

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Baumgartner v. Jamieson*,
2004 BCSC 1540

Date: 20041124
Docket: S031496
Registry: Vancouver

Between:

Betty Baumgartner

Plaintiff

And

Ian Jamieson d.b.a. Advertising in Print

Defendant

Before: The Honourable Mr. Justice Cohen

Reasons for Judgment

Counsel for the plaintiff

R. Fleming

Counsel for the defendant

J. Dubas

Date and Place of Trial:

June 14 - 18,
July 6 - 9, 12 - 16, 26,
28-30,
August 3 & 4, 2004

Vancouver, B.C.

I. THE PLAINTIFF'S CLAIM

[1] The plaintiff's claim against the defendant is damages for wrongful dismissal.

[2] The plaintiff, Betty Baumgartner, was employed by the defendant, Ian Jamieson ("Jamieson"), doing business as Advertising in Print ("AIP"), from May 2000 to January 9, 2003. She was employed as a commissioned sales person, selling print advertising in select publications represented by AIP.

[3] The plaintiff was one of AIP's three full-time sales persons at the material times, the others being Brent Kane ("Kane") and Michelle Rodrigue ("Rodrigue"). Kane was already employed by AIP when the plaintiff was hired. Rodrigue, a friend of the plaintiff joined AIP afterwards. At the time of her dismissal, the plaintiff was second in sales to Kane.

[4] On or about December 16, 2002, the plaintiff learned that the employment standards legislation relating to minimum wage, vacation and statutory holiday pay might apply to the commission sales persons at AIP. She initially discussed this matter with Kane and Rodrigue. They in turn brought the matter to the attention of the sales manager, Ruth Findlay ("Findlay"), who in turn told Jamieson.

[5] Although from the time she commenced her employment with AIP, the plaintiff and Jamieson had been friends (each party alleging a different point in time when their friendship deteriorated and ended), the plaintiff claims that when Jamieson heard about the employment standards issue he was furious and that his attitude towards her changed dramatically, almost overnight. She claims that he behaved in an erratic and abusive manner towards her, so much so that she consulted a lawyer on the possibility of constructive dismissal.

[6] The plaintiff also claims that around the time of the employment standards issue being raised by her, Jamieson and general manager, Linh Huynh ("Linh"), presented the plaintiff and the other sales persons an inaccurate statement of the amounts owing to them, and a completely new salary structure with a per diem wage and a much reduced commission formula. She claims that this new package of compensation was not to the sales person's advantage and that, most significantly, the new compensation package made the plaintiff's November 2002 agreement with Jamieson for her to work a four day week and still meet her budget impossible, because a component of the package was the per diem rate.

[7] On January 9, 2003, Jamieson dismissed the plaintiff. When she asked him why, he replied "insubordination ... there's a list". Jamieson has refused to pay severance to the plaintiff because he alleges that her dismissal was for cause.

[8] The plaintiff claims that she was wrongfully dismissed, without just cause. In the alternative, she claims that if Jamieson did have just cause to dismiss her, then she was constructively dismissed on December 18, 2002, when Jamieson unilaterally changed her compensation package. She seeks severance pay; payment of future commissions; overtime pay; vacation and statutory holiday pay.

II. THE POSITION OF THE DEFENCE

[9] According to the defence, in about the fall of 2002 the members of AIP noted a sudden and dramatic change in the plaintiff's attitude and work habits. It is alleged that her sales fell, she had a poor attitude towards colleagues, was insubordinate to superiors and there were complaints from clients about her performance.

[10] At his discovery on June 4, 2003, Jamieson asserted several grounds for the plaintiff's dismissal: that in August 2002, at a sales meeting, the plaintiff was insubordinate to Findlay; that in September/October 2002 Findlay told Jamieson words to the effect that it was the plaintiff or Findlay; that the plaintiff complained to Jamieson on November 21, 2002, that Kane was in breach of AIP policy about new advertising prospects; that Jamieson decided to terminate the plaintiff on December 5, 2002, because of her behaviour following a meeting between AIP and the WCB; that on December 9, 2002, the plaintiff queried Linh about her decision on the ownership of the Waltham account; that on January 6, 2003, the plaintiff was rude and sarcastic to Jamieson when

he told her he was taking her off the Dr. Pezim account; that on January 7, 2003, the plaintiff sent an email about her compensation package inappropriately copying Kane and Rodrigue and that when this matter was raised with her by Jamieson the plaintiff was insubordinate to him; that when the plaintiff was informed that her agreed upon work week of 4 days would result in a reduction in her per diem compensation she unilaterally decided to work 5 days a week; and, that the plaintiff had problems with the Psychometrics account.

[11] Following the discovery Jamieson responded to some outstanding questions by mentioning additional grounds for the plaintiff's dismissal: that she was gruff and short with Dr. Pezim's staff; that she failed to notify the C.G. Jung account of a change of publication date; that she failed to notify the Eclipse Awards account of fees which had to be refunded; and, that she was insubordinate to Jamieson, erratic in her work habits, disparaged staff members and made inappropriate racial comments.

[12] On November 12, 2003, Jamieson provided some further answers to outstanding questions stating that the Psychometrics account contacted Findlay in the fall of 2002 with a request that the plaintiff be taken off the account because she had been rough and rude and failed to warn the client about a deadline for publication; that prior to the plaintiff's dismissal she copied the AIP client list and removed it from the office; and, that she placed a competitor, Ms. Karen Foss, on a free mailing list which exposed AIP clients to the competition.

[13] At his April 16, 2004, discovery Jamieson gave evidence that there were two culminating events which led to his decision to dismiss the plaintiff: her rough treatment of Dr. Pezim and the January 7th email incident. Jamieson said that it was not until January 7th that he decided to dismiss the plaintiff and that the cause for her dismissal was all in the last three days of her employment; that he was not relying on the Psychometric account as a ground; that the C.J. Jung account was still a ground; that he knew nothing about the Eclipse Awards account (he later advised that the plaintiff failed to tell the account that the client would have to pay the full rate if the advertising was cancelled early); that the plaintiff's erratic work habits referred to the plaintiff's absence from the office and attending to personal matters while at work; that the plaintiff disparaged staff members by complaining about Kane, complaining about Findlay and about the administrative support staff, Mui Hau ("Mui") and Judy Huynh ("Judy"); that the plaintiff used the phrase "Jew me down" and made remarks about Asians; that the plaintiff stole AIP's client list; that the plaintiff put Ms. Foss on a distribution list for the human resources magazine "People Talk", a magazine represented by AIP; and, that the plaintiff was always attempting to get Mui and Judy to do work for her.

[14] The defence asserts that when considered in light of all of her past conduct, Jamieson made the decision on January 7th to dismiss the plaintiff for the benefit of the other members of AIP and the long-term viability of AIP. The defence insists that the raising of the employment standards issue by the plaintiff had nothing to do with her dismissal.

[15] The defence claims that the plaintiff was dismissed for just

cause and has no entitlement to damages for wrongful dismissal. In the alternative, the defence claims that there has been a total failure on the plaintiff's part to mitigate her damages in that she has not sought full-time replacement employment since her dismissal. Moreover, AIP has complied with the **Employment Standards Act**, R.S.B.C. 1996 c. 113, and no compensation is payable to her for overtime, nor is she entitled to payment of future commissions.

III. THE ISSUES

1. Was the plaintiff wrongfully dismissed?
2. If so, what are her damages?

IV. WAS THE PLAINTIFF WRONGFULLY DISMISSED?

(a) THE LAW

[16] I think that the law applicable to this issue is most succinctly set out by Himel J. in **Geluch v. Rosedale Golf Assn., Ltd.**, [2004] O.J. No. 2740(Sup. Ct.) (QL), where at paras. 78 to 106 the Court said, in part, as follows:

In **Reference Re Public Service Employee Relations Act (Alta.)**, [1987] 1 S.C.R. 313 at para. 91, 38 D.L.R. (4th) 161, Dickson C.J. wrote (in dissent), that:

Work is one of the most fundamental aspects in a person's life, providing the individual with a means of financial support and, as importantly, a contributory role in society. A person's employment is an essential component of his or her sense of identity, self-worth and emotional well-being.

More recently, in **Wallace v. United Grain Growers Ltd.**, [1997] 3 S.C.R. 701 at para. 95, the Supreme Court of Canada also recognized that "the manner in which employment can be terminated is equally important to an individual's identity as the work itself."

The "special relationship" and the "unique characteristics" of the employment contract thus inform the law of wrongful dismissal and the modern doctrine of just cause: Wallace, supra at para. 90. As Justice Echlin and Matthew Certosimo explain in *Just Cause: The Law of Summary Dismissal in Canada* (Aurora: Canada Law Book Inc., 2003) at 1-3 ("Just Cause"), while the principles of contract law apply to the employment context, "The power imbalance between employer and employee has been said to differentiate employment contracts from 'ordinary commercial contracts': see Wallace, supra at paras. 91 and 92. In **Ditchburn v. Landis & Gyr Powers, Ltd.** (1995), 16 C.C.E.L. (2d) 1 at para. 2 (Ont. Gen Div.), varied on other grounds (1997), 34 O.R. (3d) 578 (C.A.), the court commented on the distinctiveness of the employment relationship, saying:

An employment relationship is based on contract. However, it is not like purchasing a car - a contract governing a discrete transaction. It is a transitional contract in which each of the employer and employee can reasonably expect more from each other as the relationship continues. As it is a contract governing a relationship between the parties,

almost by definition it continually changes.

At common law, an employer has the right to dismiss an employee for misconduct, disobedience or incompetence, or for a repudiatory breach of the employment contract. As Echlin and Certosimo explain at 2-4 of *Just Cause*, "A repudiation results from a contracting party's failure to perform a major obligation or set of obligations in the contract, or failure to perform some obligation which has the ultimate effect of depriving the other party of 'substantially the whole benefit of the contract'": see ***Hunter Engineering Co. v. Syncrude Canada Ltd.***, [1989] 1 S.C.R. 426, 57 D.L.R. (4th) 321. In the employment context, an employee may be said to have repudiated the contract when, "The employee's conduct, and the character it reveals, must be such as to undermine, or seriously impair, the essential trust and confidence the employer is entitled to place in the employee in the circumstances of their particular relationship": ***Ennis v. Canadian Imperial Bank of Commerce*** (1986), 13 C.C.E.L. 25 at 27 (B.C.S.C.). If the employer can establish that cause exists, no notice or severance pay is required to terminate the employee.

The employer bears the onus of demonstrating that cause exists for the employee's discharge. In Howard Levitt, *The Law of Dismissal in Canada*, 3rd ed. (Aurora: Canada Law Book Inc., 2003) at 6-1, the author explained that: "The employer must prove cause on the balance of probabilities, based on a finding of real incompetence or misconduct, rather than simple dissatisfaction with performance or concern as to potential misconduct." Levitt cautioned at 6-2, that: "Since dismissal without notice is such a severe punishment, it can be justified only by misconduct of the most serious kind." Indeed, Echlin and Certosimo, at 1-1 of *Just Cause*, described an employee's summary dismissal as the "capital punishment" of the employment relationship.

There is no fixed rule of law defining the degree of misconduct that justifies dismissal: see ***Essery v. John Lecky & Co.*** (1986), 60 Nfld. & P.E.I.R. 219 (P.E.I.S.C.). In ***R. v. Arthurs***, [1967] 2 O.R. 49 at 55 (C.A.), rev'd [1969] S.C.R. 85, Schroeder J.A. (in dissent) provided his definition as follows:

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.

