IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Davies v. Canada Shineray Suppliers Group Inc.,* 2017 BCSC 304

Date: 20170227
Docket: S163406
Registry: Vancouver

Between:

Sian Lydia Davies and Daisy Chain Montessori Child Care Inc.

Plaintiffs

And

Canada Shineray Suppliers Group Inc. dba Shineray Suppliers Group Inc. and the said Shineray Suppliers Group Inc.

Defendants

Before: The Honourable Madam Justice Fisher

Reasons for Judgment

Counsel for the Plaintiffs:	M. Sheard S. Barker
Counsel for the Defendants:	J. Wang
Place and Date of Trial:	Vancouver, B.C. January 23-27, 2017 January 30-31, 2017 February 1 and 3, 2017
Place and Date of Judgment:	Vancouver, B.C. February 27, 2017

[1] The plaintiffs, Sian Davies and Daisy Chain Montessori Child Care Inc. (Daisy Chain) seek damages for breach of a fixed term contract of employment. The contract related to Ms. Davies' services in establishing and operating a licensed daycare facility in Coquitlam, B.C.

[2] The defendant, Canada Shineray Suppliers Group Inc. (Shineray), challenged the plaintiffs' right to damages on several bases, some of which were abandoned at trial. The central issues relate to the enforceability of a termination clause in the contract and whether Shineray was entitled to terminate for just cause.

Background

[3] Sian Davies, originally from Wales, came to Canada in 1988. She worked as a nanny for about 10 years and in 2006, started Daisy Chain. In 2007, Ms. Davies obtained a certificate in Early Childhood Education from the College of the Rockies and a preschool and kindergarten teaching diploma from the North American Montessori Center. In October 2009, she obtained an Early Childhood Education (ECE) certificate, which is a B.C. licence to teach preschool children ages 5 and under. Through Daisy Chain, Ms. Davies operated a daycare in her home until 2015, when she met Derek Du, the principal of Shineray.

[4] Mr. Du wanted to establish a daycare facility as part of Shineray's business. Premises had been leased for that purpose and Mr. Du was looking for a qualified person to assist with establishing and managing the daycare. Mr. Du, who came to Canada from China in 2012, did not speak English, so all of his communications with Ms. Davies were through an interpreter and intermediary. From the start, and until November 2015, Mr. Du's nephew, William Du, acted in that role. After that, communications were primarily facilitated by Douglas Lee, a friend of Mr. Du.

[5] Ms. Davies first met William Du in January 2015. After showing her the premises, Ms. Davies expressed interest in the project, as she was excited about the prospect of expanding her home-based daycare into a larger facility. William Du then introduced Ms. Davies to Mr. Du, who eventually offered Ms. Davies the position of manager of the daycare. A contract, in the form of a letter dated March 16, 2015

from Shineray to Ms. Davies and Daisy Chain, was signed by Ms. Davies on March 19, 2015. William Du signed the letter on behalf of Shineray. There is no issue as to his authority to bind the company.

[6] The contract, which purported to offer Ms. Davies the position "as an Independent Contractor", included the following terms:

> Employment and Duties
>
> 1. Your employment will commence on July 1st, 2015, and will continue for a term of five (5) years from July 1st, 2015
>
> 2. Your employment will be in the position of Day Care General Manager. Your job description is as follows:
>
> - Prepare and set up the day care program, including communication with government agencies and final approval.
> - Set up the curriculum and daily operation structures of the day care.
> - Responsible for staff recruitment, salary and evaluation system
> - Create a marketing strategy and supervise the implementation of same
> - Set up operations and regulations and supervise the implementation of same, and
> - Set up safety procedures and regulations and supervise the operation of same
>
> …
>
> Targets:
>
> Preparation stage (before July 2015): All documents and material required to apply to the day care program finished and submitted. Pass all government reviews and evaluations to be ready to start the business.
>
> Operation ("First stage") (Sep 2015 - Sep 2016)
>
> Achieve $320k annual net profit (after tax).
>
> All costs calculated.
>
> Operation ("Second stage") (After Sep 2016)
>
> Achieve $400k annual net profit (after tax).
>
> All costs calculated.
>
> Remuneration
>
> 1. No payments from the Company to the Contractor for the Preparation Stage above.
>
> 2. $5000 monthly payment from the Company to the Contractor will commence on July 1, 2015 (Payable to Daisy Chain …).
>
> …

> 7. If the Contractor fails to achieve targets during any consecutive two years during the initial Term, the Agreement may be terminated by Shineray …
>
> 8. Additionally, the Company may terminate this Agreement with or without cause by providing you with three (3) months' notice of cancellation. In such an event, the Company shall have no further liability or obligation to you and you will have no action, claim or demand against the Company at common law or under statute.
>
> 9. This letter describes your entire agreement with the Company. It supersedes and replaces any prior agreements or representations, whether oral or written. You agree that there are no other contracts or agreements between you and the Company, and that the Company has not made any representations to you except as specifically set forth in this agreement.
>
> 10. Upon termination or cancellation of this agreement, you are required to return to the Company all materials, literature, lists of clients and any other information and property pertaining to the business of the Company which you have in your possession.
>
> …
>
> 12. You agree that all restrictions contained in this agreement are reasonable and valid and you hereby waive any and all defences to their strict enforcement by the Company.
>
> 13. All paragraphs and covenants contained in this agreement are severable, and in the event that any of them shall be held to be invalid, unenforceable or void by a court of a competent jurisdiction, such paragraphs or covenants shall be severed and the remainder of this agreement shall remain in full force and effect.
>
> …
>
> [Emphasis added]

[7] Despite receiving no payment until July 1, 2015, Ms. Davies did a considerable amount of preparation work to set up the daycare. This included discussions with William Du, the Fraser Health Authority, the strata council for the premises, the architect and the fire department, advertising for teachers, and promoting the daycare centre. She continued to operate Daisy Chain until mid-August with some assistance from her mother, doing much of the paperwork related to the new daycare in the evenings and on weekends. After passing three inspections by the Fraser Health Authority in August 2015, Ms. Davies secured a licence on September 4, 2015 for the daycare to operate as the Ladybird Montessori Learning Academy (Ladybird). To assist Ladybird, Ms. Davies brought with her a considerable amount of Daisy Chain's educational materials, equipment and

furniture that she was no longer using. She estimated the value of these things at about $40,000.

[8] Ladybird was licensed to a maximum capacity of 52 children. Enrollment was small in the first two months but gradually increased. In January 2016, two months after William Du had left, Ms. Davies received two emails from Douglas Lee on behalf of Mr. Du, in which some concerns were expressed about expenses, enrollment, and Ms. Davies wasting time doing banking. Mr. Lee advised that he had asked Sally Liu, Mr. Du's wife, to do the banking. Ms. Liu had been teaching ballet classes at the daycare centre.

[9] On March 30, 2016, Shineray gave Ms. Davies a notice of termination effective April 1, 2016. Shineray alleged that Ms. Davies had failed to provide well-organized reports, failed to achieve more than half the "promised revenue", and had caused the daycare to lose more than $130,000. The notice also requested Ms. Davies to return all relevant documents, materials, inventory and assets before April 5, 2016.

