Employment Law Update

This edition of the Verdict is focused on Trial. There are a variety of routes to a trial or to avoiding a trial and the last few months in employment law have provided several examples of the routes to avoiding a trial. We have seen decisions involving summary trial, summary judgment, stay of proceedings, prejudgment garnishee orders, questions of jurisdiction of the Human Rights Tribunal and the use of applications to dismiss in Small Claims proceedings. A review of these cases may provide you with some creative ideas for dealing with your employment law cases.

Cotter v. Point Grey Golf and Country Club[1] provided a comprehensive review of the principles applicable to a determination of whether a summary trial should be allowed and the principles applicable to an allegation of cause in circumstances of insubordination was undertaken. Although the use of summary trial proceedings in employment law are common, their use with an allegation of cause and disputes on the evidence is not. This decision provides an excellent example of how creative counsel can use summary trial proceedings to expedite the conclusion of matters for the client in difficult cases. *Damani v. Stuart Olson Construction Ltd.* [2] provides an example of the use of summary judgment to bring about the dismissal of a case in circumstances where the terms of a written employment agreement had been complied with. *Bowman v. Coastal Shellfish Corporation*[3] involved the use of a pre judgment garnishee order in an employment law case. *Rashid v Wipro Limited.*[4] involved an application for a stay of proceedings in circumstances where an arbitration agreement was said to apply to the rights of the parties. Jurisdiction of the Human Rights Tribunal was challenged in *Schrenk v. British Columbia Human Rights Tribunal* [5] and *Pommer v. Match Converge Inc.* [6] provided an example of using a summary dismissal application in the Small Claims Court.

The substantive issues considered in the recent cases included:

1. The basis on which insubordination can constitute just cause;[7]
2. Oral fixed term contracts[8] ;
3. Mitigating while out of the country[9]; and
4. Treatment of failure to mitigate[10]

And finally, the Court of Appeal reconsidered the decision in *Munoz*[11] and spoke about the burden when alleging that the notice period should be longer than the norm.

Summary Trial

[1] 2016 BCSC 10
[2] 2015 BCSC 2322
[3] 2016 BCSC 726
[4] 2015 BCSC 2199
[5] 2016 BCCA 146
[6] 2016 BCPC 0025
[7] *Cotter v. Point Grey Golf Club*
[8] *James v. The Hollypark Oranization Inc.* 2016 BCSC 495
[9] *James v. The Hollypark Organization Inc.*
[10] *Steinebach v. Clean Energy Compression Corp.,* 2016 BCCA 112
[11] 2016 BCCA 140.

Madam Justice Maisonville provided a comprehensive review of the law relating to use of summary trials to dispose of matters in *Cotter*. She began her analysis with the following quotation from the judgment of our Court of Appeal in *Barkwill v. Pachomchuck*[12] in which the test for determining whether judgment should be given on a summary basis was described as follows:

> [14] The suitability of an action for disposition by way of summary trial depends on whether the evidence is sufficient for the chambers judge to find the facts necessary to give judgment, *Inspiration Management Ltd. v. McDermid St. Lawrence Ltd.* (1989), 36 B.C.L.R. (2d) 202 (C.A.) at 214-16.

She also quoted from the Court of Appeal decision in *Inspiration Management*[13] in which then Chief Justice McEachern, considering the Rule for summary trial under our previous rules and described the factors to be taken into consideration in determining the appropriateness of a matter for summary disposition:

> [47] In fact R. 18A substitutes other safeguards which are sufficient to ensure the proper attainment of justice. First, 14 days notice of the application must be given (R. 18A (1.1), secondly, the chambers judge cannot give judgment unless he can find the facts necessary to decide issues of fact or law (R. 18A(3)(a)); and thirdly, the chambers judge, even if he can decide the necessary factual or legal issues, may nevertheless decline to give judgment if he thinks it would be unjust to do so. The procedure prescribed by R. 18A may not furnish perfect justice in every case, but that elusive and unattainable goal cannot always be assured even after a conventional trial and I believe the safeguards furnished by the Rule and the common sense of the chambers judge are sufficient for the attainment of justice in any case likely to be found suitable for this procedure. Chambers judges should be careful but not timid in using R. 18A for the purpose for which it was intended.
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> [48] In deciding whether it will be unjust to give judgment the chambers judge is entitled to consider; inter alia, the amount involved, the complexity of the matter; its urgency; any prejudice likely to arise by reason of delay, the cost of taking the case forward to a conventional trial in relation to the amount involved, the course of the proceedings and any other matters which arise for consideration on this important question.

