IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Chu v. China Southern Airlines Company Limited,* 2023 BCSC 21

Date: 20230105
Docket: S1910486
Registry: Vancouver

Between:

Paul Chu

Plaintiff

And

China Southern Airlines Company Limited dba China Southern Airlines

Defendant

Corrected Judgment: The text of the judgment was corrected at paragraphs 6, 145 and 166 where changes were made on February 6, 2023.

Before: The Honourable Mr. Justice Verhoeven

Reasons for Judgment

Counsel for the Plaintiff:	J.R. Lithwick M. Ollek
Representatives for the Defendant Company, appearing in person:	Z. Yu J. Liu
Place and Dates of Hearing:	Vancouver, B.C. November 17, 18, 2022
Place and Date of Judgment:	Vancouver, B.C. January 5, 2023

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I. INTRODUCTION

[1] The plaintiff, Paul Chu, applies for judgment on a summary trial. He claims damages for wrongful dismissal by the defendant, China Southern Airlines (“CSA”).

[2] The plaintiff began working for CSA on an informal basis in 2008. His work for CSA increased in volume in the years that followed. He began full-time employment with CSA in approximately April 2011. From 2011 to January 2018 he was employed as CSA's “Marketing and Business Development Manager” or some variation of that title.

[3] In March 2018 the plaintiff was demoted to a customer service position, working at the reception desk of CSA’s downtown Vancouver office. His pay was reduced by 25%. In early October 2018 the plaintiff was demoted again. He was assigned to work at the Vancouver International Airport (“YVR”) as an airport services worker.

[4] CSA terminated his employment on February 1, 2019, with immediate effect, alleging just cause for immediate termination. In its termination letter, CSA alleged incompetence, focussed upon his work at YVR, and “time theft”. No specifics of the “time theft” were provided.

[5] The plaintiff claims damages for wrongful dismissal based upon CSA's failure to provide reasonable notice of termination. He also claims aggravated damages based upon CSA's breach of duty of good faith and fair dealing in the manner of his dismissal, and punitive damages.

[6] The plaintiff alleges that beginning in February 2018, CSA engaged in a broad and sustained pattern of bad faith abusive conduct, including unfair discipline, insincere warnings, manufactured cause, and public embarrassment. He alleges that CSA’s bad faith conduct has continued throughout the course of the litigation.

[7] For the reasons that follow, I agree with the plaintiff’s allegations.

II. BACKGROUND

A. General Background

[8] CSA is a Chinese company, headquartered in Guangzhou, China. It is a major airline. It is controlled by the Chinese government, but its shares are also publicly traded on the Shanghai, Hong Kong, and New York stock exchanges.

[9] The highest-level CSA employee in British Columbia is the general manager ("GM"). In 2008 CSA's GM, Shaohong Chen (known as "Kitty") approached the plaintiff and asked him to help her establish Vancouver operations for CSA. CSA was in the process of opening its first Canadian office.

[10] The plaintiff was 68 years of age when he was fired by CSA. He has been a Canadian citizen since 1979. He has spent most of his professional life working in the fields of air travel and tourism, with a specific focus on travel between Canada and China. His experience is in marketing and business management. He speaks and writes fluently in both English and Cantonese.

[11] From 2003 until 2007 the plaintiff worked with Harmony Airlines, a small Canadian airline based in Richmond, BC, which provided air travel to China. He was a member of the board of directors, and director of international sales. The focus of his work was on relationship building for the airline. Harmony Airways folded in 2007. From 2007 to 2011 the plaintiff worked with a sister company to Harmony Airways, Companion Holidays Limited, as its general manager. Companion Holidays was a travel agency.

[12] No formal job descriptions exist for any of the plaintiff's roles with CSA.

[13] Beginning in 2008, the plaintiff assisted CSA's GM, Kitty Chen, in establishing CSA's Vancouver office. Ms. Chen was a Chinese expatriate. The plaintiff provided local industry knowledge and contacts. He was the primary point of contact with local authorities and media groups. He was involved with obtaining regulatory approvals from Canada Border Services Agency ("CBSA") and Transport Canada, so that CSA could operate flights between YVR and China. From 2008 to 2011 he was paid for

time spent working for CSA. In February 2011 he was offered and accepted full-time employment as CSA's Marketing and Business Development Manager, beginning in or about April 2011. This coincided with CSA commencing operations after obtaining the necessary approvals and making logistical arrangements with YVR and others.

[14] As Marketing and Business Development Manager, the plaintiff's work focused on establishing and building CSA's business in Canada. The plaintiff regularly met with senior corporate management representatives from CSA's head office in China.

[15] During this time, he worked closely and harmoniously with the GM, Ms. Chen. Ms. Chen was a proponent of promoting CSA's business by building good relations with the local community, including local businesses and industry organizations.

[16] In further detail, the plaintiff's work as CSA's Marketing and Business Development Manager included:

1. representing CSA with business and industry organizations, and attending industry events, sometimes as a speaker;
2. networking with Chinese and Chinese Canadian contacts, including frequently attending business lunches and dinners;
3. organizing industry events hosted by CSA;
4. promoting CSA's business with both English and Chinese speaking media;
5. marketing CSA's flight offerings to local travel agents; and
6. dealing with regulatory authorities and obtaining necessary approvals, including:
    i. dealing with immigration issues in respect of CSA's staff;
    ii. obtaining security clearance from YVR for CSA employees required to work within restricted areas of YVR;

iii. in late 2011, attending with the GM as industry observer to contract negotiations between the Government of Canada and the government of China in relation to negotiations for amendment of the Canada-China Air Trends Port Agreement;

iv. obtaining approval for CSA's participation in Canada's "Transit Without Visa Program" ("TWV Program"), which allows passengers with connecting flights to the USA to transit through Canada without a Canadian travel visa; and

v. representing CSA in disputes brought by customers to the Canadian Transportation Agency.

[17] Ms. Chen was replaced as CSA's Vancouver GM in January 2018 by Ms. Rui Zhang (known as "Jocelyn"), who had been working in CSA's Toronto office. Kitty Chen was repatriated to China, where she remains a senior management employee with CSA. CSA had opened an office in Toronto in 2016, where Ms. Zhang worked for about two years before being assigned to the Vancouver office. Indeed, as CSA's Marketing and Business Development Manager, the plaintiff was involved in obtaining permits to allow Ms. Zhang to work at Toronto International Airport in 2016.

[18] The new GM, Ms. Zhang, did not value the former GM's relationship-building focused marketing efforts, in which the plaintiff was involved. She and the former GM did not get along. The plaintiff and two other former CSA employees testify that they heard them quarrelling loudly with each other in the GM's office. Ms. Chen returned to China peremptorily.

[19] Ms. Zhang was immediately dismissive of the plaintiff's role and responsibilities. The plaintiff was excluded from management meetings that he had previously attended. The marketing department that he headed was soon eliminated.

[20] Rather than simply dismissing the plaintiff, Ms. Zhang embarked upon a campaign designed to manufacture cause for dismissal or induce the plaintiff to resign.

[21] CSA had no complaints about the plaintiff's work prior to the arrival of Ms. Zhang in January 2018. However, beginning in February 2018, CSA began criticizing the plaintiff's work, issuing reprimands accompanied by threats of dismissal, and carefully documenting disciplinary measures with self-serving records.

[22] In February 2018, the plaintiff was formally disciplined for attending industry events, allegedly without prior approval. Later, the plaintiff was reprimanded for other alleged failures.

[23] In March 2018, along with Yu Xia (known as "Patrick"), the other member of the marketing department, the plaintiff was unilaterally transferred to a front-line service position in the sales department, as a customer service representative. He was told his title was "account manager", the same title as the rest of the sales staff. He was placed under the authority of the sales department manager, Jinrong Liang (known as "Max"), a former co-level manager. Without consultation, CSA unilaterally reduced his salary from $3,890 per month to $2,940 per month, a reduction of about 25%. He was assigned to work at CSA's reception desk at the Vancouver office, where he dealt with customers in person and by telephone.

[24] In his new customer service position, he was required to learn and apply CSA's complex ticketing system, with which he had no experience. The plaintiff and Patrick Xia were given thick codebooks and told to learn them. With limited training and time to learn, this was a practically impossible task.

[25] Patrick Xia was later transferred to the cargo department. He resigned in April 2018, and successfully alleged constructive dismissal in proceedings under the *Canada Labour Code*, R.S.C. 1985, c. L-2.

[26] On or about October 6, 2018, after further formalized discipline, the plaintiff was again demoted without consultation. He was assigned to work at CSA's YVR station as an airport operations worker, another front-line service position.

[27] The plaintiff's airport terminal work involved checking in passengers, creating reports, onboarding and de-boarding operations, preparing various documents such as load sheets and passenger manifests, completing pre-flight checklists, and other related work. He was required to become familiar with another set of codes, the airport operations codes. He had no prior familiarity with them.

[28] The airport services manager, Ms. Rui Li, was unwelcoming. She was not pleased at having to train the plaintiff in work that he had no familiarity with.

[29] The airport work involved intense time pressure. The plaintiff was criticized for not being able to run to the gate to help with onboarding or other urgent matters. He was criticized for being too slow in carrying out his other tasks. He was told that he failed two competency tests.

[30] In January 2019, at a meeting with several employees, the plaintiff was told that he was not performing up to standards, and that his employment was now subject to probation for three months. He was told he would receive further training with another airport station worker, Ying Liu ("Lorraine").

[31] CSA prepared purported minutes of the meeting. The minutes indicate that the plaintiff requested further training with Lorraine Liu and "promised that if after one month, his test results do not meet the work requirements at the airport station, he will voluntarily resign".

[32] The plaintiff made no such commitment. He agrees that he was to receive further training and that he would be tested again between February 16 and 18, 2019.

[33] Despite the employer's commitment to provide further training and performance testing, the plaintiff was dismissed on February 1, 2019.

[34] The plaintiff has been unable to find reasonable or comparable alternative employment. He is now 71 years of age. He works as a driver for the restaurant meal delivery service, DoorDash.

B. The Litigation

[35] The plaintiff initiated these proceedings on September 16, 2019.

[36] Initially, the defendant was represented by legal counsel. Since December 17, 2020, it has represented itself through non-legally trained local employees.

[37] As noted, CSA's termination letter of February 1, 2019, referred to "time theft" and "completely unacceptable performance". Four specific details were set out, all having to do with alleged instances of errors or failures in connection with the plaintiff's work at the CSA airport station. In addition, the letter alleged that the plaintiff's performance had "consistently failed to meet the company's expectations".

