IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Dove v. Destiny Media Technologies Inc.,* 2023 BCSC 1032

Date: 20230615
Docket: S197475
Registry: Vancouver

Between:

Zashean Dove

Plaintiff

And

Destiny Media Technologies Inc. and Destiny Software Productions Inc.

Defendants

Before: The Honourable Justice Branch

Reasons for Judgment

The Plaintiff, appearing in person:	Zashean Dove
Counsel for the Defendants:	N. Mitha, K.C. N. Toye
Place and Date of Trial:	Vancouver, B.C. April 3-6, 11-13, 2023
Place and Date of Judgment:	Vancouver, B.C. June 15, 2023

Table of Contents

I. INTRODUCTION

[1] To what extent is an employee entitled to work on a side business during work hours? That is the issue at the core of this wrongful dismissal claim.

II. BACKGROUND

The Plaintiff

[2] The plaintiff was born April 15, 1964. After leaving high school, she obtained baking and cooking certificates. Prior to beginning work for the defendant, Destiny Software Productions Inc. ("Destiny"), the plaintiff worked at various jobs, including as a chocolatier and a restaurant worker. She had no prior experience in the technology industry space.

The Plaintiff's Role with Destiny

[3] The plaintiff was close friends with Destiny's CEO, Steve Vestergaard ("SV"). They had previously been in a romantic relationship, but she asserts that this was no longer the case by the time she started with Destiny. She says her actual partner was living in Ecuador for much of the material period. This explains why she was living at SV's properties over the relevant time frame. She and SV also took trips together, and spent time with each other's families. The plaintiff and SV routinely travelled to work together.

[4] In 2007, the plaintiff started doing administrative work for Destiny, such as picking up office supplies, and providing purchasing and shipping support. She performed these tasks in return for the use of office space at Destiny for her crystal business. She says she was generally present at Destiny during normal office hours. However, she was not paid a salary, was not added to Destiny's payroll, and had no job title. She agrees that she had the right to say no to work if she did not want to perform it.

[5] To use her own word, she was then "hired" by Destiny on August 4, 2009, as their List Manager. There was a discussion regarding the decision to formally hire her between SV and Destiny's Chief Financial Officer, Fred Vandenberg, which

included Mr. Vandenberg raising the issue of whether it was appropriate for the plaintiff to be reporting directly to SV.

[6] SV wrote on August 5, 2009 that "…Zashean started yesterday". She agreed that she was no longer permitted to work on her crystal business in Destiny's office after this date.

[7] As her job title suggests, the plaintiff's primary function was to oversee and manage Destiny's list management service, called "PlayMPE". PlayMPE is a software-based platform for marketing music within the music industry. PlayMPE users can upload content such as music, album art, and other artist information, select the intended recipients, and then share the content securely. Destiny's customers are generally the senders who pay a fee based on the volume of the content delivered and number of recipients selected. Recipients are generally persons in the media industry who can broadcast content to a wider audience, such as radio stations and media reviewers. The success of PlayMPE is largely driven by the accuracy and currency of the network of recipients maintained in Destiny's lists.

[8] Destiny is wholly owned by Destiny Media Technologies ("Destiny Media"), a U.S. corporation publicly traded on the TSX Venture exchange.

[9] The plaintiff was employed by Destiny on a full-time basis for 40 hours/week. Destiny's regular office hours were 8:30 am to 5:00 pm, Monday to Friday, although there was some flexibility to shift one's hours with managerial approval. The plaintiff accepts that she did not have any right to work from home. On July 16, 2012, Destiny's Operations Manager distributed an email to staff stating, "Just a reminder that our office hours are from 8:30 am to 5 pm. Please make sure you're in by then and sign in to our staff page so that others know you are available."

[10] There was no written contract governing the plaintiff's relationship with Destiny. However, the plaintiff agrees that in 2009 she likely saw Destiny's Code of Conduct, which included the following provisions:

a) The stated purposes of the Code of Conduct included promoting "honest and ethical conduct, including properly addressing actual or apparent conflicts of interest between personal and professional relationships."

b) Destiny employees "have an obligation to Destiny and its shareholders to act in a responsible, moral and ethical manner."

c) Employees were advised that “A conflict situation can arise when an employee, officer or director takes actions or has interests that may make it difficult to perform his or her duties objectively and effectively.”

d) "Destiny equipment should not be used for non-Destiny related business, though incidental personal use may be permitted."

e) "All employees, officers and directors have a responsibility to understand and follow the Code of Conduct. A violation of this Code of Conduct may result in appropriate disciplinary action, including the possible termination of employment."

[11] Mr. Vandenberg and another employee, Alen Vitasovic, both testified that they and others at Destiny generally assumed that the plaintiff and SV were a couple given their demeanour, the fact that they lived at the same properties, and that they often came into work together. Their relationship was clearly very close. In an email between SV and Mr. Vestergaard regarding a potential property purchase, SV states, “Zashean wears the pants – tried buying a dress but don’t like getting yelled at.” On August 30, 2006, the plaintiff registered with the provincial health insurer as SV’s common-law spouse. However, she asserts that this declaration was incorrect and, admittedly, improper.

[12] Notwithstanding the plaintiff’s lack of prior technology experience, Destiny did not have any issue with the plaintiff’s performance until the period after January 1, 2017. Problems only began to develop after the plaintiff became involved in a commercial business purchased by SV. From that point, an array of problems started to develop.

The External Business Problem

[13] In 2016, SV purchased a cafe and general store in Lions Bay, BC (“LB”) in partnership with Craig Doherty. Shortly thereafter, the plaintiff started performing work for LB. The plaintiff was not paid by LB for her work. Rather she claims that she did the work because she had extra time, and the work matched her skills given her prior experience in the food industry.

[14] The plaintiff denies that she was an owner of LB. However, she, SV, and Mr. Doherty, often referred to her as an "owner" in various LB correspondence. In other LB correspondence, the plaintiff referred to herself as SV’s spouse. The plaintiff acknowledged in cross-examination that these representations were misleading. However, she says they were necessary in order to ensure that LB’s suppliers and contractors took her seriously.

[15] The plaintiff’s work for LB included the following:

a) sourcing and ordering alcohol, including putting certain orders on her personal credit card;

b) managing certain inventory, pricing and equipment procurement matters, particularly relating to the alcohol part of the business;

c) receiving and reviewing reports from LB’s point of sale computer system;

d) corresponding with employees, contractors and suppliers;

e) attending trade shows and conferences;

f) registering the business on government websites;

g) determining proper shelving arrangements;

h) arranging for an offsite computer backup service; and

i) creating signage.

(the "LB Work").

[16] From January 2017 until her dismissal in June 2017, the plaintiff spent time on LB Work during Destiny Software's regular office hours. The plaintiff says that she did limited LB work in early 2017, but the work admittedly increased in April 2017. When asked how many hours per day she was doing LB Work during the January to June 2017 period, she responded, "Couldn't be more than an hour a day." Later in cross-examination, it was put to her that she appeared to be very busy in May 2017, and the plaintiff responded that "I maybe did 1 to 2 hours max in a whole day."

