COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Café La Foret Ltd. v. Cho,*
2023 BCCA 354

Date: 20230913
Docket: CA48570

Between:

Café La Foret Ltd.

Appellant
(Defendant)

And

Song Hwan Cho

Respondent
(Plaintiff)

Before: The Honourable Madam Justice Fenlon
The Honourable Mr. Justice Fitch
The Honourable Mr. Justice Abrioux

On appeal from: An order of the Supreme Court of British Columbia, dated September 2, 2022 (*Cho v. Café La Foret Ltd.*, 2022 BCSC 1560, Vancouver Docket S233799).

Counsel for the Appellant:	J.D. Kondopulos S. Blanco S.A. Toor
Counsel for the Respondent:	J. Wu S. Ewart
Place and Date of Hearing:	Vancouver, British Columbia April 25, 2023
Place and Date of Judgment:	Vancouver, British Columbia September 13, 2023

Written Reasons by:
The Honourable Madam Justice Fenlon

Concurred in by:
The Honourable Mr. Justice Fitch
The Honourable Mr. Justice Abrioux

Summary:

The employer appeals an award of damages against it for the wrongful dismissal of the respondent, who was found to have sexually harassed a subordinate employee. It says the judge erred in finding the employer did not have cause for dismissal and in making a global award for aggravated and punitive damages. Held: Appeal allowed in part.

The employer has not established a material error in the judge's reasons for concluding there was insufficient cause for termination. The judge's finding that the employee was not dishonest prior to his termination was supported by the record. It was not an error to consider whether the sexual harassment alone justified termination, as the other alleged grounds for dismissal were not made out. Any errors in the judge's contextual analysis as to whether there was sufficient cause were not material. Although the judge erred in making a global award for aggravated and punitive damages, as they are distinct remedies with different objects and distinct analyses, the $25,000 she awarded is warranted for aggravated damages alone. An award for punitive damages is not required.

Reasons for Judgment of the Honourable Madam Justice Fenlon:

Introduction

[1] Café La Foret Ltd. appeals an award of damages against it for the wrongful dismissal of the respondent Song Hwan Cho, who was found to have sexually harassed a subordinate employee. The appeal addresses what factors may be considered in assessing whether sexual harassment is sufficient cause for termination, and whether a global award may be made for aggravated and punitive damages.

Background

[2] Mr. Cho was 60 years old when he was dismissed by Café La Foret. He was born and raised in South Korea, where he trained and worked in various baking positions for 22 years. After immigrating to Canada, he worked exclusively in Korean-owned businesses where the employees communicated with each other primarily in Korean, as Mr. Cho has limited proficiency in English. Café La Foret was one such workplace. Mr. Cho worked at Café La Foret as head baker from December 1, 2017 to November 30, 2018 and again from April 1, 2019 to November 9, 2020.

[3] Nam Gyeong Lee worked alongside Mr. Cho at Café La Foret as an assistant baker from April 1, 2019 until November 9, 2020. She was about 30 years old at the time and reported directly to him.

[4] On November 9, 2020, Mr. Cho and Ms. Lee were assigned to work together from 12 p.m. to 6 p.m. Based in part on CCTV footage of the kitchen, the judge found that Mr. Cho touched Ms. Lee on two occasions without her consent:

> (i) At 12:18 pm by applying a brief light tap on her left shoulder, followed by a brief open hand pat to her upper back, in the context of Mr. Cho telling Ms. Lee about a therapeutic massage that he had received the day before (at para. 97); and
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> (ii) A second time between 5:00 and 5:23 p.m. by lightly tapping her in the buttock area while discussing the pain in his lower back: at para. 98.

[5] The judge concluded that Mr. Cho's touching of Ms. Lee constituted sexual harassment, saying:

> [99] In my view, Mr. Cho's above actions constituted harassment of Ms. Lee. While chatting with Ms. Lee about a massage that he had received on the weekend was not harassing behaviour, Mr. Cho crossed the line when he proceeded to touch Ms. Lee while discussing the massage. Though the touching was brief, it was intentional, unwarranted, and non-consensual. It was a violation of Ms. Lee's bodily integrity, and caused her emotional distress.
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> [100] I also find that the touching which occurred was sexual in nature. The surrounding circumstances lead me to conclude that this action on the part of Mr. Cho reflected a gross error of judgment, rather than an act committed for sexual gratification or with the intention of violating Ms. Lee's bodily integrity. Nevertheless, when Mr. Cho touched Ms. Lee's buttocks, the touching took on sexual connotations. Even if it was in the form of a "tap", the intentional placement of his finger or hand on Ms. Lee's buttocks was entirely inappropriate and falls within the scope of sexual harassment.
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> [Emphasis added.]

