CITATION: Partridge v. Botony Dental Corporation, 2015 ONSC 343
COURT FILE NO.: CV-13-0843-SROT
DATE: 20150119

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
LEE PARTRIDGE	)	M. Wright and C. Perri, for the Plaintiff
Plaintiff	)	
– and –	)	
BOTONY DENTAL CORPORATION	)	A. McMackin, for the Defendant
Defendant	)	
	)	**HEARD:** November 19, 20, 22, 24 and 27, 2014

REASONS FOR JUDGMENT

HEALEY J.

Overview

[1] In this action the plaintiff, Lee Partridge, sought damages and declarations arising from the alleged wrongful termination of her employment with Botony Dental Corporation. Botony operates a family and cosmetic dentistry located in Barrie, Ontario. The pecuniary claims of the plaintiff were $70,000, representing a notice period of 12 months, and a $30,000 for breach of her human rights.

[2] The defendant alleged that it terminated Partridge's employment for just cause, and counterclaimed for damages in the sum of $400,000 for loss of revenue and loss of value of the dental practice.

Judgment

[3] A handwritten endorsement was released on November 28, 2014 granting judgment in the action, with written reasons to follow. This Court ordered that judgment would issue in the following terms:

1. This Court declares that the plaintiff was wrongfully terminated from her employment on or about July 19, 2011;
2. This Court declares that the defendant breached the plaintiff's human rights;

3. This Court declares that the defendant breached the employment contract in effect with the plaintiff, an implied term of which required reasonable notice of termination;

4. This Court orders that the defendant shall pay to the plaintiff the sum of $62,517.44 as damages for wrongful dismissal and breach of the *Human Rights Code*, comprised of $42,517.44 and $20,000, respectively;

5. This Court orders that prejudgment interest shall be added to the above global sum, calculated from July 19, 2011;

6. This Court orders that postjudgment interest shall accrue from the date of this judgment in accordance with s. 129 of the *Courts of Justice Act*; and

7. This Court orders that the counterclaim is dismissed.

[4] The issue of costs, to be agreed upon by the parties or determined by the Court, was also addressed in the endorsement.

Facts Not in Dispute

[5] At the time of trial, Partridge was 39 years of age. She is a dental hygienist by education and training. Partridge began her employment with Botony in March, 2004. There was no written employment contract. Her employment was terminated on July 19, 2011, making her term of employment seven years and four months in length. During that time she had two maternity leaves. The first ran from June, 2007 to July, 2008, and the second from June, 2010 to July, 2011.

[6] Partridge was initially hired by Botony as a dental hygienist. In 2007, her role changed to that of office manager. The parties are not in agreement as to the date on which Partridge assumed the position of office manager; Partridge's evidence was that it occurred in March, 2007, and her former employer's evidence was that it occurred in October, 2008. This issue will be revisited later.

[7] Botony's sole director, officer and shareholder is Balbinder ("Bo") Jauhal. In 2002, Botony opened the dental office at which Partridge came to work two years later, called Big Bay Point Dentistry. Jauhal was not consistently at the premises, as a result of operating other practices in other locations. She typically came to Big Bay Point Dentistry twice per week, for the morning. There were no written office policies or procedures.

[8] As the office manager, Partridge was responsible for the general operations of the practice, including managing patient bookings and staff schedules, answering phones,

pursuing bad accounts, advertising for the practice, collecting and paying bills by cheque or corporate credit card (although Jauhal would sign the cheques), running advertisements for staff, interviewing, hiring and firing employees in collaboration with Jauhal, with Jauhal having the final decision, training staff, and dealing with maintenance issues.

[9] At the time of Partridge's termination, the office hours of Big Bay Point Dentistry were Monday to Tuesday 10 a.m. to 8 p.m., Friday 8 a.m. to 4 p.m., and Saturday 9 a.m. to 4 p.m.. The hygienists typically started at 10 a.m. The hygienists' hours were Monday to Thursday 10 a.m. until 8 p.m., and Friday and Saturday 9 a.m. to 4 p.m.. Between her date of hire as a hygienist and the day that she was given the position of office manager, Partridge's work hours were 10 a.m. to 6 p.m., Tuesday to Friday. She earned $35 per hour as a hygienist. There was no guaranteed minimum number of hours; they ranged from 20 to 35 hours per week. As a hygienist, she was only paid for the hours spent working on patient care. Once she accepted the management position, Partridge's hours changed to 9 a.m. to 5 p.m., although there is a dispute over the extent to which her actual hours fluctuated weekly within those set hours. She continued to work four days per week, Tuesday to Friday. While the hygienists were required to take an unpaid lunch break, as the office manager, Partridge worked through her lunch hours and was paid for that time. As an office manager, Partridge's rate of pay was $41 per hour. In 2009, which year was uninterrupted by a maternity leave, her total earnings from Botony were $70,100.

[10] Prior to her return to work in July, 2011 following her last maternity leave, Jauhal told Partridge by way of text messaging that she was "booking her into the hygienist schedule with patients booked Tuesday 8-3, Wednesday 8-3, Thursday 9-3, Friday 8-3". Thereafter began a series of events and interactions between Partridge and Jauhal that culminated in Partridge being fired on July 19, 2011.

[11] At the time of Partridge's dismissal, Jauhal provided Partridge with a cheque for a severance payment in the sum of $7,605.50, indicating on the Record of Employment that it was representative of seven weeks' pay. Under the section of that document entitled "comments", Jauhal wrote as follows:

> *did not return to work on agreed date after end of maternity leave
>
> 1. Taking day sheets - personal patient information
>
> 2. Falsifying hours worked. Leaving at 3:15 signing out at 4:00 p.m.
>
> 3. Demanding to work thru (sic) lunch. Demanding to work hours not available.
>
> * Wilful neglect

[12] Partridge received this Record of Employment and severance cheque at the meeting during which she was terminated. Partridge returned the cheque to Jauhal that same day.

[13] Jauhal testified that she amended the Record of Employment six days later so that the comment section then read:

> 1. Did not return to work on agreed date
>
> 2. Falsifying hours worked
>
> 3. Demanding to work thru (sic) lunch
>
> 4. Demanding to work hours not available
>
> 5. Taking home day sheets with personal patient information.
>
> Demonstrating wilful misconduct, disobedience, wilful neglect of duties.

[14] During Partridge's time as manager, and at her termination, there were approximately 10 employees working at Big Bay Point Dentistry. One of the primary dental hygienists was Jillian Caswell. Another hygienist was Meghan Johnston. Kristine Hubble was a dental assistant, as was Katie Ryckman. Cathy Petrie worked at the front reception desk. These latter two individuals, as well as Jillian Caswell, continue to be employed by Botony and testified as witnesses.

[15] The dentistry office produced day sheets on a daily basis, which were kept in each operatory. The practice of each employee varied; the day sheets were either posted on a wall behind the patients while treatment was being given, or on the inside of a cabinet door. They contained the patient's full name, treatment to be performed, and patient medical alerts, if necessary. They contained information for approximately 40 patients each day. They were shredded at the end of each day to maintain patient confidentiality.

[16] The computer software used by Botony permitted the tracking of patient information such as patient names, contact information and scheduling details, as well as business financial reports. When she became the manager, Partridge was the only employee to know the secondary password to the system, which allowed access to all of the same information that was accessible to Jauhal. She was also given the code for the office safe, and the keys to the filing cabinet and the office itself. Documents such as resumes, employee reviews, and supplier information and statements were kept in the filing cabinet.

[17] A term of working for Botony was that patient confidentiality was to be maintained by the employees.

Allegations of Each Party

[18] Partridge alleged that she was promoted to the position of office manager in March, 2007, and that it was therefore a position that she held for three years and four months. Prior to her return from her second maternity leave, Jauhal advised her that her position as office manager was no longer available, and forced her to assume her former job as a hygienist.

