IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Briggs v. ABC Insurance Solutions Inc.,*
2024 BCSC 1918

Date: 20241018
Docket: S250003
Registry: New Westminster

Between:

Lauren Briggs

Plaintiff

And

ABC Insurance Solutions Inc.

Defendant

Before: The Honourable Mr. Justice Blok

Reasons for Judgment

Counsel for the Plaintiff:	M. Sheard
Counsel for the Defendant:	R. Dueckman
Place and Dates of Hearing:	New Westminster, B.C. January 11-12, 2024
Place and Date of Judgment:	New Westminster, B.C. October 18, 2024

I. Introduction

[1] This is a wrongful dismissal case.

[2] The plaintiff was hired as a customer service manager at the defendant insurance brokerage, effective November 15, 2021. Her employment ended on July 9, 2023. I use the neutral phrase "employment ended" because the plaintiff says the employer terminated her employment, while the employer maintains that it accepted the plaintiff's repudiation of the employment contract.

[3] There are additional issues. The plaintiff maintains the termination clause in the employment contract is unenforceable, and there are issues on damages. The defendant pleads, as an alternative to an accepted repudiation, that there was cause for dismissal, and also says the plaintiff failed to mitigate.

II. Procedural Issues

[4] Counsel fenced over various procedural complaints. The procedural chronology is as follows:

a) the notice of civil claim was filed on August 18, 2023 as a "fast track" action;

b) the defendant filed a response to civil claim on August 29, 2023, alleging repudiation of the employment contract by the plaintiff. The defendant did not plead cause for dismissal;

c) also on August 29, 2023, defence counsel indicated he would be applying for dismissal through summary trial, that he looked to have that hearing in October, and he asked for available dates, which plaintiff's counsel provided. However, the defendant never followed up by filing summary trial materials;

d) not having heard from defence counsel on dates, counsel for the plaintiff arranged a hearing date for November 1, 2023. That date was booked on September 12, 2023;

e) the plaintiff delivered unfiled summary trial materials on October 13, and filed materials on October 20;

f) the matter came before Justice Devlin on November 1, 2023. The defendant had filed no responsive materials. The defendant asked that the matter be adjourned, arguing that it had been given insufficient time to respond. Justice Devlin adjourned the application and made the new date peremptory on the defendant, noting the defendant "should be ready to proceed well in advance of the [new] date";

g) the defendant filed an amended response to civil claim on December 12, 2023, now alleging cause for dismissal based on matters it says it learned after the plaintiff's employment ended;

h) on December 15, 2023, the plaintiff demanded particulars of the allegations of after-acquired cause, but the defendant did not provide particulars;

i) the defendant delivered application response materials late in the day of December 18, 2023, meaning the effective delivery date was December 19, 2023; and

j) the defendant delivered further response affidavits on January 5, 2024, less than a week prior to the hearing of this matter.

[5] The defendant now says this matter is not suitable for disposition by summary trial, except perhaps for the repudiation issue.

[6] The plaintiff alleges that the conduct of the defendant has been vindictive, which is the basis of her claims for aggravated and punitive damages. However, counsel said that rather than adjourn the application if conflicting evidence prevents adjudication of the aggravated and punitive damages claims, the plaintiff would prefer to waive the claims and proceed to judgment on the question of notice alone.

III. Facts

[7] Ms. Briggs, who was 36 years old at the time of termination, was hired as a customer service manager with the defendant, effective November 15, 2021. The defendant's business is that of providing benefit and administration programs for small and medium sized employers.

[8] The parties signed a written employment agreement on October 18, 2021 (the "Employment Contract"), which contained the following clause:

> 43. The Employee and the Employer agree that reasonable and sufficient notice of termination by the Employer is the greater of two (2) weeks or any minimum notice required by law.

[9] The Employment Contract set out a starting salary of $60,000 per year, which was increased to $67,410 in April 2023.

[10] Ms. Briggs deposes that, at the time of hiring, she was informed that the position was a "hybrid role", meaning that she could work at home as well as in the office. She said that working from home was the norm in the defendant's workplace.

[11] She also deposed that the hybrid work feature was important to her because she lives in Mission, B.C. and the defendant's office is in Langley. She said driving to and from work costs her $1,200 per month, a very significant expense.

[12] The defendant's deponent, David Boyce, acknowledges there was a "work from home" policy in place, but said this was due to the pandemic.

