
CANADA / JUDGMENT

Scorpio Security Inc. v. Jain

2018 BCSC 978

COURT

Supreme Court of British Columbia

DECIDED

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2018 BCSC 978 Scorpio Security Inc. v. Jain

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Scorpio Security Inc. v. Jain,

2018 BCSC 978

Date: 20180614

Docket: S168212

Registry: Vancouver

Between:

Scorpio Security Inc.

Plaintiff

And

Chitrarth Jain

Defendant

And

Scorpio Security Inc., Narinder Singh Hara, and Amandeep Hara

Defendants by Counterclaim

Before: The Honourable Mr. Justice Branch

Reasons for Judgment

Counsel for the Plaintiff and Defendants by Counterclaim:

N.A. Mulholland

Counsel for the Defendant:

M. Pytlewski

Place and Dates of Trial:

Vancouver, B.C.

April 30, 2018

May 1-4, 2018

Place and Date of Judgment:

Vancouver, B.C.

June 14, 2018

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I. INTRODUCTION

[1] The various claims and cross-claims in this case result from a breakdown in the defendant security guard's employment relationship with the plaintiff.

[2] The plaintiff employer commenced this proceeding alleging that the defendant was overpaid because he did not work the entirety of the shifts to which he was assigned. The plaintiff also made a claim in defamation, which is no longer being advanced.

- [3] When the defendant was served with the claim, he responded with a counterclaim for wrongful dismissal and unpaid overtime. He added as defendants by counterclaim the owner and sole director of the plaintiff company, Narinder Hara, and the plaintiff's manager, Amandeep Hara. The claim against these individuals is said to be based on a director's liability for wages under the Employment Standards Act, R.S.B.C. 1996, c. 113.
- [4] The claims have a strong immigration undercurrent, in that the plaintiff alleges that documentation reflecting the defendant's position, rate, and hours were effectively a sham designed to facilitate the defendant obtaining permanent residence status in Canada, and did not in fact reflect the actual agreement between the parties.
- [5] The effect of my ruling on these various issues is effectively "a plague o' both your houses": W. Shakespeare, *Romeo and Juliet*, Act III, Scene 1. Given the immigration gamesmanship, both parties unsurprisingly struggled to satisfy the burden of proof facing their respective contractual claims. If parties wish to put themselves in a position to enforce contractual claims, it behooves them to govern themselves pursuant to their formal written contracts, rather than make sham agreements, sham payments and record sham hours for immigration purposes.

II. BACKGROUND

- [6] The parties' evidence starts on a common footing. The defendant came to Canada in 2012 on a student visa in order to obtain a diploma in tourism in Ontario. In 2013, he was put in contact with Amandeep Hara ("Amandeep") by his cousin, who was close friends with Amandeep. His cousin asked Amandeep to take care of the defendant. The defendant obtained his work visa on November 5, 2013, which would be valid until November 11, 2016. He then made arrangements to move to Vancouver, where Amandeep lived.
- [7] Amandeep took steps to fulfill his promise to his friend as soon as the defendant landed in Vancouver on December 1, 2013. Amandeep found the defendant a place to live in his sister's basement. When the defendant struggled to find work, Amandeep found him work with his uncle's company as a security guard. Amandeep himself was working with the plaintiff company as his uncle's manager. He helped the defendant get his security guard licensing in place, trained him, and provided him with the use of a company car.
- [8] The defendant officially started work on February 14, 2014 at \$10.25 per hour, working more or less 40 hours a week. These financial and hourly commitment terms were not in writing. The defendant signed a Job Expectations agreement on March 5, 2014, which set out certain requirements, including the following "Three Strike Rule" in relation to sleeping on the job (an occupational hazard for security guards):

Any Security Officer found asleep on the job will be dealt with the 3 Strike Program:

1st Strike: A very Strict Warning

2nd Strike: A pay deduction of 4 hours.

3rd Strike: A pay deduction of 4 hours and appropriate job action.