[10] Ms. Davies testified that she was shocked and devastated by the notice. She carried on with her work that day. She also sought a meeting with Mr. Du, which took place briefly that afternoon, but nothing appears to have come out of that meeting. Concerned that Shineray was already taking away her email and changing passwords, Ms. Davies, with the help of friends and a U-Haul, went to Ladybird that evening and removed all of the materials and equipment she had brought from Daisy Chain. She also wrote a letter to the parents, advising of the sudden loss of her job and her intention to resume her home-based daycare. She then took immediate steps to resume operating Daisy Chain.

[11] The sudden departure of Ms. Davies along with her materials and equipment created obvious difficulties for Ladybird. On April 2, 2016, a letter signed by Mr. Du was sent to Ladybird's parents and students, explaining the chaotic situation as "due to the sudden resignation of Sian Davis [*sic*] and the disappearance of our school equipment".

[12] Ms. Davies commenced this action on April 14, 2016. She seeks damages of $255,000, being the balance of her salary to the end of the fixed term, as well as aggravated and punitive damages.

[13] Shineray initially defended the action by alleging that Ms. Davies fraudulently misrepresented her qualifications, seeking rescission of the contract or, in the alternative, damages, and in the further alternative that Ms. Davies was dismissed for just cause related to her competence and willingness to improve her job performance. It also issued a counterclaim seeking damages for the losses it incurred. Subsequently, Shineray learned two things that it says constituted after-acquired cause for dismissal: (1) Ms. Davies' ECE certificate expired on October 26, 2015, and (2) a deposit of $1,000 for the enrollment of two children was received by Ms. Davies and not provided to Shineray. In November 2016, it filed an amended response adding claims that the contract was frustrated due to the expiry of Ms. Davies' ECE certificate and an allegation of misappropriation of $1,000 as just cause for dismissal. It also filed an amended counterclaim, withdrawing its claim for damages and seeking only restitution of the $1,000.

[14] A considerable amount of time at trial was spent on the circumstances surrounding the expiration of Ms. Davies' ECE certificate. Ms. Davies did not disclose the expiry to Mr. Du at the time and gave inconsistent evidence about the circumstances in affidavits filed in support of a summary trial application, in an examination for discovery, and at trial. I will address these inconsistencies later in these reasons. At this point, it is important to note that Ms. Davies' role as a daycare manager did not require her to maintain a valid ECE certificate. This was confirmed by Ruth Sullivan, a child care licensing officer with Fraser Health Authority, who dealt with Ms. Davies in her roles with both Ladybird and Daisy Chain. In any event, Ms. Davies eventually renewed her licence in the fall of 2016.

[15] A considerable amount of time was also spent on the issue of the $1,000 deposit. In January 2016, Ms. Davies agreed to accept an electronic transfer of $1,000 for a tuition deposit from a woman who wanted to register two children at Ladybird for the fall. The money was transferred through Ms. Davies' personal email,

deposited into her personal bank account and withdrawn as cash a few days later. Ms. Davies testified that she brought the cash to Ladybird that same afternoon and gave it to Ms. Liu. Ms. Liu testified that she was not at the daycare that day. Because Shineray had been unable to trace this money into its bank account, it accused Ms. Davies of keeping it. Ms. Davies vehemently denied doing so.

The positions of the parties

[16] The plaintiffs claim to damages for the remainder of the term of the contract depends on establishing two things: (1) the termination provision in clause 8 of the contract is unenforceable, and (2) the defendant has not established just cause for dismissal. Counsel submitted that the termination clause is unenforceable because it is an impermissible variance with the *Employment Standards Act*, RSBC 1996, c 113, and the *Human Rights Code*, RSBC 1996, c 210. Counsel also submitted that the defendant failed to establish that it gave Ms. Davies sufficient warnings about any competence issues, condoned her lack of an ECE certificate when it hired Ms. Liu, who did not have one, to replace her, failed to properly investigate the allegation of misappropriation, and failed to establish that Ms. Davies misappropriated the $1,000 deposit.

[17] At trial, counsel for the defendant abandoned the assertions in the pleadings of fraudulent misrepresentation and frustration. Mr. Wang's primary position was that the expiration of Ms. Davies' ECE certificate constituted, rather than frustration, a fundamental breach of an implied term in the contract, which entitled Shineray to treat the contract as rescinded. As a consequence, he submitted, the entire contract was unenforceable. In the alternative, Mr. Wang submitted that the termination provision in clause 8 was enforceable but that it should be interpreted to require three months' notice of termination only without cause. He also submitted that Ms. Davies was dismissed for just cause, primarily due to the misappropriation of the $1,000 but also due to her dishonesty about the expiration of her ECE certificate and her lack of competence by not producing curricula, bookkeeping records and not addressing Mr. Du's concerns about health and safety issues in the daycare.

[18] Although not pleaded, Mr. Wang also submitted that Ms. Davies was hired as an independent contractor, not an employee.

The issues

[19] The main issues raised by the parties are as follows:

1. Was Ms. Davies hired as an employee or independent contractor?
2. Was a valid ECE certificate a fundamental term of the contract?
3. Is the termination provision in clause 8 unenforceable?
4. Was there just cause for dismissal?
5. What damages, if any, are the plaintiffs entitled to?

[20] In my view, the defendant's submissions with respect to the first two issues had little merit in the context of the evidence. The real dispute between the parties centred on the enforceability of the termination clause and whether there was just cause for dismissal. All of the defendant's complaints would have been more properly addressed within the issue of just cause.

1. Employee or independent contractor

[21] In *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*, 2001 SCC 59 at para. 47, the court set out a number of factors to consider in determining whether a person is an employee or an independent contractor. In doing so, it recognized that the central question is whether the person is performing the services as a person in business on his or her own account. The factors include the level of control the employer has over the worker's activities, whether the worker provides her own equipment or hires her own helpers, the degree of financial risk taken by the worker, the worker's degree of responsibility for investment and management, and the worker's opportunity for profit in the performance of her tasks.

[22] There was little evidence to suggest that Ms. Davies was anything other than an employee. Although Shineray's letter purported to offer her the position as an

independent contractor, it also asked her to accept "the offer of employment described in this letter", and the contract referred to her "employment" as the Day Care General Manager with specific job duties. As a manager, she had obvious latitude in how she carried out her responsibilities but she was required to obtain the approval of Mr. Du for all major decisions, including the hiring of staff, tuition fees and major expenses. She had no responsibility for investment and took no financial risk. Mr. Du referred to himself as her boss. Although the contract provided an opportunity to earn bonuses if the targets were met, Ms. Davies was not generally entitled to share in the company's profits. And while she brought materials, equipment and furniture from Daisy Chain, she was not required to do so. She said that she did this because she no longer needed them for Daisy Chain and wanted to help Ladybird. This was not challenged by Shineray.

