

**CITATION:** Birnbaum v. Dr. Chan., 2026 ONSC 2009  
**COURT FILE NO.:** CV-20-642484  
**DATE:** 20260415

**ONTARIO**

**SUPERIOR COURT OF JUSTICE**

**BETWEEN:** )  
 )  
ELKA BIRNBAUM ) *Jonquille Pak & Dilpreet Grewal, for the*  
 ) Plaintiff  
Plaintiff )  
 )  
- and - )  
 )  
DR. VICTORIA CHAN and DR. )  
VICTORIA CHAN MEDICINE ) *G. Joseph Falconeri, for the Defendants*  
PROFESSIONAL CORPORATION )  
 )  
Defendants )  
 )  
 )  
 ) **HEARD: January 12-16, 2026**

2026 ONSC 2009 (CanLII)

**JUSTICE POLLAK**

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**REASONS FOR DECISION**

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**Overview**

[1] The Plaintiff, Elka Birnbaum, was employed by the Defendant as a Medical Secretary initially on a full time basis and most recently on a part-time basis by the Defendants in total for approximately 19 years.

[2] This simplified rules action was heard in a five day trial. The Plaintiff has waived all damages in excess of \$200,000 in accordance with r. 76 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194.

[3] The Defendant Dr. Victoria Chan is a medical doctor specializing in Respiriology and Sleep Disorders.

[4] The Defendant Dr. Victoria Chan Medicine Professional Corporation (the “Defendant Corporation”) is incorporated pursuant to the laws of the Province of Ontario and the Dominion of Canada. Dr. Chan is the sole shareholder of the Defendant Corporation.

[5] The Defendants operate a medical clinic from a three-storey house with Dr. Chan and two other medical secretaries and Doctors for sleep disorders and respirology treatment.

[6] The Plaintiff was hired by the Defendants on a full-time basis in September of 2001. In the month of August of 2014, as Dr. Chan’s practice at the Clinic had slowed down and the Defendants no longer required the Plaintiff’s services at the Clinic, the Plaintiff was given a written notice of termination of employment effective on December 31, 2015.

[7] Soon thereafter, in January of 2016, the Plaintiff told Dr. Chan that she could not afford to lose her job. Dr. Chan agreed that the Defendants would reduce her position to part-time hours in an effort to continue her employment. Dr. Chan’s evidence is that notwithstanding the fact that it was not in the clinic’s best interests to continue the employment of the Plaintiff on a part-time basis, the Defendants agreed to do so to accommodate the plaintiff.

[8] In March of 2019, the Plaintiff had double bypass surgery after suffering a heart attack. She returned to work on a graduated basis after a four-month medical leave. In this action, the Plaintiff alleges that during her medical leave, she was replaced with a younger medical secretary. The Defendants implemented strict health and safety protocols as of March 17, 2020, at the start of the COVID-19 pandemic. Patients appointments were conducted virtually or by telephone. The Defendants also made numerous accommodations for the Plaintiff to ensure her well-being and safety while performing the duties of her employment at this time. This included arranging for the Plaintiff to work in isolation from all other employees on a separate floor of the Clinic.

[9] However, on March 22, 2020, the day before her next scheduled part-time workday, the Plaintiff sent an email to the Defendants stating that she no longer felt safe working at the Clinic for her scheduled shifts because of her age and ongoing health issues as well as those of her husband. She requested to work remotely from home. In response, the Defendants gave the Plaintiff a two-week paid leave. At the end of this paid leave, the Plaintiff was advised that as a result of the extreme downturn of the clinic’s business and as a result of the confidentiality requirements for the clinic, which precluded her from working remotely, the difficult decision had been made to terminate her employment with 12 months continuation of payment of her salary. The evidence of the Defendants is that at that time the Clinic was not permitting any secretarial staff to work from home due to the highly confidential nature of patient information that they are frequently required to access on the clinic’s computer program in performing the duties of their employment. In addition, as a result of the ongoing Declaration of Emergency the government had

enacted as a result of the COVID-19 pandemic, the Defendants' workload at the clinic was reduced by more than 50%. As there were no further reasonably practicable accommodations that could be made for the Plaintiff at that time, and due to the significant reduction in the Plaintiff's workload for the foreseeable future, the Defendants made the decision to terminate the Plaintiff's employment. On April 3, 2020, the Defendants therefore provided the Plaintiff with notice that her employment was being terminated without cause effective immediately and she was notified that in lieu of notice, she would continue to receive her existing remuneration for one year until March 31, 2021.