Madam Justice Maisonville concluded her review of the law with respect to the use of summary trials as follows:

> [94] Accordingly, the decision to proceed with a summary trial is a matter for the court's discretion. Both cost and complexity are included as factors to be considered. Credibility also remains an important issue for the court to determine. Nonetheless, if the court is able to find the necessary facts to justly resolve the matter, the court should proceed to judgment.

She explained that the existence of conflicts in the evidence does not preclude proceeding on a summary basis, stating that the crucial question is whether the court is able to achieve a just and fair result by

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[12] 2011 BCCA 207
[13] (1989), 36 B.C.L.R. (2d) 202

proceeding summarily. [14] As can be seen from the judgment itself, this conclusion then led her to render a decision on the merits of the case and summary judgment despite the existence of conflicts in the evidence.

Summary Judgment

Madam Justice Bruce reviewed the principles applicable to summary judgment applications in *Damani*. This case involved the termination of a project assistant who had signed a written contract, drafted by the defendant, which she was given seven days to review and return to the employer. The agreement contained a clause providing for termination without cause and the payment that the employee would be entitled to in such a circumstance. The plaintiff was terminated without cause and paid in accordance with the contract. The plaintiff then sued the employer, claiming that she was entitled to reasonable notice of the termination. No allegation of unconscionability was made nor was there any attempt on the part of the plaintiff to lead extrinsic evidence of terms apart from the written contract. The defendant brought an application for summary judgment.

Madam Justice Bruce confirmed the high bar for the defendant in seeking summary judgment, quoting the test from the Supreme Court of Canada decision in *Canada (Attorney General) v. Lameman*[15]*:*

> For this reason, the bar on a motion for summary judgment is high. The defendant who seeks summary dismissal bears the evidentiary burden of showing that there is "no genuine issue of material fact requiring trial".[16] The defendant must prove this; it cannot rely on mere allegations or the pleadings.[17] If the defendant does prove this, the plaintiff must either refute or counter the defendant's evidence, or risk summary dismissal.[18] Each side must "put its best foot forward" with respect to the existence or non-existence of material issues to be tried:[19] The chambers judge may make inferences of fact based on the undisputed facts before the court, as on as the inferences are strongly supported by the facts:[20]

She goes on to review the standard that is to be applied and quotes from the decision in *Edgar v. The British Columbia Institute of Technology*[21]*:*

> The essence of the defendants' application is that there is no genuine issue for trial pursuant to Rule 9-6(5)(a). The standard on such an application is the same as it was under former Rule 18,

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[14] *MacMillan v. Kaiser Equipment Ltd.,* 2004 BCCA 270
[15] 2008 SCC 14 at para. 11
[16] *Guarantee Co. of North America v. Gordon Capital Corp.,* [1999] 3 S.C.R. 423 at para. 27.
[17] *1061590 Ontario Ltd. v. Ontario Jockey Club* (1995), 21 O.R. (3d) 547 (C.A.); *Tucson Properties Ltd. . Sentry Resources Ltd. (1982), 22* Alta. L.R. (2d) 44 (Q.B. (Master)) at pp 46 – 47.
[18] *Murphy Oil Co. v. Predator Corp.* (2004), 365 A.R. 326, 2004 ABQB 688 at p. 331, affèd (2006), 55 Alta L.R. (4th) 1, 2006 ABCA 69
[19] *Transamerica Life Insurance Co. of Canada v. Canada Life Assurance Co.* (1996), 28 O.R. (3d) 423 (Gen. Div.), at p. 434; *Goudie v. Ottawa (City),* [2003] 1 S.C.R. 141, 2003 S.C.R. 14,, at para. 32.
[20] *Guarantee Co. of North America,* at para. 30
[21] 2015 BCSC 710 at para. 4

the predecessor to Rule 9-6: it asks whether there is a "bona fide triable issue". The question is whether it is manifestly clear that there is no matter to be tried:[22]

After reviewing the evidence she concludes that although the termination without notice clause in the contract is long and complicated, it is no ambiguous and accordingly there is no *bona fide* triable issue. She accordingly grants summary judgment in favour of the defendant.

