

CANADA / JUDGMENT

Fobert v. MCRCI Medicinal Cannabis Resource Centre Inc.

2020 BCSC 2043

COURT

Supreme Court of British Columbia

DECIDED

22 December 2020

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2020 BCSC 2043 Fobert v. MCRCI Medicinal Cannabis Resource Centre Inc.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Fobert v. MCRCI Medicinal Cannabis Resource Centre Inc.,

2020 BCSC 2043

Date: 20201222

Docket: S198626

Registry: Vancouver

Between:

Carly Fobert

Plaintiff

And

MCRCI Medicinal Cannabis Resource Centre Inc. and

Global Health Clinics Ltd.

Defendants

Before: The Honourable Madam Justice Fleming

Reasons for Judgment

Counsel for the Plaintiff:

I. Kennedy

Agent for the Defendants, appearing on own behalf:

J. Dhaliwal

Place and Date of Trial/Hearing:

Vancouver, B.C.

September 21-24, 2020

Place and Date of Judgment:

Vancouver, B.C.

December 22, 2020

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Introduction

- [1] In this fast track action, the plaintiff Carly Fobert seeks damages for wrongful termination of her employment by the defendants MCRCI Medicinal Cannabis Resource Centre Inc. ("MCRCI") and Global Health Clinics Ltd. ("Global Health"). Her claims include damages for reasonable notice, aggravated damages and punitive damages.

- [2] Before commencing this action, Ms. Fobert complained to the Employment Standards Branch ("ESB") about the defendants, which resulted in a settlement agreement with MCRCI. In addition to arguing Global Health was never her employer, the defendants take the position that the settlement agreement addressed all of her claims.
- [3] Ms. Fobert's claims for aggravated and punitive damages rest in part on the conduct of a person named Justin Liu during a meeting to discuss her termination, outstanding wages and severance. The defendants allege Mr. Liu had no authority to meet with Ms. Fobert or negotiate on their behalf, although their pleadings assert the opposite with respect to MCRCI.
- [4] In addition, the defendants dispute the amount of the damages claimed by Ms. Fobert.

Overview

- [5] The evidence for Ms. Fobert includes her testimony, a recording of her meeting with Mr. Liu, a transcript of the recording, and a number of documents including her version of the ESB settlement agreement, some of which were admitted for limited purposes. The defendants' evidence includes the testimony of Danilen Villanueva, who identified herself as the operations manager for MCRCI, as well as a slightly different version of the settlement agreement.
- [6] Represented by counsel for most of the proceeding, at the outset of the trial, the defendants applied for an adjournment, because they had dismissed their counsel a few days earlier. Jatinder Dhaliwal, a director of both defendants, and the CEO of MCRCI, made the application which I denied. Mr. Dhaliwal then appeared for the defendants throughout the trial.
- [7] Many of the basic facts are not disputed.
- [8] Born in 1994, Ms. Fobert is now 26 years old.
- [9] MCRCI is a wholly owned subsidiary of Global Health, which is a publicly-traded company.
- [10] On December 8, 2017, Ms. Fobert was hired by MCRCI to work as an intake specialist. She and MCRCI entered into a written employment agreement (the "Employment Agreement"). The Employment Agreement included a termination provision that required MCRCI to provide Ms. Fobert with 30 days notice of termination or pay in lieu, if terminated without cause.
- [11] The recitals in the Employment Agreement identified MCRCI as providing comprehensive training programs and support for patient education and medical authorization for medicinal cannabis through its relationships with licensed producers and suppliers.

- [12] Ms. Fobert described MCRCI's business as gathering patient information and booking appointments with physicians to obtain prescriptions for medicinal marijuana. Her role was to look at the schedule, review the forms completed by patients, book appointments, manage the email inbox, and train other staff to do intakes.
- [13] Ms. Fobert worked full-time Monday to Friday and started at a wage of \$15.00 per hour. By the time she was terminated, she had received three raises along with favourable performance reviews and was earning \$17.50 per hour.
- [14] Her managers were Andrea Difonzo and Sarah Donald. Ms. Donald was the Director of Operations for MCRCI.
- [15] Ms. Fobert was aware that until April 2019, Terry Roycroft, the founder of MCRCI, was its CEO and President. Testifying to some confusion over corporate changes around that time, Ms. Fobert understood that Global Health went public and owned MCRCI and that the CEO of Global Health was going to be appointed to replace Mr. Roycroft. Two weeks before she was terminated, Ms. Villanueva and Cassidy McCord began attending MCRCI's office. Ms. Fobert understood they were "from corporate", and there to help with inefficiencies. Rumours began about a restructuring and pending job losses.
- [16] At the end of the workday on May 24, 2019, Ms. Villanueva and Ms. McCord meet with Ms. Fobert to terminate her employment, informing her it was because new systems were being put in place that would automate the booking process for patients. Ms. Fobert described both of them as polite and respectful during the meeting. She also testified Ms. McCord offered her two weeks' severance. Uncertain of her entitlements, Ms. Fobert said she left the office to "get some air". By the time she returned, Ms. Villanueva and Ms. McCord were no longer there.
- [17] Acknowledging she was not happy about losing her job, Ms. Fobert also said she was not surprised or anxious.
- [18] After being terminated, Ms. Fobert did some research and learned that under the Employment Standards Act, R.S.B.C. 1996, c. 113 [Act], given the length of her employment, she was entitled to two weeks severance, but the Employment Agreement provided for 30 days pay in lieu of notice. Not having received her outstanding wages, Ms. Fobert calculated that she was owed 67 regular hours at \$17.50 and statutory holiday pay for Victoria Day. She drafted a letter to MCRCI to this effect dated May 31, 2019 but never sent it. Instead, she completed a self-help kit that she had found on the ESB website and provided to Ms. Villanueva on May 29, 2019, along with a copy of the Employment Agreement.
- [19] Ms. Villanueva advised Ms. Fobert she would be "paid out" two days later. But on May 31, 2019, Ms. Villanueva sent Ms. Fobert the following text message:

Hey Carly! It's Danilen. We're currently working with the accountant to get all the documents and pay sorted out correctly on our end. We're aiming for end of day today but might have to be Tuesday [sic] the latest! We're just picking up where Dawn left off. Apologies for the inconvenience. [Emoji] you will get paid."

[20] Ms. Fobert responded: "Hi Dani! Thanks for reaching out. Would I be able to have a letter confirming that it was a dismissal without cause and my ROE so I can collect my EI benefits?" Ms. Villanueva replied, "[w]e'll be working with our employment lawyer regarding the documents!" Later that day, Ms. Fobert and other terminated employees received this text message:

Hi,

Unfortunately since there is \$0 in the MCRCI account and we have to get approval from Global Health for each cheque, the legal team is reviewing each person's case to ensure everything is done properly given the circumstances. I know everyone has their different reasons as to why they need their pay today and we personally apologize for that as I wish this could be done.

At this stage, there is nothing I can have done by the end of today and cheque's/etransfers will have to be sent next week.

We are doing everything that we can to ensure that everyone gets what is fair and deserved but with the company being insolvent, it is not just your pay that is being delayed.

Sincerely,

Cassidy & Danilen

Corporate, MCRCI

[21] On June 3, 2019, Ms. Villeneuve sent Ms. Fobert another text message asking if she was "available to come in Thursday (June 6) to meet with the team to finalize the termination and get your pay".

[22] The next day Ms. Fobert spoke to her former manager Ms. Donald by phone. She too had lost her employment and informed Ms. Fobert that Anthony Jackson, the CEO and Chairman of Global Health had offered her and another former employee one weeks severance and their unpaid wages. Ms. Donald indicated the offer was being extended to Ms. Fobert. Given the meeting scheduled for June 6, 2019, Ms. Fobert told Ms. Donald she would sort things out herself.

[23] On June 5, 2019, Ms. Villanueva texted Ms. Fobert to advise her the meeting would be held at 400 - 837 West Hastings Street.