[38] The defendant's Response to Civil Claim ("RTCC") was filed on November 1, 2019, when it was still represented by legal counsel. It made far more serious and extensive allegations than it had made in its termination letter, including that:

1. the plaintiff never worked in a management position, he was not part of the management team, and had no role in CSA's expansion to British Columbia;

2. the plaintiff's duties prior to January 8, 2018, consisted of "chauffeuring the Former GM", and delivering messages, running errands, and various other administrative tasks;

3. the duties of the plaintiff consisted primarily of attending to the personal needs of the former GM;

4. the plaintiff breached duties of honesty and faithfulness owed to the employer;

5. the former GM was aware that the plaintiff was not qualified for the role of "Business Development Manager", that the plaintiff did not carry out such functions, and the plaintiff was not entitled to be paid as such;

6. the position of "Business Development Manager" was a sham created by the plaintiff and the former GM to defraud CSA and extract additional unauthorized compensation;

7. the plaintiff and the former GM conspired together to deceive and defraud the defendant;

8. the plaintiff knowingly misrepresented himself to be in a management position;

9. the nature of the plaintiff's duties were "uncovered" when the new GM arrived, and "could not be continued" as they were "unauthorized and contrary to CSA policy," which the plaintiff knew;

10. the plaintiff was transferred to a customer service position, which he was unable to perform;

11. the plaintiff was unable to perform his duties in the airport station position;

12. the plaintiff was guilty of sexual harassment, occurring in July 2017, involving a female supervisor, and complaints from other female employees;

13. the plaintiff was guilty of theft (conversion) of several large model airplanes;

14. the plaintiff attended public events as a representative of the CSA without authority;

15. the plaintiff was repeatedly absent from work without good reason, arrived late, took long breaks, and left early;

16. the plaintiff engaged in dishonesty and breached CSA's clear policies and procedures with respect to timesheets, leave policies, job descriptions; and

17. the plaintiff failed to fulfil regulatory requirements on time.

[39] All of these allegations are unfounded other than, perhaps, the contention that the plaintiff was unable to perform the duties of an airport services worker. As I will explain, the defendant knew or ought to have known that the plaintiff could not possibly do that job when it unilaterally assigned him to it four months before his employment was terminated.

[40] The plaintiff filed the present summary trial application on October 3, 2022. Shortly before the hearing of the summary trial application on November 17 and 18, 2022, CSA abandoned a number of the most serious allegations. Specifically, the defendant abandoned the allegations that the plaintiff was guilty of:

1. fraud, alone or in concert with the former GM;

2. theft of the model airplanes, or taking them without authorization; and

3. sexual harassment in the workplace.

[41] The defendant also abandoned the allegations that the plaintiff's previous duties consisted “primarily of attending to the personal needs of the Former GM”, including chauffeuring her around, delivering messages for her, running errands for her, and so on. It abandoned the allegation that the nature of the plaintiff's duties were “uncovered” when the new GM arrived in January 2018.

[42] However, the defendant continues to assert that the plaintiff was fired for cause, consisting of incompetence, misconduct, and unauthorized absences from work.

[43] The defendant has not adduced evidence from several key witnesses who could be expected to provide relevant evidence, including, most notably:

1. the new GM, Ms. Zhang;

2. the former GM, Ms. Chen;

3. Mr. Liang, the manager of CSA's sales department and the plaintiff's immediate superior when he worked as a customer service representative;

4. Mr. Jian ("Ken") Zhang, accounting manager;

5. Ms. Rui Li, the airport station services manager.

[44] The defendant adduced only four brief affidavits sworn by four employees. The defendant's affidavit evidence does not directly respond to the evidence adduced by or on behalf of the plaintiff. The evidence of the plaintiff is therefore largely uncontested.

III. SUITABILITY FOR DETERMINATION BY WAY OF SUMMARY TRIAL

[45] The defendant takes no position on the question of whether the plaintiff's claims are suitable for disposition by way of a summary trial.

[46] I recently discussed the rule and principles relevant to summary trial applications in *Zucker v. Zucker,* 2022 BCSC 2025:

> [23] Rule 9-7(15) of the *Supreme Court Civil Rules*, B.C. Reg. 168/2009 [*Rules*] states:
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> > (15) On the hearing of a summary trial application, the court may
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> > > (a) grant judgment in favour of any party, either on an issue or generally, unless
> > >
> > > > (i) the court is unable, on the whole of the evidence before the court on the application, to find the facts necessary to decide the issues of fact or law, or
> > > >
> > > > (ii) the court is of the opinion that it would be unjust to decide the issues on the application,
> > >
> > > (b) impose terms respecting enforcement of the judgment, including a stay of execution, and
> > >
> > > (c) award costs.
>
> [24] Pursuant to the terms of the Rule, then, the court may grant judgment on a summary trial, unless: (i) the court is unable to find the facts necessary, on the whole of the evidence, or (ii) it would be unjust to decide the issues on the application.

[25] The principles governing the issue of suitability for summary trial were discussed in *Gichuru v. Pallai*, 2013 BCCA 60:

> [30] In *Inspiration Management Ltd. v. McDermid St. Lawrence Ltd.* (1989), 36 B.C.L.R. (2d) 202 (C.A.), the court confirmed that the court under this rule "tries the issues raised by the pleadings on affidavits", that "a triable issue or arguable defence will not always defeat a summary trial application", and that "cases will be decided summarily if the court is able to find the facts necessary for that purpose, even though there may be disputed issues of fact and law" provided that the judge does not find "it is unjust to do so" (p. 211). In determining the latter issue (whether it would be unjust to proceed summarily), the Chief Justice identified a number of relevant factors to consider (at p. 215):
>
> > In deciding whether it will be unjust to give judgment the chambers judge is entitled to consider, inter alia, the amount involved, the complexity of the matter, its urgency, any prejudice likely to arise by reason of delay, the cost of taking the case forward to a conventional trial in relation to the amount involved, the course of the proceedings and any other matters which arise for consideration on this important question.
>
> [31] To this list has been added other factors including the cost of the litigation and the time of the summary trial, whether credibility is a critical factor in the determination of the dispute, whether the summary trial may create an unnecessary complexity in the resolution of the dispute, and whether the application would result in litigating in slices: *Dahl v. Royal Bank of Canada et al.,* 2005 BCSC 1263 at para. 12, upheld on appeal at 2006 BCCA 369.
>
> [32] All parties to an action must come to a summary trial hearing prepared to prove their claim, or defence, as judgment may be granted in favour of any party, regardless of which party has brought the application, unless the judge concludes that he or she is unable to find the facts necessary to decide the issues or is of the view that it would be unjust to decide the issues in this manner. This requirement was underscored by Madam Justice Newbury in *Everest Canadian Properties Ltd. v. Mallmann,* 2008 BCCA 275:
>
> > [34] It is trite law that where an application for summary determination under Rule 18A is set down, the parties are obliged to take every reasonable step to put themselves in the best position possible. As this court noted in *Anglo Canadian Shipping Co. v. Pulp, Paper & Woodworkers of Canada, Local 8* (1988) 27

> B.C.L.R. (2d) 378 (B.C.C.A.) at 382, a party cannot, by failing to take such steps, frustrate the benefits of the summary trial process. Where the application is brought by a plaintiff, the defendant may not simply insist on a full trial in hopes that with the benefit of *viva voce* evidence, 'something might turn up': see *Hamilton v. Sutherland* (1992), 68 B.C.L.R. (2d) 115, [1992] 5 W.W.R. 151 (B.C.C.A.) at paras. 66-7. The same is true of a plaintiff where the defence has brought the R. 18A motion. [Emphasis added.]
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> …
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> [34] In summary, the jurisprudence is clear that, subject to certain guidelines, the decision as to the suitability of proceeding by way of summary trial to determine an action (or issue), is a discretionary one. …
>
> [35] The authorities are also clear that a summary trial, although heard on affidavits in chambers, remains a trial of the action for which the plaintiff (even if not the applicant) retains the onus of proof of establishing his or her claim(s) and the defendant (even if not the applicant) retains the burden of establishing any defence that is raised. …

[26] In *Hryniak v. Mauldin*, 2014 SCC 7 [*Hryniak*], the Supreme Court of Canada recognized that most Canadians cannot afford the cost of a conventional trial, and that a culture shift was required in order to create an environment promoting timely and affordable access to the civil justice system: at paras. 1 – 2. The Court endorsed the use of what are in British Columbia called summary trials, in appropriate cases: at para. 3. The Court stated that the relevant rules of court must be interpreted broadly, favouring proportionality and fair access to the affordable, timely and just adjudication of claims: at para. 5. The Court of Appeal of this province has endorsed the principles discussed in *Hryniak* in the context of the British Columbia summary trial rule: *Universe v. Fraser Health Authority,* 2022 BCCA 201, at para. 21; *Knight v. British Columbia,* 2021 BCCA 251, at para. 25. This is all consistent with the object of the *Rules*, as set out in Rule 1-3:

> Object
>
> (1) The object of these Supreme Court Civil Rules is to secure the just, speedy and inexpensive determination of every proceeding on its merits.
>
> Proportionality
>
> (2) Securing the just, speedy and inexpensive determination of a proceeding on its merits includes, so far as is practicable, conducting the proceeding in ways that are proportionate to

> (a) the amount involved in the proceeding,
>
> (b) the importance of the issues in dispute, and
>
> (c) the complexity of the proceeding.

[47] I have no difficulty concluding that I am able to find the facts necessary to decide the issues of fact and law, and that it would not be unjust to decide the issues on the application.

[48] As noted, the plaintiff's evidence is largely uncontested. The proceedings have been extant since 2019. Although the plaintiff's application was brought relatively recently, the defendant had ample prior notice of the plaintiff's intention to bring the summary trial application, and ample time and opportunity to prepare for the hearing. The defendant cannot and does not say that it has not had a full opportunity to prepare for the hearing. When this application was heard, the matter was set for trial for five days, commencing relatively soon, on February 13, 2023.

[49] There is no reason to think that the evidence on a conventional trial would be substantially different than the evidence before me on this application. In particular, in my view the defendant's decision not to adduce evidence from key witnesses who could be presumed to be within its control is a matter of choice on its part. At the hearing, Mr. Yu, the defendant's representative, suggested that several expatriate employees (the former GM, the new GM, and Max Liang) had returned to China, and that due to Covid-19 measures there it was difficult for the defendant to obtain affidavit evidence from them. This is a convenient excuse that I do not accept. Mr. Yu conceded that the defendant had never taken this position before the hearing, nor had the defendant sought an adjournment on this basis. As I will set out in more detail, the defendant has been uncooperative and obstructive during the course of the litigation.

[50] The plaintiff cannot afford the costs of a conventional trial. More generally, economic factors favour a summary disposition, if possible.

IV. ADVERSE INFERENCE

[51] The court may draw an unfavourable inference where, in the absence of an explanation, a party fails to provide affidavit 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. Where the witness could be expected to have better evidence than the evidence of the witnesses adduced, the court may infer that the evidence of the absent witness would be contrary to the party's case or at least would not support it.

