CITATION: Lagala v. Patene Building Supplies Ltd, 2024 ONSC 253
COURT FILE NO.: CV-20-3-0
DATE: 20240111

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:	)	
	)	
Shari Lagala	)	Alex MacDonald, for the Plaintiff
	)	
Plaintiff	)	
	)	
- and -	)	
	)	
Patene Building Supplies Ltd.	)	Andrew Camman and Jennifer Hahn, for the Defendant
	)	
Defendant	)	
	)	
	)	**HEARD:** December 5-7, 2023

REASONS FOR JUDGMENT

LEMAY J

[1] The Plaintiff, Ms. Shari Lagala, was the Health, Safety and Training Manager for the Defendant, Pantene Building Supplies Ltd. She had been in that

role for more than thirteen years when her employment was terminated for cause on December 18th, 2019.

[2] The Plaintiff's employment was terminated primarily as a result of her management and reporting (or non-reporting) of a workplace safety and insurance claim that she made on her own behalf to the Workplace Safety and Insurance Board ("WSIB"). The Plaintiff allegedly suffered a fall in the parking lot at the Defendant's facility in Brantford on March 28th, 2019.

[3] She did not report this accident to her supervisors in any way until the beginning of October of 2019. In the meantime, the Plaintiff had initiated a WSIB claim by completing the employer's claim form and had received a decision granting her physiotherapy benefits. WSIB then asked the Plaintiff to have a supervisor sign off on the employer's claim form. She sought that sign-off at the end of October, 2019, approximately a month after she had included the accident on a monthly report of health and safety incidents that she provided to the Defendant's upper management.

[4] The Plaintiff's claim then came to the attention of the President of the Defendant company, Patrick George. He conducted an investigation and, based on the results of that investigation, determined that he had lost trust in the Plaintiff. As a result, the Plaintiff's employment was terminated for cause on December 18th, 2019. The Plaintiff commenced this lawsuit.

[5] The Defendant commenced a counterclaim, alleging that the Plaintiff had failed to pay back money that she had borrowed from the Defendant. That action was a claim to recover approximately $30,000.00 that had originally been loaned to the Plaintiff. At least some of these monies had not been paid back. However, the Installment Note by which the Plaintiff had agreed to pay the money back was held by a numbered company, and not the Defendant.

[6] For the reasons that follow, the Plaintiff's wrongful dismissal claim is dismissed. The Defendant's counterclaim in respect of the monies allegedly owing by the Plaintiff is also dismissed.

Background Facts

a) The Parties

[7] The Plaintiff is presently fifty-six years old. She was fifty-three years old at the time her employment was terminated. She has a Bachelor of Arts degree in Human Resources from George Brown College and a general accounting degree from the Toronto School of Business. She has worked in the Human Resources field for more than a decade and a half.

[8] The Defendant, Patene Building Supplies, has been in business since 1955. It provides interior and exterior building products and finishes and operates about fifteen branches across Ontario. It also has a branch in Winnipeg.

[9] Patene is part of a larger group of companies that is controlled by members of the George family. I understand that the businesses were originally run by Eugene George, who passed away in 2016. The corporate structure was not delineated in the evidence, although I heard testimony that G & A was a related company and was responsible for some maintenance issues at Patene sites.

[10] The Plaintiff was hired by Patene as the Health, Safety and Training manager, working out of Patene's head office in Guelph. She began her employment on April 24th, 2006. Her salary when she started was $58,000.00. She was also entitled to various employee benefits, including a health and dental package, a company cell phone, a company car and an annual bonus. Both the company car and the cell phone could be used for reasonable personal uses. At the time her employment was terminated, the Plaintiff's salary was $72,500.00 and the other details of the compensation structure remained the same.

[11] Prior to the events giving rise to the Plaintiff's termination, she had been a valued member of Patene's management team. She was responsible for providing leadership to Patene in the areas of Health, Safety and Operational Training. Her job included the following responsibilities that are relevant for this case:

a) Ensuring that Patene met all of its requirements under applicable legislation, including the *Workplace Safety and Insurance Act, 1997*, S.O. 1997, c. 16, Sched. A. ("*WSIA"*).

b) Ensuring that Patene has an effective system to certify that "all accidents and incidents are properly investigated, root causes are assessed and actions are taken to prevent reoccurrence."

c) Establishing appropriate policies and procedures to minimize accident costs, including WSIB claims and administration, accident reporting and modified work programs.

[12] The Plaintiff was responsible for the administration of Patene's accident and incident reporting policies. Those policies state, in part:

> When an injury, accident or incident occurs you must take the following steps:
>
> > 1) look after the injured person - get first aid, remove anything that may have fallen on top of him/her etc.
> >
> > 2) do not disrupt the scene - (other than that required in #1)
> >
> > 3) report incident to supervisor immediately - if it is after hours, leave a note or a message on their voice mail. It is imperative that all injuries are reported immediately. Form HS707 (internal report) is to be completed for ANY minor incidents.
>
> The supervisor must ensure the employee is being looked after, secure the scene, and advise members of the JHSC if applicable.

[13] When the Plaintiff joined Patene, the policies were largely out of date and in some cases did not conform with the statutory requirements. Patene also lacked standardized policies and procedures regarding WSIB reporting, or the reporting of injuries or accidents. One of the Plaintiff's responsibilities was to prepare company policies in respect of these and other health and safety issues.