[17] The plaintiff also admitted that in the January-June 2017 period she sent or received about 2,700 emails related to her LB Work, most of which were between April and June 2017. The plaintiff claimed that some of the emails were drafted in the evening and sent out the next day. However, this was not supported by the records, which showed the plaintiff responding promptly and in real time to various LB communications.

[18] In terms of her signage work, on or about April 27, 2017, the plaintiff asked a Destiny employee, Ryan Gutierrez, to assist her in mocking up a proposed electronic logo for an LB sign. The plaintiff says that she asked Mr. Gutierrez to do this work outside of company hours. Mr. Vandenberg expressed a concern that, given her relationship with SV, Mr. Gutierrez would not have felt like he had the right to object to this request.

[19] On May 15, 2017, SV wrote to Mr. Doherty about the plaintiff's LB Work stating "She's living and breathing inventory – it actually gets annoying as it is all she talks about, but she is spending a lot of time talking to people to get the right product mix…She's also pushing for us to rip out the shelves and put in adjustable steel racks, which would allow us to have four rows instead of three." On at least one occasion she stored goods intended for LB at Destiny's premises. On May 16, 2017, SV wrote that "Zashean has been going through the POS [LB's Point of Sale system] meticulously to correct mistakes."

[20] In terms of her attendance at conferences for LB, such as the May 25, 2017 *Wines of British Columbia* Convention at the Vancouver Convention Centre, the plaintiff suggests that she was generally able to attend these conferences outside of normal office hours.

[21] The plaintiff controlled the main email address for LB. She arranged for the LB internet domain to be transferred to her control.

[22] The plaintiff's depth of involvement in LB's operations is well illustrated by two May 16, 2017 emails where she (1) provides her comments on the proper price for a travel mug purchased wholesale for $7.50, and (2) questions whether the pricing for "powerade tropical mango" should be $1.41 or $2.59.

[23] On June 2, 2017, she advised the onsite managers at LB that "You will have to report everything to me regarding liquor issues…"

[24] On June 5, 2017, Mr. Doherty sent an email to an LB contractor stating, "I know [the plaintiff] is super busy (she's looking after re-engineering all of our inventory…and she's kicking arse) so she may not have had a chance to get to you."

[25] The plaintiff says that she felt she was entitled to do LB Work while employed by Destiny given that she regularly worked excess hours per week for Destiny. She also asserted that she often had to work late or from home for Destiny in order to manage its relationships with Australian and New Zealand contacts. As such, her position is that she simply applied excess Destiny work hours against her LB Work. However, she accepts that never sought managerial approval for this approach.

The Business Plan Problem

[26] In early 2017, the Board of Directors was concerned about Destiny's declining revenues, so decided that it needed fresh information regarding Destiny's various business processes (the "Business Plan"). On April 28, 2017, Mr. Vandenberg passed on this request to the various department heads, including the plaintiff. The

intention was for the Business Plan to be used in the preparation of Destiny's 2018 budget.

[27] The plaintiff understood that the request for a Business Plan came from the Board. She knew it was important, and she recognized that she needed to provide the requested information by the stated deadline of May 19, 2017. She failed to do so.

[28] On May 1, 2017, the plaintiff asked for more information about the request. Mr. Vandenberg offered to send her a draft outline that had been prepared previously. The plaintiff asked him to send it again. On May 3, 2017, Mr. Vandenberg replied by sending the older draft document which had a table of contents and other basic information, red-lined with details and a series of questions to help guide the plaintiff through the preparation of the information required. The plaintiff still did not respond. She claims that she still did not understand what Mr. Vandenberg wanted, and that the one time she went to see Mr. Vandenberg to discuss her confusion, he was on holiday. However, (1) she agreed that all the questions were understandable, and (2) she (somewhat inconsistently) argued that she had already done this work as part of earlier evaluations in or about 2009 and 2015.

[29] On May 15, 2017, Mr. Vandenberg received an email from the plaintiff's subordinate, Joanna Vestergaard, indicating that Ms. Vestergaard had planned to help the plaintiff prepare the Business Plan, but that the plaintiff had indicated this was not necessary.

[30] On May 24, 2017, the plaintiff sent a message to LB's Mr. Doherty stating that "I am behind on a big deadline on a report so I need to get this done. The board of directors are asking this of me and the CFO." She sent a similar message on May 26, 2017, stating, "...I have just been so busy. The [LB] store does take up a lot of my time. I also had a deadline to the CFO and the Board of directors and I missed that. [So] I need to focus on that right now."

[31] On June 21, 2017, Mr. Vandenberg asked the plaintiff to send him everything she had completed on the Business Plan. The plaintiff accepts that she received this email, but says she did not read it. The plaintiff says that she had difficulty keeping current with her internal PlayMPE emails because she was also getting copied on all service tickets emails. She did not have her internal email open throughout the day, only checking it about once daily. She suggested that she was unaware of how to filter her email to prevent her inbox from being swamped with service tickets. However, during the course of her testimony, she admitted to applying a filter on the emails coming to her LB email address. Furthermore, Mr. Vandenberg said that the service tickets were already being copied to her email in 2015, yet she has been able to stay current on her Destiny emails prior to her starting her LB Work. Mr. Vitasovic also confirmed that the service ticket email protocol was changed earlier than 2017.

[32] On June 22, 2017, Mr. Vandenberg asked Lillian Sun to follow up again with the plaintiff. Mr. Vandenberg was told that she had done nothing about the Business Plan. Mr. Vandenberg instructed Ms. Sun to follow up and ask for anything she had prepared to date. Nothing was forthcoming.

The Absenteeism Problem

[33] During the January to June 2017 period, the plaintiff was regularly absent from work. She suffered a series of unfortunate events that spring, including a house fire and personal and family health problems. She started falling into a negative position in relation to her Destiny vacation time allocation. She rarely, if ever, sought advanced managerial approval for her time off.

[34] Given his concerns about the plaintiff and SV's spotty attendance, Mr. Vandenberg began monitoring when they were in the office. He never saw the plaintiff working late. His tally has the plaintiff taking 24 vacation days between March 1, 2017 and April 12, 2017 alone.

[35] On Wednesday, June 14, 2017, Joanna Vestergaard wrote to SV stating, “I’m just wondering if everything is ok with Zashean? I have not heard from her directly since last Tuesday.”

[36] The plaintiff claims that it would not be possible for others to know whether she was in the office, because she was working out of a boardroom near reception. She says she set up there because she had a hearing problem, a condition that causes her to speak too loudly when there is ambient noise. Mr. Vandenberg stated that other employees would still know if the plaintiff was there from their trips to reception, the elevator or the washroom.