[9] I will refer to this initial arrangement between the parties, which was partially oral and partially in writing, as the "Original Contract".

[10] It is at this point that the evidence diverges.

[11] The defendant suggests that by April 2014, within approximately two months of starting his first job, the plaintiff became so enamoured with his work performance that the plaintiff decided to promote him to full-time supervisor at \$18.25 per hour. The defendant says that after certain limited training in April, he was officially promoted as of May 11, 2014. He suggests that he started to perform managerial tasks at that point, including arranging scheduling. I will refer to the defendant's version of this new agreement as the "Supervisor Agreement". The defendant says that under the Supervisor Agreement he was relieved from the responsibility to regularly check in with the plaintiff's dispatcher.

[12] The plaintiff's version of events is very different. Amandeep says that in or about May 2014, the defendant approached him stating that he wanted to obtain permanent residency in Canada. Amandeep made arrangements for him to speak to an immigration consultant. Amandeep and the defendant were advised that in order to expedite the application for permanent residency under the BC Provincial Nominee Program ("PNP"), it would be necessary for the defendant to be employed in a supervisory or managerial position on a full-time basis with a wage rate of at least \$18.25 per hour.

[13] Amandeep told the defendant that there was no way the plaintiff could afford to pay him \$18.25 per hour, as this was well above what was being paid to other employees, and in fact was more than Amandeep was making as the manager of the operation while his uncle worked primarily in the U.S. Amandeep says the defendant begged for his help with his immigration efforts. Accordingly, Amandeep agreed that the defendant would be shown as earning a bi-weekly wage equivalent to 80 hours at \$18.25 per hour, and given the title of "supervisor," but the actual agreement was that the defendant would have to work the additional hours necessary in order to drive his actual effective hourly wage down to \$10.25 per hour. The defendant agreed to this arrangement and the new higher stated wage rate was shown in his pay effective April 27, 2014. I will refer to the plaintiff's version of the actual agreement as the "Immigration Agreement".

[14] In July and August 2014, the plaintiff executed and submitted the various materials necessary to represent to immigration authorities that the defendant's position was as a supervisor earning \$18.25 per hour. There was a formal written contract signed by the defendant on August 1, 2014, reflecting the terms represented to the immigration authorities, and also providing (a) overtime payable at "time and a half", (b) 10 days of paid holidays, and (c) vacation pay of 4%.

- [15] The defendant does agree that he became interested in permanent residency in June or July 2014, and also agrees that the plaintiff made arrangements for him to meet with an immigration consultant. However, with regard to satisfying the conditions for a more efficient PNP process, he says he had already been made a full-time supervisor earning \$18.25 per hour one month prior, a happy coincidence according to his evidence. As such, the defendant relies on the written document executed on August 1, 2014 as the operative binding contract reflecting the Supervisor Agreement.
- [16] The evidence generally reunites from July 2014 until the fall of 2015, over the course of which the plaintiff agrees it was generally content with the defendant's performance, and no issues of note arose. However, as will be discussed further below, the defendant was generally working far in excess of the contractual hours of work over this period. The plaintiff attributes this to the natural fallout from the Immigration Agreement, requiring extra hours to make up for the artificially enhanced rate of pay. The defendant attributes this to his performing massive amounts of overtime under the Supervisor Agreement.
- [17] There was a car accident in 2014 involving the company vehicle that Amandeep provided for the defendant's use. The defendant loaned the vehicle to his friend, who also worked for the plaintiff. The friend was apparently at fault for the accident such that the insurance premiums for the plaintiff increased. The plaintiff's position is that the defendant did not have the right to lend the vehicle to anyone. However, it is notable that this issue was not pressed with the defendant at the time of the accident, and only arose in the context of a series of text messages that appear to have been exchanged much later in 2015.
- [18] In January 2015, there was an incident at the Marine Pub in Burnaby, which was damaged by fire, and which site was secured by the plaintiff. Amandeep says that following the fire he discovered soot-stained beer in the defendant's fridge, and that he cautioned the defendant that he should never take material from a secured site. The defendant denies this incident. He accepts he was on site that day, but notes that a police report actually raises an issue with alcohol being discovered in the vehicle of another security guard for the plaintiff, one RJ. No formal written warning was placed on the defendant's own file arising from this incident.
- [19] Notably, Amandeep and the defendant went to India together for a month in the summer of 2015 for a wedding, and Amandeep paid for the flight. This suggests that there were no serious issues between the parties at that time, either in relation to unpaid overtime or the other issues noted above. It is alleged that other problems started to develop thereafter.
- [20] In October 2015, the defendant starting working at Walmart doing stocking overnight. The defendant says he took this step because the plaintiff was reducing his shifts. The plaintiff's evidence is that it was the defendant's own decision to reduce his hours with the plaintiff to 32 hours per week because the immigration consultant advised that 32 hours was sufficient to qualify for the PNP program. The pay stubs from the plaintiff do show a reduction to 32 hours per week as of November 22, 2015.