[14] The Plaintiff developed clearer policies and was responsible for implementing them. By all accounts, she was firm and diligent in her

implementation and enforcement of safety policies and expected adherence to all of the accident reporting policies in particular.

[15] The Plaintiff had received bonuses in the years prior to her termination. They were relatively close to the maximum of $2,500.00 per year, but the Plaintiff was never paid the maximum possible bonus. The bonuses were generally paid out in April of each year. Between 2015 and 2018, the bonus payments were between $2,125.00 and $2,225.00.

[16] In terms of the Plaintiff's compensation over the years, there was also some disagreement about a truck that was sold to the Plaintiff back in 2011 or 2012. The payment for that truck was, according to the Plaintiff, forgiven in lieu of a bonus for one year. The Defendant has a different view as to the facts in respect of this matter. Given my conclusion that the bonuses were a regular part of the Plaintiff's compensation, it is not necessary for me to resolve this factual dispute.

b) The Events Giving Rise to the Termination

[17] The Plaintiff testified that, on March 28th, 2019, she was attending the Patene branch in Brantford when she slipped and fell. The Plaintiff testified that she did not experience any pain when this accident took place, but that she landed on her left hip/lower back area and broke her fall with her left hand. The Plaintiff testified that she did not report this accident to a supervisor, as she did not view it as a serious accident at the time.

[18] The Plaintiff testified that she advised Dale Cormier, who was the shipper in the Brantford branch, both that she had fallen and that the potholes in the parking lot at the Patene branch needed to be filled with cold patch. Mr. Cormier also testified and stated that the Plaintiff had never told him about the March 28th, 2019 incident until October of 2019, when she asked him to provide a corroborating e-mail. I will return to the contradictions in this evidence below.

[19] In cross-examination, the Plaintiff stated on several occasions and in response to numerous questions, that she was too embarrassed to report this accident, as she was the Health, Safety and Training Manager. I will return to this evidence below.

[20] The Plaintiff testified that she was in Mexico in early April of 2019, and cut short her vacation by two days because she was feeling discomfort in her back. She testified that she did not want to be out of the country in case her back condition worsened.

[21] The Plaintiff saw her family doctor in April of 2019, but did not pursue the issue of her back at that time. The Plaintiff testified that the pain was getting worse in May of 2019. As a result, also testified that she completed one of the employer's "blue forms", which was a Report of Minor Accident/Injury. It is signed by the Plaintiff and dated May 9th, 2019. It has a notation (also in the Plaintiff's

handwriting) that says, “on monthly reports for July/19 for Pat/Joe.” As discussed in paragraph 26, below, this statement is inconsistent with the actual reports.

[22] In July of 2019, the Plaintiff had an appointment with her rheumatologist. The clinical note from that visit indicates that the Plaintiff had “acute onset lower back pain”, but there is no mention of a workplace accident. The pain is mentioned as having begun approximately two months ago when she noticed a lump in her lower back.

[23] A CT scan was performed of the Plaintiff’s lower spine on August 14th, 2019. That scan showed the presence of multilevel degenerative changes with significant degenerative disc disease. The Plaintiff also attended at the Woodstock hospital on September 4th, 2019, with ongoing chronic lower back pain.

[24] The WSIB uses two forms, known as Form 6 and Form 7, for accident reporting. Form 6’s are completed by the injured worker. Form 7’s are completed by the employer. The Plaintiff did not complete a Form 6 until September 19th, 2019. However, the Plaintiff did complete and file the employer’s Form 7. She also signed it. She did not advise any other manager of her claim, or of her ongoing problems until well after the accident.

[25] Although I do not have the WSIB’s file in this case, I accept that the Plaintiff completed the Form 7 on September 13th, 2019. I reach this conclusion because the Plaintiff’s testimony was that, when she approached Mr. Joe George in

November of 2019, she had revised the original Form 7 by whiting-out portions of it. Mr. George confirmed that some of the form appeared to have white out on it. The Form 7 that was filed in evidence has the Plaintiff's signature on it, and the form was dated September 13th, 2019.

[26] In terms of reporting accidents and incidents to management, the Plaintiff provided Patrick George, Patene's President, with monthly branch reports. Those reports outline both WSIB reports and incidents that are only internal incidents. Some of the incidents that the Plaintiff has included on these reports are very minor, such as tripping over the carpet in the shipping office. However, the Plaintiff's accident does not appear on the Branch reports that were sent to Patrick George on July 12th, 2019 or August 7th, 2019. The first mention of the March 28th, 2019 incident is in the Branch Reports for August and September 2019, which were provided by the Plaintiff to Joe and Patrick George on October 2nd, 2019.

[27] The report of the Plaintiff's alleged slip and fall has a date of July 21st, 2019 associated with it, and contains only the notation "fell at branch in early spring". It does not set out which branch. However, there is also a chart associated with this report, which indicates that there have been zero "WSIB reportable injuries" at the Brantford branch in 2019.

[28] The WSIB allowed the Plaintiff's claim by way of a letter dated September 17th, 2019. That letter has an accident date of July 21st, 2019 on it. I will return to the issue of the inconsistent accident dates below.

