IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Ram v. The Michael Lacombe Group Inc.,*
2017 BCSC 212

Date: 20170209
Docket: 164422
Registry: New Westminster

Between:

Usha Ram

Plaintiff

And

The Michael Lacombe Group Inc.
carrying on business as Burger King and Burger King Canada Holdings Inc./Placements Burger King Canada Inc.

Defendant

And

Usha Ram

Defendant by Counterclaim

Before: The Honourable Madam Justice Warren

Reasons for Judgment

Counsel for the Plaintiff:	Lee A. Cowley Shahhin Asiaee K. Barron (A/S)
Agent for the Defendant:	Janif Mohammed
Place and Dates of Trial:	New Westminster, B.C. July 27–29; December 12–15, 2016
Place and Date of Judgment:	Vancouver, B.C. February 9, 2017

Introduction

[1] The plaintiff, Usha Ram, seeks damages for wrongful dismissal against the defendant, The Michael Lacombe Group Inc. Ms. Ram was working as a cook at a Burger King restaurant on Granville Street in Vancouver when her employment was terminated without notice in January 2014. The defendant operated the Granville Street Burger King as a franchise and was Ms. Ram's employer.

[2] In the 24 years prior to her dismissal, Ms. Ram worked at several Burger King restaurants in the Greater Vancouver area. At the time of her dismissal she had been working at the Granville Street location for five years and was earning about $21,000 per year.

[3] The defendant concedes that Ms. Ram was a good and valued employee, with no record of any formal discipline. She was fired because one of the defendant's owners, Mr. Janif Mohammed, concluded that she stole a medium-sized order of fries and a drink at the end of her shift on December 27, 2013. Ms. Ram admits that when she finished her shift on the day in question she took a fish sandwich, an order of fries, and an orange pop, without paying. She says she asked the general manager, Ms. Tayyaba Salman, if she could take the food and Ms. Salman gave her permission to do so.

[4] Ms. Ram says the defendant has not established just cause for her dismissal. She also alleges the defendant failed to discharge its obligation of good faith and fair dealing, and dismissed her in a callous, high-handed and reprehensible manner. She claims that she suffered mental distress as a result, including shame, embarrassment, depression, stress and anxiety. She seeks general, aggravated and punitive damages.

[5] The defendant was self-represented. Mr. Mohammed conducted the trial on its behalf. The defendant concedes that Ms. Salman gave Ms. Ram permission to take the fish sandwich without paying for it, but says that Ms. Ram was not also authorized to take the fries or the drink. The defendant asserts that Ms. Ram stole the fries and drink and that the theft constituted just cause to dismiss her summarily.

The defendant denies that it failed to discharge its obligation of good faith and fair dealing in its termination of Ms. Ram. The defendant also says that although Ms. Ram worked as a cook at various Burger King restaurants over 24 years, she was employed by different corporate franchisees at each location, and she was employed by the defendant for only the five years she worked at the Granville Street location.

[6] The defendant advanced a counterclaim for reimbursement of costs incurred in defending this action. At the opening of the trial, Ms. Ram's counsel sought summary dismissal of the counterclaim on the basis that it disclosed no reasonable cause of action because those costs are payable, if at all, as costs of the proceeding under the *Supreme Court Civil Rules*, B.C. Reg. 168/2009. I agreed and granted an order dismissing the counterclaim.

Issues

[7] The issues are:

1. Was the defendant justified in terminating Ms. Ram's employment for cause?
2. If the defendant was not justified in terminating Ms. Ram's employment for cause, what is the appropriate notice period?
3. If the defendant was not justified in terminating Ms. Ram's employment for cause, what damages should she be awarded and, in particular, has she established a claim to aggravated or punitive damages, or both, in addition to general damages reflecting the compensation she would have earned during the notice period?

Background

[8] Many of the facts are not in dispute. In the following background summary, I specify the few areas of factual disagreement.

[9] Ms. Ram was 55 years old at the time of the dismissal. She immigrated to Canada from Fiji in 1987, when she was 28 years old. She has a grade 8 education. Her first language is a form of Hindi spoken in Fiji. She testified through a Hindi interpreter but she is able to communicate in English at a basic level.

[10] Ms. Ram is married and has two children, both of whom are adults. Her husband is physically disabled and unable to work. Her son was living with her at the time of the dismissal, but he has since married and moved out. Her daughter, who is disabled by mental illness, lives with Ms. Ram and Ms. Ram's husband.

[11] Ms. Ram started working as a cook at a Burger King restaurant on East Hastings Street in 1989. Mr. Mohammed was either the manager of that restaurant or an area manager with responsibility for that restaurant. She then worked at the Main Street Burger King, the King George Highway Burger King, the Kings Cross Burger King, and finally the Granville Street Burger King. The length of time she spent at each location was not made clear but it is agreed that she started working at the Granville Street location in December 2008, and just prior to that she had been working at the Kings Cross location. Apart for a period of absence following a car accident just before joining the King George Burger King (the duration of which was not specified), she was continuously employed at Burger King restaurants during the 24 years between 1989 and January 2014.

[12] Each of the Burger King restaurants in question is owned and operated by a different corporate franchisee. Mr. Mohammed was the manager or area manager for the Hastings Street, Main Street, Kings Cross and Granville Street locations at the times Ms. Ram worked at those locations. As already mentioned, he is also one of the owners of the defendant corporation, which operates the Granville Street location. Michael Lacombe is the other owner of the defendant. Mr. Mohammed denies having any involvement in the King George location, but that is disputed by Ms. Ram.

[13] Ms. Ram paid little, if any, attention to which company was her actual employer at any given time. As far as she was concerned, she worked for Burger

King. She considered Mr. Mohammed to be her boss. She testified that each time she was transferred from one location to another the arrangements were made by Mr. Mohammed. Her employment was formally terminated at one location and she became employed by the company that operated the new location, but she paid no attention to these details. She did not receive severance pay at the time of any of the transfers and there was never any discussion to the effect that she would lose her seniority upon being transferred.

[14] Mr. Mohammed does not dispute being involved in most of the Ms. Ram's transfers. He agreed that each transfer but one was his decision. In his questioning of Ms. Ram in cross-examination, he suggested that he was not involved in the transfer to the King George location, but Ms. Ram maintained that he arranged that transfer at her request. She testified that when she was about to return to work after the car accident, she asked Mr. Mohammed to transfer her to a location closer to her home and he then arranged for her to work at the King George Highway location where she stayed for six or seven months. She testified that she saw Mr. Mohammed at the King George location from time to time and eventually he arranged for her to be transferred to the Kings Cross location. Mr. Mohammed's testimony on this point was limited to an assertion that "one time Ms. Ram quit" and he had nothing to do with it, but he provided no context or details concerning this particular incident or Ms. Ram's transfer to either the King George Highway location or the Kings Cross location.

[15] While Ms. Ram was working at the Kings Cross location she asked Mr. Mohammed for additional hours. He told her he was going to be opening a new Burger King on Granville Street and if she moved to that location then he would give her full time, consistent hours on the weekday opening shift. He also told her she would be paid $9 per hour, which was a $1 per hour raise. Mr. Mohammed testified that he specifically told Ms. Ram she would have to formally quit her job at Kings Cross and then become employed by the defendant at the new location, but he acknowledged that he did not tell her she would lose her seniority. There was no

discussion between Mr. Mohammed and Ms. Ram about whether her past years of service would be recognized by the defendant.

[16] Ms. Ram agreed to the move to the Granville Street location. She started working there in December 2008. She consistently worked the weekday opening shift, from 6:00 a.m. to 2:00 p.m. She was initially paid $9 per hour. At the time of her dismissal about five years later she was earning $10.25 per hour, which was then the minimum wage.

[17] Ms. Ram was a hard-working, reliable employee. Mr. Mohammed characterized her as a "great lady", a "wonderful lady", and a "good worker". She had some minor interpersonal difficulties with one co-worker but other than that she got along well with her colleagues. She testified that she intended to work until age 65. Mr. Mohammed agreed that but for the dismissal, it is likely that Ms. Ram would have continued to work at the Granville Street Burger King until age 65 or even longer.

[18] Ms. Ram was never subjected to any formal discipline, although the defendant says that on three occasions she was warned about giving her son more food than he had paid for. Ms. Melita Palting, the assistant manager at the Granville Street Burger King, testified that on three occasions between December 2012 and June 2013 she concluded that Ms. Ram had given her son more than four chicken tenders when he had paid for only four. She referred to this as "overserving". She testified that on each occasion she confronted Ms. Ram and Ms. Ram cried, asked her not to tell Mr. Mohammed, and promised she would not overserve her son again. Ms. Palting said she accepted Ms. Ram's promise the first two times but on the third occasion she told Mr. Mohammed about the incident and also about the two prior incidents. She said she asked Mr. Mohammed not to speak to Ms. Ram about the overserving because she had already told Ms. Ram that Mr. Mohammed would be informed. Ms. Ram was upset, and Ms. Palting was confident that Ms. Ram would not overserve her son again. Mr. Mohammed acknowledged that Ms. Palting told him about these incidents in June 2013, that he agreed not to speak to Ms. Ram,

and that he did not consider the matter to be serious because Ms. Ram's son had paid something for the food (although not the full amount due). Ms. Ram and her son, Evan Ram, flatly denied the overserving allegations. I address the conflict in the evidence on this point later.

[19] In 2013, Ms. Salman became the general manager at the Granville Street Burger King. She had previously worked as an assistant manager and before that as a regular crew member, and she and Ms. Ram were friendly. Mr. Mohammed and Ms. Salman are friends. He is her landlord and they live next door to each other.