- [24] Ms. Fobert testified she was not familiar with the address and was not sure who she would be meeting with. Ms. Donald had mentioned during their phone call that Ms. Fobert would be meeting with Justin Liu. Ms. Fobert had never been introduced to Mr. Liu, but she had seen him go in and out of MCRCI's office and boardroom. She understood he played an important role with Global Health but nothing more specific.
- [25] Given the offer Ms. Donald had discussed, Ms. Fobert said she went to the meeting assuming one weeks severance and unpaid wages would be on the table. She arrived on the fourth floor of 827 West Hastings Street and saw Mr. Liu standing in the hall. There was no signage. Ms. Fobert described Mr. Liu taking her into the office area, where everything was in boxes, there was unpacking going on, and a bunch of glass offices. He then led her into a particular office.
- [26] Ms. Fobert recorded their meeting. As I have said, the recording is in evidence. The discussion between Ms. Fobert and Mr. Liu includes the following:

Mr. Liu states:

L: Sorry, we just moved in

He then says:

L: So basically, my understanding is we have the close-out contract for you or whatnot.

Ms. Fobert explains that when she was hired she signed the Employment Contract which provides for 30 days pay in lieu and under the Act would be entitled to two weeks. Mr. Liu responds with a serious allegation:

L: So for us -- and I'm serious, you guys misplaced a lot of money. So Sarah and, you know, your group or whatnot, spent about \$90,000 on meals in the last year.

Ms. Fobert denies being involved but Mr. Liu continues:

L: Yeah, not including hotel trips, not including all of these things. So everyone on the entire roster has signed off on it; no severance and whatnot.

So for us, like, I've raised probably over \$300 million, we put \$12 and a half million in MDRX and - [indiscernible] can you go to the boardroom? They're just in the boardroom - So for us, unfortunately, we've taken a hard-nosed approach of just saying we don't care anymore. Like, we're willing to go to court, willing to sue, and we have endless resources to do so.

Ms. Fobert attempts to say and then does say, she just wants to talk to him. Mr. Liu carries on:

L: Yeah, so it's -- it's kind of zero or nothing. So we said the same to Sarah, and Sarah signed off. All --and I don't even know everyone's names, but everyone signed off. But that's where we're at. You know, they've misplaced funds. We're debating going back and suing Terry. We're -- they were paying for another office on top of their office. So yeah, there's been a huge misuse of funds.

He also states:

L: Yeah. So everyone wants to sign off and just -- the days you work, everyone gets paid. But if everyone is looking for severance and wants more and more and more, I will fucking go the distance. I don't care.

Ms. Fobert attempts to discuss her own circumstances:

F: But, you know, what I'm trying to say is I got no notice. You know, I really tried hard at that job and I wanted to stay and I just got let go just with no notice or anything. And, you know, I am entitled to two weeks under the Employment Standards Act --.

Ms. Fobert adds that she was requesting a month and offers to meet somewhere in the middle.

After asking her how much she makes per month, Mr. Liu states:

L: an extra 500 bucks and then that's it.

The exchange continues:

F: So what about the severance?

L: That's it, period.

F: So not even two weeks?

L: Zero. Zero.

Mr. Liu returns to his allegations:

L: you guys have misplaced millions.

Ms. Fobert says more than once any misplacement of funds had nothing to do with her. Referring to the "500 bucks", Mr. Liu says:

L: I can offer you that, and that's literally coming out of my own pocket. If you want it, you can take it; if you don't -- like, I don't care if this costs me 100 grand.

Ms. Fobert again tries to discuss her "proper severance". Mr. Liu responds:

L: I actually feel bad, and that's why I'm offering you the 500, because anyone else, like, any other person I've had the conversation with, I just told to fuck off. So you can go through the employment board we're not worried about that. So you can - or you can take the 500 and sign the document and we can both go our own ways.

Their discussion continues:

F Do you have anything on paper? I just - I want to get some advice on this ..

L This is the one time you're meeting with me. If you don't want it, we'll send you the contract, go to the employment board, everything. But the 500 bucks is gone after this.

F Okay. Okay. Do you have anything in writing? You know there was some documents written up, right, for every single employee?

F Can I have a copy of that?

[L] Yeah, again, if you're not agreeing to terms then just go for it, right. Like we'll send you all the documents and everything, and you can go to Cassie and sign today. If you don't want to, then that's fine too. Like, I'm not going to spend my time meeting you again over \$500 or \$2000. The only reason I did this is because you're the only one that never signed off, and I was like let's do it. Like, even if this was \$20,000 I wouldn't meet you over it. this is kind of your last stop. If you got to sue, you got to sue. Go for it.

F Can I have a copy of - I would like a copy of it now.

[L] You know what? I think its best just to go to the employment board.

F With nothing?

[L] I'm good with that.

[27] Ms. Fobert then asks Mr. Liu for his contact information which he does not provide. She also asks more than once if she should contact "Danny" or "Cassidy", and whether to go through MCRCI or Global Health. He replies, "Just MCRCI", but he also tells her she does not need to contact Ms. Villanueva or Ms. McCord, adding, "I'm not [your] legal counsel. Go find the guy, 500 bucks an hour, to tell you".

Evidence of Ms. Villanueva

[28] Ms. Villanueva testified that she had to a very good knowledge of those involved with both defendants and the companies' structure.

[29] Ms. Fobert was the first permanent employee to be terminated after Ms. Villanueva and Ms. McCord decided to let some of the staff go. Initially she denied that severance was discussed at the termination meeting with Ms. Fobert on May 24, 2019 but, during cross-examination, she acknowledged she could not recall whether or not Ms. Fobert was offered two weeks severance. Ms. Villanueva testified that before the termination meeting "we" looked things up on a BC government website but were not sure of all the rules, other than knowing Ms. Fobert had to be paid for the hours she worked. It was a week or two later Ms. Villanueva said, that she became aware the Act obligated employers to make payments to an employee within 48 hours of termination. Ms. Villanueva recalled Ms. Fobert bringing the self-help kit or a document to the office on May 29, 2019 that set out what she was owed in unpaid wages and severance. Taken to her text message to Ms. Fobert on May 31, 2019 and the references to "pay getting sorted out" and "you will get paid", Ms. Villanueva equivocated about whether she meant unpaid wages and severance or just wages, testifying, "for sure her wages". Ms. Villanueva gave uncertain evidence about whether Ms. Fobert received any payments before the ESB settlement agreement was reached in October 2019, stating both she was pretty sure Ms. Fobert received her wages, she could not confirm and she could not remember.

- [30] Asked in cross-examination about her text message to Ms. Fobert on June 3, 2019, which proposed a meeting with "the team" on June 6, 2019, Ms. Villanueva agreed she expected to give Ms. Fobert some form of payment that day. Ms. Villanueva could not recall if she had a settlement cheque prepared for Ms. Fobert, or if she needed to speak to the accountant after the meeting. Ms. Villanueva said by "the team" she meant herself and Ms. McCord.
- [31] Ms. Villanueva testified to changing the location of the meeting to the new address for Global Health, where she worked sometimes, describing it as an office space shared by multiple companies, with multiple separate offices and a shared boardroom. The meeting with Ms. Fobert was scheduled for 11:30 a.m.
- [32] Ms. Villanueva's direct evidence about what happened instead was vague. Stating she usually worked in the very back of the office, Ms. Villanueva indicated that after the start time for the meeting had passed, she went to look for Ms. Fobert and discovered she was in the (glass) boardroom with Mr. Liu. When Ms. Villanueva checked again, Ms. Fobert was gone. Asked about Mr. Liu's role with the defendants, Ms. Villanueva denied that he was employed by, or a contractor of, either defendant. As far as she was aware, he was a shareholder. Without explaining how she knew this, she also denied that he had been given permission to represent the defendants or negotiate on their behalf. Ms. Villanueva gave no evidence about whether Ms. McCord was also in the office that day, whether Mr. Liu had his own office there, or whether she spoke to him at any point about his meeting with Ms. Fobert.
- [33] In cross-examination, Ms. Villanueva acknowledged she did not tell the receptionist about her meeting with Ms. Fobert despite working in the very back of the office. Asked why she did not interrupt Mr. Liu and Ms. Fobert, Ms. Villanueva responded that she knew better than that, and the two were already sitting down talking. When it was suggested to her that she must have known they were discussing issues related to Ms. Fobert's termination, Ms. Villanueva testified they could have been discussing anything, or having a social meeting, indicating Mr. Liu had visited the MCRCI office before. Although she had identified him as a shareholder, Ms. Villanueva denied knowing if Mr. Liu was a major shareholder with Global Health. Acknowledging she did understand the scheduled meeting was important to Ms. Fobert, Ms. Villanueva agreed she did not text or call Ms. Fobert afterwards. In fact, Ms. Villanueva never communicated with Ms. Fobert again.