[23] Applying the *Sagaz* factors, it is quite clear that the relationship here more closely resembles an employment relationship rather than one of independent contractor. The language of the contract itself is very much the language of a contract of employment. In my view, any confusion stems from Shineray's offer letter being addressed to both Daisy Chain and to Ms. Davies. Clause 2 refers to the monthly payment being payable to Daisy Chain, but there is no evidence that Daisy Chain as an entity had any involvement in operating Ladybird. The offer of employment was signed by Ms. Davies in her personal capacity. I find that the true parties to the contract were Ms. Davies and Shineray.

[24] Therefore, I find that Ms. Davies was hired as an employee and the contract, which is between her and Shineray, is a contract of employment.

2. Fundamental term

[25] There are two main problems with Mr. Wang's submission that a fundamental term of the contract was that Ms. Davies have a valid ECE certificate: (1) the expiration of Ms. Davies' certificate did not affect her ability to perform her duties as the manager of Ladybird; and (2) Shineray learned about this in April 2016, after it had replaced Ms. Davies with a person who did not have a valid ECE certificate, and before it alleged that the expiration was a fundamental term.

[26] The law permits contractual terms to be implied to give business efficacy to a bargain or to correct an obvious oversight (such as a term that "goes without saying"). An implied term must be clearly formulated and must be consistent with the express terms of the contract: *Athwal v. Black Top Cabs. Ltd.*, 2012 BCCA 107 at para. 48.

[27] Mr. Du testified that he would not have hired Ms. Davies if she did not have a valid certificate. However, this testimony stemmed from a simple answer ("no") to a leading question. Prior to this Mr. Du testified that he relied on Ms. Davies to provide him with information about the rules for setting up a daycare and the requirements for managerial staff. He attempted to characterize the position she was offered as both a teacher and a manager, yet he acknowledged that he was aware that Ms. Davies was not willing to be hired as a teacher due to concern that she would not earn sufficient income. There is no question, in my view, that Ms. Davies was not hired as a teacher. She was hired to be Ladybird's General Manager, with all the duties of a manager, as clearly set out in the contract.

[28] Mr. Wang stressed that Ms. Davies herself admitted that the ECE certificate is why Shineray hired her. However, this admission must be considered in context. At the time she was hired, Ms. Davies had a valid ECE certificate. She was also trained in early childhood education, held a diploma as a Montessori preschool and kindergarten teacher, and had close to 10 years' experience running her own daycare. She understood that Shineray hired her due to all of her credentials and experience.

[29] At the time she was hired, however, Ms. Davies mistakenly thought that she needed a valid ECE certificate to work as a daycare manager. She was aware that her certificate needed to be renewed on October 26, 2015, some seven months later. Ruth Sullivan, the licensing officer with Fraser Health Authority, testified that she encouraged Ms. Davies to renew her ECE certificate to be a good example but also confirmed that this was not required in her position as manager.

[30] Ms. Davies did in fact submit an application for renewal in September 2015, but was later told by the ECE Registry that she had not completed all of the required 40 hours of professional development. Most of the courses she submitted were outdated, in that they were not completed in the previous five years, and one workshop could not be included because no certificate had been submitted for it. As a result, Ms. Davies was credited with only eight of the 40 hours required, and needed to complete an additional 32 hours.

[31] Ms. Davies did not at that time take steps to obtain the additional 32 hours required, nor did she advise Mr. Du of the expiry. However, she said that Douglas Lee had a copy of her ECE certificate and in any event it was displayed in a frame on a wall in her office. The expiration date, while in small print, was visible if one were to examine the document. Mr. Du was aware that the certificate was hanging in Ms. Davies office; he said that he helped her hang it up. However, as he does not understand English, there is no evidence that he was aware of the expiry date.

[32] Ms. Davies ought to have advised Mr. Du about the expiry and what she was doing about it. Although not raised in the pleadings at the time, this issue was a focus at Ms. Davies' examination for discovery in August 2016 and at her summary trial in September 2016. It became a bigger issue because Ms. Davies gave evidence that she applied to the Fraser Health Authority and received an exemption to the requirement for a current ECE certificate, but she did not have a copy of the document. She also gave evidence that only eight, not 32, of the professional development hours she had submitted did not qualify.

[33] At trial, Ms. Davies was cross-examined at some length about her evidence at discovery. The questions and answers put to her from the August 2016 transcript revealed a lot of cross-communication, from my reading, as Ms. Davies appeared to give answers based on what she was doing at the time to renew her ECE certificate. At trial, she testified that she believed she had applied for an exemption in the fall of 2015 and received one, but also said that she was told by the Fraser Health Authority that she did not need the ECE certificate to work as a manager. It was quite apparent to me that she confused the exemption she needed after her

termination in April 2016, when she re-started Daisy Chain, with the circumstances in October 2015 when she learned that she did not have sufficient professional development hours to renew her certificate. She was in the process of completing those hours in August 2016 when she was questioned on discovery, and she subsequently obtained a new ECE certificate on October 6, 2016.

[34] With respect to Ms. Davies' evidence about the number of professional development hours she needed to complete, it was also apparent to me that she had mistaken the information provided to her in October 2015. At trial, she said that she was mistaken about this, and I accept that. Although she said in discovery and deposed in an affidavit that eight hours did not qualify, the document attached as an exhibit to her affidavit clearly stated that she had submitted eight eligible hours only and had to submit an additional 32 hours. While she was careless about this evidence, I do not find that she had any intention to deliberately mislead.

[35] To imply a term in the contract requiring Ms. Davies to maintain her ECE certificate, the question is what the parties would have stipulated had their attention been drawn to this at the time of contracting. Given that Ms. Davies was not hired as a pre-school teacher, I find it unlikely that the parties, properly informed, would have considered a valid ECE certificate to be crucial to her employment as a manager. The only term they would likely have considered necessary was that Ms. Davies would maintain all certifications and credentials necessary to her job.

[36] Even if a term requiring Ms. Davies to maintain her certificate is implied, it was not a fundamental term of the contract. This case is distinguishable from *Thomas v. Lafleche Union Hospital*, [1991] 5 WWR 209 (Sask CA), where the plaintiff's job as director of nursing clearly required that he maintain his status as a registered nurse. The trial judge found that registered nurse status was at the root of his position, without which he could not perform the duties expected of him and for which he was employed. Here, the ECE certificate was not in fact required and without it Ms. Davies was clearly able to perform all of the managerial duties set out in the contract. Mr. Du was aware of this at least by early April 2016 when he hired his wife, who did not have a certificate, to take over as daycare manager. He

testified that he made inquiries at Fraser Health Authority and was told that they were permitted to do this. This was months before Shineray asserted that the contract was frustrated due to the expired certificate. Despite the absence of evidence that Ms. Davies was hired as a teacher, Shineray continued to make this assertion in relation to a fundamental breach throughout the trial.

[37] Accordingly, there is no basis to conclude that a valid ECE certificate was a fundamental term of the contract, and Ms. Davies' failure to maintain a valid certificate did not constitute a fundamental breach of the contract.

