IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Plank v. Hapnin Enterprises Ltd.,*
2024 BCSC 1949

Date: 20241024
Docket: S133464
Registry: Kelowna

Between:

Nancy-Ann Plank

Plaintiff

And

Hapnin Enterprises Ltd.

Defendant

Corrected Judgment: The text of the judgment was corrected at paragraph [195] on October 28, 2024

Before: The Honourable Justice Betton

Reasons for Judgment

Counsel for the Plaintiff:	A.D. Mardiros
Counsel for the Defendant:	P. Tiwari
Place and Dates of Trial/Hearing:	Kelowna, B.C. March 11-14, April 2, 2024
Place and Date of Judgment:	Kelowna, B.C. October 24, 2024

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Introduction

[1] The plaintiff alleges she was wrongfully dismissed from her employment with the defendant. She had been an employee of the defendant, pursuant to an oral contract of employment, since approximately June 1993.

[2] The defendant operated a business in Nakusp, a small community in the Kootenay region of British Columbia.

[3] In 1993, the principals of the defendant were Mr. Warren Jones ("Mr. Jones") and his brother. Mr. Jones acquired his brother's interest in the defendant in or about 1995.

[4] Mr. Jones continuously owned the defendant thereafter until his passing on or around August 30, 2020. At that time, his children, Mason Jones and Haley Jones ("Ms. Jones"), acquired Mr. Jones' control of the defendant. Ms. Jones assumed the principle active role as the operator of the business.

[5] On or about November 9, 2021, the defendant terminated the plaintiff's employment, alleging fraudulent misconduct and breach of the defendant's confidentiality and trust.

Background

[6] The plaintiff's employment with the defendant began when she was just out of high school in 1993. At that time, the defendant's business was a gasoline station and mechanical shop. The plaintiff worked as a gas attendant.

[7] During 1994, the defendant renovated the premises and added an automotive parts section to the business.

[8] Although the details of the share ownership of the defendant are not in evidence, both Mr. Jones and his brother had an interest in the defendant.

[9] Details of the finances of the company are not in evidence but the business can anecdotally be described as a small business with only a few employees.

[10] In the mid-1990's, following the plaintiff's graduation from high school, she became a permanent full-time employee of the defendant. In and around the same time, Mr. Jones acquired his brother's interest in the business. To that point in time, Mr. Jones' sister-in-law had carried out the bookkeeping for the business. With the change in ownership she also left the business. Thereafter, the plaintiff assumed a bookkeeping role, the precise evolution of which is not in evidence.

[11] The automotive parts store was operated through an affiliation with the NAPA (National Automotive Parts Association) distributorship. That affiliation involved the use of specific software and a warranty program.

[12] The business was also authorized to sell lottery products through the BC Lottery Commission ("BCLC") via a licensing arrangement. The particulars of that licensing process and the plaintiff's role in it is disputed.

[13] Although there were interruptions for heart-related health reasons and maternity leave, the plaintiff remained employed with the defendant until her termination in 2020.The plaintiff has three children, which impacted her full-time employment at points in time between 2001 and 2016. After 2016, she worked full-time hours until her termination.

[14] During the periods the plaintiff worked part-time or reduced hours and generally, she frequently attended the business premises after hours to complete tasks associated with bookkeeping and payroll.

[15] As part of her bookkeeping role, the plaintiff dealt with payroll, although she did not have signing authority on behalf of the defendant. Beginning in approximately 2016, the defendant used a payroll software program known as Ceridian. The plaintiff was given her own credentials and password for this program.

[16] The business used various other software and computer functions which required passwords. A list of at least some of these passwords was maintained on the premises in a hardcopy form located on a desk. The evidence does not suggest this was hidden and/or only accessible to some employees.

[17] At an unspecified point in time, a BCLC representative provided a Bluetooth speaker to the plaintiff during the course of an attendance by the representative to the business premises. That BCLC representative did not testify and there is no evidence as to whether the speaker was intended as a gift to the plaintiff or the business. The Bluetooth speaker remained on the business premises until it was removed by the plaintiff.

[18] The plaintiff and Mr. Jones had an intimate personal relationship for approximately the last five years of Mr. Jones' life.

[19] Ms. Jones was to assume the day-to-day management role of the defendant after the passing of Mr. Jones in August 2020. She did not begin this process in earnest until approximately October 2020 as she dealt with various estate matters and relocated from the Lower Mainland to Nakusp.

[20] When she did arrive, Ms. Jones was largely unfamiliar with the operations of the business, including the various software systems utilized in the business, the payroll, the interactions with NAPA and the BCLC. She looked to the plaintiff for assistance in understanding those various processes. It largely fell to the plaintiff to train and educate Ms. Jones.

[21] Ms. Jones consulted with her brother regarding business decisions, but he was not actively involved on a day-to-day basis.

[22] Initially the working relationship between the plaintiff and Ms. Jones was good. Although there is dispute between the parties on exactly what might have precipitated it, the relationship between Ms. Jones and the plaintiff had deteriorated by August 2021. Ms. Jones and the plaintiff have different perspectives of what transpired on August 10, 2021, but the events of the day resulted in the plaintiff leaving work for health issues, which she associated to stress of her employment. She then received advice to take a medical leave of absence.

[23] On behalf of the defendant, Ms. Jones conceded in her testimony that it takes no issue with the legitimacy of, or justification for, the plaintiff's medical leave.

[24] The plaintiff generated her own record of employment ("ROE") from the Ceridian payroll software to support her claim for benefits while on medical leave.

[25] The plaintiff never had a written contract of employment and the terms of her employment were never specifically recorded or documented other than what can be found in the payroll records.

[26] On the day of her return to work from medical leave, on October 20, 2021, the plaintiff was presented with a written employment contract which included reduced hours and days of work.

[27] On October 27, the plaintiff advised Ms. Jones that she would not sign the new employment contract.

[28] While at work on November 3, Ms. Jones indicated she wished to meet with the plaintiff. She brought another individual with her to the meeting whom the plaintiff knew to be an employee of a local lawyer.

[29] During that meeting, Ms. Jones asked a series of prepared questions of the plaintiff. Notes of the plaintiff's responses were made adjacent to the questions by the third party. The notes are not verbatim. The evidence suggests there was additional dialogue between the two beyond the prepared questions being asked and the plaintiff's direct responses. At the end of the meeting Ms. Jones permitted the plaintiff to take photographs of the paper where the questions and notes were written. Those are in evidence.

[30] Following that meeting the plaintiff was advised to go home for the day.

[31] Before the plaintiff returned to work, the defendant provided the plaintiff with a letter of termination. That letter stated:

> Further to our meeting on Wednesday, November 3, 2021, this letter confirms that Hapnin Enterprises Ltd. (the "Company") has made a decision to terminate your employment with cause effective immediately (the "Termination Date") due to the fraudulent misconduct with respect to the Company, specifically but not limited to, issuing a Record of Employment fraudulently in the name of someone deceased, paying yourself for hours you

> did not work, insubordination/insolence, and breach of Company confidentiality and trust. A report has been filed with the RCMP.
>
> You will receive your regular compensation, less applicable statutory deductions, for hours worked from the last pay period up to and including the Termination Date, along with any outstanding vacation pay.
>
> Despite this termination with cause, we are willing to compensate you with an additional 8 weeks of pay, less applicable statutory deductions, paid as a lump sum, upon receipt of your signature on the attached Full and Final Release and Indemnity by Tuesday, November 16, 2021 (a copy of which is enclosed).
>
> A Record of Employment will be issued to you in due course.
>
> Should you have any questions or concerns about your final payment, please contact Haley Jones at hjones@napacanada.com.
>
> Please return all Company property (mail key), information, records, or documents in your possession immediately. Additionally, we ask that you return to us our Bluetooth speaker that you removed from the premises, without asking, that was given to our Company by the BC Lottery Corporation.
>
> We remind you that your obligation to maintain the confidentiality of the Company's information and that of its employees and patrons continues despite the termination of your employment.
>
> You agree that you will note write, say, or communicate, by any means or in any forum, including on social media, anything disparaging about the Company or its employees.
>
> We wish you all the best in your future endeavors.

Issues and Analysis

Just Cause for termination

[32] The Court in *Chu v. China Southern Airlines Company Limited*, 2023 BCSC 21, provided a useful summary of the law starting at para. 59:

> [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.
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> [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.):
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> > 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.
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> [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."
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> [52] In *McKinley* the court emphasized the importance of proportionality between the severity of the alleged misconduct and the sanction imposed …
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> . . .
>
> [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:
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> > [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:
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> > [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.).

[33] Here several of the allegations made by the defendant are of dishonesty.

