them to perform their duties.

- [94] Mr. Cho also denied that he prevented Ms. Lee from eating a meal or told her not to eat her lunch. Rather, if Ms. Lee said that she was hungry, he would make something for her to eat. Under cross-examination Mr. Cho explained that they worked in an establishment where food was prepared, and that there were no restrictions for eating placed on anyone by anyone.
- [95] There are some aspects of Mr. Cho's evidence that raise concerns about his credibility. For example, he initially denied touching Ms. Lee at all, and it was only after the CCTV video from 12:18 p.m. was played to him that Mr. Cho admitted to "tapping" Ms. Lee twice on the shoulder. Further, when Mr. Cho was asked about what transpired around 5:18 p.m., he was vague and stated that there was "an argument or some kind of trouble". When asked to elaborate, he stated that Ms. Lee was upset that her shift had been assigned with another co-worker that she did not have a good relationship with. He did not explain who this co-worker was, and why Ms. Lee appeared to be upset with Mr. Cho. Under cross-examination, Mr. Cho stated that he did not remember whether Ms. Lee spoke the words "why are you doing this to me". Given that this event happened very shortly before Mr. Cho was sent home, it is unlikely that Mr. Cho would not remember what caused Ms. Lee to be upset, or what words she spoke to him before she left the kitchen area at La Foret prior to the completion of her shift.

3. Harassment

- [96] The burden lies on the defendant to establish the allegations justifying dismissal for cause. This evidence must be clear and cogent.
- [97] The evidence establishes that on November 9, 2020, Mr. Cho touched Ms. Lee on two separate occasions without her consent. The first touching occurred around 12:18 p.m., in the context of Mr. Cho telling Ms. Lee about a therapeutic massage that he had obtained the day prior. The touching on this occasion consisted of a brief light tap on her left shoulder, followed by a brief open hand pat to her upper back.
- [98] Though he denies it, I conclude that Mr. Cho touched Ms. Lee for a second time sometime between 5:00 p.m. and 5:23 p.m. Despite my concerns about her credibility on other issues, Ms. Lee's evidence on this point was compelling. I find that on this occasion, Mr. Cho lightly tapped Ms. Lee in the buttock area while discussing the pain in his low back. This touch was also brief, and although not observed on the CCTV, I am satisfied that the quality of the video would make it difficult to discern. However, I reject Ms. Lee's testimony that this touch was in the form of firm pressure on her buttocks. Rather, I find that her earliest and most contemporaneous account as relayed in her text message to Mr. Yang at 5:23 p.m. on November 9, is the most accurate reflection of the nature of the touch that occurred on this second occasion. In that message, Ms. Lee stated that "Just a little while ago, he tapped my buttock complaining about the pain on his sacrum."

[99] In my view, Mr. Cho's above actions constituted harassment of Ms. Lee. While chatting with Ms. Lee about a massage that he had received on the weekend was not harassing behaviour, Mr. Cho crossed the line when he proceeded to touch Ms. Lee while discussing the massage. Though the touching was brief, it was intentional, unwarranted, and non-consensual. It was a violation of Ms. Lee's bodily integrity, and caused her emotional distress.

[100] I also find that the touching which occurred was sexual in nature. The surrounding circumstances lead me to conclude that this action on the part of Mr. Cho reflected a gross error of judgment, rather than an act committed for sexual gratification or with the intention of violating Ms. Lee's bodily integrity. Nevertheless, when Mr. Cho touched Ms. Lee's buttocks, the touching took on sexual connotations. Even if it was in the form of a "tap", the intentional placement of his finger or hand on Ms. Lee's buttocks was entirely inappropriate and falls within the scope of sexual harassment.

4. Bullying

[101] I reject Ms. Lee's claim that Mr. Cho bullied her on November 9 by preventing her from eating. This evidence is contradicted by her text message to Mr. Yang, and her viva voce testimony that Mr. Cho told her she could go eat.

[102] In arriving at this conclusion, I accept that Ms. Lee did not eat that afternoon as she did not believe that Mr. Cho would approve. However, I am unable to conclude that she did not eat because Mr. Cho prevented her from doing so. While it is possible that Mr. Cho may have behaved in a manner which could lead Ms. Lee to conclude that he would not respond favorably if she took a meal break, the evidence falls short of establishing bullying behaviour on the part of Mr. Cho.

[103] As noted previously, I have concerns about the reliability of Ms. Lee's evidence, and to some extent, her veracity. It is notable that Ms. Lee's text message indicated that the Team Leader and Manager was present when Mr. Cho prevented her from eating, yet no such witness was called to testify, nor was their absence explained.