- [21] Amandeep gave evidence of having to admonish the defendant about taking home a Christmas gift from a secured residential complex which was not meant for him. Amandeep declined to report the matter to his uncle out of consideration for the defendant, whom he often described as "a younger brother." The plaintiff sought to corroborate this evidence with testimony from its employee, Mohammad Ismail, who was primarily responsible for the complex. However, Mr. Ismail's evidence added little to this allegation, in that he only received second-hand complaints from residents complaining more generally about a group of plaintiff employees working at the complex when Mr. Ismail was not present.
- [22] In or around late 2015 or early 2016, Amandeep says that the defendant was photographed sleeping on the job by staff at Premier Security, for whom the plaintiff did certain subcontracting. Although a photo was submitted into evidence that the defendant acknowledged showed him asleep, the import of this evidence was undermined by the fact that (1) the Premier Security employee called at trial could not confirm with certainty that he took this photograph, or when or where it was taken, and (2) the defendant's evidence is that on the occasion of the photograph, he had completed his shift, was off the work site, and was too tired to drive home. Again, no formal written reprimand was issued, and there are no documents to contradict the defendant's evidence. The photo itself is not dated nor geotagged, nor is the photographer noted thereon. Notably, there is no written evidence of the plaintiff taking steps to enforce their "Three Strike Program" as a result of this incident.
- [23] The defendant's former roommate testified that he generally had a sense of the defendant's shifts, as they talked about them, and that the defendant would sometimes come home earlier than he expected, as often as one to two times a week.
- [24] An employee at a 7-Eleven store for whose shopping complex the defendant provided security services testified to the fact that the defendant asked him to slide his timesheet under the complex owner's door on several occasions. However, it is not clear that this employee would have been aware of the defendant's precise work schedule. It is also not clear what advantage would be gained by the defendant in having the timesheet slid under the door at a later time by someone else. It was not as though there was a "punch clock" mechanism associated with the submission of the timesheet in this manner.
- [25] Amandeep says that on February 22, 2016, he was contacted by one of the plaintiff's clients, Jasbir Gill, who said that he had caught the defendant sleeping on the site and demanded that the defendant never again be assigned to his site. Mr. Gill did corroborate this event in his own testimony, as well as noting that he once arrived at a site during a snowstorm and the defendant was not on site (although his evidence as to the date of this incident varied in a way that undermined its reliability). However, there is no evidence of the application of the "Three Strike" program in relation to the sleeping incident.
- [26] Nonetheless, Amandeep testified that the problems with Mr. Gill were the final straw. He said that the defendant was given no more shifts after February 23, 2016, and a termination letter was delivered on March 5, 2016. The defendant disputes receiving this letter, but does

agree that he received a follow-up email on April 1, 2016 that referenced his dismissal. He says that his last scheduled shift was March 7, 2016. The defendant took steps in March to find work with another security company, and continued his work at Walmart. He says he spoke with Narinder and Amandeep on April 20 or 21, 2016, but they would not reconsider the decision to let him go.

