

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Zheng v. China Southern Airlines
Company Limited*,
2023 BCSC 1763

Date: 20231011
Docket: S220243
Registry: Vancouver

Between:

Zong Li Julie Zheng

Plaintiff

And

China Southern Airlines Company Limited dba China Southern Airlines

Defendant

Before: The Honourable Justice Thomas

Reasons for Judgment

Counsel for the Plaintiff:

M. Voell

Place and Date of Hearing:

Vancouver, B.C.
September 18, 2023

Place and Date of Judgment:

Vancouver, B.C.
October 11, 2023

Table of Contents

INTRODUCTION 3

FACTUAL OVERVIEW..... 3

 Ms. Zheng’s pre-CSA experience..... 3

 China Southern Airlines..... 4

 CSA’s hiring of Ms. Zheng..... 4

 Ms. Zheng’s performance at CSA 5

 Administrative leave and termination..... 6

 Search for employment in the airline industry..... 8

DAMAGES FOR WRONGFUL DISMISSAL..... 9

 Legal principles 9

 Analysis..... 10

 Character of the employment..... 11

 Length of service 12

 Age 12

 Availability of alternative employment..... 12

 Assessment for failure to provide reasonable notice 13

AGGRAVATED DAMAGES 14

 Legal principles 14

 Analysis..... 15

 Did CSA breach its duty of good faith and fair dealing in the manner of dismissal? 15

 Has Ms. Zheng suffered compensable damages caused by CSA’s breaches? 16

PUNITIVE DAMAGES 17

 Legal principles 17

 Analysis..... 19

COSTS 22

Introduction

[1] The plaintiff, Zong Li Julie Zheng, claims damages for wrongful dismissal by the defendant, China Southern Airlines (“CSA”).

[2] She obtained default judgment and now applies for:

- a) general damages for CSA’s failure to provide reasonable notice;
- b) aggravated damages based on CSA’s breach of duty of good faith and fair dealing in the manner of her dismissal;
- c) punitive damages; and
- d) costs.

[3] In the face of default judgement, CSA is deemed to have admitted the allegations of fact contained in Ms. Zheng’s notice of civil claim. Ms. Zheng still bears the burden of proving the damages she claims on a balance of probabilities: *Vestergaard v. Digital Caddies, Inc.*, 2020 BCSC 1444 at para. 6. She relies on her own affidavit evidence and the affidavit of Paul Chu filed in the related action of *Chu v. China Southern Airlines Company Limited*, 2023 BCSC 21 [*Chu*].

Factual Overview

Ms. Zheng’s pre-CSA experience

[4] Ms. Zheng is a 57-year-old Chinese Canadian living in BC.

[5] She graduated from Beijing City University in 1989 with degrees in hospitality and hotel management.

[6] In 2002, she moved from China to Canada with her family. Upon arrival, she took English language courses and underwent training in the airline industry.

[7] Ms. Zheng was employed by Air China in Vancouver from 2004 until 2010. Her responsibilities grew over the course of her multiple promotions at Air China, from a reservation and ticketing agent to a sales executive to a Billing and

Settlement Plan auditor. Her work focused on the niche area of flights from Vancouver to China.

China Southern Airlines

[8] CSA is a Chinese company headquartered in Guangzhou, China. It is a major international airline controlled by the Chinese government. It has corporate shares which are publicly traded on the Shanghai, Hong Kong and New York stock exchanges.

[9] In the related action of *Chu*, this Court noted that CSA reported annual profits exceeding the equivalent of 500 million Canadian dollars in 2019: at para. 178.

CSA's hiring of Ms. Zheng

[10] In 2008, CSA began to take steps to open a Vancouver branch office with the goal of establishing regular flights between Vancouver and Guangzhou, China.

[11] In 2009, Ms. Zheng was approached by CSA's general manager, Ms. Cheng. At the time, Ms. Zheng was working at Air China as a sales executive and group coordinator for flights between Vancouver and China.

[12] Ms. Cheng persisted in her efforts to recruit Ms. Zheng. In January 2011, largely due to Ms. Cheng's communications, Ms. Zheng became CSA's first local employee in the Vancouver branch.

[13] Ms. Zheng's responsibilities were to obtain customers for CSA's routes to China and to recruit, hire and supervise staff at CSA's Vancouver branch.