[29] After the WSIB allowed the claim, the Plaintiff testified that a WSIB employee contacted her in mid-October and asked her to provide witness statements to clarify the date of the accident and to have her supervisor sign the Form 7. No one actually saw the Plaintiff slip and fall. She identified two friends (Chantelle Tower and Margaret Schaeffer) who worked for Patene as having heard from her that she had back problems as a result of a fall at a branch. She also identified Dale Cormier as a witness.

[30] The Plaintiff then asked Dale Cormier to send her an e-mail confirming that she had slipped and fell in the parking lot and had reported that accident to him. Mr. Cormier sent that e-mail. He testified that the Plaintiff had dictated the e-mail to him. Mr. Cormier testified that the Plaintiff was a supervisor and he felt uncomfortable disobeying her instructions. The Plaintiff's evidence is starkly different from Mr. Cormier's evidence, and I will resolve that dispute below.

[31] On October 30th, 2019, the Plaintiff approached Darlene Riley, who is Patene's Controller. The two of them got into a verbal altercation. That verbal altercation was investigated by Patrick George, who determined that the Plaintiff should be suspended for four days. The Plaintiff was also offered counselling.

[32] As a result of the altercation between Ms. Riley and the Plaintiff, the fact that the Plaintiff had made a WSIB claim came to the attention of Patrick George. An investigation was conducted. Ultimately, the Plaintiff's employment was terminated for cause on December 18th, 2019. The grounds for the termination were "dishonesty, serious conflict of interest, breach of your fiduciary obligations and potentially fraudulent conduct".

[33] The termination letter also makes mention of allegedly disrespectful behaviour, including the altercation with Ms. Riley. However, counsel for the Defendant advised that he would not be calling Ms. Riley to testify. As a result, I advised both counsel that it was my view that the question of whether there was cause to terminate the Plaintiff's employment turns on the issue of the WSIB claim only. Both counsel advised that they understood and accepted this view.

[34] The Plaintiff conducted a job search after her employment was terminated. On September 7th, 2020, she accepted a position with Verspeeten Cartage, earning $57,000 per year. There was a benefits package associated with this position. I was not provided with all of the details of the employment benefits.

c) The Loan to the Plaintiff

[35] Patene has counterclaimed against the Plaintiff for the sum of $30,700.00. Patene had a history of loaning money to the Plaintiff, and the Plaintiff has

previously paid that money back. On June 28th, 2017, the Plaintiff signed an installment note for $30,700 payable to 340268 Ontario Limited.

[36] Patrick George testified that 340268 Ontario Limited is a holding company owned by himself and his brothers. He also testified that he did not want the loan residing in Patene's financial records, as he did not want it known by other Patene employees that the Plaintiff had financial difficulties.

[37] The Plaintiff acknowledged receiving and paying back different loans over the years. She states that she was not required to make any further payments on the loans as of March 9th, 2016 and that she assumed that the funds she received, including $5,000.00 on June 28th, 2017, were all forgiven. For clarity, there is no real dispute that the Plaintiff received more than $30,000 over and above her regular salary and bonuses from her employer.

[38] Patene disagrees and has counterclaimed for the value of the loans plus interest. The Defendant has also alleged that, if an award of notice is made, the loan should be set off against any damages the Plaintiff may recover.

Evidentiary Record

[39] The examinations in chief in this trial were generally conducted by affidavits, which were identified and filed as exhibits. Cross-examinations and re-examinations were conducted orally. There was one exception, Robert Handsplant, who was a former supervisor in the Brantford branch. He had refused

to swear an affidavit. As a result, he gave *viva voce* testimony for both his examination in chief and cross-examination.

[40] In addition to Mr. Handsplant, the following witnesses gave *viva voce* testimony:

a) Shari Lagala, the Plaintiff.

b) Chantal Tower (formerly Chantal Scapinello). She worked for Patene as a Branch Accountant in the Defendant's head office until August of 2019.

c) Patrick George, the President of Patene. There are a number of other members of the George family involved in the business. However, when I refer to Mr. George in my decision, I am referring to Mr. Patrick George.

d) Dale Cormier, the shipper in the Brantford branch.

[41] The parties also stipulated that Ms. Margaret Schaeffer, a payroll coordinator with Patene at the time, would have testified that the Plaintiff had told her in passing conversation that she had fallen at a branch. Ms. Schaeffer could not recall the particulars of when this occurred. An e-mail from Ms. Schaeffer confirming these facts was marked, on consent, as a numbered exhibit. This evidence assists in confirming that the Plaintiff made complaints about her back injury to coworkers but is otherwise of limited assistance in my consideration of this case.

[42] Finally, there was the evidence of Ms. Darlene Riley, the Comptroller. She prepared an affidavit and was originally going to give evidence. However, at the

conclusion of the Plaintiff's case, counsel for the Defendant advised that he would not be calling Ms. Riley and would be abandoning any reliance on the altercation between Ms. Riley and the Plaintiff.

[43] There was a possibility that this late abandonment of an affidavit might prejudice the Plaintiff. As a result, counsel for the Defendant accepted that any of the documents that were attached to Ms. Riley's Affidavit could be included in the factual record and would be accepted for the truth of their contents as they were described by Ms. Riley. Two documents were included in the records and I have considered them as well.

Issues

[44] The following issues must be determined in this case:

a) Did the Defendant have cause to terminate the Plaintiff's employment?

b) Is the Plaintiff entitled to punitive damages?

c) What notice period would the Plaintiff be entitled to?

d) Is the Defendant entitled to any damages for the counterclaim?