[34] In *Roe v. British Columbia Ferry Services Ltd.*, 2015 BCCA 1, the Court of Appeal said this:

> [26] In *McKinley v. BC Tel,* 2001 SCC 38 at para. 49, the Court set out a two-part test for determining whether an employer is justified in dismissing an employee on the grounds of dishonesty. The court must determine: (i) whether the evidence establishes the employee's deceitful (dishonest) conduct on a balance of probabilities; and (ii) if so, whether the nature and degree of the dishonesty warrant the employee's dismissal. Both parts of the test involve factual inquiries (paras. 48-49). Absent palpable and overriding error, it is common ground that an appellate court may not interfere with a trial judge's findings of fact.
>
> [27] In particular, the test requires an assessment of whether the employee's misconduct gave rise to a breakdown in the employment relationship justifying dismissal, or whether the misconduct could be reconciled with sustaining the employment relationship by imposing a more "proportionate" disciplinary response (paras. 48, 53 and 57). A "contextual approach" governs the assessment of the alleged misconduct at this stage of the test (para. 51). That assessment includes a consideration of the nature and seriousness of the dishonesty, the surrounding circumstances in which the dishonest conduct occurred, the nature of the particular employment contract, and the position of the employee (paras. 48-57). The ultimate question to be decided is whether the employee's misconduct "was such that the employment relationship could no longer viably subsist" (para. 29).

[35] I find it useful in this case to quote para. 57 of the *McKinley* decision referred to above:

> [57] Based on the foregoing considerations, I favour an analytical framework that examines each case on its own particular facts and circumstances, and considers the nature and seriousness of the dishonesty in order to assess whether it is reconcilable with sustaining the employment relationship. Such an approach mitigates the possibility that an employee will be unduly punished by the strict application of an unequivocal rule that

> equates all forms of dishonest behaviour with just cause for dismissal. At the same time, it would properly emphasize that dishonesty going to the core of the employment relationship carries the potential to warrant dismissal for just cause.

[36] The defendant's letter of termination specifies but does limit the cause for termination to fraudulent misconduct, issuance of a ROE in the name of someone deceased, paying herself for hours not worked, insubordination/insolence and breach of company confidentiality and trust.

[37] The response to civil claim ("RTCC") provides responses to various allegations made in the notice of civil claim. Those responses include statements that are consistent with the conduct referred to in the termination letter but do not specify which provided the cause for termination without notice. It also includes allegations of fact described as being discovered after termination, again without specifying which are being relied upon as after acquired cause.

[38] In argument, the defendant makes a number of assertions that it says individually or collectively gave it cause to terminate the plaintiff without notice. Its argument provides this summary:

> 71. Ms. Plank's destruction of Hapnin documents, failure to collect debt, manipulation of ROEs to receive government benefits, the attempted cancellation of the gaming license, and her general dishonesty and insubordination give rise to cumulative cause over a period of time and constitutes a pattern of conduct inconsistent with Hapnin's business interests.

[39] More specifically, the argument makes the following assertions (which are the assertions I will address in this analysis):

a) The plaintiff gave herself unauthorized raises in pay and vacation allowances;

b) She manipulated access to benefits including that she improperly and inappropriately completed her own ROE to commence her sick leave (also listed as an act of insubordination);

c) She committed theft of a Bluetooth speaker;

d) She attempted to cancel the defendant's lottery license;

e) She paid herself for hours in excess of those actually worked leading up to her medical leave;

f) She removed the defendant's password list;

g) She refused to collect customer debt because of a personal relationship with the customer (also listed as an act of insubordination);

h) She committed various acts of insubordination (other than those identified above) described as follows:

> 27. On August 10, 2021, Haley was assisting Nancy with inventory when Nancy snapped and yelled at her to "go away", telling her that she did not know what she was doing in the presence of another staff member. Despite being reduced to tears by this interaction, Haley again attempted to address Nancy's attitude and outbursts towards herself, staff, and customers. Nancy immediately became combative, asking repeatedly "why don't you just fire me?". Haley explained that the Company had no intention of firing her. Even so, Nancy failed to show up for her next scheduled shifts, claiming that she believed she was being fired or having her hours cut back. Haley reiterated that this was not the case;
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> . . .
>
> 29. e. Emailed NAPA's head office to advise that she was on a medical leave and to email her personal email instead of sending correspondence to the owners/managers of the business; . . .

i) She failed to provide a doctor's note in support of her medical leave in a timely manner. The argument acknowledges this fact is disputed as the plaintiff claims she sent a note, and Ms. Jones claims she did not receive it initially.

[40] No amendments to the RTCC to coincide with the evidence were sought. Where the allegations do not align with the RTCC, I will address the discrepancies as I move through my analysis.

Unauthorized raises and vacation allowances

[41] The pleadings contain the following relevant assertions:

> Notice of Civil Claim
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> 17. Haley Jones repeatedly told the Plaintiff that she would receive a raise following the change of ownership and the Plaintiff did in fact receive raises in or around February and June of 2021.
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> . . .
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> 49. At the time of her dismissal, the Plaintiff was entitled to a compensation package which included, but was not necessarily limited to, the following:
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> a) annual income of approximately: a wage of $24.00 for each hour of an 8.5 hour day in a 42.5 hour work week;
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> b) Annual vacation of 3 weeks with 2 of those weeks being paid; and
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> c) discounted prices on automotive parts and free labor in relation to any maintenance or repairs needed to be performed on the Plaintiffs personal vehicles (collectively the "Compensation Package").
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> Response to Notice of Civil Claim
>
> 16. In response to paragraph 17, Neither Haley nor Mason ever agreed to or suggested that Nancy would receive a raise. In fact, during a meeting between Haley, Mason, Nancy and their respective partners on November 21, 2020, Nancy expressed that she did not want a raise as it would affect her child support payments. During this same meeting, Nancy was asked if there were any verbal contracts between her and Warren or if there were any arrangements between the two that the owners should be aware of, to which she replied, "no".
>
> . . .
>
> 18. The Company also has reason to believe that Nancy dishonestly recorded her hours of work during the period of time between August 30,2020 and August 10,2021. Since her termination, the Company reviewed Nancy's hours and found that they were unsupported by her attendance records and the store's regular operating hours, resulting in overpayments of approximately $7,500.

[42] The plaintiff testified that the defendant gave her two raises following Mr. Jones' death. She could not recall the dates but indicated the first was at the same time two other employees received increases. That increase was from $20 per hour to $21 per hour. The second was at a point when Ms. Jones directed that her own pay rate be changed. The plaintiff says Ms. Jones told her she had identified a wage of $24.50 per hour as the threshold above which would place the recipient in a

higher tax bracket. Ms. Jones directed the plaintiff to change Ms. Jones' pay to that wage and to place the plaintiff at $24 per hour.

[43] Ms. Jones testified that she never authorized any raises for the plaintiff from her $20 per hour rate and only became aware of the increases on review of the payroll records after the plaintiff had been terminated.

[44] She did agree that she had instructed the plaintiff to change the pay rate for Ms. Jones to $24.50 per hour.

[45] As indicated in the background section above, when the plaintiff was returning from her medical leave, Ms. Jones presented her with a written contract of employment. It specified a pay rate of $24 per hour. Ms. Jones indicated that it was coincidental that the rate was the same as what the plaintiff was in fact being paid at the time. She testified that all employees were being given written contracts and the human resources firm the defendant was being guided by suggested each employee get a raise as part of the process. It is noteworthy that the defendant introduced no evidence of that advice or of any changes to other employees' contracts to corroborate Ms. Jones' testimony.

[46] I will add some general comments here regarding the credibility of the plaintiff and Ms. Jones.

[47] Generally, I found the plaintiff to be a credible witness. She presented as unsophisticated and perhaps naïve in some respects. She was soft spoken and very passive. Her manner of presentation was straightforward and candid. All of this appears consistent with any of the documented communications placed into evidence including text messages and emails.

[48] My impression was that she was comfortable with work routines but did not posses in-depth or analytical appreciation of accounting or general business principles.

[49] I did not find Ms. Jones to be a credible or straightforward witness. As with the employee contracts and human resources advice above, she tended to rely on documentary sources of support for her testimony without producing them. Another important example is discussed below in relation to records of the plaintiff's hours worked.

[50] There were examples where her testimony appears in conflict with the preponderance of evidence. One is her description of the plaintiff's demeanour at the workplace. She described the plaintiff as being confrontational and insubordinate when any text and written communications in evidence are consistent with the passive and non-confrontational approach displayed by the plaintiff in her testimony.

[51] Generally, Ms. Jones' manner of presentation and her evidence as a whole gave the impression of attempting to recast events and actions of the plaintiff in an unfairly negative light to support the defendant's position.