[20] There is little dispute about what the defendant's policy is with respect to employees taking or consuming food and drinks. While an employee is working, he or she is entitled to free drinks and employees working the graveyard shift are also entitled to a free meal. Otherwise, employees receive a 50% discount on the price of food and drinks. This discount also applies to the employee's family members. There is no firm definition of "family members". It is understood that the discount applies to immediate family, such as an employee's spouse and children who are living with the employee, and managers have the discretion to grant the discount to more extended family members as well. In addition, the managers have the discretion to specifically authorize an employee to take food or drinks for free.

[21] The one area of dispute about the employee food and drink policy concerns whether employees who have just finished a shift are allowed to take a final free drink with them when they leave work. Ms. Ram testified that employees are allowed to take a pop at the end of their shift and drink it while preparing to leave and while leaving the premises. She acknowledged that they are not supposed to pack a drink to take home with them to consume later, but she said that if they start drinking it on the premises they can walk out with it and drink it on the way home. She said she often did this in the presence of Mr. Mohammed and he never stopped her. In contrast, Mr. Mohammed testified that employees are not allowed to leave the premises with a free drink. He agreed that an employee could take a free drink

in the final moments of a shift, but he insisted the employee would have to either finish it on the premises or throw it out before leaving. Ms. Salman's testimony aligned with Mr. Mohammed's but Ms. Palting's understanding of the policy was somewhat different. She testified that "no matter what" employees have to pay half price for both food and drinks unless a manager specifically authorizes them to take something for free, which suggests that she mistakenly thought employees had to pay half price for drinks even while working.

[22] On Thursday, December 26, 2013, Ms. Ram worked her usual 6:00 a.m. to 2:00 p.m. shift. She testified that in the afternoon, Ms. Palting told her that her name was not on the schedule for the following week. Ms. Ram testified that she was not concerned about this because she was a full-time employee and Ms. Palting was known as a bit of a gossip. She ignored what Ms. Palting told her and did not even bother to check the schedule. Ms. Palting denied saying anything to Ms. Ram about the schedule. She was not cross-examined on this point.

[23] On Friday, December 27, 2013, Ms. Ram worked her usual 6:00 a.m. to 2:00 p.m. shift. She testified that at the end of the shift she wanted to purchase some food but discovered she did not have her wallet. She asked Ms. Salman if she could take some food for free. What she asked for specifically is in dispute. Nevertheless, Ms. Salman granted her request. Ms. Ram testified that she then packed a fish sandwich and fries into a bag and that Ms. Salman was standing next to her as she did so. Ms. Ram testified that she also took a small orange pop and then left the premises.

[24] It is not disputed that Ms. Ram asked Ms. Salman for free food at the end of her shift on December 27, 2013. What is in dispute is what food Ms. Salman actually authorized her to take. As discussed in more detail below, Ms. Ram displayed considerable difficulty in testifying and she often appeared to be confused. The general thrust of her evidence was that she asked Ms. Salman for a fish sandwich and fries and that she took the drink because employees were allowed to take a free drink at the end of their shift. It is agreed that she spoke to Ms. Salman

in Hindi. When Ms. Ram was asked to relay, in Hindi, the precise words she used, the interpreter interpreted her answer as, "Can I take fish fry?".

[25] Ms. Salman testified that there is no word for "sandwich" in Hindi. She said Ms. Ram's request, translated literally, was, "Can I have a fish?", which Ms. Salman interpreted, at the time, as, "Can I have a fish sandwich?". Ms. Salman testified that she understood Ms. Ram to be asking for a fish sandwich and that she granted that request.

[26] There is no dispute that Ms. Salman saw Ms. Ram pack a fish sandwich and fries in a bag and then take the drink as well. She agreed that Ms. Ram made no attempt to conceal what she was taking and that she took the food items in full view of Ms. Salman. Ms. Salman testified she was working on the till serving a customer at the time and Ms. Ram left before she finished with the customer. As a result, she did not have an opportunity to immediately confront Ms. Ram about taking the fries and drink.

[27] The price of a fish sandwich is discounted on Fridays. On the day in question, the difference in price between a fish sandwich alone and a fish sandwich combo meal, which consists of the sandwich, fries and a drink, was about $1. After applying the employee discount, the loss to the defendant of Ms. Ram taking the fries and drink was about 50¢.

[28] On Monday, December 30, 2013, Ms. Ram went into work for her usual 6:00 a.m. to 2:00 p.m. shift. Ms. Salman also worked that day, starting at 9:00 a.m. Ms. Salman did not ask Ms. Ram about taking the fries and drink. She testified that she was waiting to see if Ms. Ram would pay for the items. At about 11:30 a.m., having concluded that Ms. Ram was not going to pay, Ms. Salman reported the matter to Mr. Mohammed. She testified that she told Mr. Mohammed that Ms. Ram asked to take a fish sandwich, that she authorized her to do so, and that Ms. Ram took an order of fries and a drink in addition to the sandwich. Ms. Salman also told him that she did not confront Ms. Ram at the time because she was serving a customer.

[29] Mr. Mohammed asked Ms. Salman no questions. He did not ask whether Ms. Salman thought it was possible that she and Ms. Ram had a misunderstanding about what food Ms. Ram had asked to take and he did not ask whether Ms. Ram attempted to conceal the fries or drink. He told Ms. Salman that he would meet with her and Ms. Ram later in the day.

[30] At about 1:00 p.m. on December 30, 2013, Ms. Ram was asked to accompany Ms. Salman to Mr. Mohammed's office. Ms. Ram did so. Ms. Ram testified that as soon as she and Ms. Salman entered the office, Ms. Salman started weeping and said words to the effect of, "Don't put me into trouble – I don't want to be in any mess". Ms. Ram said Mr. Mohammed then asked her, Ms. Ram, whether she stole a fish sandwich and fries. Ms. Ram said she told him that Ms. Salman said she could take the food. She said she then offered to pay for the food, but he did not take her money. She testified that Mr. Mohammed called her a thief, and told her to go home and wait to be apprised of the consequences of her conduct.

[31] Ms. Ram's version of what happened during the meeting on December 30, 2013 was not shaken in cross-examination. Mr. Mohammed urged her to acknowledge that, during the meeting, she admitted to taking the fries and drink without permission, but she insisted that she told Mr. Mohammed, at the meeting, that Ms. Salman gave her permission to take the food. When asked directly whether she only asked Ms. Salman for "free fish" she insisted that she asked for both fish and fries. She also testified that she offered to pay for the food because she wanted to keep her job.

[32] Mr. Mohammed testified that he opened the December 30, 2013 meeting by asking Ms. Ram whether she had something to tell him. She replied she did not. He then asked why she took "free food" home with her. He said Ms. Ram immediately said, "I'm sorry and I will pay for it". He said he then asked Ms. Salman to repeat what she had told him earlier. Ms. Salman repeated the same version of events; particularly that she had authorized only the free sandwich. He said Ms. Ram did not dispute Ms. Salman's version, and that she started crying, said she was sorry,

and again offered to pay for the food. He told Ms. Ram that her conduct amounted to theft and that he was suspending her. He said she left the office crying. He testified that he considered, and still considers, Ms. Ram's apology and offer to pay to be an admission of theft. Ms. Salman's evidence about the December 30, 2013 meeting aligned with that of Mr. Mohammed.

[33] Ms. Ram was upset and crying as she left Mr. Mohammed's office. As she came down the stairs, some other employees were looking at her and, in their presence, Michael Lacombe asked her more than once whether she had been fired. Initially, she testified that she responded "yes" but later she testified that she said "no". She also testified that she could not speak further because she was very embarrassed and in shock, and because the other employees were looking at her. She left the premises and went home. She was not cross-examined about this and Mr. Lacombe did not testify.

[34] Ms. Ram testified that later in the day on December 30, 2013, she received a phone call from Ms. Salman who advised her that she was suspended. Initially, she testified that Ms. Salman said she was terminated but she later clarified that she meant suspended. She said she was very upset. She phoned the Burger King office phone number and asked to speak to Mr. Mohammed but was told he was in a meeting. She phoned again but no one answered the phone. She then phoned Mr. Mohammed's cell phone and spoke to him. She testified that she told him he had fired her for a trivial thing and she started crying. She said he told her he was in a meeting and could not talk, but that Mr. Lacombe and Ms. Salman would be making a decision about the consequences of her conduct. I note that although Ms. Ram testified that as of December 30, 2013 she had only been suspended, she initially used the word "fired" when relaying what she said to Mr. Mohammed during her phone call to him that day; namely, that he had "fired" her for a trivial thing. However, later, in cross-examination, she said that during this phone call she asked Mr. Mohammed, "Are you going to fire me for a trivial thing?" Mr. Mohammed did not testify about this phone call.

[35] Ms. Salman acknowledged phoning Ms. Ram after the meeting on December 30, but she denied telling her she was suspended. Her evidence was that Mr. Mohammed advised Ms. Ram during the December 30 meeting that she was being suspended. She said she phoned Ms. Ram after the meeting only because Ms. Ram had left a message asking her to call. She said when she returned Ms. Ram's call, Ms. Ram said, "I used to support you all the time, and you couldn't hide a small thing, fries and a drink, for me". This version of the December 30, 2013 phone call was not put to Ms. Ram in cross-examination.