After the Meeting

- [34] Ms. Fobert testified that during her meeting with Mr. Liu she was shocked by his serious allegations of misplaced funds but also confused given she had no spending authority. Once he began swearing, Ms. Fobert said she started to feel quite uncomfortable and nervous. His discussion of suing also made her feel very intimidated, small and threatened.
- [35] According to Ms. Fobert, after the meeting, she essentially had an "anxiety attack", specifying her heart felt as though it was beating out of her chest and her palms were sweating; she was on the verge of tears, hyper aware and overwhelmed with nervousness.

Never having had an experience like this before, not knowing what to do and without many resources, Ms. Fobert called Alpine Counselling that afternoon and arranged for a free half-hour consultation the next day. She described the counsellor she met with as "good", but without a job and not having been paid for some time, Ms. Fobert said she could not afford \$120 for additional appointments. When she told her boyfriend about the situation, he arranged to add her to his benefits plan which took some time to sort out.

- [36] On July 18, 2019, Ms. Fobert began attending counselling sessions with a registered clinical counsellor that were free through the plan. She attended a total of four sessions, the last one occurring on August 21, 2019.
- [37] Ms. Fobert recalled that for about two weeks after the meeting she had a lot of trouble sleeping, to the point where she felt as though she was not sleeping at all. She continued to have trouble sleeping about 10 times per month for a couple of months. In addition to feeling stressed out and not rested, Ms. Fobert said she also had trouble eating due to nausea from feeling anxious and nervous. She found she was only able to stomach soup for a couple of months. Ms. Fobert added that even now she has trouble sleeping and feelings of anxiety a few times per month. Ms. Fobert denied previous problems with anxiety or sleep.
- [38] She also testified that the counselling sessions were really helpful. She learned "really great" techniques that helped her to calm down, which she has continued to use. Ms. Fobert was cross-examined about the content of some of the very brief entries contained in the clinical records kept by her counsellor. For example, regarding the first session, the counsellor wrote: "CT says she has been suffering anxiety since May 24 when she was terminated from her job. Discussed how her anxiety manifests, triggers, what it is about the termination that causes it, what she can do about it". Ms. Fobert maintained that her problematic symptoms began after the June 6 meeting although she experienced general stress after being terminated on May 24, 2019.
- [39] On June 27, 2019, Ms. Fobert submitted identical complaints to the ESB against each defendant.
- [40] Ms. Fobert started a new job on July 31, 2019. Prior to that, she travelled to Spain for two weeks. During the trip, which had been planned and booked for over a year, she attended her boyfriend's sister's wedding.
- [41] Ms. Fobert's statement of claim was originally filed on August 1, 2019. Her amended pleading filed October 3, 2019, simply corrected the name of the defendant MCRCI, based, I accept on communication between counsel.
- [42] On October 11, 2019, Ms. Fobert signed a written settlement agreement with MCRCI regarding her complaint to the ESB. The document specifies an agreement was made on October 4, 2019, but the parties had until October 18, 2019 to deliver a copy bearing their signatures to the Director of Employment Standards ("Director"). Ms. Fobert testified to receiving the unsigned settlement agreement from the ESB and adding some handwritten

text that appears next to clause one on the first page, before she signed it and sent it back to the ESB. The handwritten text reads: "For clarity this Settlement Agreement does not settle any matters between the parties that are not under the Act, including the complainant's law suit [against] the employer that has been filed with the BC Supreme Court". Ms. Fobert said she received a reply email from ESB confirming they had received her signed copy but she could not recall whether she received a final version with all of the parties' signatures. Her copy of the settlement agreement includes a second page signed by her.

- [43] The defendants' copy of the settlement agreement does not include Ms. Fobert's handwritten text on page one but it does include the same second page, and separate signature pages from the Director dated October 4, 2019 at Prince George, and MCRCI's dated October 15, 2019.
- [44] The defendants filed their response to civil claim that same day.
- [45] The settlement agreement required MCRCI to pay Ms. Fobert \$2,821.00, which is the amount sought in her complaint for unpaid regular wages, statutory holiday pay and two weeks severance. Ms. Villanueva gave evidence that the payment required Global Health's approval although she was not sure which defendant actually made the payment.
- [46] The trial of this action was originally scheduled to begin on March 30, 2020. There was trial management conference ("TMC") on February 12, 2020. In their trial brief, the defendants listed Mr. Liu and Ms. McCord as witnesses. The trial brief specified that Mr. Liu was to address three of 11 issues in dispute related to Ms. Fobert's claims of aggravated and punitive damages. Among those issues were whether MCRCI breached its obligation to terminate an employment contract only in good faith, whether a breach caused a loss to her, and whether MCRCI's conduct was harsh and reprehensible.
- [47] An examination for discovery of Mr. Liu was scheduled for early March 2020. Ms. Fobert's counsel advises, and I accept, that the discovery was adjourned at the request of Mr. Liu. Around that same time, Ms. Fobert's counsel was notified the defendants' counsel had been dismissed. The trial was then postponed because of the court's reduced operations in response to the COVID-19 pandemic. A second TMC occurred in August 2020. The defendants' previous counsel appeared having been retained again at some point and relied on their original trial brief. In other words, Mr. Liu remained a witness for the defendants.
- [48] At the trial, the defendants took the position for the first time, that Mr. Liu was never authorized to represent them. When asked about the defendants' witness, Mr. Dhaliwal advised that Mr. Liu would not be testifying although he was available. According to Mr. Dhaliwal, Mr. Liu did not want to come to court, and was at home caring for a young child. Mr. Dhaliwal also stated that Ms. McCord was unavailable because she was ill with Covid-19 and Ms. Villanueva would testify instead.

Defendants' Pleadings and Inconsistent Evidence

[49] Before assessing the evidence, I will discuss the obvious issue that arises from the stark contradiction between the defendants' pleadings and Ms. Villanueva's evidence regarding Mr. Liu's role during the meeting with Ms. Fobert on June 6, 2019.

[50] As it relates to Mr. Liu, the defendants' response to civil claim includes:

Termination

8. On or around May 24, 2019, MCRCI terminated the Plaintiff's employment as part of a company-wide restructuring.
9. On June 5, 2019, the Plaintiff met with Justin Liu, a representative of MCRCI.
10. At the June 5 meeting, Mr. Liu offered in good faith a global settlement and release from any and all claims, controversies, disputes or causes of action between the parties, including in relation to the conduct addressed above.

[51] As I have indicated, Mr. Liu was listed as one of two witnesses for the defendants in their trial brief, which remained unchanged at the second TMC in August 2020; and he was scheduled to be discovered by Ms. Fobert's counsel, presumably as their representative, in early March 2020. Mr. Dhaliwal intimated more than once that previous counsel were fired because the defendants were unhappy with their performance. He also suggested Ms. Fobert's counsel knew about the defendants' position that Mr. Liu was not authorized to represent them, before the trial, although there was nothing adduced that would suggest the defendants ever communicated this view or an intention to resile from their pleadings.

[52] When asked to address the issue during closing submissions, Mr. Dhaliwal suggested the evidence not the pleadings should determine the court's determination of Mr. Liu's role and the extent of his authority, pointing out that amendments can be made even after trial to ensure that the pleadings align with the evidence.