[14] In June 2011, CSA made their maiden flight from Vancouver to Guangzhou.

[15] In 2011, CSA hired two other personnel with expertise in the niche Vancouver to China air travel market, Mr. Chu and Mr. Xia.

Ms. Zheng's performance at CSA

[16] Ms. Zheng's significant responsibilities increased during her tenure at CSA until 2018. Her income steadily rose from \$3,000 (after tax) per month to \$3,500 (after tax) per month. She also received a yearly bonus which varied each year, but averaged \$1,000 per year.

[17] In January 2018, CSA assigned a new general manager, Ms. Zhang, to the Vancouver branch, and Ms. Cheng returned to China.

[18] Ms. Zhang reorganized the Vancouver branch throughout 2018. Ms. Zheng, Mr. Chu and Mr. Xia were all assigned to new jobs. Both Mr. Chu and Mr. Xia were constructively dismissed in a demeaning manner. Mr. Chu was not able to obtain employment in the niche Vancouver to China air travel market, or anywhere else in the travel industry, thereafter. This Court awarded Mr. Chu punitive and aggravated damages against CSA: *Chu*.

[19] In the reorganization, Ms. Zheng lost the accounts that she had developed, and Ms. Zhang instructed her to have no contact with her old accounts. She was required to obtain new clients. Her supervisory responsibilities ended and her role in sales and client development increased.

[20] Ms. Zhang brought in new employees with little experience in the travel industry. CSA paid these new employees less than Ms. Zheng, Mr. Chu and Mr. Xia. The new employees took over the old employees' existing accounts.

[21] CSA cut Ms. Zheng's base salary, but she nevertheless continued to increase her income through a bonus structure attached to performance and obtaining new clients. To develop the new business, she had to work considerable overtime.

[22] Ms. Zheng's salary increased to \$3,725, net of tax, \$4,800 inclusive of tax, per month as of January 2020, and she continued to receive her annual bonus.

Administrative leave and termination

[23] On January 21 and 22, 2020, Ms. Cheng was examined in a wrongful dismissal case involving Mr. Xia. The arbitrator ultimately rejected much of her evidence and determined that Mr. Xia had been dismissed contrary to s. 240 of the *Canadian Labour Code*, R.S.C., 1985, c. L-2. Ms. Zheng did not participate in the arbitration.

[24] On January 23, 2020, Ms. Zheng was ordered to attend a meeting with CSA managers. They told her:

- a) the meeting was being recorded;
- b) she was immediately being placed on administrative leave;
- c) she was under investigation;
- d) she was not provided a reason for the leave or investigation;
- e) she had to immediately provide CSA with all documents, ID, passwords, keys, passes and anything else belonging to CSA; and
- f) she had to pack up her personal belongings and immediately leave the building.

[25] CSA did not provide Ms. Zheng with a reason for her administrative leave or their investigation. CSA staff searched Ms. Zheng's belongings before she was allowed to leave the building.

[26] Ms. Zheng was in a state of panic and anxiety at the meeting. She was humiliated and shocked by her treatment by CSA.

[27] After she got home, Ms. Zheng had trouble talking, eating or sleeping. She could hardly function. She could not sleep for more than three hours a day. These symptoms persisted over the Chinese New Year on January 25, 2020.

[28] Ms. Zheng received a number of emails from CSA demanding the return of documents and threatening to search her home. She continued to advise them that she did not have any of their documents.

[29] On January 28, 2020, Ms. Zheng saw her family doctor who put her on an urgent waitlist to see a psychiatrist. She was prescribed anti-depressant medication. Her doctor provided a note stating that she should not work due to illness.

[30] After Ms. Zheng saw her doctor, CSA emailed her and demanded that she come to a meeting the next morning to be advised of the results of the investigation. She advised them that she was ill and provided them with her doctor's note.

[31] CSA told Ms. Zheng that they had contacted her doctor and that the note only said that she had seen the doctor, not that she should not work (though this is clearly not what the note said). CSA told Ms. Zheng if she did not come to the meeting, it would amount to her "giving up [her] job".

[32] Ms. Zheng told CSA that she was ill, needed to see a psychiatrist and could not make the meeting on such short notice. She advised that she would be happy to meet with them after seeing the psychiatrist.