[13] Ms. Briggs had an employee review with Mr. Boyce on March 17, 2023. She says they discussed both a raise in salary of seven percent and the matter of a travel allowance. She pointed out to him that there was no work function that she could not do at home. Mr. Boyce said he still wanted her in the office, but offered the allowance as a compromise. She deposes that Mr. Boyce told her both would be in place effective April 1, 2023.

[14] Mr. Boyce agrees that Ms. Briggs was given a seven percent raise, but said he never committed to paying any commuting allowance. He said he merely asked the plaintiff to track her kilometrage in order to evaluate the viability of such a policy.

[15] Mr. Boyce said the defendant had implemented a work at home policy as a result of the pandemic, but on March 17, 2023, the same day as his meeting with the plaintiff, they notified all employees that they were expected to return to the office in person full-time by September 2023.

[16] From April 2023 to July 2023, Ms. Briggs continued her pattern of commuting to the office except for her regular work at home day (Wednesdays) or when she was sick.

[17] Ms. Briggs says she followed up with Mr. Boyce on the matter of the allowance in three emails sent between April 2023 and July 2023, but he did not respond. She raised it again with Mr. Boyce in a meeting, and he replied it was "in his pile of things to do". At this time, she was keeping track of her kilometrage as asked, which she did by noting it on her time sheets. These time sheets were then signed by Mr. Boyce before being placed into the employee files.

[18] For his part, Mr. Boyce said that on June 5, 2023, Ms. Briggs provided him with a note showing her total kilometres driven, which was not what he asked for. He also deposed that sometime in June he told Ms. Briggs that "a business [decision] was made to decline the possibility of a commuter allowance".

[19] On July 3, 2023, Ms. Briggs sent Mr. Boyce the following email:

> I have been emailing you about the km allowance for several months but have not been responded to.
>
> I am finding it financially impossible to continue coming into the office without the allowance that we discussed in my yearly review.
>
> I am concerned that my discussion with you was not taken seriously.
>
> I am unable to afford to drive in to work any more.
>
> …
>
> Currently, I am the only person, other than you, that is consistently in the office.

> …
>
> I live the furthest away, and have expressed to you, in detail that it is forcing me into debt. As such, it is no longer financially feasible for me to come into the office.
>
> I do not currently need to work in the office as everything I do, including phone calls, can be professionally and efficiently answered from my home office as is currently being performed on my one work-from-home day.
>
> I am incapable of coming to the office tomorrow due to these factors.
>
> I hope that you will take this situation seriously, and will continue to discuss this very dire situation with me so that I can continue to provide the service and support that our clients rely on and that I pride myself on brining to your company.

[20] On July 5, 2023, Ms. Briggs sent Mr. Boyce a further email:

> I had been hoping to hear back from you regarding my email I sent you on Monday evening.
>
> With matters left unaddressed, I am still unable to work from the office.
>
> I will continue my work from home to the same high standard as I have been able to provide in the office.
>
> I hope that we will be able to open a line of communication soon, as the lack of communication has been affecting me.

[21] I should note that the July 5 email is referenced in Mr. Boyce's affidavit as a "July 11" email, but the email header clearly has a July 5, 2023 date.

[22] On July 6, 2023, Ms. Briggs provided the defendant with a letter from her doctor "as I was having difficulty attending my physical rehabilitation appointments due to the increasing commute". There was no response to this communication. In her covering email she also said the lack of communication from the defendant was affecting her mental health.

[23] Mr. Boyce responded with the following email dated July 9, 2023:

> In response to your email, I now inform you that as of July 09, 2023, you will be no longer employed with ABC Insurance Solutions Inc. I have made this decision after receipt of your email dated Monday July 03, 2023 … .

[24] Ms. Briggs said she first learned she had been fired when a co-worker texted her. She said she was on vacation on the day she was fired.

[25] Ms. Briggs was paid severance of $4,550.85. The defendant issued a record of employment with an “M” code used in the box for “reason for issuing this ROE”. Counsel said code “M” denotes an employee dismissed for cause. Ms. Briggs says the severance was insufficient irrespective of the insufficient notice issue because the actual amount should have been approximately $6,741. She says she was owed two weeks plus one day of vacation pay, salary for July to the date of termination, plus the two weeks’ notice the defendant says is the proper notice.

[26] Following the termination, the parties argued about the return of property, with the plaintiff asserting that the defendant had to deliver her personal ergonomic equipment to her, and the defendant insisting the plaintiff had to deliver her company laptop and key card and pick up all of her personal items. The evidence indicates the laptop (and, I assume, the key card) was returned on October 20.