[45] I will deal with each issue in turn. Before doing so, I will set out some preliminary comments about credibility and reliability.

Credibility and Reliability

[46] Credibility and reliability are different, but related, concepts. Credibility is the question of whether the witness is being truthful to the best of their ability. Reliability is the question of whether the witness can accurately observe, recall and recount the events in question. *R. v. H.C.,* 2009 ONCA 56, 244 O.A.C. 288, at para. 41.

[47] In assessing credibility, I am guided by the oft-cited principles in *Faryna v. Chorny,* 1951 CanLII 252, [1952] 2 D.L.R. 354 (B.C.C.A.), at para. 10:

> The credibility of interested witness, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions.

[48] I have significant concerns with both the credibility and reliability of the Plaintiff's evidence. Those concerns are significant enough that, where the Plaintiff's evidence differs from either the documentary evidence or the testimony (or affidavits) of other witnesses, I have rejected the Plaintiff's evidence unless I note otherwise.

[49] I will deal with credibility in my analysis of the question of whether the Defendant had cause to terminate the Plaintiff's employment. In terms of reliability, it is worth setting out one example of my concerns with the Plaintiff's reliability at this point. In her testimony before me, the Plaintiff was presented with a Form 6

that was attached to Mr. George's Affidavit. It was suggested to the Plaintiff that she had completed this form. She originally denied this suggestion. It was only after a detailed review of the form in cross-examination that the Plaintiff ultimately accepted that she had completed the form.

[50] For the Plaintiff to have confusion about whether she had completed a Form 6 that was at least partly in her handwriting raises concerns about the reliability of her evidence. She is an experienced health and safety manager, and the completion of WSIB paperwork is at the core of her responsibilities. The fact that she denied completing this form that she had obviously completed until she was taken through the form in detail is surprising and is one of the reasons that I have generally rejected the Plaintiff's evidence..

Issue #1- Was the Plaintiff's Employment Terminated for Cause?

[51] Yes.

[52] To understand the reasons for my conclusion, it is helpful to divide my analysis into two parts. I will begin by setting out the legal framework applicable to this case. Then, I will apply that framework to the facts of this case.

a) Legal Framework

[53] The parties referred me to a number of the relevant authorities outlining when an employer will have cause to terminate an employee's employment. The leading authority is *McKinley v. B.C. Tel*, 2001 SCC 38, [2001] 2 S.C.R. 161. In

that decision, the Court stated that not every case of dishonesty would justify the termination of an employee's employment. Instead, the trier of fact must consider the whole context of the conduct.

[54] These principles have been expanded upon in *Dowling v. Ontario (Workplace Safety and Insurance Board)* (2004), 192 O.A.C. 126, leave to appeal refused, [2005] S.C.C.A. No. 25. In that decision, the Court of Appeal set out the process to be followed:

> [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).

[55] In *Dowling*, the Court goes on (at paras. 51-53) to set out specifics of how these three parts of the test are to be applied.

[56] Before I apply this test to the facts of this case, there are two evidentiary points that I must briefly address. Counsel for the Plaintiff argued that the employer has the burden of demonstrating that the termination was for cause, a principle which I accept. Counsel also seemed to suggest that, where dishonesty or fraud were alleged, the standard of proof is somewhat higher than the usual civil standard of a balance of probabilities. To support both positions, he provided me with the decision of *Tong v. Home Depot of Canada Inc.* (2004), 39 C.C.E.L. (3d) 59 (Ont. S.C.), at para. 9.

[57] In *F.H. v. McDougall,* 2008 SCC 53, [2008] 3 S.C.R. 41, at paragraph 49, the Court concluded that “in civil cases there is only one standard of proof and that is proof on a balance of probabilities.” This decision is binding on me.

[58] *McDougall* was a case in which the Defendant was alleged to have sexually assaulted the Plaintiff while the Plaintiff was a student at a residential school. If that type of serious allegation is subject to proof on a balance of probabilities, I see no reason why an employer seeking to prove fraud or misfeasance in the employment context would be required to meet any higher standard of proof.

[59] Further, the policy reasons for a single standard of proof set out at paragraphs 40-49 in *McDougall* seem to me to apply, with equal force, to an employment law case. There is nothing that makes the proof required in an employment law case, even one with serious allegations of misconduct, any different from any other civil case. Finally, I note that *Tong* was decided before *McDougall*. Therefore, *Tong* is no longer good authority on this point.

[60] For all these reasons, I conclude that the standard of proof I am required to apply in this case is the single standard of proof on a balance of probabilities as identified in *McDougall*. It is up to the Defendant, however, to prove the cause allegation on a balance of probabilities.

b) Application to the Facts

[61] The case-law requires me to consider the entire context of the events giving rise to the termination of the Plaintiff's employment. Therefore, I will review the events from the date of the alleged accident to the point where the Plaintiff's employment was terminated.

[62] The Plaintiff claims that this injury took place on or about March 28th, 2019. She also claims that she was too embarrassed to report the injury to her supervisors. To consider the whole context, I must begin by determining what happened on March 28th, 2019.

[63] Although the Plaintiff claims that she was too embarrassed to tell a supervisor about this incident, she also testified (in her Affidavit) that she "recall[ed] contacting Dale Cormier, the traffic manager at the Brantford branch, to complain about the incident and expressed my frustration that the potholes are not getting filled." The Plaintiff went on to testify that she believed that she asked Mr. Cormier to have G & A to come and fill the potholes in the parking lot.