To decide whether misconduct constitutes just cause, a court must consider the nature of the misconduct and the consequences arising from the misconduct, within the totality of the employment context, including the nature and history of the employment relationship. In ***McKinley v. BC Tel***, [2001] 2 S.C.R. 161 at para. 57, the Supreme Court of Canada outlined the proper approach as being a "contextual" one that:

examines each case on its own particular facts and circumstances, and considers the nature and seriousness of the dishonesty in order to assess whether it is reconcilable with sustaining the employment relationship. Such an approach mitigates the possibility that an employee will be unduly punished by the strict application of an unequivocal rule that equates all forms of dishonest behaviour with just cause for dismissal. At the same time, it would properly emphasize that dishonesty going to the core of the employment relationship carries the potential to warrant dismissal for just cause.

The test can thus be described as involving two steps: first, the employer must establish the employee's misconduct on a balance of probabilities; second, the employer must establish that the nature or degree of misconduct warranted dismissal.

i. Establishing the Employee's Misconduct:

There are many types of employee misconduct that can be relied upon by an employer to justify dismissal. Furthermore, even if an individual item of conduct is insufficient to warrant dismissal, the cumulative effect of numerous incidents of minor misconduct may suffice: see *Ma v. Columbia Trust Co.* (1985), 9 C.C.E.L. 300 at para. 37 (B.C.S.C.). The nature of the proof varies depending upon the type of misconduct alleged.

...

ii. Establishing that Dismissal is Warranted:

The way that the employer treated the employee during the course of the employment relationship and leading up to the dismissal, must be taken into consideration. "In practical terms," say Echlin and Certosimo at 1-7 of *Just Cause*, an employer's chances of success at trial are "enhanced by evidence of prior discipline or notice of dissatisfaction, such as in the context of a poor performance evaluation or a negative decision respecting remuneration, particularly for the same or similar misconduct": see *United Electrical Workers and Square D Co., Ltd. (Re)* (1955), 6 L.A.C. 289 (O.L.R.B.), adopted in *Ritchie v. Intercontinental Packers Ltd.* (1982), 14 Sask. R. 206 at para. 9, 2 C.C.E.L. 147 (Sask. Q.B.).

In some situations, employers have a duty to warn employees about the consequences of continued misconduct, rather than dismiss them summarily. After surveying the case law in *The Law of Dismissal in Canada*, Levitt concluded at 6-7, that: "Before an employee is terminated for cause, he or she should be advised that the misconduct is a matter of serious significance and its continuation could place his or her employment in jeopardy": see *Webb v. Eaton Yale Ltd.*, [2003] O.J. No. 5013 at para. 43 (Sup. Ct.) (QL). Of course, whether a prior warning and an opportunity to improve must have been granted in order to justify summary dismissal depends on the circumstances and the quality of the misconduct: "the greater the wrong, the less likely it is that an employer will be required to first put the employee on notice that such

misconduct is not acceptable to the employer": see **Leach v. Canadian Blood Services**, [2001] 5 W.W.R. 668 at para. 117, 7 C.C.E.L. (3d) 205 (Alta. Q.B.).

In **Fonceca v. McDonnell Douglas Canada Ltd.** (1983), 1 C.C.E.L. 51 at para. 16 (Ont. H.C.J.), the court held, "Where the incidents complained of are trivial, but annoying, then warnings are necessary before termination for cause is justified. However, where incidents, each in themselves, are serious, even though not sufficient to justify dismissal at the time, then a warning is not essential": see also **Atkinson v. Boyd, Phillips & Co.** (1979), 9 B.C.L.R. 255 (C.A.).

...

Echlin and Certosimo also cautioned at 1-6 of Just Cause: "where the employer has condoned similar misbehaviour in the past, a warning is likely necessary to 'lift the veil' of condonation." If an employee's misconduct is known to the employer, and the employer does not terminate the employee immediately, and instead provides the employee with commendation, a salary increase, a letter of reference, etc. the employer may be found to have condoned the misconduct. The employer cannot thereafter rely on the misconduct as a reason for dismissing the employee.

In **Murrell v. Burns International Security Services Ltd.** (1994), 5 C.C.E.L. (2d) 123 (Ont. Ct. Gen. Div.), the plaintiff was found to have been wrongfully dismissed despite an allegation of sexual harassment. The court held, at para. 34, that the plaintiff's dismissal could not be justified on those grounds, "as that matter was investigated and dealt with. Rivenbark did not find it a reason to justify dismissal then and since there has been no repetition of the impugned conduct, it cannot now be deemed to be cause for dismissal."

Condonation should not, however, be assumed merely as a result of a delay before termination. The court in **Tracey v. Swansea Construction**, [1965] 1 O.R. 203, 47 D.L.R. (2d) 295 (H.C.J.), aff'd [1965] 2 O.R. 182, 50 D.L.R. (2d) 130 (C.A.), held that an employer should be given a reasonable time to consider what action is appropriate. Furthermore, in **Fleming v. Safety Kleen Canada Inc.** (1996), 20 C.C.E.L. (2d) 140 at para. 29 (Ont. Gen. Div.), the court noted that some continued payment following an employee's misconduct can be interpreted as "an act of generosity on the part of the company": see also **Matheson v. Matheson International Trucks Ltd.** (1984), 4 C.C.E.L. 271 at para. 7 (Ont. H.C.J.), where the court held that the defendant was not precluded from alleging dismissal for cause merely because it had offered one month's severance pay to the plaintiff on his date of dismissal. In **Connolly v. General Motors of Canada Ltd.** (1993), 50 C.C.E.L. 247 at para. 42 (Ont. Gen. Div.), the court summarized, "the cases establish that the court may conclude that misconduct has been condoned where the court can draw such an inference from all the circumstances, including any delay."

Despite an employer's duties to investigate allegations and to

warn employees prior to dismissal, as Echlin and Certosimo observe, at 1-6 of *Just Cause*: "It has been a well-established rule at common law that an employer does not have a duty to give reasons for dismissal at the time of dismissal, nor does the employer have an obligation to grant the employee a hearing, before making the decision to dismiss." One reason that employers do not have a duty to give reasons at the time of dismissal, is that "an employer can rely on an after-discovered ground as justifying or assisting to justify the initial dismissal": *Ma v. Columbia Trust Co.*, supra at para. 10; *Lake Ontario Portland Cement Co. v. Groner*, [1961] S.C.R. 553 at 563, 28 D.L.R. (2d) 589.

However, while "allegations of cause, provided only after the fact, can be relied on, the fact that they were not alleged at the time of termination will affect their weight": Levitt, *The Law of Dismissal in Canada*, supra at 6-10. This reflects an emerging duty of employers "to be candid, reasonable, honest and forthright with their employees" at dismissal: see Wallace, supra.

At para. 98 as the court in *Boyes v. Saskatchewan Wheat Pool* (1982), 18 Sask. R. 361 at para. 16 (Q.B.) explained:

It is not uncommon in a wrongful dismissal trial for the employer to dredge up every incident arising during the term of employment which might tend to show the employee in an unfavourable light, and the court must be diligent to distinguish between those incidents which comprise the grounds for the dismissal and those advanced for the sole purpose of discrediting the employee.

c. Conclusion:

The essence of the employment relationship is that the employee and employer are in an unequal bargaining relationship and that the employee is in a vulnerable position. In *Black v. Robinson Group Ltd.*, [2002] O.T.C. 766 (Sup. Ct.), Pitt J. said, at para. 50, that, in wrongful dismissal cases, "The courts are required to maintain the principle of proportionality between the misconduct in question and the sanction imposed, and to avoid unduly aggravating the power imbalance already inherent in the employment relationship." In that case, the plaintiff had given herself unauthorized salary increases and vacation pay. However, Pitt J. described the misconduct, at para. 37, as "indiscretion rather than dishonesty." The court adopted the statement of Iacobucci J. in *McKinley*, supra at para. 54:

Given [the] recognition of the integral nature of work to the lives and identities of individuals in our society, care must be taken in fashioning rules and principles of law which would enable the employment relationship to be terminated without notice. The importance of this is underscored by the power imbalance that this Court has recognized as ingrained in most facets of the employment relationship. In Wallace, both the majority and dissenting opinions recognized that such relationships are typically characterized by unequal bargaining power, which places

employees in a vulnerable position vis-à-vis their employers. It was further acknowledged that such vulnerability remains in place, and becomes especially acute, at the time of dismissal.

Similarly, the court in *Varsity Plymouth Chrysler (1994) Ltd. v. Pomerleau* (2002), 5 Alta. L.R. (4th) 187 at para. 32 (Alta. Q.B.), held that to dismiss an employee who had fraudulently reported personal-use purchase transactions, was disproportionate to the misconduct, given that such practices were not unusual within the employer's particular business culture.

(b) THE DEFENCE ARGUMENT

[17] Defence counsel submitted that one of the things that is vitally important is that the plaintiff was employed in a small office dealing with the public in a sales capacity. In this regard, to perform her job properly, she was required to maintain good relationships with all of the employees of AIP. Counsel said that respecting her superiors was even more critical because disrespect for superiors would be quickly noticed by other people and have a serious repercussion in the office leading to deteriorating morale and sub-optimal work performance.

[18] Counsel also submitted that it is not the function of the Court to re-write the terms of the employment contract or "to look into the rear-view mirror and decide how it would run AIP for Jamieson": See *Stein v. British Columbia (Housing Management Commission)*, [1992] B.C.J. No. 280 (C.A.) (QL), where at p. 5, Southin J.A. said, as follows:

I begin with the proposition that an employer has a right to determine how his business shall be conducted. He may lay down any procedures he thinks advisable so long as they are neither contrary to law nor dishonest nor dangerous to the health of the employees and are within the ambit of the job for which any particular employee was hired. It is not for the employee nor for the court to consider the wisdom of the procedures. The employer is the boss and it is an essential implied term of every employment contract that, subject to the limitations I have expressed, the employee must obey the orders given to him.

It is not an answer for the employee to say: "I know you have laid down a rule about this, that or the other, but I did not think that it was important so I ignored it."

But it may be an answer, on the question of whether disobedience is repudiatory, that the employer so conducted himself that the reasonable man would conclude, and the employee did, in fact, conclude, that the employer considered the rule of little or no importance. For instance, if an employer had a rule that equipment was to be covered at the end of the day and the rule was ignored by the employees to the knowledge of the employer, he could hardly come to work one morning and discharge the lot for failing to obey the rule.

[19] Counsel said that one of the most important documents in the case upon which to judge the actions of the parties is the Policy and

Procedures Manual (the "Manual") that was put into place by Jamieson and adopted by all employees of AIP at a meeting on June 27, 2002. Counsel submitted that the plaintiff adopted the Manual with respect to all of its terms, including the following:

Remuneration Structure:

The company offers a competitive compensation package that is fair and reasonable relative to the market and industry. All source deductions are calculated on a monthly basis and remitted to Canada Customs and Revenue Agency. Pay cheques will be issued on the 15th and end of the month. If either of these days fall on a Saturday, Sunday or Monday Holiday, the payday will be preceding Friday or day preceding Statutory Holiday.

Structure:

- Administrative employees are paid at agreed amounts.
- Account Executives are paid a commission as agreed upon at budget review.

Upon termination of employment, Account Executives will not be entitled to any compensation for advertising booked into the future as per industry standard. The last paycheque will include the month's gross total less any source deductions.

[20] Under the heading of "Discipline Policy", the Manual states, as follows:

Advertising In Print considers its employees to be good, honest, industrious individuals who expect and prefer an orderly and efficient atmosphere in which to work. However, if the need for disciplinary measures arise, this policy outlines the philosophy of the company with respect to discipline.