[52] I reject the suggested coincidence that the proposed contract contains the hourly rate the plaintiff says she was directed to put into the payroll system. In fact, on the evidence before me, it is corroborative of the plaintiff's evidence that her wage rate at the time was $24 per hour.

[53] I prefer the evidence of the plaintiff regarding the raises.

[54] The plaintiff testified that her annual vacation entitlement was three weeks with two weeks paid and that she received 6% holiday pay. She indicated this was established by Mr. Jones as a "bonus" for herself and a former mechanic employee. It began for her after her return to full-time work in 2016. That mechanic was no longer with the defendant at the time of Mr. Jones' passing. She testified this aspect of her pay scheme had been mentioned to Ms. Jones who made no comment at the time.

[55] It was Ms. Jones' evidence that such a vacation pay arrangement was "not normal in her experience" and that the vacation entitlement was 6%. It was not clarified what her experience was.

[56] She added that after her father's passing, she had the plaintiff to her home several times for dinner where she and her brother asked if there was anything they should know about "her pay, her relationship with Mr. Jones, the business or anything out of the ordinary". She said the plaintiff responded there was not and specifically the plaintiff never told her of the arrangement for her vacation pay.

[57] The proposition that was put to the plaintiff in cross-examination was materially different. It was that the plaintiff had been to a single dinner "immediately following Warren Jones' death" with Ms. Jones, her brother and the family. The plaintiff agreed such an event had occurred. It was further suggested they asked about "her employment, her history, and the business". The plaintiff denied such a dialogue occurred. She was further asked if her rate of pay was discussed at that time which she also denied.

[58] That Ms. Jones viewed the vacation pay arrangements for the plaintiff as unusual is not determinative of anything. There is nothing to contradict the plaintiff's evidence that the arrangement had been endorsed by Mr. Jones on behalf of the defendant years prior. The defendant did not provide historical records to suggest otherwise.

[59] I am not satisfied on the whole of the evidence that any inquiry was made as described by Ms. Jones at the family gathering. In any event, the suggestion in cross-examination that somewhat general inquiries about her work for Mr. Jones at family dinners should have prompted, let alone compelled, the plaintiff to describe her vacation pay structure is without merit.

[60] The defendant has failed to prove the raises the plaintiff received or the vacation entitlements were unauthorized.

[61] To the extent the defendant includes the plaintiff's alleged responses to the inquiries as an element of insubordination, I reject the proposition.

The plaintiff improperly and inappropriately completed her own ROE to commence her sick leave (also listed as an act of insubordination)

[62] There is no dispute that the plaintiff generated the ROE connected with her medical leave. The Ceridian payroll software used by the defendant included the functionality for producing those documents. Over the years, it had been used by the plaintiff as part of her bookkeeping role for that purpose for herself and other employees.

[63] The Ceridian software generated physical reports of activity on it each pay period. They were sent to and retained by the defendant. This included any ROEs that may have been generated during the preceding pay period. The plaintiff's evidence was that when a ROE was requested through the system, a physical document was not generated at the time. Rather, the document was included in the report that the Ceridian system generated at the end of the pay period.

[64] In cross-examination, the defence reviewed an example of the plaintiff generating an ROE for herself prior to the example in issue here. That occurred in March 2020 during the early stages of the COVID pandemic.

[65] Text messages between the plaintiff and Mr. Jones related to that scenario are in evidence. It is apparent from them and the testimony of the plaintiff that there was uncertainty about what would happen to the business operations of the defendant as a result of the pandemic. The texts also provide some sense of the level of the plaintiff's understanding of the Ceridian system even though it had been in use by the defendant for approximately 10 years at the time. Those texts read as follows:

Plaintiff:	Do you think I should issue myself an roe? I'm still working…???
Mr. Jones:	Ya but your hours are limited, and I will top you up some how
	Also they could just shut us down or Purolator only come in a few days a week
Plaintiff:	I'm not sure how that works, I'll get the others done then figure mine out

Mr. Jones:	Ok what ever is good for you or I will just pay you your regular wage, but if we can do it differently then the government pays for some of your wage, what ever you think is best I'm good with
Plaintiff:	Still trying to figure this payroll website out, think I might have to phone, I'm going in circles and the videos are of NO help.
Mr. Jones:	Hum
Plaintiff:	I filled out all the boxes, clicked all the things but nothing is happening…

[66] The plaintiff did in fact generate a ROE with a date issued of 24/03/2020. It indicated "final pay period of 21/03/2020" and an "expected date of recall" as "unknown". She did not in fact leave work or receive any COVID benefits and later issued another ROE with an issued date of 06/04/2020. The latter indicated the previous ROE had been "issued in error" and showed the same final pay period, but an expected date of recall of 23/03/2020.

[67] While the defence sought to portray this as nefarious in nature, in my view, the evidence does not support the proposition. The defendant was at that time at least, a small unsophisticated business. Clearly Mr. Jones and the plaintiff were close personally and Mr. Jones acted as a supportive employer. Without in any way being critical or trying to be unfair or unkind, the plaintiff too was and remained throughout unsophisticated. While she assumed bookkeeping responsibilities, they were largely routine and simplistic in nature. COVID was entirely novel to business operations and resulted in entirely novel issues and processes. That the plaintiff and Mr. Jones would be uncertain as to how to proceed is not at all surprising. That Mr. Jones would seek to minimize the impact on the plaintiff is also not surprising.

[68] Importantly what occurred in 2020 is informative in assessing the evidence regarding the issuance of the ROE at issue here. It reveals an experience of the plaintiff where the issuance of a ROE for herself had been endorsed by the operating mind of the defendant. It also suggests a limited understanding of how to use the software. There is no evidence as to what additional experience or understanding of that aspect of the software, if any, the plaintiff acquired before the ROE at issue here was generated.

[69] The ROE at issue here identifies Warren Jones as the “Name of Issuer”. The plaintiff testified that she did not populate that portion of the document, that the Ceridian system did so automatically.

[70] In cross-examination, defence counsel took the plaintiff through a document that is self-identified as “Audit Trail – Company: Hapnin Enterprises LTD” (“Audit Trail Document”). He indicated it was generated from the Ceridian software. It lists information related to the plaintiff and has, among other things, columns for “New Value” and “Old Value” in connection with numerous employment related statistics including status and contact information. Beside each value is a time stamp formatted year/mth/day/time 00:00:00 (the latter is to the second). Within that list, only two items have an Old Value populated. One is “status” where the Old Value reads “Active” and the associated New Value is “On Leave”. The other is in connection with an item under “Timesheet Entry” identified as “Current Accrual-Vacation Pay” where the Old Value is “6.99” and the New Value is “1.80”. All other items list only a New Value including Warren Jones as the “contact” and separately Warren Jones as the “issuer”.

[71] There is a column titled “Keyed By” and all items indicate “C555Nplan” with the exception of two where the document indicates keyed by “Powerpay”. These are the two items referred to above where there is an old and new value.

[72] No similar audit trail document was produced in relation to the two other ROEs generated by the plaintiff for herself described earlier from 2020 for comparison.

[73] The Audit Trail Document appears to be the first of several pages. At its bottom is the start of employee information related to Ms. Jones which is in identical format to that portion of the document that relates to the plaintiff. It is truncated without evidence as to why. It would appear, however, to be carried on in subsequent pages that were not placed into evidence. In the result, there is no other employee information for comparison that might, at least, have helped understand the content and its format.

[74] The defence called no evidence to explain the format or interpretation of the Audit Trail Document from a Ceridian representative or otherwise. In cross-examination and in argument counsel, nonetheless, made unsupported propositions as to how the document should be interpreted.

[75] Essentially, the defendant suggests that all of the New Values were inputted by the plaintiff on the date the document was requested. There are several reasons why I am unable to accept this as accurate.

[76] The first is in relation to the time stamps. All of the entries flagged by the defendant as evidencing fraudulent intent have the identical time stamp of “2021-08-23 13:35:18”. The entries regarding the pay period portion of the document that relate in part to the plaintiff and in part to Ms. Jones all have the time stamp “2021-08-23 13:31:42”. The two items described above with an Old Value keyed in by “Powerpay” both have time stamps of “2021-08-23 16:37:08”. Obviously, each item for each time stamp could not have been entered simultaneously. It might be the stamps relate to when the plaintiff did something to enter information but it may be something else including that only one or some items were changed and the timestamp is connected then to all items.