IV. Positions of the Parties

A. Plaintiff

[27] The plaintiff submits the termination clause in the Employment Contract is unenforceable.

[28] The plaintiff cites *Kaiser v. Dural, a division of Multibond Inc.,* 2001 NSSC 131, aff’d 2002 NSCA 69, where a termination clause that provided for “the minimum notice required by law” was found to be unenforceable due to ambiguity, both at trial and on appeal.

[29] The plaintiff submits the subject termination clause in this case is even more ambiguous than that in *Kaiser*, insofar as that termination clause purported to reference one single knowable thing (“*the* minimum required by law”), and the clause at issue refers to *any* minimum notice required by law. Given that the clause in *Kaiser* failed due to ambiguity, the same result must obtain here, where the clause is even more ambiguous.

[30] The plaintiff says using the word “any” means there is no acknowledgement that there is a minimum at all. There might be a minimum, or there might not be, and there may be more than one source of law to consider.

[31] The plaintiff also cites *Shore v. Ladner Downs*, [1998] B.C.J. No. 1045, which reaffirmed the policy rationale that mandates invalidation of onerous termination provisions.

[32] The plaintiff submits the defendant’s allegations of after-acquired cause ought to either be struck or dismissed for lack of evidence. Here, the plaintiff recounts the procedural history of this matter, summarized earlier, noting that the defendant had already caused one adjournment (the November 1 date), prompting Devlin J. to make the rescheduled hearing peremptory on the defendant. Yet even then the defendant did not deliver materials until December 18 (but as per the *Rules*, effectively December 19), a week before Christmas and at a time when plaintiff’s counsel was out of the country. The defendant then delivered further affidavits on January 5, 2024, less than a week prior to the hearing of the summary trial.

[33] The defendant raised its allegations of after-acquired cause only after the initial summary trial hearing date, and it failed to provide demanded particulars of the allegations. In these circumstances, the plaintiff was either faced with adjourning a hearing that was made peremptory on the defendant, or proceeding without having had a fair opportunity to respond to the allegations.

[34] The plaintiff cannot afford to have this matter delayed further. As counsel put it, “she is financially ruined and needs a result”.

[35] Citing *McKinley v. BC Tel*, 2001 SCC 38, the plaintiff submits that where an employer alleges dishonesty, as the defendant has effectively done here, there must be evidence allowing the Court to fully assess the context of the alleged behaviour. Here, the defendant offers no evidence it interviewed a single witness, provided no indication it disciplined, much less terminated, any other employee for similar

conduct, never sought to obtain the plaintiff's version of events, or in any way fulfilled its common law obligation to carry out a proper investigation.

[36] The plaintiff challenges the admissibility of the defendant's evidence, arguing the Boyce affidavit consists of conclusory statements such as "we would have terminated", without indicating who or why, and a series of hearsay statements that begin with "we discovered" or similar phrases. For matters that Mr. Boyce or other members of management were aware of, the defendant must be taken to have condoned them.

[37] The plaintiff notes the defendant alleges cause relating to events that took place after termination. An incident occurring post-termination cannot give rise to just cause: *Sjerven v. Port Alberni Friendship Centre*, 1999 CanLII 6484 (B.C.S.C.).

[38] The plaintiff also argues the defendant failed to follow its own progressive discipline policy, which says in part:

> By using progressive discipline, we hope that most employee problems can be corrected at an early stage, benefitting both the employee and ABC Insurance Solutions.

[39] Finally on this point, the plaintiff says the defendant cannot allege cause for dismissal given that it paid the plaintiff severance. The defendant is estopped from alleging cause for those matters it knew prior to dismissal: *Ayalew v. The Council for the Advancement of African Canadians in Alberta*, 2023 ABKB 113.

[40] As to the defendant's allegation of repudiation, the plaintiff made no threat and gave no ultimatum. In her July 3 email, the plaintiff referred to just one day she could not make it to the office, and in doing so she affirmed her commitment to her ongoing employment. The plaintiff notes that the defendant's termination letter expressly states it was Mr. Boyce, not the plaintiff, who "made this decision" to end the contract.