3. Enforceability of the termination clause

[38] At issue is the enforceability of clause 8 of the contract, which provides:

> 8. Additionally, the Company may terminate this Agreement with or without cause by providing you with three (3) months' notice of cancellation. In such an event, the Company shall have no further liability or obligation to you and you will have no action, claim or demand against the Company at common law or under statute.

[39] Given that a three month notice of termination complies with the minimum notice requirements in the *Employment Standards Act*, Mr. Sheard's argument focused on the latter part of this clause. He submitted that clause 8 purports to remove the right of Ms. Davies to make *any* kind of claim against Shineray, whether at common law or under any statute. This, he says, is an impermissible variance with the rights Ms. Davies has under not only the *Employment Standards Act* but also the *Human Rights Code*, both of which provide significant protections to her as an employee. He says that this is especially so when clause 8 is considered along with the waiver in clause 12:

> 12. You agree that all restrictions contained in this agreement are reasonable and valid and you hereby waive any and all defences to their strict enforcement by the Company.

[40] The determination of this issue involves an analysis of the case law addressing contractual compliance with minimum statutory standards, an interpretation of clause 8, and consideration of a waiver argument.

Contractual compliance with minimum standards

[41] Mr. Sheard relies primarily on the principles enunciated in *Machtinger v. HOJ Industries Ltd.*, [1992] 1 SCR 986, which held that a termination clause in an employment contract that does not comply with minimum statutory notice provisions will be null and void. In his reasons, Iacobucci J., at 1003, addressed policy considerations arising from the importance of employment and the objective of the *Employment Standards Act*, R.S.O. 1980, c. 137, to protect the interests of employees:

> … an interpretation of the Act which encourages employers to comply with the minimum requirements of the Act, and so extends its protections to as many employees as possible, is to be favoured over one that does not.

[42] Because many employees may be unaware of their rights, whether under statute or at common law, the court considered it important to impose the obligation on all employers to comply with minimum statutory standards.

[43] Despite the fact that *Machtinger* and cases which have followed it (*Shore v. Ladner Downs*, 52 BCLR (3d) 336 (CA); *Waddell v. Cintas Corp.*, 2001 BCCA 717*)* have dealt only with minimum standards for termination clauses, Mr. Sheard urged me to extend the principles and public policy considerations applied in those cases to the circumstances here. He submitted that these principles apply not only where there have been actual breaches but also where there is a possibility of a breach at any point in time. He says that Ms. Davies has claims for unpaid wages prior to July 1, 2015, unpaid overtime, other remedial rights under the *Employment Standards Act*, and "hypothetical" claims under the *Human Rights Code*; the contract, however, allows Shineray "to rely on having given three months' notice as their sole and maximum exposure".

[44] In my opinion, it is a stretch to extend the principles from *Machtinger* as broadly as counsel suggests, particularly in the context of the specific clause in issue here. The cases of *Shore* and *Waddell* demonstrate only that the courts are careful to ensure that contractual notice periods in fact comply with the minimum statutory requirements during a contract. The principles were not applied to the possibility of

any kind of breach at any point in time but rather to the possibility of a breach of the notice requirements at any time during the contractual period; nor were they applied to purely hypothetical claims under other legislation.

[45] In *Shore*, the employee was terminated during the first year of his employment and given 30 days' notice as provided under his contract. This notice period exceeded the minimum requirements under the *Employment Standards Act* at that time, but would not have met the minimum requirements after five years of employment. The court held that in such circumstances, the termination clause was void from the beginning, reasoning as follows at para. 16:

> The policy considerations applied in *Machtinger* … would not be served if the contract were to be interpreted in favour of the employer so as to leave the individual employee responsible for determining, at the point of termination, whether the statutory minimum had risen above the notice period stated in the contract.

[46] *Waddell* involved a contractual notice period that was stated to be in accordance with the Ontario *Employment Standards Act*. The employee was dismissed in B.C., where the B.C. *Employment Standards Act* provided for the same length of notice. However, the formula for calculating payment in lieu of notice was different, and the difference could have been significant. This was held to be enough to demonstrate the possibility that the termination clause could fail to meet the minimum requirements in the B.C. Act. The issue was remitted back to the trial court to determine whether compensation calculated under the Ontario Act would be equal to or greater than that payable under the B.C. Act.

Interpretation of clause 8

[47] The goal of contract interpretation is to determine the intention of the parties at the time the contract was made. This intention is to be determined by the words used in the contract itself, and in light of the whole of the contract. A literal meaning should not be applied where to do so would bring about an unrealistic result or one that would not be contemplated in the commercial context in which the contract was made: see *Consolidated-Bathurst Export Limited v. Mutual Boiler and Machinery Insurance Company,* [1980] 1 SCR 888 at 901.

[48] I do not interpret clause 8 in this contract to be in effect a waiver of all of Ms. Davies' statutory rights. In my view, the provision in clause 8 that Ms. Davies will have "no action, claim or demand against the Company at common law or under statute" relates only to actions, claims or demands arising from termination. This is because it is expressed to apply only in the event that Shineray provides three months' notice of termination. Since three months' notice is greater than the statutory minimum standard, clause 8 does not require Ms. Davies to waive the minimum notice requirements of the *Employment Standards Act*. Nor does it require her to waive any other protections in the Act unrelated to notice of termination. Any broader interpretation would bring about not only an unrealistic result but also one not contemplated in the context in which this contract was made.

[49] With respect to the notice provision itself, clause 8 requires Shineray to give Ms. Davies three months' notice if it wishes to terminate the contract, with or without cause. Mr. Wang submitted that this should be interpreted to require Shineray to give three months' notice only where it is without cause, as it would be redundant to give notice where there is cause for dismissal.

[50] In my view, there is no basis to interpret this notice provision in the manner suggested by Mr. Wang. The requirement for notice to be given with or without cause is clearly expressed, and in the context in which the contract was made, it demonstrates an intention by the parties to avoid any disputes about cause.

Waiver

[51] Mr. Sheard and Mr. Barker advanced a second argument, asserting that Shineray waived its right to rely on clause 8 due to concessions made in its pleadings that $15,000 was owing to Ms. Davies and its refusal to pay any of this money without conditions. They submitted that Shineray should not be allowed to rely on a provision if it is in wilful breach of it despite being put on notice of that breach.

[52] I am alive to the inconsistent positions taken by Shineray, not only in its pleadings but also by its counsel in his submissions at trial. However, I do not see

how this can ground a waiver argument, particularly in the absence of any supporting authority. Such an argument seeks in effect to contradict long-standing authority that permits an employer to rely on a termination clause even where that employer does not comply with its terms: see *Nygard International Ltd. v. Robinson*, 46 BCLR (2d) 103 (CA).

[53] Therefore, I have concluded that clause 8 is enforceable, and under its terms, Shineray was required to give Ms. Davies three months' notice of termination, with or without cause.

4. Just cause

[54] Given my conclusion about the enforceability and meaning of clause 8, it is not strictly necessary to address the issue of just cause. However, a considerable amount of time was spent on this at trial and I consider it important to address the allegations, especially the allegation of misappropriation given its seriousness and potential effect on Ms. Davies.