[77] Another mysterious element is the absence of Old Values. The defence focusses on the alleged inputting of Warren Jones’ name as the issuer and contact person. Obviously, he was deceased at the time. The earlier ROEs also had Warren Jones’ name in those locations. From this, one can reasonably infer that those “values” existed in Ceridian at that time. If, as the defence alleges, the plaintiff fraudulently inputted that information one would expect to see an Old Value that had not been changed.

[78] The plaintiff testified that those values were not something that the system prompted her to input. She also says that no physical or virtual ROE was produced when she made the “request” for it in the Ceridian system, that the document would be delivered to the defendant in the next payroll package. The result was that she did not have the completed document to review at the time.

[79] Ms. Jones testified as to her observations of the system in preparation for the trial. At that time at least, she says to produce a ROE the data entry required identifying the issuer and contact person.

[80] There is no evidence of what if any changes were made to the relevant aspects of the Ceridian software in the time between Ms. Jones' experiment and when the plaintiff requested her ROE. As noted, I have only defence counsel's argument and the precarious option of making assumptions as to the interpretation of the software generated audit trail to rely on.

[81] The defence theory is not compelling and the assumptions leave too many questions to make that theory compelling.

[82] It is apparent from the earlier texts connected with the COVID-related ROEs that the plaintiff had only superficial abilities and knowledge prompting her to say at that time "I'm going in circles" and "I filled out all the boxes, clicked the things but nothing is happening". It is possible the plaintiff missed opportunities in the software data entry in 2021 to make further changes but I am unable to conclude her failures, if they occurred, were calculated or dishonest.

[83] Perhaps most importantly are the following observations. The defendant alleges fraudulent intent connected to the plaintiff's preparation of the ROE. It was however a document that, after being requested by the plaintiff, was to be sent to the defendant where it would be received by Ms. Jones. The plaintiff knew this. It was not produced and relied on covertly by the plaintiff.

[84] Further, the defendant accepts that the plaintiff's medical leave was justified and proper such that the defendant was required to issue a ROE.

[85] The defendant refers to s. 398 of the *Criminal Code* and s. 19 of the *Employment Standards Act*. The former requires an intent to deceive, which I conclude is absent here.

[86] The latter requires that the employer complete documents such as the ROE. This is to ensure documents are completed when required. The defendant is a corporate entity, thus some person must carry out the actual task on behalf of it. It was part of the plaintiff's regular duties on behalf of the defendant.

[87] I accept that there were important errors in the document. I am unable to conclude, however, that the plaintiff deliberately caused those errors.

[88] The defendant lists as one of the acts of insubordination supporting cause for termination as "Failing to advise Ms. Jones she had already submitted an ROE when Ms. Jones asked for her medical note so she could submit the ROE".

[89] In cross-examination, the plaintiff confirmed that Ms. Jones had indicated she would submit a ROE. This is evidenced on the text message exchange of August 23 and 24, as follows:

> HJ: I was also wanting to message you regarding you coming into the store after hours. You told me you were advised to take a medical leave of absence, so there is no expectation for you to be coming in after hours.
>
> Also, can you please provide me with the medical note from your specialist indicating the medical leave so we can issue your ROE and so we have a return to work date. Thank you.
>
> NP: I feel bad for letting you down which is why I was going in to help, but you are probably right so I will not be doing it anymore.
>
> Please find attached the letter you requested.

[90] The time stamps on these texts are Aug 23 5:30 PM and Aug 24 1:26 PM, respectively. The Audit Trail Document indicates the plaintiff had requested the ROE on August 23 at approximately 1:35 PM. It would have been simple and logical for the plaintiff to indicate what she had done at that time. In her cross-examination she stated she knew that Ms. Jones would get the ROE when the Ceridian payroll package for that pay period was delivered.

[91] The plaintiff should have informed Ms. Jones that she was generating the ROE through the Ceridian software. She was justified in going on medical leave and the defendant was obligated by s. 19 of the *Employment Standards Act* to produce a

ROE for her. The plaintiff knew that the ROE would go to Ms. Jones for the defendant in the ordinary course. The tone of the text communications contradicts assertions of insolence or insubordination. I reject however that the plaintiff proceeded with fraudulent intent or with any wrongful intent at all or that she was being insubordinate.

Theft of a Bluetooth speaker

[92] In the defendant's RTCC it says, in part, at para. 29:

> 29. The Company soon discovered that during the period when Nancy was allegedly on medical leave, she would enter the store after hours, the reasons for which remain unknown. During this time, Nancy, without authorization:
>
> . . .
>
> (b) Removed the Company's Bluetooth speaker from the store without authorization…

[93] At a point in time that is not specified in any of the documentary or *viva voce* evidence, a Bluetooth speaker was provided to the plaintiff by a representative of the BCLC. This occurred while the representative was in attendance at the defendant's business premises. The Bluetooth speaker remained on the business premises until the plaintiff removed it. She did this following her indication that she would be commencing her medical leave and during her attendance after hours. She testified that she believed it to have been given to her personally. When the issue of the speaker was raised with her by Ms. Jones, the plaintiff returned the speaker to the premises.

[94] The defendant takes the position that it was the defendant's property. More specifically, Ms. Jones testified that it was given to the business by the BCLC representative. There is no evidence that Ms. Jones was present at the time the Bluetooth speaker was provided by the BCLC representative. That representative was not called as a witness and there is no specific evidence as to what that representative said, if anything, upon presentation of the speaker to the plaintiff.

[95] As will be alluded to later in this decision, when dealing with matters related to the BCLC license, the plaintiff was, at a minimum, a contact individual on behalf of the defendant. She was the defendant's manager. That she was dealing directly with the BCLC representative was entirely appropriate.

[96] No submissions were made by either party as to any applicable legal authorities on the question of entitlement or ownership of the property in the circumstances. As indicated, no one from the BCLC was called to testify as to what the intention of the representative was at the time the speaker was provided. There is little evidence of the factual circumstances of the gift.

[97] For purposes of this issue I will proceed on the basis that ownership remained with the defendant.

[98] I accept that the plaintiff believed she owned the speaker. She returned it upon request. I am not able to attribute any malice nor make any finding that the plaintiff subjectively intended to steal any property of the defendant.

Attempted to cancel the defendant's lottery license

[99] In the RTCC, para. 29 sets out the allegations of conduct after hours during her medical leave and prior to termination. Paragraph 29(d) states:

> (d) Called the BC Lottery Corporation to report that the Company needed to update its gaming license

[100] In argument on this point, the defendant relied on the events that followed the plaintiff's termination. The cross-examination of the plaintiff and the evidence from Ms. Jones focussed entirely on the plaintiff's contact with the BCLC beginning November 10, 2021. There is no evidence of communications by the plaintiff with the BCLC prior to that time.

[101] The RTCC does not refer to this as part of the alleged post-termination conduct in support of the grounds for termination.

[102] The defendant began selling BC lottery products during the time of Mr. Jones' control of the defendant. The evidence as to what authorizations or licenses the defendant required to sell lottery items is unclear. No one from BCLC testified and the evidence of how that authorization was obtained and what roles and designations existed for Ms. Jones, the plaintiff or any other staff was also left unclear.

[103] Some efforts were made by Ms. Jones to acquire "managerial responsibility" for the lottery portion of the defendant's business prior to September 30, 2020. A text exchange between she and the plaintiff is in evidence. The only date and time reference from the page is "Sep 30, 2020, 5:09 PM" and that relates to the texts that follow the time stamp. The relevant texts precede that date stamp although the index to the exhibit book suggests the relevant texts are also from September 30. In any event, the exchange between Ms. Jones and the plaintiff proceeded as follows:

HJ:	Well, I've been in contact with BC lottery to get the gaming policy paperwork to transfer responsibility for that end of it. I will fill it out in my name as the one who has "managerial responsibility". Looks like I only have to offer up my first born and a $45 fee haha
Plaintiff:	Bahahaha bye bye Cam
HJ:	I'm going to miss him… [sad crying emoji]
Plaintiff:	"Nakusp boy sold to BC Lotto Corp in exchange for updated gaming policy"

[104] There is no clear evidence as to what came of Ms. Jones' contact with BCLC.

[105] The plaintiff testified that, following her termination, she wanted her name removed from the defendant's BCLC licencing or authorizations. That prompted her to send an email to BCLC on November 10, 2021, as follows:

> Hello,
>
> My name is Nancy Plank.
>
> I am writing today in regards to Nakusp Auto Parts, BCLC retailer #0358 in Nakusp BC.
>
> I am no longer an employee at this location as of Nov 9, 2021 however the gaming licence was held by me for the location.

> I would like have the gaming licence I hold in regards to this location canceled right away.
>
> Please advise as to how this can be canceled. You can contact me through this email or by phone.