[6] After the second incident of touching, Ms. Lee reported the events to a fellow employee and to the front counter manager who in turn informed the general manager, Dong-Hyuk Kwak. Mr. Kwak met with Ms. Lee to hear first-hand what had

happened. He then met with Mr. Cho. The judge described their encounter as follows:

> [117] Mr. Cho was still working at the bakery counter when Mr. Kwak took him into his office. He told Mr. Cho that Ms. Lee said that he had verbally abused her, and touched her on her arm, shoulder and buttocks. Mr. Kwak asked Mr. Cho to tell him his version of events. Mr. Cho told him that he had received a massage, and was trying to explain to Ms. Lee the parts of his body that were hurting. He admitted that in the process, he touched Ms. Lee.
>
> [118] Mr. Kwak told Mr. Cho that regardless of the reason, touching a female subordinate was wrong. Mr. Cho told him he thought he had made a mistake. He asked if he should apologize to Ms. Lee or quit his job. At trial, Mr. Cho explained that he offered to apologize because though he only touched Ms. Lee on her shoulder, he realized that he may have unknowingly caused distress to Ms. Lee.

[7] Mr. Kwak did not immediately tell Mr. Cho whether he should apologize or quit. Instead he told him that he would consult management and conduct an investigation, and that Mr. Cho should go home and wait for a call: at para. 119. After speaking with Yunhee Park, the owner of Café La Foret, that same evening, Mr. Kwak called Mr. Cho to tell him that he should not attend work the next day: at para. 122.

[8] The following day, November 10, Ms. Park met with Ms. Lee at work to discuss the idea of seeking an apology from Mr. Cho. Ms. Lee said she was afraid to see or meet Mr. Cho and wanted an apology in writing from him so that she could report the incident to the police: at para. 125.

[9] On November 11, Mr. Kwak sent a text message to Mr. Cho asking him to call but Mr. Cho did not respond.

[10] On November 13, Mr. Kwak contacted the corporate secretary for Café La Foret, Chang Han, and asked him to prepare an apology letter to be signed by Mr. Cho. Mr. Han had previously been a lawyer and prepared the apology letter in the form of an affidavit (the “Affidavit”) based on information provided to him by Mr. Kwak: at para. 129.

[11] Mr. Kwak sent the Affidavit to Mr. Cho on November 15, asking for his signature: para. 131. The following text message exchange then ensued:

> [132] …
>
> Mr. Kwak: I sent you an email. Please contact me if you need an explanation. Everything will end well.
>
> 14:48
>
> Mr. Cho: I checked the email and did not see the ROE and Termination Letter. Please email them to me by Monday.
>
> 17:33
>
> Mr. Kwak: Kindly do this one first.
>
> 17:38E

[12] Two days later, on November 17, Café La Foret issued the first record of employment ("ROE") which simply stated that the reason for issuing the ROE was "dismissal". On November 18, Café La Foret issued a second ROE purporting to correct errors in the first ROE; the reason for dismissal was changed to "sexual harassment and bullying of female subordinate staff": at para. 133.

[13] The judge found that Café La Foret terminated Mr. Cho's employment on November 17, and it did so because he refused to sign the Affidavit admitting to his misconduct: at para. 134. She also accepted Mr. Cho's evidence that he believed he had been terminated on November 9, when Mr. Kwak told him not to come to work the next day. She observed that, consistent with this belief, Mr. Cho applied for another bakery position on November 9, and on November 10 asked Café La Foret to remove him as the contact person on a job search site; he also repeatedly asked Mr. Kwak to forward his ROE and termination letter to him.

Grounds of appeal

[14] Café La Foret contends the judge erred by:

1. Finding that Mr. Cho was not dishonest;

2. Failing to cumulatively consider Mr. Cho's misconduct in assessing whether there was cause for dismissal;

3. Considering irrelevant factors in assessing the nature and extent of the sexual harassment; and

4. Making a global award of $25,000 for aggravated and punitive damages.

[15] I turn now to the first ground of appeal.

1. Finding Mr. Cho was not dishonest

[16] The judge's determination that Mr. Cho was not dishonest is a finding of fact that can only be set aside on appeal if the judge made a palpable and overriding error. Café La Foret submits that the judge made two such errors.

[17] First, it says that she erred in finding that Mr. Cho had admitted on November 9 to all of the inappropriate touching of Ms. Lee, because Mr. Cho did not admit to touching Ms. Lee on the buttocks—the most problematic, offensive and invasive element of the sexual harassment.