D. Other Instances of Harassment and Bullying

[104] Ms. Lee alleges that Mr. Cho also harassed her prior to November 9, 2020. This consisted of instances where he would: stand very close to her, so that she could feel his breath; sometimes put his arm around her shoulder; habitually poke her in the side around the waist area and the top of the shoulder; and if she was not working or doing a good job, he would hit her on the head as a joke. In addition, Ms. Lee alleged that Mr. Cho invited her to go with him for dinner with other female staff, asked her personal questions that made her uncomfortable, commented on her eating habits, and told her she should wear leggings. On one occasion Mr. Cho told her he loved her, and asked if she felt the same way. When she did not give him the response he was expecting, he retaliated against her.

- [105] Ms. Lee testified that she did not report these events to the Employer prior to November 10, for fear of losing her job. This is a reasonable excuse and I do not make any negative inferences for failure to do so.
- [106] However, when Ms. Lee's evidence is considered as a whole, it falls short of establishing that Mr. Cho harassed her or bullied her prior to November 9, 2020. I found Ms. Lee's evidence regarding Mr. Cho's alleged misconduct prior to November 9, 2020, unreliable and not credible. Her evidence was vague and lacking in detail, and not corroborated by any other witnesses, such as other kitchen staff. In addition, I note that these allegations of prior misconduct were not put to Mr. Cho during his cross-examination. It would be unjust and unfair to allow the defendant to rely on them now, without having afforded Mr. Cho an opportunity to respond and provide his version of events.
- [107] I conclude that the defendant has failed to establish that Mr. Cho was guilty of any misconduct in the form of harassment or bullying, prior to November 9, 2020.

E. Abuse of Authority

- [108] There is no dispute that at all material times, Mr. Cho was Ms. Lee's superior, and in a position of power in relation to her.
- [109] I am satisfied that the harassing actions committed by Mr. Cho on November 9, 2020, constituted an abuse of his authority.

F. Lack of Contrition and Remorse

- [110] The final ground of alleged misconduct relates to the allegation that Mr. Cho refused to show contrition and remorse, and participate in reconciliatory efforts by the Employer. For reasons that will become evident in the following sections, I conclude that this allegation is not supported by the evidence.
- [111] I now turn to Mr. Cho's termination.

G. Termination

- [112] The parties disagree on when Mr. Cho was terminated, and what the reasons were for the termination.
- [113] According to the Employer, Mr. Cho was terminated on November 17, 2020, for his sexual harassment of Ms. Lee, his dishonesty during the investigation of the harassment allegations, and his unwillingness to apologize and show contrition or remorse. Mr. Cho states that he understood his employment to have been terminated on November 9, 2020. Alternatively, he says that he was terminated on November 17, 2020, for failing to sign an incriminating affidavit.

1. Evidence

- [114] The key events following the alleged harassment, are not in dispute.
- [115] Mr. Kwak testified that around 5:20 p.m. on November 9, 2020, the Front Counter Manager, Ms. Jeong, came to him and reported Ms. Lee's allegations about Mr. Cho. Mr. Kwak looked for Ms. Lee, and found her standing outside La Foret, talking on the phone to Mr. Yang, and crying. He tried to calm her down, and then asked her what happened. Ms. Lee told him that on that day Mr. Cho had "pressured her" with violent language; told her to continue working without having her lunch; touched her on the back of her neck; and poked her on her side and on her buttocks. Mr. Kwak brought her inside La Foret, and told her to leave work and go home. Ms. Lee left work about 10-15 minutes later.
- [116] Not long after, Ms. Lee's husband, Mr. Kim, arrived at La Foret. Mr. Kim was very upset and had a conversation with Mr. Kwak. He told Mr. Kwak that something needed to be done regarding Mr. Cho, otherwise his wife would not be coming back to work. Mr. Kwak assured Mr. Kim that he would investigate the matter, and that he should calm down and go home. Around this time Ms. Lee returned to La Foret, and she and Mr. Kim went home together.
- [117] Mr. Cho was still working at the bakery counter when Mr. Kwak took him into his office. He told Mr. Cho that Ms. Lee said that he had verbally abused her, and touched her on her arm, shoulder and buttocks. Mr. Kwak asked Mr. Cho to tell him his version of events. Mr. Cho told him that he had received a massage, and was trying to explain to Ms. Lee the parts of his body that were hurting. He admitted that in the process, he touched Ms. Lee.
- [118] Mr. Kwak told Mr. Cho that regardless of the reason, touching a female subordinate was wrong. Mr. Cho told him he thought he had made a mistake. He asked if he should apologize to Ms. Lee or quit his job. At trial, Mr. Cho explained that he offered to apologize because though he only touched Ms. Lee on her shoulder, he realized that he may have unknowingly caused distress to Ms. Lee.
- [119] Mr. Kwak did not immediately tell Mr. Cho whether he should apologize or quit. Rather, he told him that an investigation has to be conducted, and that Mr. Kwak needed to consult with management. Mr. Kwak told Mr. Cho to go home for the rest of the day and wait for his call.
- [120] Mr. Kwak then called Ms. Park. He told her Mr. Cho had touched Ms. Lee on her neck and buttocks and had admitted to that conduct. He explained that the plaintiff had asked if he should apologize or quit in order to resolve the matter. Ms. Park conferred with her husband, and Mr. Kwak was instructed to speak to Ms. Lee the next day, and to also tell the plaintiff not to come to work temporarily.
- [121] Later that evening Mr. Kwak spoke to Ms. Lee's husband. He explained that Mr. Cho had admitted to the inappropriate touching, and would be agreeable to providing an apology. He asked Mr. Kim if he would like Mr. Cho to contact Ms. Lee and talk to her directly and apologize. Mr. Kim said no.