The Responsiveness Problem

[37] Beyond these three major issues (too much work on external LB work, not enough work on Destiny’s Business Plan, and excessive and unapproved absences), the plaintiff was also falling behind on many routine tasks. She fell several months behind in signing off on her subordinate’s time. She was late in the provision of her vacation documentation. She failed to respond promptly to inquiries requesting receipts for her corporate credit card.

The Suspension and Aftermath

[38] On June 22, 2017, the plaintiff was placed on administrative suspension by way of a letter hand-delivered in Destiny’s office by Mr. Vandenberg. The letter advised her to show up at Destiny’s lawyer’s office at 12 p.m. on Friday, June 23, 201,7 for an interview with an investigator, Paula Boddie. The letter declared that a failure to attend would be considered insubordinate conduct.

[39] The plaintiff says she lost this letter, so she showed up with SV at the earlier time set for his interview. The plaintiff says she asked the investigator whether they could witness each other’s interviews or record them, and was told no. However, it was Ms. Boddie’s recollection that it was SV that asked about these points. The plaintiff waited while SV met with Ms. Boddie. After only about 15 minutes, the meeting with SV ended. SV had advised the investigator that he and the plaintiff

would be tentatively willing to meet with her on Tuesday afternoon, but only with their legal counsel present.

[40] The plaintiff testified that Ms. Boddie then told her that "it's over for today" and that "somebody would contact her" about rescheduling for another time. Ms. Boddie testified that she did not say this, as she did not even know at the time whether the meeting would be rescheduled. Given all that occurred over the weekend following this meeting, it is unnecessary for me to resolve this particular evidentiary conflict.

[41] SV and the plaintiff immediately and jointly retained Oliver Hanson as their legal counsel. On June 23, 2017, Mr. Hanson wrote an aggressive letter to Destiny stating, *inter alia*:

> [Our] clients do not accept that their positions have been altered in any manner and will continue to perform their duties and responsibilities on behalf of the company. As DMT's actions against our clients are entirely unlawful and improper, Mr. Vestergaard and Ms. Dove will not participate in any internal investigation, the only purpose of which would be to continue the oppressive conduct undertaken by DMT and its directors, Mr. Cho and Mr. Graber.
>
> Instead Mr. Vestergaard, Ms. Dove and Mr. Kaland will be present at the office on Monday morning to continue their employment. If DMT does not acknowledge, in writing, by **9:00 a.m. on Monday June 26, 2017** that our clients' positions with the company are unchanged and, further, does not immediately restore our clients' access to their company email accounts and reactivate their keycards, we have instructions to initiate legal proceedings against DMT, Mr. Vandenberg and the remaining directors of the company for oppression, conspiracy and other wrongful corporate conduct.
>
> Govern yourselves accordingly.
>
> [Bold in original.]

(the "Hanson Letter")

[42] Mr. Vandenberg testified that the Hanson Letter caused him a concern about the scene that might develop if the three dismissed employees showed up at Destiny's offices on Monday morning. On Sunday, June 25, 2017, Destiny responded to Mr. Hanson stating, *inter alia*:

> …We trust that Mr. Vestergaard and Ms. Dove will comply with our lawful directions as outlined in their letters of suspension and will not return to work tomorrow as indicated in your letter. The company's investigation is still in progress.

> We have decided to give Mr. Vestergaard and Ms. Dove a final opportunity to cooperate with the investigation. Please advise immediately, and no later than 9:00 am Monday June 26, 2017, if Mr. Vestergaard and Ms. Dove are willing to cooperate with the investigation and meet alone with the investigator and a meeting will be arranged. Please note that, if they continue to refuse to participate in the investigation, we will have no choice but to conclude the investigation without their input.
>
> (the "Destiny Letter").

[43] The Destiny Letter was only sent to the plaintiff by her counsel at 1:16 pm on Monday, June 26, 2017. The plaintiff testified that while it went to her LB email account, she did not read it. When probed as to why she did not see or read the letter, she stated she was with her mother all weekend. However, June 26, 2017, was a Monday. The plaintiff also suggested that she did not see the letter due to the volume of emails in her account. However, the plaintiff's own record of the emails sent and received for LB shows only 4 emails on June 26, 2017.

[44] As noted earlier, the plaintiff admitted that she was using the filtering function in her LB account. When asked why she did not also filter her Destiny emails, she said "I don't know." She later followed up with an explanation that she had only recently learned how to filter her emails, but then eventually conceded that "she probably could have" filtered her Destiny emails.

[45] The plaintiff did not engage further with Destiny thereafter. As such, Ms. Boddie submitted her Workplace Review Report on June 28, 2017. That same day, the plaintiff was terminated for cause. A letter to that effect was sent to her counsel Mr. Hanson and SV directly. The letter instructed her to return all company property in her possession or control, including computers. The plaintiff failed to return her work computer after her dismissal. She claims that she no longer knows where it is.

[46] In its final argument, Destiny summarized its grounds for dismissal as follows:

> a. Ms. Dove worked on the External Business Work during regular business hours, and during time in which she was being paid by Destiny Software;

> b. Ms. Dove did not perform her duties and responsibilities as list Manager diligently or at all. She subordinated her duties and responsibilities for Destiny Software to the External Business Work. Ms. Dove almost entirely stopped working at Destiny and instead focused her time and attention on the External Businesses;
>
> c. One critical example of Ms. Dove's failure to perform her duties for Destiny Software was her failure to provide information about the list management processes, as requested by the Board of Directors. The information was to be utilized in the 2018 budget and ultimately a business plan for the company, at a critical period of time for the business. Ms. Dove knew the request came from the Board. She knew it was important and knew she was to provide the information by May 19, 2017. Notwithstanding many requests to provide this information, and Mr. Vandenberg outlining a detailed series of questions for Ms. Dove to answer,
>
> Ms. Dove entirely failed to provide anything at all in response to this request …;
>
> d. Ms. Dove was regularly absent from work and did not communicate promptly or effectively with other employees of Destiny Software. She left it to Destiny Software to perpetually have to chase her for information about her attendance and other matters;
>
> e. Ms. Dove utilized Destiny Software's offices, office equipment and staff for the External Businesses;
>
> f. Ms. Dove was always late in filling out her vacation requests and most often filled them out after the fact, contrary to the policy;
>
> g. On June 22, 2017, Ms. Dove was placed on an administrative suspension while an investigation into Ms. Dove's conduct occurred .... She was directed by the Board of Directors to cooperate with the investigation, but insubordinately refused to cooperate.

[47] Mr. Vitasovic took over the plaintiff's role after she left. He is no longer with the company, but testified that:

a) he did not observe the plaintiff in the office working late in the January-June 2017 period;

b) he was able to fulfil the plaintiff's role without being overwhelmed by emails. He estimated he only received about 150-200 service ticket emails per week, or less;

c) there was no real need to work outside or beyond normal business hours. In particular, the time-pressured work for Australia and New Zealand only occurred in a couple of weeks throughout the year; and

d) he was able to make a number of useful process improvements to improve the operation of the department.