[10] The parties have agreed to the following:

- Dr. Chan is a medical doctor specializing in Respiriology and Sleep Disorders.
- The Defendant Corporation is incorporated under the laws of the Province of Ontario and the Dominion of Canada.
- Dr. Chan is the sole shareholder of Dr. Victoria Chan Medicine Professional Corporation.
- The Defendants are engaged in the business of sleep disorder and respirology treatment.
- The Plaintiff commenced employment on a full-time basis with the Defendants as a medical secretary on September 11, 2001.
- During her employment, the Plaintiff reported directly to Dr. Chan.
- At the time that the Plaintiff's employment was terminated on April 3, 2020 she earned \$18,200 per annum and was entitled to four weeks of paid vacation.
- On or about March 17, 2020, the Government of Ontario enacted a Declaration of Emergency due to the COVID-19 pandemic.
- On March 22, 2020, in an email to Dr. Chan, the Plaintiff requested to continue working from home. This request was denied by Dr. Chan.
- On April 3, 2020, the Defendants provided the Plaintiff with notice that her employment was being terminated without cause effective immediately. She was notified that in lieu of notice, she would continue to receive her existing remuneration until March 31, 2021.

- The Plaintiff was 70 years of age at the time of dismissal.
- The Defendants paid the Plaintiff an all-inclusive amount of \$2877.39 following her dismissal on April 3, 2020.
- Subsequent to the Plaintiff's April 3, 2020 dismissal, the Defendants claimed after-acquired termination for cause of the Plaintiff.

[11] In this action, the Plaintiff claims her termination was a breach of the Ontario *Human Rights Code*, R.S.O. 1990, c. H19 (the "*Code*"), that it was reprisal and breach of the *Occupational Health and Safety Act*, R.S.O. 1990, c. O.1, and that it was made in bad faith. The Plaintiff further alleges that in response to her claim, the Defendants withdrew their offer of paid notice on the basis of their discovery of after-acquired cause, resulting from the Plaintiffs misuse of the clinic's software system which generated and stored medical information regarding the clinic's patients. As mentioned below, the Plaintiff did not make submissions at trial on all of her claims.

[12] The Plaintiff's claims are for damages for wrongful dismissal based on a 24-month notice period (from April 3, 2020 to April 3, 2022) totaling \$36,400, general damages of \$50,000 for injury to dignity, feelings and self-respect pursuant to section 46.1 of the *Code*, compensation of \$54,600 for loss of income pursuant to section 46.1 of the *Code*, R.S.O. 1990, moral or punitive damages for the Defendants' breach of their duty of honesty and good faith in the performance of contractual and statutory duties owed to the Plaintiff, for a total of \$200,000 plus pre-judgment and post-judgment interest.

[13] No monetary damages are claimed for the other claims pleaded.

### **Alleged Contraventions of the Code**

#### **The Law**

[14] The Plaintiff submits that the Defendants breached their duty to accommodate the Plaintiff on the basis of her disability as they did not consider her request for remote work accommodation, which is in of itself a breach of the procedural duty to accommodate under the *Code*. As a result, even if the evidence establishes that it was not possible to accommodate the Plaintiff to the point of undue economic hardship, the failure to consider the Plaintiff's request is a breach of the *Code*.

[15] Both parties agree that employers have a duty to accommodate to the point of undue hardship as some hardship is anticipated. The Defendants must prove "undue hardship" and adduce evidence of such hardship that cannot be based on speculative or unsubstantiated concerns, which

could possibly result if the Plaintiff is accommodated: see e.g. *ADGA Group Consultants Inc. v. Lane et al.* (2008), 91 O.R. (3d) 649 (Div. Ct.).

[16] The Supreme Court of Canada in *Hydro-Québec v. Syndicat des employé-e-s de techniques professionnelles et de bureau d'Hydro-Québec, section locale 2000 (SCFP-FTQ)*, 2008 SCC 43, [2008] 2 S.C.R. 561, has provided guidance on the test for undue hardship as follows:

[16] The test is not whether it was impossible for the employer to accommodate the employee's characteristics. The employer does not have a duty to change working conditions in a fundamental way, but does have a duty, if it can do so without undue hardship, to arrange the employee's workplace or duties to enable the employee to do his or her work.