[18] Café La Foret says Mr. Cho's failure to admit to touching Ms. Lee's buttocks was a failure to provide a complete and truthful description of what had occurred. It says this was a breach of the implied duty of honesty and faithfulness, particularly because he occupied a supervisory role, relying on *Obeng v. Canada Safeway Ltd.*, 2009 BCSC 8 at paras. 36–37, 40.

[19] I am not persuaded that the judge misapprehended the evidence. In finding that Mr. Cho had admitted to all of the touching, the judge relied on Mr. Kwak's evidence. He testified that when he confronted Mr. Cho, he asked him specifically about Ms. Lee's allegation of improper touching of "her arm, shoulder and buttocks". He testified Mr. Cho said in response that he had received a massage, was trying to explain to Ms. Lee the parts of his body that were hurting, and admitted that in the process he touched Ms. Lee. Mr. Cho said he thought he had made a mistake, and offered to apologize or quit his job. It was open to the judge on this evidence to find,

as she did at para. 138, that Mr. Cho admitted to all of the touching put to him by Mr. Kwak**.**

[20] Café La Foret points out that after his termination and throughout the legal proceedings, including at trial, Mr. Cho denied that he had touched Ms. Lee on her buttocks: at paras. 89, 95. However, as the judge implicitly recognized, the relevant date for assessing whether an employer has cause for dismissal is the date of termination: *Van den Boogaard v. Vancouver Pile Driving Ltd.*, 2014 BCCA 168 at para. 34. It was open to Café La Foret to rely on events following the sexual harassment on November 9 up to the date of termination on November 17. However, the judge found that during that period, Café La Foret understood Mr. Cho to have fully admitted to the misconduct. Café La Foret has not demonstrated how this finding was made in error. Café La Foret could not therefore have relied on Mr. Cho's dishonesty as to the extent of the inappropriate touching in terminating his employment.

[21] Café La Foret says the judge's second error regarding dishonesty arose because she misunderstood its argument about Mr. Cho's conduct around the apology. It says she analysed its submission as being that Mr. Cho's refusal to sign the Affidavit amounted to dishonesty. It says its argument was, rather, that Mr. Cho was dishonest about his remorse for his actions because he refused to engage with the employer about the form of the apology.

[22] I do not agree that the judge misunderstood Café La Foret's argument. In addressing the appellant's assertion that Mr. Cho acted dishonestly when asked to apologize, she said:

> [138] ... Although Mr. Cho ultimately refused to sign the Affidavit prepared by the Employer, that refusal cannot be considered an act of dishonesty, or a lack of contrition, or a failure to participate in reconciliatory efforts.
>
> [Emphasis added.]

[23] Further, the judge reviewed in detail the communications between Mr. Kwak and Mr. Cho concerning an apology. The judge squarely addressed Mr. Cho's willingness to engage in a reconciliatory process, saying:

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

[24] In summary on this ground of appeal, Café La Foret has not established that the judge erred in finding that Mr. Cho was not dishonest in the period between the incident of sexual harassment and his termination.

2. Failing to cumulatively assess the grounds for dismissal

[25] Café La Foret submits the judge failed to consider the full range of Mr. Cho's conduct when assessing whether cause for dismissal had been made out. It says that the judge erred because she considered the sexual harassment "in a silo", without taking into account his other misconduct of dishonesty and refusal to apologize, all of which must be considered cumulatively, citing to *Dowling v. Ontario (Workplace Safety & Insurance Board)* (2004), 246 D.L.R. (4th) 65 at paras. 49, 60, 2004 CanLII 43692 (Ont. C.A.), leave to appeal to SCC ref'd, 30737 (19 May 2005) and *Hucsko v. A.O. Smith Enterprises Limited*, 2021 ONCA 728 at para. 38.

[26] In my view, this ground of appeal can be dealt with summarily. First, the judge correctly set out the test for wrongful dismissal at paras. 45–53 of her reasons. She expressly recognized the need to conduct a contextual inquiry, saying: "[t]he inquiry is factual, and requires the court to undertake a contextual examination of the nature and circumstances of the misconduct": at para. 49.

[27] Second, the judge applied the test for wrongful dismissal without error. She can hardly be faulted for considering the sexual harassment "in isolation" given her finding that the other conduct relied on by the employer had not been proved—a matter she expressly addressed in her reasons, saying:

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

In my view, nothing more need be said about this ground of appeal.

3. Consideration of irrelevant factors in assessing whether the sexual harassment was sufficient cause for dismissal

[28] Café La Foret submits that the judge considered a number of irrelevant factors in assessing whether the sexual harassment was sufficient on its own to warrant dismissal.