[48] At the time of her dismissal, the plaintiff testified that she was in receipt of the following compensation and benefits:

a) a base salary of $70,000[1]; and

b) the right to participate in an employee share purchase plan (the "Plan"), which right she had exercised over the years.

[49] The Plan provided for the following to occur with any shares after termination:

> 9.1 Termination. The Participant's rights under the plan will terminate when he or she ceases to be an eligible Participant due to …termination…
>
> 9.2 Disposition of Shares. In the event of the Participant's termination under section 9.1, the Participant will be required to:
>
> (a) sell any shares then remaining in the Participant's account;
>
> (b) transfer all remaining shares to an individual brokerage account; or
>
> (c) request the Company's transfer agent to issue a share certificate to the Participant for any shares remaining in the Participant's account.
>
> …
>
> 9.4 Failure to Notify. If the Participant does not do any of the options set out in section 9.2 within 30 days, the Participant will be sent a certificate representing his or her whole Shares…

[50] The plaintiff had accrued 19,099 shares at the time of her dismissal. The plaintiff did not contact Destiny to provide directions in relation to the delivery of these shares after her dismissal. For their part, the defendants never delivered any certificate. It was only on March 14, 2023, that the defendants finally put these shares under the plaintiff's control. Between her dismissal and the date the shares were placed under her control, the share price varied between $0.45 USD and $1.60 USD.

[1] Although this was the figure the plaintiff used, the defendant submitted her 2016 T4 as evidence showing that her employment income was $75,715.

[51] The plaintiff controlled other earlier acquired shares during the period after her dismissal, but there was no evidence that she disposed of any of these shares following her termination.

[52] After being let go, the plaintiff continued her LB Work without compensation until about December 2017. The plaintiff was offered a position with LB as a manager at about $50,000 per year, but she turned that down as she did not want to do the drive to Lions Bay on a daily basis.

[53] In terms of other efforts to find employment, the plaintiff only sent out one resume. She says she did in-person research at various establishments to confirm if they were a good fit. In particular, she needed to ensure that the ambient noise would be manageable in light of her alleged hearing problems. She remains unemployed.

III. ANALYSIS

A. Credibility and Reliability

[54] In *Faryna v. Chorny,* [1952] 2 D.L.R. 354 (B.C.C.A.) the Court of Appeal stated:

> The credibility of interested witnesses, particularly in cases of conflict of evidence cannot be gauged solely by the test of whether the personal demeanor 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 current 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 pace and in those conditions.

[55] In *Bradshaw v. Stenner,* 2010 BCSC 1398, aff'd 2012 BCCA 296, Madam Justice Dhillon stated:

> [186] Credibility involves an assessment of the trustworthiness of a witness' testimony based on the veracity or sincerity of a witness and the accuracy of the evidence that the witness. The art of assessment involves the examination of various factors such as the ability and opportunity to observe events, the firmness of his memory, the ability to resist the influence of interest to modify his recollection, whether the witness' evidence harmonizes with the independent evidence that has been accepted, whether the witness

> changes his testimony (during direct and cross-examination), whether the witness' testimony seems unreasonable, impossible or unlikely, whether the witness has a motive to lie, and the demeanor of the witness generally. Ultimately, the validity of the evidence depends on whether the evidence is consistent with the probabilities affecting the case as a whole and shown to be in existence at the time.
>
> [187] It has been suggested that a methodology to adopt is to first consider the evidence of the witness on a "stand alone" basis, followed by an analysis of whether a witness' story is inherently believable. Then, if the witness testimony has survived relatively intact, the testimony should be evaluated based on the consistency with other witnesses and with any documentary evidence. The testimony of non-party, disinterested witnesses may provide a reliable yardstick for comparison. Finally, the courts should determine which of events is the most consistent with the "preponderance of probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions". I have found this approach useful.

[56] I find that the plaintiff's evidence had a number of reliability and credibility issues

[57] The fact that the plaintiff often advised persons that she was married to SV, or was an owner of LB, shows a willingness to misrepresent facts when it serves her interests. Even more serious was the insurance misrepresentation (unless she was, in fact, SV's common-law spouse, which would simply establish a different inconsistency with her trial evidence).

[58] The plaintiff gave her evidence in a painfully circuitous manner. She would start in one place, then head off into an array of tangents, to the point where it was difficult to understand what she was trying to communicate. It was difficult to assess if this was reflective of a reliability problem or a credibility problem. The plaintiff claims to suffer from post-traumatic stress disorder which affects her thought processes. That said, she did not present any evidence of this diagnosis.

[59] The plaintiff's manner of testifying and conducting herself was quite confusing. I expect that her work colleagues also had difficulties dealing with the plaintiff's communication challenges.

[60] Indeed, Mr. Vandenberg freely admitted that part of the reason he did not go to see the plaintiff in person after she first expressed difficulty preparing the

Business Plan was that she was very difficult to engage with. That willingness to make an admission against interest did help me reach the conclusion that Mr. Vandenberg was generally credible and reliable.

[61] Between the plaintiff's credibility problems and her struggle to tell a coherent story, I find that I must approach her evidence with caution.

[62] The investigator, Ms. Boddie, appeared to be generally truthful, although she could not recall many of the details of the relevant day.

[63] Mr. Vitasovic was the most credible and reliable of the witnesses. He is now independent of the parties, and had a very good recollection of the facts to which he testified.

B. Adverse Inference

[64] The court may draw an unfavourable inference where, in the absence of an explanation, a party fails to provide evidence from a material witness, when it can be inferred that the witness would be willing to assist the party or is someone over whom the party has exclusive control: *Chu v. China Southern Airlines Company Limited*, 2023 BCSC 21 at paras. 51-52.

[65] The plaintiff did not call SV to testify. No explanation was provided for this absence, although the plaintiff suggested vaguely that they had had a falling out. The defendants argue that the Court should assume that SV likely would have had material evidence, including: the nature of her relationship with SV; the scope of work and time spent on the LB business; the plaintiff's restricted work for Destiny; and the interactions with Ms. Boddie on June 23, 2017.

[66] I note that SV has his own wrongful dismissal trial upcoming. I expect that part of the explanation for the fact that he did not testify is that he did not want to risk an opportunity to frame potential inconsistencies, but this is speculation. That said, given the clear relevance of his potential testimony, I am prepared to draw an

adverse inference against the plaintiff, but the weight of this inference is moderated by the following factors:

a) The defendants could also have called SV, as he is independent of the plaintiff: *Hranka v. Zeibak*, 2006 BCSC 1232 at para. 30; and

b) Somewhat surprisingly, the plaintiff did not seek to advance an argument that SV, as her supervisor, insisted on the plaintiff working on his LB business. The Court alerted the self-represented plaintiff on several occasions that this could well be an alternate defence on the evidence, but the plaintiff made it clear that this was not an argument she wished to advance. This decision made SV's evidence less material to the outcome.