- [122] Mr. Kwak also called Mr. Cho on the evening of November 9. He told Mr. Cho that the Employer would be conducting an investigation, and that Mr. Cho should not attend work the next day. Mr. Kwak then called Mr. Yang, and asked him to cover Mr. Cho's shift the next day.
- [123] Mr. Kwak testified that on November 10, 2020, Mr. Kwak met with Ms. Lee and asked her to recount the events from the day prior. Ms. Lee told him that Mr. Cho had prevented her from eating, harassed her verbally throughout the day, pressed her firmly twice on the buttocks, touched her shoulder firmly as though he was massaging it, and put his hand deeply under her armpit while doing a kneading like motion. According to Ms. Lee, she did not provide Mr. Kwak with details, but simply told him that she had a rough day and did not know what to do. Mr. Kwak told her that he would try to get a letter of apology from Mr. Cho and show it to her in advance.
- [124] Ms. Park also met with Ms. Lee on November 10, 2020. During this meeting, Ms. Lee was trembling and crying. Ms. Park gave her a hug and apologized to her, and tried to calm her down to get more details. There is some dispute about what Ms. Lee told Ms. Park. According to Ms. Park, Ms. Lee told her that: Mr. Cho had touched her on the nape of the neck and pressed her hip twice firmly; this had happened several times on prior occasions where he would touch her on her shoulder and sometimes place his body very close to her to the point where she could hear his breathing; he commented on her clothes; and he commented on her eating. According to Ms. Lee, she told Ms. Park that Mr. Cho had: poked her on the side; touched her back and shoulders; would come up close to her in a hugging motion when trying to retrieve something from a cupboard; told her he loved her; and that similar things had happened prior to November 9, but did not provide her with any details.
- [125] Ms. Park and Ms. Lee discussed the idea of seeking an apology from Mr. Cho. Ms. Lee told her she was afraid to see or meet Mr. Cho, and wanted an apology in writing from him so that she could report the incident to the police.
- [126] Ms. Park spoke to Ms. Jeong and Mr. Yang. However, she did not speak to Mr. Cho about Ms. Lee's allegations. Ms. Park explained that she did not think this was necessary as Mr. Cho had already admitted his misconduct to Mr. Kwak.
- [127] Following the meetings with Ms. Lee, Mr. Kwak, Ms. Park and her husband, decided that they would draft a letter of apology for Mr. Cho to sign.
- [128] On November 13, 2020, Mr. Kwak contacted Mr. Han, the corporate secretary for La Foret, to prepare an apology letter on behalf of Mr. Cho. The substance of the original apology letter that Mr. Han was asked to prepare for Mr. Cho to sign, was based on Ms. Lee's initial account provided to Mr. Kwak on November 9.

[129] On November 15, Mr. Han emailed the first version of the "apology letter" to Mr. Kwak. Mr. Han, who had previously been a lawyer, decided to prepare the "apology letter" in the form of an affidavit. Mr. Han did not speak directly to Ms. Lee or Mr. Cho when drafting the Affidavit. Rather, he based it on information provided to him by Mr. Kwak.

[130] Over the next few days, Mr. Kwak and Mr. Han edited the Affidavit a number of times. Ms. Park provided a copy of one of the drafts to Ms. Lee, who asked to change the word "poked" to the phrase "inappropriate touching".

[131] On November 11, Mr. Kwak sent a text message to Mr. Cho and asked him to call. Mr. Cho did not reply. Mr. Kwak sent a follow up message on Friday November 13. Mr. Cho told Mr. Kwak that he was busy and that Mr. Kwak should "text [Mr. Cho] concerning any changes". The following exchange occurs:

Mr. Kwak: It seems difficult to get [Ms. Lee's] signature. I will just go ahead. Don't worry.

16:39

Mr. Cho: I would like to know how this is going to proceed. I want to see the document that you are going to ask me to sign. In addition, please tell me why, during the previous phone conversation, you talked about calling, talking and asking the staff who left the work already about this incident and why you told me about that. Please send me a copy of the record of employment and termination letter that should contain what kind of investigations were made about me and the reasons of termination. Please send all the details and the documents to [email address] before Monday. Thank you.

17:07

Mr. Kwak: Can we please talk on the phone? Chef Jo [sic], I am really trying to bring a good end to this.