(a) Willingness of Café La Foret to remediate the relationship

[29] Café La Foret says the judge erred in considering its efforts to remediate the employment relationship as evidence that the harassment on its own was not serious enough to give rise to a breakdown in the employment relationship. In other words, it says that the judge used Café La Foret's laudable efforts to obtain an apology, and thereby preserve the employment relationship, against it when she said:

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

[30] Café La Foret submits that there would be a chilling effect if an employer might be prejudiced at trial because a failed attempt at reconciliation could be used against it as evidence that the underlying misconduct was not sufficiently serious to warrant dismissal. It warns that as a result, employers generally, and small businesses such as Café La Foret in particular, will be unwilling to take steps to try and resolve issues arising out of misconduct in the workplace and will be more

inclined to move to immediate termination of employment. It contends, therefore, that efforts to remediate should not be relevant to the just cause analysis.

[31] In support of this contention, it points to the many benefits of remediation efforts: to the employee who has the chance to save their job; to the employer for business and operational reasons, including workplace morale; to others affected by the employee's misconduct, such as a victim of sexual harassment who might be open to reconciliation; and wider social benefits including the avoidance of potential unemployment and the need for formal dispute resolution and adjudication.

[32] I agree that an employer's willingness to try to preserve the employment relationship should not, on its own, be construed as an admission that the underlying conduct is not sufficiently serious to warrant dismissal. But I do not agree that it cannot be considered as one contextual factor in the just cause analysis.

[33] Assessing whether there is just cause for dismissal requires a contextual approach (*McKinley v. BC Tel*, 2001 SCC 38 at para. 51) and the employer's view of the potential for an ongoing relationship is part of that context.

[34] The employer knows the dynamics of the workplace, the employees involved, their roles within the organization, and the potential for reassigning or creative scheduling. In short, the employer is uniquely well-positioned to assess whether the conduct is so fundamentally inconsistent with the employee's obligations that it has given rise to a breakdown in the employment relationship.

[35] In my opinion, it was open to the judge to consider, as one contextual factor in assessing the gravity of the misconduct, whether the employer viewed the relationship breakdown from the outset as either irremediable or salvageable should the employee take responsibility, express remorse, apologize, or in some other manner make amends.

[36] I hasten to add that the context includes consideration of whether the employer's efforts to effect a remedy are thwarted by the employee or prove for some other reason to be unachievable. To repeat, a judge should not in general

consider the employer's willingness to remediate as determinative of the gravity and sufficiency of the underlying misconduct. The employee's willingness or lack of willingness to engage in remedying the misconduct will be a significant factor, as will the ultimate success or failure of such efforts. Remorse and an apology can in some circumstances mitigate the misconduct and restore the relationship. Without that successful remedial action, the unmitigated misconduct, standing alone, may well be so corrosive as to break the employment relationship and justify dismissal.

[37] The judge in the present case correctly identified the legal principles relevant to a wrongful dismissal claim in the context of sexual harassment, including the criteria identified in *Alleyne v. Gateway Co-operative Homes Inc.* (2004), 14 C.C.E.L. (3d) 31, 2001 CanLII 28308 (Ont. S.C.J.) at para. 28, which were endorsed by Justice Nielsen, later of this Court, in *Brazeau v. International Brotherhood of Electrical Workers* 2004 BCSC 251 at para. 218, aff'd 2004 BCCA 645.

[38] Café La Foret's willingness to work towards an apology was only one of many factors the judge took into account in assessing whether Mr. Cho's misconduct was sufficiently serious that it gave rise to a breakdown in the employment relationship justifying dismissal. The judge expressly addressed the severity of the underlying conduct in the particular circumstances of the case, saying:

> [143] I have considered the *Alleyne* criteria within the facts of this case, and note the following:
>
> a) On the spectrum of workplace sexual harassment, the established misconduct was relatively minor. It consisted of a brief light tap on Ms. Lee's left shoulder, followed by a brief open hand pat to her upper back, and a subsequent light tap on Ms. Lee's buttock. The contact lasted for only a second or two on each occasion, and reflected a gross error of judgment, rather than *mal fide* intentions.
>
> b) Though Ms. Lee was quite distraught when recounting the incident to Mr. Kwak and Ms. Park, it is evident that she was upset for multiple reasons. In addition to Mr. Cho's non-consensual touching, Ms. Lee was upset because she believed that he had prevented her from eating her meal that day. Only the non-consensual touching on November 9 has been proven in this case. I accept that part of Ms. Lee's distress was also due to the power imbalance between her and Mr. Cho. Mr. Cho was her direct supervisor, and in a position of authority over her, thereby

making it difficult for her to assert herself. However, the fact that Ms. Lee did report Mr. Cho to a manager very shortly after the non-consensual touching of November 9 occurred, suggests that the power imbalance between them was not overly prohibitive.