[67] The defendants also argued that the Court should draw an adverse inference from the plaintiff's failure to return her work computer. It was possible that the emails on this computer would have contained additional internal PlayMPE emails. However, I am not prepared to draw an adverse inference on this basis given that:

a) the plaintiff credibly suggested that these emails would actually have helped her case more than the defendants', since they would presumably show how she was at least doing some regular Destiny work during the relevant period; and

b) it is very surprising that the defendants would not have set up their email server in a way that would allow for the company to be able to access a backup of their employees' emails.

C. When did the Plaintiff's Employment Begin?

[68] I find that the plaintiff only became an employee with Destiny on August 4, 2009. Even she described this as the date that she was "hired". She was only added to Destiny's payroll on this date. It was only then that she committed to working a full-time 40 hours per week, and started to receive a salary. Prior to that date, I find

that the plaintiff was, at most, a contractor performing odd jobs in return for space within Destiny's premises.

D. Was there Just Cause for the Plaintiff's Termination?

Legal Principles

Generally

[69] I summarized the general principles applicable to wrongful dismissal claims in *Scorpio Security Inc. v. Jain,* 2018 BCSC 978:

> [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 CanLII 88 (SCC), [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.

Working on Other Businesses

[70] Employees have a duty to provide full-time service to their employer unless otherwise agreed. Working for outside business during business hours without approval can be a basis for dismissal: *McMahon v. TCG International Inc.,* 2007 BCSC 1003 at para. 50-52.

[71] In *Wells v. Newfoundland and Labrador Nurses' Union,* [1986] N.J. No. 370 (S.C.) an employee accepted a position with a commission while still working in his position. The court found that there was just cause for dismissal stating:

> [63] Mr. Wells had entered into an employment contract with the union to act as its business agent. The regular hours of work were weekdays from 9 to 5 with no entitlement to overtime pay. Although the hours of work are not specified in the employment contract, this is only because it is understood that where a person engages himself to work for another he will do that work during normal business hours of the employer unless the contrary is specified or is obvious from the nature of employment. Mr. Wells had leased his time and talent to the union for an indefinite period at $50,000 a year. The time and talent were to be available during office hours. Whether he was busy or not, he was not free to allocate any of that time to other commitments without the consent of the union.
>
> …
>
> [74] It is not really unnecessary to determine whether Mr. Wells was or would have been busy or not. He had, as noted, leased his time and talent to the union and it was for the union and not for him to say how that time should be spent…
>
> [80] It is the right of the union that is really an issue here. The union had a right to Mr. Wells's undivided time during normal office hours subject to the informal arrangement to accommodate his commitment to the city council.

> [81] A person has duties as well as rights. The duties may be voluntarily assumed and this may preclude the exercise of rights.
>
> [82] Rights are frequently surrendered voluntarily. A contract of employment is a good example. The employer has rights, the employee, duties. The converse is true, too, for the employee has a right to be compensated by the employer. The discharge of the duty undertaken by a contract of employment may involve the forfeiture of rights inconsistent with that duty during the period that the duty exists. To put it in blunt terms, if Mr. Wells commits himself to work for someone during normal business office hours, he cannot commit himself to work for someone else during those same office hours. The making of such a commitment of itself is grounds for dismissal. In effect, Mr. Wells renounced the contract, at least in part. He announced to his employer that although he had committed himself to work for it during normal business hours, he now intended to devote some of those normal business hours to the Royal Commission.
>
> [Emphasis added.]

[72] In *Ross v. IBM Canada Limited*, 2015 ABQB 563, a senior salesman was terminated by IBM on the basis that he was also working for his own personal company during IBM's office hours. IBM had clear conduct guidelines of which one particular guideline expressly prohibited using company time to perform non-IBM work or using IBM assets for outside work. The court held that the plaintiff's termination was justified. His role was a full-time job with a substantial salary and required that all of his work energy to be devoted to IBM's interests. The court accepted evidence that the employee spent on average three to four hours per week conducting his private businesses on IBM time. This breakdown in the employment relationship was sufficient to warrant termination with cause, as Ross's misconduct:

> [60]…constituted a clear breach of a clear conduct standard that was emphasized by the employer as being at the core of the employment contract. The repeated breach of the conduct guidelines was inconsistent with the fulfillment of the express terms of his employment contract.

[73] In *Ross v. Readyfoods Ltd*., 1981 CanLII 3493 (M.B.Q.B.), an employee became involved with an external business during his employment with the defendant. The court found that cause for dismissal was established because the employee spent significant time during the employer's regular business hours focused on his external business, to an extent that was incompatible with his duties to his employer. The court held as follows:

> [17] The evidence satisfies me that during the period of the employment in which the employer's complaints arose the plaintiff did spend significant time during usual business hours on Goldbrook affairs - time during which the corporate defendant was entitled exclusively to have the focus of his attention and energies directed to its affairs...Robinson observed a change in the plaintiff's attitude towards his employer's affairs and report he was no longer as readily available a previously to deal with problems encountered by ordinates and on which they required direction. His appropriation of Johnson's time and services and that of the maintenance staff was additional default. The impression the whole of the evidence leaves with me is that the plaintiff was not dealing with Goldbrook affairs (as he had assured Levenstein he would) on his own time but was involved in such matters to an extent incompatible with his obligation to serve the corporate defendant...The case is not one of an isolated occasion or incident but of a pattern of conduct inconsistent with the plaintiff's contractual obligation to devote himself only to the service of the employer during normal business hours...

[74] In *King v. Kenair Apartments Ltd*. (2001), 8 C.C.E.L. (3d) 289, 2001 CarswellOnt 1412 (Ont.S.C.J.), the court found no support for the employer's contention that the plaintiff's involvement with a second job detracted from his job performance as the building manager of an apartment complex. His role in relation to the second position was largely confined to administrative work done during his time off. Moreover, the fact that the plaintiff had a second job was known throughout by the employer.

Warnings

[75] In *O.W.L. (Orphaned Wildlife) Rehabilitation Society v. Day*, 2018 BCSC 1724, the court considered the importance of the employer providing warnings, and considering alternative measures, prior to dismissal:

> [144] The suitability of alternative disciplinary measures to address the impugned conduct must be considered by the employer before taking the most severe form of reprimand step possible, which is to fire the employee and deny him or her with a means of financial support. An effective balance must be sought by the employer between the severity of the alleged misconduct and the sanction imposed: *McKinley* [2001 SCC 38] at para. 53; *Kerr* [2018 BCSC 704] at para. 56. Progressive discipline, usually starting with clear and unequivocal warnings, followed by suspensions prior to dismissal is the usual course...
>
> [Cites in brackets added.]