[19] In doing so, Jauhal reduced Partridge's work hours, as well as the certainty of those hours. Partridge alleged that when she attempted to assert her right to be reinstated to her previous position and working conditions, Jauhal responded by way of reprisal. Jauhal insisted that Partridge work during hours that she had not worked prior to her maternity leave, including times that knowingly conflicted with Partridge's daycare arrangements. Met with further insistence from Partridge that she be reinstated on more favorable terms than were being offered, Jauhal terminated her. The plaintiff alleges that by express or implied term of the employment agreement, her employment could only be terminated on reasonable notice or pay in lieu of notice. By failing to provide either, Partridge alleged that Botony breached those terms. Partridge also alleged that the refusal by Botony to reinstate her to her prior position was discriminatory, and a breach of the Ontario *Human Rights Code*, R.S.O. 1990, c. H and a breach of the *Employment Standards Act*, 2000, S.O. 2000, c. H. Further, being terminated after asserting her right to reinstatement amounted to a reprisal, and was another contravention of a legislated employment standard.

[20] Botony alleged that while it was able to reinstate Partridge to the position of office manager, and that the position remained open for her during her maternity leave, it was Partridge who requested that she assume her former role as a hygienist. She then demanded that Jauhal change the ordinary business hours of the dental practice by changing regular opening times from 10 a.m., to 8 a.m.. As a result of Botony's refusal to alter the hours, Partridge began to systematically harass management and other employees. It was alleged by Botony that such misconduct and office disruption constituted lawful cause for dismissal.

[21] There were two additional grounds advanced by Botony as cause for terminating Partridge’s employment. The first is an allegation that, in conjunction with an intention to set up a competitive dental practice in the same area, Partridge secretly copied and removed confidential and proprietary patient records and information from Botony. The second is that Partridge contacted, solicited and procured other dental hygienists employed by Botony for the purpose of having them join her new business. It is alleged that in using this proprietary and confidential patient information to her own benefit, Partridge caused Botony to suffer damages through lost revenue and decreased resale value. The claim for diminished business value was not pursued at trial. The claim for lost revenue was pursued, but was lowered from $200,000 to $25,000.

The Law Related to Just Cause

[22] Partridge’s employment with Botony was held pursuant to a contract of indefinite duration. The law is well established that, prior to terminating that contract, Botony was

required to provide proper notice to Partridge or pay in lieu thereof. The exception to this is when there is "just cause" for immediate or summary dismissal.

[23] How does the law define "just cause"? In H. Levitt, The Law of Dismissal in Canada, 3rd ed., (Toronto: Canada Law Book, 2003), at p. 6-3, the author attempts to summarize what constitutes cause for discharge, as follows:

> The court has to apply general principles and past decisions to each case as it arises in order to determine whether or not an employee's termination is justified. The usual definition of just cause is as follows: "…misconduct inconsistent with the fulfilment of the express or implied conditions of service will justify dismissal". Although there is no airtight evidence of what constitutes cause for discharge, the definition relied on most is:
>
> > If an employee has been guilty of serious misconduct, habitual neglect of duty, incompetence, or conduct incompatible with his duties or prejudicial to the employer's business, or if he has been guilty of wilful disobedience to the employer's orders in a matter of substance, the law recognizes the employer's right summarily to dismiss the delinquent employee. [*footnotes omitted*]

[24] As each case must be decided on its own facts, this is an area of the law where there is no sharp line demarcating when an employee's conduct has reached the point where dismissal is justified.

[25] The onus is on the employer to establish, on the balance of probabilities and on an objective basis, that cause existed for the employee's discharge. Dismissal without notice is such a severe punishment that it can only be justified by misconduct of the most serious kind. Further, the misconduct in question must be weighed against the entire context and history of that employee's performance, such that the "misconduct must be of such magnitude as to overshadow the years, loyalty and efforts devoted by the employee to the employer": H. Levitt, The Law of Dismissal in Canada, supra, at pp. 6-1 to 6-5.

[26] Because employees owe a general duty of loyalty and fidelity to their employers, dishonest conduct may amount to just cause in circumstances where such conduct is seriously prejudicial to the employer's interests or reputation, or where the conduct reveals such an untrustworthy character that the employer is not bound to continue the employee in a position of responsibility or trust: E. Mole and M. Stendon, The Wrongful Dismissal Handbook, 3rd ed. (Markham: LexisNexis Canada, 2004), at p. 147.

[27] Theft is one of the clearest examples found in the common law of dishonest conduct warranting summary dismissal. Theft or misappropriation of an employer's property is something that is clearly inconsistent with the proper discharge of an employee's duties,

and the cases have recognized that it can form the basis for dismissal for cause: The Wrongful Dismissal Handbook, supra, at p.149, *Kong v. Oshawa Group Ltd.* 1993 CarswellOnt 932 (Ont. Ct. (Gen. Div.)); *Ball v. MacMillan Bloedel Ltd*, (1989) 29 C.C.E.L. 99, 1989 CarswellBC 675 (B.C.S.C.); *Murrell v. Simon Fraser University* (1996), 20 C.C.E.L. (2d) 203 (B.C.S.C.). An employer need only establish theft on the balance of probabilities: *Housepian v. Work Wear Corp of Canada Ltd.* (1981), 33 O.R. (2d) 575 (Co. Ct.), at p. 581; *Hanes v. Wawanesa Mutual Insurance Co.* (1963), 36 D.L.R. (2d) 718 (S.C.C.). Other cases have held that appropriation of an employer's property for personal use is cause for discharge: *Neigum v. Wilkie Co-operative Association Ltd.* (1987), 55 Sask. R. 210 (Q.B.); *Taynton v. Newmont Mines Ltd.* (1988), 12 A.C.W.S. (3d) 316 (B.C.S.C.); *Eayds v. Linked Investment Ltd.* (1989), 15 A.C.W.S. (3d) 388 (B.C.S.C.).

[28] In terms of theft of confidential employer information, the case law substantiates that an employee who appropriates, removes or copies confidential business documents including client lists may be dismissed for cause, as to do so is contrary to the implied obligation of good faith owed to the employer: *The Wrongful Dismissal Handbook*, supra, p. 164; *Imperial Sheet Metal Ltd. v. Landry*, [2007] N.B.C.A. 51 at para. 33-34; *C.H.S. Air Conditioning Ltd. v. Environmental Air Systems Inc.*, [1996] CanLII 8137 (Ont. S.C.J.) at para. 18; *Quantum Management Services Ltd. v. Hann* (1993), 11 O.R. (3d) 639 (C.A.) at para. 3; *Edward Jones v. Klassen*, 2006 ABQB 41 (CanLII) at paras. 34, 35.