Advertising In Print subscribes to the philosophy that discipline should be corrective. That is, whenever possible, an employee should be allowed an opportunity to change his/her behaviour and improve his/her work performance.

The company also subscribes to the view that the responsibility for determining the need, appropriateness and degree of discipline is a function of the manager to whom the individual reports. The need for dismissal will be at the discretion of the principal and/or manager.

Certain types of behaviour such as theft, wilful destruction of the company's property, and misconduct such as tardiness, absenteeism, poor work performance, disregard for established policies and procedures, disrespect towards colleagues, advertisers and publishers are serious infractions and can lead to immediate dismissal. Repetitive infractions will result in increasingly severe disciplinary measures leading up to and including termination of employment.

...

Progressive Discipline:

After assessing that some type of discipline is warranted based on the five factors listed in the preceding section, the managers will then exercise their objective judgments as to the severity of discipline to be imposed.

As a basic guideline, the company proposes that discipline be imposed within the following framework. Written notice will outline infraction, course of action, corrective measures, and signature acknowledging receipt of notice by the employee. These are types of discipline that may be chosen:

Framework: -First written notice
 -Second written notice
 -Final written notice and possible dismissal

[21] Counsel submitted that due to her personality type, and perhaps for her financial gain, the plaintiff consistently overstepped her bounds and was directly insubordinate to Findlay, and thereby Jamieson. He said that she failed to follow Findlay's orders to update her data base and qualify leads in the data base in a reasonable time frame. She was disrespectful to Findlay and refused to follow a direct order to clean up her data base after an August 2002 sales meeting. Counsel said that the plaintiff's tone at this meeting, and others, was aggressive and showed insubordination towards Findlay.

[22] Counsel also said that the plaintiff had previously been insubordinate to Findlay by demanding an explanation of ownership with respect to the Skin Care Centre account, and by pounding on Findlay's desk while dealing with this account.

[23] Counsel also referred to the memorandum dated October 15, 2002, sent by the plaintiff to Jamieson. He said it's content was nothing more than insubordinate to Findlay and Jamieson because it clearly indicated disdain for Findlay and attempts to undermine her in the eyes of the employer. Counsel also said that the memorandum showed direct disregard and disrespect for Findlay as sales manager and, as Jamieson said in his testimony, he saw the memorandum as an insubordinate attack on Findlay and indirectly to himself, and, further, that he felt the plaintiff was asking him to fire Findlay.

[24] Counsel argued that by her failing to follow requirements made of her by Findlay, Mui and Judy, the plaintiff breached established policy, and was therefore in direct contravention of a request of management. This was insubordination, which is a factor to be considered in the need to dismiss her.

[25] Counsel submitted that by the end of October 2002, the plaintiff had been identified as a problem to Jamieson. He testified that in his November 1st memorandum to the members of AIP, which was written immediately following his individual meetings with all of the AIP employees at the end of October, he was clearly addressing the plaintiff in his comments regarding the level of respect in the office, and positive change.

[26] Counsel said that Jamieson also told the plaintiff in her meeting with him on October 30, 2002, to respect Findlay. Counsel submitted that, in fact, in both direct and cross-examination, Jamieson

indicated that he told the plaintiff many times to respect Findlay and the other members of AIP.

[27] Counsel noted that within several days of the November 1st memorandum, Jamieson received an email from the plaintiff dated November 4, 2002. Based upon the content of the email, Jamieson felt that the plaintiff "got the message" delivered at the November 1st meeting and in his written memorandum.

[28] Counsel argued that the October meetings between Jamieson and all of the members of AIP, and his memorandum of November 1st were in keeping with his laid back management style, but provided a clear warning, acknowledged by the plaintiff, for her to change her conduct.

[29] In addition, counsel said that the plaintiff acted inappropriately towards Mui and Judy by requesting Mui to prospect advertising leads for her and enter items in her data base, not complying with deadlines, making Mui and Judy feel badly for taking personal time and using profanity, all of which led to a situation where Mui and Judy were prepared to quit their jobs at AIP.

[30] Counsel said that, according to Mui and Judy, the plaintiff's conduct in the office disturbed them. Also, counsel said that Jamieson would not tolerate the plaintiff's inappropriate racial slurs towards Mui and Judy if he had known about them at the time. Counsel submitted that every witness indicated Jamieson did not agree with the plaintiff's use of derogatory remarks towards Kane, or anyone else for that matter, and noted that the plaintiff admitted to using inappropriate language and making racial slurs.

[31] Counsel submitted that the plaintiff's lack of attendance at work, her treatment of clients in the fall of 2002, as illustrated by the Psychometric, C.G. Jung, Eclipse Awards, and Dr. Pezim incidents, all illustrated the plaintiff's lack of concern to detail and her being more absorbed in family matters outside of the office. Counsel also said that these incidents show the plaintiff's deteriorating ability to deal with her workload and were factors to be considered in her dismissal.

[32] Counsel mentioned the WCB incident which, he said, was wholly and totally inappropriate conduct on the part of the plaintiff, represented a very serious incompatibility with the plaintiff's job requirements at AIP and showed insubordination. Counsel said that in front of a new client for AIP, the plaintiff interrupted a meeting with the client, disciplined Kane for no reason at all, thus being insubordinate to Jamieson. Counsel noted that this was the first meeting between AIP and WCB and was therefore critical to AIP. He said the plaintiff's conduct potentially placed this new client at risk, and that the plaintiff's continued rant and swearing at Kane in Jamieson's presence was evidence of her poor treatment of others at AIP, paranoid behaviour, and combative nature.

[33] Counsel argued that the WCB incident was likely enough cause to terminate the plaintiff. He said that Jamieson's explanation for not dismissing the plaintiff at the time was because he was concerned about declining sales, Christmas season was fast approaching, and the plaintiff's difficult situation at home. Counsel said that although Jamieson did not dismiss the plaintiff, he was certainly considering it

in December 2002. Counsel also said that the plaintiff's email to Jamieson of December 5, 2002, contains acknowledgement by her of wrongdoing. Counsel submitted that the plaintiff reprimanded herself, and that a non-response from Jamieson was not acquiescence or condonation of her conduct.

[34] Counsel submitted that although the plaintiff also sent an email to Findlay following the WCB incident, it was not a full apology to Findlay. Counsel submitted that this showed a lack of sincerity on the plaintiff's part, and that the WCB incident was not resolved and had to be dealt with. Counsel also said that coupled with her prior behaviour and luke warm apology to Findlay, it was correct for Jamieson to take some time to consider his options as it was apparent to him on December 5th that the plaintiff could not continue her employment with AIP.

[35] Counsel also mentioned the Waltham account incident which required Linh to twice deal with the plaintiff to provide her with the same information. Findlay testified that it was her account and that she advised the plaintiff of this and Linh again orally confirmed this to the plaintiff. Counsel said that the plaintiff then requested a further review and Linh had to do additional research to satisfy the plaintiff.

[36] Counsel submitted that the Waltham account incident showed the plaintiff's incompatibility with her workplace and insubordination given the comments in the plaintiff's email to Linh which made it clear that the plaintiff did not accept the first determination by Linh, which was correct, and this caused Linh to waste time on the matter.

[37] Defence counsel said that the Dr. Pezim incident represented direct mocking and insubordination by the plaintiff towards Jamieson. He said this was a most serious incident. A publisher called Jamieson and told him to remove the plaintiff from the Dr. Pezim account. According to counsel, this meant that a whole profit center was at risk and that the plaintiff's conduct showed that there was a limited future for her at AIP.

[38] Counsel also submitted that the plaintiff's terms of employment at AIP, particularly her budget and her agreement with Jamieson to work a four day week, were to be kept private by her. The fact that she sent an email about these matters and copied Kane and Rodrigue was a breach of clearly understood policy at AIP.

[39] Moreover, counsel said that the plaintiff was clearly aware that providing a competitor, Ms. Karen Foss, with subscription to People Talk magazine was a violation of a direct order incompatible with the plaintiff's work conditions and which exposed Jamieson to risk from a competitor. As such, counsel said it justified immediate termination no matter when it was discovered by Jamieson.

[40] Counsel said that, similarly, the plaintiff's inducement of Kane and Rodrigue to provide her with the client lists of AIP after her termination, and her continuing possession of them was a theft which should have resulted in her immediate dismissal. However, it was only discovered by Jamieson after her dismissal.

[41] Regarding the employment standards issue, counsel submitted that the plaintiff knew about this matter well prior to December 16, 2002.

He claimed that she acquiesced in this situation, but was using it against Jamieson as a bargaining chip to get an agreement with Jamieson on a four day work week. Counsel said that after November 1st, it would have been obvious to the plaintiff, along with her diminishing friendship with Jamieson, that she had lost her battle for his counsel to the management team.

[42] Also, counsel said that in October 2002, Jamieson had re-asserted his authority at AIP and noted that in his November 1st memorandum he said, "Commitment, Commitment, Commitment, or Consequences." Jamieson also said, "the level of respect in the office, to the company's procedures and to each other is down...Late arrivals, early departures, extended lunch and non productive hours during the day add up to an enormous amount of time that can be quickly calculated in weeks per year. It also screams out disrespect to the work environment and others in it."

[43] Counsel submitted that in this environment, the plaintiff was becoming increasingly more agitated and concerned about her future, and not that of AIP. Counsel argued that without her relying on the employment standards issue, the plaintiff would have had no excuse for her conduct regarding the Dr. Pezim incident, and that this conduct was consistent with her prior behaviour towards Findlay and her need to always have the last word.

[44] Counsel also said that without the excuse by her of Jamieson's "snapping" as a result of the disclosure to him of the employment standards issue, the plaintiff's conduct in early January 2003 was nothing more than directly insubordinate to Jamieson. Counsel called it a major issue.

[45] Regarding the October 15th memorandum, Jamieson characterized it as being "toxic". Counsel submitted that the memorandum is not professional and is more than non-politic, or letting it all hang out. Jamieson viewed the memorandum as an attack on Findlay, and as insubordination.

[46] Counsel conceded that Jamieson did not meet with the plaintiff and comment to her about his views regarding the October 15th memorandum. However, counsel said that in the plaintiff's meeting with Jamieson on October 30th, Jamieson clearly told her that she had to be more respectful to Findlay and the other members of AIP.

[47] Moreover, counsel said that Jamieson's November 1st memorandum indicates that members of AIP should be adults and self-motivated. It directs the members of AIP to take ownership of their jobs and that late arrivals and early departures and extended lunch hours were costing AIP money. Counsel said that these comments were clearly directed to at least both the plaintiff and Kane. He said that clearly the memorandum was directed at someone other than Mui and Judy because by all accounts, they were self-motivated and always very busy.

[48] Counsel submitted that when the plaintiff's November 4th email to Jamieson is taken in conjunction with her November 26th email to Jamieson wherein she states, "The past 5 weeks has been really wearing me down", this clearly indicates that, as the witnesses testified, the mood at AIP on November 1st was sombre and everyone knew their jobs were on the line if they did not perform.

[49] In the context of the WCB incident, counsel said that the plaintiff's actions were clearly incompatible to her obligations to Jamieson. She dressed down Kane in front of a new client, undermining the authority of Jamieson and Findlay. The fact that Jamieson and Findlay did not respond to the plaintiff's apology emails to them is of no moment because, as counsel stated previously, the plaintiff had essentially already acknowledged that she had done wrong.

[50] Counsel said it was reasonable for Jamieson to take time to consider his position following the WCB incident, which is what he did. Counsel also said that when one considers that between December 5th and December 20th there were only 11 working days before Christmas, and that he and the plaintiff were not back to work together until January 6, 2003, the time frame that is being dealt with should not be said to be long enough to lead to any condonation argument.