[76] In *Hennessy v. Excell Railing Systems Ltd.,* 2005 BCSC 734 the plaintiff was given no warning that his job was in jeopardy, nor that he was failing to meet the level of job performance required of him. The court found that "[the plaintiff's] performance was not so grossly deficient that the likelihood of discharge was so obvious that warnings and reasonable notice were not required. Although dissatisfaction with his work may well have led to the decision to terminate his employment, he was entitled to receive proper warnings that his job was in jeopardy and to have been given a reasonable opportunity thereafter to correct the deficiencies": paras. 13-14.

[77] This warning issue was also discussed in *Ross*. In *Ross*, the court found that a warning was not required given the nature of the plaintiff's conduct. The court stated:

> [32] Whether a warning must be given to an employee prior to summary dismissal is one of the factors that a court will consider in determining if termination was justified: each situation must be assessed on its own circumstances. The more serious the misconduct, the less likely will a court require an employer to give notice to an employee of unacceptable misconduct. However, if an employer has tolerated certain behaviour in the past, but decides to longer tolerate that conduct, notice must be given to employees of the change in approach. Also, if an employee has demonstrated faithfulness to an employer and the misconduct is not, assessed objectively, very serious, notice of the potential consequences of the breach may have to be given.

[78] To similar effect, in *Fonceca v. McDonnell Douglas Canada Ltd.* (1983), 1 C.C.E.L. 51 at para. 16 (Ont. H.C.J.), the court held, "Where the incidents complained of are trivial, but annoying, then warnings are necessary before termination for cause is justified. However, where incidents, each in themselves, are serious, even though not sufficient to justify dismissal at the time, then a warning is not essential".

Mitigation

[79] Damages for wrongful dismissal will be reduced if the court finds that the plaintiff did not adequately mitigate their wage loss by seeking alternate

employment. The duty to mitigate was described as follows in *Smith v. Aker Kvaerner Canada Inc*., 2005 BCSC 117:

> [31] In seeking and accepting alternate employment, the plaintiff has a duty to act reasonably and to take such steps as a reasonable person in the plaintiff's position would take in his own interest to maintain his income in and his position in the industry, trade or profession. This duty involves a constant and assiduous application for alternative employment, an exploration of what is available through all means…

[80] In *Moore v. Instow Enterprises Ltd.,* 2021 BCSC 930, this court considered what a reasonable job search should look like:

> [39] A job search is an active prospect, and it can be a difficult and onerous one. It requires more than creating a resume and conducting computer searches. Looking at job postings, absent further action, is not sufficient to fulfill the requirement that a person undertake a reasonable job search. A reasonable job search may include activities such as reaching out to contacts within the industry, writing cover letters setting out why you qualify for a position, following up with telephone calls or email correspondence.

[81] If there is a complete failure to seek work after dismissal, the court may deny a claim for damages in its entirety. ln *Steinebach v. Clean Energy Compression Corp.,* 2016 BCCA 112, the Court of Appeal stated as follows:

> [40] As was stated in *Coutts,* a dismissed employee's duty to mitigate is to take reasonable steps to find alternative employment, that is, to secure employment that will replace the employee's lost income. If the employee fails to take any steps to do so, the result may be no damages. Where the employee takes some, albeit inadequate, steps to do so, damages may be reduced to take that into account...

[82] In *Cimpan v. Kolumbia Inn Daycare Society,* 2006 BCSC 1828*,* the plaintiff did not take steps to secure new employment following her dismissal. The court found she failed to mitigate and the court dismissed her claim for wrongful dismissal. The court stated as follows with respect to her failure to mitigate:

> [106] Here, the clear evidence from Ms. Cimpan is that she did not make any attempt to obtain alternate employment, initially relying upon the financial ability of her husband to support her, and then deciding to educate herself towards opening her own day care centre.
>
> [107] It cannot be the law that a dismissed employee can elect to take further training for self-employment and charge that to the employer, unless the employee cannot obtain alternate suitable employment.

> [108] While the onus is on the defendant to prove the plaintiff has not mitigated, it would be impossible for any employer to prove that the employee would have been able to secure a particular job. Here the defendant has proven to my satisfaction that there were comparable positions as available through the newspaper. I believe it has satisfied its onus.
>
> [109] As the plaintiff has made no efforts whatsoever to mitigate her damages by seeking alternate employment that was available, I conclude that she has not suffered any damages at law as a result of her termination and I accordingly dismiss her action.

[83] In *Besse v. Dr. A.S. Machner Inc*., 2009 BCSC 1316, the court held that a plaintiff's refusal to consider alternate employment in Chilliwack when she resided in Hope was unreasonable. The court stated at para. 96 that "the desire to avoid a short commute is not a reasonable ground for a failure to pursue employment in mitigation of damages."

Application of the Legall Principles to the Present Case

[84] I find that there was just cause for the plaintiff's dismissal. This determination is not based on any one factor. Rather the conclusion is driven by the cumulation of the following findings and factors:

a) Although the plaintiff suggests that she did certain LB work from home, including the preparation of draft emails, I find that the volume of emails, as well as the time stamps on the emails, indicate that the plaintiff was doing substantial LB work during Destiny's work hours without prior approval from management at Destiny;

b) The plaintiff's LB work was broad-reaching across LB's operations;

c) The plaintiff's LB work impacted her ability to stay current with her Destiny work;

d) The plaintiff's requested that a Destiny employee help her with LB's signage. Even if the plaintiff suggested that the work be done outside of work hours, the employee would likely have perceived this as an order given the plaintiff's position and close relationship with SV;

e) The plaintiff overstated her inability to stay on top of emails to her internal PlayMPE email address, particularly as she was able to:

   i. respond promptly to Destiny emails before beginning work for LB;

   ii. respond promptly to LB emails after beginning work for LB; and

   iii. filter her LB emails

f) The plaintiff's suggestion that she was fitting her LB work in and around a full work commitment to Destiny is belied by the fact that, if she had extra time to devote voluntarily to LB work, she should clearly have also been able to:

   i. respond to the Board of Directors' request for the Business Plan;

   ii. complete the timesheet approvals for her subordinate; and

   iii. deliver her vacation and credit card documentation in a timely fashion.

   In fact, her May 24, 2017 email clearly reflects that she was not able to stay on top of both jobs at once. She, herself, recognized that she was struggling, but was only being paid for one of the jobs and that position should have received priority.

g) The plaintiff overstated the extent to which she was accruing excess hours managing Australian and New Zealand contacts outside of normal business hours.

h) Rather than accruing additional excess work during this six-month period, the plaintiff was actually in a heavy negative position in relation to her vacation days, with no end in sight in that trend.

i) The plaintiff did not do any work on the Business Plan, notwithstanding the reasonable deadlines established by Mr. Vandenberg and the Board. She did no work notwithstanding her suggestion at trial that she had already considered these types of planning issues twice over the course of her

employment with Destiny. She also did not take sufficient steps to ask questions about the preparation of the Business Plan.