17:11

Mr. Cho: It's difficult for me to talk on the phone. I also want to have a good end. Please send me the things that I have requested in the text via email by Monday.

17:14

Mr. Kwak: there's no problem sending those documents to you. I am just trying to help you. Please sign the documents that I mentioned. I will show the document once I complete it. I have never called the former staff. I think you have some misunderstanding.

Mr. Kwak: Can we talk? I will come to you.

17:38

Mr. Cho: Please send the documents requested in the text message and the document prepared via email.

18:45

Mr. Kwak: You really can't talk on the phone.

18:45

Mr. Kwak: I am asking you this for the last time. I cannot help you if you are this way.

18:49

[132] On November 15, 2020, Mr. Kwak emailed a final draft of the Affidavit for Mr. Cho's signature. The following text message exchange ensues:

Mr. Kwak: I sent you an email. Please contact me if you need an explanation. Everything will end well.

14:48

Mr. Cho: I checked the email and did not see the ROE and Termination Letter. Please email them to me by Monday.

17:33

Mr. Kwak: Kindly do this one first.

17:38

[133] On November 17, 2020, the Employer issued ROE #1. At Box 16, the reason for issuing the ROE was identified as "Dismissal". Box 18 for comments was left blank. On November 18, 2020, the Employer issued ROE #2, purporting to amend errors in ROE #1. This time, Box 18 included comments indicating that Mr. Cho had been dismissed "due to his sexual harassment and bullying of female subordinate staff". The name of the contact person for the ROE was also changed to Mr. Kwak.

2. Termination Date and Reasons

[134] I find that Mr. Cho was terminated on November 17, 2020, and that the termination was for his refusal to sign an Affidavit admitting his misconduct, rather than for his actual misconduct.

[135] I come to this conclusion, despite my acceptance of Mr. Cho's evidence that he believed that he had been terminated on November 9, 2020 when Mr. Kwak told him not to come to work on November 10. Consistent with this belief: Mr. Cho applied for another bakery position on the same date; on November 10, Mr. Cho asked La Foret to remove his contact information from a job search site, following receipt by him of an application for a vacancy in La Foret's bakery department; and Mr. Cho repeatedly asked Mr. Kwak to forward his ROE and termination letter to him. In my view, Mr. Cho would not have taken these steps if he believed he had only been temporarily suspended by the Employer.

[136] Both Ms. Park and Mr. Kwak testified that Mr. Cho was not terminated on November 9. Rather, the decision to terminate Mr. Cho was not made until November 17, 2020. Ms. Park testified that even after the allegations were reported to her, she was of the view that they could all work together again after Mr. Cho signed the apology letter. Mr. Kwak also acted in a manner consistent with this decision by the Employer not to immediately terminate Mr. Cho. Mr. Kwak made representations to Mr. Cho in the November 11 text messages, that the situation between him and Ms. Lee could be remedied by him providing an apology letter. These communications from Mr. Kwak indicate that the Employer did not consider Mr. Cho's employment to be terminated on November 9. Rather, La Foret presented to Mr. Cho that it would continue to employ him as long as he apologized in writing to Ms. Lee.

H. Was the Termination Justified

[137] The Employer has advanced three grounds to justify Mr. Cho's termination: his sexual harassment of Ms. Lee, his dishonesty during the investigation of the harassment allegations, and his unwillingness to apologize and show contrition or remorse. Of these three grounds, the Employer has only been able to establish the first one, i.e. that Mr. Cho sexually harassed Ms. Lee by briefly touching her on her shoulder, upper back, and buttocks.

[138] The second ground, that Mr. Cho was dishonest during the investigation of the sexual harassment, is not supported by the evidence. Indeed, Mr. Kwak testified that Mr. Cho admitted to him that he had touched Ms. Lee inappropriately. Although Mr. Cho ultimately refused to sign the Affidavit prepared by the Employer, that refusal cannot be considered an act of dishonesty, or a lack of contrition, or a failure to participate in reconciliatory efforts.

[139] The third ground is also unsubstantiated. By offering to apologize to Ms. Lee or to quit his job, Mr. Cho showed contrition and remorse immediately when Ms. Lee's distress was brought to his attention by Mr. Kwak. He also agreed to participate in reconciliatory efforts by the Employer, even after he believed that his employment had been terminated. By asking for the apology document that the Employer wanted him to sign, Mr. Cho was clearly trying to remedy the situation between himself and Ms. Lee, and by extension, the Employer.

[140] I turn then to consider whether the sexual harassment was sufficient to justify dismissal.

[141] Workplace sexual harassment has been defined by the Supreme Court of Canada in *Janzen v. Platy Enterprises Ltd.*, 1989 CanLII 97 (S.C.C.) 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 an abuse of power. 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. By requiring an employee to contend with unwelcome sexual actions or explicit sexual demands, sexual harassment in the workplace

attacks the dignity and self-respect of the victim both as an employee and as a human being.