[52] The Court of Appeal discussed the relevant principles in *Singh v. Reddy,* 2019 BCCA 79:

> [8] The principle is described by authors S.N. Lederman, A.W. Bryant and M.K. Fuerst in *The Law of Evidence in Canada* (2018, 5th ed.) as follows:
>
> > §6.471 In civil cases, an unfavorable inference can be drawn when, in the absence of an explanation, a party litigant does not testify, or fails to provide affidavit evidence on an application, or fails to call a witness who would have knowledge of the facts and would be assumed to be willing to assist that party. In the same vein, an adverse inference may be drawn against a party who does not call a material witness over whom he or she has exclusive control and does not explain it away. The inference should only be drawn in circumstances where the evidence of the person who was not called would have been superior to other similar evidence. The failure to call a material witness amounts to an implied admission that the evidence of the absent witness would be contrary to the party's case, or at least would not support it. [Emphasis added.]
>
> In *Thomasson v. Moeller* 2016 BCCA 14, this court summarized the principle in similar terms:
>
> > An adverse inference may be drawn against a party, if without sufficient explanation, that party fails to call a witness who might be expected to provide important supporting evidence if their case was sound: *Jones v. Trudel*, 2000 BCCA 298 at para. 32. The inference is not to be drawn if the witness is equally available to both parties and unless a *prima facie* case is established: *Cranewood Financial v*. *Norisawa*, 2001 BCSC 1126 at para. 127*; Lambert v. Quinn* (1994) 110 D.L.R. (4th) 284 (Ont. C.A.) at 287. [At para. 35; emphasis added.]
>
> (See also Rohl v. British Columbia (Superintendent of Motor Vehicles) 2018 BCCA 316 at paras. 1-5.)

> [9] As noted in *Rohl*, it is now generally accepted that the court is not r*equired* as a matter of law to draw an adverse inference where a party fails to call a witness. Thus in *Witnesses* (looseleaf), A.W. Mewett and P.J. Sankoff write:
>
> > A considerable number of cases now reinforce the view that there is no such thing as a "mandatory adverse inference" to be drawn where a party fails to call a witness. Rather, the question of whether to make such an inference seems to depend upon the specific circumstances, in particular whether:
> >
> > - There is a legitimate explanation for the failure to call the witness;
> > - The witness is within the "exclusive control" of the party, and is not "equally available to both parties"; and
> > - The witness has material evidence to provide; and
> > - The witness is the only person or the best person who can provide the evidence.
> >
> > Essentially, the decision to draw an adverse inference is discretionary and premised on the likelihood that the witness would have given harmful testimony to the party who failed to call him or her. In a case before a jury, where there are circumstances that support the drawing of such an inference, the trial judge should charge the jury that it is "appropriate for a jury to infer, although [jurors] are not obliged to do so, that the failure to call material evidence which was particularly and uniquely available to [a party] was an indication that such evidence would not have been favourable to [that party]. [At 2-23 to 2-24; emphasis added.]

[53] In this case, I do not need to draw adverse inferences from the failure of the defendant to adduce evidence from the absent witnesses that I referred to in order to assess credibility issues between the plaintiff and the defendant, because very little of the plaintiff's evidence and that of the other plaintiff witnesses is contested.

[54] However, the inference that the evidence of the absent witnesses would not have supported the defendant's case is irresistible.

[55] The defendant was also unwilling to produce its key witness Ms. Zhang for examination for discovery. It is beyond imagining that the evidence of the former GM would support the defendant's case.

V. ISSUES AND ANALYSIS

[56] The theme of the defendant's submissions is that, with the arrival of the new GM Ms. Zhang in January 2018, structural re-organization of CSA's local operations imposed by CSA's head office rendered the plaintiff's position redundant. In consideration the plaintiff's tenure, CSA provided the plaintiff with alternative employment, an entry-level position in customer service. Because he was not capable of performing his duties in this position, after about six months, in a further attempt to accommodate his skill-set, the defendant assigned him to the airport terminal position, which he was also incapable of fulfilling.

[57] From this, it appears that the defendant relies in part upon alleged incompetence of the plaintiff in the customer service and airport terminal positions to support its claim of just cause for dismissal.

[58] The defendant also refers to a few specific allegations of misconduct, which I will review.

VI. WRONGFUL DISMISSAL

A. Legal Principles

[59] An action for wrongful dismissal is based on an implied obligation in the employment contract to give reasonable notice of an intention to terminate the relationship in the absence of just cause: *Honda Canada Inc. v. Keays*, 2008 SCC 39, at para. 50.

[60] A practical and functional definition of what is meant by "just cause" was set out in the decision of M. Saunders J. in *Leung v. Doppler Industries Incorporated*, [1995] B.C.J. No. 690, 1995 CanLII 2530 (S.C.), aff'd [1997] B.C.J. No. 382, 1997 CanLII 3435 (C.A.):

> 26 Just cause is 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.

[61] The onus of establishing just cause rests with the employer: *Staley v. Squirrel Systems of Canada, Ltd.,* 2013 BCCA 201, at para. 19, citing *Leung* at para. 27.

[62] In *Scorpio Security Inc. v. Jain,* 2018 BCSC 978, Branch J. stated:

> [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.

[63] Although *McKinley v. BC Tel*, 2001 SCC 38 was a case dealing with allegations of dishonesty, the contextual approach and the principle of proportionality also apply to other allegations of misconduct: *Kirby v. Amalgamated Income Limited Partnership,* 2009 BCSC 1044, at paras. 157-159.

[64] In this case, most of the employer's allegations were made after the plaintiff's dismissal, in its RTCC. As to this, in *Kirby* Metzger J. stated:

> [162] Although additional allegations of cause enumerated after dismissal can be relied on by the defendants, the fact that they were not claimed at the time of termination will affect their weight: *Baumgartner,* at para. 16, quoting *Geluch.* The court must be cautious about finding for an employer who simply "dredges up" any and all incidents prejudicial to an employee in its defence to a wrongful dismissal claim: *Coventry v. Nipawin (Town)*, [1981] S.J. No. 1184, 12 Sask. R. 40, at para. 4 (Q.B.).
>
> [Emphasis added.]

[65] This caution is especially apt in this case.

B. Incompetence

[66] It is particularly difficult for the employer to establish just cause based upon incompetence, especially in the case of a long term employee with a good record of performance, as in this case. More recent authorities emphasize that just cause consists of conduct on the part of the employee incompatible with his or her duties. The misconduct must go to the root of the contract, resulting in a fundamental fracturing of the employment relationship such that the employer cannot be expected to continue to employ the employee.

[67] From this perspective, it is clear that mere dissatisfaction with the employee's performance is insufficient to ground just cause for dismissal. Likewise, failure to

perform in isolated incidents to the satisfaction of the employer does not establish incompetence. Incompetence can only provide a basis for a finding of just cause if it is serious or gross incompetence: *Renwick v. MacMillan Bloedel Ltd.*, [1995] B.C.J. No. 198, 1995 CanLII 1487, at para. 24 (S.C.).

[68] Generally, and absent a flagrant dereliction of duty clearly inconsistent with the proper discharge of the employee's duties, to successfully prove cause on the basis of incompetence, an employer must demonstrate that:

a) the employer established an objectively reasonable, attainable standard of performance;

b) the standard was communicated to the employee;

c) suitable training was given to enable the employee to meet the standard;

d) the employee was given a reasonable time to meet the standard;

e) the employee was warned that failure to meet the standard would result in dismissal; and

f) the employee was incapable of meeting the standard.

(See *Riehl v. Westfair Foods Ltd.*, [1995] 8 W.W.R. 51, 1995 CanLII 6086 (Sask. Q.B.), as summarized in *Boulet v. Federated Co-operatives Ltd.*, 2001 MBQB 174, at para. 3, aff'd 2002 MBCA 114 and in *Vernon v. British Columbia (Liquor Distribution Branch)*, 2012 BCSC 133, at paras. 285 and 286).

1. Customer Service Position

[69] CSA alleges that the plaintiff was incapable of fulfilling his functions in the customer service position at its Vancouver offices. It has not established this.

[70] An affidavit from a customer service co-worker states that when she worked together with the plaintiff, she observed that "… It is too difficult for Paul to understand and handle the task[s] he was given in customer service". She attaches

a single complaint from a customer dated September 5, 2018. The complaint itself is hearsay. Standing alone, the fact a customer made a complaint attributable to the plaintiff is of no consequence.

[71] I accept the plaintiff's evidence that, while he was not trained or qualified for the customer service position, he did his best. He never received a job description for the position. He had little or no relevant experience for this work. He was given inadequate training. Learning the codes for CSA's complex ticketing system was very difficult. The plaintiff typically dealt with complaints from English-speaking customers, as he spoke the best English among the customer service staff. Customers were often angry before the plaintiff even picked up the phone.

[72] Despite all this, he performed well in this position. The plaintiff was given no specific criticism about his work in customer service at the time. The employer's termination letter makes no reference to the matter of customer complaints or to any specific deficiency in the plaintiff's work in this position.

[73] The employer has not established that the plaintiff was guilty of any serious dereliction of duty in the customer service position, or of failure on his part to meet an objectively reasonable standard of performance, clearly communicated to him, and for which he was given suitable training, reasonable time to meet the standard, warnings, or that he was not capable of meeting the standard.

[74] In any event, when the plaintiff was terminated, he was employed as an airport terminal worker. He had been transferred to that position on October 6, 2018, approximately four months before his employment was terminated February 1, 2019. Therefore, CSA's allegations of poor performance or incompetence prior to the plaintiff's employment at the airport terminal are of little or no relevance to its case for just cause.

2. Airport Terminal Position

[75] CSA set up the plaintiff for failure by assigning him to the airport terminal job. The plaintiff was not qualified or trained for his duties as an airport terminal worker,

and was physically incapable of performing the role, as CSA could not have failed to realize when it assigned him to it.

[76] When he was assigned to the airport terminal position, the plaintiff was approximately 67 years of age. He had no recent, relevant experience or qualifications in the type of work required. As noted, the work involved checking in passengers, creating reports, preparing load sheets, passenger manifests, pre-flight checklists, and other duties relating to airport terminal operations. The plaintiff was also required to learn a new and completely unfamiliar set of codes for airport operations. The plaintiff was not proficient at the computer work required. He made mistakes, particularly under time pressure. I accept his evidence that he could not run to the gate when required, but he tried to walk as fast as he could. He was criticized for being too slow generally. He received minimal training. At the outset, he received a few hours of training, and after that he was expected to learn on the job. His trainers, Mary Li and Ying (“Lorraine”) Liu, watched him perform tasks while holding a timer, causing him stress.

[77] The employer administered competency tests twice, once each in November and December of 2018. No standards were communicated to the plaintiff. As noted, he was told that he had failed the tests. He was told he would be given a further opportunity to improve and would be tested again on February 15, 2019. Instead, he was fired on February 1, 2019.