[29] In *Stonetile (Canada) Ltd. v. Castcon Ltd.* , 2010 ABQB 392 (CanLII), the Court noted the following factors that have been applied to determine whether information has the necessary quality of confidence:

1. The extent to which the information is known outside of the owner's business;

2. The extent to which it is known by employees and others involved in the owner's business;

3. The extent of measures taken by the owner to guard the secrecy of the information;

4. The value of the information to the owner and its competitors;

5. The amount of money or effort expended by the owner in developing the information; and

6. The ease or difficulty with which the information could be properly acquired or duplicated by others.

[30] The other category of dishonest conduct relevant to this case is that of making plans to compete with one's employer, while still employed. A former employee unrestricted by a non-competition covenant is free to compete against a former employer subject to any

residual duties that may remain from his former employment: *RBC Dominion Securities Inc. v. Merrill Lynch Canada Inc.*, 2008 SCC 54, [2008] 3 S.C.R. 79, at para 19. The difficulty arises when the employee takes steps to do so while still employed. The leading case on point is *Restauronics Services Ltd v. Forster*, 2004 BCCA 130 (CanLII) ["*Restauronics*"] in which the British Columbia Court of Appeal, at para. 50, quoted the following passage from G. England, Employment Law in Canada, 3rd ed., vol. 2, para. 11.13:

> Difficulties have arisen in determining the exact point at which planning and preparation by an employee who is still employed to set up himself or herself in competition with the employer will violate his or her implied duty of fidelity…After all, if it is lawful for an employee to engage in post-termination competition with an employer, it hardly makes sense to hold it unlawful to plan the form that such competition will take. In more recent decisions on point, the courts have held that merely planning to establish a competing business does not *ipso facto* violate the duty, unless it is clear that the employee has already determined to abuse the employer's confidential information or trade secrets in his or her future business or has already begun to canvass the employer's customers or entice fellow employees to join him or her in the new business. [*Corporate Classic Caterers v. Dynapro Systems Inc.* (1988), 1997 CanLII 4408 (B.C.S.C.), 33 C.C.E.L. (2d) 58 (B.C.S.C.); *Leith v. Rosen Fuels Ltd.* (1984), 5 C.C.E.L. 184 (Ont. H.C.J.), esp. at 195].

[31] In *McMahon v. TCG International Inc.*, 2007 BCSC 1003 (CanLII), at para. 74, the court noted that *Corporate Classic Caterers v. Dynapro Systems Inc.* and *Leith v. Rosen Fuels Ltd.*, cited above, each involved plaintiffs who did not use confidential information, did not embark on a course of conduct to entice business away from his or her employer, and were not subject to a non-competition agreement.

[32] Another category of conduct sometimes giving rise to cause for dismissal concerns insolence or insubordination. "Insolence" has been defined as the use of insulting, abusive, threatening or unreasonably violent words, and insubordination as rebellion or refusal to follow a proper direction: The Wrongful Dismissal Handbook, supra, at p. 173. Again, context is significant; just cause will only be made out where the employee's conduct is incompatible with the continuance of the employment relationship: S. Ball, Canadian Employment Law (Toronto: Canada Law Book, 1996), at pp. 11-26 to 11-27. Examples are words or conduct that is prejudicial to the employer's business, seriously undermines management's authority, or destroys harmonious relations between the parties.

[33] In appropriate cases, justification for summary dismissal can be shown by proof of facts discovered subsequent to dismissal: *Lake Ontario v. Portland Cement Co. v. Groner*, [1961] S.C.R. 553 at pp. 563-564; see also *Knowlan v. Trailmobile Parts & Services*

Canada Ltd, 206 BCSC 337 (CanLII), *Campbell v. Harrigan Rentals and Equipment Ltd*, 2013 BCSC 1813 at para. 53; and *Herrod v. Marr's Leisure Holdings Inc.* (1998), 41 C.C.E.L. 92d) 293 (Ont. Ct. (Gen. Div.)), at para. 25. In Canadian Employment Law, supra, at pp. 11-59 to11-60, the author asserts that courts will look at these situations from the perspective of what might have occurred had the matter been raised prior to termination by an employer not looking for a reason to get rid of an employee, citing *Herrod v. Marr's Leisure Holding Inc*, *supra*. At para. 25 in *Herrod*, while Sharpe, J. accepted the proposition that grounds that are learned of post-termination may be relied on, he also noted that caution is called for, such that courts should scrutinize the defence of cause in such circumstances to determine whether what is being raised is nothing more than an excuse by an employer who is seeking to escape its contractual obligations to the former employee.

[34] The Ontario Court of Appeal's decision in *Dowling v. Ontario (Workplace Safety and Insurance Board)*, (2004) 246 D.L.R. (4th) 65, 2004 CarswellOnt 4923 (C.A.) ["*Dowling*"] provides guidance to courts faced with the question of whether "just cause" exists in a particular case. After citing the seminal case that sets out the test for assessing whether an employee's conduct gives rise to just cause for dismissal, *McKinley v. BC Tel*, [2001] 2 S.C.R. 161 (S.C.C.) ["*McKinley*"], Gillese J.A. writing for the Court in *Dowling* summarized the applicable analytical framework as follows, at paras. 49-53:

> [49] Following *McKinley*, 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. See *Lake Ontario Port-land Cement Co. v. Groner*, [1961] S.C.R. 553 (S.C.C.).

> [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.

Findings and Analysis Regarding Just Cause

[35] As indicated from the outset, the defence of cause was not proven in this case. Specifically, the evidence failed to satisfy this Court that:

1. Partridge chose to reject her former position as office manager on return from maternity leave, or that she demanded that the office hours be changed; or

2. Partridge systematically harassed coworkers and management; or

3. Partridge acted insolently or displayed insubordination; or

4. Partridge solicited Botony's employees to open a competing business; or

5. Partridge copied confidential client records for the purpose of establishing a competing business; or

6. Partridge solicited patients for that purpose; or

7. That the removal by Partridge of one or two day sheets constitutes just grounds for dismissal.

[36] By way of general comment on the quality of the evidence overall, at any point where the evidence of Partridge conflicted with any of the defence witnesses, I prefer that given by Partridge. She was a candid and forthright witness and I find that she was attempting at

all times to provide her best recollection of events to the Court. By contrast, the tone of the defence witnesses' evidence was invariably to attempt to vilify Partridge. For several of Botony' s witnesses, their evidence about Partridge's alleged dishonest, uncooperative or overbearing conduct conflicted with the documentary evidence contained in text messages exchanged between themselves and Partridge. In the result, the evidence of the defence overall could not be relied upon to the same extent as that provided by the plaintiff.

[37] The evidence reviewed below was weighed in the context of the plaintiff's work history with the defendant. She testified that at the time of her hiring in 2004, she was the only hygienist and was given the task of developing the hygiene program. She remained the sole hygienist at first; in the next year or two or another hygienist was hired, then gradually others. In contrast, Jauhal testified that there were one or two hygienist in 2004, but did not indicate if Partridge was one of those. Due to the greater specificity in Partridge's evidence, and my overall finding that the Court can place greater reliance on it than that of Jauhal's, I find that Partridge worked on her own as the only hygienist for the first year or two, and assisted to develop the hygiene program at Big Bay Point Dentistry. This was not her first job after graduating in 2002; she had worked at two clinics previously, as well as temporary placements. Accordingly, Partridge brought some experience with her to Botony's practice. Once Partridge took on the role of office manager, she testified that she tried very hard to fill the schedules of the dentists and hygienists, and saw a corresponding increase in month-end production reports and profitability. She further testified, and was not challenged on this point, that Jauhal recognized this and complimented her on her work.

[38] The evidence reviewed below was also weighed in the context of the employer's needs and expectations. As a dental practice, professionalism from staff was essential, and particularly the need for patient confidentiality. In a small office such as this one, the need for harmonious and positive working relationships would be important to morale and productivity. Adherence to office policies and procedures, and respect for the employer's authority, would be essential. As the office manager, a great deal of trust was placed in Partridge to safeguard and maintain each of those goals.