[55] Shineray alleges that Ms. Davies was incompetent to perform her employment duties and was unwilling to improve despite repeated requests to do so and warnings of termination. It also alleges as after-acquired cause, the misappropriation by Ms. Davies of the $1,000 deposit, and although not clear from the pleadings or Mr. Wang's submissions, the expiration of her ECE certificate and her failure to inform Mr. Du at the time.

[56] Shineray has the onus of establishing just cause for dismissal on a balance of probabilities. To do so, it must prove conduct by Ms. Davies which goes to the root of the contract and fundamentally strikes at the employment relationship; in other words, conduct that is seriously incompatible with her duties: *Panton v. Everywoman's Health Centre Society (1988)*, 2000 BCCA 621 at para. 28. This would include habitual neglect of duty, incompetence, willful disobedience or serious misconduct: *Port Arthur Shipbuilding Co. v. Arthurs* [1967] 2 OR 49 (CA), rev'd on other grounds [1969] SCR 85, at 55.

[57] Where misconduct is not sufficient to justify summary dismissal, the employer must clearly warn the employee that her job is in jeopardy if she does not improve and must give her a reasonable opportunity to improve: see *Rodrigues v. Shendon Enterprises Ltd*., 2010 BCSC 941 at para 9, citing *Rieta v. North American Air Travel Insurance Agents Ltd*., [1996] BCWLD 1286 (SC), aff'd (1998) 52 BCLR (3d) 114 (CA); and *Haddock v. Thrifty Foods (2003) Limited*, 2011 BCSC 922 at para. 112, citing *Bomford v. Wayden Transportation Systems Inc*., 2010 BCSC 1506.

[58] An employer is entitled to rely on after-acquired cause, that is, grounds that existed at the time of dismissal which had not yet come to its attention. This is based on the principles described in *Halsbury's Law of England*, referred to in *Lake Ontario Portland Cement Co. Ltd. v. Groner*, [1961] SCR 553 at 563-564:

> It is not necessary that the master, dismissing a servant for good cause, should state the ground for such dismissal; and, provided good ground existed in fact, it is immaterial whether or not it was known to the employer at the time of the dismissal.

[59] These principles have been confirmed in many decisions in both trial and appellate courts, for example: *Blomgren v. Jingle Pot Pub Ltd.*, 1999 BCCA 9; *Nishina v. Azuma Foods (Canada) Co., Ltd.*, 2010 BCSC 502.

Incompetence

[60] With respect to the allegations of incompetence, Shineray failed to adduce documentary evidence to support its bare assertions that Ms. Davies failed to keep proper records or failed to properly manage the daycare. In the termination letter, Shineray asserted that Ms. Davies had "completely disregarded our company's requirements and the terms on the signed agreement", referred to having received only disorganized reports after many delays, and focused on the failure to achieve the first stage target, citing losses of $130,000. The letter also referred to a "consultation meeting" in early January 2016 where Shineray:

> ... specifically stated our company's requirement that if your company cannot improved [sic] the desired management system, enrolment expansions of preschool full time or OSC [out of school care] students, and achieve the profit targets under the agreement, we would rescind the agreement and close the preschool department.

[61] No one testified about the contents of the termination letter other than Ms. Davies, who said that she had no indication she was going to receive it. Ms. Liu, who took over as manager responsible for administration and bookkeeping after Ms. Davies' termination, testified only that the records were in disarray. With the exception of a receipt book that was kept by Ms. Davies, Shineray produced no other source records. The only evidence took the form of summary sheets prepared by Shiny Shan, who was hired as Ms. Liu's assistant in April and later became the daycare manager, but Ms. Shan testified that her role in this was limited to translating for Ms. Liu and typing the charts using calculations given to her by Ms. Liu. There was nothing in the receipt book to suggest that Ms. Davies was not performing her duties responsibly.

[62] Shineray adduced no evidence about the losses referred to in the termination letter. Mr. Du testified that he made a number of requests to Ms. Davies, all through intermediaries, for documents such as curriculum plans, rules and regulations for safety and security, teachers and "management". He also testified about specific complaints he had about lack of cleanliness, safety issues, and changing a classroom space without approval.

[63] None of Mr. Du's evidence about these matters was put to Ms. Davies in cross-examination, contrary to the rule in *Browne v. Dunne* (1893), 6 R. 67 (HL). This is a rule of trial fairness, which requires a party who intends to "impeach a witness" to confront the witness with the evidence during cross-examination so that the witness has an opportunity to provide an explanation. The rule is not fixed and the extent of its application is within the discretion of the trial judge after taking into account all the circumstances in the case: see *R. v. Lyttle*, 2004 SCC 5 at para. 65; *R. v. Gill*, 2017 BCCA 67 at paras. 22-24. Evidence contradicting a witness's testimony may be admitted despite a failure to put it to the witness, and the failure goes to the weight to be given to the evidence: *Vasiliopoulos v. Dosanjh*, 2008 BCCA 399 at para. 37. I allowed the evidence to be admitted subject to consideration of weight.

[64] I cannot give any weight to Mr. Du's evidence about these matters. Not only did its admission cause unfairness to Ms. Davies, the complaints about cleanliness and safety are inconsistent with the fact that Ladybird passed three inspections by the Fraser Health Authority after it was in operation, and no evidence was adduced from any intermediary who communicated directly with Ms. Davies about any of these matters. Mr. Du acknowledged that he asked his nephew, William Du, to make the requests and collect the documents. In evidence read in from his examination for discovery, Mr. Du acknowledged that he did not give a warning to Ms. Davies to dismiss her, but only told her, through Douglas Lee at a meeting in January 2016, that "if we continue like this, we have to cancel all contract".

[65] As noted above, Ms. Davies testified that she had no indication that she was going to receive a notice of termination. This evidence is consistent with the only documentary evidence adduced (other than the termination letter) that was related to these issues: two emails sent to her from Douglas Lee in January 2016. In the first email, dated January 11, Mr. Lee expressed concern about the heating bill and the need to get more full day students. He stated as well that they did not want Ms. Davies to "waste time on the banking stuff" and that he had asked Ms. Liu to do the banking. In the second email, dated January 15, Mr. Lee advised Ms. Davies that Mr. Du had decided to hire an assistant for her, as they wanted her to focus more on education and student enrollment. There was no warning about termination or cancellation of the contract and no reference to a meeting in early January.

[66] Even if I accept Mr. Du's evidence that he communicated a warning in January 2016 to cancel the contract, the reasons given were so vague as to be insufficient to allow Ms. Davies the opportunity to improve. His evidence as read in was that it was "just regarding the whole management issue … you can't do things first and then report afterwards" apparently in relation to increases in staff and expenses. This evidence is particularly weak when considered along with the absence of any direct evidence that Ms. Davies had refused or neglected to provide certain records to Mr. Du. Even if a warning has some ambiguity in the language used, there must be no doubt that the employee was aware of the consequences of

his or her conduct: see, for example, *Blomgren* at paras. 3 and 8. No such finding can be made on the evidence before me.