[142] In assessing whether sexual harassment constitutes just cause for termination, Justice Neilson in *Brazeau* considered the following criteria endorsed by the court in *Alleyne v. Gateway Cooperative Homes Inc.* (2001), 2001 CanLII 28308 (ONSC) at para. 28:

- the degree and nature of the conduct amounting to sexual harassment;
- the nature of the employment relationship between the offending employee and the victim employee(s), and whether the offending employee was in a position of authority over the victim(s), such that the degree and nature of the conduct was thereby exacerbated by a particularly offensive abuse of power;
- whether the offending employee was told that the impugned conduct was unwelcome or offensive;
- whether the offending employee continued or repeated the unwelcome or offensive behaviour, after being told that the conduct was unwelcome;
- whether the employer warned the employee that the misconduct was inappropriate and that dismissal was a possible consequence of further similar misconduct;
- whether the employer had a formal, and known, sexual harassment policy, which was enforced by the employer;
- the nature of the employment relationship between the offending employee and the employer, including length of service and position, and whether there were implied or express terms of the employment contract which gave rise to additional obligations on the employer's part, such as with respect to warnings or the opportunity to respond; and
- whether the impugned conduct was condoned by the employer.

[143] I have considered the *Alleyne* criteria within the facts of this case, and note the following:

- a) On the spectrum of workplace sexual harassment, the established misconduct was relatively minor. It consisted of a brief light tap on Ms. Lee's left shoulder, followed by a brief open hand pat to her upper back, and a subsequent light tap on Ms. Lee's buttock. The contact lasted for only a second or two on each occasion, and reflected a gross error of judgment, rather than mal fide intentions.
- b) Though Ms. Lee was quite distraught when recounting the incident to Mr. Kwak and Ms. Park, it is evident that she was upset for multiple reasons. In addition to Mr. Cho's non-consensual touching, Ms. Lee was upset because she believed that he had prevented her from eating her meal that day. Only the non-consensual touching on November 9 has been proven in this case. I accept that part of Ms. Lee's distress was also due to the power imbalance between her and Mr. Cho. Mr. Cho was her direct supervisor, and in a position of authority over her, thereby making it difficult for her to assert herself. However, the fact that Ms. Lee did report Mr. Cho to a manager very shortly after the non-consensual touching of

November 9 occurred, suggests that the power imbalance between them was not overly prohibitive.

- c) Mr. Cho admitted during his cross-examination that he was aware that touching Ms. Lee on the buttock would be inappropriate and unwelcome. Thus, the fact that Mr. Cho was never told that the impugned conduct was unwelcome or offensive prior to the offensive conduct occurring, is irrelevant in this case.
- d) The fact that Mr. Cho never repeated the offensive behaviour is a neutral fact, as Mr. Cho did not have any further in person contact with Ms. Lee or other staff of La Foret. Once Mr. Kwak told Mr. Cho that the conduct was unwelcome, Mr. Cho offered to apologize to Ms. Lee or to quit.
- e) Mr. Cho was not warned prior to the incident that such conduct was inappropriate and that dismissal was a possible consequence of such misconduct.
- f) The Employer did not have a formal, and known, sexual harassment policy, which was enforced by the Employer. However, Mr. Cho agreed that such a policy was not necessary for him to know that the behaviour complained of was inappropriate.
- g) Mr. Cho's relationship with the Employer, including his length of service, position, and age, create implied terms of employment which give rise to additional obligations on the Employer's part to provide Mr. Cho with a warning or an opportunity to respond. He was given neither prior to his employment being terminated.

[144] After having regard to all of the evidence in this case, I conclude that the proven misconduct on the part of Mr. Cho was not sufficient to justify termination. Specifically, I find that this is not a situation where the misconduct was irreconcilable with sustaining the employment relationship. The Employer's actions following Ms. Lee's complaint is consistent with this conclusion. The Employer investigated Ms. Lee's allegations against Mr. Cho and concluded that they were founded. Mr. Kwak also met with Mr. Cho and believed that he had admitted to inappropriately touching Ms. Lee. The Employer was also aware that Ms. Lee said she was afraid of Mr. Cho and did not want to see him. From this, one can assume that Ms. Lee would not agree to continue to work with Mr. Cho. Though this could potentially pose problems with respect to scheduling of staff, the Employer did not view this as an insurmountable problem. It was Ms. Park's evidence that despite everything, she believed that they could all work together again after Mr. Cho signed the apology letter.

[145] The decision not to terminate Mr. Cho following the completion of its investigation of Ms. Lee's allegations, reflects the Employer's view that the employment relationship had not irretrievably broken down. By maintaining that Mr. Cho could keep his job if he provided the Affidavit admitting his guilt, the Employer did not consider his misconduct against Ms. Lee to be sufficiently serious to justify termination.