c) Mr. Cho admitted during his cross-examination that he was aware that touching Ms. Lee on the buttock would be inappropriate and unwelcome. Thus, the fact that Mr. Cho was never told that the impugned conduct was unwelcome or offensive prior to the offensive conduct occurring, is irrelevant in this case.

d) The fact that Mr. Cho never repeated the offensive behaviour is a neutral fact, as Mr. Cho did not have any further in person contact with Ms. Lee or other staff of La Foret. Once Mr. Kwak told Mr. Cho that the conduct was unwelcome, Mr. Cho offered to apologize to Ms. Lee or to quit.

e) Mr. Cho was not warned prior to the incident that such conduct was inappropriate and that dismissal was a possible consequence of such misconduct.

f) The Employer did not have a formal, and known, sexual harassment policy, which was enforced by the Employer. However, Mr. Cho agreed that such a policy was not necessary for him to know that the behaviour complained of was inappropriate.

g) Mr. Cho's relationship with the Employer, including his length of service, position, and age, create implied terms of employment which give rise to additional obligations on the Employer's part to provide Mr. Cho with a warning or an opportunity to respond. He was given neither prior to his employment being terminated.

[39] The judge was alive to the ultimate failure of Café La Foret's remediation efforts, but found that this was due to Café La Foret's conduct, not Mr. Cho's, saying:

> [147] The following supports my conclusion that it was reasonable for Mr. Cho to refuse to sign the Affidavit:
>
> a) I accept Mr. Cho's evidence that he did not sign the Affidavit because he could not agree with the statements made in it, including wording that made him out to be a sexual offender.
>
> b) The Affidavit was designed to be used for legal purposes, rather than to repair any fractured relationship between Mr. Cho and Ms. Lee, or Mr. Cho and the Employer:
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> i. Ms. Lee was very clear to Ms. Park that she intended to go to the police, and wanted a document signed by Mr. Cho so that he would not later resile from his admission of misconduct.

Ms. Park was aware that this was Ms. Lee's intention, and agreed to get a signed apology from Mr. Cho.

ii. The Affidavit was drafted in English, rather than Korean which was the preferred language of communication for Ms. Lee and Mr. Cho. This reflects the Employer's knowledge that the Affidavit would be used for legal rather than reconciliatory purposes.

c) The apology letter that Mr. Cho agreed to provide, was materially different than the Affidavit that was prepared for his signature.

d) The Affidavit as drafted, contained factual errors. For example, at para. 5 the Affidavit states that Mr. Cho was told not to return to work on November 11, though the actual date was November 9.

e) It was impossible for Mr. Cho to comply with the terms of the Affidavit and still do his job at La Foret. Paragraph 9 stipulates that Mr. Cho promises not to contact Ms. Lee "or any other current, former or future female staff member of La Foret for any reason" and that if he breaches this promise, "such female staff member could be severely emotionally distressed as a result". Mr. Kwak admitted during his cross-examination that many of the baking staff at La Foret were female, and it would be impossible for Mr. Cho do his job alone at La Foret.

[Emphasis added.]

[40] In summary on this point, the judge did not err in considering Café La Foret's initial view of the remediability of the relationship as one factor among many in assessing the sufficiency of the sexual harassment misconduct as cause for dismissal.

(b) Mr. Cho's intention in touching Ms. Lee

[41] Café La Foret submits that the judge erred in assessing the severity of the conduct on the spectrum of workplace sexual harassment when she described Mr. Cho's actions as reflecting a gross error of judgment, rather than bad faith intentions: at paras. 100, 143. Café La Foret argues that the intention of the perpetrator of sexual harassment has no bearing on the nature and degree of the harassment's severity. It says the law is clear that the assessment of the nature and degree of sexual harassment depends on what actually happened to the victim and their experience of it. Further, improper physical contact, especially the touching of intimate body parts such as the buttocks, falls on the serious end of the spectrum for sexual harassment.

[42] Although I agree that the severity of sexual harassment does not depend on the intentions of the perpetrator, intentions may be relevant to whether the employee's misconduct amounts to cause for termination. That is so because the employee's intentions can be a factor in assessing the salvageability of the relationship. The overarching question on a wrongful dismissal claim is whether the misconduct was so fundamentally inconsistent with the employee's employment obligations as to give rise to a breakdown in the employment relationship. An employee who intentionally touches another employee improperly and for sexual gratification is arguably engaging in behaviour more inconsistent with those obligations than one who does not. I repeat that the intention of the perpetrator does not determine whether the touching amounts to sexual harassment and does not alter the severity of that harassment. It is, rather, part of the context to be considered in assessing the employee's behaviour *vis á vis* the salvageability of the employment relationship.