[53] Ms. Fobert argues the issue is best analyzed based on the legal principles that govern the withdrawal of an admission, relying on *Miller v. Norris*, 2013 BCSC 552 and Rule 7-7(5) of the Supreme Court Civil Rules.

[54] Rule 7-7(5) requires the party seeking to withdraw an admission in a pleading to obtain leave from the court, absent consent. The test to be applied, reiterated in *Miller* asks: "Whether there is a triable issue which, in the interests of justice, should be determined on the merits and not disposed of by an admission of fact" (para. 34). In making the determination, a court examines the relevant factors surrounding the admission identified in *Hamilton v. Ahmed* (1999), 28 C.P.C. (4th) 139 (B.C.S.C.), and restated in *Miller* at para. 34:

- a. the admission was made inadvertently, hastily or without knowledge of the facts;
- b. the fact admitted was not within the knowledge of the party making the admission;

- c. the fact admitted is not true;
- d. the fact is one of mixed law and fact;
- e. the withdrawal of the admission would not prejudice a party; and
- f. there has been no delay in applying to withdraw the admission.

[55] Were I to apply the factors, they certainly would not weigh in favour of permitting the defendants to withdraw the admission. My assessment of Ms. Villanueva's evidence along with the absence of evidence from Mr. Liu, however, makes it unnecessary to consider them.

Assessing the Evidence

[56] I turn now to consider the disputed evidence of Ms. Fobert and Ms. Villanueva.

[57] The proper approach to assessing the truthfulness of any interested witness's testimony was articulated many years ago in *Faryna v. Chorny*, [1952] 2 D.L.R. 354 (B.C.C.A.) at 357:

The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions.

[58] A number of the factors, many of them identified in *Bradshaw v. Stenner*, 2010 BCSC 1398, at paras. 186-87, often play an important role in assessing whether the evidence of a witness is not only truthful, but accurate:

- the capacity and opportunity of the witness to observe the events at issue;
- their ability to remember those events;
- the ability of the witness to resist being influenced by their interest in recalling events; or whether the witness has a motive to misrepresent the events;
- the internal consistency of the witness's evidence, meaning whether their testimony changed between direct and cross-examination, or whether there are inconsistencies between prior statements, discovery evidence and his or her evidence at trial;
- the external consistency of the witness's evidence, meaning whether the witness's evidence harmonizes with or is contradicted by other evidence, particularly independent or undisputed evidence;
- whether their evidence seems unreasonable, unlikely, or implausible, bearing in mind the probabilities affecting the case; and

- the witness's demeanour, meaning the way they presented while testifying.
- [59] The defendants attack Ms. Fobert's credibility based in part on the handwritten text that appears next to the first term on her version of the settlement agreement. Her version also included only her signature page and not the signature pages from MCRCI and the ESB Director attached to the defendants' version. They argue her version shows she acted in bad faith by attempting to amend the settlement agreement before signing it on October 11, 2019. They also question the truthfulness of her evidence that she could not recall if she later received a fully completed agreement. In addition, the defendants challenge Ms. Fobert's account of the psychological and emotional impact of her meeting with Mr. Liu.
- [60] Applying the Faryna approach and the relevant Bradshaw factors, however I am satisfied Ms. Fobert testified honestly and accurately. Throughout her evidence she was entirely straightforward, respectful and responsive. Her evidence was internally consistent and reasonable bearing in mind the probabilities affecting the case. Ms. Fobert also readily acknowledged circumstances that did not align with her interest.
- [61] In my view, it is not reasonable to infer she attempted to change the agreement without the defendants' knowledge to gain an advantage. The identical text in both versions sets out that Ms. Fobert and MCRCI reached an agreement on October 4, 2019. In other words, the written agreement, apparently drafted by the Director of the ESB, documents an oral agreement. Absent MCRCI's consent, Ms. Fobert simply could not change the terms. In any event, as I will explain in a moment, Ms. Fobert's handwritten note would not effect the scope of the settlement agreement.
- [62] Further, the written agreement was executed in counterparts and I infer from the appearance of the defendants' versions, electronically. Ms. Fobert signature page dated October 11, 2019 is the second page in both versions. MCRCI's version includes its signature page dated October 15, 2019 as the third page, and the Director's signature page dated October 4, 2019 as the fourth page.
- [63] There is no evidence about whether the Director sent the same unexecuted version of the written agreement to both parties at the same time or what the Director sent to the defendants after receiving an executed version from Ms. Fobert. In other words, there is also no evidence about whether the Director forwarded Ms. Fobert's version with the handwritten note and or an unaltered first page with her signature page, along with the other signature pages. Ms. Villanueva's testimony is of no assistance here, stating as she did their version was provided to her by Ms. McCord.
- [64] While I would expect the ESB to send completed versions to both parties, I also expect Ms. Fobert's primary concern was receiving payment of the settlement, which she did.
- [65] I am not able to rule out the defendants putting together the unaltered first page with all of the signature pages, despite receive Ms. Fobert's version with the handwritten note on the first page.

[66] My view of this issue is informed to some extent by serious concerns about Ms. Villanueva's credibility, because she was the defendants only witness and because of the defendants change of position regarding Mr. Liu.

[67] To be frank, I found her account of the June 6 meeting unbelievable and implausible. Various features of it, examined alongside the evidence as a whole lead to this conclusion, bearing in mind, but not limited to the following:

- The notion Ms. Fobert somehow met with Mr. Liu by mistake or was accidentally intercepted by him, even though Ms. Villanueva changed the meeting to that location;
- Ms. Fobert's evidence that her previous manager Ms. Donald, who was also negotiating with the defendants about her own termination, told Ms. Fobert she might be meeting with Mr. Liu (which is admissible for the fact it was said and not its truth);
- Ms. Fobert's uncontradicted evidence that Mr. Liu was in the hall outside the office when she arrived and ushered her into a specific office;
- It is clear from the recording that Mr. Liu intended from the outset of the meeting to discuss and negotiate her termination issues;
- Ms. Villanueva's evidence that Ms. Fobert was scheduled to meet with her and Ms. McCord, and yet there was no evidence that Ms. McCord was in the office that day;
- Related to this, Ms. Villanueva's evidence she did not notify the receptionist about her scheduled meeting with Ms. Fobert, although Ms. Villanueva described working in the back of the office;
- Ms. Villanueva's claim she had no idea why Ms. Fobert and Mr. Liu were meeting or what they might have been talking about because he had no role with the defendants other than being a shareholder, and no authority to discuss issues related to Ms. Fobert's termination, despite the nature of Mr. Liu's discussion with Ms. Fobert, which focused entirely on issues related to her termination and reflected Mr. Liu's apparent knowledge of and involvement with other employees' termination issues;
- Similarly, Ms. Villanueva choosing not to interrupt the meeting because she knew better, despite her denial Mr. Liu was a person of significant influence with Global Health and her scheduled appointment with Ms. Fobert;
- Ms. Villanueva apparently missing Ms. Fobert's departure from the office, although any number of things would have prevented this from occurring such as communicating with the receptionist, or simply waiting outside the meeting room;
- Ms. Villanueva never communicating with Ms. Fobert after the meeting, even though she knew Ms. Fobert was entitled to her outstanding pay and statutory severance and had been pursuing those entitlements, and Ms. Villanueva apparently expected to resolve those issues at the meeting;

· The obvious alignment between Mr. Liu's discussion with Ms. Fobert during the meeting and the defendants' decision to continue not paying Ms. Fobert her outstanding wages and statutory severance, until the ESB settlement was reached after this lawsuit began.

[68] Ms. Villanueva's false evidence taints her credibility generally. But I have some additional concerns. When she appeared to understand the implications, Ms. Villanueva was reluctant to acknowledge facts that did not align with the defendants' interest. There was also a rehearsed quality to important aspects of her direct testimony.

[69] I conclude therefore that it is necessary to approach Ms. Villanueva's evidence very cautiously. Unless it is supported by or consistent with other evidence I do accept, I cannot accept it.