Stay of Proceedings

In *Wipro* the Court considered whether to grant a stay of proceedings to an employer in circumstances where the employment agreement included an arbitration agreement. These are not seen that frequently and it is important for counsel to be aware of the requirements and procedure for obtaining a stay in circumstances where the arbitration agreement is present. The defendant in *Wipro* did not file a defense to civil claim, but rather only a jurisdictional response disputing the Court's jurisdiction. They then brought an application pursuant to s. 15 of the *Arbitration Act* for a stay. The prerequisites for the stay are set out in *Prince George (City) v. McElhanney Engineering Services Ltd.*,[23]. The pre requisites are as follows:

(a) The applicant must show that a party to an arbitration agreement has commenced legal proceedings against another party to the agreement;
(b) The legal proceedings must be in respect of a matter agreed to be submitted to arbitration; and
(c) The application must be brought in a timely manner, i.e. before the applicant takes a step in the proceeding.

The issue in *Wipro* related to whether the legal proceedings were in respect of a matter agreed to be submitted to arbitration, with the plaintiff arguing that some of his claims were independent of the employment contract and not covered by the arbitration clause. Specifically, the plaintiff made allegations with respect to representations made leading up to the employment, the intentional infliction of mental suffering, breach of fiduciary duty and the taking of secret profits in the failure to make bonus payments under the incentive plan. The trial judge granted the stay finding that all of the issues had a sufficient *prima facie* connection to the employment contract that it must be left to the arbitrator to decide if they come within the arbitration clause.

Use of Pre Judgment Garnishee Order

Registrar Cameron's decision in *Bowman* explained the technical requirements for obtaining a pre judgement garnishee order. *Bowman* involved a claim by a dismissed employee that he was wrongfully dismissed and that accordingly he was entitled to damages under his employment contract of $150,000. The employer alleged that they had just cause for the termination. When the plaintiff employee filed his notice of civil claim, he claimed the liquidated sum of $150,000 based upon his employment agreement. Concurrently he obtained a garnishing order before judgment for the sum of $150,000 based upon his supporting affidavit that set out his calculation of the application notice period and his base salary

[22] *Haghdust v. British Columbia Lottery Corporation.,* 2011 BCSC 1627 at para. 15
[23] (1995), 61 B.C.A.C.254 at para. 22

amount. The defendant employer paid the $150,000 into court and then brought their application to set aside the garnishing order. This is the application that resulted in Registrar Cameron's decision.

Sections 3 and 5 of the *Court Order Enforcement Act* are relevant to prejudgment garnishee orders. Registrar Cameron noted that prejudgment garnishing orders are an extraordinary remedy and require strict compliance with the statutory requirements as detailed in the *Court Order Enforcement Act.*[24] The basis of the employer's application to set aside the garnishee order was primarily relating to an allegation of inaccuracies in the affidavit materials that were filed by the plaintiff to obtain the order.

In dismissing the employer's application Registrar Cameron noted that the fact that there is an issue with respect to whether the plaintiff will ultimately be successful at trial or not, or whether the employer's allegation of cause will be proven, does not prevent the plaintiff from obtaining a garnishee order. It is not the Registrar's function to decide the plaintiff's entitlement to the amount claimed, rather the Registrar only has to determine compliance with the statutory requirements. At paras. 21 and 22 he states as follows:

> [21] The *Court Order Enforcement Act* requires that the affidavit in support of the garnishing order clearly state the "actual amount of the debt, claim or demand". In this case, the amount claimed is clearly stated. Whether or not the plaintiff establishes that he is entitled to any amount for termination in lieu of notice or without just cause will be decided at trial, as will the amount due of cause is not found for his dismissal.
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> [22] The plaintiff has made a claim for an amount predicated on interpretation of the employment agreement that may or may not prevail at trial, but there has been no failure to be transparent in the manner in which the claim has been advanced.

This case is a reminder to counsel to consider remedies such as garnishing orders, even pre judgment. Obtaining one can ensure not only that the funds are available to ultimately satisfy any judgment that is obtained, but also can serve as a tool to encourage resolution of a matter in a timely way.

<u>Jurisdiction of the Human Rights Tribunal</u>

The Court of Appeal had the opportunity to consider the scope of the jurisdiction of the British Columbia Human Rights Tribunal to address discrimination in the workplace[25]. The appellant was a site foreman. The complainant was the site representative of a consulting firm that served as the contract administrator on the project and in that capacity supervised the work of the company that employed the appellant. The complainant alleged that the appellant made derogatory comments about the complainant's place of birth, religion and sexual orientation while on the work site. Following complaints to the employer about this, the appellants employment was terminated.

