

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***Chapple v. Umberto Management Ltd.***,
2009 BCSC 724

Date: 20090601
Docket: S077794
Registry: Vancouver

Between:

Sarah Chapple

Plaintiff

And

**Umberto Management Ltd. and
Il Caminetto Di Umberto Restaurant (1982) Ltd.**

Defendants

Before: The Honourable Madam Justice Gropper

Reasons for Judgment

Counsel for Plaintiff

N. R. Howell

Counsel for Defendants

A. P. Devine

Date and Place of Trial/Hearing:

October 20 – 24, 2008
March 16 – 20, 2009
Vancouver, B.C.

Introduction

[1] The plaintiff, Sarah Chapple, claims that she was wrongfully dismissed from her employment by the defendants after 13 1/2 years. The defendants say that she was suspended, not terminated.

[2] Ms. Chapple was employed by the defendants at its restaurant, Il Caminetto, in Whistler, as a restaurant manager. Her last evening of work was January 20, 2007. An incident occurred at the restaurant that night, which the defendants claim resulted in her suspension. Ms. Chapple says it resulted in her dismissal or constructive dismissal from employment.

Issues

1. Was Ms. Chapple dismissed expressly or constructively by the imposition of an indefinite suspension without pay?
2. If she was suspended:
 - (a) Was a suspension permitted as an implied term of her employment agreement?
 - (b) Was there justification for the suspension?
3. If the plaintiff was dismissed, what are her damages?
 - (a) reasonable notice
 - (b) compensation for gratuities
 - (c) mitigation

Analysis

1. Was Ms. Chapple dismissed or suspended?

Facts

[3] The defendants operate two restaurants in Whistler, British Columbia: Trattoria Di Umberto and Il Caminetto Di Umberto. The owner is Umberto Menghi. Trattoria is casual dining; Il Caminetto features fine dining.

[4] Ms. Chapple started her employment with the defendants as a server at the Trattoria in 1994. In 1999 she was promoted to a management position at Trattoria. In 2005 she moved to a management position at Il Caminetto. In that position she was responsible for making the restaurant presentable, managing staff, and ensuring that the guests' experience met Mr. Menghi's high standards of food quality and service. She would work with a general manager most evenings, although not always. Some nights she would work on her own. She reported directly to Mr. Menghi. She describes him as a "passionate" manager/owner who shared his philosophy about his restaurants with her. Mr. Menghi describes Ms. Chapple as making a valuable contribution to his restaurants.

Events of January 20, 2007

[5] On Saturday, January 20, 2007, Il Caminetto was very busy. Donna Workman, a neighbour of Ms. Chapple, made a reservation for 8:30 p.m. for eight people. Ms. Chapple did not take the reservation for Ms. Workman. She did not recognize Ms. Workman's name on the reservation list as she only knew of her neighbour as "Donna".

[6] When members of Ms. Workman's party arrived, there were guests lined up waiting for tables in the restaurant and in its bar/lounge area. Mr. Menghi and his wife, Marian Menghi, were also in the restaurant that night. They arrived for their reservation at 8:00 p.m. with seven people and were seated immediately. Ms. Workman's party had to wait for a table. Ms. Chapple arranged for drinks before they were seated and antipasto to be available once they were seated in the restaurant.

[7] On most evenings Ms. Chapple worked until the restaurant closed. On this particular night she had planned to leave early. She wished to attend a party in Pemberton. A relatively new manager at Il Caminetto, Michael Graham, was there, and it was arranged that he would close the restaurant that night.

[8] Ms. Chapple says she ensured that all the guests, including the Workman party, were receiving satisfactory service and were happy. She spoke to the chef and to Mr. Graham and other employees to ensure that things were running smoothly and then left by the restaurant's back door. Both bar managers, who tended the bar throughout the evening, said goodbye to Ms. Chapple. One of them, Eric Griffith, saw Ms. Chapple leave through the back door. Mr. Griffith and the other bar manager, Edward Dangerfield, describe Ms. Chapple as happy about leaving early, as it was an unusual event. She was not afraid or upset when she left. Her friend, Stefans Desbiens, picked her up at the back door and they drove off to Pemberton.

[9] Sometime that evening, Donna Workman approached Mr. Menghi's table and told him how angry she was about having to wait so long for a table when she had a reservation. She told Mr. Menghi that he should take better care of the "locals" and that it was inappropriate that he was given her table. Ms. Workman said that she knew Sarah Chapple and implied that Ms. Chapple had taken her reservation and had advised her that Mr. Menghi had taken her reserved table. Mr. Menghi says he was embarrassed and angry. He left the table. He spoke to Mr. Graham who was in front of the bar and told him to find Ms. Chapple. Mr. Graham went to find her.

[10] Mr. Menghi says that he was also looking for Ms. Chapple and met up with her in the hallway leading to the bathroom. He says that he had a conversation in front of the bar. In that conversation, Mr. Menghi says he told Ms. Chapple that Ms. Workman had confronted his table and said that she was a friend of Ms. Chapple's and that Ms. Chapple had given Ms. Workman's reserved table to Mr. Menghi. He says he told Ms. Chapple to go home and that they would "talk tomorrow". He says he told Ms. Chapple to get an apology letter from Ms. Workman.