[51] In relation to the Dr. Pezim incident, counsel submitted that it was clear that the fact that Jamieson may have known about this incident in December was not material. First of all, he did not have time to address it until January 6th because of the Christmas break. Secondly, the fact that the client called Jamieson is clearly a different sort of an issue than if Dr. Pezim complained himself. The client is the publisher. Counsel submitted that directly mocking Jamieson over this incident, as the plaintiff admitted, is inappropriate and insubordinate.

(c) DECISION ON WHETHER THE PLAINTIFF WAS WRONGFULLY DISMISSED.

(i) Credibility Findings

[52] As set out in *Geluch*, supra, the employer must first establish the employee's conduct on a balance of probabilities; and second, the employer must establish that the nature or degree of misconduct warranted dismissal. Thus, I must consider the reasons alleged by the defence for the plaintiff's dismissal, in order to determine whether the plaintiff committed acts that, either individually or in combination, justified her dismissal.

[53] The plaintiff testified that she was not aware of the employment standards issue earlier than December 16, 2002. She said that from the moment the issue was raised until her dismissal Jamieson "was not a nice guy."

[54] The plaintiff also testified that when the Dr. Pezim incident arose, no consideration was given to her previous performance on the file; the plaintiff conceded that she overreacted at the WCB meeting, that she was not professional and that is why she apologized. Jamieson did not reprimand her. Instead he said to her, "Betty - that is ancient history."; the plaintiff said, in relation to the Waltham account incident, that she was never told that she was not to question Linh about the ownership of accounts; regarding the January 7th email incident, the plaintiff said that the content of her email was not a secret; the plaintiff said that on the C.G. Jung account incident she failed to notify the client of a change in publication date and that the worst she could be accused of is that she made a mistake; she said the same was true about the Eclipse Awards account incident; the plaintiff said it was no secret in the office that she and Kane butted heads, nor was it a secret that she did not think highly of Findlay. No one in AIP

ever complained to the plaintiff about her conduct or told her to change her ways; the plaintiff admitted that she made some racial slurs, but with regard to her conversation with Jamieson about her Jewish remarks, she did not recall registering that it "was all that deep"; the plaintiff denied that she removed the client lists from the office. She received them from Kane or Rodrigue after she was dismissed; the plaintiff said that she did not keep secret the fact that she put Karen Foss on the distribution list for People Talk. She said there was no conflict in that Ms. Foss worked for a publisher not a representative house like AIP; the plaintiff denied that she pounded on Findlay's desk over the ownership of the Skin Care Centre account, or that she yelled at Findlay.

[55] On the issue of cause, where there is a conflict in the testimony between the witnesses for the plaintiff and the witnesses for the defence, I prefer the testimony of the witnesses for the plaintiff, for two main reasons. First, there are major discrepancies in the evidence of Jamieson between his discovery and trial evidence.

[56] At his June 4, 2003 discovery when Jamieson was asked about the WCB incident he said that it was a very serious incident, serious enough for him to think about dismissing the plaintiff. When he was asked why he did not send her a letter of reprimand he said that he had never done a formal reprimand. This was not a true answer.

[57] On June 27, 2002, Jamieson sent a memorandum to Kane in which he set out a list of 11 "points of your bad attitude in the office". The list includes disrespect for the budgeting process, a blatant disrespect for administration staff and colleagues with either rudeness or inappropriate comments, a disrespect for colleagues and a disdain for AIP events and policies. The only explanation Jamieson could offer for not sending a warning to the plaintiff was that in the fall of 2002 he was trying to correct her behaviour and that the November 1st memorandum was all about the plaintiff, and that she knew it when she sent him an email on November 4th.

[58] In his June discovery, Jamieson also testified that there was nothing to substantiate Dr. Pezim's complaint about the plaintiff. There is no mention of a call from Mr. Jay Draper of the BCMA in his answer. Jamieson disagreed with counsel's suggestion that in fact the problem was not Dr. Pezim, but rather how the plaintiff spoke to him about the incident. Jamieson said that it was the first time that he had received a call from a publisher asking that a sales person be taken off an account and that this was enough for him. However, at his discovery Jamieson testified, as follows:

Q So just to sum up then, in relation to Michael Pezim, the problem appears to have been Michael Pezim, not Betty Baumgartner, correct, do you agree?

A Possibly. The problem was, again, how Betty spoke to me about it.

Q I see.

A The sarcasm and with the other thing, how she handled it.

Q I misunderstood that. So you are concerned about the Michael Pezim incident in terms of your grounds for

terminating Betty's employment, the concern is not what happened with Michael Pezim, it is her reaction to you about it, her writing the note the first time and being sarcastic about it and that is it?

A Yes. In relation to Pezim and that ground me a bit but then the next time, the next day when we brought up the problem with cc'ing the note and she came up and was extremely rude to me in front of all the staff. That was it. I don't -

[59] Jamieson said that his answers were true, but that "the substantiveness" was there.

[60] Jamieson said that he did not talk to the plaintiff in December about Dr. Pezim. In his June discovery when asked whether he ever did speak to the plaintiff about Dr. Pezim to see what her recollection of the incident was he said, "um-hum". When asked whether she said anything to him which gave him any concern that the plaintiff had done anything wrong, he said, "no". Jamieson said that this answer was partially true: that the plaintiff was not going to tell him what she had done wrong. He said it was brought up in December with the plaintiff by Findlay and that it was not until January 6, 2003, that he received the call from Mr. Draper.

[61] Counsel suggested to Jamieson that he knew perfectly well that there was no reason for him to believe that the plaintiff had done anything wrong in relation to the Dr. Pezim incident. Jamieson disagreed. Counsel then put the following answers to Jamieson from his June discovery:

Q Right. But you are not aware that Betty has done anything wrong, she hadn't failed to make good efforts to keep things -

A According to this, I wasn't listening into the conversation, where Michael Pezim felt he had been run rough shod or felt like he was at a used car lot or something.

Q I want to be clear with you, sir, I'm asking you about your grounds for cause and so far you have told me in respect of Michael Pezim your only ground for cause is Betty Baumgartner's reaction to you raising the concern with you?

A Yes.

Q So there is no ground for cause in what Michael Pezim said to you about his complaint about Betty, do you agree?

A There is nothing in there. I didn't hear the conversation between Michael Pezim and Ruth. I didn't hear - rather Michael Pezim's nurse and Ruth. I didn't hear the conversation between Michael Pezim and the B.C. Medical Association, only what the B.C. Medical Association had to say to me.

Q You haven't relied -

A And Betty's reaction.

Q And you haven't relied on Michael Pezim's decision, in your decision, to terminate Betty's employment, have you?

A No.

[62] Jamieson said that the answer was not true. He said that it was not that single event that was a cause for the plaintiff's dismissal.

He said he did not lie, rather he thought counsel was asking him if the Dr. Pezim incident was the only ground for the plaintiff's dismissal.

However, he agreed that there was never any suggestion to him from Mr. Draper that AIP would lose the account. He said the client would not do that for a single incident. He said that is why he was not relying on the Dr. Pezim incident alone because there was never any risk to AIP that the company would lose the client over this incident.

[63] Jamieson said, in cross-examination, that he decided on January 7, 2003, to dismiss the plaintiff for incidents that had happened in the prior weeks. However, at his June discovery he testified, as follows:

Q So please continue then and tell me what the problem was?

A So I have never experienced so much profanity in my office as in the time that Betty worked there. And this was no exception. And she came roaring into my office and said I have never been so fucking mad in my entire life. And went on and on and on to describe what she thought had happened. So I asked - I excused myself for a moment. I went out to Mui and I said to her - first of all, I said to her, don't - I'm you know, giving Betty the benefit of the doubt that she is - that this was happening. I went out to Mui. Don't distribute any accounts that have just been put in. She said no accounts have just been put in?

Q Right.

A And that loudness and the - it just went on and on and everybody in the office could hear even through my closed door. The meeting was over. Betty then went back, further back into the office to the sales department to berate Brent about this and you F'ing this and F'ing that and every body heard it. And that was the first time on December the 5th, after that whole episode that I thought Betty cannot stay here. I have a small company, a few people and it just - you know, just wasn't appropriate for the business. I had people coming up asking what was wrong with her, is there something wrong, what has gone wrong with Betty.

...

Q Sir, a moment ago you told me that you didn't send her or give her any sort of reprimand because you had decided to fire her and now this tells me you hadn't quite decided to fire her, so which is it?

A Oh, no, I decided that she was not going to stay.

Q On December the 5th you made that decision?

A Um-hum.

Q Yes.

A Yes. What do you do, let someone go before Christmas? There was that consideration as well.

Q One reason you didn't fire her on December the 5th was because Christmas was approaching?

A Yes.

Q Was there any other reason?

A No.

Q Why didn't you give her notice that you were going to fire her?

A At that point?

Q Yes.

A Well because if you give somebody notice you are going to fire them, you're firing them and then, generally, in a business if you fire someone you don't want them hanging around for two weeks notice.

Q So you made a conscious decision not to give any notice even though you knew on December the 5th, that you intended to fire Betty?

A Well, there was a couple of things after that.

Q Answer my question, please. You made a conscious decision not to give Betty notice even though you decided on December the 5th to fire her, correct?

A Right.

[64] Jamieson testified, in cross-examination, that he often told the plaintiff to respect Findlay and the other sales persons. However, at his June discovery he testified, as follows:

Q Now, sir, you say in this letter that in the early fall of 2002, everyone in the office noted a sudden and dramatic change in Betty's attitude and work habits. Is that correct, that statement?

A It is.

Q So tell me then, what happened in the early fall of 2002 with that sudden and dramatic change of attitude and work habits, what happened from that point to -

A Okay.

Q - January 9, 2003 in terms of your allegation of cause?

A Okay. The first one - the first one started in August at a sales meeting where there was insubordination to the sales manager where Betty told her sales manager, that one, I don't need you to tell me how to do any job.

Q Don't wait for me, please don't.

A I wasn't sure how fast you are getting this and I thought I'm pacing - okay. And two, I doubt if I could learn anything from you.

Q When was that meeting?

A August.

Q When in August?

A On or about the 16th.

Q Who was present?

A I would say that it would have been Betty, Brent, Michelle and the sales manager Ruth.

Q How did you hear about it?

A Ruth told me about it.

Q When?

A Well, fairly shortly thereafter because Betty was in the habit of disrupting sales meetings.

Q Is there any document that makes any reference to this meeting and that comment?

A Do you mean minutes of the meeting?

Q Minutes of the meeting, e-mails, correspondence, letters of reprimand, anything at all that makes reference to either the meeting or this comment which is of concern to you and the sales manager?

A No.

Q No document?

A No.

Q Nothing?

A No.

Q It wasn't a serious enough concern for you to bring it to Betty's attention?

A No.

Q You didn't talk to her about it?

A No, no.

[65] Jamieson also testified that in September and October 2002, he told the plaintiff that her behaviour towards Findlay would have to change. He also mentioned her email to him after the November 1, 2002, meeting, the Waltham account incident, the Dr. Pezim incident, claiming that it was the way she spoke to him and the substance of the complaint, the plaintiff's email to him of January 7th, which she copied to Kane and Rodrigue, and the Psychometrics account. He was then referred to the following answers he gave at his June discovery:

Q Anything else at all, sir, that you rely on in your suggestion that you showed just cause to terminate Betty Baumgartner?

A A couple of minor things that don't - in regard to our defence here. Disregard for established workplace policies and procedures.

Q What happened there, sir?