[43] The judge blended this assessment by addressing both the severity of the harassment and the intentions of Mr. Cho at para. 143(a). Although it would have been preferable for the judge to address the two considerations independently, in my view this does not amount to a material error. I do not see that she erred in considering the intentions of Mr. Cho in assessing the severity of his misconduct as part of determining whether the employment relationship was salvageable.

[44] Nor do I see that the judge erred in finding the sexual harassment to fall on the lower end of the spectrum. All sexual harassment is serious, and I agree with the appellant that unwanted physical contact can fall at the more serious end of the spectrum. As Justice Pearlman stated in *van Woerkens v. Marriott Hotels of Canada Ltd.*, 2009 BCSC 73:

> [181] In assessing the nature and degree of sexual harassment on the particular facts of each case, courts have classified the gravity of the harassment on a continuum: [*Brazeau*] at para. 226; *Leach* [*v. Canadian Blood Services*, 2001 ABQB 54] at paras. 119, 120. At the serious end of the continuum are forms of harassment involving improper physical contact such as touching, forced kissing, or fondling, while less serious forms of harassment include sexual innuendo, offensive jokes and suggestive words

> or gestures. Harassment involving a physical component may constitute a form of sexual assault: *Leach* at para. 120.

However, "improper physical touching" incorporates a broad range of behaviour. The judge's placement of the touching on the lower end of the spectrum should not be understood as a finding that the offending conduct was not serious. To the contrary, she stressed that it was "entirely inappropriate": at para. 100. I see no error in the judge's finding that the touching in this case, a brief light tap on Ms. Lee's shoulder, a brief open hand pat on her upper back, and a subsequent light tap on her buttocks, was relatively minor on the range of physical contact which extends to more prolonged touching, more extensive body contact, forced kissing and fondling. That finding should not lightly be interfered with on appellate review given the institutional advantages of a trial judge.

(c) Timing of Ms. Lee's complaint

[45] The judge recognized that there was a power imbalance between Mr. Cho and Ms. Lee, given that she was his subordinate, which caused part of her distress. However, Café La Foret says the judge erred in downplaying the significance of that power imbalance by finding that it was not "overly prohibitive" because Ms. Lee made a report of the sexual harassment to another manager shortly after it occurred: at para. 143(b).

[46] I agree that the timing of Ms. Lee's report is not a relevant factor in assessing whether the power imbalance exacerbated the nature of the misconduct. In *R. v. D.D.*, 2000 SCC 43, in stating that a delay in disclosure of a sexual assault should not give rise to an adverse inference against the complainant's credibility, the Supreme Court of Canada observed the following general principle:

> [65] A trial judge should recognize … that there is no inviolable rule on how people who are the victims of trauma like a sexual assault will behave. Some will make an immediate complaint, some will delay in disclosing the abuse, while some will never disclose the abuse.

[47] In my view, the same reasoning applies to the timing of reports of sexual harassment in the workplace. Further, the fact of immediate reporting does not

logically diminish the significance of the severity of the harassment by suggesting a less prohibitive power imbalance; it could just as readily reflect the degree to which Ms. Lee experienced the unwanted touching as offensive and upsetting, compelling her to report despite her subordinate position.

[48] In my view, however, this error is not a material one; the judge gave somewhat less weight to the power imbalance but recognized nonetheless that Ms. Lee experienced distress due to the power imbalance between her and Mr. Cho and that made it more difficult for her to assert herself: at para. 143(b).

(d) Mr. Cho's age and absence of a warning and opportunity to respond

[49] One of the criteria identified in *Alleyne* for assessing whether the misconduct justifies dismissal is:

> [28] … [T]he nature of the employment relationship between the offending employee and the employer, including length of service and position, and whether there were implied or express terms of the employment contract which gave rise to additional obligations on the employer's part, such as with respect to warnings or the opportunity to respond …

[50] In addressing this factor, the judge said:

> [143] …
>
> (g) Mr. Cho's relationship with the Employer, including his length of service, position, and age, create implied terms of employment which give rise to additional obligations on the Employer's part to provide Mr. Cho with a warning or an opportunity to respond. He was given neither prior to his employment being terminated.