[146] I turn now to the Affidavit, and whether Mr. Cho's refusal to sign it, is sufficient to establish just cause. For the following reasons, I find that it is not.

[147] The following supports my conclusion that it was reasonable for Mr. Cho to refuse to sign the Affidavit:

- a) I accept Mr. Cho's evidence that he did not sign the Affidavit because he could not agree with the statements made in it, including wording that made him out to be a sexual offender.
- b) The Affidavit was designed to be used for legal purposes, rather than to repair any fractured relationship between Mr. Cho and Ms. Lee, or Mr. Cho and the Employer:
 - i. Ms. Lee was very clear to Ms. Park that she intended to go to the police, and wanted a document signed by Mr. Cho so that he would not later resile from his admission of misconduct. Ms. Park was aware that this was Ms. Lee's intention, and agreed to get a signed apology from Mr. Cho.
 - ii. The Affidavit was drafted in English, rather than Korean which was the preferred language of communication for Ms. Lee and Mr. Cho. This reflects the Employer's knowledge that the Affidavit would be used for legal rather than reconciliatory purposes.
- c) The apology letter that Mr. Cho agreed to provide, was materially different than the Affidavit that was prepared for his signature.
- d) The Affidavit as drafted, contained factual errors. For example, at para. 5 the Affidavit states that Mr. Cho was told not to return to work on November 11, though the actual date was November 9.
- e) It was impossible for Mr. Cho to comply with the terms of the Affidavit and still do his job at La Foret. Paragraph 9 stipulates that Mr. Cho promises not to contact Ms. Lee "or any other current, former or future female staff member of La Foret for any reason" and that if he breaches this promise, "such female staff member could be severely emotionally distressed as a result". Mr. Kwak admitted during his cross-examination that many of the baking staff at La Foret were female, and it would be impossible for Mr. Cho do his job alone at La Foret.

[148] I find that the requirement that Mr. Cho sign the Affidavit, prior to being reinstated at his job, was wholly inappropriate. By putting Mr. Cho in that position, the Employer effectively forced him to choose between incriminating himself and facing possible criminal charges as a result, or keeping his job.

[149] In my view, it was reasonable for Mr. Cho to refuse to sign the Affidavit. His termination, which flowed from this refusal, was not justified, and constitutes unjust dismissal.

VI. Damages

- [150] The defendant agrees that in the event this Court were to determine the defendant to not have just cause for termination of the plaintiff's employment, the plaintiff would be entitled to damages based on the defendant's failure to provide the plaintiff with reasonable notice prior to his termination.
- [151] The reasonable notice period is determined on the basis of the factors identified in *Bardal v. Globe & Mail Ltd.* (1960), 24 D.L.R. (2d) 140 (Ont. H.C.J.) at para. 21, including the employee's age, length of service, position or role, and the availability of similar employment having regard to the experience, training and qualifications of the employee.

A. Reasonable Notice Period

- [152] At the time of the termination, Mr. Cho was 60 years old, and employed as a Head Baker with La Foret. His job responsibilities were in the nature of middle to lower management. His primary managerial function was to supervise bakery employees; he had a limited role with respect to recommending discipline of bakery employees or assisting in their recruitment. Mr. Cho reported to Ms. Park who made decisions regarding the menu. To that end, his position is distinguishable from that of an executive chef. Mr. Cho's job prospects are also bolstered by the fact that there is a strong demand for bakers with his experience, skills and qualifications.
- [153] Nevertheless, Mr. Cho's prospects are reduced by his age and lack of facility in English. Mr. Cho has always worked in bakeries where Korean is primarily spoken. There are only a handful of such businesses in the lower mainland area of B.C.
- [154] Mr. Cho is also particularly vulnerable due to his age at the date of termination. Mr. Cho falls into the category of worker that is too young to retire but too old to retrain or change career paths. Our courts have found it appropriate to give such workers increased notice to address these limitations: *Mohammed v. Dexterra Integrated Facilities Management*, 2020 BCSC 2008 at paras. 43-44; and *Wong v. Polynova Industries Inc.*, 2021 BCSC 603 at para. 47.
- [155] In determining whether additional notice is appropriate, the court should consider the individual circumstances and evidence: *Sciancamerli v. Comtech*, 2014 BCSC 2140 at para. 31.
- [156] Having regard to the whole of the evidence, I conclude that Mr. Cho's age does impact his ability or opportunity to find new employment, though not as substantially as in other fields where educational upgrading or the acquisition of new skills may be necessary to remain competitive.