A There was way too much absenteeism in the course of the day, absenteeism and handling family matters and vacation days

taken during our blackout time and that sort of thing but those - it is - it - the actual dismissal had to do with the way she was speaking to me in those last few days.

Q You have just given me a fairly long list of general things, absenteeism, vacation days taken in blackout times, personal time, I can go through them with you individually but I infer from what you just told me, you haven't actually relied on these things in your decision to terminate Betty's employment, am I right in that?

A They were the cumulative things that came up, up to that culminating thing.

Q So you had concerns about absenteeism, did you?

A Yes.

Q Did you ever address them with Betty?

A Yes.

Q When did you do that?

A During the course of the time that it was happening but there always seemed to be reasons why it had to happen.

Q Did you ever say to Betty Baumgartner, you are not in the office often enough, you need to be here more often?

A No.

Q You never told her that her absenteeism was putting her employment in jeopardy?

A No.

Q You never suggested to her anything about her absenteeism being inappropriate, did you?

A I did tell her there was too much of it.

Q When did you do that?

A Maybe a couple of times during the course of the year.

Q 2002?

A Yes.

Q You were aware that she had some serious things going on with her daughter that were causing her concerns?

A Absolutely, correct.

Q You agree?

A Yes.

Q In fact, you were quite sympathetic to those?

A Absolutely.

Q You were aware, for example, that her daughter at the same time had to commit suicide?

A Yes.

Q That caused Betty to be away from the office quite a bit,

correct?

A Um-hum.

Q Yes or no?

A Yes.

Q You didn't have any concerns about those absences?

A I was sympathetic to that.

Q You said that, in fact, sir, you were sympathetic to all of Betty's absences because she had reasons for them all which she told you about, correct?

A Yes.

Q There was never a day she was absent from work without her telling you why that was, correct?

A Even if it was sort of two minutes before the fact, yes.

Q Every time she told you why and you agreed that she had good reason to be absent?

A I'm not a person that says no.

Q You said she took vacation days at blackout times?

A Yes.

Q Did you ever express any concerns to her about that?

A Don't recall.

Q I'm going to suggest to you that at no point did you ever tell her that she was not allowed to do that and at no point did you ever suggest to her or anyone in your company suggest to her that her employment was in jeopardy because of that behaviour?

A No, it was never - her employment was - it was never suggested to her that her employment was in jeopardy but these things were written in the policy manual and just happened. Anyway, you would find out the day before even if it was two minutes before. We have lots of e-mails, sorry, I have got to - I have to have some time away. I won't be in the next two days.

Q Have those e-mails been produced?

A No.

...

Q So this has to do with e-mails to do with absenteeism and vacation days taken in blackout times. Now, in fairness, I couldn't write down all the things you mentioned but you said, generally, there was disregard for workplace policies and procedures and I have got absenteeism and taking vacation days in blackout times. What else was there, sir?

A That is all.

Q So I'm going to ask that question again. Is there anything else at all that you rely on for your allegation that you had

just cause to terminate Betty Baumgartner's employment?

A Nothing specific. It was cumulative to the culminating day.

Q What is there that is not specific that you haven't already told me about that you rely upon?

A Nothing else.

[66] At his April 16, 2004, discovery Jamieson said, "The cause is all in the last three days." He said, in cross-examination, that it was true that in the last three days of the plaintiff's employment there was enough that she did to let her go for gross insubordination.

[67] Jamieson also testified at his April discovery that on January 7th, when he decided to dismiss the plaintiff, that he did not rely on the Psychometrics account incident. In cross-examination, he admitted that at the time of the plaintiff's dismissal he knew about the incident, but not the details. With respect to the Eclipse Awards account incident he said he did not know any of the details.

[68] At his April discovery, Jamieson testified as follows:

Q Okay. "In addition to customer-based complaints, Ms. Baumgartner was insubordinate in Mr. Jamieson ..."

Now, before I go any further, sir, you've already told me about an incident that you considered to be insubordinate which was the January 7 incident, I take it?

A Yes.

Q And you've told me about other incidents that we've reviewed; correct?

A One or two days before that, yes.

Q Now, are there any other incidents of insubordination that you rely on?

A No.

[69] In cross-examination, Jamieson said that when he gave his answers he was talking about insubordination to him.

[70] To say that Jamieson's evidence is conflicted regarding the actual grounds that he relies upon to establish that he dismissed the plaintiff for cause would be an understatement.

[71] Secondly, I do not accept that the incidents which allegedly took place prior to December 16th were either relied upon by Jamieson as grounds for dismissal, or that they even unfolded in the manner testified to by the defence witnesses. I find the evidence of the defence witnesses surrounding their recollection of the incidents completely implausible and unreliable.

[72] The October 15th memorandum was predominantly about Findlay. Jamieson said that he did not respond to it because there was so much "venom", so much "anger". He called it "venomous junk", said that he had heard a lot of it before and that it was absolutely none of the plaintiff's business. He explained that the memorandum was not solicited by him. The plaintiff asked him if he was interested in

hearing her ideas, and when she asked him if she should put them in writing he said, "good".

[73] Jamieson testified that the plaintiff's comments in the memorandum about Findlay was total disrespect to him and Findlay. He did not respond to the memorandum because it's content was "venomous, rude and insubordinate."

[74] In cross-examination, counsel suggested to Jamieson that the plaintiff was a good friend of his into the mid-fall of 2002, and that by the fall of 2002 he was taking the ideas set out in the plaintiff's October 15th memorandum seriously. He disagreed. When plaintiff's counsel suggested to him that as of October 21st he was considering the changes that the plaintiff had set out in the memorandum, Jamieson said that he did not know. When counsel suggested that as of October 21st Jamieson was considering Findlay's position as sales manager, he replied that while he and Linh may have spoken about it, there was no actual consideration of it. I find his evidence not credible given the evidence that on October 21, 2002, Linh sent Jamieson an email which said, inter alia, as follows:

I find it very disconcerting to find out that you wish to make changes where I cannot see them as a changes for the better. Because my responsibilities are quite removed from the day to day activities at AIP, I write these thoughts to you as an objective observer.

Since our conversation of almost two weeks ago, I still have not figured out what problems we have at AIP that Betty refers to as "fixable problems". I do not see a problem as long as reps are selling close to or over their budget, admin businesses are fulfilled and AIP's contractual obligations to publishers are met. AIP's problems are not operational; they are personnel related issues on an individual basis.

It was agreed that established policies and guidelines were needed to give AIP structure. These policies and procedures were implemented but never enforced. How can we now say to Ruth that she is not doing her job as a sales manager if reps are overstepping their bounds and going straight to your office. I think that you should reiterate to everyone that they should go to Ruth for sales related issues, to me for admin and to you regarding terms of employment. If Ruth and I cannot come to some sort of resolution for the issue at hand, you should be their last resort. Until Ruth and I are given an opportunity to do our jobs as outlined by our job description, no one should have their titles removed.

When we were an office of 3, a sales manager was not necessary. With your intentions to expand the sales team, AIP needs a sales manager more than ever. Are you prepared to allocate your time to deal with sales issues on a more frequent basis as the sales team grows? When an organization hierarchy was developed, our goal was on business development and growth. Any change in this hierarchy is a step back. Any decisions made regarding magazines we represent, personnel we have on staff or policies and procedures should be made because it's better for the company as a whole not because it's self-serving for a few.

[75] Linh testified, in chief, that she sent the email because earlier that day Jamieson told her of the plaintiff's suggestion that AIP did not need a sales manager. She rejected the idea and later in the day reiterated her position in the email. It is inconceivable to me that if Jamieson felt, as he testified, that the plaintiff's ideas about Findlay were "venomous junk", that he would have raised the subject with Linh at all. I find that Jamieson did not reject the plaintiff's ideas as being insubordinate. Rather he canvassed with Linh the plaintiff's ideas about eliminating Findlay's position, and when she rejected the notion then Jamieson told her that he would not change the management structure.

[76] Regarding the events leading up to Jamieson's meetings with all of the members of AIP at the end of October 2002, and his written memorandum of November 1, 2002, I find the defence evidence most implausible.

[77] Findlay testified that Mui and Judy both told her that they did not enjoy working at AIP, that they were thinking of quitting and that the plaintiff had destroyed the working atmosphere. They asked her to do something about it. Findlay said that the first time she went to see the Jamieson about the atmosphere in the office was in March 2002. There is no mention by Jamieson that in March 2002 he was told this by Findlay.

[78] Findlay also testified the Skin Care account incident took place in March 2002 when, according to her, the plaintiff pounded on her desk over the account and screamed and yelled at her. Findlay said she was so upset that she was shaking from the "ferocity of the attack", and that she was shocked and intimidated. Findlay said she did not tell Jamieson about this incident until several months later. I find it most implausible that if this incident unfolded as described by Findlay that she would not have told Jamieson about the plaintiff's conduct at the time.

[79] Regarding the conduct of the plaintiff at a sales meeting in August 2002, according to Findlay, she raised a concern over the fact that the plaintiff and Rodrigue had put information into the data base with no follow-up. She said that the plaintiff "threw a fit" and told Findlay to mind her own business. She said that the plaintiff was very angry. Findlay had a confrontation with the plaintiff and told her that if she did not look after the leads put into the data base for the Homes West magazine that the leads would be taken away from her. It was at this point in time that Findlay said she told Jamieson that the plaintiff was totally out of hand. She wanted Jamieson to talk to the plaintiff and do something about the plaintiff's conduct towards her.

[80] I find Findlay's testimony unreliable on this point. It does not make sense to me that if Findlay had insisted in August 2002 that Jamieson raise this matter with the plaintiff, that he would not have done so, particularly given his insistence that it would be insubordination to Findlay not to follow her directions, and given Findlay's testimony that around this same time frame Findlay told Jamieson that she would quit if he did not reign in the plaintiff.

[81] In fact, according to Findlay, the situation in the office in the late summer, early fall of 2002 was so serious that the stress was

affecting her health. It just does not make common sense that in this alleged atmosphere Jamieson would not have disciplined the plaintiff if in fact he had been told by Findlay of the degree of disruption that the plaintiff was causing to Findlay and her ability to manage the sales persons.

[82] I find that the reason that no steps were taken by Jamieson to discipline the plaintiff is because the events did not unfold as testified to by Findlay. Rather, I accept the testimony of the plaintiff and Rodrigue that following the August 2002 meeting they went to see Jamieson and he told them that Findlay's remarks at the meeting were aimed primarily at Kane and not them.

[83] According to Findlay, there was another sales meeting in September 2002, when the plaintiff was nudging Rodrigue and rolling her eyes at everything Findlay was saying. It was at this meeting where Findlay decided to tell Jamieson about all of the incidents involving the plaintiff. She said she knew then that it was the plaintiff or her.

[84] In October 2002, Findlay discussed the plaintiff with Jamieson. According to her, she told Jamieson that not only would she leave AIP if something was not done about the plaintiff, but that so would Mui and Judy. She told Jamieson that if he did not dismiss the plaintiff he would lose the entire staff. She said she laid out everything about the morale in the office and the lack of respect.

[85] Mui testified that when she met with Findlay in the fall of 2002, she told her that she was unhappy with the environment in the office; that she complained to her mainly about the plaintiff's behaviour. She told her that she was not happy and that she would be looking for another job. She mentioned that the morale in the office was low, that there was no respect and that it was the plaintiff who was making her uncomfortable and unhappy and that she did not want to work with the plaintiff.

[86] Judy testified that she spoke to Findlay in the late summer or fall of 2002, about the atmosphere in the office, that the morale was low and that the plaintiff was being rude to a lot of people in the office. It made her feel that she did not want to come to work.