[64] Mr. Cormier, on the other hand, testified that he had never had this discussion with the Plaintiff and that the first time he had heard of any accident in March of 2019 was in October of 2019, when the Plaintiff called him and asked him to write an e-mail about it. The Plaintiff dictated what she wanted the e-mail to say.

[65] Mr. Cormier testified that he had known the Plaintiff since he was a child, and that there has been a relationship between his family and the Plaintiff's family for a long time. Mr. Cormier also testified that the Plaintiff had gotten him his job with Patene. As a result, Mr. Cormier felt that he had to write the e-mail as the Plaintiff had requested him to do.

[66] The e-mail, dated October 24th, 2019, reads as follows:

> To whom it may concern;
>
> As the Traffic Manager of the Brantford Branch It was brought to my attention that Shari had slipped and fell on ice in the front parking lot, this happened in middle of April.
>
> Next time we spoke she mentioned that it hasn't gotten any better and would need to get it looked at.

[67] This e-mail is followed by one from Mr. Cormier to the Plaintiff asking if this was good. Mr. Cormier went on to testify that he came forward voluntarily after having thought about this incident for a month. He discussed it with his mother, who told him that was not right and that he should say something.

[68] In cross-examination, counsel for the Plaintiff suggested to Mr. Cormier that he was lying about the discussion in order to protect his job. I reject this suggestion, and accept Mr. Cormier's evidence that he had not heard about the Plaintiff's alleged fall until October of 2019 for the following reasons:

a) The Plaintiff's evidence that she called Mr. Cormier to report the accident is not consistent with the phone records that were provided. There

are no calls from the Plaintiff's cell phone to the Brantford Branch within a week after March 28th, 2019.

b) The Plaintiff testified at discoveries that she had called Mr. Cormier from her car on her cellphone to report the incident either the day it happened or the next day. However, when the phone records showing that there were no calls from her cell phone to the Brantford branch, the Plaintiff then suggested that she might have called Mr. Cormier from another branch. This changing story suggests that the Plaintiff's evidence is not reliable or credible.

c) Plaintiff's counsel suggested that there had been a discussion between Mr. Cormier and the Plaintiff around March 28th, 2019 and that the accident had been reported to Mr. Cormier. The phone records show that there were a couple of phone calls from the branch to the Plaintiff. However, the essential ingredient of the Plaintiff contacting Mr. Cormier is missing from any of these potential conversations. All of the contact from the Brantford branch around March 28th, 2019 is from the branch to the Plaintiff's cell phone.

d) The Plaintiff's explanation that she was "too embarrassed" to report this accident to a member of management is inconsistent with her claim that she reported it to Mr. Cormier and asked him to get G & A to fill in the potholes. If the Plaintiff actually reported the accident to Mr. Cormier as she described, then she should have expected that management would have become aware of the issue and would have dealt with it. Therefore, I conclude that the Plaintiff's explanation of being embarrassed was invented after the fact to justify her failure to follow the corporate policies that she herself was responsible for. I am fortified in that conclusion by the fact that

the Plaintiff interjected this explanation in response to cross-examination questions that had limited relation to her failure to report the accident.

e) If Mr. Cormier had, in fact, been advised of the incident in March of 2019, he would have added it to his safety reporting and would have contacted someone at G & A to look at filling in the potholes. There is no record of any of those types of contacts in the evidence before me.

[69] I have rejected the suggestion that Mr. Cormier lied to the Court to protect his job. Instead, I accept Mr. Cormier's evidence that he never heard from the Plaintiff about this accident in March or April of 2019. I accept Mr. Cormier's evidence because it was internally consistent, it fit with the contemporaneous documentation, and there was no reason for Mr. Cormier to lie about what had happened.

[70] Counsel for the Plaintiff suggested that it was Mr. George, and other managers of the Defendant, who pressured Mr. Cormier to come forward and provide testimony that implicated the Plaintiff. I reject that suggestion as well. Mr. Cormier was clear that he had come forward to speak to the Brampton Branch Manager and, ultimately, Mr. George about his concerns in respect of this incident in November of 2019. I find that neither the Brantford branch manager nor Mr. George sought Mr. Cormier out or asked him to provide damaging evidence about the Plaintiff. From that conclusion, it follows that, but for Mr. Cormier coming forward, the e-mail he sent at the Plaintiff's request would have been the final word from him on the issue.

[71] From this conclusion it also follows that I find that the Plaintiff was untruthful with both Mr. George and the Court about reporting this incident to Mr. Cormier in March of 2019 and attempted to use her relationship with Mr. Cormier, and the influence it gave her over him, to conceal this lie and convince both Mr. George and the Court that she had reported this accident in a timely way. This is very significant misconduct that might, on its own, be sufficient to support the Defendant's decision to terminate the Plaintiff's employment for cause.