- [27] In September and October 2016, around the time that this litigation commenced, the plaintiff advised the immigration authorities that the defendant's employment had been terminated, and revoked its support for the defendant's PNP application. However, it appears that his work for the new security company was sufficient to keep him on his immigration path, and he remains in Canada.
- [28] I note that the plaintiff's owner Narinder Hara was called by the defendant as an adverse party witness. However, he had a very poor recollection of events given that he has recently suffered a stroke. From the limited evidence he was able to provide, he confirmed that he allowed Amandeep to run the business, and generally trusted him to such an extent that he would generally sign all documents that were put in front of him.

III. ISSUES

[29] The various claims and factual disputes generate the need to consider the following issues:

- a) What was the actual agreement between the parties?
- b) Should the plaintiff be compensated for the defendant's failure to attend all paid shifts?
- c) Is the defendant entitled to overtime or vacation pay?
- d) Was the defendant dismissed with just cause?
- e) If the answer to (d) is no, is the defendant entitled to aggravated or punitive damages?

IV. DISCUSSION AND ANALYSIS

A. Terms of the Agreement

- [30] Although this issue requires an assessment of credibility, given that there are two very different versions of the agreement proposed, I have found that both parties' key witnesses suffer from credibility problems.
- [31] Amandeep's credibility is undermined by the fact that his version of events requires an admission that he and Narinder lied to immigration authorities in a series of official documents. However, accepting that major difficulty, Amandeep otherwise gave his evidence in a clear and consistent manner.

- [32] In terms of the defendant, I found him to be defensive during his cross-examination, failing to answer a number of questions directly, and often trying to turn around and ask questions of plaintiff's counsel rather than providing the requested information. That said, the cross-examination was extremely aggressive, bordering on sarcastic, which could explain some of this reaction.
- [33] Where do those mutual credibility challenges leave the question of the actual terms of the employment agreement?
- [34] First, I note that the initial Notice of Civil Claim, filed by the plaintiff without the assistance of counsel, did make the following factual pleas in its Statement of Facts:
5. In the course of just several months, CJ's work ethic was one to be applauded. He acted faithfully and with great regards to his shifts, at time taking shifts that were given on short notice, and filling in when necessary.
 6. Receiving positive reviews from the job sites, and seeing his willingness to be an ample part of Scorpio, he was offered the position of Supervisor in April of 2014.
 7. He accepted, and his duties were increased to not only taking phone calls, but checking all the job sites, the guards, making sure the Scorpio name was ethically being distributed properly.
 8. He completed all of his duties as required, and Scorpio couldn't ask for more. He was also given a pay raise.
- [35] This original pleading from the plaintiff is inconsistent with the plaintiff's evidence at trial. It is also inconsistent with the plaintiff's final theory of the case presented at trial, where they were represented by counsel. That being said, as stated in *Ledinski v. Chestnut*, 2015 BCSC 373:
- [27] As an initiating document, a Notice of Civil Claim is a statement of a party's belief or understanding of the facts and issues when it is drafted. In a perfect world, a party's knowledge and belief would be complete at the time of drafting, and the party's lawyer's grasp of the case and the issues would be similarly complete. That is not always the case.
- [28] As the court said in *Kamei Sushi*, at the point where an initiating pleading is drafted and filed, there are no facts in issue between the parties. This is so in spite of disagreements that have led the parties to litigation. The pleadings process is intended to define, refine, and perhaps even confine the matters in issue between the parties. To hold a plaintiff to a pleading in a Notice of Civil Claim that a defendant might find advantageous would require better evidence that the plaintiff intended by its pleading to confer that advantage on a defendant than I have before me.
- [36] Those comments from Justice Johnston came in the context of an application to amend pleadings. No such application was made in this case. However, the defendant did not argue that the above factual pleas in the Notice of Civil Claim amounted to formal admissions that

barred the presentation of the plaintiff's theory of the case at trial. I expect that these pleas were made at a time when the plaintiff felt constrained by the terms of the sham written agreement without the advice of counsel. Had it been necessary to grant leave to withdraw statements properly characterized as an admission, I would have granted it: Supreme Court Civil Rules, R. 7-7(5).