[67] Moreover, the language used in the termination letter about this January meeting does not provide evidence of a clear warning to Ms. Davies that she would be terminated as manager; it was a warning that the agreement would be rescinded and the "preschool department" would be closed, primarily if profit targets could not be achieved. Yet, the contract did not require any target to be achieved before one year and the documents provided by Shineray indicated that total enrolments had increased from eight children in September 2015 to 34 in January 2016 and 42 in March 2016.

[68] Mr. Barker suggested that Shineray condoned any alleged misconduct by doing nothing about it and continuing to employ Ms. Davies. Given the lack of evidence of any proper warnings, I do not consider it necessary to consider this issue.

[69] Shineray has failed to establish incompetence as a ground for dismissal.

After-acquired cause – misappropriation

[70] The allegation that Ms. Davies misappropriated $1,000 is serious. It is conceded that if this is established, it constitutes a proper ground for dismissal.

[71] There is no dispute that Ms. Davies received a $1,000 deposit from a parent by way of an email transfer to her personal email, which funds were deposited into her personal bank account on January 22, 2016 and withdrawn in cash on January 25, 2016. She recorded this deposit in Ladybird's receipt book as received from "Jinu" by wire transfer, for two children to attend full time toddler and daycare in October 2016. She testified that she gave the cash to Ms. Liu in the presence of Tracy Guan, her assistant, later in the afternoon of January 25. However, Ms. Liu testified that she was not at the daycare on January 25.

[72] The parent, Jinu Thomas, testified that she met Ms. Davies at Ladybird on January 14, 2016. She was pregnant at the time and this was her last day of work

before she took maternity leave. She was looking for a daycare close to her work in Coquitlam, and because she lived in Surrey, she asked Ms. Davies if she could pay a deposit by way of e-transfer. Ms. Thomas confirmed that she sent all of the application documents to Ms. Davies by email on January 22 and her husband made the e-transfer on the same day. Before he did so, Ms. Thomas contacted Ms. Davies to confirm which email address should be used and was given her personal email.

[73] Ms. Davies testified that she did not know Jinu's last name at the time and agreed to receive the funds by e-transfer to accommodate her due to her personal circumstances. She explained that she provided her personal email address because her business email was not associated with Shineray's bank account, and at the time, she understood that she could only receive funds into a bank account associated with the recipient's email address. She only recently learned that this was incorrect.

[74] Ms. Davies vehemently denied taking this money. She said that she would never dream of it, as she wanted Ladybird to be successful. She was surprised that Shineray denied receiving the funds, as she was never questioned about it, the deposit receipt was always available for inspection, and Ms. Thomas' children were entered into the daycare's registration system on January 22, 2016.

[75] The fact that Ms. Davies created a paper trail of this transaction supports her contention that she had no intention of keeping this money. Not only did she record a fairly detailed receipt, she also provided her bank statement showing when the money was received into her account and when it was withdrawn. It is unfortunate, however, that her paper trail ended with a cash withdrawal. This leaves the determination of this important issue to an assessment of the conflicting evidence of Ms. Davies and Ms. Liu.

[76] Ms. Davies provided fairly detailed evidence about giving the cash to Ms. Liu. She said that she withdrew the money just after 3:00 pm, went back to the daycare, and gave it "to Sally and Tracy in the full day classroom" before 3:30 pm. She believed that Ms. Liu took it when she was about to teach ballet.

[77] Ms. Liu's evidence had little detail. She said simply that she did not go to the daycare when she did not have ballet classes. When shown her record list for ballet classes, which indicated that she had no classes on January 25, she said that she stayed home that day, going out only for a walk and to do some grocery shopping.

[78] On this issue, I prefer Ms. Davies evidence over Ms. Liu's evidence. Ms. Davies maintained her version of the events and her composure throughout a rather extensive and at times unpleasant cross-examination. Her demeanour was sincere and straightforward. Her memory of the details about handing over the money was plausible given that she was not a woman of means and did not normally carry that amount of cash on her person. It is also plausible that she would have given the money to Ms. Liu, who she had recently been told was responsible for the banking.

[79] In contrast, Ms. Liu's memory of what she did on January 25, 2016 was not plausible. It was clear to me that it was based only on her assertion that she did not go to the daycare on days when she was not teaching ballet. She had no memory of what she was doing on other days that same month, stating, "how can I remember where I was on those dates", nor did she remember the date of her examination for discovery, an event that one might expect to remember, and which took place only two weeks prior to her testimony at trial. Ms. Davies said that Ms. Liu was at the daycare every day, whether or not she was teaching ballet.

[80] I find it more probable that Ms. Liu attended at the daycare far more often that she was prepared to admit. She acknowledged that she often helped her daughter, who managed the coffee shop next door to the daycare, and there is other evidence that supports Ms. Davies' assertion.

[81] I appreciate that language issues play a role here. Ms. Liu testified that she understands very little English and was unable to communicate directly with Ms. Davies. Despite this, she was tasked with doing the banking for the daycare, as indicated by Douglas Lee in his January 2016 emails. At trial, she admitted that Mr. Lee asked her to do this but denied doing it more than once, stating that she tried but could not communicate with Ms. Davies.

[82] I cannot accept that evidence. It is inconsistent with Ms. Davies' evidence that she did communicate with Ms. Liu about banking matters, some of which is reflected in chat messages between her and Ms. Davies between December 2015 and March 2016. Ms. Liu said that these chat messages were set up after William Du left for China, so that Ms. Davies could communicate with Mr. Du, and that all of them were translated by her daughter. While the messages may have been translated for Ms. Liu, I cannot accept her evidence about their purpose. Few of the chat messages involved Mr. Du; much of their content demonstrates direct communication between Ms. Davies and Ms. Liu.

[83] I find that Ms. Liu was involved and present at the daycare beyond teaching ballet and starting in January 2016 she was responsible for at least some of the banking. I find it more probable than not that she was there on the day Ms. Davies handed over the $1,000. It may be that Ms. Liu forgot about this. She was not aware of the issue until sometime later in 2016 when she was examining the records of the daycare. It does appear that there was no deposit of $1,000 into Shineray's business bank account in January 2016 but no deposit slips were ever produced and there is no evidence establishing that this was the only account used in the operation of the daycare business. In fact, the bank statement in evidence shows a number of branch to branch deposits, including two on January 26, 2016, the day after Ms. Davies said that she gave the money to Ms. Liu (one in the amount of $1,050 and the other $1,375).

[84] One more issue relating to this matter needs to be addressed. On the last day of evidence at trial, Mr. Wang sought leave to call an additional witness who had never appeared on Shineray's witness list prior to trial. This witness was Tracy Guan, the other person who Ms. Davies said was present when she gave the $1,000 to Sally Liu. Mr. Sheard strongly opposed the granting of leave at such a late stage in the trial, citing prejudice to Ms. Davies and a history of late notice by Shineray. In response, Mr. Wang explained that his client would not agree to call Ms. Guan as a witness until the very last minute, but there was good reason for this due to an apparent rift in their relationship.