[36] Ms. Ram's employment was subsequently terminated, but the date that occurred is in dispute. It is not disputed that Ms. Ram went to see her family doctor on January 2, 9 and 20, 2014, and that on each occasion her doctor gave her a note stating that she was unable to work. She testified that this was because of emotional distress caused by the dismissal and, in particular, the theft allegation. The medical notes dated January 2 and 9 each state that Ms. Ram is unable to work for "medical reasons" while the note of January 20, simply says she is unable to work for three to four months. It is not disputed that on the day after Ms. Ram received each of these notes, her son, Evan Ram, delivered a copy of the note to Mr. Mohammed. Accordingly, by January 3, 2014, Mr. Mohammed was aware that Ms. Ram's doctor had given her the January 2 note stating she could not work due to medical reasons. Ms. Ram claims that her employment was terminated after Mr. Mohammed had been made aware of her medical condition, which she submits supports her claims for aggravated and punitive damages.

[37] Ms. Ram testified that Ms. Salman phoned her on January 9, 2014, after she had returned home from her doctor's appointment earlier that day, and told her that her employment was being terminated. She said there was nothing more to the phone call – Ms. Salman simply said, "You are terminated" and then she hung up. Evan Ram corroborated his mother's testimony on this point. He said he was standing next to his mother on January 9, 2014 when the phone rang, he saw his mother answer the phone, and then she asked him what "terminated" meant.

[38] Mr. Mohammed and Ms. Salman both testified that Ms. Salman phoned Ms. Ram on January 1, 2014 and advised her that her employment was being terminated. Mr. Mohammed testified that he instructed Ms. Salman to make that call on January 1, 2014 and Ms. Salman testified that she did so. Ms. Salman said she had more than one phone number for Ms. Ram. She said she could not remember which phone number she used, but that she did phone her on January 1, 2014 and during that call she told Ms. Ram her employment was being terminated. She said she called Ms. Ram again on January 8, 2014 to tell her that her final pay stub would be mailed to her.

[39] Records for Ms. Ram's cell phone, which were apparently obtained after Ms. Ram and Evan Ram testified, show that Ms. Ram received a call on her cell phone from the Burger King office on December 30, 2013 and also on January 8, 2014. There is no record of a call being made from Burger King to her cell phone on January 1 or January 9, 2014. However, it is agreed that Ms. Ram also had a home phone, that the defendant used her home phone number as one of her contact numbers, and that the home phone records do not identify incoming local calls.

[40] Ms. Ram's counsel submitted that it is more likely than not that the dismissal call was made on January 8, 2014, because that date aligns with the evidence of Ms. Ram and Evan Ram, and with the cell phone records showing an incoming call on January 8 but not on January 1. In argument, her counsel said that Ms. Ram and Evan Ram testified that the termination call occurred on January 8. That is plainly not so. They both testified that the termination call was received by Ms. Ram on January 9, and Ms. Ram said she received the call after getting home from the doctor. The medical notes in evidence establish that she went to the doctor on January 9. There is no evidence that she also went to the doctor on January 8. Further, given that the defendant also used Ms. Ram's home phone as a contact number, the fact that a call was made to Ms. Ram's cell phone on January 8 but not on January 1 does not compel the conclusion that the termination call was made on January 8 and not on January 1.

[41] It is clear from the cell phone records that a call was placed to Ms. Ram's cell phone on January 8. The only evidence about the purpose of that call is Ms. Salman's evidence that she called Ms. Ram on that day to tell her that her final pay stub would be mailed to her. I find that Ms. Salman phoned Ms. Ram on January 8 to tell her that her final pay stub would be mailed to her. The only reasonable inference is that Ms. Ram had, by that time, already been advised that her employment was being terminated. On the evidence before me, that could only have occurred on January 1. For the foregoing reasons, I am not persuaded that Ms. Ram's employment was terminated after Mr. Mohammed was given the January 2, 2014 medical note. Further, I note that in Ms. Ram's Notice of Civil Claim it is alleged that her employment was terminated on December 30, 2013. No application was brought to amend that pleading.

[42] Ms. Ram has not secured alternative employment. She has not made any effort to find another job. Her position is that she is permanently disabled as a result of anxiety and the worsening of her pre-existing depression caused by the theft allegation. There is very little, if any, evidence to support that position. In particular, there is no medical evidence.

[43] Ms. Ram acknowledged that she has suffered from depression since about 2010. Prior to the dismissal, her depression was well managed with medication. In 2012, she was hospitalized for two days with chest pain. In cross-examination she referred to this as a heart problem. She testified that she recovered from that episode.

[44] Ms. Ram was clearly very upset and embarrassed after the December 30, 2013 meeting. She went to her family doctor on January 2, 2014 because she was having difficulty sleeping. She went back to the doctor on January 9 because she was having chest pains and was depressed. She said she could not sleep because she was concerned about losing her job. She went to her family doctor again on January 20. At each of these three visits, her family doctor gave her a note to the effect that she could not work, but those notes are not admissible medical opinion

evidence and do not provide a basis upon which I could find that she was, in fact, unable to work.

[45] Ms. Ram's own evidence about her ability to work after the termination of her employment by the defendant was vague. In her direct evidence she said only that she has continued to see her doctor regularly. In cross-examination she said that after the termination she was very upset, depressed and crying, but she did not describe how long these symptoms persisted or whether they worsened or improved. She said that she continues to suffer from stress and anxiety as a result of her name being tarnished by the theft allegation, but she provided no details that would permit me to make findings concerning the intensity of the symptoms or the impact they have on her ability to function. She said she sees a psychiatrist once a month or once every two months but she did not give any evidence about having been diagnosed with any particular psychiatric illness.

[46] The only other evidence of Ms. Ram's condition after the termination came from Evan Ram. However, his evidence was even less detailed than was his mother's evidence. He said little more than that in the year after the termination his mother was upset and continued to see her psychiatrist.

Credibility

[47] There were aspects of the testimony of all the witnesses, with the exception of Ms. Palting, that gave rise to credibility concerns.

[48] Ms. Ram displayed considerable difficulty in testifying. She often appeared to be confused. Her answers were at times unresponsive to the questions. On occasion, I was left with the impression that she was focussed more on repeating her position than telling me what had actually happened. She also had a tendency to express opinions for which she seemed unable to provide a reasonable basis. For example, she asserted more than once that Mr. Mohammed wanted to get rid of her because she was old. However, when asked to explain what that was based on, she was unable to provide a coherent explanation and, in cross-examination, she

acknowledged knowing several older employees who were still working for the defendant.

[49] Some aspects of Ms. Ram's testimony were embellished. During her direct examination she stated, more than once, that at the time of the termination she was the sole breadwinner for the family. Her daughter was characterized as profoundly mentally disabled and her husband as physically disabled. However, in cross-examination she admitted that both the daughter and the husband received income in the form of disability benefits and she also acknowledged that the family was receiving rental income from a basement suite.

[50] Ms. Ram's counsel submitted these problems stemmed from her intellectual deficit, lack of sophistication and psychiatric condition. I was not persuaded that this is so. There was no evidence to support the conclusion that she suffers from any material intellectual deficit or psychiatric condition. I concluded that the above mentioned issues more likely arose from a combination of nervousness associated with being in court; stress resulting from having to face Mr. Mohammed, who conducted the trial on behalf of the defendant and personally questioned her in cross-examination; and ongoing indignation over the way she was treated by Mr. Mohammed. She would not look at Mr. Mohammed and kept her body turned towards me while she was testifying, in a position that placed her back to Mr. Mohammed during most of the cross-examination. She appeared visibly nervous and it seemed to me that this affected her ability to concentrate on the questions she was being asked.

[51] More troubling are two aspects of Ms. Ram's testimony that were, in my view, intentionally misleading or incorrect. The first of these related to whether Ms. Ram was aware of the identity of her actual employer. Ms. Ram maintained that she believed she was employed by Burger King. When presented with Employment Standards Branch complaint forms that she signed and that expressly identified the defendant as her employer, she claimed that she simply signed her name to the forms without reading them. That, alone, is not implausible. Her English skills are

limited and I accept that it would be difficult, if not impossible, for her to read the forms and understand their contents. The problem is that she gave wildly varying accounts of other people who she said filled in the forms on her behalf. Initially, she said one of the forms was filled in by one of the defendant's managers after the termination. She later said that form was filled in by the daughter of a friend. She appeared reluctant to identify this person by name. She later said she did not know who filled in the portion of the form that identified the defendant as her employer. I accept that during the many years she worked at Burger King restaurants, Ms. Ram had no understanding of the potential legal implications of transferring among locations operated by different corporations. However, I do not accept that she was unaware that the defendant corporation was her actual employer during the time she worked at the Granville Street location. The only reasonable conclusion to draw from the whole of her evidence about the Employment Standards Branch forms is that she thought that it would be detrimental to her case to acknowledge this and so she resisted disclosing the circumstances under which she had come to sign the forms.

[52] The second of these aspects related to the allegations of overserving. I accepted Ms. Palting's evidence. Her testimony was responsive, straightforward and reasonable. She was not shown to have given inconsistent evidence and she was not shown to have any bias or inclination to shape her evidence to favour the defendant. Her testimony about the overserving incidents, in particular, was appropriately detailed, reasonable and entirely plausible. On the strength of that evidence I find that the three overserving incidents did occur as described by Ms. Palting. Accordingly, I also find that Ms. Ram and her son, Evan Ram, were untruthful when they denied the overserving incidents because they concluded admitting the truth would be detrimental to Ms. Ram's case.

[53] Evan Ram's testimony was brief, but his credibility suffered from his denial of the overserving incidents.

[54] There were also aspects of Mr. Mohammed's testimony that were troubling. There was an inconsistency in his evidence on a fundamental point. As discussed in more detail later, Mr. Mohammed insisted, at the trial, that he has a "zero-tolerance" for theft by his employees irrespective of the value of the items stolen or the circumstances. However, he also testified that the incidents of overserving were not particularly serious and were materially different from taking food without paying at all, even though they involved Ms. Ram giving her son food that he had not paid for.