[51] Café La Foret contends there are two errors in the judge's reasoning here. First, it says the judge's finding that Mr. Cho was not consulted is inconsistent with her earlier finding that Mr. Cho was provided with an opportunity to respond when Mr. Kwak confronted him with the allegations while he was still at work on November 9, 2020. However, Mr. Cho was not invited to respond following completion of the investigation, which led to allegations of harassment on other occasions. Those other allegations were not proved at trial. Further, the Affidavit was prepared without

Mr. Cho's involvement and then presented to him for signature on November 15, 2020, again without an opportunity to respond meaningfully to its contents.

[52] Next, Café La Foret contends that Mr. Cho's age and length of service did not impose an obligation on it to provide him with a warning, because whether that obligation arises depends on the severity of the incident of sexual harassment. It says where sexual harassment is on the serious end of the spectrum as in this case, the employer may not have a duty to warn, relying on *Brazeau* at para. 216 citing *Tse v. Trow Consulting Engineers Ltd.*, (1995), 14 C.C.E.L. (2d) 132, [1995] O.J. No. 2529 (Gen. Div.), *Gonsalves v. Catholic Church Extension Society of Canada* (1998), 164 D.L.R. (4th) 339, 1998 CanLII 7152 (Ont. C.A.), and *Leach*.

[53] The fundamental flaw with this submission is that the judge did not find that the sexual harassment in this case fell on the serious end of the spectrum. Further, it was not an error for the judge to consider Mr. Cho's age, position and length of service. As stated in *Alleyne* and *Gonsalves*, a case relied on heavily by Café La Foret, factors such as employment record, age, length of service and implied or express terms of the employment contract with respect to warnings or the opportunity to respond, may be considered in assessing whether sexual harassment amounts to just cause for dismissal: *Alleyne* at para. 28; *Gonsalves* at para. 13.

[54] I agree that age does not in general excuse misconduct, but it may be a consideration in cases of lesser wrongful behaviour in assessing whether the employer has an obligation to impose a lesser consequence than dismissal. In my view, the trial judge did not err in concluding that, in the circumstances of this case, the employer had a duty to warn or provide an opportunity to respond, given her findings that the sexual harassment was relatively minor, Mr. Cho immediately acknowledged his misconduct, and offered to apologize or to resign. Although Mr. Cho ultimately did not sign the apology letter proffered by Café La Foret, the judge found the form of the apology proposed to be highly problematic. Indeed, Café La Foret acknowledged at the hearing of the appeal that Mr. Cho could not have signed it in that form.

[55] In summary on this ground of appeal, although I agree that the judge considered some factors that were not relevant to the sufficiency of the sexual harassment as cause for dismissal, consideration of those factors did not materially affect her ultimate decision that the sexual harassment conduct alone did not warrant dismissal.

4. Global award for aggravated and punitive damages

[56] Having found that Mr. Cho was wrongfully dismissed, the judge awarded damages in lieu of notice in the amount of $15,600, representing an award of $26,000 for five months' notice reduced by two months' notice to account for Mr. Cho's failure to mitigate. She also made a global award of $25,000 for aggravated and punitive damages, saying:

> [175] The circumstances of this case support an award for aggravated and punitive damages. For example:
>
> a) The Employer refused to issue a ROE to Mr. Cho until he had signed a self-incriminating affidavit.
>
> b) The Employer knew the Affidavit would place Mr. Cho in legal jeopardy but tried to exert pressure on him to sign it to Mr. Cho's detriment.
>
> c) The Employer's offer for Mr. Cho to retain his employment if he signed the Affidavit was disingenuous, and the Employer knew it would be impossible for Mr. Cho to do his job with the restrictions placed on him.
>
> [176] Mr. Cho testified that the Affidavit that the Employer required him to sign made him out to be a sexual offender. He testified that this destroyed his self respect, made him feel betrayed, and caused him depression and insomnia. I agree that the language used in the Affidavit, as well as the requirement that he not have any contact with former, current, or prospective female staff, made it appear as if he was a dangerous sexual offender from whom all female staff must be protected. There was no factual or legal basis for the Employer to impose such a requirement on Mr. Cho.

[57] The judge described Café La Foret's conduct as "highly blameworthy" because it refused to provide Mr. Cho with a ROE unless he signed the Affidavit, which Café La Foret knew would place Mr. Cho in legal jeopardy in criminal proceedings, as Ms. Lee wanted an apology in writing to report the incident to the police.

[58] Café La Foret argues that it was an error for the judge to make a global award rather than discrete awards for each of the aggravated and punitive heads of damages. I agree. In fairness to the judge, however, Mr. Cho's counsel at trial asked the court to make a global award in this form.