The complainant filed a Human Rights complaint against the appellant and his employer. The appellant and the employer brought applications to dismiss the complaint on the basis that the required nexus between the conduct and the employment was not present. . The Tribunal dismissed the application. The appellant the filed a petition for Judicial Review on the grounds that the Tribunal lacked jurisdiction to

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[24] *Knowles v. Peter* (1954), 12 W.W.R. (N.S.) 560 (B.C.S.C.)
[25] *Schrenk v. British Columbia (Human Rights Tribunal)* 2016 BCCA 146

hear the complaint. The petition was dismissed and the appellant appealed on the basis that the judge erred in misinterpreting the *Code* by concluding all that is required to found jurisdiction is that the complainant be negatively affected in the course of his employment by discrimination on prohibited grounds engaged in by any person.

The Court of Appeal described the critical question as being whether the allegation made by the complainant against the appellant was a complaint about conduct that might possibly amount to discrimination "regarding employment". The Court of Appeal focused its analysis on the question of whether the appellant had the power or authority to impose unwelcome conduct on the complainant as a condition of employment. In finding that the appellant did not have such power, the Court of Appeal found that the Tribunal had no jurisdiction over the appellant and should have dismissed the complaint against him. The Court summarized the appellant's position as follows:

> [17] The appellant argues not every act by a person in the workplace that causes a worker to feel demeaned on prohibited grounds is the proper subject of the jurisdiction of the Tribunal. Not all discrimination in the workplace constitutes discrimination "regarding employment or any term or condition of employment". The legislature has chosen to legislate only within certain limited spheres of public conduct and the Tribunal was not created to regulate all social relations or remedy all social ills. Regardless of how offensive the appellant's conduct may have been, it did not amount to discrimination in employment.

The Court of Appeal largely accepted this argument, finding at paragraph 36 as follows:

> [36] Not all insults inflicted upon employees, even in the course of their employment, amount to discrimination *regarding employment.* Such insults can amount to discrimination regarding employment if the wrongdoing is clothed by the employer with such authority that he or she is able to impose that unwelcome conduct on the complainant as a condition of employment, or if the wrongdoing is tolerated by the employer. If the wrongdoer has no such power or authority, the Tribunal has jurisdiction to consider whether the complainant's employer played some role in allowing the conduct to occur or continue, in which case the insult is endured as a consequence of employment. But even then, the Tribunal has no jurisdiction over the wrongdoer.

Applying these principles to the facts in the case at bar, the Court of Appeal summarized the jurisdiction of the Tribunal at paragraph 44 as follows:

> [44] …the Tribunal certainly has jurisdiction in relation to an allegation that a person has forced the complainant, expressly or otherwise, to endure harassment at work. It had jurisdiction to address the response of the complainant's employer to his complaint. It does not, however, have jurisdiction to address a complaint made against one who is rude, insulting or insufferable but who is not in a position to force the complainant to endure that conduct as a condition of employment.

This analysis by the Court of Appeal underscores the necessary element of a respondent to a human rights complaint having the power to force the complainant to endure the discriminatory behaviour. If that element is not present, then the Tribunal has no jurisdiction over the complaint.

<u>Application to Dismiss in Small Claims Court</u>

Pommer v. Match Converge Inc.[26] is a provincial court decision which all employment law counsel should be aware of. *Pommer* concerned a claim for unpaid wages by the self- represented plaintiff /that fell outside of the six months limited by the *Employment Standards Act.* Mr. Pommer had pursued and settled an *Employment Standards* complaint for the unpaid wages that fell within the six month time period covered by the *Act.* That complaint was settled by the parties. Mr. Pommer then commenced a small claims action to recover unpaid wages for travel which occurred outside of that time limit. The defendant applied to dismiss the plaintiff's small claims action on three basis:

1. There is no entitlement to enforce statutory right to wages for travel in a civil action;
2. Mr. Pommer's claim is statute barred, as he has not obtained the consent of the Director of Employment Standards to commence a civil action for wages;
3. Mr. Pommer's complaint has already been settled and is therefore *res judicata.*

The application focused on the second of these after the court found that the action was not *res judicata* as it considered claims outside the six month limitation. The court reviewed *Macaraeg v. E. Care Centers Ltd.*,[27] which provided the Tribunal with jurisdiction for all claims that fall under the *Act.* Mr. Justice Callan also considered section 82 of the *Employment Standards Act* which provides as follows:

> 82 Once a determination is made requiring payment of wages, an employee may commence another proceeding to recover them only if
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> (a) The director has consented in writing, or
> (b) The director or the tribunal has cancelled the determination.