[55] On one occasion, Mr. Mohammed was also unable to resist shaping his evidence in a manner that he thought would be more favourable to the defendant's position. At trial, he emphatically denied being angry at Ms. Ram during the December 30 meeting but during his examination for discovery he said that he had been angry. When faced with this inconsistency, he attempted to distinguish between being angry at Ms. Ram and being angry at the situation, but I was not persuaded that there was any material distinction.

[56] Ms. Salman's testimony aligned almost perfectly with Mr. Mohammed's testimony on all material aspects. She acknowledged that before testifying she met with him many times to discuss the case, and I was left with the impression that some of her recollections, particularly the details of what transpired at the December 30 meeting, had been influenced by Mr. Mohammed. In addition, on at least one occasion, her testimony was embellished in a manner that appeared intended to favour the defendant. Although Ms. Salman admitted that Ms. Ram made no effort to conceal the food she was taking at the end of her shift on December 30, 2013, she then characterized Ms. Ram as "running" to the back of the restaurant after taking the food. When challenged by Ms. Ram's counsel over that characterization, she acknowledged that, in fact, Ms. Ram did not run at all.

[57] In the circumstances, I am not able to wholly prefer the evidence of some witnesses over that of others. Where it has been necessary for me to resolve disputed facts, I have preferred the testimony that is the most plausible when

considered together with independent evidence, common sense, and the probabilities affecting the case as a whole.

Has the defendant established just cause?

Legal principles

[58] The Supreme Court of Canada made clear in *McKinley v. BC Tel*, 2001 SCC 38, that dishonest conduct on the part of an employee does not always amount to cause for dismissal. Whether an employer is justified in dismissing an employee without notice on grounds of dishonesty, including theft, is a question that requires an assessment of the seriousness of the misconduct in the context of the particular case in order to determine whether dismissal without notice is a proportionate sanction. Accordingly, where an employer alleges theft as justification for dismissal without notice, it is necessary to determine whether the evidence establishes that the theft actually occurred and, if so, whether the specific nature of the misconduct in the specific circumstances warrants dismissal. The employer bears the onus of establishing both parts of the test on a balance of probabilities.

[59] Where criminal conduct or dishonesty is relied on as a ground for termination, the court must engage in a vigorous assessment of the evidence and will require "particularly cogent evidence" to conclude that it is more likely than not that the misconduct actually occurred: *Price v. 481530 BC Ltd.*, 2016 BCSC 1940 at para. 180; *Porta v. Weyerhaeuser Canada Ltd.*, 2001 BCSC 1480 at para. 10.

[60] If the court concludes that it is more likely than not that the employee engaged in the misconduct alleged, the court must then consider the misconduct in context to determine whether it has caused an "irreparable breakdown of the employment relationship": *Steel v. Coast Capital Savings Credit Union*, 2015 BCCA 127 at para. 27; *Nishima v. Azuma Foods (Canada) Co. Ltd.*, 2010 BCSC 502 at para. 194. The principle of proportionality is applied to determine whether dismissal is an appropriate sanction or whether, given the nature and seriousness of the misconduct, it remains reconcilable with sustaining the employment relationship. As stated by Justice Iacobucci for the Court in *McKinley* at para. 57:

> 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 behavior 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.

Discussion

[61] Ms. Ram's position is that the defendant has not proved that Ms. Ram took the fries and drink with a dishonest or deceitful intent. She emphasizes that she asked Ms. Salman for permission to take food home with her without paying. She says she understood she was authorized by Ms. Salman to take both the fish sandwich and the fries and that it was consistent with the defendant's employee drink policy for her to leave the premises with a free drink after her shift. She says, at most, there was a misunderstanding about what specific food items she was authorized to take.

[62] In the alternative, she says even if the defendant has proved, on a balance of probabilities, that she was dishonest in taking the fries and the drink, the termination of her employment is not a proportionate sanction in the circumstances. In this regard she relies on the negligible value of the food items in question and her long and unblemished tenure with Burger King. Mr. Mohammed acknowledged that notwithstanding the termination of Ms. Ram's employment, he would have helped her find alternative work and Ms. Ram says this must be viewed as a concession that taking an order of fries and drink without authorization, in the circumstances of this case, is not serious misconduct.

[63] The defendant's position is that it was justified in dismissing Ms. Ram for cause. The defendant says Ms. Ram was authorized only to take the sandwich and that she intentionally and with dishonest intent also took the fries and the drink. The defendant says that Ms. Ram's apology and offer to pay when confronted by Mr. Mohammed on December 30, 2013, amounts to an admission of theft.

[64] In final submissions, the defendant sought to rely on the three prior incidents of Ms. Ram overserving her son chicken tenders as factors that, when considered

cumulatively with the incident of December 27, 2013, justify the summary dismissal. However, that submission is inconsistent with the testimony of Mr. Mohammed. He said that he did not consider the overserving incidents to be serious and he acknowledged that he did not even speak to Ms. Ram about those incidents. In particular, it is clear from his version of what was said during the December 30 meeting that he did not mention those incidents to Ms. Ram at that time. In fact, Mr. Mohammed made clear that it was the single incident of alleged dishonesty on December 27, 2013 that caused him to fire Ms. Ram. In his view, the dismissal was justified because it is necessary that the defendant's employees realize that theft of food, irrespective of its value, will not be tolerated.

[65] The first question is whether the defendant has established that it is more likely than not that Ms. Ram committed theft when she took the fries and the drink on December 27, 2013. This requires the defendant to prove, on a balance of probabilities, both that Ms. Ram took the food items and that, in doing so, she had the requisite intent for theft: *Dhatt v. Kal Tire Ltd.*, 2015 BCSC 1177, at paras. 58–59; *Kalsi v. Greater Vancouver Associate Stores Ltd.*, 2009 BCSC 287, at para. 276.

[66] There is no dispute that Ms. Ram took a fish sandwich, fries and a drink without paying for them. The only question is whether the defendant has proved that she intended to steal the fries and the drink. For the following reasons, I find that the defendant has not discharged this burden.

[67] Although I have some concerns about the credibility of certain aspects of Ms. Ram's testimony, I accept that she believed she was authorized by Ms. Salman to take both the sandwich and the fries, and that she believed it was consistent with the defendant's employee drink policy for her to take a free drink with her at the end of her shift. This aspect of her evidence harmonizes with independent evidence and with common sense.

[68] First, I find there was ambiguity about what Ms. Ram was authorized to take. She spoke to Ms. Salman in Hindi and there is no word in that language for "sandwich". Further, it was clear from the evidence of Ms. Salman and Ms. Palting

that people very commonly order a "combo meal", which includes fries as well as a sandwich. Even if Ms. Ram's words, translated literally, were, "Can I have a fish?", it is plausible that she meant a fish combo. Ms. Salman did not clarify the request. Dealing specifically with the drink, I am satisfied that the defendant's employee drink policy was somewhat ambiguous. There was no evidence that the policy is expressed in written form. Ms. Ram testified that on several occasions, Mr. Mohammed observed her leaving the premises at the end of her shift with a free drink and that he never told her this was inconsistent with the policy. Although he and Ms. Salman testified that employees were not allowed to take free drinks off the premises, he did not specifically deny Ms. Ram's claim that he had previously observed her leaving with a free drink and he had not stopped her from doing so. Ms. Palting's testimony suggests that there was some confusion about the drink policy generally. As already mentioned, she testified that employees always had to pay half price for drinks and, while that is not consistent with Ms. Ram's conduct on the day in question, the fact that Ms. Palting appears to have had an understanding that differs from that of the other witnesses suggests some ambiguity about the policy. In all the circumstances, whether Ms. Ram asked for "fish fry", as she said she did, or for "a fish", as Ms. Salman said she did, it is entirely plausible that she believed that she had authorization to take all three items.

[69] Second, Ms. Ram did not act surreptitiously. The defendant concedes she made no effort to conceal the items in question. She packed the sandwich and fries, and took the drink, in full view of Ms. Salman and immediately after asking Ms. Salman for free food. It is very unlikely that she would have done so if she thought she was authorized to only take the sandwich.

[70] Third, it is unlikely that Ms. Ram would have asked Ms. Salman for only some of the food she intended to take. Both Ms. Salman and Ms. Palting testified that it was quite common for managers to authorize employees to take free food. In these circumstances, it is unlikely that Ms. Ram would have asked only for a sandwich if she intended to take fries as well. It is more likely that she would have asked for both food items because she would have had a high degree of confidence that

Ms. Salman would grant her request. In other words, it would not make sense, in light of the fact that managers often authorized free food, for her to only ask for the sandwich if she wanted an order of fries as well.

[71] I do not intend to suggest that I do not believe Ms. Salman's testimony to the effect that she interpreted Ms. Ram's request as a request for a fish sandwich only. However, it is more likely than not that there was a misunderstanding between Ms. Salman and Ms. Ram as to what, specifically, Ms. Ram was asking to take.

[72] I have considered the defendant's submission that Ms. Ram's apology and offer to pay for the food during the December 30 meeting constituted an admission of theft. Given the circumstances Ms. Ram found herself in, specifically being accused of theft by Mr. Mohammed in the presence of Ms. Salman, I do not consider her apology and offer to pay for the food to be an admission. She testified that she offered to pay for the food because she was very upset and she thought that if she offered to pay, Mr. Mohammed might be more inclined to let her keep her job. I accept that explanation. It is apparent that she was intimidated and upset at the meeting. In all the circumstances, I place very little weight on her immediate reaction to the accusation.