[59] Aggravated and punitive damages are distinct remedies. Although both heads of damage are potentially available to a plaintiff in a wrongful dismissal claim, they have different objects and require distinct analyses: *Ojanen v. Acumen Law Corp.*, 2021 BCCA 189 at paras. 72–73.

[60] Aggravated damages are compensatory, intended to address the mental distress experienced by an employee resulting from the manner of termination. Punitive damages are intended to punish the employer for its egregious or outrageous behaviour and serve only the objectives of retribution, denunciation, and deterrence: *Honda Canada Inc. v. Keays*, 2008 SCC 39 at paras. 60, 62; *Ojanen* at paras. 72–73, 77–78.

[61] There are two reasons why a judge is required to assess the two heads of damages independently. First, the amount awarded in respect of aggravated damages is relevant to the assessment of whether punitive damages should be awarded and, if so, in what amount. In *Hill v. Church of Scientology of Toronto,* [1995] 2 S.C.R. 1130, 1995 CanLII 59, the Supreme Court of Canada directed that punitive damages should only be awarded "where the combined award of general and aggravated damages would be insufficient to achieve the goal of punishment and deterrence": at para. 196. In *Whiten v. Pilot Insurance Co.,* 2002 SCC 18, the Court further explained that an award of punitive damages must be rationally proportionate to the objectives it serves, and that the other amounts already awarded against the employer, including compensatory damages such as aggravated damages, also serve as a "penalty" which must be taken into account. It said:

> 123 Compensatory damages also punish. In many cases they will be all the "punishment" required … The key point is that punitive damages are awarded "if, but only if" *all* other penalties have been taken into account and

> found to be inadequate to accomplish the objectives of retribution, deterrence, and denunciation.
>
> [Emphasis in original.]

[62] In short, a judge must first determine compensatory damages, including aggravated damages, and then turn to the question of whether punitive damages are necessary because the total of the compensatory awards is not yet sufficient to achieve the goals of denunciation, deterrence and retribution: *Honda* at para. 69; *Ojanen* at para. 75.

[63] Second, a global award impedes appellate review both because the reasoning followed by the judge in relation to each category is not available to the reviewing court, and because different standards of review apply. Aggravated damages are subject to a reasonableness standard of review: *Lau v. Royal Bank of Canada*, 2017 BCCA 253 at paras. 36–37; punitive damages are reviewed on a rationality standard which is far less deferential: *Whiten* at paras. 100–101; *Hill* at 197; *Yates v. Langley Motor Sport Centre Ltd.*, 2022 BCCA 398 at para. 67.

[64] Café La Foret asks this Court to set aside the $25,000 award in its entirety, contending that neither aggravated nor punitive damages are available on the facts of this case. I would not accede to this submission. The appellant's arguments on this point amount to a rejection of the judge's findings of fact. I cannot agree that Café La Foret's manner of terminating Mr. Cho did not involve bad faith or unfairness. It effectively acted as the complainant's agent, attempting to lever an admission from Mr. Cho by withholding the ROE, knowing that the admission would work to his prejudice in other contexts.

[65] Nor has Café La Foret demonstrated an error in the judge's assessment of whether Mr. Cho experienced mental stress resulting from the manner of dismissal which goes beyond the fact of the dismissal itself. As I have already noted, the judge found that the manner in which Café La Foret terminated Mr. Cho's employment "destroyed his self-respect, made him feel betrayed, and caused him depression and insomnia": at para. 176. Those findings were available to her on the record. Mr. Cho

testified that the insistence that he sign the Affidavit left him “afraid of meeting a new person or meeting other people” and he was concerned that Café La Foret was “trying to send [him] to jail.”

[66] In my view, an award of $25,000 is an appropriate award for aggravated damages to compensate Mr. Cho for the mental distress he experienced over the form of his dismissal. Similar awards have been made in comparable cases including *Ram v. The Michael Lacombe Group Inc.,* 2017 BCSC 212 at paras. 122, 127, 130; and *Dhatt v. Kal Tire Ltd.*, 2015 BCSC 1177 at paras. 169, 173. I accept the judge’s assessment that this sum combined with the other compensatory damages is sufficient. As nothing more is needed to achieve the goals of denunciation, deterrence and retribution, there is no basis to award punitive damages.

Disposition

[67] I would allow the appeal only to the extent of varying paragraph 1(b) of the order to read “aggravated damages in the amount of $25,000.” The respondent has been substantially successful and is entitled to his costs of the appeal.

“The Honourable Madam Justice Fenlon”

I AGREE:

“The Honourable Mr. Justice Fitch”

I AGREE:

“The Honourable Mr. Justice Abrioux”