[33] On January 31, 2020, CSA sent a termination letter to Ms. Zheng advising that her termination was based on the fact that she had copied and sent out confidential CSA documents to third parties.

[34] On February 1, 2020, Ms. Zheng's psychiatrist diagnosed her with acute stress and PTSD symptoms from a sudden termination of work. She was recommended not to work for at least two months.

[35] On February 26, 2020, CSA sent Ms. Zheng a letter demanding the return of confidential documents. A court application was threatened against her. In addition, CSA stated:

- a) their investigation had uncovered financial irregularities involving her employment;

- b) they are in the process of determining the magnitude of these irregularities;
and
- c) they reserve the right to commence a legal action against her with respect to these irregularities.

[36] Ms. Zheng reiterated to CSA that she did not have any confidential information. CSA replied by stating that they could attend at her house if she did not wish to bring the information to CSA's office.

[37] In light of the default judgement, I am satisfied on the evidence before me that the allegations made by CSA against Ms. Zheng were baseless and false. The evidence discloses no reason to place Ms. Zheng on administrative leave. Rather, Ms. Zheng's treatment appears to be part of CSA's ongoing process of terminating senior employees without notice.

[38] I find CSA's investigation into Ms. Zheng's conduct was a sham. The determination that Ms. Zheng sent confidential information to third parties and was responsible for financial irregularities is unfounded.

[39] I find that Ms. Zheng did not quit her job.

[40] Ms. Zheng was terminated without cause and without notice by CSA. This has not been contested.

Search for employment in the airline industry

[41] Ms. Zheng's poor mental health persisted. Without the assistance of anti-depressant medication, she suggests she might well have become suicidal.

[42] Ms. Zheng attempted to look for work in the airline industry, specifically in the area of her expertise, the Vancouver to China market.

[43] However, Ms. Zheng was unable to find any work. Travel agencies she had worked with while she was employed at CSA declined to provide her with letters of recommendation, and her inquiries about job opportunities were all declined.

[44] Ms. Zheng then discovered that CSA had communicated throughout the Vancouver travel industry that she had been fired.

[45] Ms. Zheng was over 55 years old. CSA had marred her reputation in a tight-knit industry without basis. Her anxiety, depression, insomnia and nervousness persisted and increased. She was devastated.

[46] By September 2020, it was clear that she would not be able to obtain a job in the airline industry. She retrained as a chef by August 2021, and she obtained a job as a pastry chef in February 2022.

[47] Ms. Zheng was not able to obtain employment until that time.

[48] I find Ms. Zheng's search for work, retraining and subsequent employment commendable.

Damages for Wrongful Dismissal

Legal principles

[49] An action for wrongful dismissal is based on an implied obligation in the employment contract to give reasonable notice of an intention to terminate the relationship in the absence of just cause: *Honda Canada Inc. v. Keays*, 2008 SCC 39 at para. 50 [*Honda*].

[50] In *Chu*, Justice Verhoeven summarized the principles relating to the assessment of damages for failure to give reasonable notice as follows:

[121] I adopt the following summary of principles relating to the assessment of damages for failure to give reasonable notice set out in the decision of Justice Kent in *Ensign v. Price's Alarm Systems (2009) Ltd.*, 2017 BCSC 2137:

[34] The statements of principle that follow are largely taken from *Vernon v. British Columbia (Liquor Distribution Branch)*, 2012 BCSC 133, and the leading case law to which it refers and adopts.

[35] Absent an enforceable contractual term or legislative provision to the contrary, it is an implied term of every employment contract that an employee must be given reasonable advance notice of any termination. The notice periods stipulated in the *Employment Standards Act* are just a legislative minimum. At common law, the

length of any advance employment termination notice is determined by four central factors: (1) the character of the employment; (2) the length of service; (3) the age of the employee; and (4) the availability of similar employment having regard to the experience, training and qualifications of the employee. Absent exceptional circumstances, 18 to 24 months is generally considered to be the upper limit for any such reasonable notice.