[73] I have also considered Ms. Salman's evidence that when she phoned Ms. Ram on December 30, after the meeting in Mr. Mohammed's office, Ms. Ram said, "I used to support you all the time, and you couldn't hide a small thing, fries and a drink, for me". As already noted, this was not put to Ms. Ram in cross-examination with the result that she did not have the opportunity to deny having made this statement or to provide an explanation. It is not in dispute that Ms. Ram's English is less than fluent. Even if she made a statement to this effect, she may have meant that Ms. Salman ought to have acknowledged the possibility of a misunderstanding between them, particularly given their history of working together, their friendly relationship, Ms. Ram's good record, and the small value of the food in question. In all the circumstances, this aspect of Ms. Salman's testimony does not carry sufficient weight to establish, on a balance of probabilities, that Ms. Ram intended to steal the

fries and the drink, especially given the particularly cogent evidence and vigorous assessment that is required where criminal conduct or dishonesty is relied on as a ground for termination.

[74] As the defendant has not established that Ms. Ram had the requisite intent for theft, it is not necessary to address the second part of the test applicable to the question of whether an employee's dishonesty constitutes just cause for summary dismissal. Here, the dishonesty has not been established and accordingly the defendant has failed to establish just cause. Nevertheless, I think it is important to say something about the second part of the test given Mr. Mohammed's emphatically expressed views with respect to the consequences of employee dishonesty. He testified that he has "a zero tolerance" policy for theft. In his submission "theft is theft", "it's not the amount but the principle", and "if people steal they should get fired", no matter the circumstances.

[75] As explained above, where an employer alleges theft as justification for dismissal without notice, it is necessary for the employer to prove not only that the theft actually occurred but also that the specific nature of the misconduct in the specific circumstances warrants dismissal. It is necessary to consider whether dismissal is a proportionate sanction given the seriousness of the misconduct. This principle of proportionality reflects the importance of work to individuals in our society and, in particular, the sense of identity and self-worth individuals derive from their employment.

[76] Even if the defendant had established Ms. Ram's conduct in taking the fries and drink was intentionally dishonest, in this case I would not have found that dismissal was a proportionate sanction. In the specific circumstances of this case, the taking of an order of fries and a drink when authorized only to take a sandwich would not cause an irreparable breakdown in the employment relationship.

[77] Mr. Mohammed did not consider the particular circumstances or make any assessment of the actual seriousness of Ms. Ram's conduct before deciding to terminate her employment. He claimed that he did not do so because it is necessary

to ensure that employees know that taking food without authorization will not be tolerated. However, his failure to take any steps to address overserving incidents is inconsistent with the view that theft of food always warrants dismissal. On his own evidence, he continued to consider Ms. Ram to be an excellent employee even after Ms. Palting told him about the overserving. He even claimed that he would have helped Ms. Ram find alternative work after the termination, which indicates that he did not actually think Ms. Ram's conduct was so egregious as to irreparably undermine the relationship.

[78] In *Roe v. British Columbia Ferry Services Ltd.*, 2015 BCCA 1, the Court of Appeal allowed an appeal by an employer where the trial judge concluded that the employee's misconduct in knowingly giving complimentary food and beverage vouchers to his daughter's volleyball team without prior authorization did not amount to just cause for dismissal. The Court of Appeal held, at para. 37, that the trial judge failed to apply the contextual approach mandated by *McKinley* in assessing whether the employee's misconduct irreconcilably undermined the employment relationship and ordered a new trial. In doing so, the Court of Appeal emphasized that the value of the vouchers was of little consequence and the misconduct ought to have been considered in the context of the high standard expected of the employee in question given the responsibilities and trust attached to his senior management position, the core values of integrity and honesty expressed in his employment contract, and the deliberate concealment of his actions.

[79] This case is different from *Roe* in several material respects. Here, the value of the food in question was even less than the value of the food vouchers in issue in *Roe*. More importantly, Mr. Roe was a senior management employee, with a relatively short tenure, whose responsibilities included handling and reconciling large amounts of cash, acting as a role model and mentor to other staff, and whose misconduct was premeditated and actively concealed. In contrast, Ms. Ram was a low-level employee with very limited responsibility and no mentoring or supervisory role, who made no attempt to conceal her actions, who had no formal record of

discipline, and who had worked successfully with Mr. Mohammed for more than two decades.

[80] As already indicated, the defendant was self-represented. No submissions were advanced on its behalf to the effect that the theft of the fries and the drink, when considered in the context of the three previous incidents of overserving, justified the conclusion that the employment relationship between the defendant and Ms. Ram was irreparably broken down by the theft of the fries and the drink. Nevertheless, I have considered whether the cumulative effect of this misconduct would have justified dismissal.

[81] In *Ogden v. Canadian Imperial Bank of Commerce*, 2015 BCCA 175 at paras. 25–33 and 51, the Court of Appeal explained the two ways that cumulative misconduct can influence the determination of whether a defendant has established just cause. First, where an employee has committed more than one act of misconduct, the cumulative effect may justify dismissal even where dismissal would be disproportionate in relation to each individual incident on its own. That is not in issue here because, as I have found, Mr. Mohammed's decision to terminate Ms. Ram was based on the single incident that occurred on December 27, 2013. However, the impact of the second type of cumulative misconduct remains to be considered. This is where a single incident of misconduct is alleged to be grounds for summary dismissal when considered in the context of a discipline history that includes previous incidents of similar misconduct. In my view, the three prior incidents of overserving could not be characterized as a "discipline history" sufficient to justify the conclusion that the employment relationship was irreparably undermined by the single incident of theft on December 27 (assuming the defendant had established that theft). This is because Mr. Mohammed acknowledged that he did not consider the overserving incidents to be serious at all and Ms. Ram was not subjected to any kind of formal discipline as a result of them.

[82] There is no doubt that it is important to the defendant that its employees abide by its policies concerning the taking and consumption of food items. There is

no doubt that the defendant's employees should not take food without authorization. However, it is my view that given the absence of any evidence of premeditation or attempted concealment, the absence of any formal discipline history, Ms. Ram's excellent and lengthy record working with Mr. Mohammed, the nature of her position, and her economic vulnerability as a 55-year-old woman with little education who had worked as a fast food cook for 24 years, summary dismissal would not be a proportionate sanction even when considered in the context of the overserving incidents. The defendant's objective of making clear that the breach of its employee food policies will not be tolerated could have been achieved with a less serious sanction, such as a formal letter of reprimand that expressly warned Ms. Ram that any repetition of this kind of conduct could justify dismissal. Accordingly, even if the defendant had established that Ms. Ram intended to steal the fries and drink, in the circumstances of this case that would not amount to just cause for summary dismissal.

What is the appropriate notice period?

Legal principles

[83] *Bardal v. The Globe & Mail Ltd.* (1960), 24 D.L.R. (2d) 140 at 145 (Ont. H.C.J.), continues to be cited on the issue of the general principles to apply in determining a period of reasonable notice:

> 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.

[84] The leading decision on reasonable notice in British Columbia, which refers to the *Bardal* factors, is *Ansari v. B.C. Hydro & Power Authority*, [1986] 4 W.W.R. 123, 2 B.C.L.R. (2d) 33 (S.C.), aff'd (1986), 55 B.C.L.R. (2d) xxxiii (C.A.). At p. 133 McEachern C.J.S.C., as he then was, summarized the approach to assessing notice:

> At the end of the day the question really comes down to what is objectively reasonable in the variable circumstances of each case, but I repeat that the most important factors are the responsibility of the employment function, age, length of service and the availability of equivalent alternative employment...
>
> In restating this general rule, I am not overlooking the importance of the experience, training and qualifications of the employee but I think these qualities are significant mainly in considering the importance of the employment function and in the context of alternative employment.
>
> What all this means, in my view, is that the general statement of factors quoted above from Bardal are the governing factors, and it would be better if other individual or subjective factors had not crept into the determination of reasonable notice. In my view such other matters are of little importance in most cases.

[85] The Supreme Court of Canada endorsed the *Bardal* factors in *Honda Canada Inc. v. Keays*, 2008 SCC 39 at paras. 25–32, emphasizing that reasonable notice may only be determined on a case-by-case basis, and that no one *Bardal* factor should be given disproportionate weight in the overall analysis.

Discussion

[86] Ms. Ram was 55 years old at the time of the dismissal. As already noted, she had only a grade 8 education, limited English skills and limited Canadian work experience. Prior to the termination of her employment she had experienced some minor health issues related to chest pain and ongoing but well-managed depression but neither was disabling and she was able to fulfill her duties for the defendant on a full-time basis. However, she says that as a result of her age, her health issues, her very limited education, and a general lack of sophistication, she was not an attractive job prospect in January 2014. She also says that she did not have the opportunity to test the job market because she was rendered disabled as a result of the worsening of her "psychiatric symptoms" following the dismissal and that she remains entirely disabled from working.

[87] It is Ms. Ram's position that all of her years working at Burger King restaurants should be taken into consideration in determining the duration of her employment with the defendant. Specifically, she says she should be treated as an employee with 24 years' service notwithstanding that she was formally employed by the defendant for only five years.

[88] Ms. Ram submits that reasonable notice in her case is 12 months. In support of that submission she relies on the following cases: *Coulombe v. Lake Cowichan Elks Lodge No. 293*, 2004 BCSC 1350, where two bartenders with over 20 years of service were each awarded damages reflecting 44 weeks' notice; *Byers v. Prince George (City), Downtown Parking Commission*, (1996) 38 C.C.E.L. (2d) 83 (B.C.C.A.), where a 55-year-old parking attendant with almost 15 years of service was awarded damages reflecting eight months' notice; and *Dhatt*, where a 53-year-old automotive mechanic with 23 years of service was awarded damages reflecting 21 months' notice.