[17] Because of the individualized nature of the duty to accommodate and the variety of circumstances that may arise, rigid rules must be avoided. If a business can, without undue hardship, offer the employee a variable work schedule or lighten his or her duties — or even authorize staff transfers — to ensure that the employee can do his or her work, it must do so to accommodate the employee. ...

[18] Thus, the test for undue hardship is not total unfitness for work in the foreseeable future. If the characteristics of an illness are such that the proper operation of the business is hampered excessively or if an employee with such an illness remains unable to work for the reasonably foreseeable future even though the employer has tried to accommodate him or her, the employer will have satisfied the test. In these circumstances, the impact of the standard will be legitimate and the dismissal will be deemed to be non-discriminatory. I adopt the words of Thibault J.A. in the judgment quoted by the Court of Appeal, *Québec (Procureur général) v. Syndicat de professionnelles et professionnels du gouvernement du Québec (SPGQ)*, [2005] R.J.Q. 944, 2005 QCCA 311: [translation] “[In such cases,] it is less the employee's handicap that forms the basis of the dismissal than his or her inability to fulfill the fundamental obligations arising from the employment relationship” (para. 76).

[19] The duty to accommodate is therefore perfectly compatible with general labour law rules, including both the rule that employers must respect employees' fundamental rights and the rule that employees must do their work. The employer's duty to accommodate ends where the employee is no longer able to fulfill the basic obligations associated with the employment relationship for the foreseeable future. [Emphasis added.]

[17] Further, in the Supreme Court of Canada case of *British Columbia (Public Service Employee Relations Commission) v. BCGSEU*, [1999] 3 S.C.R. 3, the Court held at paras. 64-65 that:

[64] Courts and Tribunals should be sensitive to the various ways in which individual capabilities may be accommodated. Apart from individual testing to determine whether the person has the aptitude or qualification that is necessary to perform the work, the possibility that there may be different ways to perform the job while still accomplishing the employer's legitimate work-related purpose should be considered in appropriate cases. The skills, capabilities and potential contributions of the individual claimant and others like him or her must be respected as much as possible. Employers, courts and tribunals should be innovative yet practical when considering how this may best be done in particular circumstances.

[65] Some of the questions that may be asked in the course of the analysis include:

- (a) Has the employer investigated alternative approaches that do not have a discriminatory effect, such as individual testing against a more individually sensitive standard?
- (b) If alternative standards were investigated and found to be capable of fulfilling the employer's purpose, why were they not implemented?
- (c) Is it necessary to have all employees meet the single standard for the employer to accomplish its legitimate purpose or could standards reflective of group or individual differences and capabilities be established?
- (d) Is there a way to do the job that is less discriminatory while still accomplishing the employer's legitimate purpose?
- (e) Is the standard properly designed to ensure that the desired qualification is met without placing an undue burden on those to whom the standard applies?
- (f) Have other parties who are obliged to assist in the search for possible accommodation fulfilled their roles? As Sopinka J. noted in [*Central Okanagan School District No. 23 v. Renaud*, [1992] 2 S.C.R. 970], at pp. 992-96, the task of determining how to accommodate individual differences may also place burdens on the employee and, if there is a collective agreement, a union. [Emphasis in original.]

[18] To summarize our jurisprudence, our Courts have held that the obligation on the Defendants is not to implement the Plaintiff's ideal form of accommodation or preferred form of accommodation, but one that is reasonable in the circumstances. The duty to accommodate is fact-specific, considering the Plaintiff's circumstances or position, the restrictions in question, and the Plaintiff's needs. With respect to the procedural duty to accommodate, employers are required to obtain all relevant information about the employee's disability where it is readily available and seriously consider how the employee could be accommodated: see *ADGA Group*, at para. 107. For the reasons which I set out below, I am of the view that the jurisprudence relied on by the Plaintiffs are not of assistance to this court as they are distinguishable from the facts of this case.

[19] The Plaintiff relies on *Khanom v. Idealogic PDS Inc.*, 2024 ONSC 5131, and *Cosentino v. Octapharma Canada Inc.*, 2024 HRTO 1331, as examples of situations where employers' failure to allow remote work during the COVID-19 pandemic amounted to a failure to meet the employers' duty to accommodate. As I elaborate on below, these cases do not assist the Plaintiff. As *Hydro-Québec* instructs, a contextual analysis is required for each case based on the evidence before the court. Both *Khanom* and *Cosentino* involved large corporate employers, dealt with different factual scenarios, and *Khanom* was a default judgment without a full factual record.