- [157] I turn now to Mr. Cho's length of service. Although Mr. Cho had been working with La Foret for approximately 19 months, this was his second period of employment with La Foret. The first period of employment lasted for about 12 months, and was interrupted when he took a job with another employer for four months. At issue is whether it is appropriate to include the first period of employment when calculating the total length of service.
- [158] In *Beach v. Ikon Office Solutions Inc.*, 1999 CanLII 5522 (B.C.S.C.) at para. 13, Justice Lysyk noted that "[w]here there is no express term in the re-employment contract dealing with the issue, the question is whether the employer has effectively recognized continuity of service". In the case at bar, there is compelling evidence that the employer did in fact recognize the continuity of service when Mr. Cho was re-hired to work at La Foret during his second period of employment. On March 24, 2020 the employer temporarily laid off Mr. Cho due to pandemic related shortage of work. The ROE issued at that time indicates that his first day worked was December 1, 2017, and that last day worked prior to the lay off, was March 19, 2020. In my view, this pandemic-related ROE is more reflective of the true situation between the parties regarding the date of Mr. Cho's termination, than the ROE's issued after the termination which refer only to the second employment period. In my view these ROE's cannot be relied on to reflect the true state of affairs, as they were created in circumstances where litigation was a distinct possibility.
- [159] In addition to considering whether the employer treated the employee as continuously employed or recognized the employee as a long-service employee, the court should consider the length of the break in service; whether the employee left voluntarily or was induced to return; and the purpose of the break: *George v. Cowichan Tribes*, 2015 BCSC 513 at para. 217. In the case at bar, the break was for only four months, Mr. Cho was re-hired with the promise of higher pay and resuming the Head Chef role, and although Mr. Cho left voluntarily he did so because he found his job difficult to perform due to lack of staffing support
- [160] In the circumstances, I find it appropriate to disregard the interruption in Mr. Cho's employment, and conclude that Mr. Cho's total length of service with La Foret was 31 months.
- [161] The Employer did not take issue with the plaintiff's submission that the best method to determine his damage award is to base it on his annualized earnings of \$62,400. Having regard to all of the circumstances of this case, I find that a reasonable notice period for Mr. Cho is five months, or \$26,000.

B. Mitigation

- [162] In a wrongful dismissal or breach of contract action, an employee has a duty to mitigate their damage or loss by taking reasonable steps to find alternative employment upon dismissal: *Coutts v. Brian Jessel Autosport Inc.*, 2005 BCCA 224 at para. 22.

- [163] The search for employment must be "constant and assiduous", and entail an exploration of employment through all means: *Smith v. Aker Kvaerner Canada Inc. and Kvaerner Power Inc.*, 2005 BCSC 117 at para. 31, citing *Forshaw v. Aluminex Extrusions Ltd.* (1989), 39 B.C.L.R. (2d) 140 (C.A.) (emphasis added).
- [164] The onus is on the employer to prove that: (1) the employee failed to mitigate; and (2) had the employee taken reasonable steps to mitigate, he would likely have obtained equivalent or alternate employment: *Nardulli v. C-W Agencies Inc.*, 2012 BCSC 1686 at para. 449.
- [165] Where a failure to mitigate is made out, the notice period may be reduced substantially or eliminated altogether: *Cimpan v. Kolumbia Inn Daycare Society*, 2006 BCSC 1828 at para. 109.
- [166] While the duty to mitigate begins at the date of termination, courts have "acknowledged that employees generally require a period of readjustment and regrouping before pursuing re-employment strategies": *Stuart v. Navigata Communications Ltd.*, 2007 BCSC 463 at para. 43. A terminated employee may delay his search for work in circumstances where it is appropriate to do so, such as "recover[ing] from the stress of the dismissal": *Borsato v. Atwater Insurance Agency Ltd.*, 2008 BCSC 724 at para. 77. An assessment of all the circumstances is required.
- [167] I agree with the defendant that Mr. Cho's job search efforts were sub-optimal.
- After initially applying for a bakery position on November 9, 2020, Mr. Cho did not resume his job search efforts until March 2021, at which time he applied for four jobs ranging from a bakery to a landscaping company. He also contacted one bakery by phone.
 - Though Mr. Cho contacted WorkBC in December 2020, and received instructions on steps to assist with his job search, he did not follow these steps due to English language limitations.
 - Mr. Cho did not apply to Inno Bakery, although he had worked there in the past and the manager really wanted to work with him.
 - Mr. Cho admitted that he did not engage in the expansive job search that he conducted when he was previously unemployed.
- [168] I accept Mr. Cho's evidence that his job search efforts were hindered to some extent by his English language limitations, and distress at the manner of his dismissal. Nevertheless, I conclude that Mr. Cho failed to mitigate his loss, and that had he taken reasonable steps to mitigate he would likely have found alternate employment.
- [169] Mitigation is made more difficult when dismissal is related to allegations of sexual harassment: *Brazeau* at para. 269.
- [170] In the circumstances, it is appropriate to reduce Mr. Cho's notice period by two months. As such, after accounting for his failure to mitigate, he is entitled to damages in lieu of notice, in the amount of \$15,600.