[89] The defendant did not make submissions concerning the appropriate length of notice in the absence of just cause. However, it is the defendant's position that Ms. Ram's tenure with the defendant was limited to the five years she worked at the Granville Street location. It is also the defendant's position that Ms. Ram could easily find an alternative minimum wage job, but the defendant led no evidence concerning the availability of fast food jobs.

[90] Recently decided British Columbia cases addressing similar situations provide guidance as to the length of reasonable notice: *Saalfed v. Absolute Software Corporation*, 2009 BCCA 18 at para. 14. However, the court must not fall into the application of a formulaic approach, and each case falls to be determined by reference to its own circumstances: *Pritchard v. Stuffed Animal House Ltd.*, 2010 BCSC 213 at para. 56.

[91] Turning then to a consideration of the *Bardal* factors, I start with the level of responsibility associated with Ms. Ram's position. She was a cook at a fast food restaurant. This is a low-level position, with little responsibility and no decision-making authority.

[92] Ms. Ram was 55 years old when she was terminated. This is an important factor to consider because employees terminated at an older age tend to have greater difficulty finding alternate employment than do those who are younger.

[93] Next, I consider the availability of similar employment, taking into consideration Ms. Ram's training, experience and qualifications. There is no evidence regarding the availability of similar employment. As just mentioned, the defendant led no such evidence. Neither did Ms. Ram. Her counsel submitted that she did not have the opportunity to test the job market because she was rendered disabled by her "psychiatric symptoms" following the dismissal. I do not accept that submission. The record does not support the conclusion that Ms. Ram ever suffered from disabling "psychiatric symptoms". There is no medical evidence at all. Her testimony was limited to vague assertions to the effect that that her pre-existing, but well-managed depression worsened after the accident, that she remains anxious about the fact that the theft allegation has tarnished her name, and that she continues to see her doctors.

[94] Ms. Ram's counsel submitted that medical evidence was not required. He relied on *Lau v. Royal Bank of Canada*, 2015 BCSC 1639, in support of that submission. In that case, in the context of determining whether a plaintiff had established a claim to aggravated damages for wrongful dismissal, Justice Loo said:

> [221] I do not need medical evidence to prove that a false accusation of failing to tell the truth which is published can lead to mental distress.

I agree entirely, but that does not mean that vague evidence from Ms. Ram about being anxious and depressed is sufficient to find that she was disabled from working.

[95] Despite the lack of evidence concerning the availability of fast food jobs, it is clear that Ms. Ram did not require specialized knowledge to obtain a similar, minimum wage job, and the skills she had from her years at Burger King were transferrable to alternative similar positions. However, as a result of her age, less than fluent English, and history of depression, I am satisfied that she would have experienced somewhat greater than typical difficulty in securing alternative similar employment.

[96] Finally, I turn to consider Ms. Ram's length of service. As already indicated, there is a dispute as to whether her prior years of service at other Burger King

locations ought to be considered. This depends on whether the defendant implicitly agreed to recognize her prior years of service when she moved to the Granville Street location in late 2008.

[97] The determination of whether an employer has agreed to recognize an employee's prior service depends upon the construction of the employment contract between the employer and the employee. Where, as here, there is no express term in the employment contract dealing with the issue, the question is whether there is an implied term. The determination of whether there is an implied term depends on whether, in all the circumstances, it ought to be presumed that the parties intended the employee's prior service to be recognized.

[98] The authors of David Harris, *Wrongful Dismissal*, loose-leaf (Toronto: Carswell, 1990), articulated the test for finding an implied term in an employment contract this way at p. 9-14.6(10.2):

> In particular, terms may be, and frequently are, implied in employment contracts where the court concludes that the parties would have agreed to them if when forming the contract, they had turned their minds to the type of situation which later transpired.

[99] This test is sometimes referred to as the "officious bystander" test. That phrase appears to have originated in *Shirlaw v. Southern Foundries (1926) Ltd.*, [1939] 2 All E. R. 113 (C.A.), which was cited by Southin J. (as she then was) in *Merilees v. Sears Canada Inc.* (1986), 24 B.C.L.R. (2d) 165 at 169, affirmed (1988) 24 B.C.L.R. (2d) 172:

> If, at the time the contract of employment was made (which I take to be the relevant time for the implication of the term), these parties had been asked, "Does the plaintiff have to work Sunday?", the answer from both would have been "No".
>
> As MacKinnon L.J. put it in *Shirlaw v. Southern Foundries* (1926) Ltd., …
>
> > For my part, I think that there is a test that may be at least as useful as such generalities… (MacKinnon L.J. was referring to *The Moorcock*).
> >
> > Thus, if, while the parties were making their bargain, an officious bystander were to suggest some express provision for it in their agreement, they would testily suppress him with a common: "Oh, of

> course." At least it is true, I think, that, if a term were never implied by a judge unless it could pass that test, he could not be held to be wrong.
>
> In the case at bar, if the officious bystander had said to the parties "should you not put in a term that Mrs. Marilees does not have to work on Sundays", the parties would have suppressed him as MacKinnon L.J. suggested.

[100] A test requiring the court to find that an officious bystander would "testily suppress" the suggestion that a particular term be expressed demands more than a finding that the term sought to be implied is reasonable. It must be so obvious that it "went without saying": *Olympic Industries Inc. v. McNeill* (1993), 86 B.C.L.R. (2d) 273 (C.A.), citing *Trollope & Colls Ltd. v. North West Metropolitan Regional Hospital Board*, [1973] 1 W.L.R. 601 (H.L.).

[101] An implied term that an employer will recognize an employee's prior service has been found in circumstances where the employer purchased a business as a going concern, the new employer did not notify the employee that his or her prior years of service would not be recognized, the employee did not receive severance pay from the former employer, and the new employer retained the employee to perform duties similar to those performed by the employee prior to the purchase: *Dhatt* at paras. 123–125 and 130–138. Similarly, a gap in service (in other words, where an employee is employed by a particular employer, leaves that employment for a period, and then returns to work for the original employer) will be disregarded for the purposes of assessing an employee's entitlement to reasonable notice if an implied term is found based on the parties having conducted themselves at the point of re-hire in a manner consistent with the employee's prior service being recognized: *Dobbs v. The Cambie Malone's Corporation*, 2011 BCSC 1830 at paras. 46–52.

[102] This is not a case of an employer purchasing a business as a going concern. Nor is it a case of a gap in service with a single employer. Nevertheless, the question remains as to whether, in the circumstances of this case, there is an implied term in the employment contract between Ms. Ram and the defendant to the effect that the defendant would recognize Ms. Ram's lengthy service at the other Burger King locations and treat her as a long-term employee. This is a question of fact to be determined on all of the evidence.

[103] Applying the "officious bystander" test I have no difficulty finding an implied term in the employment contract between the defendant and Ms. Ram to the effect that her prior service would be recognized. I rely on the following factors:

- Mr. Mohammed was associated with all or virtually all of the Burger King restaurants in question. The possible exception is the King George location, but Ms. Ram was only employed there for about six or seven months.
- Throughout her 24-year tenure working at Burger King restaurants, Ms. Ram considered Mr. Mohammed to be her boss. Mr. Mohammed did not take issue with this characterization.
- I accept Ms. Ram's evidence that she paid little if any attention to which company was her actual employer at any given time. Although she was aware that, technically, her employer at the Granville Street location was the defendant corporation, she had little if any understanding of the potential implications on her rights of transferring among locations operated by different corporate franchisees.
- Mr. Mohammed agreed that all but one of Ms. Ram's transfers was his decision, and that Ms. Ram never received any severance pay at the time of any of the transfers.
- When Ms. Ram agreed to move to the Granville Street location, Mr. Mohammed told her she would have to formally quit her job at the Kings Cross location and become employed by the defendant, but he did not also tell her that her years of prior service would not be recognized by the defendant. The impact of the move on her seniority was simply not discussed.
- Ms. Ram did not receive any severance pay from the corporate franchisee that operated the Kings Cross location when she left that location to join the defendant at the Granville Street location.

- Ms. Ram's duties did not change in any material way when she moved to the Granville Street location. She had always been a cook and she remained a cook, although she was guaranteed her preferred, full-time shift.
- Mr. Mohammed personally arranged for Ms. Ram to become employed by the defendant at the Granville Street Burger King location. As a result of his association with the other Burger King locations that Ms. Ram had worked at he was well aware of the length of her service and her good employment record. He knew Ms. Ram was a valuable employee because he had been her manager for almost 20 years.

[104] Given the forgoing, it is not at all surprizing that Ms. Ram did not raise the issue of her seniority with Mr. Mohammed at the time she agreed to transfer to the Granville Street location. It would not have occurred to her to do so. Mr. Mohammed suggested that Ms. Ram move to the Granville Street location at least in part because it was in his interest, as one of the owners of the defendant, to secure valuable employees. The guarantee that she would be assigned to her preferred shift reflected her value to the defendant and indicated that she was to be treated by the defendant as a senior employee.

[105] In these circumstances, if, at the time Ms. Ram agreed to move to the Granville Street location, an officious bystander had said to the parties, "Should you put in a term that Ms. Ram will be treated as a long-term employee?", they would have "testily" responded with words to the effect that this "went without saying". Accordingly, for the purposes of determining reasonable notice, I find that it was an implied term of the employment contract between Ms. Ram and the defendant that Ms. Ram's almost 20-year prior history working at various Burger King locations managed by Mr. Mohammed would be recognized by the defendant. Accordingly, for purposes of determining reasonable notice, she was a long-service employee with approximately 24 years' tenure.