[70] Given my assessment of her credibility, I firmly reject her evidence that Mr. Liu was not authorized to meet with Ms. Fobert as the defendants' representative. Mr. Liu's failure to testify only reinforces this view. In all of the circumstances, I am entirely satisfied the June 6 meeting proceeded as planned. Regardless of his formal role with either defendant, I find Mr. Liu met with Ms. Fobert to resolve issues related to her termination, as the defendants' authorized representative.

Was Ms. Fobert Employed by both Defendants?

[71] Ms. Fobert asserts that by the time she was terminated, both MCRCI and Global Health were her employers, relying on the common employer doctrine as discussed in *Shoolestani v. Ichikawa*, 2016 BCSC 347:

[25] The common employer doctrine was established to avoid injustice in a wrongful dismissal action involving complex corporate structures. A representative scenario might be this: a wrongfully terminated employee pursues damages against their employer. However, that employer lacks assets and the employee seeks to establish more than one corporation as their employer for the purposes of recovery. Courts have recognized that "for the purposes of determining the contractual and fiduciary obligations which are owed by employers and employees, an individual can have more than one employer": *Stacey Ball*, Canadian Employment Law., (Aurora: Canada Law Book) (loose-leaf updated 2013) at 4:10. The leading BC case on the common employer concept or doctrine is *Sinclair v. Dover Engineering Services* (1987), 11 B.C.L.R. (2d) 176, affirmed [1988] B.C.J. No. 265 Court of Appeal. There the plaintiff held himself out to be an employee of Dover Engineering Services, but was at all times paid by Cyril Management. Mr. Justice Wood held that Dover and Cyril should be considered jointly as the plaintiff's employers. Where a sufficient degree of relationship between the corporate entities exists, "there is no reason in law or in equity why they ought not all to be regarded as one for the purpose of determining liability for obligations owed to those employees " (para. 18).

[26] What constitutes a sufficient connection to establish a common employer it appears will depend on the details of each relationship. The essential characteristic appears to be an element of common control. A court may consider "such factors as individual shareholdings, corporate shareholdings and interlocking directorships" (para. 18). In *Downtown Eatery (1993) Ltd. v. Ontario*, [2001] O.J. No. 1879 (C.A.) [*Downtown Eatery*], the court held that the question is "where effective control over the employee resides" (para. 33). Examples of where a common employer relationship have been established include: where there was a "paymaster" company closely connected with another corporate entity ; "a highly integrated or seamless group of companies" ; and where there were common shareholders and directors between the corporations. In sum, and in very general terms, where there is a sufficient degree of proximity between business entities, the common employer doctrine may operate to ensure that corporate structures do not circumvent legitimate employee rights.

[Emphasis added.]

[72] Ms. Fobert argues the defendants were a "highly integrated or seamless group of companies" and there was a more than sufficient degree of relationship between MCRCI and Global Health to warrant a finding that they were her common employer. She points to the uncontested evidence that MCRCI was a wholly owned subsidiary of Global Health, and a number of undisputed documents including company summary documents for both MCRCI and Global Health, documents from MCRCI's website, and text messages from Ms. Villanueva and Ms. McCord to Ms. Fobert related to payment following the termination. Ms. Fobert also points to Mr. Dhaliwal's role in representing both companies and his frequent references during the trial to the company in the singular. When I asked him to clarify which company he was referring to, he indicated they were essentially the same.

[73] Ms. Fobert notes specifically that documents from MCRCI's website refer to MCRCI as "now Global Health Clinics Ltd.", Mr. Dhaliwal as the CEO, Ms. McCord as the Director of Operations, and to Ms. Villanueva as the Corporate Manager, none of which the defendants disputed. Other documents show the defendants have continued to have many common directors and officers. Ms. Fobert identified Mr. Roycroft as the founder and CEO of MCRCI until in or about April 2019. A company summary shows Mr. Roycroft as the CEO of Global Health and Mr. Jackson as an officer and chair as of March 18, 2019. That same documents shows Mr. Dhaliwal, Mr. Jackson, Ms. McCord and others as Directors of Global Health. Further, Ms. Villanueva gave much the same evidence, indicating Mr. Dhaliwal is the CEO of Global Health and Mr. Jackson is the CFO and Chairman. A company summary for MCRCI with a currency date of July 5, 2019 lists Mr. Jackson as the only Director and Terry Roycroft as the only officer, president and secretary, as of January 29, 2018. A more recent company summary with a currency date of February 28, 2020 shows Mr. Dhaliwal as the sole Director of MCRCI. No officer information is included.

- [74] Ms. Fobert further argues that although she was hired by MCRCI, Global Health played the role of the "paymaster company" during her termination and attempts to obtain her outstanding wages and severance. Again there is the text message to Ms. Fobert and other dismissed employees, in which Ms. McCord and Ms. Villanueva wrote MCRCI had \$0 in its account and they had to "get approval from and signature from Global Health on each cheque". Ms. Fobert's final meeting was with Mr. Liu, identified by the defendants as a shareholder in Global Health. Arranged by Ms. Villanueva, that meeting was held at Global Health's office. She testified to working there sometimes. I have already found that Mr. Liu acted as the defendants' representative when he met with Ms. Fobert for the purpose of discussing and settling her termination. Ms. Villanueva gave evidence that the payment of Ms. Fobert's outstanding wages and statutory severance prior to the settlement agreement would have required Global Health's approval as did the amount under the settlement agreement. Ms. Villanueva was not sure which defendant paid the funds, meaning it could have been Global Health.
- [75] Considering the relevant factors, there is ample evidence to establish a high degree of proximity between the defendants or a relationship with an element of common control. I find the defendants are common employers for the purpose of determining liability for damages owed to Ms. Fobert in this action.

Period of Reasonable Notice

- [76] Arguing the 30-day notice provision in the Employment Agreement is void and unenforceable, Ms. Fobert suggests four or five months is a reasonable notice period, less the portion of the ESB settlement amount for two weeks notice.
- [77] In addition to disputing the amount of notice she proposes, and arguing she failed to mitigate, the defendants take the position that all of Ms. Fobert's claims were settled by the settlement agreement reached in response to her ESB complaints, including those in this action. I will deal with that issue first.

Scope of the Settlement Agreement

- [78] The defendants' written submissions on this point include:

Pursuant to Section 1 of the agreement, any and all of the Plaintiff's claims arising from any alleged breach of the Employment Standards Act on the part of the defendant have been settled upon execution of this agreement. As such, the plaintiff's claim for 10 weeks notice has also been settled pursuant to Section 1 of the agreement.

- [79] Pointing also to term one, Ms. Fobert submits the settlement agreement is manifestly limited to her complaint under the Act.
- [80] Having considered the language of the settlement agreement as a whole and in context, I entirely agree. Firstly, fact B reads: "[t]he Complainant and the Employer have resolved the complaint and wish to enter into a Settlement Agreement pursuant to s. 78 of the Act". Terms

one and two expressly state that the settlement agreement resolves and is a full and final settlement of Ms. Fobert's complaint against MCRCI under the Act. Term one further specifies that upon full performance of all the terms, the "Employment Standards complaint" will be closed. There is no reference to this action or her claims in this action, although her statement of claim had been filed and served well before the settlement agreement was both entered into and executed. I am reinforced in my view by s. 78 of the Act, which empowers the Director to assist in settling a complaint or matter investigated under s. 76 but nothing more.