[78] In support of its case for cause based on incompetence, CSA relies on an affidavit from Ms. Liu, who states that she conducted the two tests in November and December of 2018. She states that she found the plaintiff “learned and performed daily operation tasks slower than average". He “also had more mistake[s] and revised email than others”. She adds that “we found it was difficult for him to pick up the operation task and catch up the fast pace at the airport working environment".

[79] The evidence of Lorraine Liu is the only sworn evidence supporting CSA’s contention of incompetence in relation to the plaintiff's airport terminal position. It is far from sufficient to establish just cause for dismissal.

[80] The fact that the plaintiff was slow, made mistakes, and had difficulty learning new, complex tasks in a fast-paced stressful environment is hardly surprising. The defendant could not possibly have expected any other result. The defendant's conduct in assigning the plaintiff to this job and its subsequent treatment of him in relation to it was cruel and insensitive.

[81] A memorandum disclosed by the defendant as part of its document disclosure in the litigation, but not shared with the plaintiff previously, is revealing. The memorandum is undated, but must have been prepared in late 2018 or January 2019 at the latest. It is apparently written by Lorraine Liu and/or Mary Li. In translation from Chinese, it states:

> PAUL'S WORK PERFORMANCE SUMMARY
>
> Marketing staff Paul Chu started to undergo training at the airport station on October 5, 2018. This staff cannot is not qualified [sic] to perform the job at the airport station. A report on the relevant situation is as follows:
>
> …
>
> At this time, Paul's performance was found to be unsuitable for working on site. The main reasons are:
>
> 1. The learning ability and reflex ability cannot adapt to the requirement of the station such that the relevant work can be completed within the specified time. Because he is too old as he is 68 years old, his learning ability has declined, and his reflex speed is relatively slow. After nearly two and a half months of study and training at the station, despite his hard study and repeated training, and he still cannot remember many basic skills and instructions or he would have a wrong recollection of them.
>
> …
>
> 2. Given his age and physical strength, it is difficult for him to adapt to high-intensity, high-pressure work which sometimes requires working overnight. … This all requires a person's memory, resilience, reflex speed, and even physical strength.
>
>   Paul Chu does not have the capacity to deal with the on-site situation in this respect. During our assessment process, his face was flushed from tension throughout the entire process. We were worried that if the high tension will make him unwell, this may cause more trouble to the office. During the flight schedule guarantee period, there is the necessity to communicate with the maintenance department, the fuel truck RAMP, OPS and other departments and personnel, so continuous running up and down through the corridor stairs is

> required. All this activity is not precluded on rainy days, and we are worried that if he has to run around on rainy days, he may fall and get injured, because once he is injured, it will become a very troublesome situation. Also, when there is a flight delay, we often have to work through the night and continue working the next day. In his present situation, given his age and physical strength, he may not be able to bear all this.

[82] The memorandum vividly demonstrates that the plaintiff could not realistically meet CSA's work performance requirements. Notably, the trainers were concerned that if the plaintiff was hurt or became unwell, this would be problematic for the employer.

[83] In its termination letter, CSA referred to four specific errors or failures on the part of the plaintiff connected with his work at the airport terminal. Each of these have specifically been referred to and explained in the plaintiff's affidavit. I accept his uncontradicted evidence that they were all minor, unintentional mistakes, and that none of them resulted in any serious consequences. The employer has failed to establish that any of these instances, alone or in combination with any other conduct it relies on, would be sufficient to constitute cause for dismissal. It is unnecessary that I review these minor allegations in detail.

VII. OTHER CONTINUED ALLEGATIONS OF CAUSE

[84] I will now discuss the other circumstances the defendant continues to rely upon in support of its case for cause.

A. Attendance at YVR Lunar New Year Event – February 2018

[85] In its submissions, CSA alleges that the plaintiff attended a YVR Lunar New Year's event in late February 2018 without authorization.

[86] CSA has adduced no admissible evidence concerning the matter, other than a copy of the letter of reprimand given to the plaintiff about it. The lack of admissible evidence, other than that of the plaintiff, would alone be sufficient to dismiss the allegation, but the matter is relevant to the plaintiff's claims for aggravated and punitive damages.

[87] The incident followed an earlier, related incident. The plaintiff attended a CBSA and airline industry meeting in Montréal, Québec in early February 2018, on behalf of CSA. CSA has apparently abandoned reliance on this matter, as it made no submission about it. However, CSA's RTCC alleges that the plaintiff had a "long history of discipline and performance issues", including attending the CBSA meeting without prior authorization.

[88] The plaintiff attended the CBSA meeting very soon after the new GM arrived. Attending the meeting on CSA's behalf was clearly within the plaintiff's role and scope of responsibilities under the former GM, which had not yet changed. The plaintiff's uncontradicted evidence is that the previous GM had approved his attendance at the meeting months previously, and that CSA paid for his flight.

[89] After he returned from the CBSA meeting, he was reprimanded. The reprimand occurred in a meeting on February 13, 2018, attended by Jocelyn Zhang, Max Liang, and five other employees. CSA has produced two significantly differing sets of purported minutes of the meeting, but both sets of minutes record that he was reprimanded by "the Office", which in the circumstances must mean Jocelyn Zhang and Max Liang. The minutes were probably circulated among the office staff, but were not approved by anyone other than the authors. On the basis of the inconsistent minutes, the precise nature of the reprimand and expected consequences are not clear. However, the plaintiff's evidence is that he was reprimanded for attending the meeting without prior permission of the employer, and this is consistent with CSA's subsequent written warnings and its RTCC allegations.

[90] The allegation that the plaintiff attended the CBSA meeting without authorization is unfounded. The plaintiff attended the meeting as part of his regular employment responsibilities. The reprimand was unfair. The public manner of the reprimand added to the plaintiff's embarrassment and humiliation.

[91] Later in February the plaintiff was personally invited by a representative of YVR to attend its 2018 Lunar New Year celebration. This was precisely the type of event he had attended on CSA's behalf in the past. Perhaps unwisely in view of the

reprimand he had received regarding the CBSA meeting, he attended the event. He did not wear a name tag or otherwise represent himself as attending on behalf of CSA. The new GM, Jocelyn Zhang, and the sales department manager, Max Liang, were present. The plaintiff won a door prize, an air freshener. He was invited to the stage to accept the prize. In awarding the prize, the master of ceremonies stated that the plaintiff was with CSA, no doubt as a result of his familiarity with the plaintiff and his association with CSA.

[92] Ms. Zhang was furious. After the event, she yelled at the plaintiff in the office in front of at least two other staff members. While she was yelling at him she threw a computer mouse at him. She accused him of disrespecting her. She refused to accept his explanation that he did not attend as a representative of CSA.

[93] Later, on February 21, 2018, the plaintiff was formally disciplined in relation to the incident by Max Liang and the accounting manager, Ken Zhang. The defendant again prepared purported minutes of the meeting, not approved or confirmed as accurate, which record that the plaintiff "admitted his mistake to the Office", and that his decision to attend the event "constituted a work error", and that he "did not dispute the written warning". The plaintiff was informed that a written warning would ensue. The plaintiff agrees that the meeting occurred, but denies making these concessions or admissions.

[94] CSA gave the plaintiff a letter dated February 22, 2018, written in English, and obviously prepared for CSA by legal counsel, reprimanding him for attending the CBSA meeting and the YVR event. The letter states that it is an "official warning to you regarding several instances of misconduct and poor judgment". The letter refers to the two events, not "several". It refers to the "warning" he received verbally on February 13, 2018, after the CBSA meeting. Predictably, the letter includes a statement that:

> If you engage in any further similar acts of misconduct, you will be subject to further discipline, up to and including termination of employment.

[95] The letter was given to the plaintiff by Max Liang. Despite telling Mr. Liang that he did not agree with it, the plaintiff was compelled to sign it, including this statement:

> I understand the seriousness of this matter and the expectation going forward. I acknowledge by my signature below that I have been afforded the opportunity to review and sign this correspondence prior to it being placed in my personnel file.

[96] The plaintiff's attendance at the YVR celebration was a triviality, which had no actual or potential negative consequences of any kind for CSA. The personal offence apparently taken by the GM was perhaps completely feigned, and was certainly unjustified. In reality, the employer seized the opportunity to discipline and warn the plaintiff following the unjustified reprimand he had received for attending the CBSA meeting. CSA's conduct bears the hallmarks of an employer attempting to manufacture and document a basis for allegations of cause, where none existed.

[97] In the context of the rest of the evidence, these events demonstrate that as early as February 2018, very soon after the arrival of the new GM, the employer was seeking to terminate the plaintiff's employment without providing reasonable notice or paying severance in lieu, and in breach of its obligations of good faith and fair dealing in the manner of dismissal.

[98] CSA makes no allegations of any subsequent breaches of the policy it alleges in this respect. Therefore, in the circumstances of this case, these matters are not relevant to its allegations of cause for dismissal nearly a year later.

B. Canadian Transportation Agency/International Air Transport Association (IATA) slot submissions

[99] In March 2018, the plaintiff was again unfairly reprimanded by CSA. He allegedly failed to submit CSA's flight route information to the International Air Transport Authority (the "IATA slot submission") in a timely manner.

[100] As the plaintiff explains, CSA submits its flight routes twice per year, once in the spring and once in the fall. The submissions are due March 31 and October 31

of each year. Copies are sent to YVR and the Canadian Transportation Agency ("CTA" or "Transport Canada"). The submissions had previously been prepared by CSA's solicitors, Dentons LLP, during the tenure of the former GM. The plaintiff signed them.

[101] On March 9, 2018, Jocelyn Zhang angrily approached the plaintiff, demanding to know why the submissions had not been sent. The plaintiff was unaware that CSA had terminated the services of Dentons LLP, including the solicitor who had been responsible for preparing the IATA slot submissions. The plaintiff had not been told that he was now responsible for preparing and submitting the documents. By then, his role within CSA was in a state of flux.

[102] On the same date, March 9, the plaintiff and the entire local staff of CSA were told that the "Marketing Department" and the plaintiff's position as "Marketing Department Manager" were "cancelled" (or "rescinded", on a different translation attached to the plaintiff's affidavit). CSA advised the plaintiff and the "Marketing Specialist" (Patrick Xia) that they were being integrated into the Sales Department.

[103] After the encounter with Ms. Zhang, the plaintiff prepared the IATA slot submission, on March 12, 2018. It was submitted within time. There were no adverse consequences to CSA.

[104] CSA again made sure to document the plaintiff's alleged transgression, and to threaten his continued employment. Jocelyn Zhang issued a letter in English and Chinese advising him that:

> This letter should [serve] as an official warning to you. Your performance has been unacceptable. According to records, you have had the following problems: … failed to report Winter 2018 IATA Slot Submission issues to CTA…We fully expect you to take the necessary steps to correct this situation. Failure to take care of these problem[s] prior to your performance review will result in loss of your job.