[41] On the matter of damages, the plaintiff cites *Greenlees v. Starline Windows Ltd.*, 2018 BCSC 1457; *Dhaliwall v. Hook Restaurant Ltd.*, 2021 BCSC 1358; and

Lau v. Royal Bank of Canada, 2015 BCSC 1639. The plaintiff says these cases support an award based on seven and a half months' reasonable notice.

B. Defendant

[42] The defendant began its submissions by addressing some factual matters:

a) code "M" on a record of employment covers a wider situation than just dismissal; and

b) the defendant did not pay severance to the defendant as an entitlement, but merely said "a severance package will also be included in your final pay that will amount to two weeks of salaries [sic]".

[43] The defendant reviewed various clauses of the Employment Contract, noting:

a) Clause 13: the employee's primary place of work will be at [the Langley office];

b) Clause 19: the employee shall devote full-time efforts … to the employment duties and obligations as described in this Agreement;

c) Clause 21: the employee will not engage in any business activities that the employer determines to be in conflict with the best interests of the employer;

d) Clauses 26 to 30: confidential information is the property of the employer, but does not include anything developed by the employee on the employee's own time; and

e) Clauses 31 and 32: the employee must keep confidential information confidential and any disclosure is a material breach of this agreement.

[44] The defendant also reviewed the employee handbook, which has provisions dealing with company laptops, internet usage, employee conduct and the use of progressive discipline.

[45] Counsel then reviewed the affidavits of Ms. Briggs and Mr. Boyce. In doing so, counsel asserted that Ms. Briggs was only attending the office once a week. This is incorrect. What Ms. Briggs actually said in her affidavit was that from April 2023 to July 2023, she continued, as before, to work from home on Wednesdays or when she was sick. She was therefore in the office four days each week.

[46] The defendant argues that the plaintiff's email of July 3 was an ultimatum. She was refusing to abide by the employer's direction to work in the company office. This was a repudiation of the employment relationship and that repudiation was accepted by the defendant.

[47] The defendant argues, in the alternative, that there is cause for the dismissal, based on matters that came to its attention after the plaintiff's employment ended. The defendant denies these allegations are hearsay or inadmissible, arguing that they are all based on business records.

[48] The allegations of cause include:

a) running a personal business during work hours. I pause to note that this apparently relates to a business the plaintiff had of selling herbal products;

b) conveying credit card information in a non-secure manner on one occasion;

c) talking negatively with another employee about one of the defendant's insurance agents;

d) creating a trade show sign for a friend in the industry. I note the defendant itself acknowledges that this friend was someone who sometimes worked with the defendant;

e) researching benefit programs for that friend during working hours;

f) using the company's graphic design account to generate marketing materials for other friends of hers;

g) organizing a quiz contest within the company through a group chat using the company's accounts; and

h) organizing another group chat where company employees engaged in unprofessional conversations.

[49] The defendant surmises that these matters contributed to various performance issues it had noted during the course of her employment.

[50] The defendant addresses the plaintiff's complaints of dilatory litigation behaviour by noting that none of the matters listed could be investigated until the plaintiff's company laptop was returned on October 20. Counsel also argued that the second hearing was not peremptory on the defendant, although I must note that this is beyond controversy because the entered order of Devlin J. dated November 1, 2023, says exactly that.

[51] The defendant argues that the plaintiff's July 3 email was a repudiation. She had been instructed to return to the office full-time, and she refused to comply unless her terms were met. This amounts to repudiation: *Gould v. Hermes Electronics Ltd.*, [1978] N.S.J. No. 770; *Roden v. The Toronto Humane Society*, 259 D.L.R. (4th) 89, 2005 CanLII 33578 (Ont. C.A.).

[52] On the matter of after-acquired cause, the defendant cites *Dove v. Destiny Media Technologies Inc.*, 2023 BCSC 1032, where the plaintiff in that case was spending "at least 3-4 hours per week", over a six month period, working for her ex-boyfriend's business (para. 86). During that same period, from her regular employment worksite she sent 2,700 emails related to that outside work. There, the Court concluded there was cause for dismissal, noting the plaintiff was doing a substantial amount of outside work during her regular employment hours, and this substantially affected her ability to keep up with her regular appointment duties.

[53] The defendant also notes that in *Dove*, the Court drew an adverse inference for the plaintiff's failure to call the ex-boyfriend as a witness. The defendant in this

case asks that a similar inference be drawn as the plaintiff did not answer any of the allegations of cause.

[54] As to damages, the defendant says the plaintiff has failed to mitigate her damages, noting that she proffered no evidence of any attempts to find work.