[85] Although it is more important to determine whether she failed to keep up with her responsibilities for Destiny than to determine why that was the case, my sense is that the plaintiff had a fixed capacity to work over the relevant period, so she chose the work that she found more enjoyable – being her volunteer work for LB. However, that was not her choice to make, particularly without Destiny's express permission. While I am suspicious that she was encouraged to make that choice by SV, the plaintiff repeatedly refused to argue that she was "just following orders". I am also suspicious that her decision not to advance this condonation defence may have been motivated by a desire to protect SV's legal position in relation to his own upcoming wrongful dismissal trial. However, it is not necessary to come to arrive at findings on those suspicions in order to resolve the present matter, but these suspicions do "fit" the evidence.

[86] In terms of setting the present matter within the case law, *Ross* is the most helpful precedent given the parallels between the two cases:

a) the plaintiff was doing LB work during her regular work hours: *Ross*, paras. 20-21;

b) the plaintiff started working more and more on the LB business over time: *Ross*, para. 18;

c) the plaintiff failed to produce material requested by her superior: *Ross*, para. 19;

d) the plaintiff was slow in responding to emails: *Ross*, para. 21;

e) the plaintiff's work was essential to the company's success: *Ross*, para. 39; and

f) I find that the plaintiff was spending at least 3-4 hours a week on LB business during Destiny work hours across the six-month period from January to June, 2017: *Ross*, para. 42.

[87] That said, there are certain factors that make the present case somewhat less clear-cut:

a) there were no "clear business conduct guidelines" communicated to the plaintiff: *Ross*, para. 1. The guidelines in *Ross* read as follows:

> 2.0 Introduction
>
> . . .
>
> Because rapid changes in our industry constantly present new ethical and legal issues, no set of guidelines should be considered the absolute last word under all circumstances. If you have any questions about interpreting or applying these Guidelines – or about guidelines and procedures published by IBM or its operating units, subsidiaries or specific functions, such as the Public Sector guidelines – it is your responsibility to consult your manager or IBM counsel. A violation of any IBM guidelines can result in disciplinary action, including dismissal.
>
> . . .
>
> 5.1 Conflicts of interest
>
> Your private life is very much your own. You are, however, an IBMer both on and off the job and a conflict of interest may arise if you engage in any activities or advance any person interests at the expense of IBM's interests. It's up to you to avoid situations in which your loyalty may become divided. Each individual's situation is different, and in evaluating your own, you will have to consider many factors. The most common type of conflicts are addressed here to help you make informed decisions.
>
> …
>
> . . .
>
> 5.1.4 Using IBM's time and assets
>
> You may not perform non-IBM work or solicit such business on IBM premises or while working on IBM time, including time you are given with pay to handle personal matters. Also, you are not permitted to use IBM assets, including equipment, telephones, materials, resources or proprietary information for any outside work.
>
> . . .

That said, the plaintiff understood that she was not to work again on her crystal business once she was hired, which should have been an indication that outside work was prohibited.

b) the plaintiff was not a particularly highly paid employee, whereas the plaintiff in *Ross* was earning approximately $193,000 annually, and was described as a "hot skills recruit": *Ross*, para. 5;

c) the plaintiff was not working in an "autonomous work situation": *Ross,* para. 5;

d) the plaintiff did not charge LB business phone calls to Destiny: *Ross*, para. 26;

e) there was an expectation here that the plaintiff would have to work outside normal working hours on occasion: *Ross*, para. 35; and

f) the plaintiff in *Ross* specifically informed his employer when he was hired that he would transfer operational responsibilities relating to his personal business to his wife when he was hired, creating an element of deceit: *Ross*, para. 51.

[88] Nonetheless, I find that the comparable elements outweigh the distinguishing factors such that *Ross* is generally supportive of the conclusion I have reached on just cause. On the facts of this case, I find that there was just cause for dismissal, disregarding for the moment the question of the need for a warning.

[89] In terms of the need for a warning, beyond the points already reviewed, I find that the following factors favour the need for some form of warning:

a) the misconduct was not, assessed objectively, as serious as that in *Ross*; and

b) I would describe the plaintiff as more "oblivious" than "deceitful": *Ross*, paras. 50-53.

[90] On the other side of the ledger however, I find that the plaintiff ought to have understood from the surrounding circumstances that her job was in jeopardy if her

conduct continued, particularly as it relates to her failure to produce a Business Plan notwithstanding Destiny's repeated efforts to extract same.

[91] Were it appropriate to simply ignore the fact that Destiny did take steps to investigate, I may well have reached the conclusion that some additional form of warning should have been provided. However, the facts surrounding the investigation undercut the suggestion that a further warning was required.

[92] When issued, the suspension was just that – a suspension. At the time the investigation began, it was just that – an investigation. Ms. Boddie was acting in good faith with an intention to discover the true facts. Her investigation would presumably have given Destiny an opportunity to outline its concerns, and the plaintiff an opportunity to explain her actions.

[93] An employer's decision to investigate is reasonably related to the provision of a warning. As the court stated in *Geluch v. Rosedale Golf Assn*., 2004 CanLII 14566 (ON SC):

> [98] Employers may also have an obligation to properly investigate serious allegations, such as those of theft, fraud, or sexual harassment, to provide the employee with an opportunity to respond to any such allegations, prior to dismissing the employee: see *Francis v. Canadian Imperial Bank of Commerce* (1992), 41 C.C.E.L. 37 at 48 (Ont. Gen. Div.), varied on other grounds 1994 CanLII 1578 (ON CA), 21 O.R. (3d) 75 (C.A.). In *Simpson v. Consumers' Association of Canada* (2001), 2001 CanLII 23994 (ON CA), 57 O.R. (3d) 351 (C.A.), the Court of Appeal reversed the finding of the trial judge that a former Executive Director had been wrongfully dismissed despite numerous incidents of inappropriate comments to and touching of other employees. However, at para. 90, Feldman J.A. noted that, "The respondent had a fair opportunity to respond to the allegations. This was a situation where the CAC had no choice but to terminate [him]." The implication is that it was not only the allegations of sexual harassment, but also the fact that the employer had given the employee a fair opportunity to respond, and that his responses had been insufficient, which justified the dismissal.

[94] Here, the plaintiff's decision to tie her lot to SV's decision not to cooperate with the investigation, coupled with her own counsel's aggressive reaction to the proposed investigation as communicated in the Hanson Letter, effectively destroyed Destiny's ability to use the investigation as a means of alerting the plaintiff to the

precise nature of its concerns. Furthermore, Destiny did (reasonably) advise the plaintiff that a failure to cooperate with the investigation would be itself be treated as insubordination.