- [37] The defendant also did not argue that there was any surprise created by the plaintiff's theory of the case at trial.
- [38] Further, the plaintiff did contest the written agreement presented to immigration authorities in their Response to Counterclaim, albeit imprecisely, stating that "a Contract was drawn up between the Plaintiff and Defendant, but not as per what is stated in the Counterclaim. Hours and the exact details were not written in the Contract". The plaintiff also stated that "The Contract that was signed by both the Plaintiff and the Defendant, was effective as of February 2014 until the Termination of Employment in February 2016", providing some notice that the plaintiff was going to rely on the Original Agreement, and not the later Supervisor Agreement. Collectively, these pleas give some notice that the plaintiff's ultimate position was that the contract presented to immigration officials was not the contract under which the parties were operating.
- [39] These broad pleas, combined with the fact that the plaintiff argued that the Supervisor Agreement was a sham throughout the trial without objection from defendant's counsel, lead me to find that there was sufficient notice to the defendant of the case he had to answer: *Saadati v. Moorhead*, 2017 SCC 28 at para. 12.
- [40] Moving from the pleadings to the evidence, I conclude that Amandeep's version of the contractual framework governing the relationship between the parties is in fact more consistent with the evidence as a whole, notwithstanding that it requires me to find that the written documents executed in July and August 2014 were a sham. I come to this conclusion for the following reasons:
- a) The suggestion that the defendant would be promoted to security guard supervisor within only approximately two months of starting his very first job is difficult to accept.
 - b) The suggestion that the defendant would be paid more than Amandeep makes no sense. I note that Amandeep was not challenged on his evidence that he was paid less than \$18.25 per hour. Amandeep had been with the plaintiff for some time, and held a superior position to the defendant. Amandeep was also the owner's nephew. Why would the owner install an unknown, unrelated, first-time, short-term employee at a wage rate higher than his own nephew, his trusted on-site manager? The defendant offered no logical explanation for this.

- c) Although the defendant says that he started to perform managerial roles thereafter, there was no corroborating evidence. One would expect that the defendant might have retained some written evidence of his own managerial efforts to arrange scheduling or other managerial tasks, or that some current or former employee or customer could be called who could confirm that the defendant held that higher status within the plaintiff.
 - d) The fact that the defendant was paid for a round and regular number of hours every two weeks is supportive of the fact that this fixed number of hours was designed for a purpose other than actually reflecting the amount of work performed by the defendant, which all parties agreed varied wildly.
 - e) It does not make sense that the defendant would tolerate being underpaid for the excessive number of overtime hours he was working for months on end without pressing the issue. The defendant says that he did raise the issue in or about November 2014, but was told that he could choose between overtime pay and continued support for his immigration claim. However, this does not explain why he did not raise the issue before November 2014. It is also difficult to understand why he wouldn't have (as he finally did) simply left the employ of such an unethical underpaying employer in order to continue to earn his immigration eligibility elsewhere, given that his work permit allowed him to work for virtually any employer.
 - f) The number of excess overtime hours that the defendant says he worked, based on his own records and calculations, comes very close to matching the number of excess hours that the defendant would have had to have worked in order for the Immigration Agreement to make economic sense, i.e., to bring his effective rate back down to the amount set out in the Original Agreement.
 - g) Under the Immigration Agreement, it would make sense for the defendant to be as meticulous as he apparently was in recording all of his hours, rather than simply relying on the plaintiff's records. It was only with such a detailed record that the defendant would be able to show that he was working all the excess hours necessary to support the Immigration Agreement.
 - h) Cutting back the defendant's hours in the fall of 2015 is inconsistent with his role as a supervisor. Who would be conducting the required supervision and scheduling in his absence? There was no explanation offered by the defendant.
- [41] The court is entitled to accept that the true agreement between the parties is on terms other than those reflected in a sham written agreement: 2529-1915 Québec Inc. v. Canada, 2008 FCA 398 at paras. 57-59, 79. I find that the true terms are those in the Immigration Agreement.