[85] Rule 12-5(28) of the *Supreme Court Civil Rules* provides that, unless the court otherwise orders, a party must not lead evidence at trial from a witness unless that witness is listed in a witness list. In my view, for the court to "otherwise order", there must be a reasonable explanation for the late notice, some ability for the court to rectify any prejudice caused by such a late addition, and some utility in the expected evidence. In assessing this, I was advised by both counsel of what Ms. Guan was expected to say. Mr. Wang advised that Ms. Guan was expected to testify that she did not recall receiving money from Ms. Davies. Mr. Sheard advised that he had text messages between Ms. Guan and Ms. Davies that indicated Ms. Guan had no memory of this.

[86] I was not satisfied that Shineray provided a reasonable explanation for such late notice or that the prejudice to Ms. Davies could be addressed at such a late stage in a trial which had exceeded the time scheduled. Nor was I satisfied that the evidence Ms. Guan was expected to provide would assist the court in determining the issue surrounding the misappropriation allegation. Therefore, leave was not granted.

[87] For all the reasons outlined above, I am not satisfied that Shineray has established that Ms. Davies misappropriated this money. I accept Ms. Davies' evidence and find that she did not misappropriate the $1,000 deposit.

[88] Given this determination, the Amended Counterclaim seeking restitution of this money is dismissed.

After-acquired cause – lack of good character

[89] Shineray pleaded that the contract was frustrated because Ms. Davies lacked good character, an essential requirement for her position as daycare manager. This was based on her lack of honesty about the expiry of her ECE certificate, the courses that did not qualify for renewal, and her misappropriation of the $1,000 deposit. At trial, Mr. Wang argued this as constituting a fundamental breach. He relied on s. 19(2)(a) of the *Child Care Licensing Regulation*, BC Reg 332/2007,

which provides that a licensee must not employ a person unless satisfied that he or she is of good character.

[90] I have already addressed the issue of fundamental breach in relation to the expired ECE certificate and determined that Ms. Davies did not misappropriate the $1,000. I have also determined that Ms. Davies was not deliberately misleading, but rather was mistaken, in relation to the courses that did or did not qualify for a renewal of her certificate. Given these determinations, none of these allegations could constitute either a fundamental breach or just cause for dismissal.

[91] Accordingly, I conclude that Shineray has not established just cause for dismissal.

5. Damages

Contractual damages

[92] The employment contract between Ms. Davies and Shineray is for a fixed term of five years. For such contracts, the employment relationship automatically terminates at the end of the term with no obligation on the employer to provide notice. However, parties can specifically provide for early termination by specifying a fixed term of notice or payment in lieu: *Howard v. Benson Group Inc*., 2016 ONCA 256 at paras. 21-22. In such circumstances, the fixed term of notice is treated as a mutual estimate of the damage that would flow from the termination, or a fixing of liquidated damages: *Howard* at para. 33.

[93] Clause 8 provides for early termination of the contract by Shineray giving Ms. Davies three months' notice of cancellation. While it does not expressly provide for payment in lieu of notice, damages for Shineray's breach are what Mr. Davies would have received or earned had the contract been performed according to its terms, which in this case amounts to the same thing: three months' pay.

[94] It is clear that Shineray was in violation of clause 8 when it terminated the contract with only two days' notice. Despite its non-compliance, the weight of authority requires me to allow Shineray to avail itself of the early termination clause.

In *Nygard*, the majority followed *Wallace v. Toronto-Dominion Bank* (1983), 41 OR (2d) 161 (CA), which in turn applied the reasoning in *Jobber v. Addressograph Multigraph of Canada Ltd.*, [1980] OJ No. 1598 (CA). However, the general principle, which has been followed in many cases, was stated by Southin J.A. at 107:

> When a contract is repudiated and the innocent party accepts the repudiation, which in my opinion is what happened here, the contract remains alive for the purpose of assessing the compensation to be paid. That compensation, that is to say, damages for the breach are what the innocent party would have received or earned depending on the nature of the contract had it been performed according to its terms. Here had it been performed according to its terms it would have been terminated within 30 days and thus, in my opinion, the defendant … was entitled to whatever amount he would have earned in that 30 days according to the evidence.

[95] In *Arasteh v. Best Buy Canada Ltd*., 2010 BCSC 48, Baker J. reviewed *Nygard* and the authorities it relied on, summarizing at para. 31:

> … These cases held that absent evidence of unconscionability or unfairness providing a basis for setting aside a contractual provision limiting notice, the fact that no notice was given does not nullify or bring to an end the provisions of a termination clause. Such clauses are treated as a mutual estimate of the damage that would flow from the termination without cause which the parties had in actual contemplation.

[96] In this case, the three months' notice in clause 8 is a mutual estimate of damage flowing from the termination. Ms. Davies was to receive $5,000 per month under the contract. Therefore, contractual damages for Shineray's breach of contract are $15,000.

Aggravated damages

[97] Damages resulting from the manner of dismissal may be awarded where an employer engages in conduct during the course of dismissal that is unfair or in bad faith, described in *Wallace v. United Grain Growers Ltd.*, [1997] 3 SCR 701, as "untruthful, misleading or unduly insensitive" (at para. 98). These principles were reviewed in *Honda Canada Inc. v. Keays*, 2008 SCC 39, where the majority equated aggravated damages resulting from a separate cause of action with moral damages resulting from conduct in the manner of dismissal:

> [58] … In *Wallace*, the Court held employers "to an obligation of good faith and fair dealing in the manner of dismissal" (para. 95) and created the

> expectation that, in the course of dismissal, employers would be "candid, reasonable, honest and forthright with their employees" (para. 98). At least since that time, then, there has been expectation by both parties to the contract that employers will act in good faith in the manner of dismissal. Failure to do so can lead to foreseeable, compensable damages…
>
> [59] To be perfectly clear, I will conclude this analysis of our jurisprudence by saying that there is no reason to retain the distinction between "true aggravated damages" resulting from a separate cause of action and moral damages resulting from conduct in the manner of termination. Damages attributable to conduct in the manner of dismissal are always to be awarded under the *Hadley* principle. Moreover, in cases where damages are awarded, no extension of the notice period is to be used to determine the proper amount to be paid. The amount is to be fixed according to the same principles and in the same way as in all other cases dealing with moral damages. Thus, if the employee can prove that the manner of dismissal caused mental distress that was in the contemplation of the parties, those damages will be awarded not through an arbitrary extension of the notice period, but through an award that reflects the actual damages. Examples of conduct in dismissal resulting in compensable damages are attacking the employee's reputation by declarations made at the time of dismissal, misrepresentation regarding the reason for the decision, or dismissal meant to deprive the employee of a pension benefit or other right …

[98] Mr. Barker submitted that Shineray was unduly insensitive in its dismissal of Ms. Davies by characterizing her departure as a resignation in its communications with Ladybird's families and also implying that she took school equipment.