[106] The response from BCLC on November 17, 2021, provides the best evidence as to her connection between the defendant and BCLC. It reads as follows:

> Hello Nancy,
>
> I appreciate the update regarding your status as a lottery retail contract manager for Nakusp Auto Parts.
>
> I can confirm that your lottery registration has been cancelled.

[107] The defendant takes the position however that the plaintiff was endeavouring to harm the defendant by having its ability to sell lottery items terminated. It says in argument:

> 67. Ms. Plank advised Ms. Jones and gave evidence that she was having her name removed from the gaming license, however, she directed the BC Lottery Corporation Enforcement to cancel the license for the location. She did not CC Ms. Jones or Mason in this email correspondence. In fact, she asked for the license for the location to be cancelled right away.
>
> 68. In fact, when she did tell Ms. Jones about the license, she told Ms. Jones that she contacted the BCLC to have her name removed from the gaming license, not that she requested it to be cancelled for the location. A further example of Ms. Plank's deceptive behaviour towards Hapnin.
>
> 69. The reality was, and it is a fact, that Ms. Plank was Hapnin's "Contract Manager" for BCLC. She held no license in her name for Hapnin for BCLC outside of her certification to sell lottery tickets. Ms. Plank gave evidence at great length on this subject but was not clear and not forthcoming. Gaming licenses are held by each location – there is no name associated with them outside the name of the corporation itself.

[108] The plaintiff denied that was her objective and testified she simply wished to have her name disassociated with the BCLC licensing of the defendant. That goal was entirely reasonable. It is apparent from the email from BCLC that BCLC understood the plaintiff's objective to be as the plaintiff testified.

[109] The defendant conceded that its interests were never adversely affected.

[110] It was clear to me from the testimony of both the plaintiff and Ms. Jones that the nomenclature for the titles or roles of the defendant's staff used by BCLC was not well understood. No documents from BCLC or the defendant were placed in evidence and no one from BCLC testified to provide any clarification.

[111] Again, I am unable to conclude that the plaintiff acted maliciously or with any intent to harm the defendant either as alleged in the RTCC or in the defendant's argument. I am not satisfied the plaintiff's objective was as described in the defendant's argument as set out above.

Entering inaccurate hours of work for pay

[112] Prior to Mr. Jones' passing and up to the time of her termination, one of the plaintiff's payroll tasks was to enter the hours worked by each employee including herself into the Ceridian payroll system.

[113] The first part of the issue raised by the defendant is connected to the plaintiff going on medical leave. The manner in which that leave was commenced, including the medical support for it and the issuance of the record of employment, are addressed in separate sections of these reasons.

[114] As noted above, the medical leave began on Friday, August 13, 2021. On that day, the plaintiff sent a text message to Ms. Jones, at 8:28 PM, as follows:

> As you know I have been struggling with the stress and anxiety of trying to keep the store functioning as well as teach you the ins and outs of running the store.
>
> Unfortunately I have reached a point where I no longer continue on with the stress as it is putting too much strain on my heart.
>
> I have been advised to take a medical leave of absence, effective immediately, to try and deal with some of the adverse affects this has caused me. I will be working with a number of specialists to hopefully speed my recovery so I can return to work ASAP. I anticipate I will be off for 4 weeks, after which time I will be reassessed by my health care professionals.
>
> I will try and help out as much as possible with the day to day things as I don't want to abandon you completely.
>
> I am very sorry that it has come to this but I need to put my health and well-being first.

[115] The following Monday at 10:01 AM, Ms. Jones sent a responsive text. Included in it was a request for the login information for the Ceridian software. The plaintiff declined to provide her login information, noting that it was "personal to me so I don't feel comfortable giving out my login information. I can however login from home to submit the hours. . . . " The text proceeds to indicate the hours to be entered in respect of various employees, including the plaintiff, all identified by initial. In her case, she proposed to enter 16 hours. Also in the list was Ms. Jones, with the hours indicated as 80. Her text closes with the following, "Please let me know if this is correct and I will go ahead and submit it. Also, if you have time today I am able to sit down to discuss things moving forward." In further response Ms. Jones, referencing the hours for the employees, said, ". . . Yes, those hours are correct."

[116] According to the Audit Trail Document described above in the discussion of the ROE, the hours for both the plaintiff and Ms. Jones were entered into the Ceridian payroll system sometime after 13:00 hours on August 23/2021.

[117] Ms. Jones went on to say in a text on that same date at 17:30hrs, "I was also wanting to message you regarding you coming into the store after hours. You told me you were advised to take a medical leave of absence, so there is no expectation for you to be coming in after hours."

[118] In the defendant's RTCC it says, in part, at paragraph 29:

> 29. The Company soon discovered that during the period when Nancy was allegedly on medical leave, she would enter the store after hours, the reasons for which remain unknown. During this time, Nancy, without authorization:
>
> . . .
>
> f. Paid herself for hours not in fact worked during her medical leave. Nancy had only worked 12 hours during this pay period but paid herself for 16. The Company was not aware of this discrepancy until Nancy returned to the store, as she alone had the payroll login information. The Company denies that it ever gave Nancy express authorization to pay herself for the hours not in fact worked, and neither Haley nor Mason ever asked or agreed to Nancy completing payroll remotely from a personal computer due to privacy concerns.

[119] Based on the text exchanges above and the Audit Trail Document relied on by the defendant, the assertions that this was done after hours and that the plaintiff was not authorized to enter the hours or to do so from her personal computer are clearly inaccurate.

[120] I turn to the specific issue of the accuracy of the hours entered.

[121] In her testimony, Ms. Jones described maintaining a daybook and a calendar where she recorded at least some of her and other employee's work hours. The daybook entries would be transferred to her calendar. She also described a calendar on the wall at the workplace where the plaintiff would make notes of her absences.

[122] In her testimony, Ms. Jones referenced a single page from a calendar as a sample page from the calendar she kept. That page did not relate to the issue being addressed here, and indeed neither the relevant page nor any other pages from either of the calendars or the daybook were placed in evidence.

[123] The plaintiff confirmed that requests from examination for discovery of Ms. Jones included that Ms. Jones' calendar be produced. It was not.

[124] In her testimony, Ms. Jones says that the calendar she kept was produced to her former counsel (not Hapnin's trial counsel) and she had been advised by that lawyer that the documents had been lost. There is no evidence from the lawyer to support that hearsay assertion. It is unclear what became of the daybook which was the alleged original source of the information that the plaintiff in fact worked only 12.5 hours.

[125] In relation to Ms. Jones' text communication confirming the 16 hours that the plaintiff proposed to enter for herself was correct, Ms. Jones testified that it was only later that she went back to check her calendar where she had recorded the plaintiff's hours as being 12.5.

[126] In another summary prepared for the defendant and entered into evidence, it is indicated that the appropriate hours, from the defendant's perspective, were 12.0

not the 12.5 Ms. Jones says her records showed. This was not a document maintained in the ordinary course of the defendant's business but was, as I understand it, a form of reconciliation carried out by the wife of Mason Jones for purposes of this litigation. The source documents for this summary are also not in evidence and were not clearly identified to me.

[127] The discrepancy of .5 hours between what Ms. Jones testified her calendar showed and the summary is of insignificant monetary consequence but, given the other concerns as to the defendant's evidence on the subject, it is significant in terms of credibility.

[128] As one of the grounds for termination relied upon by the defence, the defendant's evidence on this point is simply inadequate. The defendant possesses the documentary evidence that might support its assertion that 12.5 (or 12.0 hours) was the appropriate number of hours to enter. The suggestion that the records to support the assertion of 12.0 hours were provided to its former counsel and were lost is not supported by any admissible evidence, and in particular nothing from that former counsel. The source documents for the summary which alleges 12.5 hours were not produced. The discrepancy is not explained.

[129] Further, the assertion in the RTCC suggests that the alleged deception by recording 16 hours was only discovered after the plaintiff's return to work after her medical leave. Ms. Jones testified that she discovered the alleged discrepancy as soon as she logged into Ceridian on August 24. The latter is confusing because the apparent source of the allegation was Ms. Jones' calendar which was entirely separate from Ceridian.

[130] The plaintiff was certainly not hiding or attempting to deceive the defendant in any way. She wrote to Ms. Jones by text, asking her to confirm her records were correct and Ms. Jones did so. Logically one would have expected that Ms. Jones would reference her own records that she says existed on the subject and had at her ready disposal.

[131] I do not accept Ms. Jones' testimony that those records contradicted the 16 hours the plaintiff described in her text message. Even if they did, it shows nothing more than an error by either or both of the plaintiff and Ms. Jones. Even if the 16 hours was in fact incorrect, to suggest that the plaintiff's proceeding to enter those hours supported the grounds for dismissal is entirely untenable. The most that could be said in support of the defence position is that the plaintiff erred in recording her hours.