### **Accommodation of the Plaintiff**

[20] The Plaintiff's evidence was that she had a number of duties in her job which included scheduling appointments, administering breathing tests, and communicating with other doctors to book appointments amongst other typical duties ordinarily expected of a medical secretary. When the Plaintiff first started working, the Clinic's charts were in paper format but eventually changed to electronic medical records which contained private medical information.

[21] Dr. Chan's evidence was that the Accuro software platform was implemented in her clinic in 2013. The Plaintiff had training on the Accuro software but she had experienced issues in grasping how to use the new software. Dr. Chan took time away from her practice to help the Plaintiff learn to use the new software.

[22] The importance of confidentiality was emphasized by the computer program itself that warned the user on each sign-in displaying a message on the login portal which stated:

This system may only be logged into and/or used by specifically authorized persons and/or their automated tools. Authorization must be obtained from the Authorized Owner or Licensee. Unauthorized use of this system is unlawful and may be subject to civil and/or criminal penalties. Use of this system may be logged and/or

monitored at any time and without further notice and any information from this system may be used as evidence in court.

[23] The Plaintiff testified that she completed a training course on patient privacy and confidentiality with McKenzie Health in June of 2017. After that, she signed a confidentiality agreement regarding the issues of patient privacy and confidentiality. However, at the conclusion of her evidence, she stated that she did not know or understand that there were ethical and professional obligations for Dr. Chan in protecting patient privacy and confidentiality. I find this evidence troubling, for the reasons I set out below.

[24] Dr. Chan's evidence was that the Plaintiff had also signed a confidentiality agreement confirming that she understood the contents of the course materials. Dr. Chan emphasized the importance of confidentiality with the use of the Accuro program because her Clinic's patient records were linked with those of McKenzie Health.

[25] At trial, the Plaintiff read in the following discovery transcript of Dr. Chan's evidence, which was Dr. Chan's response to the question of why she could not accommodate the Plaintiff's request to work remotely:

- “March of 2020, the pandemic came upon us as a big shock. A big shock. My accommodation was to stop all in-person appointments so that no one could infect the secretaries. And so two secretaries could not infect each other because we had a large office and each person could work in a separate room on a separate floor. That was the accommodation I was making. Plus, they could wear very high quality masks and PPE's. At that point, I had no plans to go remote because it was too quick and too sudden, and that kind of information takes months to do it properly. You have to scope out the equipment. You have to buy it. You have to install it. You have to troubleshoot it. I was called to action at the hospital myself as a respirologist. So my best efforts was to make the workplace safe for everyone to work in.
- What do you mean by further reasonable practical accommodation? I did not have a remote work strategy at that time. Is that what you are referring to here, that she asked to work from home? That was possible. You were not set up for that, and therefore you had to be terminated. That was one of the reasons you terminated, correct? Yes, she did not want to come in the office. And also, the workload had dropped drastically because the patients did not want to come in anymore either. Why not place her on a leave of absence? I did, I gave her two weeks. She got to stay home. She [got to] to get paid. And she got to self isolate.”

[26] In cross-examination, Dr. Chan stated in response to the question of why the Plaintiff was not put on an indefinite leave of absence: “maybe I would have brought her back, but she decided to sue me.”

[27] Dr. Chan’s evidence was that all of her actions that led to the Plaintiff’s termination were governed solely by Dr. Chan’s conviction that she could not allow her medical assistants to work from home where they could potentially divulge privacy and confidentiality information as a result of their required and routine use of the Accuro program. The evidence was that Dr. Chan had concerns about her computer security issues as well. During the COVID-19 pandemic, Dr. Chan worked as a respirologist to help Ontarians and, as a small clinic, the Defendants did not have the remote work arrangements (as some large employers had) in place to accommodate the Plaintiff’s request which was made on such short notice.

[28] The Defendants emphasize that with respect to the duty to accommodate when the Plaintiff returned to work following her sick leave period, they followed the Plaintiff’s cardiologist’s recommendation. There was a graduated return to work schedule. The Plaintiff eventually returned to her full work duties on her 14-hour weekly basis.

[29] The Plaintiff was given her own floor in the clinic to work, personal protective equipment, and her own office. Clients were not coming into the clinic.

[30] The Plaintiff’s evidence was that she thought another medical assistant was allowed to work from home. Dr. Chan’s evidence was that such was not the case and that the assistant the Plaintiff was referring to was typing sleep study reports for other Doctors, which were unrelated to the Plaintiff’s duties.