[36] When an employer fails to give an employee sufficient advance notice of intended termination, a cause of action accrues for breach of contract, i.e., breach of the implied term of the employment contract referred to above. In any such action for breach of contract, the dismissed employee's damages are usually assessed with reference to the amount of remuneration the employee would have received had the employment continued throughout the reasonable advance notice period. This includes not only the amount of wages or salary that would have been earned, but also the value of any benefits or other perquisites incidental to the employment relationship. The court will also take into account (by way of a deduction) any amount by which the wrongfully dismissed employee mitigates his or her loss or, acting reasonably, could and should have done so. This will include any payment made by the employer "in lieu of" the required reasonable notice.

[51] As Verhoeven J. noted, the four factors that courts generally consider in determining reasonable notice are: (1) the character of the employment; (2) length of service; (3) age and (4) availability of alternative employment (the "*Bardal* factors"): *Bardal v. Globe & Mail Ltd.* (1960), 24 D.L.R. (2d) 140 at 145, 1960 CanLII 294 (Ont. H.C.); *Honda* at para. 28. The *Bardal* factors are not exhaustive: *Wallace v. United Grain Growers Ltd.*, [1997] 3 S.C.R. 701, 1997 CanLII 332 at para. 82 [*Wallace*]. Courts must assess the *Bardal* factors on a case-by-case basis, rather than formulaically, to determine the objectively reasonable period of notice in the circumstances: *Ansari v. British Columbia Hydro and Power Authority*, 2 B.C.L.R. (2d) 33 at 43, 1986 CanLII 1023 (S.C.), aff'd 55 B.C.L.R. (2d) xxxiii, [1986] B.C.J. No. 3006 at paras. 39–43 [*Ansari*]. The upper limit for reasonable notice is 18 to 24 months absent exceptional circumstances: *Ansari* at para. 39.

Analysis

[52] I will review each of the *Bardal* factors in turn.

Character of the employment

[53] Employees with advanced training and specialized skills tend to be entitled to a longer notice period: *Ansari* at paras. 23–26, 75. This principle reflects the primary purpose of notice, which is to give the employee an opportunity to find alternative and comparable employment. Positions requiring advanced training and specialized skills are presumably less widely available and take longer to find, thus entitling employees to longer notice: *Ostrow v. Abacus Management Corporation Mergers and Acquisitions*, 2014 BCSC 938 at paras. 39–40.

[54] The Supreme Court of Canada also affirmed in *Wallace* that whether the employer induced the dismissed employee to leave secure employment may be relevant to determining the notice period: at paras. 83–85. In considering this factor, courts seek to safeguard the dismissed employee’s reliance and expectation interests. Courts have consistently held that the significance of any inducement will depend on the circumstances of the case: *Wallace* at para. 85; *Greenlees v. Starline Windows Ltd.*, 2018 BCSC 1457 at paras. 43–52 [*Greenlees*].

[55] In *Greenlees*, this Court found that an employer’s attempts to persuade a prospective employee to leave secure employment for a new position carried “some weight” as an inducement in determining the notice period, even though the employer’s communications did not amount to actual promises or guarantees: at paras. 51–52. The employer’s communications included discussions about the employer’s business and the prospective employees’ prospects if he took the position: at para. 12.

[56] I find that CSA sought and induced Ms. Zheng to work for them precisely because of her expertise in the relatively niche market of airline travel between Vancouver and China. Ms. Zheng left her secure previous employment in a similar position at Air China to begin working at CSA, largely due to Ms. Cheng’s attempts to recruit her. This shift in Ms. Zheng’s employment occurred around six months prior to CSA’s maiden flight, and was therefore accompanied by some risk.

[57] Ms. Zheng went on to become CSA’s longest-serving employee in the Vancouver branch. During this time, her expertise in her niche area of employment deepened, and her level of responsibility grew.

[58] For these reasons, I find that the character of Ms. Zheng’s employment at CSA militates in favour of a notice period towards the upper end of the range.

Length of service

[59] Ms. Zheng had worked for CSA for nine years when her employment was terminated.

[60] Generally speaking, the law requires a longer notice period for longer terms of employment: *Ansari* at para. 26.

Age

[61] Ms. Zheng is 57 years old.

[62] Older employees may be at a competitive disadvantage in finding alternative employment due to their age, and as a result, they are generally entitled to longer notice periods: *Ansari*, at para. 27; *Chu* at para. 134.