Mr. Justice Callan concluded that the interplay between *Macaraeg* and the *Act* requires a plaintiff to obtain the consent of the Director to proceed with an action after a complaint has been rendered. He then ordered that the Claimant had until April 30 to file an affidavit attesting that the Director of Employment Standards has consented to a civil action against the Defendants for Mr. Pommer's claim for wages not considered by the Employment Standards Branch. If the affidavit is not filed by that date, Mr. Pommer's action is dismissed without costs.

Bearing in mind that the plaintiff in *Pommer* was self represented and that therefore Mr. Justice Callan was likely deprived of fulsome submissions on his behalf, it appears that this decision is arguably wrongly decided. The implications of this decision are that any time that the *Act* potentially has jurisdiction over any part of a claim the plaintiff will be required to obtain the consent of the Director to proceed with the claim. The Employment Standards Tribunal did not have jurisdiction over the claim that Pommer was attempting to pursue in the small claims court. It concerned a claim for the same type of wages considered by the Tribunal, i.e. wages for travel, but the claim being pursued at the Small Claims Court was for a period of time outside that during which the Tribunal has jurisdiction. Employer's could use this case to argue that any time a dismissed employee wants to seek damages over and above that which the Tribunal has jurisdiction over, they require the Director's permission to do so. It seems that the legislation could not have intended this result but rather the permission should only be required if the

[26] 2016 BCPC 0025
[27] 2008 BCCA 182

dismissed employee is seeking the same type of damages for the same time period as those which the Tribunal has jurisdiction over.

Insubordination

The British Columbia Supreme Court had the opportunity to consider whether in circumstances where a senior employee disagrees with the handling of a matter, just cause will exist if they refuse to bend to the wishes and views of the employer. *Cotter* involved the dismissal of a controller of the golf club. Mr. Cotter had been employed as the Controller for 16 ½ years prior to his dismissal. The employer alleged that the termination arose as a result of a breakdown of the employer-employee relationship and violation of direct orders given to Mr. Cotter. They sought determination of the cause issue in a summary trial. Mr. Cotter argued against determination of the claim on a summary basis and disputed the allegation of cause. The termination arose as a result of a property tax issue. In simple terms, Mr. Cotter took a different view than his employer of the manner in which the issue should be dealt with and whether in fact the issue had been dealt with. There were direct instructions from his employer on how to deal with the issue which Mr. Cotter chose to disregard. Ultimately this resulted in the termination of Mr. Cotter for cause.

The termination letter sets out the allegations of cause as follows:

> Your conduct over the recent weeks has been unacceptable. First, you have refused to sign off on the management representation letter even though the letter is identical in all material respects to the letter which you signed off on last year. You have also refused to provide the Club the information necessary to support your difference of opinion. This has created undue delay and an obstruction in the Club's ability to obtain audited financial statements. We view this refusal to sign the management representation letter drafted by me, as both insubordination and a dereliction of your duty.
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> Second, you were instructed by way of my letter dated February 26, 2013 not to have any further discussions regarding the property tax matter as the matter is now closed as also referenced in the Minutes of the Audit Committee Meeting from 2012. Despite these explicit instructions you have discussed the matter recently with Mel Rowles, who is not a member of the Board of the Audit Committee. Not only are your actions in that regard contrary to my explicit instructions but you also breached the confidentiality of the meetings of the Audit Committee.
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> Third, you have disclosed what you allege to be a "contingent liability" to or external auditors in respect of severance and damages to yourself relating to the possible termination of your employment, referencing "illegal acts committed by the Club". Your revelation of this matter to the external auditor in this manner breaches the duty of confidence that you have with respect to or internal employment matters but also is defamatory of the Club. Your reference to a contingency for potential termination of your employment when recently speaking to Mel Rowles is a breach of confidence and unacceptable behaviour.
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> You clearly are incapable of working with this Board and by carrying on in the manner that you have, you have broken the trust relationship between you and the Club. While each of the above matters is, in and of itself, sufficient grounds for the termination of your employment, taken

> together they demonstrate a wholly unacceptable course of conduct which the Club is no longer prepared to tolerate…