B. Plaintiff's Claim for Recovery

[42] The evidence in support of the plaintiff's claim for recovery of unworked or short shifts is weak, and insufficient to meet the burden of proof resting on the plaintiff. Specifically:

- a) The 7-Eleven employee could not say with certainty whether the defendant was leaving his shifts earlier than the plaintiff designated.
- b) The defendant's roommate could not say for sure that the defendant's shifts were not adjusted without his knowing.
- c) While there does appear to be a period after which the defendant stopped using his electronic fob at particular job sites, there is no direct evidence that this reflects a corresponding failure to attend or shorten his shifts. It is notable that this failure was "knowable" by the plaintiff at the time of the failings, and no steps were taken to dock his pay at the time.
- d) The defendant provided a written record of the hours he says he worked, which indicated that he was generally working heavy hours and long shifts, a record that he says he maintained regularly and at the end of each shift. The plaintiff's own shoddy record-keeping practices do not allow the company to rebut the defendant's own time records.

[43] The plaintiff suggests that where the quantum of shifts unworked is unknown, the court should apply a robust approach to damages: *Penvidic Contracting Co. Ltd. v. International Nickel Co. of Canada Ltd.*, [1976] 1 S.C.R. 267 at 279-280. However, this approach assumes that liability has been made out in the first place. I am unable to find that the required burden of proof on liability has been met here. Further, I find that the evidence provided was simply inadequate to support a claim for damages: *0712914 B.C. Ltd. v. Aviva Insurance Company of Canada*, 2007 BCSC 163 at paras. 36-41.

[44] The plaintiff also sought to make a claim for increased insurance costs arising from the 2014 car accident. Again, I find that:

- a) the fact that the plaintiff failed to raise this claim until about a year after the accident happened undermines the position that it should be treated as a breach of the employment contract at all; and
- b) inadequate evidence was provided to support the damages aspect of this claim, such as the actual insurance costs before and after the accident.

C. Defendant's Counterclaim for Overtime and Vacation Pay

- [45] The defendant claims \$37,172.97 for overtime he says that he worked under the Supervisor Agreement. However, I have found that the Supervisor Agreement was a sham put in place for immigration purposes, and hence he is not in a position to make a claim under that agreement. Rather, as noted above, I conclude that the hours he recorded as overtime were in fact designed to help support the economics underlying the sham. By working excess hours at the true pay level of \$10.25 per hour, his reported pay at \$18.25 makes more sense.
- [46] The defendant also claims for \$889.14 in vacation pay noted on his last pay stub. However, this claim is also based on the sham Supervisor Agreement. Also, there are inconsistencies in the pay stubs that were left unexplained at trial. For example, there was no notation of any vacation pay payable in the January 20, 2016 pay stub, which does not make sense if vacation pay was accruing steadily. The defendant did not suggest that there was a change in the Supervisor Agreement before and after January 20, 2016.
- [47] The defendant's purported claims against Amandeep and Narinder under the Employment Standards Act were dependent on a finding that the Supervisor Agreement was enforceable, which I have rejected. I have not considered other bases upon which this claim might otherwise be faulty, such as the jurisdictional concerns raised.