Availability of alternative employment

[63] Ms. Zheng’s work experience, as was that of the plaintiff in *Chu*, was in a niche area. I accept her evidence that the availability of similar positions in the airline industry in Vancouver is limited, and even more so for positions specializing in travel between Vancouver and China. This was especially true following Ms. Zheng’s dismissal in 2020, when the Covid-19 pandemic impacted travel between Canada and China. I also accept that the skills Ms. Zheng developed during her fifteen total years of working in this industry—including her six years working for Air China—did not directly transfer to the general employment marketplace.

[64] Despite seeking a new position in the airline industry for about nine months following her dismissal, Ms. Zheng was unable to find alternative employment, which

prompted her decision to start retraining as a chef. Ms. Zheng's unsuccessful nine-month job search supports an inference that available alternate employment was limited: *Saalfeld v. Absolute Software Corporation*, 2009 BCCA 18 at para. 16; *Corey v. Kruger Products L.P.*, 2018 BCSC 1510 at para. 49.

[65] This factor justifies a longer notice period.

Assessment for failure to provide reasonable notice

[66] In assessing reasonable notice, I must consider the notice periods ordered by courts in similar cases: *Hall v. Quicksilver Resources Canada Inc.*, 2015 BCCA 291 at para. 42. I rely on the following decisions to assess reasonable notice in this case:

- a) *Chu*: 20 months of notice for a 68-year-old marketing and business development manager with eight years of service;
- b) *Ansari*: 21 months of notice for a 50-year-old plaintiff engineer with 19.33 years of service;
- c) *Fanzone v. 516400 B.C. Ltd.*, 2022 BCSC 2089: 20 months of notice for a 56-year-old pub general manager with 23 years of service;
- d) *Matusiak v. IBM Canada Ltd.*, 2012 BCSC 1784: 14 months of notice for a 60-year-old non-management sales representative with 9.5 years of service;
- e) *Whiting v. Boys and Girls Club Services of Greater Victoria*, 2011 BCSC 681: 18 months of notice for a 57-year-old social services supervisor with 13 years of service;
- f) *Okano v. Cathay Pacific Airways Limited*, 2022 BCSC 881: 24 months of notice for a 59-year-old plaintiff holding a middle-management position at an airline with 35 years of service; and
- g) *Moore v. Instow Enterprises Ltd.*, 2021 BCSC 930: 20 months of notice for a 53-year-old senior commercial sales representative with 26.5 years of service.

[67] In consideration of these authorities and my assessment of the *Bardal* factors in the circumstances of this case, I accept that it would be appropriate to award damages based upon a reasonable notice period of 20 months.

[68] Ms. Zheng’s gross monthly salary at the time of her dismissal was \$4,800, which would have totalled \$96,000 over 20 months. She is also entitled to her \$55-per-month cell phone plan, which was an employment benefit provided to her by CSA, for a total of \$1,100. Her damages also include her \$1,000 annual bonus, which amounts to \$1,666.67, and special damages of \$66.08 for compensation for computer software she had to purchase as part of her employment. This amounts to total general damages of \$98,832.75.

[69] Ms. Zheng is also entitled to prejudgment interest on this amount.

Aggravated Damages

Legal principles

[70] Where an employer breaches its duty of good faith and fair dealing in the manner of the plaintiff’s dismissal, and the plaintiff suffers compensable damages as a result of that breach, a court may award aggravated damages. In *Hrynkiw v. Central City Brewers & Distillers Ltd.*, 2020 BCSC 1640 [*Hrynkiw*] Justice Horsman noted:

[190] The common law imposes an obligation on an employer to act in good faith in the manner of dismissal. Failure to do so can lead to foreseeable, compensable damages. If an employee can prove that the manner of dismissal caused mental distress that was in the contemplation of the parties at the time of the contract, then damages for the mental distress (often referred to in the case law as “aggravated damages”) may be recoverable: *Honda Canada Inc. v. Keays*, 2008 SCC 39 at paras. 58-59 [*Honda*].

[191] As set out by our Court of Appeal in *Lau v. Royal Bank of Canada*, 2017 BCCA 253 [*Lau*] at para. 17, an employee seeking to recover aggravated damages must establish two conditions:

- i. the employer has breached its duty of good faith and fair dealing in the manner of dismissal, and
- ii. the employee suffered compensable damages as a result of breach.