Contractual Notice Term

- [81] Ms. Fobert relies on *Nowak v. Biocomposites Inc.*, 2018 BCSC 785 and *Shore v. Ladner Downs* (1998), 52 B.C.L.R. (3d) 336 (B.C.C.A.) to establish that the notice term of 30 days in the Employment Agreement is void and unenforceable because it is inconsistent with the minimum notice requirements in s. 63(3)(a) of the Act.
- [82] In *Shore*, the plaintiff was dismissed after ten months employment and the employment contract provided for 30 days notice of termination. The Court of Appeal held that a termination provision is void if it would have become contrary to the statutory minimum at a future date, even if compliant at the time of termination. In *Nowak*, where the plaintiff was terminated after being employed for 13 months, Justice Smith applied *Shore*. Leaving aside inconsistent references in the agreement to employment at will and a two week notice period, he concluded a two week notice period would have been void from the outset because it would have violated the minimum notice provisions after three years of employment.
- [83] The 30-day notice term in the Employment Agreement here and Ms. Fobert's length of employment makes this case indistinguishable from *Shore*. I conclude therefore, the term is void and unenforceable and Ms. Fobert's notice period entitlement must be determined by the common law.

Common Law Notice

- [84] It is well established that absent an express term, contracts of employment are deemed to include an entitlement to reasonable notice of termination. If the employer does not provide reasonable notice, it is required to pay the employee a sum in lieu of notice. Absent exceptional circumstances, eighteen to 24 months is considered the rough upper limit: *Liboiron v. IBM Canada Ltd.*, 2015 BCSC 1523 at paras. 28 and 30.
- [85] Reasonable notice is determined with reference to a range of factors including the character of the employment, the employee's length of service, the age of the employee, and the availability of similar employment having regard to the experience, training and qualifications of the employee: *Bardal v. Globe & Mail Ltd.* (1960), 24 D.L.R. (2d) 140 (Ont. High Ct.) at 145.

- [86] Ms. Fobert provided limited evidence relevant to these factors. After graduating from high school, she completed unspecified college courses for a couple of years. Ms. Fobert did not testify about her work experience before MCRCI. Without indicating whether she had prior technical training or experience, she said her job as an intake specialist had many technical aspects to it but did not identify them. Although she trained newer intake workers, she had no management responsibilities. Further, her evidence indicates there was no shortage of similar or comparable employment. Ms. Fobert began applying for new jobs on May 24, 2019, the day she was terminated. She began full-time employment on July 31, 2019, after applying for ten to 12 positions, which resulted in three interviews, two with one company and the other with her current employer.
- [87] A few hours before her termination meeting, Ms. Fobert was notified by a recruitment consultant of a "temp to perm" position as an intake assistant with North York Rehabilitation Centre ("North York") that was starting "fairly quickly" and paid \$17 per hour. Ms. Fobert did not apply for the position, testifying she did not see it as a good fit based on the job description. That same day however, she did apply for an administrative assistant position with the BC Public Service. A short time later, on May 30, 2019 she applied to work in customer service, which led to two interviews, but no job offer. Ms. Fobert applied for another customer service position on June 2, 2019. In cross-examination, she acknowledged her trip to Spain from June 29 to July 14, 2019 was a barrier to her job search, and she had received no offers before then. She also gave evidence however that she would have started a job that still allowed for the trip. Ms. Fobert explained the trip had been planned and booked for over a year. Her boyfriend's sister was getting married there. She described the wedding as a very important life event. Ms. Fobert wanted and was expected to be there. A few months before she was terminated by the defendants, she had arranged for the time off.
- [88] Ms. Fobert relies on several decisions as analogous and supportive of a four or five month notice period: *Kim v. International Triathlon Union*, 2014 BCSC 2151 (five months notice); *Saalfeld v. Absolute Software Corporation*, 2009 BCCA 18 (five months notice); *Cassady v. Wyeth-Ayerst Canada Inc.* (1998), 163 D.L.R. (4th) 1 (B.C.C.A.) (eight months notice); and the trial decision in *Shore* (five months notice).
- [89] I note the employees were all somewhat older than Ms. Fobert, and Kim involved a management position that required much more training and experience, as did Saalfeld, but the lengths of service were comparable or less. I also note both Shore and Cassady were decided more than 20 years ago.
- [90] Applying the Bardal factors, Ms. Fobert was only 25 years old when she was terminated, after being employed for about 18 months, a relatively short period of time. I am not able to conclude her position as an intake specialist required specialized knowledge, training or education. Without diminishing the importance of the job, it was essentially a front line position. Again, Ms. Fobert found positions to apply for immediately and applied for as many as twelve positions before securing a new job quite quickly. In other words, comparable employment was readily available. Based on these considerations, I am satisfied

a notice period of eight weeks is reasonable.

Mitigation

- [91] The defendants take the position that Ms. Fobert failed to mitigate. A person who is wrongfully dismissed has a duty to take reasonable steps to obtain equivalent employment. The duty is not an obligation to the former employer. Rather it is a "duty to take such steps as a reasonable person in the dismissed employee's position would take in his own interests - to maintain his income and his position in his industry, trade or profession" (Forshaw v. Aluminex Extrusions Ltd. (1989), 39 B.C.L.R. (2d) 140 at 144).
- [92] The law places a high burden on the defendants to prove Ms. Fobert failed to mitigate. They are required to establish not only that she failed to take reasonable steps, but also, had she taken those steps she likely would have found equivalent employment.
- [93] Misstating the evidence, the defendants assert that Ms. Fobert declined to apply for what was a similar job with similar wages at North York because of her trip to Spain, and she did not intend to work until after she returned. I accept the reason Ms. Fobert did not apply for the North York job was unrelated to her trip. It is clear she applied for a number of other positions around that same time and before leaving for Spain. More importantly, whether or not it would have been reasonable for her to decline a job offer that would not have prevented her from taking the trip, she did not receive any offers. Although she acknowledged the trip interfered with her job search, there is no evidence she missed out on reasonable opportunities while she was away for two weeks. Based on the evidence, I am unable to find that Ms. Fobert's efforts to find employment were insufficient. The defendants have not proven she failed to mitigate.
- [94] Consequently, Ms. Fobert is entitled to damages based on a notice period of eight weeks consisting of her salary for that period, less the portion of the ESB settlement amount for two weeks wages. I trust the parties can agree on that amount.

Aggravated Damages

- [95] Ms. Fobert seeks aggravated damages of \$35,000.
- [96] In the employment law context, aggravated damages are awarded to compensate a plaintiff for damage caused by the unfair or bad faith conduct of the employer during the course of dismissal.
- [97] In *Bailey v. Service Corporation International (Canada) ULC*, 2018 BCSC 235, Justice Griffin as she then was summarized the applicable legal principles, referring to *Lau v. Royal Bank of Canada*, 2017 BCCA 253; *Wallace v. United Grain Growers Ltd.*, [1997] 3 S.C.R. 701; and *Honda Canada Inc. v. Keays*, 2008 SCC 39:
1. A person's work is a significant aspect of a person's life, key to self-worth.

2. Employers have an obligation of good faith and fair dealing in the manner of dismissal of an employee. This includes refraining from conduct that is untruthful, misleading or unduly insensitive (Wallace at paras. 95 and 98).
 3. When the employment relationship ends, the employee is vulnerable and some upset can be expected. Normal upset that can be expected is not compensable. However, aggravated damages resulting from the manner of dismissal are available if they result from conduct that is unfair or in bad faith (Honda at paras. 56, 57).
 4. Examples of facts which can give rise to aggravated damages include but are not limited to conduct that is untruthful, misleading or unduly insensitive. Other conduct in which aggravated damages may be awarded include maintaining wrongful allegations of dishonest conduct; misrepresenting the reason for the termination; and firing an employee who is on disability leave (Lau at para. 31).
 5. Aggravated damages are compensatory based on foreseeable injury for breach of the duty of good faith and fairness. Because of this there must be some evidence that the manner of dismissal (as opposed to the mere fact of dismissal) is the cause of damaging effects on the dismissed employee, whether mental distress or intangible effects such as damage to reputation (Lau at paras. 54, 59-60, 62).
 6. Medical evidence is not necessary to award aggravated damages based on mental distress caused by the manner of dismissal but there must be some evidence that transcends ordinary upset or distress (Lau at para. 49). This can include evidence from the employee or from family members or friends.
- [98] In determining whether Ms. Fobert has established a claim to aggravated damages there are two primary inquiries. The first is whether she has established that the defendants' conduct in the course of dismissal was unfair or in bad faith. If so, the second inquiry is whether Ms. Fobert has established that she suffered mental distress as a result of that conduct, beyond the normal upset expected from the dismissal itself.
- [99] I note the employer's dealings with the employee after the dismissal may be considered as part of the manner of dismissal: see *Acumen Law Corporation v. Ojanen*, 2019 BCSC 1352 at para. 126.
- [100] I have no difficulty in concluding aspects of the defendants' conduct during the dismissal process, after the termination meeting on May 24, 2019 significantly breached an employer's obligation of good faith and fair dealing. That conduct included the ongoing withholding of Ms. Fobert's unpaid wages and statutory severance, both modest amounts, well after the defendants were aware of their statutory obligations, and most significantly Mr. Liu's conduct during the June 6 meeting.