[39] With respect to when Partridge was given the role of office manager, there are at least four points in evidence that supports the plaintiff's, rather than the defendant's, version of the timing. Both Jauhal and Partridge testified that there was an office manager when Partridge joined in 2004; Partridge testified that that employee had left by March, 2007 and the position was open to be filled. This evidence was not challenged. Second, Jauhal conceded that Partridge began to do clerical duties at the front desk, instead of hygiene, as of April, 2007, although suggested that it was due to accommodation of Partridge's physical discomfort because of her pregnancy. Third, Cathy Petrie, who was hired in 2008, testified that when Partridge returned from her maternity leave, Partridge was her boss. This would have been upon Partridge's return in July, 2008. Fourth, Kristine Hubble testified that it was Partridge who interviewed her for a position at Big Bay Point Dentistry in August, 2008. Neither of these latter two dates accords with Jauhal's testimony regarding October, 2008. Accordingly, although the Record of Employment

prepared for the first maternity leave and dated June 18, 2007 indicates that Partridge's position was that of dental hygienist, in the face of all of the evidence regarding timing, I accept Partridge's evidence that this is likely a reflection of the fact that she had only been a manager for a short period before her departure, whereas she had worked as a hygienist for the previous three years. Accordingly, I find as a fact that Partridge was given the job of office manager as of March, 2007.

[40] With respect to whether Partridge held that position at her termination, again, despite the designation of "hygienist" in the Records of Employment prepared in July, 2011, I find that she held the position of office manager. Jauhal's evidence on cross-examination was that she still considered Partridge to be the office manager on July 19, 2011, and that the role had never been taken from her or given to someone else. That evidence, coupled with my finding that Partridge never voluntarily elected to return to hygiene, leads to no other conclusion. Accordingly, Partridge held the position of office manager for a total of approximately four years and four months, including maternity leaves.

[41] Partridge was given no written performance appraisals or warnings during her tenure with Botony. The undisputed evidence was that she received a raise in October, 2008, to $41 per hour. Jauhal testified that she spoke to Partridge five or six times during the two-year period leading up to her second maternity leave about an "ongoing issue" of failing to follow her direction, or failing to book dentists or hygienists because of Partridge's personal dislike of those individuals. None of these allegedly ongoing issues were documented, and there is no evidence of any written warnings. Jauhal's evidence is directly contradicted by the tone and content of her text messages to Partridge during that period. Some of the comments made by Jauhal are:

> "Thanks Lee, ur the best" (May 12, 2010)
>
> "After all, I found u didn't I" (October 1, 2010)
>
> "So long as ur coming I am happy" (November 30, 2010)
>
> "You deserve it! Thank you for all your hard work, I really appreciate everything you do" (December 15, 2010)
>
> "That's why I love u!!" (February 25, 2011)

[42] The text messages also show the Jauhal trusted Partridge enough to confide in her about the performance of other employees, the pay rate for other employees, and to request feedback from Partridge for the reviews of other employees, along with consulting her on a myriad of office related issues, even during her maternity leave.

[43] Accordingly, I find that despite some derogatory comments made by Botony's witnesses while providing testimony, which I do not accept as credible, Partridge was at all times a high-performing, reliable and valued employee with an unblemished work record leading up to her return from her second maternity leave.

[44] Each of the alleged grounds for dismissal will now be addressed.

(a) Demanding to change office hours

[45] The evidence is clear that the return of Partridge to hygiene work was unilaterally imposed by Jauhal, without warning or prior explanation. Partridge testified that, during an early telephone conversation that pre-dated her first day back, Jauhal explained that she did not want to pay $41 per hour for management work. I thoroughly reject Jauhal's evidence that the change was presented as a suggestion, with the position of office manager still being an available option. Further, rather than "demanding" that office hours be changed, it was Jauhal, by text message dated July 5, 2011, who proposed that Partridge's schedule would begin at 8 or 9 a.m., depending on the day of the week. It is clear from that message that Jauhal's intent was to have patients booked for Partridge as early as 8 or 9 a.m.. It was also clear that the hours unilaterally imposed presented 23 potential hours per week, as lunch hours for hygienists were unpaid. As Partridge's first day back approached, even that commitment was not fulfilled, with her start times being pushed back. On her second day back, being July 13, 2011, Partridge was presented with a schedule by Jauhal that had her working three out of four days between the hours of 10 a.m. to 6 p.m.. I find that it had been well known to Jauhal that Partridge's daycare arrangements would not allow her to work until 6 p.m., ever since Partridge' s return from her first maternity leave three years before.

[46] It had been the case that Partridge's regular working hours as office manager were from 9 a.m. to 5 p.m., with flexibility built in to expand or reduce those hours daily in accordance with office or personal demands. The totality of the evidence leads to the finding that Partridge's average work week was between 30 to 35 hours, including paid lunches, which she worked through. In 2009, Partridge earned $70,100. At a pay rate of $41 per hour, she worked 1,731 hours in 2009. Dividing those total hours by 52 weeks provides a figure of 33.3 hours per week. Evidence was presented of timesheets covering a period of approximately six months while Partridge was the office manager. At the lowest, she worked 16 hours per week; at the highest, 37.5 hours. During weeks having less than 33 hours, Partridge provided uncontradicted evidence about why this was the case, being vacation, statutory holidays or attendance at an educational clinic. Jauhal prepared the employees' paycheques from those timesheets, and was aware that Partridge was being paid for a lunch hour.

[47] I find as a fact that Jauhal's progressively authoritative and restrictive responses to Partridge were a retaliation to Partridge's insistence that she be permitted to work at least 30 hours each week, during the same or similar hours to her pre-maternity leave schedule. Specifically, after receiving a text message from Partridge on July 12, 2011, in which Partridge reminded Jauhal of her obligations under the *Employment Standards Act*, Jauhal retaliated in what amounted to an unlawful reprisal. The next day, she presented Partridge with the schedule that required her to work until 6 p.m. on three of her four workdays, and told her that it was effective immediately. It was Jauhal, not Partridge, who insisted that Partridge accept work hours that did not at all resemble those which she had worked for two years before her maternity leave. I do not accept Jauhal's evidence that she was

attempting to work with Partridge to arrive at a schedule that could provide her with 30 hours. Instead, after receiving the message from Partridge on July 12, 2011, I accept that at the next meeting Jauhal's attitude toward Partridge had deteriorated. Jauhal had a witness present for that meeting, which occurred the following day, requested the return of the office key, and in Partridge's words, her demeanor was "cold, intimidating and ruthless". She stated to Partridge that she "could've done a lot more" to her, and that she "didn't need to explain herself".

(b) Systematically harassing coworkers and management

[48] This allegation arises from the time period spanning Partridge's return to work and her dismissal, being July 12 to19, 2011.

[49] The factual underpinnings of these allegations seem to be Partridge's interaction with Jauhal around work hours, which I have now dealt with, as well as her request to use a certain operatory, her request to have patients moved from other hygienists schedules to her own, and her general attitude during that week.

[50] None of these facts, even if proven, would be sufficient to warrant dismissal. There is no reliable evidence of Partridge interfering with patient scheduling, other than her initial attempts to fill her week's hygiene schedule on short notice. With respect to her demeanor, the evidence does not persuade me that she was other than demoralized by her apparent demotion, concerned about her job security, and justifiably upset by the reduction in hours and corresponding uncertainty in pay. These emotions and concerns were understandable in the circumstances and undoubtedly communicated to others throughout the day. However, there is no evidence that she caused disruption in the workplace such that the day-to-day operations were affected.

[51] Partridge's conduct with respect to the use of the operatory, which overall is a minor issue, cannot be characterized as insubordination. Jauhal has initially told her that she could use it and then retracted that assurance. Partridge's interference in the choice of operatory was, I find, motivated more by her confusion over her demotion and her attempts to understand the rationale for it, than by any deliberate intent to challenge Jauhal's authority.

(c) Insolent actions or displaying insubordination

[52] As previously stated, I reject Jauhal's evidence that Partridge failed to follow her direction during the time that she was the office manager. Evidence was heard of an impromptu staff meeting arranged during Partridge's maternity leave, of which Jauhal was unaware. It is alleged that Partridge made comments about Jauhal designed to have the effect of adversely affecting the employees' views of Jauhal and undermining her authority, all of which would affect profitability. This was, according to Jauhal's evidence, part of Partridge "putting up walls" between herself and other staff, by having employees feel that they had to bring issues forward to Partridge instead of Jauhal.