After determining that the matter was appropriately dealt with in a summary trial, she went on to review and consider the law relating to dismissal for cause. She stated that for cause to exist, the behaviour of the employee must be such that viewed in all the circumstances it is seriously incompatible with the employee's duties. It is behaviour that goes to the base of the employment contract and "fundamentally strikes at the employment relationship". She concluded that where an employer has issued directions that are lawful and not dishonest, it will amount to insubordination if those directions are disobeyed. In reaching this conclusion she quoted from the decision of Madam Justice Wedge in *Adams v. Fairmont Hotels & Resorts Inc.*[28] as follows:

> [276] In general, just cause is employee behaviour that, viewed in all the circumstances, is seriously incompatible with the employee's duties; it is conduct which goes to the root of the contract and fundamentally strikes at the employment relationship:
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> [277] Conduct amounting to insubordination sufficient to establish cause for dismissal was described half a century ago by Lord Evershed in the oft-cited decision of *Laws v. London Chronicle (Indicator Newspapers), Ltd.*, [1959] 2All E.R. 285 at 287 (Eng. C.A.):
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> > [S]ince a contract of service is but an example of contracts in general, so that the general law of contract will be applicable, it follows that, if summary dismissal is claimed to be justifiable, the question must be whether the conduct complained of is such as to show the servant to have disregarded the essential conditions of the contract of service. It is, no doubt, therefore, generally true that wilful disobedience of an order will justify summary dismissal, since wilful disobedience of a lawful and reasonable order shows a disregard – a complete disregard – of a condition essential to the contract of service, namely, the condition that the servant must obey the proper orders of the master and that, unless he does so, the relationship is, so to speak, struck at fundamentally.
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> [278] As noted in *Laws*, insubordination will not constitute case unless the employer establishes that the employee breached "an essential condition of the contract of service". That may occur, said the Court of Appeal in *Panton* at para. 33, where the employee has wilfully defied a "clear and unequivocal" instruction or refused "to carry out a policy or procedure well known by the employee to be central to the fulfillment of the employer's objectives".
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> [279] The Court in *Panton* also cited its earlier decision in *Stein v. British Columbia (Housing Management Commission)* (1992), 65 B.C.L.R. (2d) 181, 41 C.C.E.L. 213 (C.A.) where, after citing *Laws*, Southin J.A. said the following at 4:
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> > I begin with the proposition that an employer has a right to determine how his bsiness shall be conducted. He may lay down any procedures he thinks advisable so long as they are neither contrary to law nor dishonest nor dangerous to the health of the employees and are within the ambit of the job for which any particular employee was hired. It isnot for the employee nor for the court to consider the wisdom of the procedures. The

[28] 2009 BCSC 681

> employer is the boss and it is an essential implied term of every employment contract that, subject to the limitations I have expressed, the employee must obey the orders given to him.

Madam Justice Maisonville concluded that where an employer loses trust in an employee as a result of their orders being wilfully disobeyed and met with insubordination, there can be grounds for dismissal. She also concluded that it will be insubordination where the employer has issued directions that are lawful and not dishonest where those directions are disobeyed. In concluding her review of the law relating to just cause she quoted the following from the decision of Madam Justice Dillon in *Chan v. Ling*[29], which provides a comprehensive review of decisions involving just cause:

> [28] An employer has just cause to summarily dismiss an employee if he has been guilty of serious misconduct, habitual neglect of duty, incompetence, conduct incompatible with his duties or prejudicial to the employer's business, or wilful disobedience to the employer's orders in a matter of substance (*Port Arthur Shipbuilding Co v. Arthurs* (1967), 62 D.L.R. (2d) 342 at 348 (Ont. C.A.) rev'd on other grounds, [1969] S.C.R. 85). An employer has the right to set reasonable directions or procedures and to expect that employees will follow them (*Stein v. British Columbia (Housing Management Commission)* (1992), 65 B.C.L.R. (2d) 181 (C.A.); *Billows v. Carnac Forest Products Ltd.* (2003) 27 C.C.E.L. (3d) 188 at 203 (B.C.S.C.)). Insubordination by failure to follow procedures can be cause for dismissal (*Candy v. C.H.E. Pharmacy Inc.* (1997), 31 B.C.L.R. (3d) 12 at 16 (C.A.); *Aeichele v. Jim Pattison Indstries Ltd.* (1992), 44 C.C.E.L. 296 at 302 (B.C.S.C.) [*Aeichelle]*). The diversion of company funds for personal purposes in a deceptive and devious manner may justify dismissal despite the fact that no monetary damage has resulted to te company as this conduct represents a complete breakdown of trust (*Christensen v. McDougall* (2001), 14 C.C.E.L. (3d) 44 at para 69 (Ont. Sup. Ct.)). An employee responsible for the financial operations of a company must be forthright about the availability fo financial statements and submit reports as requested (*MacDonald v. Tamitik Status of Women Association*, [1998] B.C.J. No 2709 at paras. 44 – 49 (S.C.)). The ordering of prodct without authorization in contravention of policy may also be grounds for dismissal (*Mitran v. Guarantee RV Centre Inc.*, [1999] A. J. No. 403, 1999 ABQB 276). Finally, failure of an employee to attend at a crucial business time may constitute wilful disregard of specific orders or instructions (*Aeichele* at paras. 23 – 27).
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> [29} However, all misconduct must be assessed as to nature and degree within a contextual approach to determine whether it warrants dismissal. The principle from *McKinley v. BC Tel*, [2001] 2 S.C.R. 161 at para. 57 concerning dishonesty, that each case is to be considered within its own facts and circumstances and each dishonesty assessed as to nature and seriousness so to determine whether it is reconcilable with sustaining the employment relationship, applies equally to insubordination and other acts of misconduct. Conduct that causes an employer to lose trust in an employee in a responsible position may so undermine the relationship as to justify dismissal.