[55] As to quantum, the defendant cites *Linton v. The Ethical Bean Coffee Company Ltd.*, 2012 BCPC 0212, where four months was found to be reasonable notice for a 38 year old food services sales manager having about three years' service, and *Fernandes v. Direct Energy Marketing Ltd.*, [2012] O.J. No. 5275 (Ont. Small Claims), where six months notice was awarded to a 42 year old executive assistant having about two years' service, who was terminated in callous fashion.

[56] The defendant says the plaintiff's cases are distinguishable, as they involve senior managers and, in one case, inducement was a factor.

[57] The defendant says the authorities indicate that notice should fall in the two to three month range, with four months being the "top limit".

[58] Finally, the defendant says this matter is not suitable for summary trial, save perhaps for the issue of repudiation versus termination.

C. Plaintiff's Reply

[59] The plaintiff challenges the defendant's assertion that the Boyce affidavit must be taken to have been accepted by the plaintiff, noting again the chronology of this matter and the dilatory behaviour of the defendant. Even after being warned by Devlin J., the defendant took over two months to deliver response materials, and then did so by delivering them on the verge of the Christmas break.

[60] The plaintiff had just two business days to respond after the last affidavit arrived from the defendant. Any reply would have handed the defendant a ready excuse to adjourn the matter yet again, in a situation where it was the defendant on which the hearing had been made peremptory.

[61] The plaintiff said she has done her best to present her case in the face of the dilatory litigation behaviour of the defendant.

V. Discussion

[62] While there are some factual disputes in this case, I find I am able to resolve the principal issues without having to resolve those disputes. I also bear in mind the amount at issue here, the cost to the parties of further litigation, and the particular hardship to the plaintiff of further litigation. For these reasons, I conclude the matter is suitable for disposition by summary trial.

A. Repudiation vs. Termination

[63] In *Roden*, the Ontario Court of Appeal summarized the law concerning repudiation in the employment context:

> [45] … Whether an employer is justified in terminating the employment relationship based on repudiation requires an assessment of the context of the employee's refusal, in order to determine whether the employee refused to perform an essential condition of the employment contract or whether the refusal to perform job responsibilities was directly incompatible with his or her obligations to the employer.
>
> [46] However, there is a crucial distinction between dismissal for misconduct and termination for repudiation. When an employer claims to have dismissed an employee for cause based on serious misconduct, the employer must point to conduct that took place prior to dismissal. It is then for the courts to determine whether the conduct was sufficiently serious so as to constitute cause. Repudiation, on the other hand, takes place when an employee refuses to perform an essential part of his or her job duties in the future. In such a situation, the employer is entitled to accept the repudiation and treat the employment relationship as terminated because the parties no longer agree on the fundamental terms of the contract.
>
> [Emphasis added.]

[64] The test is an objective one: *Pereira v. The Business Depot Ltd.*, 2011 BCCA 361 at para. 47.

[65] The context here is important. The plaintiff asked for a commuting allowance due to her high cost of travel to and from work. Mr. Boyce said he would consider it. The plaintiff said Mr. Boyce committed to it, but for the purposes of this issue I do no have to resolve that conflict in the evidence. He asked the plaintiff to track her

kilometrage. She tracked her kilometrage and provided that information to Mr. Boyce. He says the kilometrage information she supplied was not what he wanted, but he says nothing about having told her that. She says she heard nothing. She followed up. Still nothing. Of note, the plaintiff's emails of July 3 and July 5 indicate she had still not been given a response to that point.

[66] I appreciate that Mr. Boyce deposes that, sometime in the month of June 2023 he informed the plaintiff that he had rejected her request for an allowance, but I find this very difficult to believe. First, this evidence is very notably vague, with an entire month given as the time frame for this discussion. Second, the defendant proffered no document evidencing this discussion, which seems quite an omission by an apparently sophisticated employer (as evidenced by, among other things, the comprehensive employee handbook) who alleges he conveyed a decision to an employee on an important employment matter. Finally, the plaintiff's July emails strongly suggest no response had been given.

[67] In any event, even if Mr. Boyce had offered some verbal response to the plaintiff on a date sometime in June 2023, it is clear from the plaintiff's July emails that she was still in a state of uncertainty about the issue at that time.

[68] I do not view the July emails as an ultimatum, but rather as a demand for clarity and, at most, an expression of frustration with the poor communication between the parties. The plaintiff clearly and unequivocally stated in the July emails that she would continue working. At no point did the plaintiff assert that she would only carry out her duties if the commuter allowance was provided to her.