[87] Judy met with Jamieson in October 2002. She talked to him about low morale and rude behaviour, although she did not point her finger at any individual. She believes that Jamieson knew that she was talking about the plaintiff.

[88] In my opinion, the testimony of the defence witnesses surrounding the unfolding of the events leading up to the November 1st meeting is most conflicted and unreliable.

[89] Jamieson testified that when he wrote the memorandum of November 1st it was because everything was not in good shape with the sales department. He said that the plaintiff's October 15th memorandum was definitely a part of the reason that he felt he needed to meet with all of the members of the firm, but that the November 1st memorandum and October meetings were not aimed at addressing low morale - morale he said was addressed by social events AIP organized, such as the cycling and lunch event in the summer of 2002.

[90] Jamieson testified that, save for Rodrigue, there was a general theme throughout the meetings he held in late October with the staff that the plaintiff was affecting the performance of all of the members of AIP. Despite the fact that Findlay testified that she told Jamieson as early as March 2002, and again in the early fall 2002 about her serious concerns surrounding the plaintiff's behaviour, Jamieson claimed that up until late October he did not know how much the plaintiff was disrupting the workplace. He said that at the October meetings he learned of the disruption that the plaintiff was causing to the performance of Mui and Judy. He testified that Judy brought up the plaintiff's name and her disrespect for other persons, that the plaintiff was treating her like the plaintiff's personal staff and that she was off-loading an enormous amount of extra work on her and Mui.

Judy told him that the plaintiff was not reading office memorandum and was not following office policy and procedure.

[91] Jamieson testified that Mui had the same general complaints as Judy. He said she also mentioned the lack of respect for the managers and the level of profanity in the office.

[92] As for what Findlay told Jamieson at his meeting with her, she complained about the plaintiff preventing her from holding positive sales meetings. She told him that the plaintiff continually interrupted the meetings.

[93] Jamieson also testified that everyone he spoke to, except Rodrigue, told him about their concerns with the plaintiff. He went on to state that the November 1st meeting and memorandum was a warning to the plaintiff. He said that the two worst things he heard during his meetings was the disrespect shown to colleagues and to Findlay. He said that the second last paragraph of his memorandum, which mentions commitment or consequences, was directed to the plaintiff. When he was asked, in chief, why if the memorandum was directed mainly towards the plaintiff, and perhaps to a lesser extent towards the other sales persons, did he have all of the members of AIP join the meeting, he replied that he wanted to ensure that the staff saw that the concerns they expressed to him about the plaintiff were being addressed.

[94] However, notwithstanding his testimony that, save Rodrigue, everyone told him during the October meetings that the plaintiff was at the root of the disruption and unhappiness in the office, in the notes that Jamieson made contemporaneously with the October 2002 meetings there is not a single mention of any problems with the plaintiff's performance or behaviour. His excuse was that the notes did not cover all of the conversations he had with these persons, although he agreed with plaintiff's counsel that the meetings were important, and that he kept the notes to have an accurate record of what he was told.

[95] Most significantly, there is no mention of the plaintiff in the notes he made of his meeting with Findlay, particularly there is no mention of Findlay's evidence that she had been telling Jamieson since August 2002, that because of the conduct of the plaintiff he was at risk of losing staff, including Findlay.

[96] In my opinion, given that there is no mention in Jamieson's notes of the very serious assertions allegedly made by Findlay, Mui and Judy about the plaintiff, and that according to Jamieson he did not tell

the plaintiff of a single assertion raised by Findlay, Mui or Judy, I find that the information supplied to Jamieson at the October meetings did not focus on the plaintiff. Rather, I find that the focus at the October meetings was on the low morale in the office and lack of respect between all of the members of AIP and that this is precisely what Jamieson intended to address in his written memorandum of November 1st, and at his meeting with all of the members of the firm on that same date.

[97] There is another reason why I find the defence evidence unreliable. Jamieson testified that he was away from AIP for most of the summer in 2002 and that when he returned full time in October 2002 he found the office in quite a mess. It upset him. He said that when he talked to his staff about the situation they directed him to the conduct of the plaintiff. He said that Findlay and Linh had told him "horror" stories. Both told him that the plaintiff was not the kind of person they needed at AIP and they told him that he should dismiss the plaintiff. Jamieson said he resisted the recommendation because he did not want to change sales personnel in the middle of a sales downturn.

[98] According to Jamieson the information he received from his staff was that the plaintiff was causing havoc, that Mui and Judy were threatening to leave and that Findlay told him that either the plaintiff had to leave or she would leave.

[99] It does not make common sense, in my view, that in light of the very serious situation in the office allegedly described to him by staff that Jamieson would not have moved quickly to address the situation by disciplining or dismissing the plaintiff. In fact, the only evidence from the defence witnesses that at any time leading up to the November 1st meeting the plaintiff was told that her conduct was unacceptable is from Jamieson and Findlay. Findlay claimed, in cross-examination, that she spoke to the plaintiff in April 2002 about her lack of respect. She also claimed that the plaintiff sent her an email to apologize.

However, Findlay did not produce the email. Jamieson claimed that at his meeting with the plaintiff in late October he told her to improve her behaviour. He admitted, however, that there is not a single direction or reprimand mentioned in the notes he made of his meeting with her.

[100] In fact, there is not a single document produced by the defence to corroborate the testimony of the defence witnesses about their conversations with each other, or with Jamieson in the spring, summer or fall of 2002, regarding what they described as the plaintiff's negative behaviour, which they all claimed was ruining the workplace at AIP, and leading them to tell Jamieson that the plaintiff should be dismissed.

[101] The fact is that the plaintiff was not warned, nor disciplined, the staff did not leave and instead Jamieson wrote a memorandum and conducted a meeting on November 1st of all of the members of AIP urging them to show respect for one another and commitment to AIP.

[102] In light of the whole of the evidence, I reject the testimony of the defence witnesses that it was the plaintiff who was poisoning the workplace in 2002, or that they told Jamieson that he had to dismiss the plaintiff or risk them leaving AIP. Jamieson's excuse for not dismissing the plaintiff in late October is that he was in the midst of a downturn in sales and he preferred to try and correct the situation

rather than have to replace his sales personnel. This excuse might make sense were it not for his testimony that Mui and Judy were "unbelievably critical" to his business, and that in 2002/2003 he could not imagine having to replace them. Surely then the common sense move would be for him to not risk the loss of these critical staff persons and discipline or dismiss the plaintiff. After all he did testify that when he dismissed the plaintiff in January 2003, he was able to quickly replace her with another sales person.

[103] The evidence of the defence is that following the November 1st meeting there was a sombre mood in the office, and the plaintiff calmed down for a couple of weeks. Things improved. However, on December 5, 2002, the plaintiff behaved badly at the meeting between AIP and the WCB.

[104] Jamieson testified that everyone was in attendance at the meeting, except Mui. He said that the representatives of the WCB had brought with them some magazines so that AIP could get some idea of the range and nature of advertising which suited this new client's needs.

The magazines were passed around and during the meeting and the sales persons were looking at them. Findlay was making some notes. Jamieson noticed the plaintiff becoming quite agitated. Kane got up to leave the meeting and soon thereafter Findlay left the meeting. When Kane got up to leave the plaintiff told him she thought it was rude for him to leave before the meeting had ended. The meeting became tense. Jamieson felt it was most inappropriate for the plaintiff to reprimand Kane. He quickly ended the meeting.

[105] The next thing that happened is that the plaintiff went to the sales department area of the office. She had a verbal confrontation with Kane. He called her a "fucking backstabbing bitch." It was heard all over the office. The plaintiff then went to Jamieson's office in a highly agitated manner - Jamieson said "she was vibrating she was so agitated." She said to him "I have never been so fucking mad in all my life." Jamieson was extremely shocked at her manner and language. He was very upset. The plaintiff told him that from what she observed of Kane and Findlay during the meeting, and the fact that they got up and left before the meeting ended, led her to conclude that they were pre-prospecting - that is, they were rushing away from the meeting so that they could place the names of leads in their data bases that they had taken from their perusal of the WCB magazines.

[106] Jamieson went to Mui and asked her not to approve the entry of any new accounts until she heard further from him. Mui told him that no new accounts had been sent to her for approval. Jamieson then told the plaintiff that her accusations were wrong. The plaintiff left Jamieson's office and Jamieson told Linh what had happened.

[107] Jamieson testified that he was extremely upset over the incident. He felt that the plaintiff should perhaps not be a member of AIP as had earlier been told to him by Linh and Findlay. He said that she was rude and disrespectful to her colleagues and to the new client. He told Linh that he was now thinking of dismissing the plaintiff.

[108] The end result was that the plaintiff admitted that she had overreacted and she sent apology emails to Jamieson, Kane and Findlay, although Findlay and Jamieson feel that the apology to Findlay was half-hearted and ingenuine.

[109] However, the important aspect of this incident is that Jamieson did not respond to the plaintiff's email of apology. He did not warn her that she had better change her conduct, nor did he raise up his allegations of her earlier bad conduct. On the contrary, according to Linh's testimony, he told Linh that he was concerned about AIP's sales numbers, that he was going to think about what he should do, but he was not going to dismiss the plaintiff.

[110] It seems implausible in the extreme that if Jamieson was seriously thinking that the plaintiff was not the kind of person he wanted as part of the AIP team that he would not have taken steps following the WCB incident to discipline or dismiss her. According to the defence witnesses, Jamieson had been told for months prior to this incident that he would lose staff if the situation surrounding the plaintiff's conduct was not corrected. If the meeting in November was intended to correct the plaintiff's behaviour as Jamieson alleged, then obviously it had not corrected anything given his shock and upset over the plaintiff's conduct at the WCB meeting. Yet, despite all of this he claims that he was thinking of dismissing her, but kept her on for business reasons. It does not make sense to me that he would continue to risk losing all of his irreplaceable staff over one sales person, even if she was most successful. I find that Jamieson did accept the plaintiff's apology and did, as the plaintiff testified to, tell the plaintiff that the incident was "ancient history".

[111] This brings me to the employment standards issue. I am entirely satisfied on the basis of the evidence which I do accept that this was the incident which in fact ultimately led Jamieson to dismiss the plaintiff from his employ. I reject the defence contention that it had nothing to do with her dismissal. I think it had everything to do with the plaintiff's dismissal given the unfolding of the events following the plaintiff raising the issue with Findlay and Jamieson.

[112] According to Jamieson's testimony, on December 16, 2002, Findlay came to his office and told him about the issue raised by the sales persons over vacation and statutory holiday pay. Jamieson then asked Linh to look into the matter. He then asked the plaintiff and Kane to come to his office. He told them that Linh was looking into the issue and that he had always understood that vacation and statutory holiday pay were included in the commission payments to them. He also told them that they should put together their calculations of the amount owing to them. Jamieson said there was no agitation at the meeting and that the plaintiff and Kane were fine with his position.

[113] There was another meeting a couple of days later but neither side had organized their calculations. Jamieson recalled having a conversation with Kane asking him to get his figures together so that he could finalize the matter. He said that if he was a little upset at the time it was because the plaintiff and Kane were not reporting back to him with their calculations.

[114] On December 18th, Jamieson had a meeting with the plaintiff and Linh. He told the plaintiff that nothing intentional was done to short pay her and that he fully believed that the amount she was seeking was part of her commission. He also told her that unlike what other firms might do in a financial downturn, he would not roll back her salary. He asked the plaintiff if she would be willing to forgive part of what she

was owed and the plaintiff said "well that speaks volumes about you".

He did not know what she meant at the time. The meeting ended. He was not upset.

[115] Jamieson said he had a meeting with Kane and told him the same thing he had expressed to the plaintiff. He said they had a reasonable meeting.