[31] The Defendant submits that Dr. Chan did accommodate the Plaintiff to the point of undue hardship. I agree that the Plaintiff cited authorities that are not applicable as they deal with large employers where remote access networks had already been established. This was not the case with this small clinic. I agree that considering all of this evidence in the context of the sudden COVID-19 pandemic Dr. Chan did accommodate the Plaintiff through reasonable measures to the point of undue hardship.

[32] Dr. Chan’s evidence as to why she could not accommodate the Plaintiff’s remote work request was, in my view, reasonable. Dr. Chan did not want her secretaries talking about patients and divulging confidential medical information in their homes. Dr. Chan had lost business at this time as a result of the global pandemic. Dr. Chan also had concerns about home computer security issues and the time it would take to set up the remote access. Dr. Chan was very busy as a working

respirologist in Ontario hospitals during the pandemic and did not have the remote work arrangements in place to accommodate the Plaintiff's request or the time to do so.

[33] To consider the Plaintiffs' request, Dr. Chan then gave the Plaintiff a two-week paid stay-at-home leave.

[34] When I consider the questions set out by the Supreme Court of Canada in *BCGSEU* to assist in the determination of whether the duty of accommodation has been met, I find that it was not possible for Dr. Chan to investigate alternate approaches on such short notice during the beginning of the COVID-19 pandemic. Further, when considering all of the circumstances surrounding the Plaintiff's request to work remotely, I find that there was no other way to do the job that was less discriminating while still accomplishing the duties of the job. As well, the plaintiff did not provide any assistance or ideas on how she could be accommodated other than working from home or how she could work from home while performing her duties and complying with confidential requirements of her job.

[35] Considering all of the evidence, I am of the view that, in the circumstances of the COVID-19 pandemic while Dr. Chan was extremely busy working as a Respirologist in hospitals, it was not reasonably possible for Dr. Chan to set up proper confidentiality protections for a medical assistant like the Plaintiff while the assistant was inputting data to the Accuro system as part of her job duties. Further, I must determine if it was reasonable to expect that in these circumstances, the Plaintiff could have been placed on a longer leave of absence instead of offering one year's pay in lieu of notice, as a reasonable option. While such might have been possible, I find that in all of these circumstances, the Defendants did act reasonably.

[36] With respect to the Plaintiff's allegation of discrimination based on age and disability, to properly consider these claims, the court must apply the same contextual analysis and consider all of the evidence with respect to the employment relationship. Dr. Chan's clinic was in a small residential house with two staff members and two other doctors. I find that the evidence of the Plaintiff with respect to the inquiries relating to her possible retirement was not sufficient to satisfy the Plaintiff's burden of proving discrimination on the basis of age and disability.

[37] With respect to the claim that the Defendants breached their procedural duty to accommodate after her two-week paid leave, the Plaintiff also sent another email to the Defendants again, demanding to work from home. This was not an immediate denial on a first request. I do not find that the Defendants refused to consider the Plaintiff's request for accommodation. As mentioned above, Dr. Chan had already made accommodations for the Plaintiff.

[38] I therefore find that the Plaintiff's claims of the *Code* breaches have not been proven on a balance of probabilities.

### **Just Cause**

[39] After the Plaintiff's termination of employment, the Defendants claim they discovered knowledge that justified the termination of her employment on a with-cause basis. They withdrew their offer of payment of salary continuation but provided the Plaintiff with pay in lieu of notice in accordance with the statutory minimums prescribed by the *Employment Standards Act 2000*, S.O. 2000, c. 41.

[40] The "after-acquired cause" claim is that during the course of the Plaintiff's employment, the Plaintiff improperly created a patient chart for herself in the Clinic's Accuro electronic database, listing Dr. Chan as her treating physician. The Defendant Dr. Chan denies having provided any type of medical treatment to the Plaintiff. The Defendants further deny providing the Plaintiff with consent to create this file for herself.