Madam Justice Maisonville found that the circumstances at bar that Mr. Cotter's actions were "seriously incompatible" with the employee's duties. She concluded that he was wilfully disobedient and refused to accept the directions of his supervisor. He was insubordinate in that he willfully defied "clear and

[29] 2006 BCSC 1243

unequivocal" directions from his direct supervisor. She found that the termination for cause was justified in the circumstances.

Oral Fixed Term Contract and Mitigating while out of the country

James v. The Hollypark Organization Inc.[30]is a decision of Madam Justice Burke in which the existence of a fixed term contract on the basis of oral discussions was found to exist. This case involved the employment of the plaintiff in the position of hotel manager. Before concluding that the employee's employment was for a fixed term, Madam Justice Burke reviewed and summarized the legal principles applicable to determining whether a fixed term contract existed or not. The onus is on the plaintiff employee to establish that her employment contract was for a definite term, on a balance of probabilities.[31] The considerations that apply to determine whether the contract is for a definite period include the following[32]:

- A fixed-term contract can be in writing or orally made or partly in writing and partly oral. The term may be fixed to a certain time or certain event. However, to be fixed, the intention of the parties must be clearly expressed or necessarily implied;
- The parties must be *ad idem* as to the term. If only one of the parties inferred the term was fixed, that is insufficient; and
- Whether the parties agreement was oral or partly written and partly oral- the evidence of the parties oral discussions shold allow the reasonable observer to conclude the individual at issue was hired for a fixed term.

Flexibility in the nature of the evidence that can be used to assess the terms of the oral contract is taken. Madam Justice Burke quoted from the decision of Newbury, J.A. in *De Cotiis v. Viam Holdings Ltd.,*[33] as follows:

> [21]…As G.H.L. Fridman notes in *The Law of Contracts in Canada* (5th ed., 2006) "in the case of a completely oral contract there is greater flexibility in the nature of the evidence that is admissible to prove the contents of the contract and the meaning of the language used by the parties." (At 440) This flexibility follows intuitively from the recognition that oral contracts must often be construed without the key interpretive tool used to understand written cotnracts – the words of the agreement.

Madam Justice Burke considered the oral testimony of the plaintiff as to the terms of the contract, her actions following the discussion including her move to Vernon and various documents in concluding that the contract was for a fixed term.

Another interesting issue that arose in this case related to a claim by the employer that the plaintiff had failed to mitigate her damages by spending five months in Mexico during her job search. Madam Justice Burke confirmed that it is not enough for the defendant to show the plaintiff could have been more diligent in her job search. They must prove that, had she remained in Canada, she could have procured

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[30] 2016 BCSC 495
[31] *Herold v. Marathon Developments Inc./Societe Developpement Inc..,* 1999 CarswellBC 863 at para. 6
[32] *Canelas v. People First of Canada*, 2009 MBQB 67
[33] 2010 BCCA 368 at para. 21

other employment.[34] Madam Justice Burke concluded that the defendant had failed to establish a failure to mitigate, stating at para. 68 the following:

> [68] The defendant has not introduced evidence to prove any abandonment of the job search occurred. In today's world, a person can reach out to contacts and search for jobs from a variety of locations. The defendant cannot use the fact the plaintiff left the country to prove his case for him.