[132] Simply put, this was not a deception by the plaintiff. She openly advised Ms. Jones what she intended to enter and Ms. Jones confirmed it was correct.

[133] On this subject, I find the plaintiff's evidence to be credible.

[134] The RTCC contains further allegations regarding the plaintiff's entry of her hours of work into the Ceridian payroll software. Paragraph 18 sets out the allegation as follows:

> 18. The Company also has reason to believe that Nancy dishonestly recorded her hours of work during the period of time between August 30, 2020 and August 10, 2021. Since her termination, the Company reviewed Nancy's hours and found that they were unsupported by her attendance records and the store's regular operating hours, resulting in overpayments of approximately $7,500.

[135] In its argument, the defendant states:

> 37. In In fact, based on a review of her attendance records and Hapnin's actual operating hours, a large discrepancy arose, resulting in overpayments totaling approximately $7500.
>
> 38. Ms. Plank usually worked 80 hours every pay period. However, she would attend appointments during work hours, call in sick, walk out, or fail to show up, and not reduce the hours she worked accordingly.
>
> 39. Other times, Ms. Plank would inflate her hours on the payroll recording system over 80 despite only working 80 hours.

[136] The defence relied on the document referred to in para. 126 above and a summary of it for the period beginning September 19, 2020. It was presented as a calculation of the amount the plaintiff had allegedly been overpaid as a result of her dishonesty and/or alleged fraud as to her rate of pay and hours worked. Curiously, it

suggests the plaintiff's proper rate was $21 per hour not the $20 per hour Ms. Jones testified was appropriate. It then refers to what the defence says the actual hours were and calculates an overpayment of $7219 between September 19, 2020 and August 21, 2021. As noted, none of the actual source documents were entered into evidence. The summary was not put to the plaintiff in cross-examination.

[137] I do not accept the document as objective evidence to support the defendant's assertions and do not accept as reliable Ms. Jones' testimony as to the source documents.

Attendance on the business premises after hours

[138] As referenced in the earlier introduction of paragraph 29 of the RTCC, the defence makes a number of assertions about improper conduct after hours. Some are dealt with above under separate headings. I address the remainder below under separate sub-headings.

[139] First, I will deal with the more general assertion by the defendant that it was inappropriate for the plaintiff to be attending the workplace after hours.

[140] As noted in the background section, over the many years of the plaintiff's employment while the defendant was owned and operated by Mr. Jones, her attendance after hours was not at all unusual. It was the manner in which she delivered her services during periods of time when she was working part-time and raising her children. There is no evidence that it was anything other than completely acceptable to the defendant while Mr. Jones owned the defendant.

[141] The change of ownership of the defendant does not, in and of itself, alter the plaintiff's terms of employment. There is no evidence entered by the defence to suggest that the plaintiff had been told her previous practices were unacceptable. Indeed, I accept the plaintiff's evidence that she worked very hard to ensure the business ran smoothly and to assist Ms. Jones in becoming familiar with the business during the difficult period following Mr. Jones' passing. To suggest that

there was anything wrong with the plaintiff attending as she did and following her expressed intention to take a medical leave is without merit.

[142] In the text exchange that occurred at the commencement of that proposed medical leave, the plaintiff advised of her intention and willingness to help out as much as she could and I accept that her attendance after hours was simply a manifestation of that intent.

[143] I now turn to the various activities the defence alleges occurred during the plaintiff's after-hours attendances provided as support of the alleged grounds to terminate. They are set out in the sub-paragraphs of paragraph 29 of the RTCC, and I will deal with each of them in turn.

> ***29 (a) Removed a vital document containing the Company's passwords and login information from the store and refused to provide the passwords to Ms. Jones, resulting in many hours of additional work***

[144] There was a list of passwords related to the business' activities that was maintained in open view on a desk on the premises. Ms. Jones observed following the plaintiff's attendance after hours at the commencement of her medical leave that the list of passwords was missing. She concluded that the plaintiff had taken it to frustrate Ms. Jones' ability to log into various accounts and carry out those business activities.

[145] I had no note of the proposition having been put to the plaintiff in cross-examination and raised this with defence counsel during submissions. He assured me that it had been put to the plaintiff. I have not reviewed all of the cross-examination recording to locate it. For purposes of dealing with this issue, I will accept that the proposition was put to her and, as defence counsel indicated, she denied having removed the document.

[146] There is no basis for me to conclude that the plaintiff did in fact remove the document. Accepting for purposes of this argument that it was missing, it was not stored in a secret or secure location to justify the inference the plaintiff took it. I do not know when it was last seen by Ms. Jones as she did not testify to that fact.

[147] Further, the suggested motive makes little sense. The plaintiff was leaving on medical leave and there is no indication she had any intention other than to return to her employment. The only objective evidence of her attitude regarding going on medical leave is in the text messages referred to above where she offered to assist in whatever way she could. It is illogical that the plaintiff would take such a step to frustrate the defendant's ability to continue.

[148] Any reasonable foundation for the conclusion reached by Ms. Jones is simply lacking.

> ***29 (c) Cleared much of the saved information on the Company's computer, including all pre-saved websites and auto-populated login information for those websites. In fact, it appeared as though the computer that Nancy always worked on had been reset to its factory settings***

[149] Ms. Jones testified that the computer that was frequently used by the plaintiff was wiped clean during the plaintiff's same attendance at the premises. The proposition was not put to the plaintiff for comment. Ms. Jones did not testify as to when the computer had last been examined or looked at, nor was any technical evidence introduced as to what if any steps could or had to be taken to cause the computer to appear as it did. The evidentiary foundation for concluding that the plaintiff wiped the computer clean is simply insufficient.

[150] In addition, as previously indicated, the plaintiff was going on medical leave and there is no indication that anyone had an expectation other than that she would be returning. It makes little sense why the plaintiff intending to return would sabotage the very business to which she intended to return.

> ***29 (e) Emailed NAPA's head office to advise that she was on a medical leave and to email her personal email instead of sending correspondence to the owners/managers of the business***

[151] This was not an issue that was pursued in argument. I will however address it briefly.

[152] Included in the evidence is an email from the plaintiff to a representative of NAPA dated August 16, 2021 at 7:16 PM. The body of that email reads as follows:

> Hi Rhonda,
>
> I have had to take an unexpected medical leave of absence from work. As I am the only one who knows how to finish the class return I am not sure I will be able to get it done in my normal time frame.
>
> I am able to come into work after hours for short periods of time, so am not checking my email on a regular basis.
>
> Not too sure if you still want me to finish this return up or if we should just wait to do this return with next month's return.
>
> You can email me back on my personal email if you need to and for a quicker response. It is ccncc@telus.net.

[153] In my view, this email is entirely consistent with the plaintiff's stated indication to Ms. Jones that she was willing to help out as much as she could while on medical leave and prior to Ms. Jones indicating that she did not wish the plaintiff to do so.

[154] In my view, it provides no foundation for any finding of improper or inappropriate conduct on the part of the plaintiff.

Refusal to collect customer debt because of personal relationship (also listed as an act of insubordination)

[155] North Nakusp Automotive Service & Repair ("North Nakusp") had been one of the larger customers of the defendant for a considerable time. That customer typically had an outstanding debt to the defendant.

[156] From time to time, the plaintiff would "lock" accounts of the defendant's customers when their payments on those accounts were not being adequately maintained. The plaintiff's evidence was that the trigger for that was the customer not making payments on the account to keep the balance current to 60 or even 90 days. She testified however that, while she received customer payments, her duties did not include debt collection.

[157] The plaintiff indicated the account of North Nakusp had not been locked because the threshold for doing so had not been crossed.

[158] In or about December 2020, the plaintiff became involved in a personal relationship with the principal of North Nakusp. Following her termination from the defendant, she secured employment with North Nakusp where she remained employed at the time of trial.

[159] The plaintiff's evidence is that Ms. Jones discussed the account before December 2020 but the plaintiff was not directed to and did not take any action in relation to the account. The plaintiff said Ms. Jones told the plaintiff that her brother wanted Ms. Jones to take some action on the account but Ms. Jones expressed to the plaintiff that she did not want to.

[160] Ms. Jones' evidence was that, during her time working with the plaintiff she was aware of the plaintiff locking only one account. It was not North Nakusp. She said she had discussed the North Nakusp account with the plaintiff several times and observed that doing so caused the plaintiff to become upset. When Ms. Jones suggested locking the account the plaintiff threatened to quit if it happened.