### **The Law**

[41] The Court of Appeal in *Dowling v. Ontario (Workplace Safety and Insurance Board)* (2004), 246 D.L.R. (4th) 65 (Ont. C.A.), leave to appeal refused [2005] S.C.C.A. No. 25, provided the following commentary on determining whether there is just cause for a dismissal:

[49] Following [*McKinley v. B.C. Tel*, 2001 SCC 38, [2001] 2 S.C.R. 161], it can be seen that the core question for determination is whether an employee has engaged in misconduct that is incompatible with the fundamental terms of the employment relationship. The rationale for the standard is that the sanction imposed for misconduct is to be proportional -- dismissal is warranted when the misconduct is sufficiently serious that it strikes at the heart of the employment relationship. This is a factual inquiry to be determined by a contextual examination of the nature and circumstances of the misconduct.

[50] Application of the standard consists of:

1. determining the nature and extent of the misconduct;
2. considering the surrounding circumstances; and,
3. deciding whether dismissal is warranted (i.e. whether dismissal is a proportional response).

[51] The first step is largely self-explanatory but it bears noting that an employer is entitled to rely on after discovered wrongdoing, so long as the later

discovered acts occurred pre-termination.

[52] The second step, in my view, is intended to be a consideration of the employee within the employment relationship. Thus, the particular circumstances of both the employee and the employer must be considered. In relation to the employee, one would consider factors such as age, employment history, seniority, role and responsibilities. In relation to the employer, one would consider such things as the type of business or activity in which the employer is engaged, any relevant employer policies or practices, the employee's position within the organization, and the degree of trust reposed in the employee.

[53] The third step is an assessment of whether the misconduct is reconcilable with sustaining the employment relationship. This requires a consideration of the proved dishonest acts, within the employment context, to determine whether the misconduct is sufficiently serious that it would give rise to a breakdown in the employment relationship. [Citations omitted.]

[42] Common law just cause for dismissal may be on the basis that the employees conduct gives rise to a breakdown in the employment relationship. The key question is whether an employee has engaged in misconduct that is incompatible with the fundamental terms of the employment relationship, which can include violating an essential condition of the employment contract or breaching the faith inherent in the work relationship. The sanction imposed for misconduct must be proportional – dismissal is warranted when the misconduct is sufficiently serious that it strikes at the heart of the employment relationship.

### **Just Cause to Dismiss the Plaintiff**

[43] In approximately 2014, Dr. Chan discovered that the Plaintiff had used the Clinic's electronic database (Accuro) to request medical records and diagnostic test results from multiple hospitals for herself and for members of her family who were not patients of the Clinic and had not authorized the Clinic to access their personal health records. The Defendants claim that the Plaintiff knew that this was a breach of the Clinic's patient privacy policies as well as those of the hospitals that were partnered with the Clinic, as each time the Plaintiff logged into the Clinic's database, these policies were displayed on the log-in access portal (which I have referred to above at para. 22).

[44] Dr. Chan's evidence was that there were four instances where an information communication exchange server or Ontario Hospital Report Manager imported patient information of the Plaintiff into her Clinic's database. Dr. Chan stated that this is an automated function where

the reports generated by the hospital are exchanged with office electronic medical records when the doctor is listed in the circle of care. The Plaintiff created her own chart as a patient of Dr. Chan. Dr. Chan reported this to the Privacy Officer of McKenzie Health. The Privacy Officer of MacKenzie Health did an investigation and advised Dr. Chan that for a number of scans, the Plaintiff had copied Dr. Chan's name on the scan which had caused the scan to be imported into the Plaintiff's chart which shouldn't have existed in the Clinic. In these requisitions, Dr. Chan also discovered that in November of 2017 and July 2018, the Plaintiff had included Dr. Chan's name as one of her physicians in order to passively receive the reports into her chart in the Clinic and without the hospital knowing.

[45] Through Dr. Chan's review of the Accuro audit logs, she determined that on December 19, 2018, the Plaintiff had generated a letter from the Clinic from Dr. Steven Gold. Dr. Chan's evidence was that this letter was a template for request access to medical records. Dr. Chan's belief was that the Plaintiff had misrepresented herself as a patient of Dr. Chan's practice to gain access to her records from the hospital and Dr. Gold's office. Dr. Chan testified that she did not know who Dr. Gold was.

[46] In further reviewing the Accuro audit logs, Dr. Chan saw that two of her other employees uploaded documents or handled information coming in from different sources on numerous occasions in the Plaintiff's chart. By creating a chart in the clinic, the Plaintiff created a situation in her office where her confidential information was exposed to two other employees. Dr. Chan testified that these other employees in Dr. Chan's clinic would have assumed that the Plaintiff was an office patient given that her name was in the database and information was coming in through the Clinic's fax machine.