[192] Examples of conduct that may constitute a breach of the employer's duty of good faith and fair dealing include being untruthful, misleading or unduly insensitive in the course of dismissal, or attacking the employee's reputation by declarations made at the time of dismissal: *Wallace v. United Grain Growers Ltd.*, 1997 CanLII 332 (SCC), [1997] 3 S.C.R. 701 at para. 98; *Honda* at para. 59. The employer's dealings with the employee after dismissal, including its conduct in litigating the employee's claim, may be considered as an aspect of the manner of dismissal provided it is conduct that relates to the dismissal: *Acumen Law Corporation v. Ojanen*, 2019 BCSC 1352 at para. 126; *O.W.L. (Orphaned Wildlife) Rehabilitation Society v. Day*, 2018 BCSC 1724 at para. 286.

[193] To establish the second condition of the test, the plaintiff must prove something beyond the normal distress and hurt feelings that invariably accompanies the loss of employment: *Cottrill v. Utopia Day Spas and Salons Ltd.*, 2018 BCCA 383 at paras 14-15, leave to appeal ref'd [2018] S.C.C.A. No. 533 [*Cottrill*]; *Quach v. Mitrix Services Ltd.*, 2020 BCCA 25 at paras. 26-27. Medical evidence is not required to establish that the employee has suffered emotional or health consequences but there must be some evidence of serious and prolonged disruption that transcends ordinary emotional upset or distress: *Cottill* at para. 18; *Lau* at para. 49; *Saadati v. Moorhead*, 2017 SCC 28 at para. 40.

Analysis

Did CSA breach its duty of good faith and fair dealing in the manner of dismissal?

[71] CSA breached its duty of good faith and fair dealing in the manner of Ms. Zheng's dismissal.

[72] I summarize the particulars as follows:

- a) CSA placed Ms. Zheng on sudden and immediate administrative leave without being advised of the reason;
- b) CSA ordered Ms. Zheng to leave the office and searched her belongings in a callous and humiliating manner;
- c) CSA accused Ms. Zheng of regularly copying highly confidential documents and sending them to third parties in violation of her confidentiality agreement with CSA;

- d) CSA prohibited Ms. Zheng from speaking with CSA employees during her administrative leave;
- e) CSA conducted a biased and inadequate investigation into these allegations of misconduct;
- f) CSA alleged that they discovered “financial irregularities” related to Ms. Zheng in the course of the investigation, which they stated may result in legal proceedings;
- g) CSA harassed Ms. Zheng to come into work on one day’s notice to discuss the results of the investigation despite having a copy of her doctors note explaining that she was unwell and had been advised not to work;
- h) CSA threatened Ms. Zheng with legal proceedings if she did not return the confidential information that they alleged was still in her possession following her termination and consent to an inspection of all of her electronic devices; and
- i) CSA notified other employers in the industry of Ms. Zheng’s firing, damaging her reputation.

[73] There was no merit to any of CSA’s allegations against Ms. Zheng. Justice Horsman found in *Hrynkiw* that an adversarial and biased investigation into unfounded allegations of serious misconduct against an employee constituted a breach of the employer’s duty of good faith and fair dealing: at paras. 197–205. This principle is directly applicable in the present case.

Has Ms. Zheng suffered compensable damages caused by CSA’s breaches?

[74] Ordinary distress, emotional upset and injured feelings that can be expected to accompany dismissal are not compensable losses. However, actual psychological injuries caused by the employer’s breach are compensable: *Cottrill v. Utopia Day Spas and Salons Ltd.*, 2018 BCCA 383 at paras. 14–15.

[75] I find Ms. Zheng suffered from compensable depression and anxiety as a result of CSA's breaches in the manner of her termination. Ms. Zheng's evidence, which I accept, is that she was humiliated and shocked following her termination. CSA's conduct caused her to experience anxiety, have trouble eating and sleeping and suffer from suicidal thoughts. In light of her symptoms, her doctor prescribed her with anti-depressant medication.

[76] Ms. Zheng is to be commended for her perseverance.

[77] I find Ms. Zheng's mental distress to be comparable to that suffered by the plaintiff in *Hrynkiw*. In that case, Justice Horsman found that \$35,000 was an appropriate award of aggravated damages. I see no reason to differ from that amount here. I award Ms. Zheng \$35,000 in aggravated damages.