[69] Regardless, it is clear that at the relevant time, the defendant did not prohibit working from home. The plaintiff's employment terminated in July 2023, well before the defendant's stated deadline for employees to return to work in person. Working from home was not, at the time the plaintiff sent the July emails, directly incompatible with the fundamental terms of her employment.

[70] While "it is an implied term of every employment contract that an employee must attend work", the July emails were not a refusal to do so: *Pereira* at para. 47.

[71] The defendant relies on two cases, *Roden* and *Gould*, where employee ultimatums amounted to repudiation.

[72] *Roden* dealt with two employees of an animal shelter who refused to follow a policy to take in stray animals. They were concerned with its legality. Conversations occurred between the employer and employees over the expectations surrounding the policy, and the employer provided assurances that the policy complied with the law. Despite this, the employees insisted they would not comply.

[73] In *Gould*, a long-term employee took on a new role with his employer. The employee then demanded that his salary be increased substantially. The employer asked that he withdraw the demand, and the employee refused. The employee had made it clear that without a salary increase, he would not carry on in the position.

[74] The employees in *Roden* and *Gould* took a "take it or leave it" approach, despite their employers offering an opportunity to discuss the matter at issue. Moreover, as noted in *Zoehner v. Algo Communication Products Ltd*., 2023 BCSC 224 at para. 86, in both of those cases, "repudiation was found based on the employee's refusal to abide by the employment contract, not simply the employee's demands". I agree – *Roden* and *Gould* are distinguishable from the present case for that reason. Here, the plaintiff insisted or demanded that the issue of the commuter allowance be responded to or addressed, but her words or conduct do not demonstrate a refusal to abide by the employment contract.

[75] Accordingly, I find that the plaintiff did not repudiate the employment contract and, instead, the defendant terminated the plaintiff's employment on July 9, 2023.

B. After-Acquired Cause

[76] I am satisfied that the plaintiff's criticisms of the defendant's dilatory litigation conduct are well-founded. The plaintiff's summary trial application was filed and in

the defendant's hands by October 18, 2023 (and in hand in unfiled form by October 13), yet it waited two full months before amending pleadings to plead after-acquired cause and then filing response materials.

[77] I accept that, in the circumstances of this case, the plaintiff had no time to muster a proper response to the new allegations of after-acquired cause. The defendant's response that the plaintiff could have applied for an adjournment is really no answer, as the hearing date was peremptory on the defendant and it was not up to the plaintiff to have to dance to the defendant's tune.

[78] The late delivery of defence materials has also prompted the plaintiff to abandon her claims for aggravated and punitive damages, as she has had no time to answer the defendant's responding materials and needed this matter resolved.

[79] The defendant's attempt to blame the delay on the return of the company laptop similarly fails, as the laptop was returned on October 20, leaving the defendant plenty of time to obtain what information it needed and respond well before Christmas.

[80] There are, in any event, other issues with the defendant's eleventh-hour claim of after-acquired cause.

[81] First, particulars were demanded by the plaintiff but were never provided. At the hearing, the defendant submitted that the response to civil claim itself contains sufficient particulars. It does not. Each of the seven items of alleged misconduct are only broadly described: "running her own business during her employment hours"; "sharing confidential … information with third parties", "using … confidential … information and documents for her own personal benefit"; "doing non-work tasks during work hours"; etc. These are matters that plainly require full and specific particulars.

[82] The plaintiff said the late materials and lack of particulars warrant an order striking the pleadings relating to after-acquired cause. There is a fair argument to be made for such an order, as Rule 9-5(1)(c) allows the Court to do so where the

pleading “may prejudice, embarrass or delay the fair trial or hearing of the proceeding”. Although that describes the situation here, I prefer to deal with this issue on other grounds.

[83] This brings me to the defendant’s affidavit evidence. Some of the allegations in the Boyce affidavit, specifically in para. 28, relate to matters that occurred pre-termination, they are matters of which the defendant was aware and they were not relied on as the basis for termination at the time the plaintiff was fired. The allegation concerning credit card information is one example. The defendant must be taken to have condoned these matters.