[105] CSA again required the plaintiff to sign the letter. He was very upset by the letter which he thought was unfair and untrue, and that CSA was just looking for ways to fire him. (In my view, an accurate perception). He adds that the situation

was extremely stressful, but he needed the job and was worried about looking for work elsewhere due to his age.

[106] CSA adduces no admissible evidence in relation to this matter, other than the letter given to the plaintiff. The plaintiff's evidence about the matter is therefore uncontested. There is no merit to the allegation that the plaintiff failed in his duties or misconducted himself in relation to this.

[107] On October 4, 2018, the plaintiff was required to attend another meeting in which he was reprimanded for alleged "negligence" in relation to his duties. CSA prepared minutes of the meeting. Ms. Zhang and Mr. Liang alleged "serious problems with Paul's work". They alleged that the plaintiff ignored an email dated September 10, 2018, about the need to prepare the October 2018 IATA slot submission. The minutes record various other unsubstantiated criticisms.

[108] In its submissions, CSA alleges that the plaintiff failed to instruct another employee of the need to make the IATA slot submission for October 2018. This particular allegation is not pleaded, and CSA has provided no admissible evidence of any failure by the plaintiff in this respect. CSA's own evidence is that the October 2018 submission was prepared and submitted on time by another employee.

[109] CSA's allegations that the plaintiff was guilty of misconduct in relation to the IATA slot submissions are without merit. These matters are further examples of CSA's efforts to manufacture a disciplinary record that it hoped would support the plaintiff's dismissal.

C. Unauthorized absences

[110] As noted, the employer's termination letter refers to "time theft", without providing any details whatsoever. However the defendant has not abandoned the allegation in paragraph 12 of its RTCC that: "the plaintiff acted dishonestly and in breach of CSA's clear policies and procedures with respect to timesheets, leave policies…".

[111] CSA adduced minimal evidence in support of this very serious allegation. An affidavit of Li ("Danny") Chen states that he examined the plaintiff's attendance records kept on CSA's tracking system, ZOHO, in March 2020 (more than a year after termination). He states that the records show multiple absences. The records referred to are attached, but without explanation they are practically meaningless.

[112] The records adduced extend back to March 1, 2017. At the time, the plaintiff was still in the role of Marketing and Business Development Manager for CSA. His uncontradicted evidence is that he did not have regular hours of work at the time. He worked irregular hours because he would often be out of the office, meeting with industry stakeholders in formal and informal settings, and attending industry events. His hours of work varied, and blurred with his personal time. He was on a salary and was not paid for overtime. He testifies that the CSA timekeeping system, ZOHO, was inconsistently used by him. His evidence that the ZOHO timekeeping system was inconsistently utilized is supported by the evidence of Patrick Xia.

[113] The employer made no issue of the plaintiff's purported absences or failure to consistently use the ZOHO timekeeping system prior to this litigation.

[114] I conclude that the employer has failed to establish any default on the part of the plaintiff for unauthorized absences, let alone "time theft".

[115] This is another meritless allegation manufactured by the employer in an effort to sustain its allegations of cause.

VIII. ABANDONED ALLEGATIONS

[116] As previously noted, in response to the plaintiff's summary trial application, the defendant has expressly abandoned a number of serious allegations set out in its RTCC, such as fraud, fraudulent conspiracy, theft of property, and sexual harassment in the workplace.

[117] The plaintiff's affidavit evidence, sworn prior to the defendant's withdrawal of these assertions, comprehensively refutes these allegations.

[118] There are other minor allegations in the defendant's RTCC which have not expressly been withdrawn, but in relation to which the defendant has adduced no evidence and made no submissions. These include the following:

1. That the plaintiff failed to satisfactorily prepare for a CSA promotional event on behalf of the Guangzhou Tourism Bureau, intended to promote tourism for the city of Guangzhou, China. The plaintiff was reprimanded by Ms. Zhang on or about March 15, 2018, for allegedly failing to ensure that there was adequate attendance by VIPs at CSA's Guangzhou tourism promotion event in mid March 2018. Ms. Zhang documented the plaintiff's alleged failure in this respect.

2. That the plaintiff refused to be trained by a particular employee while working at the airport terminal.

[119] In the circumstances, there is no need for me to address the merits of these further minor matters in relation to the employer's allegation of cause. However, they are relevant to the plaintiff's claims for aggravated and punitive damages, as discussed below.

IX. SUMMARY AND CONCLUSIONS – JUST CAUSE FOR DISMISSAL

[120] The defendant has singularly failed to establish just cause for dismissal without notice. All of its allegations are either entirely unsupported by evidence or lacking in any merit. Accordingly, the plaintiff is entitled to damages for wrongful dismissal.

X. DAMAGES – WRONGFUL DISMISSAL

[121] I adopt the following summary of principles relating to the assessment of damages for failure to give reasonable notice set out in the decision of Justice Kent in *Ensign v. Price's Alarm Systems (2009) Ltd.,* 2017 BCSC 2137:

> [34] The statements of principle that follow are largely taken from *Vernon v. British Columbia (Liquor Distribution Branch)*, 2012 BCSC 133, and the leading case law to which it refers and adopts.

> [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.
>
> [36] When an employer fails to give an employee sufficient advance notice of intended termination, a cause of action accrues for breach of contract, *i.e.*, breach of the implied term of the employment contract referred to above. In any such action for breach of contract, the dismissed employee's damages are usually assessed with reference to the amount of remuneration the employee would have received had the employment continued throughout the reasonable advance notice period. This includes not only the amount of wages or salary that would have been earned, but also the value of any benefits or other perquisites incidental to the employment relationship. The court will also take into account (by way of a deduction) any amount by which the wrongfully dismissed employee mitigates his or her loss or, acting reasonably, could and should have done so. This will include any payment made by the employer "in lieu of" the required reasonable notice.

[122] Additionally, in *Vernon* Goepel J. stated:

> [355] The reasonableness of notice must be determined in each case with regard to the character of the employment, the length of service, the age of the employee and the availability of similar employment having regard to the experience, training and qualifications of the employee: *Bardal v. Globe & Mail Ltd.* (1960), 24 D.L.R. (2d) 140 (Ont. H.C.) at 145; *Honda Canada Inc. v. Keays*, 2008 SCC 39, [2008] 2 S.C.R. 362 at para. 28 ("*Honda*"). Absent exceptional circumstances, 18 to 24 months is the upper limit for reasonable notice: *Ansari*.

[123] The plaintiff submits that an award of damages reflecting 20 months' notice is warranted based upon the factors set out in *Bardal v. Globe & Mail Ltd.* (1960), 24 D.L.R. (2d) 140 at 145, 1960 CanLII 294 (Ont. H.C.).

[124] The *Bardal* factors are not exhaustive: *Wallace v. United Grain Growers Ltd.*, [1997] 3 S.C.R. 701, 1997 CanLII 332, at para. 82 and *Honda*, at paras. 28 – 32. However, they remain the main factors in most cases, and are generally applied by the courts: *Ansari v. British Columbia Hydro and Power Authority* (1986), 2 B.C.L.R. (2d) 33, 1986 CanLII 1023, at paras. 41 – 43 (S.C.), aff'd (1986), 55 B.C.L.R. (2d)

xxxiii, [1986] B.C.J. No. 3006. The application of the factors depends upon the particular circumstances of the case: *Wallace*, at para. 82; *Honda*, at para. 29; and *Cormier v. 1772887 Ontario Limited c.o.b. as St. Joseph Communications*, 2019 ONSC 587, at para. 56, aff'd 2019 ONCA 965. I will review each *Bardal* factor in turn.

A. Nature of the employment and level of responsibility

[125] This factor tends to justify a longer period of notice in the case of more senior or highly skilled or specialized employees: *Ansari*, at para. 23 and *Cormier*, at para. 61.

[126] At the time of termination, the plaintiff was working in a relatively low-level position as an airport terminal worker. Prior to that he had worked for several months as a customer services representative. In practical terms, however, the process of the plaintiff's dismissal commenced in January or February of 2018, with the arrival of CSA's new GM.

[127] Even after the plaintiff was transferred to low-level positions, CSA continued to rely on the plaintiff for senior management duties. He was required to help other employees fulfill duties that he was formerly responsible for. For instance, on April 26, 2018, he participated in a meeting on behalf of CSA with YVR and federal regulators regarding the important TWV Program. In October 2018 he was also faulted for not dealing with the IATA slot submission appropriately.

[128] The plaintiff's relevant work experience at the time of his termination was in the fields of air travel and tourism, specifically focused upon the Chinese and Canadian markets. His title of Marketing and Business Development Manager aptly described his functions with CSA. In my view, in assessing damages, it is not appropriate to focus on his most recent assignments as a customer service representative and an airport operations worker. This is for two reasons: (1) he was unilaterally and unfairly placed in these jobs without consultation, as part of the defendant's efforts to terminate his employment by one means or another; and (2)

he was not suited to these jobs. Much more relevant is the plaintiff's prior experience with CSA as its Marketing and Business Development Manager.

[129] The nature of the plaintiff's employment and level of responsibility militates in favour of a notice period towards the upper end of the range.

B. Length of service

[130] Longer service tends to require a longer notice period: *Ansari*, at para. 26.

[131] The plaintiff had worked with CSA as an employee for approximately eight years when his employment was terminated. He had also worked for CSA as a contractor for about three years prior to that, performing critical duties in assisting CSA to establish Canadian operations. His work increased over time, until he became a full-time employee in 2011.

[132] In *Cormier*, the court held that all of the circumstances should be taken into account. Therefore, in principle the period of time prior to the commencement of his formal employment with CSA – i.e., when the plaintiff was an independent contractor – should not be ignored: para. 73. I agree with this approach, in the circumstances of this case, bearing in mind the plaintiff's important role on CSA's behalf between 2008 and 2011. Effectively, then, the plaintiff's length of service was somewhat more than eight years.

C. Age

[133] The plaintiff had planned to work with CSA for five more years, in order to pay off his debts. He could not afford to retire.

[134] The plaintiff was 68 years of age when he was terminated. This factor militates in favour of a longer period of notice. This is three years beyond the conventional retirement age. As the plaintiff's experience tends to show, it is often very difficult for older employees to find reasonable alternative employment. For many reasons employers often prefer younger workers: *Ansari*, para. 27.

D. Availability of alternative employment

[135] The plaintiff's work experience was in a niche area. His experience and qualifications made him uniquely well-suited to the role that he had previously performed with CSA, prior to the departure of the former GM. His skills did not transfer well to the general marketplace.

[136] The length of reasonable notice is to be determined with regard to the circumstances existing at the time of termination, and not the amount of time actually required for the employee to obtain new employment: *Cormier*, at para. 56.

[137] However, the plaintiff's evidence about his actual experience in seeking other employment supports an inference that at the time he was dismissed, there was limited availability of reasonable comparable employment: *Corey v Kruger Products L.P*, 2018 BCSC 1510, at para. 49.