[99] The evidence shows that Shineray did misrepresent the reason for Ms. Davies' departure in a way that attacked her integrity. As mentioned above, her sudden departure created a chaotic situation for Ladybird the following day. In an attempt to explain this to parents, a letter sent Saturday, April 2, 2016 and signed by Mr. Du essentially blamed the entire situation on her by falsely stating that she had resigned and implied that she had taken equipment that did not belong to her:

> On March 31, 2016, there was a chaotic situation due to the sudden resignation of Sian Davis [sic] and the disappearance of our school equipment… Although Sian was supposed to follow up before her resignation, she have [sic] left overnight without notifying the company, the parents and staffs.

[100] This reference to her "sudden resignation" was repeated in an April 2016 newsletter sent by the "management team".

[101] Ms. Davies may have acted too quickly in removing her equipment, but she was fearful that steps were already being taken to deny her access to the daycare. I find this understandable in the context of her abrupt and sudden dismissal and her immediate need to restart Daisy Chain. She said she was devastated that Shineray lied about her termination, which I also find understandable.

[102] Mr. Wang submitted that I should not imply any maliciousness from these communications, as a resignation "is not as bad as being fired" and the comments about the disappearance of school equipment could have been a misunderstanding. He allowed that Shineray may have been "too rash" but pointed out that it was trying to deal with a chaotic situation.

[103] No one from Shineray gave evidence about this, so there is no basis to find that any of these representations was based on a misunderstanding. And while it may be true that a dismissal is worse than a resignation, in the context here, it is quite obvious that the representations were made for the purpose of shifting blame for the chaos at the daycare from Shineray to Ms. Davies. In doing so, Shineray indirectly attacked her reputation before the very community she served.

[104] In my view, this is the kind of conduct described in *Wallace* and *Honda Canada* that warrants damages resulting from the manner of dismissal. It was untruthful, misleading and unduly insensitive, constituting conduct made unfairly and in bad faith. Ms. Davies said that she found Shineray's conduct devastating and I do not doubt it. Moreover, the abrupt manner of her dismissal along with these misrepresentations caused Ms. Davies distress related to her inability to pay her bills and the need to resume Daisy Chain as soon as possible. I find all of this to be mental distress that was in the contemplation of the parties at the time of the contract. The fact that they agreed to a three month notice of termination with or without cause indicates quite clearly that they intended to avoid such mental distress.

[105] The majority in *Honda Canada* emphasized that an award under this category is still intended to be compensatory and directed that it should reflect the actual

damages. This kind of mental distress is difficult to quantify, but the range of damages has generally been quite modest. In *Kong v. Vancouver Chinese Baptist Church*, 2015 BCSC 1328, the court reviewed a number of cases which established a range of damages from $10,000 to $30,000 in varying circumstances. It made an award of $30,000 in circumstances where the employer had circulated unproven allegations attacking the plaintiff's social and spiritual worth, causing hurt and shame.

[106] Of course, no case is directly applicable. While the immediate removal of Ms. Davies' equipment from the daycare contributed to the chaos that followed, it was motivated by her immediate need to protect herself, and all of this flowed from her abrupt and wrongful termination. In these circumstances, I consider an award of $30,000 to be appropriate.

Punitive damages

[107] Punitive damages serve a different purpose. They are not compensatory but rather are intended to address the purposes of retribution, deterrence and denunciation. They are limited to misconduct that is "a marked departure from ordinary standards of decent behaviour" or "advertent wrongful acts that are so malicious and outrageous that they are deserving of punishment on their own": *Whiten v. Pilot Insurance Co*., 2002 SCC 18 at para. 36; *Honda Canada* at para. 62; Judges must exercise restraint and award punitive damages only in exceptional cases: *Fidler v. Sun Life Assurance Co*. *of Canada*, 2006 SCC 30 at paras. 61-62.

[108] Counsel for Ms. Davies cited a series of acts by Shineray that they say deserve further punishment, including withholding salary to Ms. Davies during the contract, misrepresenting the reasons for her departure with the intention of causing business loss or being reckless about this, damaging her reputation by blaming the chaotic situation at the daycare on her, engaging in intimidating conduct after termination, making and then abandoning claims of fraudulent misrepresentation and a substantial counterclaim, and making the allegation of misappropriation with no factual foundation. While it is apparent that Shineray's conduct of this litigation

has been problematic in many ways, I am not satisfied that there is a proper basis on which an award for punitive damages should be made.

[109] There was insufficient evidence about improper conduct during the contract and intimidating conduct after termination. There was also insufficient evidence about Shineray's intention in misrepresenting the reasons for Ms. Davies' departure, and the conduct surrounding this has been addressed in the compensatory damages award given above. Issues related to abandoned claims can be addressed in a costs award. The only basis on which to consider punitive damages stems in my view from Shineray's conduct following Ms. Davies' termination regarding the allegation of misappropriation.

[110] My concern about this allegation is not based on my finding in favour of Ms. Davies but rather on evidence that it was made without proper investigation. The allegation was first made in an Amended Response to Civil Claim filed November 17, 2016. Both Ms. Liu and Ms. Shan testified that after Ms. Davies had left, they discovered that the $1,000 deposit had been paid by e-transfer to Ms. Davies' personal email; Ms. Shan said that this occurred in November 2016. However, it was not until December, when Ms. Shan prepared her charts, that the registration and banking records were reviewed. The one banking record produced for the month of January 2016 did not show a discrete deposit of $1,000.

[111] On December 5, 2016, counsel for Ms. Davies provided a copy of Ms. Davies bank record showing the January 2016 transactions, thus confirming that $1,000 was deposited into her personal account on January 22 and withdrawn on January 25. On December 7, 2016, Shineray filed a further Amended Response and an Amended Counterclaim. In the Amended Counterclaim, Shineray abandoned its claim for $100,000 damages but added a claim for restitution of the $1,000.

[112] This issue was canvassed at Ms. Davies' continued examination for discovery on January 13, 2017. She gave evidence about this transaction that was consistent with her evidence at trial, but at that time maintained her understanding that she

could only receive funds into a bank account associated with the recipient's email address.

[113] The evidence shows that Shineray made this serious allegation against Ms. Davies before it had fully investigated where the $1,000 may have gone. However, within several weeks, Ms. Davies confirmed that the money had initially been deposited into her personal account and Shineray discovered that no equivalent deposit had been made into its business account. It was not until the examination for discovery on January 13, 2017, that the factual dispute about the cash became known. In these circumstances, I do not consider Shineray's conduct to be "so malicious and outrageous" deserving of punishment on its own. Clearly, the principals ought to have taken more care in investigating this allegation, particularly since Ms. Liu had played a role in the banking back in January 2016 and was fully in charge of it in April and following. It may be that Ms. Liu had the cash and forgot about it, but I do not consider the evidence before me to be sufficient to find that she, or anyone else in the company, acted maliciously in making this allegation against Ms. Davies.

[114] Accordingly, the claim for punitive damages is dismissed.

Conclusion

[115] The claim for breach of an employment contract between Ms. Davies and Shineray is allowed. Contractual damages are $15,000 and aggravated damages are $30,000. The counterclaim is dismissed.

[116] Costs may be spoken to.

"Fisher J."