[95] Admittedly, there were certain problems with the investigation. In particular, the investigation did not adequately segregate the plaintiff's situation from that of SV. However, any such failings were overwhelmed by the following factors:

a) The weight of the plaintiff's collective failings had already largely destroyed any trust relationship with Destiny. The plaintiff never admitted to her failings in order to seek help: *Ross*, para. 51. One visit to the CFO's office while he was on holiday was not a good faith effort to report on her difficulties.

b) The plaintiff tied herself to SV's situation by arriving with him for the first interview in the investigation, and by accepting his decision to call the meeting to a close.

c) Destiny was entitled to take the plaintiff's counsel's representations in the Hanson Letter at face value, i.e. that he was counsel for the plaintiff and that the plaintiff had decided not to cooperate with any investigation. If counsel acted inappropriately in this regard, by (i) acting in a position of conflict, (ii) making representations that were inadvisable or without instructions, or (iii) failing to forward information to the plaintiff in a timely way in relation to the plaintiff's final opportunity to cooperate with the investigation, the plaintiff's remedy is against her counsel.

d) At the end of the day, the plaintiff was given an opportunity to explain her alleged dereliction of duty, but declined (or failed) to participate: *Ross*, para. 39.

[96] As such, I do not find that the warning/investigation issue requires a change in my conclusion that just cause existed in this case.

E. In the alternative, if there was no just cause, what would have been a reasonable notice period?

[97] The defendants say that the appropriate notice period would have been 7.5-9 months, only a slight variation from the plaintiff's proposal of 10-12 months.

[98] In *Ensign v. Price's Alarm Systems (2009) Ltd.*, 2017 BCSC 2137, the court provides a helpful summary of the law in relation to the determination of the appropriate notice period. The court stated:

> [35] Absent an enforceable contractual term or legislative provision to the contrary, it is an implied term of every employment contract that an employee must be given reasonable advance notice of any termination. The notice periods stipulated in the *Employment Standards Act* are just a legislative minimum. At common law, the length of any advance employment termination notice is determined by four central factors: (1) the character of the employment; (2) the length of service; (3) the age of the employee; and (4) the availability of similar employment having regard to the experience, training and qualifications of the employee. Absent exceptional circumstances, 18 to 24 months is generally considered to be the upper limit for any such reasonable notice.

[99] In this case:

a) the plaintiff held a managerial role. Although she only had one employee reporting to her, she reported directly to the CEO;

b) the plaintiff's length of service was 8 years, a moderately long period; and

c) the plaintiff was 53 years old at the time of her dismissal.

[100] The defendants relied on the guidance provided by the following decisions:

Case	Position	Length of Service	Age	Notice Period	Other Factors
Lelievre v. Commerce and Industry Insurance Co. of Canada, 2007 BCSC 253	Sales Manger for the Western Region	6 years	56 years old	Court awarded 6 months notice	- The plaintiff had one direct report - She earned a salary of $56,000 and was eligible for a performance bonus
Wiens v. Davert Tools Inc., 2014	Quality Control	8.5 years	52 years old	Court awarded 8.5 months	- The 2008 financial crisis

CarswellOnt 15886, 2014 C.L.L.C. 210-054	Manager (for a company that made prototype vehicles)			reasonable notice	was a factor that impacted the notice assessment
Evans v. Complex Services Inc., 2012 ONSC 6508	Quality Assurance Analyst	8.5 years	52 years old	Court awarded 9 months notice	- Low-mid level management position and managed computer systems rather than people
Upcott v. Savaria Concord Lifts Inc., (2009] O.J. NO. 3305 (S.C.J.)	Production /Planning Manager	8 years	54 years old	Court awarded 7.5 months notice	- Mid-level manager and earned less than 81,000/year

[101] I find that in the circumstances of this case, a 9-month notice period would have been appropriate, disregarding the mitigation issue.

[102] I also conclude that the defendants have established on a balance of probabilities that the plaintiff failed to properly mitigate her losses: *Coutts v. Brian Jessel Autosports Inc*., 2005 BCCA 224 at para. 23.

[103] In terms of the appropriate adjustment to the award to account for this finding, I find that refusing to make any award would have been too harsh an outcome. Even with best efforts, the plaintiff's future employment prospects would have been severely restricted in any event given her:

a) lack of education;

b) alleged hearing difficulties;

c) difficult personality;

d) strange communication style;

e) long absence from more plentiful food service industry jobs; and

f) long period of work with highly specialized software that likely has few analogues.

[104] Furthermore, the plaintiff did at least perform some minimal “on the ground” research on suitable work environments, did send in one application. The one position she was offered would have demanded a great deal of driving on her part.

[105] Although not a complete bar to recovery, I find that the plaintiff should have at least been able to find reasonable paid employment within a few months, although I expect that it would necessarily have been at a much lower salary than she had earned with Destiny. Rather than conclude that her failure to mitigate was so severe as to disentitle her to any award at all, I would have found that an appropriate remedy would have been to award approximately 4 months salary, or $25,000.

[106] If I had found no cause for dismissal, I would not have made any award for punitive and aggravated damages. The defendants’ conduct did not merit either type of award.

F. The Late Delivery of the Shares

[107] There is one claim by the plaintiff that is not dependent on a finding of wrongful dismissal. The defendants failed to provide the plaintiff with her share certificate within the time frame required by the Plan. The defendants did not seriously argue otherwise. However, they argued that the plaintiff did not sustain any loss as a result of this failing. The defendants note that:

a) As a thinly traded stock, the share price varied dramatically day by day, making it difficult for the plaintiff to argue that she would have been able to time any sale such that she would have done better than she could do after deliver of the shares on March 17, 2023. From June 2017 to March 2023, the shares traded as low as about $0.45 USD and as high as about $1.60 USD. On April 12, 2023, in the midst of the trial, it was trading for $0.70.

b) The plaintiff owned other shares, but did not dispose of them during the relevant period, and in particular, did not seek these other shares for a higher price than is currently available.

[108] I agree with these points. Although there was a breach of contract, I am unable to find any pecuniary damage. That said, breach of contract is actionable without loss.

[109] Nominal damages are awarded where a plaintiff's legal right has been invaded, but no damages have been proven. In this case, nominal damages can be awarded as the plaintiff has established a breach of contract, which is actionable, but she has failed to establish a loss caused by the wrong: S.M. Waddams, *The Law of Damages*, 5th ed. (Toronto: Thomson Reuters, 2012), at c. 10.10-10.30.

[110] There is substantial discretion in terms of the appropriate figure for nominal damages. However, in *Chohan v. Cadsky*, 2009 ABCA 334, leave to appeal to SCC ref'd, 33461 (22 April 2010), the Alberta Court of Appeal said that an award as high as $5,000 was not properly described as "nominal": para. 61.

[111] I would exercise my discretion to award $1,000 in nominal damages: *Cantera v. Leah Eller*, [2007] O.J. No. 1899, aff'd 2008 ONCA 876 at para. 64; *A.M. v. Matthews,* 2012 ABQB 185 at para. 246; *Georgian Windpower v. Stelco,* 2012 ONSC 3759 at paras. 215, 273.

IV. CONCLUSION

[112] The plaintiff's claim is dismissed save for a $1,000 nominal damage award relating to the delayed delivery of the share certificates. Unless the parties seek to make further submissions, the defendants shall have their costs at Scale C as the substantially successful party.

"The Honourable Mr. Justice Branch"