[47] Dr. Chan testified that the Plaintiff's conduct was a serious breach of patient privacy and confidentiality and she had to report these facts to the Ontario College of Physicians and Surgeons as well as the Canadian Medical Protective Association. Dr. Chan stated that both of those governing bodies advised her that the Plaintiff's conduct was an improper use of the Clinic's electronic medical records tools.

[48] Dr. Chan testified that the Plaintiff had also created a chart for her daughter Marnee that Dr. Chan had provided some informal medical advice to Marnee and the Plaintiff but no formal doctor-patient relationship had ever materialized. Marnee did not become a patient of Dr. Chan's until January 3, 2020. Dr. Chan further explained that whether or not the Plaintiff had permission from her daughter (Marnee) to access, store, copy or review all of Marnee's health information is irrelevant when considering that this constituted a serious breach of patient privacy and confidentiality.

[49] Shortly after discovering the Plaintiff's violations of the Clinic's policies in 2014, Dr. Chan told the Plaintiff that such conduct was a serious breach of confidentiality and was not permitted in her employment. Dr. Chan had a meeting with the Plaintiff during which she was warned not to engage in these privacy and confidentiality breaches. Dr. Chan also confirmed the contents of this discussion in writing by emailing the Plaintiff on November 26, 2014. The Plaintiff denies receiving this email.

[50] Throughout the remainder of the Plaintiff's employment by the Defendants, she received ongoing education and training with respect to patient health information privacy requirements and policies. In 2017, as mentioned above, the Plaintiff participated in a training seminar for the Defendants' Electronic Medical Record ("EMR") database which included extensive training on the topic of patient privacy and confidentiality in the context of EMRs. As part of this seminar, the Plaintiff was required to sign a statement indicating that she understood and agreed to abide by the clinic's patient privacy and confidentiality policies. The Plaintiff attended a further training seminar on this topic as a volunteer in the fall of 2019. The Plaintiff advised Dr. Chan that in order to complete the seminar, she was required to take a test to demonstrate her knowledge of patient privacy and confidentiality policies in relation to EMRs.

[51] However, notwithstanding this warning, the Plaintiff continued her unauthorized use of the clinic's database, which Dr. Chan discovered after the Plaintiff's termination when the Plaintiff requested that the Defendants provide her with the medical chart that she had improperly created for herself during the course of her employment. When accessing the clinics' computer systems the Plaintiff's chart, the Defendants reviewed an audit log documenting the Plaintiff's use of the database. The audit log showed that the Plaintiff had continued to use the Defendants' software to request and access her medical records from other health care providers as well as those of her family members after the time that she had been told by Dr. Chan not to do so.

[52] The Defendants submit that on this basis, there was sufficient cause to terminate the Plaintiff's employment. This is further exacerbated by the fact that during this period, the Plaintiff engaged in numerous training seminars on the subject of patient privacy and confidentiality policies and made representations to the Defendants that she understood and would abide by said policies. On this basis, the Defendants argue the Plaintiff is not entitled to any further compensation.

[53] The Plaintiff admits she accessed both her chart and that of her daughter Marnee and asked medical professionals to copy Dr. Chan on medical records. But her evidence was that she thought this was permissible.

[54] She testified that no express permission was provided but that it was reasonable in the circumstances given that Dr. Chan acted formally and informally as a doctor to the Plaintiff and her family members.

[55] The evidence in this case shows that the Plaintiff created patient charts for both herself and Marnee in Dr. Chan's clinic without Dr. Chan's permission. In addition to creating the patient charts, the Plaintiff accessed, viewed, and modified documents in these charts from 2013 up until her dismissal in April of 2020. She had also copied Dr. Chan on outgoing correspondence to different medical professionals and had misrepresented Dr. Chan as forming part of her circle of care as a medical doctor. The Plaintiff denies that she was warned by Dr. Chan that her conduct was unacceptable.

[56] The Plaintiff's evidence is that she never received the November 26, 2014 email or verbal warning from Dr. Chan. In cross-examination, the Plaintiff admitted that she may have received the November 26, 2014 email and deleted it afterwards.

[57] In light of all of the evidence I have referred to above, I find that the Plaintiff knew or ought to have known of the severity her misconduct as of November of 2014, from her training in patient confidentiality, and because of the warning I have referred to above on the login to the Accuro program. Despite this warning, the Plaintiff continued her conduct. The Accuro audit logs showed the number of times the Plaintiff continued this conduct.