D. Defendant's Counterclaim for Unjust Dismissal

1. Just Cause

- [48] The plaintiff bears the burden of establishing that it had just cause for the defendant's termination, given that no notice period was provided: *Horvath v. SAAN Stores Ltd.*, 2003 BCSC 1845 at para. 2.
- [49] Just cause is behaviour that is seriously incompatible with the employee's duties. It is conduct which goes to the root of the contract, and fundamentally strikes at the heart of the employment relationship. The test is an objective one, viewed through the lens of a reasonable employer taking account of all relevant circumstances: *Roe v. British Columbia Ferry Services Ltd.*, 2015 BCCA 1 at para. 35.
- [50] Both the circumstances surrounding the alleged misconduct and the degree of misconduct must be carefully examined. The analysis requires a contextual approach including an examination of the category of misconduct and its possible consequences, all of the circumstances surrounding the misconduct, the nature of the particular employment contract, and the status of the employee: *McKinley v. BC Tel*, 2001 SCC 38 at paras. 33-34, 51.
- [51] The court must consider the context of the alleged misconduct, examining how minor or how serious it was: *Hawkes v. Levelton Holdings Ltd.*, 2012 BCSC 1219 at para. 30, *aff'd* 2013 BCCA 306. As explained by the Supreme Court of Canada in *McKinley* at para. 48, "the test is whether the employee's dishonesty gave rise to a breakdown in the employment relationship."

- [52] In *McKinley* the court emphasized the importance of proportionality between the severity of the alleged misconduct and the sanction imposed:
- [53] Underlying the approach I propose is the principle of proportionality. An effective balance must be struck between the severity of an employee's misconduct and the sanction imposed. The importance of this balance is better understood by considering the sense of identity and self-worth individuals frequently derive from their employment, a concept that was explored in *Reference Re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313, where *Dickson C.J.* (writing in dissent) stated at p. 368:

Work is one of the most fundamental aspects in a person's life, providing the individual with a means of financial support and, as importantly, a contributory role in society. A person's employment is an essential component of his or her sense of identity, self-worth and emotional well-being.

- [53] It is incumbent upon the employer, as part of the contextual analysis, to consider the suitability of alternative disciplinary measures to dismissal: *George v. Cowichan Tribes*, 2015 BCSC 513 at para. 115; *TeBaerts v. Penta Builders Group Inc.*, 2015 BCSC 2008 at para. 73. The courts have also emphasized the importance of a proper investigation: *Porta v. Weyerhaeuser Canada Ltd.*, 2001 BCSC 1480 at para. 14. The employer must consider the fact that dismissal for cause is the most severe reprimand available. As stated in *Henry v. Foxco Ltd.*, 2004 NBCA 22:
- [109] The principle of proportionality calls for an effective balance to be struck between the severity of an employee's misconduct and the sanction imposed. This principle is a reminder of the well-worn cliché: summary dismissal constitutes capital punishment in employment law.
- [54] Even under the Immigration Agreement, the defendant would still be entitled to proper notice of dismissal.
- [55] I conclude that the plaintiff has not shown that it had just cause for dismissal, in light of the following:
- a) The plaintiff failed to follow its own "3 Strike Program" in relation to discipline for sleeping on the job. There were no formal written warnings, and the defendant did not argue or show that there were four-hour pay deductions imposed in response to any incidents. Even accepting all of the plaintiff's evidence, the defendant had not yet reached his third strike, at least in relation to sleeping issues: *Waddilove v. 1748960 Ontario Ltd.*, 2018 ONSC 448 at paras. 59-64; *Baumgartner v. Jamieson*, 2004 BCSC 1540 at paras. 20, 140-141.