Punitive Damages

Legal principles

[78] The leading authority on punitive damages is *Whiten v. Pilot Insurance Co.*, 2002 SCC 18 [*Whiten*].

[79] In that case, the Supreme Court of Canada confirmed that an employer's breach of its contractual duty of good faith and fair dealing can warrant an award of punitive damages: *Whiten* at paras. 78–79.

[80] While the same underlying conduct can give rise to both punitive and aggravated damages, these two types of damages have different purposes: *Ojanen v. Acumen Law Corporation*, 2021 BCCA 189 at para. 73 [*Ojanen*]. The Court of Appeal recently summarized this distinction in *Cho v. Café La Foret Ltd.*, 2023 BCCA 354:

[60] Aggravated damages are compensatory, intended to address the mental distress experienced by an employee resulting from the manner of termination. Punitive damages are intended to punish the employer for its egregious or outrageous behaviour and serve only the objectives of retribution, denunciation, and deterrence: *Honda Canada Inc. v. Keays*, 2008 SCC 39 at paras. 60, 62; *Ojanen* at paras. 72–73, 77–78.

[81] Courts must exercise their discretion to award punitive damages with extreme caution: *Honda* at para. 68. Punitive damages are restricted to exceptional cases of “advertent wrongful acts that are so malicious and outrageous that they are deserving of punishment on their own”: *Honda* at para. 62.

[82] The Court of Appeal provided the following commentary in *Ojanen*:

[75] The combined general, aggravated, and punitive damages should not exceed the amount necessary for the purposes of denunciation, deterrence, and retribution. Given that compensatory damages are awarded first, punitive damages would only be necessary if the total award is not yet sufficient to achieve these three goals. . . .

[78] In *Whiten* at para. 94, the Court set out the factors that should be taken into account when considering an award for punitive damages. The factors include:

- a) Punitive damages are the exception rather than the rule, imposed only if there has been high-handed, malicious, arbitrary, or highly reprehensible misconduct that departs to a marked degree from ordinary standards of decent behaviour;
- b) Punitive damages are generally awarded only where the misconduct would otherwise be unpunished or where other penalties are unlikely to achieve the objectives of retribution, deterrence, and denunciation;
- c) Punitive damages are awarded only if compensatory damages (which to some extent are punitive in nature) are insufficient to accomplish these objectives, and the amount awarded is no greater than necessary to rationally accomplish their purpose;
- d) The purpose of punitive damages is not to compensate the plaintiff, but to give a defendant his or her just desert (retribution), to deter the defendant and others from similar misconduct in the future (deterrence), and to mark the community's collective condemnation (denunciation) of what has happened;
- e) Punitive damages should be assessed in an amount reasonably proportionate to the harm caused, the degree of the misconduct, the plaintiff's relative vulnerability, and any advantage or profit gained by the defendant, having regard to any other fines or penalties suffered by the defendant; and
- f) Moderate awards of punitive damages, which inevitably carry a stigma in the broader community, are generally sufficient.

[83] In *Kelly v. Norsemont Mining Inc.*, 2013 BCSC 147 [*Kelly*], the Court provided the following examples of conduct justifying punitive damages (at para. 115):

- a) The employer knowingly fabricating allegations of serious misconduct or incompetence against an employee to support dismissal;
- b) The employer utilizing “hardball” tactics to intimidate the employee into withdrawing or settling his or her wrongful dismissal suit; and
- c) The employer implementing the dismissal in a manner designed to disparage the employee’s capabilities or honesty in the eyes of other employees or future employers.

Analysis

[84] The ultimate question is whether the awards of general damages and aggravated damages are sufficient to achieve the goals of denunciation, deterrence and retribution in this case. I find they are not.

[85] CSA’s conduct can properly be described in the language of *Honda* as “harsh, vindictive, reprehensible and malicious”, as well as “extreme in its nature and such that by any reasonable standard it is deserving of full condemnation and punishment”: at para. 68.

[86] After what appears to be a pattern of firing senior employees without notice, CSA abruptly placed Ms. Zheng on administrative leave without providing her with a reason for doing so. CSA proceeded to make serious and false allegations against Ms. Zheng, conduct an adversarial and biased investigation of these same allegations and then damage her reputation in the industry following her termination.

[87] Both the first and third above-noted examples of conduct referred to in *Kelly* justifying an award of punitive damages are present in this case.