[53] Partridge's evidence is that this meeting was initiated by a telephone call from Petrie, complaining about office morale as a result of Jauhal's interaction with staff. Petrie confirmed that staff were stressed at that time for reasons unrelated to Partridge. Petrie also confirmed that Partridge did not call the meeting, but instead was visiting during her maternity leave, at which time the meeting was convened. All of the evidence, and the context, leads me to the conclusion that any comments made by Partridge during that meeting were motivated by her desire to improve employee's morale and better the workplace, and not to undermine Jauhal's authority. Further, there is no indication that any comments that may have been made by Partridge had any effect on Jauhal's relationship with staff. Partridge testified, and I accept, that the message that she gave to staff that day was that they did not have to go through Jauhal directly with issues of concern, but should bring them to her, as was the culture of the office for interacting with the office manager. However, she did not tell them that they could not speak with Jauhal. There was no evidence that employee's withheld information from Jauhal or that her effectiveness was diminished as a result of this meeting. To the contrary, Petrie's explanation for why she did not tell Jauhal about certain things until the date of Partridge's dismissal was, in part, because Petrie felt a loyalty to Jauhal, from which I infer that she did not want to give Jauhal information that may have upset her.

[54] Of the three witnesses who testified that Partridge made comments to the effect of "let Bo's comments go in one ear and out the other because that's what I do" and "Bo doesn't have a clue" were Petrie, Hubble and Katie Ryckman. Petrie and Rychman continue to be employed by Botony. Again, this Court does not play strong reliance on these words being an accurate reflection of what was said, or accept that they have been conveyed in their proper context, because of the attempts by two of these witnesses to align themselves with Botony by vilifying Partridge. Such a portrayal could not be substantiated by the more objective evidence available from these same witnesses. Starting with Petrie, she testified that she and Partridge had a casual friendship outside of the office. She also testified that in response to Jillian Caswell confiding in her about a potential business partnership with Partridge, Petrie told Caswell to think long and hard about it because if Partridge "didn't get her own way it would be bad". By contrast, in her text message exchanges with Partridge, a much different regard is portrayed, with Petrie referencing Partridge as "darlin'", "Babe" and signing off with salutations such as "love you" and "Gramma P." Their communications are more characteristic of close friends than co-workers, and certainly go beyond the signs of a "casual friendship". Ryckman was the witness who testified that Partridge said "Bo doesn't have a clue", indicating that such a comment was generally how Partridge spoke. Ryckman also testified that Partridge always scared her. While the text messaging between Reichman and Partridge is more businesslike than that of Petrie's, Ryckman still felt comfortable enough with Partridge to inquire about her children, and to discuss matters such as attendance at the Santa Clause parade. Finally, Hubble's testimony did not wholly conflict with Partridge's; she simply testified that Partridge told them at that meeting that Jauhal was not to be approached for anything, and that instead, Partridge was to be approached and would deal with the matter. Given that Partridge testified that she believed this to be part of her job description and Jauhal's expectation, it stands to reason that there would have been some discussion of the lines of communication, particularly when Jauhal's communication with

staff was the genesis of their discontent at that time. The evidence surrounding this meeting does not come close to establishing a case of insubordination or insolence.

[55] There was also evidence given by Jauhal that, on her final day, Partridge refused to meet with her without a witness being present. This was put forward as being tantamount to a repudiation of the employment relationship. Under the circumstances of Jauhal having had Petrie present at meeting on July 13, 2011, very obviously as a witness to the conversation that took place, and given her treatment by Jauhal that first week, these circumstances make it reasonable for Partridge to also want a witness to be present. Partridge was concerned for her job security, as it turns out, for good reason.

(d) Solicitation of Botony's employees to open a competing business

[56] As will be discussed in the next section in greater detail, Partridge never opened a competing business or even came close to implementing the steps necessary to operate a dental practice.

[57] Partridge testified that in about 2007, she had discussions with another employee, Monika Hueson, regarding opening a dental practice. This was initiated over a backyard barbecue together with their husbands, both of whom were encouraging them to give it consideration. Together they looked at a template for a business plan that they found on the website of the Ontario Dental Hygiene Association. There is no evidence that matters progressed beyond that point in terms of the business plan or any collaboration between Partridge and Hueson. There is no evidence of active solicitation on the part of Partridge.

[58] With respect to Caswell, there is evidence that in 2010 she and Partridge together pursued investigations into the possibility of opening a dental office of their own. Again, Caswell placed a slant on her testimony related to this issue to place the responsibility for this initiative primarily on Partridge. Yet the evidence establishes that Caswell was an equal participant from the outset. Far from establishing solicitation of one of Botony's employees, the evidence establishes that Caswell was also initiating the endeavor.

(e) Copying of confidential client and supplier records for the purpose of opening a competing business

[59] Without recounting all of the evidence surrounding the topic of Partridge and Caswell's attempts to open a competing business, I find that such steps were begun either shortly before or after Partridge's second maternity leave had begun. I also find as a fact that such steps never went beyond the initial planning and exploratory stage. Potential equipment and software providers were contacted, an outline of a written business plan was begun, which had very obviously been "cut and pasted" from the Association's template earlier referred to, one potential premise was looked at, and a single meeting was held with a commercial account manager at a major bank. I find as a fact that, as a result of learning

at that meeting that they would be required to raise their own capital investment before the bank would consider a commercial loan, Caswell and Partridge determined that the project was not feasible and abandoned the idea completely from that point on. While the account manager with whom they met, Allen Johnson, was confident that the meeting occurred in 2012, he testified that he did not record the meeting in his calendar. Given Partridge's termination in the preceding year, he was obviously mistaken. Partridge testified that no steps were taken after that meeting, which she believed occurred sometime in the fall of 2011, although she could not recall if it came before or after the meeting with the realtor. Again, given that she had been terminated before the fall of 2011, and Caswell had confessed her involvement to Jauhal in August, 2011, I find that Partridge was confused as to the dates and that the meeting with Johnson actually occurred sometime during her maternity leave in 2010. This conclusion is supported by Caswell's evidence that the meeting occurred in August, 2010, as well as by an e-mail from the potential equipment supplier, Dave LaChapelle, dated October 13, 2010, which references a meeting with the bank. Accordingly, I find that the meeting took place sometime between August and October, 2010, and that the idea quickly fizzled out thereafter, with no implementation anticipated or planned for at a future date. Although Partridge testified on discovery that she worked on the business plan until December 2010, or even January 2011, I accept her explanation at trial that her memory surrounding the timing and sequence of events relating to the steps taken around these explorations was not wholly intact.

[60] There is no evidence that Partridge and Caswell leased equipment or space, made an offer for equipment or to lease, obtained software, computers or office furniture, or made an application to obtain financing. The evidence supporting the opening of this business does not approach the threshold necessary to find that it constituted a rupture in the employer/employee relationship, even if Partridge and Caswell held discussions about it, or potentially exchanged e-mails about it, during work hours. It is clear that the vast majority of discussions or steps took place while Partridge was on maternity leave. There is no evidence that it interfered with the work performance of either. Further, as will be discussed later, there is insufficient evidence to establish that Partridge intended to use confidential information or to solicit patients. As already covered, both Caswell and Hueson were equal planners in any preliminary discussions to open a business. Accordingly, I find that according to the guidelines set out in *Restauronics*, no cause for dismissal arises from the making of these plans.