- b) The plaintiff clearly condoned much, if not all, of the defendant's behaviour, likely because Amandeep treated the defendant as his "little brother". For example, the car accident and Marine Pub incidents occurred before Amandeep and the defendant flew together to India for a month, with Amandeep paying for the defendant's flight. An employer cannot condone or waive behaviour, and then turn around and use that conduct as a basis for dismissal: *Poirier v. Wal-Mart Canada Corp.*, 2006 BCSC 1138 at paras. 48-50.
 - c) While the defendant may have lent the company car to another employee, I cannot find that this would justify dismissal. The level of import the plaintiff itself applied to this incident is illustrated by the fact that it appears it did nothing about the issue for about a year.
 - d) The plaintiff has failed to establish the theft of the beer on a balance of probabilities. Given that the police report specifically identified another individual, I cannot find that the defendant did engage in this conduct.
 - e) The plaintiff has failed to establish an intentional theft of a gift from the residential complex. Although some evidence came forward from Amandeep, it is notable that this issue was not put squarely to Mr. Ismail, who would presumably have had more direct knowledge, being the plaintiff's lead staff person on the site. The defendant denied the allegation, and I find this particular aspect of his evidence credible.
 - f) As noted above, the plaintiff has failed to establish that there were a material number of circumstances where the defendant did not complete his shift. I accept the evidence of Mr. Gill that he was not present for one shift during a snowstorm, but that would not be enough on its own to merit a firing, without some step-up in the discipline.
 - g) The plaintiff's only written evidence of the alleged incidents provided at trial was created after the fact by Amandeep. No written warnings were provided, nor were any memos about the incidents prepared, which is indicative of the level of importance assigned by the plaintiff to the incidents: *Baumgartner* at para. 140.
- [56] The plaintiff also offered no evidence that it considered disciplinary alternatives. The plaintiff held no meetings to consider disciplinary alternatives, and requested no face-to-face meeting with the defendant. I find that this fell below the standard expected of an employer in this context. In *Nishina v. Azuma Foods (Canada) Co., Ltd.*, 2010 BCSC 502, Madam Justice Loo explained the obligation to investigate borne by employers as an aspect of the duty of good faith in the manner of dismissal:
- [262] The obligation of good faith in the manner of dismissal imposes a behavioural requirement on employers to investigate allegations of misconduct, give employees the opportunity to respond, and requires employers not to fabricate grounds for cause, maintain unfounded allegations of cause, or treat an employee in a humiliating manner: as summarized by Judy Fudge in "The Limits of Good Faith in the Contract of Employment: From Addis to Vorvis to Wallace and Back Again?" (2007), 32 *Queen's L.J.* 529.

[263] Mr. Justice Iacobucci described the content of the obligation as follows in Wallace, at para. 98:

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

[57] I find that the plaintiff has not met its heavy onus to show that there was "conduct on the part of the employee incompatible with his or her duties, conduct which goes to the root of the contract with the result that the employment relationship is too fractured to expect the employer to provide a second chance": Leung v. Doppler Industries Inc., [1995] B.C.J. No. 690 at para. 26 (S.C.), aff'd [1997] B.C.J. No. 382 (C.A.).

2. Damages for Failure to Provide Reasonable Notice

[58] Although I find that the plaintiff has not established just cause for the defendant's dismissal, the defendant agreed that there is no traditional notice period claim possible here, given that he was able to completely mitigate his damages by obtaining other work in the relevant period following his dismissal.

3. Aggravated and Punitive Damages

[59] The defendant does advance a claim for aggravated and punitive damages for his wrongful dismissal.

[60] The court in Bailey v. Service Corporation International (Canada) ULC, 2018 BCSC 235, recently set out the principles applying to the assessment of aggravated damages in wrongful dismissal cases, as follows:

[205] The Court of Appeal recently discussed aggravated damages in the context of an employment case in Lau v. Royal Bank of Canada, 2017 BCCA 253 [Lau]. From Lau and the authorities it cites including the leading Supreme Court of Canada cases of Wallace v. United Grain Growers Limited, [1997] 3 S.C.R. 701, 152 D.L.R. (4th) 1 [Wallace], and Honda Canada Inc. v. Keays, 2008 SCC 39 [Honda], a number of principles emerge:

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.
- [61] I do not find that the manner of dismissal in this case warrants a claim for aggravated damages. There was nothing particularly unusual about the events surrounding the defendant's dismissal, even if it was wrongful.
- [62] As to punitive damages, the test is described in Bailey at para. 216. It is reserved for exceptional cases, where the conduct is "harsh, vindictive, reprehensible and malicious". For similar reasons to those expressed above, I find that there is no basis for punitive damages.

V. CONCLUSION

- [63] The plaintiff's claim is dismissed. The defendant's counterclaim is dismissed. Absent either of the parties making written costs submissions within 30 days of the issuance of these reasons, in light of the divided success across the claim and counterclaim, I find that each party should bear their own costs.

"Branch J."

The Honourable Mr. Justice Branch

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