[72] However, that is not all the evidence I have. There are also other significant inconsistencies in the Plaintiff's reporting of this accident, as follows:

a) The Plaintiff's explanation about changing the travel arrangements for her trip to Mexico does not make a lot of sense. If the Plaintiff's back condition was serious enough for her to cut short a planned vacation, then I would have thought it was serious enough to seek medical attention and to report to her employer.

b) On May 9th, 2019, the Plaintiff completed a report of minor accident/injury about the March 28th, 2019 accident. However, that form indicated that the accident had been reported on the July 2019 incident reports. The accident is not, in fact, recorded on those reports and no good explanation for this inconsistency was provided.

c) The Plaintiff testified that she reported this accident as part of the July, 2019 branch reports. However, the reports in evidence do not support the Plaintiff's evidence. The Plaintiff's accident does not appear on the accident reports until the August, 2019 report, which was not provided to the Georges until October 2nd, 2019.

[73] The Plaintiff's failure to report this accident in any way until October 2nd, 2019, after the WSIB had allowed her claim, was a breach of the employer's policies on accident reporting as set out at paragraph 12**.** The Plaintiff's failure is also part of the context that supports the Defendant's decision to terminate the Plaintiff's employment.

[74] However, these concerns with the Plaintiff's failure to report this accident are not merely a breach of the policies that the Plaintiff was charged with enforcing. The Plaintiff was responsible for ensuring that the employer adhered to the provisions of the *WSIA*. Section 21 of the *WSIA* states:

> **21** (1) An employer shall notify the Board within three days after learning of an accident to a worker employed by him, her or it if the accident necessitates health care or results in the worker not being able to earn full wages.

[75] When the Plaintiff went to the emergency department in August of 2019, she had received medical treatment that was, at least arguably, related to the accident. At law, this triggered the notification requirement and the accident had to be reported by the employer within three days. The Plaintiff purported to report the accident on behalf of the employer on September 13th, 2019, weeks later. By failing to report this accident to the WSIB in a timely manner, the Plaintiff put her employer at risk of being found in violation of section 21 of the *WSIA*. Section 152(3) of the *WSIA* states that an employer who fails to comply with section 21 is guilty of an offence. In other words, the sanctions that could have flowed from the

Plaintiff's failure to report her alleged accident in a timely way are significant. It was part of the Plaintiff's job to protect the Defendant from these sanctions by ensuring that accidents were reported promptly.

[76] These concerns also illustrate the fact that the Plaintiff's decision to report her own accident on behalf of the employer put her in a conflict of interest. I reject the Plaintiff's assertion that she did not view this as a conflict of interest and that there was no conflict between her interests and the employer's interests. The Plaintiff knew, or ought to have known, that reporting, as the Defendant employer's representative, an accident that she had suffered would put her interests in clear conflict with the interests of the Defendant. She would be interested in obtaining benefits from the claim, while the Defendant would want a full investigation into the claim, particularly given the inconsistencies in the Plaintiff's reporting. This is a classic conflict of interest that any manager who works in the human resources field should have been able to see.

[77] The fact that the Plaintiff was prepared to put herself in this conflict, while denying that it was a conflict, is a significant reason why the Defendant was correct to have lost confidence in the Plaintiff. It is not necessary for me to decide whether this ground, alone, would have justified termination as the Plaintiff has engaged in a continued pattern of misconduct over this claim. However, I emphasize that the failure to recognize and avoid this conflict is, in and of itself, a very significant factor

in determining whether the Defendant's decision to terminate the Plaintiff's employment was justified.

[78] This brings me to my concerns about the Plaintiff's interactions with Mr. George once he became aware of the Plaintiff's WSIB claim. Mr. George conducted an interview with the Plaintiff on November 1st, 2019. Joe George was also present for this interview.

[79] At the time of the interview, the Plaintiff's claim had already been approved by the WSIB and the Plaintiff had already received correspondence advising of the approval. However, when Mr. George asked the Plaintiff to see Patene's complete WSIB file, the only documents that the Plaintiff provided to him were the May, 2019 blue form and a Functional Abilities Form. The decision letter that had been sent by the WSIB was not included in the Employer's file. The Plaintiff was well aware of this decision letter, and of the subsequent discussions that she had had with the WSIB.

[80] I did not receive a good explanation from the Plaintiff as to why the WSIB's decision letter was missing. Given all of the other problems with the Plaintiff's evidence, the only conclusion that I can reasonably draw from her failure to provide this letter to Mr. George when he was investigating her claim was that she was trying to conceal the letter from him. This failure to be truthful and accurate with her employer when asked to discuss the accident is part of the context I must

consider. It is also an indication that the Plaintiff was engaged in a pattern of conduct, rather than merely a single moment when she demonstrated a lack of judgment.

[81] The Plaintiff's position was not filled after the termination of her employment. Instead, the Health and Safety functions were assigned to a senior employee who works for G & A, which is another related company owned by the George family. Counsel for the Plaintiff argued that this was evidence that the Defendant wished to terminate the Plaintiff's employment by any means necessary. I disagree for two reasons:

a) Mr. George testified that he was generally happy with the Plaintiff's performance. I accept this evidence and conclude that there was no desire to terminate the Plaintiff's employment before this incident arose.

b) The Plaintiff's conduct, as described above, is sufficiently concerning that any employer would have considered either significant discipline or termination of employment.

[82] While the Plaintiff's misconduct flows from one incident, it is not a one-off lapse in judgment. Instead, the Plaintiff engaged in a continuing pattern of attempting to hide her failure to report the alleged accident to her employer. The Plaintiff compounded her misconduct by suborning Mr. Cormier, a lower-level employee, to help her cover up her failure to report the alleged accident in a timely manner.