[61] The evidence supports that Partridge knew of the equipment supplier , LaChapelle, as a result of her employment at Botony, and her contact with him goes back to 2009 when she was continuing to mull over the idea of her own business. At that time she obtained a quote from him for equipping an operatory. Her testimony is that through personal contact with him during business hours, she obtained his e-mail address and, either at the office or subsequently, asked for the quotation. She denied obtaining his contact information from the locked filing cabinet, but even if she did, I find that nothing turns on this. Much evidence was heard about Partridge's efforts to obtain the filing cabinet key in July, 2010, allegedly to obtain LaChapelle’s information. However, there is no reason to doubt that she had it in her possession since 2009. Further, given my assessment of

Partridge's credibility, while she may not have a perfect recollection of her reasons for needing the filing cabinet key, I accept that it was pursuant to a request from Jauhal of some sort, who made business-related requests of Partridge throughout her second maternity leave, as did others in the office. Applying the analysis set out in *Stonetile*, since LaChapelle appears by his letterhead to operate a business called "LaChapelle Dental Services", I can infer that his contact information would be available in the public domain and/or easily obtainable. As a supplier to Botony, it appears that he was known in the office, even to hygienists such as Caswell, who identified him in her testimony as such. Botony spent no effort or money to guard his contact information, other than to lock his invoices in the filing cabinet. His contact information was not intrinsic to Botony's business, nor did it affect its profitability. The same applies to contact information of a software representative. The information was obtained as a result of Partridge's employment, but was not confidential. Accordingly, I do not find it has the necessary qualities of confidence to find that obtaining it for the purpose of using such services was a breach of Partridge's employment obligations at all, let alone sufficient to justify dismissal.

[62] The further allegation is that Partridge printed confidential patient records from an office computer for the purpose of recruiting patients to establish a competing dentistry. There are only two items of evidence suggesting that such a thing occurred. One suggestion was that patient names provided to the office by Partridge in July, 2011, via text messaging when she was attempting to secure a full hygiene schedule for her first week back, could only have been provided from a printed list. It was alleged that Partridge could only have known of individuals due for treatment if she had those records. There is no evidence, however, that these individuals were due for hygiene services or that Partridge had suggested that that was the case. Further, a fair reading of those text messages makes clear that Partridge was unsure of some names and spellings. The fact that she recalled over 100 names is unremarkable and proves nothing given the amount of time that she had worked for the defendant.

[63] The second is Caswell's evidence that Partridge told her on June 11, 2010 that she had printed a list. Caswell confirmed on cross-examination that that was the only conversation that ever occurred regarding a patient list. Remarkably, at the time of Partridge's dismissal, neither Petrie nor Jauhal raised the topic with Partridge, even though Petrie provided this information (given to her allegedly through Caswell) to Jauhal earlier that day. It defies belief that, upon hearing such a thing, that the protection of her client's confidentiality would not have been Jauhal's first concern, and questioning Partridge about possession of such information not her first course of action. On the basis of no such discussion having occurred, I reject the testimony of Petrie, Caswell and Jauhal that there had been information provided by Partridge to specifically state that she had printed a patient list. I infer that this was either a fabrication or misinterpretation by Petrie resulting from her December, 2010 conversation with Caswell, or was fabricated by Caswell during her discussion with Jauhal in August, 2011 to assist in deflecting blame from herself, and/or was a rumor developed subsequently in this office among the existing employees. I have no difficulty in assessing Caswell's evidence in this manner. Her desire to portray Partridge in a bad light was particularly highlighted on cross-

examination when she testified that by October, 2010, she had begun to question Partridge's character. Again, her exchange of text messages with Partridge conveys a much different attitude toward Partridge. She further testified that she stopped contact with Partridge because she was hurt that Partridge did not contact her around her grandfather's passing. The text message evidence shows that to be blatantly untrue. More telling is a message of November 20, 2011 by Caswell to Partridge in which she indicates that she could not have social contact with Partridge due to a "conflict of interest with work". In her testimony she explained that this was because Partridge was manipulative and persuasive and that she knew that Partridge would “try to get things out of her about the office”. To the contrary, the "conflict" was the fact that she had betrayed their friendship by attempting to displace one hundred percent of the responsibility for the business venture onto Partridge in order to curry favor with Jauhal.

[64] Partridge has denied printing and removing records from the office, other than day sheets. Her evidence impressed me as conveying an understanding of the importance of confidentiality to a dental practice, as well as an aversion to ethical breaches, as her testimony regarding a former employer substantiates. I find that there was no printing off and subsequent removal from the office of either patient or financial information.

(f) Solicitation of patients

[65] Big Bay Point Dentistry appears to be a high-volume dental office. Jauhal testified that in 2008 there were approximately 3,500 patients. Caswell testified that as the primary hygienist she saw 40% of the patients, amounting to 1,500 to 2,000 per year. Jauhal testified that 35 patients left the practice following Partridge's termination, and that a comparison of Partridge's telephone records shows that she had contacted those individuals to solicit them to her new employer. Again, Partridge's evidence fully satisfies this Court that all of those individuals were personal friends, and that not all calls that she placed to those individuals were related to her change in employment. Further, only seven of them came to the practice where she is now employed part-time. The defendant was unable to disprove this evidence; Jauhal testified that to the best of her knowledge these individuals were not friends of Partridge’s, but conceded that she did not spend time with Partridge socially. Further, the defendant has also not established that all of these individuals transferred their files to the office in which Partridge is now working. There are many reasons why patients transfer to new practices, including residential changes, and none of the bases for the transfers were proven.

[66] While this Court accepts that part of Partridge and Caswell's business proposal involved the hypothetical idea that loyal clients would follow them to a new business, that hypothetical never unfolded and Partridge took no steps to solicit Botony's patients.

(g) Removal of day sheets

[67] Partridge testified that she took home one or two day sheets at the end of her first week back in July, 2011, because she believed that she needed documentary evidence of her decreased hours that week.

[68] I agree with the defendant that the sheets contained confidential patient information, given the medical information contained thereon. However, Botony has provided no evidence that the information on them has been used by Partridge or disseminated to third parties. No evidence was given as to whether they remain in Partridge's possession or have been destroyed, safeguarded or otherwise dealt with.

[69] I accept that it was an implied term of employment that the day sheets were not to leave the office, and that the purpose in shredding them was to maintain patient confidentiality. Removing them was a breach of Partridge's obligations to her employer.

[70] However, applying the entire contextual analysis required by *McKinley*, such an isolated incident is not grounds for summary dismissal. The purpose in removing them was not to harm the defendant's business or to use them to solicit the patients listed thereon, but to keep as evidence. When Partridge was terminated the following Tuesday, she immediately contacted the lawyers now representing her, and it was her evidence that that was not her first contact with them. I infer from the content of her e-mail of July 12, 2011, referring to sections of the *Employment Standards Act*, that she may already have obtained legal advice by that date. Given the purpose of the breach, in the context of Jauhal's treatment of Partridge that week, and contrasted against Partridge's unblemished work history, the removal of those day sheets is insufficient to justify dismissal. Jauhal did not even question Partridge about the day sheets, or any other issue for that matter, on the date of her termination. Jauhal had therefore obtained no understanding as to the reason for Partridge's actions prior to terminating her.

[71] In summary, none of the allegations advanced by Botony to justify cause have been proven. Further, it is noted that not all of the allegations of "wilful misconduct" set out in the Records of Employment prepared in July, 2011 were pled by Botony. The evidence in this case does not meet the threshold required for terminating Partridge's employment without notice.

[72] It follows from this and the findings made by this Court that the defendant's counterclaim is dismissed in its entirety. The defendant began its counterclaim seeking damages in the amount of $400,000. No damage calculation was presented to the Court other than Jauhal's evidence while she was in the witness stand, which was a combination of informed opinion, rough estimate and conjecture. Although the hypothetical damages that she calculated arising from the exodus of 35 patients amounted to $91,000 in lost profit, it was proposed to the Court that this be discounted to $25,000. Had this Court found any basis for the counterclaim, the evidence presented by Botony would have been insufficient to substantiate the damages claimed. Accordingly, I am led to the conclusion that the counterclaim was an attempt by Botony to intimidate the plaintiff, and nothing more.