[116] Jamieson denied that he was harassing the plaintiff over the issue. He said that all he did was on a few occasions ask the plaintiff and Kane for their figures, which they did not produce in a timely way.

He also said that the new compensation package presented to the sales persons around the same time was a necessary step given the requirements of employment standards.

[117] I do not accept Jamieson's testimony on this point. Firstly, although he said that the amounts involved in the employment standards issue were miniscule, and that it was strictly a clerical thing, why then did he try and get the plaintiff and Kane to forgive at least part of the amounts owing to them. He also mentioned that Kane was paid \$3,800, which, he said, was a lot because the finances at AIP were tight, and, as already mentioned, he told the plaintiff that he would not roll back salaries as other firms might do in a situation of financial strain.

[118] I find that the raising of the employment standards issue by the plaintiff put an additional strain on the already tight financial circumstances at AIP, circumstances which had already required Jamieson to cash some of his RRSP's and invest a substantial amount of his own funds in AIP. I am satisfied that the evidence of the plaintiff, Kane and Rodrigue describing Jamieson's demeanour at the time is an accurate and reliable reflection of his reaction to the plaintiff raising the employment standards issue.

[119] I accept the plaintiff's testimony that the day after the issue was raised with Jamieson by Findlay he approached the plaintiff's desk. He was furious with her. The plaintiff and Jamieson had a discussion. The plaintiff thought that she and Jamieson could work it out, but instead he remained angry with her.

[120] When the plaintiff received Linh's calculations she immediately recognized that they were not accurate. There was also a meeting between the sales persons, Jamieson and Linh when, according to the plaintiff, they tried to convince the sales persons that the new compensation package presented to them was a better arrangement.

However, the plaintiff did not agree with the proposal, but Jamieson told her that it was not up for negotiation. As for the calculations done by Linh on the amount owing to the plaintiff for employment standards, the plaintiff noticed that an amount had been deducted for sick days that she had taken off to look after her daughter. She said that Jamieson was reneging on his decision to forgive her these days.

The plaintiff said that when this happened she lost all respect for Jamieson.

[121] The plaintiff's calculation of the amount owing to her was \$10,000. Jamieson offered to pay her \$2,700, and told her that he was doing her a favour by not rolling back her salary. The plaintiff said that Jamieson kept pressing her and Kane for their calculations. They

made it clear they were seeking help from outside AIP to calculate what they were owed. The plaintiff took exception to Jamieson badgering her and said that he was antagonistic towards her. According to the plaintiff, after the employment standards issue was raised Jamieson was "jerking her chain" and harassing her. She said that after the issue was raised she "could not part her hair" without harassment.

[122] While there may be some slight exaggeration by the plaintiff regarding Jamieson's conduct towards her after she raised the employment standards issue, I find that her evidence on this point is mainly reliable. It is certainly corroborated by Kane and Rodrigue whose evidence I also generally accept.

[123] Kane testified that after the issue was raised Jamieson became enraged, that he was beet red in the face when he spoke with Kane and the plaintiff. At a meeting between Kane and Jamieson, Jamieson offered Kane an amount less than what Kane had calculated. Kane decided that rather than litigate the matter he would settle and try and move to another job. He wanted to make sure that he did not give Jamieson cause to dismiss him. At one of the meetings Jamieson held with Kane, Kane said that Jamieson was aggressive with him and that this was out of character for a man who was always pretty composed. He said that after the issue was raised, Jamieson became angry, hostile and impatient and that on occasion he was very "in your face", manipulative and belligerent, that he strong armed Kane just like a school yard bully. It was all Kane could do to remain cool in the circumstances.

[124] Kane testified that after the issue was raised Jamieson would come to the plaintiff's desk and speak to her in a hostile manner. He would raise his voice to her, which was not usual for Jamieson.

[125] Kane ultimately compromised his claim for about 45% of what he felt was owed to him.

[126] Rodrigue testified that after the issue was raised with Jamieson he became agitated and frustrated. She said that when he came to the sales persons area of the office he would direct his remarks to the plaintiff, that he was irritated and cold towards the plaintiff.

[127] Moreover, Linh's insistence that the new commission structure had nothing to do with the employment standards issue seems completely incredible given that a new compensation package was put before the sales persons one month after AIP's budget review process, which was the most obvious time to make a change, and only two days after the employment standards issue arose.

[128] Thus, I find that the atmosphere in the office after the employment standards issue was raised was one of antagonism by Jamieson towards the plaintiff, and it is in this atmosphere that I think what happened to the plaintiff in early January 2003 must be measured.

[129] According to the defence, it was on January 6th that the Pezim incident took place. Jamieson had returned to AIP on the 6th after the Christmas break and there was a message waiting for him dated January 2nd to call Mr. Draper. When he called Mr. Draper on January 6th, he insisted that Jamieson take the plaintiff off the Dr. Pezim account. Jamieson approached the plaintiff, leaned over her desk and told her that Mr. Draper had called and wanted her removed from the account and

that it was the first time he had a request from a publisher to remove a sales person from a client account. Jamieson claimed that when he told this to the plaintiff that she mocked him by saying sarcastically "very first time" and writing these words on a note pad. He said that it was the first time that the plaintiff had displayed this kind of insubordination towards him.

[130] The plaintiff conceded that she probably did mock Jamieson, but she explained that the gloves were off. She said that from the time that the employment standards issue was raised Jamieson had been nasty towards her, that he had a scowl on his face the whole time and she felt that he was taunting her about the Dr. Pezim incident because he now had something he could harass her about.

[131] On January 7th the plaintiff sent the following email to Linh, with copies to Kane and Rodrigue:

Linh, further to my request for clarity below...

Since Ian and I agreed that I would (as of Jan 1/03) work a 4 day week and continue to strive for a \$400,000 budget at no disadvantage to me except possibly a small amount of lost opportunity, I have made a series of personal (Friday) appointments commencing this upcoming Friday.

However, since it appears as though our agreement may have fallen by the wayside with AIP's new proposed wage structure, and I am left in the position of questioning whether or not the company's intention is to "charge me back", and therefore considerably disadvantaging me.

Please advise me at your earliest convenience with respect to time out of the office, and specifically, to my original agreement entitling me to Fridays off without penalty.

[132] When Jamieson saw the email and that it had been copied to Kane and Rodrigue he went to the plaintiff's desk and told her that her compensation package was confidential and that she was not to copy this kind of information to the other sales persons. The plaintiff disagreed stating that Kane and Rodrigue were part of the process. Jamieson repeated his position. He testified that the plaintiff then got up from her desk and followed about 6 inches behind him saying "O.K. Ian, we will do it your way - your way is the only way - your way is the best way." He said that her voice was totally audible to all around. At that point he said he realized that the plaintiff had to be dismissed because if he did not he would have lost the respect of every staff member, that those that threatened to leave would leave and that it was essential to his business.

(ii) Conclusion

[133] In my opinion, the defence has failed to prove, on a balance of probabilities, that the incidents alleged, individually or cumulatively, constitute cause to dismiss the plaintiff without notice.

[134] The main thrust of the defence case is that the plaintiff was poisoning the office environment to such an extent that by the fall of 2002 Findlay, Mui and Judy were all threatening to leave AIP. In my view, this assertion has not been made out by the defence.

[135] First, there is not a single contemporaneous document put in evidence by the defence to support the contention: no notes, emails or memorandum have been produced which serves to corroborate the allegation that Jamieson was on the verge of losing his administrative staff if he did not dismiss the plaintiff.

[136] Second, even though, according to the allegations of the defence witnesses, the plaintiff's impugned behaviour did not improve, Findlay, Mui and Judy did not leave AIP. No explanation was given for this inconsistency.

[137] Third, Jamieson never told the plaintiff that Findlay, Mui and Judy were threatening to leave AIP on account of her behaviour, and he certainly never told her to alter her behaviour except for his alleged general comments to her at their meeting at the end of October, and in his opaque November 1st memorandum. I reject the defence position that the November 1st memorandum was aimed at the plaintiff, or that it served as a warning to the plaintiff, or that her December 5th apology was a self warning.

[138] I agree with the plaintiff's position that it strains credulity to suggest that, while he was facing an imminent staff revolt over the plaintiff's conduct that Jamieson never talked to the plaintiff about it, or to suggest that the November 1st memorandum brought home to the plaintiff that she had to change her behaviour, or that her email to Jamieson on November 4th established her acknowledgment of this. Her email reads, as follows:

Ian, I just wanted to say that I felt good about our meeting on Friday afternoon.

I hope it will be motivating for all and I'm not sure how long we can wait around to see if it is. Not only do we have to do well in 2003, but we also have to fill in the hole we dug in 2002. I think we should move forward with Rebecca sooner than later, as it will take a bit of time.

It is my sincere wish that we get a handle on what we need to do increase our performance. It's very unfortunate that AIP has to suffer because we have not figured out how to either:

1. get a total commitment from all our sales staff
2. what to do with staff what will not comply to our needs

I am becoming very concerned about our future.

Not the most positive way to start out the week, but I wanted to add my comments (for what they are worth) to conclude our meeting.

Please let me know what I can do to help.

[139] I agree with the plaintiff that a plain reading of the email suggests the opposite of the defence contention on this point.

[140] Fourth, it also strains credulity that in light of her allegations about the plaintiff's behaviour that, as sales manager, Findlay did not create a single note, email, or memorandum to document the events. It places great doubt on the credibility of her assertions about the plaintiff that she failed to confront the plaintiff even once

about her behaviour, or take any disciplinary action, or that she could fail to talk to Jamieson about her allegations until months later. It is not good enough, in my view, for her to suggest, as she did, that discipline or dismissal was only Jamieson's responsibility. The Manual provides that the responsibility for determining the need, appropriateness and degree of discipline is a function of the manager to whom the individual reports and that the need for dismissal will be at the discretion of the principal and/or manager.

[141] The law provides that, in some situations, an employer has a duty to warn an employee about the consequences of continued misconduct, rather than dismiss them summarily. The Manual says as much. In the instant case, Jamieson conceded that he did not follow the progressive discipline policy set out in the Manual.

[142] Fifth, prior to December 16th the plaintiff was not told of the allegations of the defence witnesses or given any warning that her alleged misconduct was a matter of serious significance and that its continuation could place her employment in jeopardy. Moreover, if, as Jamieson contends, the grounds for the plaintiff's dismissal happened in the last three days of her employment then I find that the plaintiff's dismissal cannot be justified on those grounds either. First, Jamieson conceded that the Dr. Pezim incident did not place AIP at risk.

Further, even though Jamieson claimed at trial that quite apart from the plaintiff's attitude towards him when he raised the issue with her, he also relied upon the substantive complaint from the client, the evidence as a whole established that he did not believe, nor did he tell the plaintiff that she had done anything wrong in relation to this client.

[143] As for the conflict between the plaintiff and Jamieson over the January 7th email, Jamieson conceded that it was up to the employee if she wanted to keep her compensation package private. In any event, the evidence as a whole established that it was no secret in the office that the plaintiff had reached an agreement with Jamieson to work a 4 day week, and the budget figure mentioned in the email was also no secret. This incident was a tempest in a teapot.

[144] In the result, I am satisfied, and find, on the whole of the evidence, that Jamieson dismissed the plaintiff mainly because she raised legitimate issues under the **Employment Standards Act**. Thus, I find that Jamieson cannot rely upon the many incidents that he particularized as grounds only after the plaintiff's dismissal to deny her a claim for severance pay. The plaintiff is therefore entitled to damages for wrongful dismissal.