- [101] To be clear, I view Mr. Liu's conduct during the June 6 meeting as appalling, harsh and reprehensible. He made false and serious allegations of financial impropriety, used aggressive and intimidating language and repeatedly engaged in a range of bullying tactics. Further, although he did not yell, his tone and manner of communicating were intimidating.
- [102] To be specific, Mr. Liu alleged more than once that Ms. Fobert was part of a group of employees who had engaged in the misuse of enormous amounts of money although she never had any spending authority. In an obvious attempt to intimidate, he told her that the rest of the group had signed off without any severance. He made it clear the defendants were willing to sue and withstand being sued, emphasizing their financial advantage and his own. After indicating she would be offered nothing, he offered \$500 severance, an amount well below her statutory entitlement. Mr. Liu then pressured Ms. Fobert into accepting the offer immediately, telling her it would be revoked after the meeting and refusing to put it in writing. He also commented that meeting over such a minor financial matter was not worth his time, which was disparaging if not contemptuous. The same is true of his response to a perfectly reasonable question about contact information, "I'm not your legal counsel. Go find the guy, 500 bucks an hour, to tell you".
- [103] The question becomes whether Ms. Fobert has established some or all of this conduct resulted in mental distress beyond the normal distress and hurt feelings associated with termination. I am satisfied the answer is yes.
- [104] Ms. Fobert was careful to distinguish how she felt after the termination meeting from how she felt after the June 6 meeting with Mr. Liu. Her evidence is consistent with what she communicated and her conduct before and after the meeting. Although prior consistent statements are generally inadmissible for their truth, Ms. Fobert's text message on the evening of May 24, "I'm doing okay! I had a feeling it was coming", given the defendants' position, falls within the recent fabrication exception. By May 24, 2019, Ms. Fobert was already searching for new employment. She researched her entitlements and continued to engage with the defendants in pursuit of her unpaid wages and severance. Further, there is no reliable evidence that suggests she felt anything more than disappointed before her meeting with Mr. Liu. I place very little if any weight on the clinical records of her therapist in this regard, based on the considerations articulated in *Edmondson v. Payer*, 2011 BCSC 118.
- [105] I accept that after meeting with Mr. Liu, Ms. Fobert suddenly experienced intense feelings of anxiety and physical symptoms that she understood to be an anxiety attack. I also accept that Ms. Fobert's financial vulnerability likely worsened the impact of his conduct. Her salary with the defendants was very modest. Dismissed on May 24, by June 6 she still had not received her outstanding wages. Consistent with the reaction she described, within hours of the meeting with Mr. Liu (and not before), Ms. Fobert arranged to meet with a counsellor for a free consultation the following day.

- [106] I also accept Ms. Fobert's evidence about the nature and extent of her distress over time. Her sleep was seriously disrupted for the first couple of weeks, she continued to experience significant feelings of anxiety and nervousness as well as a loss of appetite for about two months. I reject the defendants' suggestion that her symptoms could not have been significant because she chose not to seek immediate medical care. Ms. Fobert never suggested she was unable to function or her condition was extreme.
- [107] Consistent with her symptoms and her financial circumstances she began counselling sessions at the end of June 2019, once she was added to her boyfriend's extended health plan. She attended four sessions during the summer of 2019, which she found very helpful. I accept she improved quickly and was feeling much better by the end of July 2019 although occasionally she continues to have trouble sleeping and experiences some anxiety.
- [108] Ms. Fobert relies on a number of cases including Bailey, where the plaintiff was awarded \$25,000 in aggravated damages. Dismissed while on medical leave, the employer in that case alleged cause, arguing the plaintiff had abandoned his job. In describing his mental distress, Justice Griffin found he was hurt, shocked and upset and also "became extremely depressed in mood". The plaintiff was however already "severely mentally stressed" before being dismissed. Consequently, the causes were difficult to parse out, which impacted the award.
- [109] Bailey considered *Ram v. The Michael Lacombe Group Inc.*, 2017 BCSC 212, where Justice Warren also awarded \$25,000 in aggravated damages. There, the owner had fired the plaintiff, a long-term employee of good service, from his Burger King franchise after she was accused of stealing French fries and a drink in front of other employees. The general manager had given her permission to take food home with her, in breach of the restaurant's policy. Justice Warren found the manner of dismissal caused the plaintiff to suffer shame, embarrassment, anxiety and distress but the evidence did not permit her to make specific findings about the intensity or duration of her symptoms.
- [110] In *Acumen*, the wrongfully dismissed employee received aggravated damages of \$50,000, a substantial award. An articulated student when she was terminated, the law firm engaged in a number of acts of unfair and unduly insensitive conduct toward the plaintiff, including a deliberate public firing and a termination letter and notice of civil claim that accused her of deceit and dishonesty based on unfounded suspicions which were pursued to trial, all of which rendered her unemployable in the legal profession. The plaintiff suffered serious and prolonged emotional distress and terrible personal consequences. For example, she was unsuccessful in completing PLTC, a pre-requisite to being called to the bar, was mostly unemployed and for a time was homeless.
- [111] In contrast to *Ram* and *Bailey*, the evidence in this case has allowed me to make findings about the intensity and duration of Ms. Fobert's mental distress. The defendants' unfair and bad faith conduct here did not result in the extreme consequences experienced by the plaintiff in *Acumen*. Further, although Ms. Fobert's mental distress was quite intense

initially, with the help of counselling and no doubt her own resilience, she improved and recovered quickly. Bearing in mind their compensatory purpose, I award her \$25,000 in aggravated damages.

Punitive Damages

- [112] Ms. Fobert claims the defendants' conduct in the course of dismissal also justifies punitive damages. She seeks an award of \$100,000.
- [113] Not aimed at compensation, punitive damages are only awarded in exceptional circumstances. They are restricted to circumstances where the employer's conduct is deserving of punishment because it is harsh, vindictive, reprehensible and malicious and compensatory damages, including aggravated damages for mental distress, are not enough to achieve the objective of deterrence: see *Honda* at para. 68 and *Kelly v. Norsemont Mining Inc.*, 2013 BCSC 147 at paras. 113 and 116. Denunciation and retribution are also objectives.
- [114] The impugned conduct must be an actionable wrong, but this requirement may be satisfied where the employer fails to meet their obligation of good faith and fair dealing in the manner of dismissal: see *Kelly* at para. 114 citing *Nishina v. Azuma Foods (Canada) Co., Ltd.*, 2010 BCSC 502 at paras. 260-64.
- [115] In *Honda*, the Supreme Court of Canada described the test for punitive damages this way:
- [68] this Court has stated that punitive damages should "receive the most careful consideration and the discretion to award them should be most cautiously exercised" (*Vorvis*, at pp. 1104-5). Courts should only resort to punitive damages in exceptional cases (*Whiten*, at para. 69). The independent actionable wrong requirement is but one of many factors that merit careful consideration by the courts in allocating punitive damages. Another important thing to be considered is that conduct meriting punitive damages awards must be "harsh, vindictive, reprehensible and malicious", as well as "extreme in its nature and such that by any reasonable standard it is deserving of full condemnation and punishment" (*Vorvis*, at p. 1108).
- [116] I have already determined that the defendants' conduct, based on Mr. Liu's conduct during the June 6 meeting, and the defendants' ongoing refusal to pay Ms. Fobert's unpaid wages and statutory severance, significantly breached its obligation of fair dealing and good faith during the course of dismissal.
- [117] Ms. Fobert also relies on the defendants' conduct in the litigation, namely making allegations of serious misconduct in the response to civil claim, despite admitting she was dismissed without cause. The pleaded allegations include Ms. Fobert breaching a non-competition term in the Employment Agreement by accepting employment with an MCRCI competitor "immediately subsequent to her termination"; and disparaging the defendants and their Directors to four MCRCI employees around the time of termination, which caused lost business and the resignation of employees. None of the allegations were even raised at the trial.