[138] As the plaintiff explains, since his employment was terminated no new airlines have begun offering services to China from Vancouver. He applied for work at several aviation-related and tourism-related businesses without success. He notes that work opportunities in the travel industry have diminished due to the Covid-19 pandemic, which impacted travel between Canada and China in particular. He applied for work at McDonald's Restaurants but was rejected.

[139] The plaintiff has been unable to find any remotely comparable work. He now works as a DoorDash restaurant meal delivery driver. The defendant pleaded but does not now contend that the plaintiff failed to mitigate his loss. It does not suggest that comparable employment was available to the plaintiff. I conclude that there was no reasonably comparable employment available to the plaintiff.

E. Other Authorities

[140] The plaintiff submits that the following authorities provide guidance on the appropriate length of reasonable notice in this case:

1. *Bachynski v. DC DiagnostiCare Inc*., 2001 BCSC 36 – 24 months;

2. *McKeough v. H.B. Nickerson & Sons Limited* (1985), 71 N.S.R. (2d) 134, 1985 CanLII 189 (S.C.T.D.), aff'd (1986), 74 N.S.R. (2d) 84, 1986 CanLII 187 (C.A.) – 18 months;

3. *Moran v. Atlantic Co-operative Publishers* (1988), 88 N.S.R. (2d) 117, 1988 CanLII 9814 (S.C.T.D.) – 18 months;

4. *Lyle v. Aluminex Extrusions Ltd*., [1996] B.C.J. No. 203, 1996 CanLII 2022 (S.C.) – 20 months;

5. *Cormier* – 21 months.

[141] Having reviewed these authorities, I agree that they broadly support the plaintiff's submission.

F. Assessment of Damages for Failure to Provide Reasonable Notice

[142] While the plaintiff's demotions to the customer service position, and then to the airport terminal position, would undoubtedly have formed the basis of a successful claim in constructive dismissal. However, the plaintiff accepted these demotions in the sense that he did not treat them as repudiations of his contract of employment, as he might have, by terminating his employment and suing for wrongful dismissal. Therefore, his damages must be based upon his salary at dismissal of $2,940 per month, rather than his previous salary of $3,980 per month. In consideration of the *Bardal* factors, as well as the authorities I have referred to, I assess damages based upon a reasonable notice period of 20 months. The total damages are therefore $2,940 multiplied by 20, being $58,800.

[143] The plaintiff began working with DoorDash in October 2020, outside the 20-month notice period. Therefore, his earnings at DoorDash are not relevant to the damages assessment.

[144] During 2020, the plaintiff earned $747 moving boxes of personal protective equipment for National Cargo Services Inc. That income must be deducted from the

award of damages. Thus, the net amount of damages in respect of this claim is $58,053.

[145] The plaintiff claims for loss in relation to travel benefits. He states that as an employee of CSA, he was entitled to three free return standby flights on CSA, which only flew to Guangzhou from YVR. He states that a return standby flight would cost approximately $600 to $800. However, there is no evidence that the plaintiff had utilized this benefit prior to dismissal, or that he would have used it during the notice period. Therefore, no damages have been established in relation to the loss of this benefit.

XI. AGGRAVATED DAMAGES

A. Legal Principles

[146] I adopt the statement of the relevant legal principles set out by Justice Horsman in *Hrynkiw v. Central City Brewers & Distillers Ltd.,* 2020 BCSC 1640, as follows:

> [190] The common law imposes an obligation on an employer to act in good faith in the manner of dismissal. Failure to do so can lead to foreseeable, compensable damages. If an employee can prove that the manner of dismissal caused mental distress that was in the contemplation of the parties at the time of the contract, then damages for the mental distress (often referred to in the case law as "aggravated damages") may be recoverable: *Honda Canada Inc. v. Keays*, 2008 SCC 39 at paras. 58-59 [*Honda*].
>
> [191] As set out by our Court of Appeal in *Lau v. Royal Bank of Canada*, 2017 BCCA 253 [*Lau*] at para. 17, an employee seeking to recover aggravated damages must establish two conditions:
>
> > i. the employer has breached its duty of good faith and fair dealing in the manner of dismissal, and
> >
> > ii. the employee suffered compensable damages as a result of breach.
>
> [192] Examples of conduct that may constitute a breach of the employer's duty of good faith and fair dealing include being untruthful, misleading or unduly insensitive in the course of dismissal, or attacking the employee's reputation by declarations made at the time of dismissal: *Wallace v. United Grain Growers Ltd.*, [1997] 3 S.C.R. 701 at para. 98; *Honda* at para. 59. The employer's dealings with the employee after dismissal, including its conduct in litigating the employee's claim, may be considered as an aspect of the manner of dismissal provided it is conduct that relates to the

> dismissal: *Acumen Law Corporation v. Ojanen*, 2019 BCSC 1352 at para. 126; *O.W.L. (Orphaned Wildlife) Rehabilitation Society v. Day*, 2018 BCSC 1724 at para. 286.
>
> [193] To establish the second condition of the test, the plaintiff must prove something beyond the normal distress and hurt feelings that invariably accompanies the loss of employment: *Cottrill v. Utopia Day Spas and Salons Ltd.*, 2018 BCCA 383 at paras 14-15, leave to appeal ref'd [2018] S.C.C.A. No. 533 [*Cottrill*]; *Quach v. Mitrix Services Ltd.,* 2020 BCCA 25 at paras. 26-27. Medical evidence is not required to establish that the employee has suffered emotional or health consequences but there must be some evidence of serious and prolonged disruption that transcends ordinary emotional upset or distress: *Cottill* at para. 18; *Lau* at para. 49; *Saadati v. Moorhead*, 2017 SCC 28 at para. 40.

B. Analysis

1. Did the defendant breach its duty of good faith and fair dealing of the manner of dismissal?

[147] I have no difficulty concluding that CSA breached its duty of good faith and fair dealing in the manner of the plaintiff's dismissal.

[148] I have already referred to a number of ways in which the employer breached its duties.

[149] I summarize the particulars of the employer's breach as follows:

1. The plaintiff's dismissal on February 1, 2019, was the culmination of a process commencing in January 2018 with the replacement of CSA's former GM with its new GM, Ms. Zhang. The new GM and the former GM were very hostile to each other. It seems clear that the new GM, Ms. Zhang, associated the plaintiff with the former GM. As of February 2018, the employer, acting through Ms. Zhang, secretly wanted and intended to terminate the plaintiff's employment. It sought to do so without giving reasonable notice or paying severance in lieu thereof. The employer could have simply informed the plaintiff that changes to its management structure meant that his position was redundant. It could have terminated the plaintiff's employment at that time. Instead, the employer was duplicitous and unfair in its dealings with the plaintiff. It demoted the plaintiff to entry-level, front-line services positions,

substantially reduced his pay, and began taking steps to manufacture cause for dismissal or to induce the plaintiff to resign.

2. To that end, the plaintiff was unfairly disciplined and threatened with termination on multiple occasions. The employer began unfairly criticizing the plaintiff's work, inventing failings, and creating an unfair, self-serving and inaccurate disciplinary record, in support of eventual allegations of cause for dismissal. The plaintiff previously had an impeccable record of service.

3. The unfair discipline was carried out in humiliating and embarrassing ways, including public reprimands, yelling at the plaintiff, on one occasion throwing an item at him (the computer mouse), and requiring him to attend meetings where his faults and failures were enumerated.

4. The plaintiff was compelled to sign letters of reprimand that he did not agree with—specifically, a letter dated February 22, 2018, and another undated letter that followed.

5. Given his age, experience, and former position as Marketing and Business Development Manager, the plaintiff's reassignments without consultation to entry-level positions in the customer service and airport station positions were humiliating.

6. The plaintiff was assigned to work at the airport terminal when the employer knew or ought to have known he could not possibly do the work to its satisfaction. He was set up for failure. The employer's treatment of the plaintiff in relation to this position was cruel and insensitive.

7. After unilaterally assigning the plaintiff to work at the airport, the employer purported to impose a probation condition upon his employment in January 2019, based upon the fact that he was in a new position.

8. The employer concocted a memorandum falsely stating that the plaintiff stated he would voluntarily resign if his performance did not improve.

9. While the plaintiff was continuing to make sincere efforts to live up to the employer's unreasonable demands, it terminated his employment. It did so before providing the additional training and further testing it had promised.

10. The plaintiff was an exceptionally vulnerable employee, as the employer must have understood. He was 68 years of age, with limited work opportunities. He accepted humiliating demotions, a substantial loss of pay, and endured multiple episodes of insulting and unfair discipline, in a desperate effort to retain any job with CSA. The plaintiff was made to suffer pointlessly, since CSA wanted to terminate his employment all along.

11. In its termination letter, the employer alleged dishonesty, by falsely stating that the employee was guilty of "time theft".

12. For no discernible reason, CSA refused to provide the plaintiff with a record of employment ("ROE"), contrary to its legal obligations as an employer and despite numerous requests. The failure to provide the plaintiff with a ROE delayed access to employment insurance by about two-and-a-half months.

13. The employer made numerous, very serious, and false allegations in the RTCC, a publicly available document. The allegations included dishonesty, fraud, theft, conspiracy, sexual harassment, and profound denigration and disparagement of the plaintiff's work record. These false, insulting allegations constituted a wholesale attack on the plaintiff's conduct, his character, his years of service, his value as an employee, and his worth as a person. They would have been predictably harmful to the plaintiff.

2. Has the plaintiff suffered compensable damages caused by the employer's breach of its duty of good faith and fair dealing in the manner of the dismissal?

[150] As the authorities make clear, the ordinary distress, emotional upset and injured feelings that can be expected to accompany dismissal are not compensable losses. However, actual psychological injuries caused by the employer's breach of duty are compensable.

[151] The plaintiff testified that he was struggling emotionally beginning with the time that the new GM arrived at CSA. He stated that “I felt like they were doing everything they could to get me to quit”. The plaintiff’s perception in this respect was accurate. He felt that his demotions were degrading. He stated that being publicly disciplined, and especially for things that he could not have anticipated would attract criticism from his superiors, made him feel humiliated, helpless, and worried. These were understandable responses. He stated that he was shocked and humiliated at the manner of his dismissal, and felt it disregarded his years of contribution to CSA, and his professional experience in the aviation and travel industry. He felt that the firing occurring on Chinese New Year’s Eve was a special insult. (The employer has not denied that this would be insulting to the plaintiff). He felt depressed, worthless, and betrayed. His emotional upset resulted in loss of sleep over a number of months and a loss of energy. He says it took him almost a year to recover, and accept reality. He saw his doctor in late March 2018 for treatment of nausea and sleeping problems, resulting from depression.