[106] Of the cases relied upon by Ms. Ram, it is my view that *Coulombe* is the best comparable. As already mentioned, in that case two bartenders with over 20 years of service were each awarded damages reflecting 44 weeks' notice. In my view, the positions of those two employees involved slightly more responsibility than Ms. Ram's position, but there was no suggestion that the two employees in question in *Coulombe* would have experienced greater than typical difficulty in securing similar alternative employment. Taking Ms. Ram's circumstances into account, and in particular her long service, age, less than fluent English, and pre-existing history of depression, I find a reasonable period of notice for her to be 12 months.

Damages

General damages

[107] As I have already noted, the defendant was self-represented. While Mr. Mohammed made clear in his submissions that he did not accept that Ms. Ram was unable to work following the termination of her employment, he did not actually advance a mitigation defence. Nevertheless, I will briefly address mitigation because Ms. Ram made no effort to find alternative employment and, for the reasons already expressed, I am not persuaded that she was disabled from working.

[108] In *Smith v. Aker Kvaerner Canada Inc. and Kvaerner Power Inc.*, 2005 BCSC 117 at para. 32, Mr. Justice Burnyeat said this about the duty to mitigate:

> The burden of proving that Mr. Smith [the employee] has failed to mitigate his losses rests with the Defendants: *Red Deer College v. Michaels* (1975), 57 D.L.R. (3d) 386 (S.C.C.). There is a heavy onus to demonstrate a failure to mitigate. In this regard, Edwards J. in *Petersen v. Labatt Breweries of British Columbia* (1996) 25 C.C.E.L. (2d) 241 (B.C.S.C.) stated:
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> > The onus on a defendant alleging a plaintiff has failed to mitigate in an action of this kind is "by no means a light one". See: *Michaels v. Red Deer College* (1976), 57 D.L.R. (3d) 386. The defendant must show not only that the plaintiff failed to take steps to mitigate but also that had the plaintiff taken those steps he could likely have found equivalent employment. See: *Jorgenson v. Jack Cewe Ltd.*, (1978), 93 D.L.R. (3d) 464, [1979] 1 A.C.W.S. 138 and *Munana v. MacMillan Bloedel Ltd.*, [1977] 2 A.C.W.S. 364. (at para. 10)

[109] As already discussed, I am not persuaded that Ms. Ram was disabled from working as a result of the mental distress caused by the fact or manner of the termination. Accordingly, her failure to attempt to find another job was a failure to mitigate. However, the defendant has not established that had Ms. Ram taken steps then she could likely have found equivalent employment in less than a year. No evidence was led concerning the availability of alternative employment and, as I have already found, given her age, less than fluent English, and history of depression, it is more likely than not that Ms. Ram would have experienced somewhat greater than typical difficulty in securing alternative similar employment. In the circumstances, no mitigation defence has been made out.

[110] It is not disputed that Ms. Ram's salary at the time of the dismissal was $21,000 per year. Based on a notice period of 12 months, she is entitled to pay in lieu of notice of $21,000.

Aggravated and punitive damages

[111] Ms. Ram's counsel advanced submissions on aggravated and punitive damages "as a single head of damage" asserting that "the traditional lines between entitlement to aggravated damages and entitlement to punitive damages, particularly in the employment context, have been so blurred as to be unrecognizable" and that the court "is given the task of looking at the total damages in these cases organically as opposed to simply adding up the various heads of damage". On this basis, Ms. Ram seeks an award of combined aggravated and punitive damages of $210,000 because, when added to the general damages she seeks, this will result in a "global damage award in the neighborhood of $230,000", which she says is appropriate.

[112] I disagree that the distinction between aggravated and punitive damages has been blurred. Aggravated damages are compensatory; punitive damages are not. While there may be some overlap in the facts relevant to establishing each of these heads of damage, each rests upon a different foundation and the purpose of awarding each is different. In a wrongful dismissal case, aggravated damages are

awarded to compensate a plaintiff for actual damage that is caused by unfair or bad faith conduct of the employer in the manner, as distinct from the fact, of the dismissal. In contrast, the objects of punitive damages are retribution, deterrence and denunciation as opposed to compensation, and punitive damages are restricted to cases where an employer's conduct is so malicious and outrageous that it is deserving of punishment: *Vernon v. British Columbia (Liquor Distribution Branch)*, 2012 BCSC 133; *Rodrigues v. Shendon Enterprises Ltd.*, 2010 BCSC 941.

[113] I also disagree that the court is tasked with assessing all heads of damage on some global or total basis. No authority was provided in support of this proposition.

[114] Recently, in *George v. Cowichan Tribes*, 2015 BCSC 513, Justice Skolrood summarized the legal principles applicable to a claim for aggravated damages in a wrongful dismissal case:

> [236] The principles governing aggravated damages in an employment law context have been canvassed in detail by the Supreme Court of Canada in the well-known decisions in *Wallace v. United Grain Growers Ltd.,* [1997] 3 S.C.R. 701 and *Honda Canada Inc. v. Keays,* 2008 SCC 39.
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> [237] Recently, in *Vernon v. British Columbia (Liquor Distribution Branch),* 2012 BCSC 133, Mr. Justice Goepel (as he then was) summarized the law as follows at paras. 369 - 370:
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> > [369] Aggravated damages in wrongful dismissal cases are compensatory in nature. It is an implied term of an employment contract that an employer will act in good faith in the manner of dismissal: *Beggs v. Westport Foods Ltd.*, 2011 BCCA 76, 14 B.C.L.R. (5th) 1 at para 48.
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> > [370] In *Honda*, the Supreme Court of Canada reviewed the history of the law relating to damages in case of employment termination, noting that aggravated damages must be considered in the context of a breach of the employment contract. The court held that aggravated damages were recoverable for breach of contract if such damages were contemplated by the parties at the time they entered the contract. As an employment contract is inherently subject to cancellation on notice, or payment in lieu of notice, damages for mental distress caused merely by the dismissal are not recoverable since dismissal is a clear legal possibility.
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> [238] Mr. Justice Goepel then cited a number of passages from *Honda* dealing with aggravated damages (at para. 371):
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> > In *Honda*, Bastarache J. summarized the discussion of aggravated damages at paras. 57-59:

> [57] Damages resulting from the manner of dismissal must then be available only if they result from the circumstances described in *Wallace*, namely where the employer engages in conduct during the course of dismissal that is "unfair or is in bad faith by being, for example, untruthful, misleading or unduly insensitive" (para. 98).
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> [58] The application of *Fidler* makes it unnecessary to pursue an extended analysis of the scope of any implied duty of good faith in an employment contract. *Fidler* provides that "as long as the promise in relation to state of mind is a part of the bargain in the reasonable contemplation of the contracting parties, mental distress damages arising from its breach are recoverable" (para. 48). In *Wallace*, the Court held employers "to an obligation of good faith and fair dealing in the manner of dismissal" (para. 95) and created the expectation that, in the course of dismissal, employers would be "candid, reasonable, honest and forthright with their employees" (para. 98). At least since that time, then, there has been expectation by both parties to the contract that employers will act in good faith in the manner of dismissal. Failure to do so can lead to foreseeable, compensable damages. As aforementioned, this Court recognized as much in *Fidler* itself, where we noted that the principle in *Hadley* "explains why an extended period of notice may have been awarded upon wrongful dismissal in employment law" (para. 54).
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> [59] To be perfectly clear, I will conclude this analysis of our jurisprudence by saying that there is no reason to retain the distinction between "true aggravated damages" resulting from a separate cause of action and moral damages resulting from conduct in the manner of termination. Damages attributable to conduct in the manner of dismissal are always to be awarded under the *Hadley* principle. Moreover, in cases where damages are awarded, no extension of the notice period is to be used to determine the proper amount to be paid. The amount is to be fixed according to the same principles and in the same way as in all other cases dealing with moral damages. Thus, if the employee can prove that the manner of dismissal caused mental distress that was in the contemplation of the parties, those damages will be awarded not through an arbitrary extension of the notice period, but through an award that reflects the actual damages. Examples of conduct in dismissal resulting in compensable damages are attacking the employee's reputation by declarations made at the time of dismissal, misrepresentation regarding the reason for the decision, or dismissal meant to deprive the employee of a pension benefit or other right, permanent status for instance (see also the examples in *Wallace*, at paras. 99-100).

[239] As can be seen from the above, aggravated damages may be available to compensate a dismissed employee for mental distress caused by

> the manner, as distinct from the fact, of dismissal. Put another way, the loss of one's employment will almost always cause some degree of upset but aggravated damages will only be awarded where the conduct of the employer in effecting the termination is inconsistent with the employer's duty of good faith and where the employee suffers mental distress because of that conduct.

[115] Accordingly, in determining whether Ms. Ram has established a claim to aggravated damages there are two primary inquires. The first is whether Ms. Ram has established that the defendant's conduct in effecting the termination was unfair or in bad faith because, for example, it was untruthful, misleading, or unduly insensitive. If so, the second inquiry is whether Ms. Ram has established that she suffered mental distress as a result of the manner of the dismissal and not just as a result of the dismissal itself.