[84] For the alleged conduct related to after-acquired cause, the Boyce affidavit does not speak in terms of personal knowledge. The relevant section begins with “After termination, we started discovering more conduct from Ms. Briggs …”. Subparagraphs of that paragraph, and sentences within those subparagraphs, begin with “We discovered that”, “We couldn’t track everything”, “We were able to confirm”, “We also discovered”, “We discovered” and “We also found”. Still other paragraphs have assertions without stating a collective “We found” or the equivalent, but they do not identify the source; for example, the bald statement that “She also established an additional group chat”.

[85] It is trite law that a summary trial is a form of actual trial and so a deponent may only offer evidence that would be admissible in a trial with witnesses. Here, the entire section on after-acquired cause is presented in a manner that indicates the deponent does not have personal knowledge. At minimum, the deponent has failed to delineate matters of actual personal knowledge from those based on information supplied by others.

[86] For these reasons, I conclude that this section of the Boyce affidavit is inadmissible.

[87] If I am wrong on that conclusion, I will say that I find the evidence supporting the allegations of after-acquired cause to be insufficient in establishing cause for

dismissal. Some allegations seem extremely weak (organizing an office group chat quiz show, "unprofessional" group chat conversations with others in the office), while others lack enough context to make any judgment about the seriousness of the conduct in question: *McKinley* at para. 48. The alleged time spent on her personal business is an example of the latter, as the defendant identifies ten emails over the course of a year that appear to involve personal business (which I must note does not compare at all well with the 2,700 emails in six months that the plaintiff sent in *Dove*), but there is no evidence showing why that is particularly serious or fundamental and no real evidence (other than conjecture) indicating the effect, if any, that the outside work activity had on the plaintiff's work performance.

[88] In this regard, it is important to note that the defendant's employee handbook expressly permits outside work, "as long as [the employee meets] the performance standards of their job with ABC".

[89] The defendant's defence of after-acquired cause therefore fails, both on the basis of lack of evidence and due to insufficient evidence on the merits.

C. Termination Clause

[90] The plaintiff argues the restriction on pay in lieu of notice is unenforceable. For convenience, I set it out again:

> 43. The Employee and the Employer agree that reasonable and sufficient notice of termination by the Employer is the greater of two (2) weeks or any minimum notice required by law.

[91] Both parties rely on *Shore*. In that case, a termination clause referred specifically to the *Employment Standards Act*, R.S.B.C. 1996, c. 113, but it limited pay in lieu to two weeks in all situations. At the time of termination, two weeks would have been the appropriate period of notice under the statute, but it would not have been sufficient had the plaintiff had longer service. There is ample authority for voiding a clause that does not accord with the statutory minimum (*Machtinger v. HOJ Industries Ltd.*, [1992] 1 S.C.R. 986, 1992 CanLII 102), but the question in *Shore* was whether the same result should obtain where a clause could *potentially*

violate the statute. The Court of Appeal held that even a potential violation was sufficient.

[92] *Shore* does not really offer direct support for either party in this case. *Shore* deals with a situation where the termination clause is clear, as it names the statute specifically, but it fails to provide the minimum notice in all situations. It does not deal with issues of general ambiguity, as is the case here. In fairness to the plaintiff, she relied more on some of the general principles quoted in *Shore* than on the *ratio* of the case.

[93] *Kaiser* dealt with general ambiguity, with the trial and appeal courts finding the phrase “the minimum notice required by law” to be unenforceable because there was no reference to the relevant statute. I agree that the termination clause in this case is more ambiguous than that in *Kaiser*. On a straight application of *Kaiser*, the plaintiff here would succeed, but the question is whether I ought to follow *Kaiser*, as those two decisions did not engage in much analysis.

[94] There is a much fuller analysis in *Boulé v. Ericatel Limited*, [1998] B.C.J. No. 1353, [1998] CanLII 3881. There, after citing *Machtinger* at 998, the Court said:

> [18] Thus, the common law presumes that an employee may be dismissed only upon reasonable notice and that this is an implied term of every employment contract which contains no provision on the matter. This presumption will be rebutted where the contract of employment clearly specifies the notice to be given, either expressly or by implication. The question is whether Ericatel's termination clause "clearly specifies some other period of notice, whether expressly or impliedly". If not, the common law presumption of reasonable notice has not been rebutted.

[95] In *Boulé*, the termination clause provided that the employee would “receive one week’s notice of termination…in addition to whatever entitlement you have under the applicable provincial law”. The employee’s previous contract with this employer had mentioned “provincial legislation”, not “provincial law”. The plaintiff argued the clause should be interpreted to refer to common law notice, while the employer said the clause referred to statutory notice.