[83] The Plaintiff also failed to protect the employer's interests by delaying in reporting this accident and put the employer in a position where they were in breach of the *WSIA*. The Plaintiff's failure to report included failing to record the accident on the monthly reports that were sent to upper management for several months after it had allegedly taken place. The Plaintiff compounded this breach by failing to tell Mr. George the truth when he investigated the matter.

[84] All of this misconduct must be considered in light of the fact that the Plaintiff was directly responsible for the administration of the Defendant's Health and Safety policies. As a result, I infer that the Plaintiff knew, or ought to have known, what the policies required her to do in this case. She failed to follow those policies.

[85] The Plaintiff's misconduct, and her dishonesty when confronted with that misconduct, irretrievably destroyed her ability to carry out her employment responsibilities. Put simply, an employer cannot be expected to employ a Health and Safety manager who does not comply with health and safety policies when those policies affect her, and then is dishonest with her employer about what happened after the fact.

[86] As a result, I find that the Defendant's decision to terminate the Plaintiff's employment was proportionate and the Plaintiff's claim for damages for wrongful dismissal is dismissed.

Issue #2- Is the Plaintiff Entitled to Punitive Damages?

[87] Given my conclusion that the Plaintiff's employment was terminated for cause, the Plaintiff is not going to be entitled to punitive damages and this claim also fails. I will briefly note that, even if the Defendant did not have cause to terminate the Plaintiff's employment, the record before me does not support a claim for punitive damages.

[88] I have already addressed the Plaintiff's assertion that the Defendant had a plan to terminate her employment, which I disagreed with. To that analysis, I would only add that the Defendant did what is required of them in this situation. They conducted a full investigation into the Plaintiff's WSIB claim and obtained all of the relevant documentation. The Defendant also separated the WSIB claim issues from the harassment issues that had been raised in respect of the argument between Ms. Riley and the Plaintiff.

[89] I should also address the Plaintiff's assertion that the Defendant acted in a malicious and high-handed matter when it alleged that the Plaintiff had fabricated the accident. To reach my decision, I have not found it necessary to conclude that the Plaintiff fabricated the accident. However, the Defendant's conclusion on that point is not unreasonable for, *inter alia*, the following reasons:

a) The Plaintiff advised the Defendant that she slipped on ice. The Defendant collected information about the weather on the day in question

as well as previous days. Based on that information, it was not unreasonable to conclude that there was no ice in the parking lot.

b) The Plaintiff had difficulties in remembering precisely what date the accident was.

c) The Plaintiff had suborned Mr. Cormier into providing false information for the accident file.

[90] The test for punitive damages is quite high: *Whiten v. Pilot Insurance Co.,* 2002 SCC 18, [2002] 1 S.C.R. 595, at para. 36; *Hill v. Church of Scientology of Toronto,* [1995] 2 S.C.R. 1130, at para. 196. In order to establish a claim for punitive damages, a Plaintiff must show that a Defendant engaged in conduct that was malicious, oppressive and high handed. It is the sort of conduct that represents a marked departure from ordinary standards of decent behaviour.

[91] As I have stated at paragraph 89, that I see nothing in the facts of this case that would show that the Defendant engaged in any conduct worthy of Court sanction, either by asserting that the Plaintiff had fraudulently claimed this accident or in expressing those concerns to the WSIB. This claim also fails.

Issue #3- Reasonable Notice Period

[92] Although I have found that the Plaintiff's employment was terminated for cause, I will set out my calculations of the reasonable notice period and of the damages that flow from that reasonable notice period.

[93] There is no notice period set out in the Plaintiff's employment contract. As a result, the factors that I consider in setting the period of reasonable notice are set out in *Bardal v. Globe and Mail Ltd.,* (1960), 24 D.L.R. (2d) 140. Those factors are as follows: (para. 21)

> There can be no catalogue laid down as to what is reasonable notice in particular classes of cases. The reasonableness of the notice must be decided with reference to each particular case, having regard to the character of the employment, the length of service of the servant, the age of the servant and the availability of similar employment, having regard to the experience, training and qualifications of the servant.

[94] None of these factors are exhaustive, and none of them should be given disproportionate weight: *Honda Canada Inc v. Keays,* 2008 SCC 39, [2008] 2 S.C.R. 362, at para. 32.

[95] The parties did not provide me with a great deal of case-law on the question of what the appropriate notice period would have been in a case such as this. I was referred to, among others, the decisions in *Morison v. Ergo-Industrial Seating Systems Inc.,* 2016 ONSC 6725, 38 C.C.E.L. (4th) 312, *Morrow v. Complex Services Inc. (Niagara Casinos),* 2017 ONSC 4183, and *Deplance v. Leggat Pontiac Buick Cadillac Ltd.*, 2008 CanLII 15897 (Ont. S.C.).

[96] The cases all include helpful discussions on the principles to be applied to calculating notice periods. *Morrow* is most directly on point, as it concerned the termination of a Health and Safety professional who had some of the same responsibilities as the Plaintiff. Mr. Morrow was 53 when he was terminated and had worked for his employer for seven and a half years. He was given eight

months pay in lieu of notice. However, as noted in *Morison*, determining reasonable notice is an art and not a science.

[97] At the date of her dismissal, the Plaintiff had been employed for a period of more than thirteen years. She was in a specialized role that had managerial responsibilities. She was in her early 50's at the time her employment was terminated and may have had more difficulties finding employment than she might have when she was starting out in her career.