V. DAMAGES

[145] Among the factors to be considered in the determination of the notice period are those identified in the leading case of **Bardal v. Globe and Mail Ltd.** (1960), 24 D.L.R. (2d) 140 (Ont. H.C.) at p. 45:

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

experience, training and qualifications of the servant.

[146] The list in *Bardal*, supra, is not exhaustive, but the enumerated factors are the most important: See *Ansari v. British Columbia Hydro and Power Authority* (1986), 2 B.C.L.R. (2d) 33 (S.C.)

[147] On the issue of whether the period of notice should be increased because of the manner of dismissal, the law provides that either an employer or employee may terminate a contract of employment at any time absent an express provision to the contrary, but the employer must act with good faith and fair dealing in the manner of discharge. Failure to do so is a factor to be taken into account in the determination of the notice period: See *Wallace v. United Grain Growers Ltd.* (1997), 152 D.L.R. (4th) 1, where at paras. 93 to 96 Iacobucci J. said, as follows:

This unequal balance of power led the majority of the Court in *Slaight Communications*, supra, to describe employees as a vulnerable group in society: see p. 1051. The vulnerability of employees is underscored by the level of importance which our society attaches to employment. As Dickson C.J. noted in *Reference Re Public Service Employee Relations Act (Alta)*, [1987] 1 S.C.R. 313, at p. 368, 3: D.L.R. (4th) 161:

Work is one of the most fundamental aspects in a person's life, providing the individual with a means of financial support and, as importantly, a contributory role in society. A person's employment is an essential component of his or her sense of identity, self-worth and emotional well-being.

Thus, for most people, work is one of the defining features of their lives. Accordingly, any change in a person's employment status is bound to have far-reaching repercussions. In "*Aggravated Damages and the Employment Contract*", supra, Schai noted at p. 346 that, "[w]hen this change is involuntary, the extent of our 'personal dislocation' is even greater."

The point at which the employment relationship ruptures is the time when the employee is most vulnerable and hence, most in need of protection. In recognition of this need, the law ought to encourage conduct that minimizes the damage and dislocation (both economic and personal) that result from dismissal. In *Machtiger*, supra, it was noted that the manner in which employment can be terminated is equally important to an individual's identity as the work itself (at p. 1002). By way of expanding upon this statement, I note that the loss of one's job is always a traumatic event. However, when termination is accompanied by acts of bad faith in the manner of discharge, the results can be especially devastating. In my opinion, to ensure that employees receive adequate protection, employers ought to be held to an obligation of good faith and fair dealing in the manner of dismissal, the breach of which will be compensated for by adding to the length of the notice period.

This approach finds support in the words of my colleague, Gonthier J., in *Farber*, supra. Writing for a unanimous Court he stated at p. 859:

...for the employment contract to be resiliated, it is not necessary for the employer to have intended to force the employee to leave his or her employment or to have been acting in bad faith when making substantial changes to the contract's essential terms. However, if the employer was acting in bad faith, this would have an impact on the damages awarded to the employee.

[148] I have found that the conclusion to be drawn from the evidence as a whole is that Jamieson dismissed the plaintiff because she raised the employment standards issue. On January 9, 2003, the plaintiff was dismissed without warning or notice, and with only the explanation from Jamieson, "Insubordination...there's a list." At that point in time, the plaintiff, who had been with AIP since May 2000, had become a very successful sales person, second only in sales to Kane, the top sales person. She was just hitting her stride with her client data base and sales skills and had achieved her goal of working a 4 day week when she was dismissed without ever having been reprimanded or rebuked for her work ethic or conduct in any way. She was devastated by her dismissal. Although the plaintiff had weathered many severe family traumas in the past, this event sent her into a state of shock and depression. She testified, as follows:

Q All right. Now, I want to come back to this issue of the effect of the dismissal on you for a moment. Vis-à-vis your relationship with Mr. Jamieson, who you described as a friend, how did you - how did you feel about this dismissal?

A I felt betrayed.

Q Why?

A I - well, it was very confusing. I - I thought that whatever information may have been brought to Mr. Jamieson that led him to that conclusion, he would have dispelled because he knew me. So I believe that because of the money that was at stake, he either altered events to justify firing me, or he chose to believe untruths that were brought to him that led him to the same end.

Q Now, we've heard some evidence yesterday that you have dealt with a number of very serious adversities in your family over the preceding years. Do you recall hearing that evidence?

A I do.

Q Do you disagree with that evidence in any way?

A It's very accurate.

Q Was there anything different about this adversity in terms of your experience?

A I think probably the reason why I was not able to manage it as well as I've managed the other challenges that we spoke of is because this time it was about me. It was a very personal thing. And I think it's a lot easier to - easier to handle problems and find solution to your stresses and - and your challenges when it's about somebody else. And quite frankly, I was very proud of my position at Advertising In Print. I thought I did an excellent job for them. I had an enviable

relationship with Mr. Jamieson. And I - I - I really was - I really was hurt, shocked, betrayed. I felt that I had been singled out to take the fall for this Employment Standards issue, which had ended up causing so much controversy. You know, Brent used an expression. He said, Ian thought that he was going to lose us all. And so he thought if he would cut off the head, the body would die. And that was - I wondered if - if that's what it was - was all about as well.

[149] The degree of the trauma suffered by the plaintiff over her dismissal is entirely borne out by the uncontroverted and persuasive evidence of her family doctor, Dr. Craig Bergstrom. In his letter to plaintiff's counsel dated June 9, 2003, Dr. Bergstrom told the doctor when she visited him on January 10th that she had been wrongfully dismissed and that she was being targeted by Jamieson.

[150] Dr. Bergstrom also said that it was his belief that the plaintiff had suffered a significant depression related to her dismissal from her job. He said that he had never seen the plaintiff as distraught as she was in January 2003 with the events related to her dismissal. He opined that due to the plaintiff's strength he believed that she would make a good recovery eventually, be able to actively return to the workplace and would be an excellent employee in some other capacity.

[151] In his cross-examination, Dr. Bergstrom said that when he saw the plaintiff on January 10, 2003, she appeared angry, upset and lost. He said the best way to describe the plaintiff's emotions at the time is that she was "extremely hurt". When defence counsel suggested to him that there was no difference between the depression the plaintiff was suffering in 2002, and what he observed when he examined her in January 2003, the doctor disagreed. He felt that having known the plaintiff for a long time and her personal circumstances, he knew how the plaintiff dealt with events in her life. He had never seen her as distressed as she was in January 2003. He felt that her dismissal from AIP was an, "Acute event in her life." The doctor strongly disagreed with counsel that the plaintiff's depression in January 2003 was related to family issues. He concluded that she was clinically depressed and called her a "straight shooter".

[152] On the defence position that the plaintiff failed to mitigate her damages, the plaintiff conceded that she did not seek full-time replacement employment during the claim notice period, although she did seek and obtain some part-time employment.

[153] The defence has the burden of proving that first, there was a lack of effort on the employee's part to search for alternative employment; second, that comparable employment was available had the employee made appropriate effort to secure it: See **Litster v. British Columbia Ferry Corp.**, [2003] B.C.J. No. 817 (S.C.)(QL), at para. 112.

[154] I find that the defence has not met the burden on this issue.

There is little evidence that reasonable replacement employment was available to the plaintiff. In any event, I agree with the plaintiff that it was perfectly reasonable for her to not seek full-time replacement employment, in all of the circumstances: she had a history of working part-time for family related reasons; she had left part-time employment to take employment at AIP; from the outset she wanted to work only part-time at AIP and had achieved her goal just before she was

dismissed; the plaintiff was depressed as a result of her dismissal, a fact established by Dr. Bergstrom. She felt she had done an excellent job at AIP. She was really hurt, shocked, felt betrayed and singled out to take the fall for the employment standards issue; the plaintiff needed some time to prepare and pursue her claims against AIP; had the plaintiff sought replacement employment in the same capacity she held at AIP she would have had to start from scratch, as she essentially did at AIP, to build up a new data base of clients. Following her dismissal she did not feel she had the strength for such an undertaking. She felt pretty beat up and bruised by the experience.

[155] On the whole of the evidence, I find that the plaintiff is entitled to 3 months notice. I also find that the period of notice should be increased based upon the principles set out in *Wallace*, supra. Thus, I find that the notice period should be extended by 2 months for a total of 5 months notice. The plaintiff is entitled to damages in the amount of \$18,750, based upon a figure for the plaintiff's annual earnings in the amount of \$45,000.

[156] The plaintiff also seeks payment for future commissions in the amount of \$28,960.54. Her counsel submitted that commissions are earned at the time the advertising contracts are booked and that some contracts book advertising well into the future. The plaintiff's estimate of her contracts for future advertising that have been cancelled is 5.9%. However, counsel said that applying a generous discount of 20% for cancellations, the plaintiff should still be awarded a sum of \$23,168.

[157] The Manual provides that, "Upon termination of employment, Account Executives will not be entitled to any compensation for advertising booked into the future as per industry standard. The last pay cheque will include that month's gross total less any source deductions." The plaintiff argued that the clause cannot be said to have intended that it applied to wrongful termination, because to do so would mean that Jamieson could dismiss a successful sales person without cause at any time and keep the fruits of the labours of the wrongfully dismissed sales person.

[158] In my opinion, the plaintiff cannot claim future commissions. The Manual was presented to the plaintiff in draft form. She had ample opportunity to consider this clause which in plain language precludes a claim for future commissions more than 30 days out. The evidence of the defence, confirmed by the plaintiff, is that when the Manual was reviewed with her, she said about this clause, "Sounds good to me." The plaintiff is a most intelligent, articulate and direct person with a very enquiring mind. I do not think it lies in her mouth to now assert that she did not understand the clause to apply to a wrongfully terminated sales person. I do not agree with her counsel's arguments on this issue. I find that the plaintiff accepted the clause as part of her employment contract, that she continued in her employment understanding perfectly well what the clause meant and that she is not entitled to payment for future commissions beyond the provisions of the Manual.

[159] Moreover, I dismiss the plaintiff's claim for overtime in the amount of \$14,384.43, according to her calculations. The defence not only disputes the claim but also the plaintiff's calculations. The plaintiff testified that she routinely worked a couple of hours of

overtime a day and that Jamieson condoned her working overtime.

[160] I think that the evidence clearly establishes that Jamieson never demanded overtime of the plaintiff. On the contrary, the plaintiff at the time of her hiring was seeking part-time employment. Jamieson was only interested in hiring the plaintiff on a full-time basis but stressed to the plaintiff, as he did with all of his employees, that one of the great advantages of employment at AIP was that the sales persons did not have to work outside of normal business hours to achieve their budgets. Thus, I do not consider it fair or reasonable to award the plaintiff payment for overtime when Jamieson never demanded overtime of her and when, in my view, there is no evidence to support that he either directly or indirectly required the plaintiff to work overtime. The evidence is consistent that the plaintiff was encouraged to leave the office at quitting time. She chose on her own accord to come early and stay late on occasion and cannot now claim that she is entitled to compensation from Jamieson under this head.

[161] There is no contest between the parties that the plaintiff is entitled to vacation pay in the amount of \$1,710.97, and to statutory holiday pay in this same amount.

VI. SUMMARY

[162] I award the plaintiff 5 months pay in lieu of reasonable notice: the plaintiff is entitled to damages in the amount of \$18,750. She is also entitled to receive from Jamieson the total amount of \$3,421.94 for vacation and statutory holiday pay. Her claims for future commissions and overtime are dismissed.

[163] I make no order as to costs. In the event that the parties are unable to reach an agreement on costs they have liberty to apply.

"B.I. Cohen, J."
The Honourable Mr. Justice B.I. Cohen