[161] Ms. Jones did not specify when these discussions occurred. She testified she was confused by the plaintiff's reaction at the time but now attributes the plaintiff's response to her relationship with the principal of North Nakusp. The defendant takes the position the plaintiff was obligated to disclose her relationship.

[162] Ms. Jones and the plaintiff described the state of the North Nakusp account differently. The plaintiff testified that North Nakusp was maintaining its account current to approximately 60 to 90 days. The defence adduced no objective evidence or records to show the state of the account at any point in time. This is another example where the defendant is in control of the records and had the ability to corroborate its assertions but it did not.

[163] Generally, I found the plaintiff to be a credible and reliable witness. Where there is objective evidence on a point of contention it has supported the plaintiff.

[164] As noted earlier, I did not find Ms. Jones to be credible. The impression given was a willingness to make assumptions and draw conclusions regarding the plaintiff

even when the information available to her was equivocal. Where she purports to rely on business records or documents she did not present those records to support her assertions.

[165] There is no evidence that Ms. Jones took the opportunity in this example or generally when she believed the plaintiff to be acting inappropriately to address the issues at the time. In this example, there is no evidence that she or anyone else for the defendant took steps in relation to the North Nakusp account at the time although Ms. Jones did say that the account was ultimately addressed.

[166] The defendant's submissions include the following:

> . . . Ms. Plank was in a romantic relationship with this client, and following her termination, the client attended at the store and cornered Ms. Jones in front of two other staff members, aggressively accusing her of being spiteful and having a "vendetta" against Ms. Plank. Hapnin has since lost this individual as a customer. Ms. Plank gave evidence that she remains in romantic relationship with [W.A.].

[167] There is no evidence the plaintiff caused the client to do this or even had knowledge that it occurred. The plaintiff cannot be responsible for the actions of the client. To the extent the defence relies on this to support cause for termination, I reject the argument.

[168] I accept the defendant's assertion that if and when the plaintiff's personal relationship created a conflict with her duties to the defendant she needed to disclose that to the defendant. Given my conclusion the plaintiff had neither been directed to nor refused to act on the account of North Nakusp, I am unable to accept the defendant's argument that any conflict had impacted the plaintiff's performance of her duties or supported a finding of cause for termination.

Various acts of insubordination (in addition to those included in the list identified above)

[169] Under this separate heading I will deal only with those of the defendant's allegations that have not been associated to one of the allegations dealt with above.

[170] The defendant points to the events of August 10, 2021, as set out above at para. 39(h).

[171] Those assertions were not put specifically to the plaintiff in cross-examination and more importantly were not described in those terms in the testimony of Ms. Jones.

[172] The plaintiff's version of events of that date is quite different. In the weeks leading up to August 10, she testified she had told Ms. Jones she was struggling with some personal stressors and was feeling overwhelmed by the changes at the business. She sought some additional time off. She testified that on August 10 Ms. Jones confronted her about not showing Ms. Jones details of the business operations fast enough and stated that Mason Jones had indicted she should fire the plaintiff or cut her work hours to two days per week. The plaintiff described the confrontation as provoking her heart symptoms and that she told Ms. Jones she needed a moment but that Ms. Jones said she had her own mental health issues and wanted to finish the discussions. The plaintiff felt she needed to and did leave work early that day.

[173] After those interactions, each of Ms. Jones and the plaintiff then communicated with Mason Jones by text. For her part, Ms. Jones' text of August 10 at 12:32 PM, included the following:

> HJ: I just told Nancy she can go.. I'm done: she's got me in tears and I'm fucking pissed. Enough is enough.
>
> MJ: What do you need from me
>
> HJ: She just left
>
> Fuck, she's insane.
>
> She kept saying "fire me, just fire me" she wants to be fired so she can legally go after us, I can feel it.
>
> MJ: Can you call me?
>
> Or do you just want a moment

[174] The plaintiff sent her text to Mason Jones on August 11 at 8:05 AM:

NP: Hey Mase, sorry to bug you first thing in the morning, I'm sure you are busy with concrete today but I think you and I need to sit down and have a chat. I don't feel like you are getting the full story about what is happening at the store. I will not be going into work today as this needs to be sorted out before it gets even worse, plus I have no idea if I am even supposed to be working?? Haley mentioned you wanted her to fire me yesterday.

Let me know when you have some free time. Thanks

MJ: No problem, yes we've got quite a busy morning. Because I'm not there everyday I can't comment on any of it. This is something you and Haley need to figure out.

[175] Soon after that, the following exchange took place between the plaintiff and Ms. Jones:

HJ: Good morning Nanc,

When you left yesterday, you didn't say if you were coming back, and I didn't hear from you.

I am just wondering if you are coming in today (so I know whether to call in Ariana/Dave).

NP: I left because my heart was beating irregular and you wouldn't give me any space to get it back under control. It was my understanding that I was either fired or having my hours cut back to two times a week. Honestly not too sure what I am supposed to be doing.

HJ: At no time were you fired and your hours were not cut to two days a week. Currently, you are four days a week (with Friday's off, as you requested).

Please let me know when you can have a meeting with me to get this sorted out.

NP: I am unable to work today as I am still not feeling very good.

[176] That led to the plaintiff's medical leave and this communication by the plaintiff on August 13 at 6:28 PM:

Haley,

As you know I have been struggling with the stress and anxiety of trying to keep the store functioning as well as teach you the ins and outs of running the store.

Unfortunately I have reached a point where I can no longer continue on with the stress as it is putting too much strain on my heart.

I have been advised to take a medical leave of absence, effective immediately, to try and deal with some of the adverse effects this has caused me. I will be working with a number of specialists to hopefully speed my

> recovery so I can return to work ASAP. I anticipate I will be off for 4 weeks, after which time I will be reassessed by my health case professionals.
>
> I will try and help out as much as possible with the day to day things as I don't want to abandon you completely.
>
> I am very sorry that it has come to this but I need to put my health and well-being first.

[177] The text messages might be viewed as self serving for each of the plaintiff and Ms. Jones, but I conclude that, at least to some degree, they reflect the different perspectives of Ms. Jones and the plaintiff. By the evidence it is clear the events were stressful and emotional for each of them. Notably, subsequent text communication between the two show a more calm, conciliatory tone. More importantly there is nothing from Ms. Jones that followed in the immediate aftermath to indicate to the plaintiff any concern regarding insubordination by the plaintiff. Even when Ms. Jones arranged the meeting with the plaintiff to confront her over issues of concern on November 3, 2021, this interaction was not part of the series of predetermined issues she wished to hear from the plaintiff on. That was the next opportunity Ms. Jones had to speak to the plaintiff about such issues.

[178] As noted, the plaintiff indicated that it was the events of August 10 that were the tipping point for her health and led to her medical leave.

[179] It is my conclusion that this was not an example of insubordination.

[180] The defendant also refers to the plaintiff's provision of a medical note justifying her medical leave. It says she failed ". . . to provide a doctor's note in a timely manner".

[181] The plaintiff did provide medical documentation to support her leave and the defendant accepts that her medical leave was justified. The plaintiff refers to the text to Ms. Jones of August 24 with an attachment (para. 89 above). She testified it is a medical letter from a mental health and substance abuse clinician regarding her need for time away from work and referencing wait times to see a physician. The latter is in evidence separately.

[182] Ms. Jones testified she did not initially receive that text. There is nothing to show that the plaintiff did not at least intend to send it or to show she had any reason to believe it was not received by Ms. Jones. The worst that can be said of this is that there was a technological breakdown in the communication. It is certainly not an act of insubordination. The defendant's submission tacitly acknowledges this when it states the allegation "is disputed as Ms. Plank claims she sent a note, and Ms. Jones claims she did not receive it initially."

Conclusions as to Just Cause

[183] It is my conclusion that the defendant lacked just cause for termination without notice. The defendant has not proved any deceitful/dishonest conduct. To the extent the plaintiff acted inappropriately in not advising Ms. Jones that she had generated the ROE in relation to her medical leave or removed the Bluetooth speaker, the conduct clearly did not warrant dismissal.

[184] The defendant argued that the plaintiff was a key employee and had a heightened duty of loyalty and was required to be open and honest. It argues the plaintiff failed in this regard including at the November 3 meeting. I agree with the former statement but not the latter. The meeting occurred as a complete surprise to the plaintiff on her first day of her graduated return to work after sick leave. The record of what was said is far from complete and the plaintiff and Ms. Jones have different versions of how the meeting unfolded and what was said. Generally, I prefer the evidence of the plaintiff over that of Ms. Jones. Further, I conclude Ms. Jones' interpretation is influenced by pre-determinations and does not reflect an objective assessment of all of the information available.