[96] The Court concluded as follows:

> [24] I am left with an ambiguity which cannot be resolved by applying the rules of construction, or by examining the factual matrix, or by considering the subsequent actions of the parties. Only where the parties set out a clear notice provision, either expressly or by implication, is the presumption of reasonable notice rebutted. Here, that clarity is lacking. Nothing which occurred between the parties suffices to supply it.

[97] Here, there was nothing in the factual matrix of the case, nor any extrinsic evidence, that provided any aid to interpretation. The clause in question provides for "*any* minimum notice required by law" (my emphasis), not *the* minimum notice, and not necessarily the notice required by *statute* law, just "by law", which could well include common law. I agree with the plaintiff that the clause does not even acknowledge there is a minimum at all.

[98] While *Machtinger* dealt with termination provisions that did not comply with employment standards legislation, the Court also addressed policy considerations present in employment matters, noting among other things, the frequently unequal bargaining positions of the parties in non-unionized situations (at 1003). The Court noted it is within the ready ability of employers to make contracts with employees referencing the minimum notice periods set out in legislation (at 1004-1005). I would add that it is also easy enough for employers to do so clearly and unambiguously.

[99] For these reasons, I find the termination clause in this case to be ambiguous, and therefore unenforceable. The plaintiff is therefore entitled to reasonable notice at common law.

D. Damages

[100] The factors applicable to the assessment of reasonable notice include those set out in *Bardal v. The Globe & Mail Ltd.* (1960), 24 D.L.R. (2d) 140 at 143 and 145, 1960 CanLII 294 (Ont. H.C.):

> In every case of wrongful dismissal the measure of damages must be considered in the light of the terms of employment and the character of the services to be rendered.
>
> …
>
> There can be no catalogue laid down as to what is reasonable notice in particular classes of cases. The reasonableness of the notice must be

> decided with reference to each particular case, having regard to the character of the employment, the length of service of the servant, the age of the servant and the availability of similar employment, having regard to the experience, training and qualifications of the servant.

[101] In this case, the evidence on the *Bardal* factors was somewhat limited. Ms. Briggs was 36 years old at termination and her employment was that of customer service manager. It does not appear that she managed other employees, and so I conclude she would not be properly described as "middle management". Her length of service was about 20 months.

[102] I agree that the notice cases cited by the plaintiff are distinguishable. Two cases involved employees with around five years' service, and the third case involved an element of inducement by the employer.

[103] The defendant's notice case, *Linton* (four months' notice) appears generally comparable. The other case cited by the defence, *Fernandes* (six months' notice) had some similarities in terms of employment level, but that plaintiff was slightly older, her length of service slightly longer, and the court found she had been dismissed in callous fashion. That latter factor is present here, although perhaps not to the same extent.

[104] I conclude the range of reasonable notice in this case is four to five months. I am unable to say that one is more suitable than the other, so I assess the reasonable notice in this case at four and a half months.

[105] The defendant pleads failure to mitigate. The plaintiff said she is searching for new employment "arduously". She also said that the manner of termination, the absence of an employment reference from the defendant, the depressed job market, and the fact that the defendant had not, by the time she swore her affidavit, returned her ergonomic equipment that was necessary for her to work, had made her "considerably less marketable".

[106] The defendant bears the burden of proving failure to mitigate. The defendant's proof consisted of photocopies of entries from the Indeed website. This falls short of meeting the burden of proof.

VI. Conclusion

[107] The plaintiff did not repudiate the employment contract and, instead she was dismissed without cause. The allegations of after-acquired cause fail for lack of evidence. The plaintiff is entitled to four and a half months' pay in lieu of notice.

[108] I leave it to the parties to finalize the judgment because there seemed to be some uncertainty concerning salary and vacation owed, irrespective of pay in lieu of notice. There may be other matters as well. The parties have leave to address any issues necessary to finalize the award if they cannot agree.

[109] As to costs, my preliminary view is that costs should go to the plaintiff in accordance with Rule 15-1. Although the ultimate judgment amount will likely fall within the small claims jurisdiction, I am of the preliminary view that the range of reasonable results, including the plaintiff's claims for aggravated and punitive damages that had to be waived due to necessity, would be such that there was sufficient reason for bringing this matter in Supreme Court.

[110] Should either party wish to make submissions on costs, they should do so in writing within 21 days of the date of this judgment.

"Blok J."