[116] Ms. Ram cites these factors in support of her claim to aggravated damages:

a) Mr. Mohammed knew Ms. Ram was an older, uneducated and unsophisticated woman with health issues who had very limited financial resources;

b) Ms. Ram had a lengthy tenure of good service;

c) Ms. Ram's immediate supervisor, Ms. Salman, did not speak to her about the incident in question even though Ms. Salman had the opportunity to do so on the morning of December 30, 2013;

d) the meeting on December 30, 2013 with Mr. Mohammed was handled by him in an insensitive manner in that Ms. Ram was not given an opportunity to explain and Mr. Mohammed failed to ask questions that, if asked, would have indicated the likelihood that there was a misunderstanding between Ms. Ram and Ms. Salman;

e) Mr. Lacombe's questioning of Ms. Ram as she was leaving the December 30 meeting, in the presence of her co-workers, was particularly insensitive and indicates that a decision to fire her had already been made before she met with Mr. Mohammed;

f) after the December 30 meeting Ms. Ram called Burger King several times and received no return calls; and

g) Ms. Ram was advised of the termination after Mr. Mohammed had been provided with a note from her doctor declaring her medically unfit to work.

[117] In addition, Ms. Ram submits the evidence supports the conclusion that Mr. Mohammed planned to fire Ms. Ram because she was an older employee and when he was presented with Ms. Salman's version of what had transpired on December 27, 2013, he seized the opportunity and characterized Ms. Ram's conduct as theft, knowing that the evidence did not support that characterization, in order to avoid paying her severance. Ms. Ram's counsel referred to this as the "ruse theory".

[118] Ms. Ram submits that as a result of the manner of her dismissal and in particular the theft allegation, she suffered mental distress, shame and embarrassment beyond the normal distress and hurt feelings that typically result from the termination of employment and that, as a result, her previously stable psychological condition destabilized and rendered her disabled from working.

[119] In my view, the evidence does not support the "ruse theory". Ms. Ram's evidence about Ms. Palting telling her, on December 26, 2013, that her name was not on the schedule for the following week is insufficient to support a finding that Mr. Mohammed had formulated a plan to fire Ms. Ram prior to December 30, 2013. Ms. Ram acknowledged that she did not consider this comment to be significant. It meant so little to her that she did not even bother to check the schedule or to ask anyone about it. Ms. Palting denied saying anything about the schedule to Ms. Ram and that aspect of her testimony was not challenged on cross-examination. Mr. Mohammed testified that Ms. Ram was in fact on the schedule for the week of December 30, 2013. In the circumstances, the evidence falls short of establishing that Ms. Ram's name was not on the schedule. Further, there was no reliable evidence that the defendant has a history of terminating older employees.

[120] The evidence does not support the assertion that Mr. Mohammed knew Ms. Ram had very limited financial resources. To the contrary, he was aware that both Ms. Ram's husband and her daughter received disability income and that Ms. Ram also received rental income from the basement suite in her home.

[121] The evidence does not support the assertion that Ms. Ram's calls went unreturned or that Mr. Mohammed terminated her employment after receiving a copy of her doctor's note indicating she was medically unable to work. I have already addressed the latter point in some detail. With respect to the former point, Ms. Ram testified that she was unable to reach Mr. Mohammed on the office line but that she did reach him on his cell phone. She did not testify that there was any material delay between her attempts to reach him at the office and her success in reaching him on his cell phone.

[122] Having said all of that, Mr. Mohammed and Mr. Lacombe behaved in an unreasonable, unfair and unduly insensitive manner on December 30, 2013, when Ms. Ram was confronted with Ms. Salman's accusation.

[123] Mr. Mohammed did not consider the effect that an accusation of theft would have on Ms. Ram generally and, in particular, on her future employment prospects. He knew that she had very limited education and that her only work experience was working as a cook in Burger King restaurants, at or near minimum wage. He must have understood that her prospects for obtaining alternative employment were limited. Nevertheless, he asked no questions of Ms. Salman before confronting Ms. Ram. Had he simply turned his mind to the specific words that Ms. Salman said Ms. Ram used when she asked to take the food, or the fact that Ms. Ram made no attempt to conceal what she was doing, he would likely have appreciated the significant possibility of a misunderstanding between Ms. Ram and Ms. Salman. Before confronting Ms. Ram, he ought to have directed Ms. Salman to speak to Ms. Ram in order to ascertain whether there was a misunderstanding.

[124] In my view, Ms. Ram was not given an adequate opportunity to respond to the allegation. Mr. Mohammed's own account was that he opened the December 30

meeting with a vague question about whether Ms. Ram had anything she wanted to tell him. He asked that question in the presence of Ms. Salman, who was Ms. Ram's supervisor. In the particular circumstances of this case, Mr. Mohammed's conduct in asking Ms. Ram to contradict Ms. Salman, directly in front of her, was unfair and antagonistic. The incident in question had occurred three days earlier and there was nothing to suggest that Ms. Ram would have given it any thought since then. In the circumstances, it should have been obvious that Ms. Ram would be caught off guard by the question and that she would be put on the defensive by the presence of Ms. Salman, who Ms. Ram had known before she became Ms. Ram's manager, and with whom Ms. Ram had developed a friendly relationship. Mr. Mohammed did not give Ms. Ram some time to think about the accusation and to respond in private. He did not take into account the impact that his relationship with Ms. Salman, as Ms. Salman's landlord and friend, could have on Ms. Ram's response. Instead, Ms. Ram was faced with having to immediately contradict Ms. Salman in the presence of Mr. Mohammed who wielded significant power over both of them. In the circumstances, it is not material whether Ms. Ram expressly disputed Ms. Salman's version of events.

[125] It was also unfair and unreasonable, in the circumstances, for Mr. Mohammed to have characterized Ms. Ram's apology and offer to pay as an admission, and to have summarily accused her of theft in the presence of Ms. Salman. It should have been apparent to Mr. Mohammed that the apology and offer to pay were likely nothing more than Ms. Ram's instinctive reaction to finding herself in a very stressful and intimidating situation.

[126] Mr. Lacombe's conduct immediately after the meeting was also unduly insensitive. As one of the owners of the defendant, he occupied a position of significant power in relation to Ms. Ram. His conduct in asking Ms. Ram, more than once and in the presence of other employees, whether she had been fired, as she was leaving Mr. Mohammed's office in tears, opened her up to ridicule.

[127] For these reasons, I find that the defendant engaged in unfair or bad faith conduct sufficient to ground a claim for aggravated damages. I turn then to consider whether Ms. Ram has established that she suffered mental distress as a result of that conduct or, in other words, as a result of the manner of the dismissal and not just as a result of the dismissal itself.

[128] I accept Ms. Ram's testimony that the manner of the dismissal, and in particular the theft allegation and the embarrassment she suffered as a result of her co-workers hearing Mr. Lacombe's questions, caused her mental distress over and above the normal distress and hurt feelings resulting from the termination of her employment itself. I accept that, in particular, the theft allegation caused her shame, embarrassment, anxiety and distress about her ability to find another job and that this worsened her depressive symptoms and resulted in sleepless nights. However, as already discussed, her evidence about the impact of these symptoms on her life was brief and vague.

[129] As already mentioned, I agree with Justice Loo's observation in *Lau*, at para. 221, to the effect that medical evidence is not required to prove that a false accusation of dishonesty can lead to mental distress, but the record before me is insufficient to support a finding that Ms. Ram was rendered disabled from working. On the record before me, I find that the manner of the dismissal caused Ms. Ram to suffer shame, embarrassment, anxiety and distress beyond that which she would have suffered anyway as a result of the dismissal, but it is not possible for me to make specific findings concerning the intensity or duration of these symptoms.

[130] I have reviewed the cases provided by Ms. Ram in which aggravated damages were awarded; in particular *Lau*, *Dhatt* and *George*, where the court awarded aggravated damages of $30,000, $25,000, and $35,000, respectively. I am also mindful of Justice Goepel's observation, in *Vernon*, of Justice Newbury's direction in *Warrington v. Great-West Life Assurance Co.* (1996), 139 D.L.R. (4th) 18 (B.C.C.A.) at para. 25, that "courts should exercise caution in their awards for mental

distress". I am of the view that an award of $25,000 for aggravated damages is appropriate in the circumstances of this case.

[131] As already discussed, unlike aggravated damages, which are compensatory in nature, punitive damages are directed towards punishment. An award of punitive damages is "very much the exception rather than the rule" and such damages are awarded "only if there has been high-handed, malicious, arbitrary or highly reprehensible misconduct that departs to a marked degree from ordinary standards of decent behavior" and where compensatory damages are insufficient to accomplish the objectives of retribution, deterrence and denunciation: *Whiten v. Pilot Insurance Co.*, 2002 SCC 18 at para. 94.

[132] As stated by Justice Goepel in *Vernon* at para. 385:

> As noted in *Honda*, in the context of damages for conduct in the course of dismissal, care must be taken when aggravated damages have been awarded to avoid the pitfall of double compensation or double punishment for the same actions. Punitive damages are restricted to advertent wrongful acts that are so malicious and outrageous that they are deserving of punishment on their own.

[133] I have not accepted Ms. Ram's "ruse theory". The evidence is insufficient to justify the conclusion that Mr. Mohammed planned to fire Ms. Ram or seized the opportunity that was presented to him when Ms. Salman told him about the December 27 incident and used it as an excuse to avoid paying Ms. Ram severance. While Mr. Mohammed acted impulsively, and while he and Mr. Lacombe treated Ms. Ram unfairly and with undue insensitivity, I have awarded aggravated damages to compensate Ms. Ram for the consequences of that conduct. Their conduct did not rise to the level of maliciousness required to also warrant an award of punitive damages.

Conclusion

[134] Ms. Ram is awarded general damages of $21,000, which reflects 12 months' salary in lieu of notice and, in addition, $25,000 in aggravated damages, for a total of $46,000.

[135] If the parties wish to speak to costs they may do so by making arrangements through the registry provided they so advise the registry within 60 days of the date of this judgment.

"WARREN J."