[152] The plaintiff’s wife testified by way of affidavit evidence, sworn on June 8, 2022, that his behaviour was abnormal. He was stressed, upset, lacked energy, became unsociable, gained weight, and his mood worsened. He became unhappy. After he was fired, he did not know what to do with himself. He sat in his room for about a week. She said that lately, his mood has improved, now that he is working with DoorDash. She said he is starting to lose weight and is more active.

[153] The circumstances have some similarity to those of the plaintiff in *Hrynkiw*, where the plaintiff was awarded $35,000 as appropriate compensation for mental distress.

[154] I accept the plaintiff's evidence that he suffered from mental distress from March 2018, well before he was terminated, and then for approximately one year post-termination. This is a longer period of time than seems to have been involved in *Hrynkiw*. It is almost surprising to me that he felt better after a year, in view of the

defendant's allegations against him, which it maintained until just before the hearing, in excess of three years after termination.

[155] I assess the plaintiff's damages for mental distress suffered as a result of the defendant's breach of duty of good faith and fair dealing in the manner of the dismissal at $50,000.

XII. PUNITIVE DAMAGES

[156] The plaintiff seeks punitive damages in the amount of $100,000.

A. Legal Principles

[157] In *Honda*, the Supreme Court stated that an employer's breach of its contractual duty of good faith and fair dealing in the manner of dismissal can ground an award for punitive damages: para. 62, citing *Whiten v. Pilot Insurance Co.*, 2002 SCC 18, at para. 82.

[158] Awards of aggravated damages for conduct in the manner of dismissal are compensatory, whereas punitive damages serve a different purpose.

[159] Punitive damages are restricted to advertent wrongful acts that are so malicious and outrageous that they are deserving of punishment on their own: *Honda*, para. 62.

[160] The distinction must be kept in mind by the courts, who must avoid the pitfall of double compensation, or double punishment: *Honda*, para. 60.

[161] Courts should only resort to punitive damages in exceptional cases. Punitive damages should receive the most careful consideration and the discretion to award them should be most cautiously exercised. The independent actionable wrong requirement is but one of many factors that merit careful consideration by the courts in determining punitive damages. Conduct meriting punitive damages must be "harsh, vindictive, reprehensible and malicious", as well as "extreme in its nature and such that by any reasonable standard it is deserving of full condemnation and

punishment": *Honda*, at para. 68, quoting *Vorvis v. Insurance Corporation of British Columbia*, [1989] 1 S.C.R. 1085 at 1108, 1989 CanLII 93.

[162] In *Ojanen v. Acumen Law Corporation,* 2021 BCCA 189, the Court of Appeal added the following commentary:

> [73] As punitive and aggravated damages are independently available, the Court in *Honda* noted the danger of duplicative awards that result in double damages or double compensation: *Honda* at para. 60. However, the same underlying conduct can ground both aggravated and punitive damages without being duplicative. The danger is awarding punitive damages to condemn behaviour that has already been adequately rebuked by the compensatory damage awards: *Kelly v. Norsemont Mining Inc.,* 2013 BCSC 147 at para. 116.
>
> [74] In *Honda*, the Court held it was an error for the lower courts to not have considered the aggravated damages already awarded when they awarded punitive damages:
>
> > [69] ... In this case, the same conduct underlays the awards of damages for conduct in dismissal and punitive damages. The lower courts erred by not questioning whether the allocation of punitive damages was necessary for the purposes of denunciation, deterrence and retribution, once the damages for conduct in dismissal were awarded. …
>
> [75] The combined general, aggravated, and punitive damages should not exceed the amount necessary for the purposes of denunciation, deterrence, and retribution. Given that compensatory damages are awarded first, punitive damages would only be necessary if the total award is not yet sufficient to achieve these three goals.
>
> [76] Unlike aggravated damages, which are compensatory in nature, punitive damages are directed toward punishment. The leading authority remains *Whiten v. Pilot Insurance Co.,* 2002 SCC 18.
>
> [77] The three objectives of punitive damages are retribution, deterrence, and denunciation. Punitive damages awards should be approached with caution and restraint and resorted to only in exceptional circumstances: *Whiten* at para. 69. Punitive damages awards are rational only when compensatory damages do not adequately achieve the objectives of retribution, deterrence, and denunciation: *Performance Industries Ltd. v. Sylvan Lake Golf & Tennis Club Ltd.,* 2002 SCC 19 at para. 87.
>
> [78] In *Whiten* at para. 94, the Court set out the factors that should be taken into account when considering an award for punitive damages. The factors include:
>
> > a) Punitive damages are the exception rather than the rule, imposed only if there has been high-handed, malicious, arbitrary, or highly reprehensible misconduct that departs to a marked degree from ordinary standards of decent behaviour;

> b) Punitive damages are generally awarded only where the misconduct would otherwise be unpunished or where other penalties are unlikely to achieve the objectives of retribution, deterrence, and denunciation;
>
> c) Punitive damages are awarded only if compensatory damages (which to some extent are punitive in nature) are insufficient to accomplish these objectives, and the amount awarded is no greater than necessary to rationally accomplish their purpose;
>
> d) The purpose of punitive damages is not to compensate the plaintiff, but to give a defendant his or her just desert (retribution), to deter the defendant and others from similar misconduct in the future (deterrence), and to mark the community's collective condemnation (denunciation) of what has happened;
>
> e) Punitive damages should be assessed in an amount reasonably proportionate to the harm caused, the degree of the misconduct, the plaintiff's relative vulnerability, and any advantage or profit gained by the defendant, having regard to any other fines or penalties suffered by the defendant; and
>
> f) Moderate awards of punitive damages, which inevitably carry a stigma in the broader community, are generally sufficient.

[163] Care must be taken not to conflate the analysis of punitive damages and special costs. In *Hrynkiw,* Horsman J. stated:

> [213] ... Generally speaking, reprehensible conduct of parties during the course of litigation should be addressed by way of an award of special costs, while punitive damages relate to an employer's conduct at the time of termination: *Marchen v. Dams Ford Lincoln Sales Ltd.*, 2010 BCCA 29 at paras. 66-69 [*Marchen*]. See also: *Smithies Holdings Inc. v. RCV Holdings Ltd.*, 2017 BCCA 177 at paras. 128-134.
>
> [214] However, an employer's conduct in the course of litigation may be taken into account in an award of punitive damages where an employer's bad faith conduct at the time of termination continues in an "unbroken course" throughout the legal proceeding: *Kelly* at para. 128.

[164] In *Kelly v. Norsemont Mining Inc.*, 2013 BCSC 147, the court provided the following examples of conduct justifying punitive damages (at para. 115):

1. The employer knowingly fabricating allegations of serious misconduct or incompetence against an employee to support dismissal;

2. The employer utilizing “hardball” tactics to intimidate the employee into withdrawing or settling his or her wrongful dismissal suit; or

3. The employer implementing the dismissal in a manner designed to disparage the employee’s capabilities or honesty in the eyes of other employees or future employers.

B. Analysis

[165] In this case, the defendant’s conduct in relation to the breach of its duty of good faith and fair dealing in the manner of the dismissal, as I have described above, also supports the plaintiff’s claims for punitive damages.

[166] Each example of conduct referred to in *Kelly* that may justify an award of punitive damages is present in this case.

[167] CSA’s conduct can be comfortably described as “harsh, vindictive, reprehensible and malicious”, as well as “extreme in its nature and such that by any reasonable standard it is deserving of full condemnation and punishment”: *Honda*, para. 68.

[168] The defendant’s bad faith conduct has continued through the litigation. It amounts to an “unbroken course” of misconduct: *Hrynkiw*, para. 214, citing *Kelly*, para. 128.

[169] In particular, CSA’s bad faith conduct in the litigation included:

1. Making numerous serious and false allegations in the RTCC. The defendant would have known that these allegations would damage the plaintiff’s chances of obtaining reasonable alternative employment. The employer did not cite these allegations in its termination letter to the plaintiff. This shows that after termination, the employer made a deliberate decision to respond to his legal claim with vicious, vindictive, and unfounded allegations that it knew or ought to have known could not be supported.

2. To take just one example of the defendant making allegations that it knew it could not support, in its RTCC the defendant emphatically denied that the plaintiff was in fact a management employee who held the title of Marketing and Business Development Manager, or something similar. The plaintiff has adduced several letters he wrote on behalf of CSA utilizing that title, including, even, the letter to Toronto International Airport seeking authorizations for Jocelyn Zhang. The plaintiff does not have access to the defendant's files, but the defendant's files would be replete with such documents. Indeed, the defendant relies on minutes of a meeting dated March 9, 2018, attached to the affidavit of Danny Chen, which identifies the plaintiff as the "former Marketing Department Manager". The former GM would surely have confirmed that these allegations were false.

3. CSA required the plaintiff to bring multiple pre-trial applications to enforce compliance with its obligations as a litigant. Examples are as follows:

    a. After making a number of unsuccessful demands, the plaintiff was forced to file an application for an order compelling CSA to produce a list of documents on December 16, 2020, more than one year after CSA filed its RTCC on November 1, 2019. The next day, December 17, 2020, CSA filed a notice of intention to act in person, and requested a delay in the proceedings so that it could retain new counsel. CSA continues to be self-represented. On January 8, 2021, Master Elwood ordered CSA to provide a list of documents by January 15, 2021, and ordered costs in the plaintiff's favour.

    b. The defendant failed to provide the documents listed on its list of documents, thus requiring the plaintiff to bring another application to compel production. On June 17, 2021, Master Cameron ordered CSA to provide the documents listed on its list

by June 24, 2021, and ordered costs in any event of the cause to the plaintiff.

c. CSA was consistently uncooperative in making arrangements for the plaintiff to examine CSA's representative for discovery. The plaintiff nominated the local GM, Jocelyn Zhang, to be examined for discovery. CSA would not confirm her attendance at the examination. In the circumstances, she was a logical choice to be examined. It would be reasonable to expect that her testimony would have been damaging to the defendant's case. Without prior notice to plaintiff's counsel, CSA presented a different and uninformed representative for examination.

d. On March 8, 2021, the plaintiff filed a notice of trial confirming a three-day trial to be heard, commencing February 23, 2022. At the trial management conference before Justice Skolrood on January 12, 2022, the court adjourned the trial due to the number of witnesses listed on CSA's trial brief. The court ordered that new trial dates would be peremptory on CSA, and ordered to CSA comply with the plaintiff's document discovery requests and to produce outlines of anticipated evidence for its witnesses. Lump sum costs were awarded to the plaintiff, payable forthwith. Subsequently, a five-day trial was scheduled for February 13 to 17, 2023. The defendant thus caused a substantial delay in the proceedings.

e. CSA did not pay the costs award made by Skolrood J. and did not otherwise comply with the court order. On April 29, 2022, Master Vos made a further order compelling compliance with Skolrood J.'s order, including the costs award and made a further costs award in the plaintiff's favour.

f. One of the plaintiff's document demands was for disciplinary records for Kitty Chen. This was a logical request in view of CSA's allegations that the plaintiff and Kitty Chen were co-conspirators in defrauding CSA, and CSA's notable efforts to create a documentary record relating to discipline of the plaintiff. Although Ms. Chen remains a CSA employee, employed in Guangzhou, China, CSA refused to disclose disciplinary records for her. After being ordered to produce the records by Master Vos on April 14, 2022, CSA asserted that there were no documents relating to the discipline of Ms. Chen, but stated in its written response "Kitty received multiple verbal warning[s] after she was transferred back to China". It is very difficult to accept that Ms. Chen was in fact disciplined, but there are no records of any kind.