[185] It is not clear that any disciplinary action was warranted but even if it was, dismissal was not justified. Proportionate disciplinary responses would have sustained the employment relationship. The contextual approach called upon by the authorities referenced above, does not support a finding of just cause for termination.

[186] The defendant did nothing to address any concerns until the November 3 meeting and even then, the effort, if it was an effort to address them, was obtuse. More is required from an employer before termination.

Damages for termination without Just Cause

[187] The plaintiff argues she should be entitled to 24 months' notice.

[188] She secured employment with North Nakusp in January 2022 at $20 per hour until November 13, 2023, when she got a raise to $22 per hour working 35 hours per week. She argues her damages should be calculated as follows:

80 hours per pay period x 52 pay periods (24 months x $24 per hour):	$99,840.00
(less 40 hours for graduated return until November 30, 2021):	($960.00)
Additional 2 week paid holiday time at Hapnin (24 months):	$3,840.00
Plus difference in holiday pay (6% at Hapnin, 4% at North Nakusp) of 2%:	$1,996.80
Subtotal:	**$104,716.80**
Minus mitigation of: 2022 T4 North Nakusp:	$31,026.98
Minus mitigation of: 2023 T4 North Nakusp (minus Dec):	$33,961.20
Total mitigation:	**$64,988.18**
Total wage loss $104,716.80 - $64,988.18:	**$39,728.62**

[189] I accept the methodology used in this calculation. The question is whether 24 months' notice is justified. The defendant argues nine months is appropriate.

[190] In *Keays v. Honda Canada Inc.,* 2008 SCC 39, the relevant factors to determining notice were described including the following:

> [28] In determining what constitutes reasonable notice of termination, the courts have generally applied the principles articulated by McRuer CJHC in *Bardal* , at p. 145:

> There can be no catalog 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.

[191] In *Kerfoot v. Weyerhaeuser Company Limited*, 2013 BCCA 330, our Court of Appeal provided guidance in relation to the availability of similar work:

> [42] Although *Ansari* directs a court to consider, as a factor, the availability of alternative work, by itself that factor is not determinative of the issue of notice. In concept, that factor may relate as much to individual attributes of the employee that may make the employee less or more able to find comparable employment, a feature that is closely related to the character of the terminated employment, as the general state of the labour market. It is, for example, clear that dismissal into a weak labour market may extend, to a modest extent, a notice period, but not to the point of making the employer entirely liable for the unavailability of alternate employment: *Hunter v. Northwood Pulp & Timber Ltd.* (1985), 62 B.C.L.R. 367, 7 C.C.E.L. 260 (B.C. C.A.). On the other hand, dismissal into a buoyant labour market will likely have the effect of reducing a notice period only very little, if at all, as the vigour of the labour market can easily be reflected by the principle of mitigation of loss.

[192] Ultimately each employee's situation is unique. While the plaintiff's tenure was long, a meaningful portion of that time was less than full-time as she dealt with her heart issue in and around 1997 and focussed on raising her children between 2001 and 2016.

[193] The plaintiff served a key role for the defendant but her responsibilities and skills were not sophisticated. Her skill set is well suited to a broad range of employers.

[194] She is 47 years' old.

[195] In my view, 18 months' notice is appropriate. Using the plaintiff's template for calculating the loss, the result is an award of $13,309.42. For clarity, this is 18/24ths of all of the components of the plaintiff's loss calculation except the deduction of $960 for the graduated return to work. The mitigation component is not altered. The calculation is as follows:

	Plaintiff's Calculations	**Award at 18/24ths**
80 hours per pay period x 52 pay periods (24 months x $24 per hour):	$99,840.00	$74,880.00
(less 40 hours for graduated return until November 30, 2021):	($960.00)	($960.00)
Additional 2 week paid holiday time at Hapnin (24 months):	$3,840.00	$2,880.00
Plus difference in holiday pay (6% at Hapnin, 4% at North Nakusp) of 2%:	$1,996.80	$1,497.60
Subtotal:	$104,716.80	78,297.60
Minus mitigation of: 2022 T4 North Nakusp:	$31,026.98	$31,026.98
Minus mitigation of: 2023 T4 North Nakusp (minus Dec):	$33,961.20	$33,961.20
Total mitigation:	$64,988.18	
Total wage loss:	$39,728.62	**$13,309.42**

Aggravated Damages

[196] The plaintiff also seeks an award of aggravated or bad faith damages "in the range of $40,000.00".

[197] In *Fobert v. MCRCI Medicinal Cannabis Resource Centre Inc.*, 2020 BCSC 2043 [*Fobert*], Madam Justice Fleming, as she then was provides this helpful summary of relevant law:

> [96] In the employment law context, aggravated damages are awarded to compensate a plaintiff for damage caused by the unfair or bad faith conduct of the employer during the course of dismissal.
>
> [97] In *Bailey v. Service Corporation International (Canada) ULC*, 2018 BCSC 235 (B.C. S.C.), Justice Griffin as she then was summarized the applicable legal principles, referring to *Lau v. Royal Bank of Canada*, 2017 BCCA 253 (B.C. C.A.); *Wallace v. United Grain Growers Ltd.*, [1997] 3 S.C.R. 701 (S.C.C.); and *Keays v. Honda Canada Inc.*, 2008 SCC 39 (S.C.C.):
>
> > 1. A person's work is a significant aspect of a person's life, key to self-worth.
> >
> > 2. Employers have an obligation of good faith and fair dealing in the manner of dismissal of an employee. This includes refraining from

> conduct that is untruthful, misleading or unduly insensitive (*Wallace* at paras. 95 and 98).
>
> 3. When the employment relationship ends, the employee is vulnerable and some upset can be expected. Normal upset that can be expected is not compensable. However, aggravated damages resulting from the manner of dismissal are available if they result from conduct that is unfair or in bad faith (*Honda* at paras. 56, 57).
>
> 4. Examples of facts which can give rise to aggravated damages include but are not limited to conduct that is untruthful, misleading or unduly insensitive. Other conduct in which aggravated damages may be awarded include maintaining wrongful allegations of dishonest conduct; misrepresenting the reason for the termination; and firing an employee who is on disability leave (*Lau* at para. 31).
>
> 5. Aggravated damages are compensatory based on foreseeable injury for breach of the duty of good faith and fairness. Because of this there must be some evidence that the manner of dismissal (as opposed to the mere fact of dismissal) is the cause of damaging effects on the dismissed employee, whether mental distress or intangible effects such as damage to reputation (*Lau* at paras. 54, 59-60, 62).
>
> 6. Medical evidence is not necessary to award aggravated damages based on mental distress caused by the manner of dismissal but there must be some evidence that transcends ordinary upset or distress (*Lau* at para. 49). This can include evidence from the employee or from family members or friends.
>
> [98] In determining whether Ms. Fobert has established a claim to aggravated damages there are two primary inquires. The first is whether she has established that the defendants' conduct in the course of dismissal was unfair or in bad faith. If so, the second inquiry is whether Ms. Fobert has established that she suffered mental distress as a result of that conduct, beyond the normal upset expected from the dismissal itself.

[198] The plaintiff points to the manner of the November interview; the “continued hectoring” of the plaintiff over the ROE at the November interview; the proposed employment contract reducing the plaintiff’s hours; and Ms. Jones telling the plaintiff that Mason Jones was suggesting the plaintiff be terminated.

[199] The defendant argues no award is justified.

[200] I agree that the defendant’s conduct through Ms. Jones was in all of the circumstances, concerning. Here, however, the evidence that “the manner of dismissal (as opposed to the mere fact of dismissal) is the cause of damaging

effects on the dismissed employee, whether mental distress or intangible effects such as damage to reputation" is lacking. I am unable to find the basis for an award.

Punitive Damages

[201] In *Fobert*, the Court said this of aggravated damages in the employment context:

> [113] Not aimed at compensation, punitive damages are only awarded in exceptional circumstances. They are restricted to circumstances where the employer's conduct is deserving of punishment because it is harsh, vindictive, reprehensible and malicious and compensatory damages, including aggravated damages for mental distress, are not enough to achieve the objective of deterrence: see *Honda* at para. 68 and *Kelly v. Norsemont Mining Inc.*, 2013 BCSC 147 (B.C. S.C.) at paras. 113 and 116. Denunciation and retribution are also objectives

[202] There being no entitlement to aggravated damages, I similarly dismiss the claim for punitive damages.

Costs

[203] I have not received any submissions as to costs. Given the outcome and the quantum of the award, it is my view that the parties will need to make submissions as to costs unless they are able to reach an agreement. The parties are to contact Supreme Court Scheduling in Kelowna within 45 days of receipt of this decision to advise that either no hearing as to costs is required or to schedule that hearing.

"Betton J."