Reasonable Notice

[73] The seminal authority in Canada setting out the principal factors for determining reasonable notice is the judgment in *Bardal v. The Globe & Mail Ltd.*, 24 D.L.R. (2d) 140. *Bardal* sets out the following factors for consideration:

> 1. Character of employment;
>
> 2. Length of service;
>
> 3. Age of the employee; and
>
> 4. Availability of similar employment, having regard to the employee's experience, training and qualifications.

[74] In *Love v. Acuity Investment Management Inc.*, 2011 ONCA 130, at paras. 18-24, the Ontario Court of Appeal emphasized the importance of carefully considering all the *Bardal* factors in determining the appropriate notice period in wrongful dismissal cases, without giving disproportionate weight to any single factor.

[75] Partridge had worked for Botony for over seven years, and held the position of office manager for approximately four years and four months. She was thirty-six years old at the time of her termination. As office manager, she held the position of greatest responsibility in this office of approximately ten employees, and had a supervisory role to the hygienists, dental assistants and receptionists. She reported directly to the owner. Jauhal reposed a heightened amount of trust in her. Accordingly, as a high level employee, a longer notice period may be warranted: *Love*, at para. 21.

[76] In terms of availability of similar employment, Partridge has provided evidence of her efforts to obtain employment at a dental office, whether as a hygienist or otherwise. Entered into evidence is a list of potential employers to whom Partridge had delivered resumes by August 23, 2011. The defendant argued that this was proof that Partridge had not fully attempted to mitigate her damages, since it was admitted by Partridge that the list was provided through counsel on March 13, 2013. This Court was asked to therefore draw the inference that that exhausted the plaintiff's efforts to find work, effective August, 2011. However, that would require this Court to ignore Partridge's evidence that she still periodically drops off resumes, as she is actively looking for more hours or a more permanent position. She testified that she has attempted to obtain employment at Georgian College's dental hygiene program, and keeps her eye on postings at the local health unit. She continues to call offices to seek more hours or a full-time position. Ever since her termination, Partridge has made efforts to mitigate her damages by doing temporary work. I accept her evidence that her family has relied on her income, and that the loss of this job created financial strain. There is no contradictory evidence to rebut her testimony that she has diligently looked for full-time employment. The best that she has been able to do is to find part-time employment.

[77] The plaintiff's counsel has provided the Court with the following cases to assist it to assess the length of the appropriate notice period:

Case Name	Position	Age	Length of service	Length of time to secure similar employment	Notice
Barton v. Rona Ontario Inc., 2012 ONSC 309	Assistant store manager	64	3 years, 8 months	12 months	10 months
Tsakiris v. Deloitte & Touche LLP, 2013 ONSC 4207	Senior manager	33	8 years	14 months	10 months
Strizzi v. CurzonsManagment Associates Inc., 2011 ONSC 4292	General manager	34	6 years	Over 4 years	7 months
Fernandes v. Direct Energy Marketing Ltd., [2012] O.J. No. 5275	Executive assistant	42	2 years	5 months	6 months

[78] What distinguishes this case is that Partridge has still not, today, found comparable full-time employment to that which she held with Botony. The defendant carries the burden of proving that the plaintiff was unreasonable in her conduct regarding mitigation, or that similar employment opportunities were available but not taken up by her: *Red Deer College v. Michaels*, [1976] 2 S.C.R. 324, at pg. 7; *Day v. JCB Excavators Ltd.* , 2011 ONSC 6848, at paras. 92-93, 110. Botony has failed to prove that either has been the case.

[79] In all the circumstances, and weighing the *Bardal* factors, this Court determined that twelve months was the appropriate notice period to have given Partridge.

[80] Partridge has suffered financial loss as a result of her wrongful termination. In 2011, her total income following termination was $8,139.66. In the period from January to July 20, 2012, her income was $20,942.90, for a total of $29,082.56 during a twelve month period.

[81] Also, in an attempt to raise her income, Partridge invested in a multi-level marketing business, selling health and beauty products. The company required its sales people to purchase their own products up front. It was Partridge's evidence, which was not challenged on cross-examination, that she lost $1,500 to $2,000 in that endeavor. Accordingly, I agreed with her counsel's submission that her further attempt at mitigation created a loss to her of, conservatively, $1,500.

[82] Using Partridge's 2009 full year's income of $70,100 as the benchmark, I found that Partridge had proven that she suffered losses in the sum of $42,517.44 during the twelve month notice period, and awarded that amount as damages arising from her wrongful dismissal.

Breach of Statutory Obligations.

[83] In its treatment of Partridge, Botony also violated the *Employment Standards Act*, 2000, S.O. 2000, c. 41 ("*ESA*"). The *ESA* grants employees the statutory right to access unpaid pregnancy and paternal leaves, and to be reinstated into their prior position once their leave comes to an end. Section 53 of the *ESA* states:

> 53. (1) Upon the conclusion of an employee's leave under this Part, the employer shall reinstate the employee to the position the employee most recently held with the employer, if it still exists, or to a comparable position, if it does not.

[84] Neither the employer nor the employee is entitled to waive the above employment standard, and any such contracting out or waiver is voided by virtue of s.5 (1) of the *ESA*. Given that Jauhal testified that the office manager position remained open at the time of Partridge's return, it is mandated that she was to have returned to that position. As I have previously found, Partridge did not elect to return to the position of hygienist, but instead, was given no other option.

[85] The *ESA* also provides that no employer shall intimidate, dismiss, penalize or otherwise commit a reprisal against an employee because that employee asks the employer to comply with the *Act*, or exercises or attempts to exercise a right under the *Act*. As previously found, all of Jauhal's actions following Partridge's reference to her rights under the *ESA* constituted a reprisal, the dismissal being the ultimate contravention of the *Act*.

[86] The Ontario *Human Rights Code*, R.S.O. 1990, c. H.19, prohibits employment-related discrimination on a number of prohibited grounds. For the purpose of this case, the relevant prohibited ground of discrimination is that of "family status."

[87] The leading Canadian authority on family status discrimination is the Federal Court of Appeal's decision in *Johnstone v. Canada (Border Services)*, 2014 FCA 110 ["*Johnstone*"]. In that case, the Court found that family status incorporates parental obligations such as childcare obligations.

[88] *Johnstone* sets out the legal test to determine whether there is discrimination on a prohibited ground of discrimination, comprised of two parts. First, a *prima facie* case of discrimination must be made out by the complainant. If that is accomplished, the analysis moves to a second stage where the employer must show that the policy or practice is a *bona fide* occupational requirement and that those affected cannot be accommodated without undue hardship: *Johnstone*, at para. 75.

[89] In order to make out a *prima facie* case of discrimination on the ground of family status resulting from childcare obligations, the individual advancing the claim must demonstrate the following:

(i) That a child is under his or her care and supervision;

(ii) That the childcare obligation at issue engages the individual's legal responsibility for that child, as opposed to a personal choice;

(iii) That he or she has made reasonable efforts to meet those childcare obligations through reasonable alternative solutions, and that no such alternative solution is reasonably accessible; and

(iv) That the impugned workplace rule interferes in a manner that is more than trivial or insubstantial with the fulfillment of the childcare obligation: *Johnstone*, at para. 93.