C. Aggravated or Punitive Damages

- [171] The leading case on aggravated damages in this context is *Honda Canada Inc. v. Keays*, 2008 SCC 39. In *Honda Canada Inc.*, Justice Bastarache's noted two required preconditions for an award for aggravated damages:
- a) Bad faith or unfairness in the manner of dismissal; and
 - b) Mental distress damages caused by the manner of dismissal.
- [172] In order to satisfy the first precondition, the Plaintiff is "required to show that the manner of dismissal caused injury rising beyond the normal distress and hurt feelings that arise from the fact of dismissal": *Lau v. Royal Bank of Canada*, 2017 BCCA 253 at para. 69.
- [173] Examples of conduct that may constitute a breach of the employer's duty of good faith and fair dealing include being untruthful, misleading or unduly insensitive in the course of dismissal, or attacking the employee's reputation by declarations made at the time of dismissal: *Wallace v. United Grain Growers Ltd.* (1997), [1997] 3 S.C.R. 701 at para 98 (S.C.C.); *Honda Canada Inc.* at para. 59.
- [174] In *Kelly v. Norsemont Mining Inc.*, 2013 BCSC 147, Justice Fenlon held:
- [116] Punitive damages should only be awarded where there is a heightened need to punish the wrongdoer because compensatory damages (including damages for mental distress) are not enough to achieve the objectives of deterrence. While damages for mental distress and punitive damages serve different objectives (compensation and deterrence respectively), courts have repeatedly warned against the danger of double-compensation and double-punishment: *Honda Canada* at paras. 60 and 69. However, in an appropriate case both heads of damages are available: see for example *Pate v. Galway-Cavendish (Township)*, 2011 ONCA 329, 342 D.L.R. (4th) 632.
- [175] The circumstances of this case support an award for aggravated and punitive damages. For example:
- a) The Employer refused to issue a ROE to Mr. Cho until he had signed a self-incriminating affidavit.
 - b) The Employer knew the Affidavit would place Mr. Cho in legal jeopardy but tried to exert pressure on him to sign it to Mr. Cho's detriment.
 - c) The Employer's offer for Mr. Cho to retain his employment if he signed the Affidavit was disingenuous, and the Employer knew it would be impossible for Mr. Cho to do his job with the restrictions placed on him.
- [176] Mr. Cho testified that the Affidavit that the Employer required him to sign made him out to be a sexual offender. He testified that this destroyed his self respect, made him feel betrayed, and caused him depression and insomnia. I agree that the language used in the Affidavit, as well as the requirement that he not have any contact with former, current, or

prospective female staff, made it appear as if he was a dangerous sexual offender from whom all female staff must be protected. There was no factual or legal basis for the Employer to impose such a requirement on Mr. Cho.

- [177] In *Kelly*, Justice Fenlon considered at para. 131 the principle of proportionality in setting a range for punitive damages. This includes ensuring that the award is proportionate to the blameworthiness of the defendant's conduct; degree of vulnerability of the plaintiff; harm or potential harm directed specifically at the plaintiff; need for deterrence; consider the other penalties, both civil and criminal, which have been or are likely to be inflicted on the defendant for the same misconduct; and consider the advantage wrongfully gained by a defendant from the misconduct.
- [178] Here, the Employer was highly blameworthy by putting Mr. Cho in a position where it knew that he would risk criminal proceedings if he signed the Affidavit. Mr. Han had previously practiced law, and it was his idea to draft an affidavit rather than apology letter. I conclude that Mr. Han, and by extension the Employer, was aware of the significant legal jeopardy that Mr. Cho would place himself in by signing the Affidavit. The Employer exposed Mr. Cho to serious legal jeopardy. The Employer took advantage of Mr. Cho's emotional and financial vulnerability by refusing to provide him with an ROE unless he signed the Affidavit. Finally, the compensatory damages award here is relatively modest and amounts to what the defendant was bound to pay under the contract.
- [179] Factors mitigating against a large punitive damages award are that the Employer is not a "moneyed" defendant, and there is a real danger of double punishment and compensation, having regard to the aggravated damages claim which is also supported by the evidence.
- [180] Having regard to all of the circumstances in this case, I conclude that a global award of \$25,000 in aggravated and punitive damages for the manner of the termination, is reasonable and in keeping with the circumstances of this case.

VII. Costs

- [181] The general rule is that costs follow the event. I am not aware of any reason that warrants a departure from this rule. The plaintiff was successful and as such he is entitled to his costs at Scale B for a matter of ordinary difficulty.
- [182] If there are settlement offers or other matters that I am not privy to, a party may prepare written submissions up to a maximum of five pages in length (excluding attachments), for my consideration. These should be submitted through Supreme Court Scheduling within 30 days of this Order. Responding submissions are to be provided seven days thereafter and are not to exceed five pages. Any Reply submissions are to be provided within seven days following receipt of Response submissions, and are limited to three pages.
- [183] Absent further submissions, this costs order will stand.

"Shergill J."

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