[88] The award of compensatory damages is \$98,832.75 and \$35,000 in aggravated damages. I note that the \$98,832.75 for failure to give notice is equivalent to CSA’s contractual obligations owed to Ms. Zheng. In my view, it is clear that these awards do not achieve the objectives of retribution, deterrence and denunciation applicable here.

[89] In assessing the amount of punitive damages, I adopt the comments of Justice Fenlon in *Kelly* as follows:

[130] The governing rule in determining the appropriate quantum of punitive damages is proportionality. The overall award, i.e. compensatory damages plus punitive damages plus any other punishment related to the same misconduct, should be rationally related to the objectives for which the punitive damages are awarded (retribution, deterrence and denunciation): *Whiten* at para. 74.

[131] Proportionality in punitive damages has six dimensions, which were set out in *Whiten* at paras. 111-126 and reviewed by the Alberta Court of Appeal in *Elgert v. Home Hardware Stores Ltd.*, 2011 ABCA 112 at para. 82, 510 A.R. 1. The award of punitive damages must be:

- (i) Proportionate to the blameworthiness of the defendant's conduct -- the more reprehensible the conduct, the higher the rational limits of the potential award. Factors include outrageous conduct for a lengthy period of time without any rational justification, the defendant's awareness of the hardship it knew it was inflicting, whether the misconduct was planned and deliberate, the intent and motive of the defendant, whether the defendant concealed or attempted to cover up its misconduct, whether the defendant profited from its misconduct, and whether the interest violated by the misconduct was known to be deeply personal to the plaintiff.
- (ii) Proportionate to the degree of vulnerability of the plaintiff -- the financial or other vulnerability of the plaintiff, and the consequent abuse of power by a defendant, is highly relevant where there is a power imbalance.
- (iii) Proportionate to the harm or potential harm directed specifically at the plaintiff.
- (iv) Proportionate to the need for deterrence -- a defendant's financial power may become relevant if the defendant chooses to argue financial hardship, or it is directly relevant to the defendant's misconduct, or other circumstances where it may rationally be concluded that a lesser award against a moneyed defendant would fail to achieve deterrence.
- (v) Proportionate, even after taking into account the other penalties, both civil and criminal, which have been or are likely to be inflicted on the defendant for the same misconduct -- compensatory damages also punish and may be all the "punishment" required.
- (vi) Proportionate to the advantage wrongfully gained by a defendant from the misconduct.

[...]

[138] In determining the appropriate quantum of punitive damages in this case, I am mindful that an award of damages that is too large goes beyond the objectives of punitive damages (retribution, deterrence, and denunciation)

and becomes irrational. An award of punitive damages that is too small fails to achieve these same objectives: *Whiten* at para. 111.

[90] CSA’s conduct was highly blameworthy. It was abusive, planned and deliberate.

[91] Ms. Zheng was highly vulnerable given her age and niche expertise. Further, CSA intentionally misconstrued Ms. Zheng’s doctors note recommending that CSA exempt her from work due to illness.

[92] CSA’s conduct was profoundly harmful to Ms. Zheng and impacted her reputation in the community. I accept that CSA’s conduct contributed to Ms. Zheng’s failure to obtain similar alternative employment, and ultimately to her having to resort to retraining in a different field.

[93] There is a substantial need for deterrence and denunciation. CSA is a large corporation. Ms. Zheng’s compensatory award is trifling in comparison. Only the rebuke represented by a substantial monetary award beyond the other damages already awarded in this case will have the required “sting” to deter CSA and other like-minded entities from similar misconduct in the future.

[94] CSA attempted to gain nearly \$100,000 from their wrongful conduct (i.e., the money it would have had to pay Ms. Zheng to properly terminate her without notice). On top of that, CSA actively sought to intimidate and humiliate Ms. Zheng during her termination and make it impossible for her to work in the industry going forward.

[95] I note that the Court awarded \$100,000 in punitive damages against CSA in *Chu*. Although the initial conduct here was even more outrageous, the misconduct did not extend for five years as it did in *Chu*.

[96] I accept Ms. Zheng’s counsel’s submissions that \$75,000 is an appropriate award for punitive damages.

Costs

[97] Ms. Zheng is entitled to her costs at Scale B.

“Thomas J.”