[58] If the court were to accept the Plaintiff's evidence with respect to the November 2014 warning, it would have to find that Dr. Chan, after realizing that the Plaintiff's and her daughter's chart were in her electronic medical records, did not discuss this issue with the Plaintiff and that she would have ignored the misconduct as it was not a serious privacy and confidentiality breach. The chronology of this warning and emailing the Plaintiff in November of 2014 is consistent with information displayed in the Accuro audit logs as well as the email communications between Dr. Chan and the Office of the Information and Privacy Commissioner of Ontario and Ms. Germanski of McKenzie Health, because it shows a pattern of an initial cessation of the Plaintiff's improper use of the Accuro programme, but a resumption of the prohibited use in recent years.

[59] I do not accept, as the Plaintiff submits, that Dr. Chan contradicted her own affidavit evidence during cross-examination, admitting that she did not specifically warn the Plaintiff that her employment would be terminated for cause at discovery. Dr. Chan's evidence was that when she met with the Plaintiff, she did not use the words "termination" or "dismissal". She has no specific recollection of saying she would be "fired". She explained that she would not have threatened to fire the Plaintiff, as she was already on a 12-month working notice, as I have referred to above.

[60] I agree that the degree of trust between a medical doctor and her medical assistant and their respective staff is critical in maintaining the medical doctor's professional and ethical standards with their regulators. The Plaintiff's conduct required Dr. Chan to report herself to her regulators. I do not think on the basis of the evidence that it was reasonable to conclude that the Plaintiff was not forewarned by Dr. Chan that her conduct was not acceptable. The Accuro audit logs suggest a "cooling off" period between November 2014 forewarning and the resumption of the Plaintiff accessing the charts, which is evidence that the Plaintiff probably did receive the warning, took time to consider the warning, and continued the misconduct nonetheless. The Defendants submit that this misconduct was irreconcilable with and that the employment relationship was forever destroyed.

[61] In this case, I find that confidentiality and proper use of the clinics database and computer system was a fundamentally important requirement of the employment relationship and that it is reasonable on the basis of the evidence to find that Dr. Chan could not trust the Plaintiff to fulfill that requirement.

### **Conclusion and Summary**

[62] In this case, I find that it was critical for the existence of the employment relationship that the Defendants should be able to trust that their medical assistants would observe the requirements and conditions of the Accuro computer system and that the evidence in this case demonstrates to the court on a balance of probabilities that the Plaintiff's misconduct "strikes at the heart of the employment relationship". I conclude that the Defendants had just cause to terminate the employment of the Plaintiff. I find that the Plaintiff has not satisfied her burden of proving that she is entitled to damages on any of the grounds that she has pleaded or that such was a breach of the *Code*, that it was reprisal and breach of the *Occupational Health and Safety Act*, or that the Plaintiff's termination of employment was made in bad faith.

[63] It should be noted that the Plaintiff has not made any submissions on the claims I have not discussed, and it is for this reason that I have not addressed them in this Endorsement.

### **Costs**

[64] As the successful party in this trial, the Defendants' are entitled to an award of costs on a partial indemnity basis, inclusive of applicable taxes and disbursements and I so order. However, if the parties are unable to agree on the amount of costs to be paid to the Defendants that arise as a result of the operation of the rules regarding Offers to Settle, the Defendants may make submissions of no more than two pages, double-spaced, sent to the Plaintiffs, uploaded to Case

Center, and with a copy sent to my assistant Roxanne Johnson at Roxanne.stammers@ontario.ca by April 24, 2026. The Plaintiffs may make submissions of no more than two pages, double-spaced, sent to the Defendants, uploaded to Case Center, and with a copy sent to my assistant by May 5, 2026. No reply submissions will be accepted. If no submissions are received by May 5, 2026, costs will be deemed to be settled.

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Pollak J.

**Released:** April 15, 2026

**CITATION:** Birnbaum v. Dr. Chan., 2026 ONSC 2009  
**COURT FILE NO.:** CV-20-642484  
**DATE:** 20260415

**ONTARIO**

**SUPERIOR COURT OF JUSTICE**

**BETWEEN:**

ELKA BIRNBAUM

Plaintiff

– and –

DR. VICTORIA CHAN and DR. VICTORIA CHAN  
MEDICINE PROFESSIONAL CORPORATION

Defendants

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**REASONS FOR DECISION**

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Pollak J.

**Released:** April 15, 2026