[98] In my view, taking into account the age, nature of employment and length of service of the Plaintiff, a notice period of twelve (12) months is reasonable in this case. As I have noted, the fact that the Plaintiff is towards the end of her career is a factor in support of a longer notice period. However, the number of positions that she was able to apply for after he employment was terminated was significant, which suggests that work in this field was available.

[99] The Defendant accepted that the Plaintiff engaged in reasonable mitigation efforts in the circumstances, particularly given the COVID-19 pandemic. The Plaintiff accepted that any earnings from her work at Verspeeten were to be set off against any reasonable notice period.

[100] The fact that the Plaintiff was able to mitigate her damages in ten months means that, on the facts of this case, I do not need to resolve the question of whether an employee could be entitled to a higher period of notice because of

the problems associated with the COVID-19 pandemic. The Plaintiff was able to mitigate her damages and find new employment within what I would call the normative notice period for a case such as this.

[101] This brings me to the calculation of the actual damages. The Plaintiff would be entitled to pay, and all benefits that would normally be earned during the notice period. This would include employee benefits (such as dental and medical) as well as the car and cellphone: *Ruston v. Keddco Mfg. (2011) Ltd.,* 2018 ONSC 2919, 49 C.C.E.L. (4th) 113, at para. 110, and the cases cited therein.

[102] The Plaintiff would also have been entitled to her bonus, as it was regularly paid as part of her compensation. In addition, Mr. George testified that, but for the reasons for termination, he had been happy with the Plaintiff's performance. As a result, I infer that the Plaintiff would have been entitled to a bonus of $2,225.00 payable in February of 2020 had she remained an employee.

[103] The parties did not focus much of their attention on this issue. However, in reaching this conclusion, I have relied on the analysis in *Ruston* at para. 122.

[104] What flows from all of this is the following:

a) Had the Plaintiff been wrongfully dismissed, she would have been entitled to her full salary and all of her benefits from December 18th, 2019 until the day that she began her employment with Verspeeten.

b) Had the Plaintiff been wrongfully dismissed, she would have been entitled to the difference between her salary at the Defendant and her salary at Verspeeten from the date she started employment at Verspeeten and December 18th, 2020. Given that there was no clear evidence on the benefits that Verspeeten provided, there is to be no allowance for any damages for lost benefits (as opposed to lost salary) after the Plaintiff was hired at Verspeeten.

[105] Given the evidentiary record I have, I cannot calculate the precise damages. Given my conclusion that the Plaintiff's employment was not wrongfully terminated, I am not sure if it is necessary to resolve these issues. If the parties view it as necessary to resolve the calculations, they are to endeavour to agree on that calculation. Should there be a need to calculate the precise damages, I remain seized to address any issues the parties may have in that respect.

Issue #4- The Defendant's Counterclaim

[106] The Defendant has counterclaimed for approximately $30,000.00 in respect of an installment note that was signed by the Plaintiff on June 28th, 2017. There is no disagreement that the Plaintiff did not pay back all of the money owing on this note. The Plaintiff argues that she viewed the amounts owing as having been forgiven and, in the alternative, that the debt is not owed to this Defendant.

[107] I do not intend to resolve the question of whether this debt has been forgiven. The problem with the Defendant's claim is that the note was between a

numbered company and the Plaintiff. The numbered company is a separate entity from the Defendant Patene, although it is controlled by the Georges.

[108] Mr. George testified that the reason that this note was put into the separate company was because he did not want an employee receivable appearing on Patene's books and giving the impression that the Plaintiff had financial difficulties. Regardless of the reasons that Mr. George had for assigning the debt to a different company, the fact remains that it was assigned to a different company.

[109] Therefore, the Defendant has no right to enforce this note as against the Plaintiff. Regardless of whether the numbered company could enforce the note against the Plaintiff, this Defendant's claim fails. I make no determination as to whether a limitations defence would be available to the Plaintiff if she were sued by the party who could seek enforcement of the note.

Conclusion and Costs

[110] For the foregoing reasons, the Plaintiff's claim and the Defendant's counterclaim are dismissed.

[111] The parties are encouraged to agree on the costs of this action. Failing agreement, each party can serve and file costs submissions of no more than three (3) single-spaced pages, exclusive of bills of costs, case law and offers to settle, within fourteen (14) calendar days of the release of these reasons.

[112] Each party can serve and file responding costs submissions of no more than two (2) single spaced pages, exclusive of case law, within fourteen (14) days after the receipt of the originating decisions.

[113] Costs submissions are to be filed electronically with the Court office and uploaded to CaseLines. An electronic copy is also to be provided to my judicial assistant at ryan.chan2@ontario.ca. Both methods are required to complete the filing process.

[114] There are to be no extensions for the deadline for costs submissions, even on consent, without my leave. If the parties do not submit costs submissions (or a request for an extension) within the deadlines I have set out, then there shall be no order as to costs.

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LEMAY J

Released: January 11, 2023

CITATION: Lagala v. Patene Building Supplies Ltd, 2024 ONSC 253
COURT FILE NO.: CV-20-3-0
DATE: 20240111

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:

Shari LAGALA

Plaintiff

- and -

Patene Building Supplies Ltd.

Defendants

REASONS FOR JUDGMENT

LEMAY J

Released: January 11, 2023