The assessment of the plaintiff's mitigation efforts was required as the legal principle is that if the plaintiff is able to prove a fixed term contract they will generally be paid the entire balance of the contract, less any deductions for work that the plaintiff could reasonably be expected to earn from other employment.[35]

Treatment of Failure to Mitigate

The British Columbia Court of Appeal sent a case back to trial due to errors made by the trial judge in dealing with a failure to mitigate[36]. In *Steinebech* the trial judge found that the plaintiff had been wrongfully dismissed and that he was entitled to 16 months notice. He awarded damages based on a 13 month notice period after a finding that he had failed to mitigate his damages.[37] This finding was based on a conclusion that the plaintiff's decision to pursue an investment counsellor career was not reasonable and that he might have been able to replace his lost income with a more focused search. The trial judge did not however make a finding as to when the plaintiff would have found alternative work. The defendant appealed that award, arguing that the plaintiff should either receive no damages or that his damages should be reduced by 12 months.

Because the trial judge had failed to make a finding as to when the plaintiff might have found alternate employment, the Court of Appeal had no option but to send the case back to trial for that determination. The Court of Appeal reviewed the law with respect to dealing with a failure to mitigate. Mr. Justice Chiasson writing for a unanimous bench noted that notice must be separated from damages, and that includes when assessing the impact of a failure to mitigate. At paragraph 15 the court noted as follows:

> [15] I agree with the appellant that the judge erred by reducing the notice period to take into account the respondent's failure to mitigate. The notice period is a substantive right that flows out of the employment relationship. A failure to give adequate notice of termination is a breach of the employment contract. A failure to mitigate damages is taken into account in the calculation of damages that flow from a breach of contract.

In this case, the Court of Appeal found two problems with the trial judge's decision. The first problem was the lack of a finding of when the dismissed employee would have found work if he had taken reasonable steps following his termination. The second problem was in reducing the period of notice to reflect the failure to mitigate.

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[34] *Fisher v. Seton Lake Indian Band,* 1994 CarswellBC 1161 at para. 22(S.C.)
[35] *Nevin v. British Columbia Hazardous Waste Management Corp.* (1995), 129 D.L.R. (4th) 569 at para. 18 (B.C.C.A.)
[36] *Steinebach v. Clean Energy Compression Corp.*2016 BCCA 112.
[37] *Steinebach v. Clean Energy Compression Corp.,* 2015 BCSC 460

Appeal of Munoz

In a previous issue of this Employment Law Update, the trial decision in *Munoz v. Sierra Systems Group Inc.* [38] was reviewed. *Munoz* considered the claim of the plaintiff for wrongful dismissal following a "bench period". The trial judge concluded that the dismissed employee should have been provided with ten months notice of his termination. She assessed damages based on the plaintiff's earnings for the 12 months preceding the bench period. The employer appealed that decision on the following grounds:

1. That the trial judge erred in finding that the termination date occurred retroactively on the first day that the plaintiff was benched;
2. That the trial judge erred in determining that the plaintiff was entitled to ten months notice;
3. That the trial judge erred in how she assessed damages for the failure to provide reasonable notice; and
4. That the trial judge erred in finding that the plaintiff had properly mitigated her damages.

The Court of Appeal found that the trial judge had erred in finding that termination had retroactively occurred, in finding that the plaintiff was entitled to ten months notice and in the manner which damages were assessed. The unanimous reasons of the Court of Appeal were written by Madam Justice Fenton.

The decision of the Court was primarily based on an assessment of the facts, however the analysis of the appropriate period of notice did include some comments that all employment law practitioner's should be aware of. In assessing the amount of notice, one of the factors that the trial judge took into consideration was the availability of other employment. The trial judge found that the unavailability of similar employment was a factor which led to her awarding a period of notice at the high end of what would be the appropriate range. The Court of Appeal found error in the manner in which this was assessed. The Court of Appeal emphasized that the burden of proving that the notice period should be longer because of the lack of availability of suitable work falls on the employee, citing *Desaulniers v. Wire Rope Industries Ltd.,* [39] as follows:

> If the plaintiff asks the court to depart from the general range of notice periods recognized by other courts in respect of plaintiffs of similar age, senority and position, she must establish an evidentiary basis for such a departure.

The Court of Appeal in reviewing the trial record found that the plaintiff had failed to establish this on the evidence and accordingly reduced the period of notice from ten months to eight months.

[38] 2015 BCSC 269
[39] [1995] B.C.W.L.D. 1332 at para. 14