- [118] Ms. Fobert points out that while reprehensible litigation conduct is generally addressed by an award of special costs, in wrongful dismissal cases it can be taken into account in awarding punitive damages, where the bad faith conduct begins at termination and continues through the legal proceedings: Kelly at paras. 127-128. In other words it can be considered where it forms part of a pattern of conduct.
- [119] In addition to making and sustaining of serious allegations against Ms. Fobert without leading any evidence about them at the trial and denying Mr. Liu was authorized to meet with Ms. Fobert, the defendants both minimized and misconstrued his conduct in their submissions.
- [120] I have already found that Mr. Liu's conduct during the June 6 meeting was appalling, harsh and reprehensible. The same is true of the defendants' refusal to pay Ms. Fobert her outstanding wages and statutory severance for five months absent any justification or explanation. I am also satisfied the defendants' litigation conduct in making and sustaining unfounded serious allegations continued a pattern of egregious conduct, which reflected an ongoing effort to intimidate.
- [121] As well as being harsh and reprehensible, all of this conduct is appropriately described as vindictive and malicious.
- [122] Recognizing the need for caution, I am nonetheless of the view that the defendants' conduct calls for punishment.
- [123] The principle of proportionality governs the assessment of the amount of punitive damages. It has six dimensions in the context of a wrongful dismissal: see *Whiten v. Pilot Insurance Co.*, 2002 SCC 18 at para. 74. As summarized in Kelly at para. 131, the award of punitive damages must be:
- (i) Proportionate to the blameworthiness of the defendant's conduct -- the more reprehensible the conduct, the higher the rational limits of the potential award. Factors include outrageous conduct for a lengthy period of time without any rational justification, the defendant's awareness of the hardship it knew it was inflicting, whether the misconduct was planned and deliberate, the intent and motive of the defendant, whether the defendant concealed or attempted to cover up its misconduct, whether the defendant profited from its misconduct, and whether the interest violated by the misconduct was known to be deeply personal to the plaintiff.
 - (ii) Proportionate to the degree of vulnerability of the plaintiff -- the financial or other vulnerability of the plaintiff, and the consequent abuse of power by a defendant, is highly relevant where there is a power imbalance.
 - (iii) Proportionate to the harm or potential harm directed specifically at the plaintiff.

(iv) Proportionate to the need for deterrence -- a defendant's financial power may become relevant if the defendant chooses to argue financial hardship, or it is directly relevant to the defendant's misconduct, or other circumstances where it may rationally be concluded that a lesser award against a moneyed defendant would fail to achieve deterrence.

(v) Proportionate, even after taking into account the other penalties, both civil and criminal, which have been or are likely to be inflicted on the defendant for the same misconduct -- compensatory damages also punish and may be all the "punishment" required.

(vi) Proportionate to the advantage wrongfully gained by a defendant from the misconduct.

[124] I turn to consider these dimensions. First, the defendants' conduct which I have already described, in its nature and extent was certainly blameworthy. I am not able to reach conclusions about the defendants' intent and motive. Given the recording of the June 6 meeting, the defendants were not in a position to conceal Mr. Liu's conduct toward Ms. Fobert. Nor is this a factor respecting the rest of their conduct. Mr. Liu's conduct although truly egregious was limited to a single meeting, held in private. None of the other aspects of blameworthiness apply here.

[125] Second, Ms. Fobert was very financially vulnerable relative to the defendants. By refusing to pay her outstanding wages and statutory severance, before and after the June 6 meeting until the settlement agreement was reached in October 2019, it is apparent the defendants attempted to take advantage of this vulnerability. During the June 6 meeting, Mr. Liu did so by pressuring Ms. Fobert to immediately settle for an amount well below her modest statutory entitlements, while intimidating her with false allegations, confusing threats of litigation and other bullying tactics.

[126] Third, while the allegations in the pleadings were no doubt distressing to Ms. Fobert, the risk of harm is attenuated here. Ms. Fobert acknowledged receiving a positive reference letter from her former manager Ms. Donald, and as I have said Ms. Fobert had no difficulty securing other full-time employment.

[127] Fourth, there is no reliable evidence about the financial position of the defendants. Although Ms. Fobert points to Mr. Liu's statements during the June 6 meeting, and as the defendants' representative they could be admissible for their truth, I am not satisfied they are reliable. At the same time, other evidence and the defendants' approach point to a strong need for deterrence. There is no dispute that several employees were dismissed around the same time as Ms. Fobert. Mr. Liu's statements indicate a complete disregard for the most basic rights of an employee.

[128] Fifth, I have awarded Ms. Fobert compensatory damages based on the defendants' conduct.

[129] The sixth dimension is not applicable.

- [130] In Kelly, \$100,000 in punitive damages was awarded. The facts involved the defendant refusing to pay the plaintiff his final month's salary for more than seven years and telling him he would only be paid if signed a release. At the termination meeting, the defendant's CEO threatened to bankrupt the plaintiff and told him he would ensure he did not have the funds to take his case to court. In a post-termination meeting, the CEO also said he would also ensure the plaintiff did not secure a particular job. Significantly, the defendant pleaded civil fraud and incompetence as grounds for dismissal, which were found to be without merit. In the meantime they made it more difficult for the plaintiff to find employment. Finally, the defendant made repeated references at the trial intended to make the plaintiff look ridiculous.
- [131] In Bailey, the award of punitive damages was \$110,000. Again, the defendant made meritless and particularly callous allegations of cause against the plaintiff who was a very long term loyal employee when he was ill and suffering mental distress. Further, the defendant was part of a very large corporate group and in a position to make the calculated choice to treat employees abusively when firing them.
- [132] I have also considered the cases the defendants rely upon in support of their alternative position, which is, if punitive damages are made out, only \$3,000 should be awarded. Among them is Canuck Security Services Ltd. v. Gill, 2013 BCSC 893. There, the plaintiff received an award of \$5,000 in punitive damages, largely because of his financial vulnerability and the defendants' failure to pay outstanding regular and overtime wages.
- [133] Bailey and Kelly establish what appears to be the higher end of the range for punitive damages in the wrongful dismissal context. Of course, each case is unique and each award fact-specific. I have already pointed to some distinguishing circumstances. Here, unlike in Kelly, the award of aggravated damages will play some role in deterring the defendants' conduct. Unlike in Bailey, without evidence regarding the defendants' financial standing, I am not persuaded that a sizeable award is necessary to deter them from treating other employees harshly and reprehensibly. In addition, unlike in both Bailey and Kelly the defendants never alleged cause. Further, the defendants refused to pay Ms. Fobert's outstanding wages and statutory severance for a much shorter period of time. The same is true of the pleaded allegations of misconduct.
- [134] At the same time, it is my view that despite the award of aggravated damages, punitive damages are also necessary to effectively deter and also to denounce the range of misconduct in this case. Applying the principle of proportionality and considering the facts relevant to the relevant dimensions, I award \$35,000.

Summary

[135] In summary, the defendants are joint and severally liable for the damage awards I have made. Again, I award Ms. Fobert an amount equal to eight weeks pay, less the portion of the settlement funds received under the ESB settlement for two weeks' severance in damages for reasonable notice; \$25,000 in aggravated damages; and \$35,000 in punitive damages.

"Fleming J."

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