[90] In order to show that the applicable workplace rule is a *bona fide* occupational requirement, an employer must prove:

(i) the rule, standard or practice was adopted for a purpose rationally connected to the performance of the job;

(ii) the rule, standard or practice was adopted in an honest and good-faith belief that it was necessary to the fulfillment of that legitimate work-related purpose; and

(iii) the rule, standard or practice is reasonably necessary to the accomplishment of that legitimate work-related purpose. To show that the standard is reasonably necessary, it must be demonstrated that it is impossible to accommodate individual employees sharing the characteristics of the claimant without imposing undue hardship upon the employer: *BCGSEU v. British Columbia (Public Service Employee Relations Commission)*, [1999] 3 S.C.R. 3 ["*BCGSEU*"], at para. 54.

[91] Applying the first part of the test set out in *Johnstone*, I find that the plaintiff has made out a prima facie case of discrimination. There is no question that the first two factors are satisfied; Partridge was legally obligated to ensure that her children were adequately cared for while she was working. With respect to the third factor, when faced with the significantly revised schedule on July 13, 2011, and told that it was effective immediately, Partridge testified how she put in place a complex set of childcare arrangements involving a number of extended family members and a neighbour, in order that she could be available to work until 6:00 p.m. She testified that it was not a sustainable arrangement, and the court agrees with that assessment. Finally, the new schedule that required Partridge to work until 6:00 p.m. interfered with her fulfilling her childcare obligation in more than a trivial way. Not only would she be charged a significant sum for picking up her children after 6 p.m. from the daycare, but that fact necessitated her relying on family members and a neighbour, inconveniencing their schedules, or having her husband (who is self-employed) leave his business premises, with much room for potential "glitches" in those plans on any given day. By necessity,

the plan differed for each child, as each was required to attend a different daycare because of their ages.

[92] The next part of the test set out in *Johnstone* demands the defendant to show that the requirement of having Partridge start at 10:00 a.m. and work beyond 5:00 p.m. was a *bona fide* occupational requirement. From the outset, this is a demanding task given Partridge's work hours prior to her return. Nonetheless, having regard to the 3-part test from *BCGSEU*, was the necessity of having Partridge begin work as a hygienist at 10:00 a.m. , and working until 6:00 p.m., rationally connected to the performance of the job? No evidence was provided by the defendant. It does not stand to reason that patients would be unavailable before 10:00 a.m.. Partridge began her workday at 9:00 a.m., or earlier, while she was the office manager, and no reasons were given as to why the office could not be opened at that hour. Based on all of the evidence heard around scheduling and the operations of this practice, the Court is unable to find that this rule or practice was a *bona fide* occupational requirement.

[93] The second question is whether the rule, standard or practice was adopted in an honest and good-faith belief that it was necessary to the fulfillment of that legitimate work-related purpose. As previously found, the requirement imposed on Partridge by Jauhal to work those hours was reprisal based, and accordingly not adopted in good faith.

[94] The third question raised in *BCGSEU* is whether the rule, standard or practice is reasonably necessary to the accomplishment of that legitimate work-related purpose. When Partridge was initially placed into the hygiene schedule by Jauhal, the hours provided to her in Jauhal's text message of July 5, 2011 were completely different. Presumably, as of July 5, 2011, those hours suited the needs of the workplace and created no hardship to Botony. No satisfactory or credible evidence was provided by Jauhal to explain why those hours needed to be changed to those presented to Partridge on July 13, 2011. Evidence was also heard that there was an "evening" shift for the hygienists, which presumably began later in the day. No evidence was provided as to how the other hygienists' schedules might be affected, negatively or positively, by the hours being requested by Partridge. This question must be answered in the negative as well.

[95] Botony having been unable to show that the hours that Partridge was asked to work were a *bona fide* occupational requirement or that she could not be accommodated without undue hardship, I find that there was discrimination by Botony on the basis of family status.

[96] Section 46.1 (1) of the *Human Rights Code* gives this Court the authority to grant a civil remedy to the plaintiff as a result of this discrimination. That section provides as follows:

> 46.1(1) If, in a civil proceeding in court, the court finds that a party to the proceeding has infringed a right under Part I of another party to the proceeding, the court may make either of the following orders, or both:

1. An order directing the party who infringed the right to pay monetary compensation to the party whose right was infringed for loss arising out of the infringement, including compensation for injury to dignity, feelings and self-respect.

2. An order directing the party who infringed the rights to make restitution to the party whose right was infringed, other than through monetary compensation, for loss arising out of the infringement, including restitution for injury to dignity, feelings and self-respect.

[97] In *Johnstone*, the plaintiff similarly suffered discrimination on the basis of family status based on her employer's refusal to accommodate her childcare needs through work scheduling arrangements. She was awarded $15,000 for pain and suffering, and $20,000 for special compensation as a result of the Tribunal's finding that her employer had engaged in the discriminatory practice willfully and recklessly. These awards were not changed on appeal. While that case involved the *Canadian Human Rights Act*, R.S.C. 1985, c. H.6, the applicable provisions are similar to that of the Ontario *Human Rights Code*. Section 53(2) and (3) of the *Canadian Human Rights Act* provides:

> 53(2) If at the conclusion of the inquiry the member or panel finds that the complaint is substantiated, the member or panel may, subject to section 54, make an order against the person found to be engaging or to have engaged in a discriminatory practice and include in the order any of the following terms that the member or panel considers appropriate:
>
> (a) that the person cease the discriminatory practice and take measures, in consultation with the Commission on the general purposes of the measures, to redress the practice or to prevent the same or a similar practice from occurring in future, including
>
> (i) the adoption of a special program, plan or arrangement referred to in subsection 16(1), or
>
> (ii) making an application for approval and implementing a plan under section 17;
>
> (b) that the person make available to the victim of the discriminatory practice, on the first reasonable occasion, the rights, opportunities or privileges that are being or were denied the victim as a result of the practice;

> (c) that the person compensate the victim for any or all of the wages that the victim was deprived of and for any expenses incurred by the victim as a result of the discriminatory practice;
>
> (d) that the person compensate the victim for any or all additional costs of obtaining alternative goods, services, facilities or accommodation and for any expenses incurred by the victim as a result of the discriminatory practice; and
>
> (e) that the person compensate the victim, by an amount not exceeding $20,000, for any pain and suffering that the victim experienced as a result of the discriminatory practice.
>
> (3) In addition to any order under subsection (2), the member or panel may order the person to pay such compensation not exceeding $20,000 to the victim as the member or panel may determine if the member or panel finds that the person is engaging or has engaged in the discriminatory practice wilfully or recklessly.

[98] The discrimination experienced by Partridge clearly did injury to her dignity, feelings and self-respect, as her testimony made clear that she took great pride in her job and the efforts that she had made on the defendant's behalf. At the time of her testimony in this trial, she remained visibly emotionally affected by the ordeal. As in *Johnstone*, I found that the discrimination arose out of Jauhal's wilful and reckless disregard for her legal obligations as an employer. Accordingly, I found that the sum of $20,000 for breach of the *Human Rights Code* was a just and proper sum to signify the seriousness of breaches of this nature. Particularly where the discrimination has ultimately taken the form of dismissal, this particular breach affects a group of individuals who typically require childcare arrangements out of economic motivation. The discrimination not only has the effect of causing injury to dignity, feelings and self-respect, but may have an economic impact on individuals who can often least afford it. The Court's censure is warranted by way of an award that will act as a deterrent to employers who are unwilling to accommodate childcare arrangements, except where legitimate, justifiable grounds exist for being unable to do so.

Prejudgment interest

[99] As indicated in the endorsement, the plaintiff is awarded prejudgment interest from the date that her causes of action arose. That date was the date of her dismissal, for both the wrongful dismissal damages and the damages for breach of the *Human Rights Code*.

Costs

[100] If necessary, counsel are directed to address costs as described in the endorsement.

HEALEY J.

Released: January 19, 2015