[170] In summary, the record shows a pattern of conduct on the part of the defendant designed to stall and frustrate the prosecution by the plaintiff of his claims in this litigation, in circumstances where CSA must be taken to know that the plaintiff's financial claims were modest, especially in relation to the high costs of litigation and his limited resources. The description "hardball tactics" easily applies to the defendant's behaviour both before and after his termination.

[171] Based upon the above-noted circumstances, as well as the circumstances supporting the award of aggravated damages, I am satisfied that the high bar required for an order of punitive damages is satisfied. The employer's conduct must be denounced and deterred.

[172] The awards of compensatory damages are relatively modest. Their combined total is $108,053. The defendant's unfair unilateral demotions and reductions in the plaintiff's pay reduces the amount of damages it would otherwise have had to pay for failure to give reasonable notice. The award of $58,053 for failure to give notice is equivalent to the defendant's ordinary contractual obligations, either for pay during

the notice period or for severance. These awards do not achieve the objectives of retribution, deterrence, and denunciation applicable here.

[173] In assessing the amount of punitive damages, I adopt the comments of Justice Fenlon in *Kelly,* as follows:

> [130] The governing rule in determining the appropriate quantum of punitive damages is *proportionality*. The overall award, *i.e.* compensatory damages plus punitive damages plus any other punishment related to the same misconduct, should be rationally related to the objectives for which the punitive damages are awarded (retribution, deterrence and denunciation): *Whiten* at para. 74.
>
> [131] Proportionality in punitive damages has six dimensions, which were set out in *Whiten* at paras. 111-126 and reviewed by the Alberta Court of Appeal in *Elgert v. Home Hardware Stores Ltd.*, 2011 ABCA 112 at para. 82, 510 A.R. 1. The award of punitive damages must be:
>
> (i) Proportionate to the blameworthiness of the defendant's conduct -- the more reprehensible the conduct, the higher the rational limits of the potential award. Factors include outrageous conduct for a lengthy period of time without any rational justification, the defendant's awareness of the hardship it knew it was inflicting, whether the misconduct was planned and deliberate, the intent and motive of the defendant, whether the defendant concealed or attempted to cover up its misconduct, whether the defendant profited from its misconduct, and whether the interest violated by the misconduct was known to be deeply personal to the plaintiff.
>
> (ii) Proportionate to the degree of vulnerability of the plaintiff -- the financial or other vulnerability of the plaintiff, and the consequent abuse of power by a defendant, is highly relevant where there is a power imbalance.
>
> (iii) Proportionate to the harm or potential harm directed specifically at the plaintiff.
>
> (iv) Proportionate to the need for deterrence -- a defendant's financial power may become relevant if the defendant chooses to argue financial hardship, or it is directly relevant to the defendant's misconduct, or other circumstances where it may rationally be concluded that a lesser award against a moneyed defendant would fail to achieve deterrence.
>
> (v) Proportionate, even after taking into account the other penalties, both civil and criminal, which have been or are likely to be inflicted on the defendant for the same misconduct -- compensatory damages also punish and may be all the "punishment" required.

> (vi) Proportionate to the advantage wrongfully gained by a defendant from the misconduct.
>
> …
>
> [138] In determining the appropriate quantum of punitive damages in this case, I am mindful that an award of damages that is too large goes beyond the objectives of punitive damages (retribution, deterrence, and denunciation) and becomes irrational. An award of punitive damages that is too small fails to achieve these same objectives: *Whiten* at para. 111.

[174] I turn to a consideration of each of these elements.

[175] CSA's conduct is highly blameworthy. The defendant's reprehensible conduct extended from one year prior to termination to the present, a period of almost five years. Its abusive conduct was planned and deliberate throughout.

[176] The plaintiff was highly vulnerable. It has taken him nearly five years to pursue his claims for reasonable compensation, and to clear his name.

[177] The defendant's conduct has been profoundly harmful to the plaintiff.

[178] There is a substantial need for deterrence and denunciation. The defendant is a very large corporation. Prior to the onset of the Covid-19 pandemic it was very profitable. Its reported profits in 2019, the year the plaintiff was dismissed, were equivalent to 590 million Canadian dollars. Given its circumstances, the plaintiff's award of compensatory damages is trifling. Only the rebuke represented by a substantial monetary award will have the required "sting". I do not expect that the court's findings, standing alone or in combination with the compensatory awards, would have any real effect upon the defendant's attitude and behaviour, and of other like-minded employers.

[179] The defendant has gained somewhat from its wrongful conduct. As noted, the award of compensatory damages is reduced because the defendant demoted the plaintiff and reduced his salary prior to termination. The plaintiff did not sue the employer at that time. It has saved the salary it would have paid to the plaintiff or the severance it would have paid in lieu of reasonable notice.

[180] Other decisions provide only limited guidance in this area. While noting that the assessment is fact-specific to each case, the plaintiff cites a number of authorities as guidance:

1. *Kelly* - $100,000;
2. *Gordon v. Altus Group Ltd.*, 2015 ONSC 5663 – $100,000;
3. *Etedali v. Disi-Peri Mgt. Inc.,* 2022 ONSC 2184 – $75,000;

[181] In *Kelly,* at paras. 139 to 145, Fenlon J. discussed a number of other authorities:

1. *Nishina v. Azuma Foods (Canada) Co.*, 2010 BCSC 502 – $20,000;
2. *MacDonald-Ross v. Connect North America Corp.*, 2010 NBQB 250 – $50,000;
3. *Elgert v. Home Hardware Stores Ltd.*, 2011 ABCA 112, leave to appeal to SCC ref'd, 34335 (24 November 2011) – $75,000; and
4. *Vernon* – $50,000.

[182] In *Kelly*, a 2013 decision, the plaintiff was 55 years of age when he was hired by the defendant as Vice President of Finance and Director of Communications on December 1, 2004. He was fired a few months later, in June 2005. The employer alleged cause. Its statement of defence alleged that the employee made false representations to it about his ability to provide services, failed to provide the services he was contracted to provide, made false and defamatory statements to third parties about the defendant and its representatives, and demanded payments from the defendant that were not due and owing. The plaintiff argued that his dismissal was in retaliation for concerns he raised about the employer's compliance with securities regulations.

[183] The court held that the plaintiff was wrongfully dismissed, and that a factor in his dismissal was the concerns he raised about securities compliance. The court noted the "remarkable" decision by the defendant not to adduce evidence from Mr. Gill and Mr. Mawji, directors of the defendant who were "key players in the events leading to Mr. Kelly's termination": at para. 83. The court rejected the plaintiff's claim for aggravated damages for mental distress.

[184] The defendant's Chief Executive Officer, Mr. Levy, threatened to bankrupt the plaintiff and told him he would ensure that he did not have the funds to take the case to court. As stated above, the defendant pleaded civil fraud and incompetence as grounds for dismissal. The grounds were rejected. In assessing punitive damages, the court emphasized the defendant's allegations of civil fraud and incompetence, which persisted for seven years without foundation, and the threats to bankrupt the plaintiff and to dissuade him from pursuing his legal rights. The court found the defendant had taken advantage of the plaintiff's relative financial vulnerability. Its allegations made it more difficult for him to find other work in his field, and carried the risk of damaging his personal and professional reputation. The award of compensatory damages was relatively modest and amounted to nothing more than what the defendant was bound to pay pursuant to the contract of employment.

[185] In *Gordon*, a 2015 decision, the plaintiff had sold his business to the defendant employer, and remained on as an employee pursuant to a written employment contract which contained specified severance terms. The sale agreement included a term for adjustment in the purchase price depending upon the performance of the business, fifteen months after the closing of the sale. The plaintiff gave notice of arbitration to determine the price adjustment. The court held that upon the plaintiff giving the notice, the employer "decided to be cheap and then conjured up a cause for firing in order to save money": at para. 25. Firing the plaintiff and Ann Gordon (presumably, the plaintiff's spouse) simultaneously was designed to save further salary expense of $105,000 per year. The employer "ran roughshod over the Plaintiff and put together a process to justify their actions after the fact": at para. 26. Despite firing the plaintiff for cause, the employer insisted that the plaintiff abide by a

non-competition clause in the employment contract, which effectively precluded the plaintiff from obtaining other employment. The court described this as a “bully tactic” intended to “beat down the employee”: at para. 43 The employer was ordered to pay $168,845 in severance pursuant to the employment contract, and $100,000 in punitive damages for its conduct, which the court characterized as dishonest, harsh, mean, cheap, terrible, outrageous, and continuing over an extended length of time.

[186] In *Etedali*, a 2022 decision, the plaintiff succeeded in obtaining a remedy for oppressive conduct against him as a shareholder and for wrongful dismissal. The court held that he was removed as a director of the company for improper purposes, namely, to teach him a lesson. The employer wrongfully withheld payment of his shareholder loan of $305,000 for ten months. The employer initially alleged cause for dismissal, but withdrew that allegation well before the trial. The withdrawn allegation of cause does not appear to have been a factor in the assessment of punitive damages. The court awarded $75,000 in punitive damages.

[187] There was no claim of aggravated damages in *Gordon* or *Etedali*.

[188] In my view, CSA’s degree of blameworthiness of the kind justifying an award of punitive damages is much higher than that of the employers in *Gordon* or *Etedali*, and is not less than in *Kelly*.

[189] With these other authorities in mind, and bearing in mind the plaintiff’s modest award for compensatory damages, in the circumstances of this case I accept the plaintiff’s submission that $100,000 represents an appropriate award for punitive damages.

XIII. CONCLUSIONS, AND COSTS

[190] The plaintiff’s claims are allowed. Damages are awarded to the plaintiff as set out above.

[191] The plaintiff is also entitled to costs. The plaintiff has requested an opportunity to address costs, including special costs, separately, following issuance of these reasons.

[192] The parties may make arrangements through Supreme Court Scheduling for a hearing in relation to the plaintiff's costs, in the event they are unable to agree on costs.

[193] If a hearing is required, the parties will be required to file any application materials in accordance with the Rules. In addition, they are required to file written outlines of their anticipated submissions on the following schedule:

1. Plaintiff, not less than 14 days pre-hearing;

2. Defendant, not less than 7 days pre-hearing;

3. Reply, if any, not less than 3 days pre-hearing.

"Verhoeven J."