[11] Ms. Chapple says the conversation did not occur. She had already left when the incident with Donna Workman occurred.

[12] Mr. Menghi says that the conversation with Ms. Chapple occurred in front of the bar. Both bar managers, who were working behind the bar that night, Eric Griffith and Edward Dangerfield, did not observe a conversation between Ms. Chapple and Mr. Menghi. Mr. Graham did not observe the conversation, nor did the

coat check person, Teri Matthews, who was working in the coat check room adjacent to the bar, nor did the hostess, Karmen Cozens.

[13] Two of these employees, Mr. Dangerfield and Ms. Matthews, describe overhearing a conversation between Mr. Graham and Mr. Menghi. Ms. Matthews says that she overheard Mr. Menghi speaking to Mr. Graham. He was about two feet from her, just outside the coat check room. She says that Mr. Menghi appeared very upset and was speaking in an angry tone with his voice raised. She says she heard Mr. Menghi tell Mr. Graham that, “she doesn’t have a job here, she is not welcome here and this was her last night in the restaurant.” After that conversation, Ms. Matthews says she said to Mr. Graham, “who was fired?” to which Mr. Graham said, “it was Sarah”. Ms. Matthews says that was the end of the conversation and Mr. Graham walked away.

[14] Edward Dangerfield learned about the Workman incident from servers who attended the bar to pickup drinks and wine. He saw Mr. Menghi come into the bar/lounge area looking a “little flustered and anxious.” Mr. Menghi was trying to find Sarah. Mr. Dangerfield notes that Mr. Menghi could not find Sarah because she had already left, he had already said goodbye to her. He did not observe a conversation occurring between Mr. Menghi and Ms. Chapple.

[15] Mr. Dangerfield overheard a discussion between Mr. Menghi and Mr. Graham, which occurred near the coat check towards the end of the bar. Mr. Dangerfield describes Mr. Menghi as visibly angry and speaking in a raised voice and doing most, if not all, of the talking. Mr. Dangerfield describes the gist of the

conversation as: “Sarah was done, it was over and it was finished.” Mr. Menghi said, “she was not to set foot in his restaurants again.”

[16] Mr. Menghi denies that the conversation with Mr. Graham in front of the coat check took place.

[17] Mr. Graham recalls a conversation with Mr. Menghi about Ms. Chapple. Mr. Menghi directed Mr. Graham to call Ms. Chapple that evening to ask her for the letter and let her know he wanted to speak to her. Mr. Graham says Mr. Menghi specifically told him that he had suspended Ms. Chapple until she brought in the letter. Mr. Graham does not recall a discussion with Mr. Menghi where he said he was firing Ms. Chapple and that he was tired of her and did not want her to set foot in the restaurant again. Mr. Graham also denies that there was any conversation that occurred at or near the coat check.

Events following the “Workman Incident”

[18] Ms. Chapple says the following day, Sunday, January 21, 2007, she heard that there had been an incident at Il Caminetto. She says she phoned Mr. Graham about 1:00 in the afternoon to find out what had happened. Ms. Chapple says that Mr. Graham told her that her neighbour had gone up to Mr. Menghi’s table and “laid into him” and was quite vocal about how long she had to wait for a table. Mr. Graham told Ms. Chapple that the neighbour (Ms. Workman) had gone on a “tirade”.

[19] Ms. Chapple says that following that telephone call, she phoned Mr. Menghi on his cell phone. She started the conversation by raising the Workman incident.

Ms. Chapple says that Mr. Menghi responded by saying, “that bitch” ruined his evening and humiliated him and it was Ms. Chapple’s fault because Ms. Workman was her friend. Mr. Menghi said he wanted an apology letter. He said: “I am through with your lies and I am finished with you and this has cost you your job”. Mr. Menghi said, “I don’t want you or that bitch ever setting foot in my restaurant again. It cost you your job and you can tell her that.” Ms. Chapple says Mr. Menghi then hung up.

[20] Mr. Menghi has a different version of this telephone discussion. He says that Ms. Chapple told him that she needed her job, to which Mr. Menghi responded, “you have a job but you need to deal with the problems that are occurring”. He also said that he needed a letter of apology from the neighbour about the incident.

[21] Ms. Chapple says that after her conversation with Mr. Menghi, she spoke to Ms. Workman about sending a letter of apology. Ms. Chapple felt that she was responsible for passing that request on. She did not know if Ms. Workman would write a letter or what the contents would be. Ms. Chapple considered her urging Ms. Workman to write an apology letter was the “right thing to do.”

[22] Ms. Workman’s apology letter was delivered to the restaurant on Sunday night. Ms. Workman states in the letter that Ms. Chapple did not take her reservation, did not know her last name, and would not have recognized it in the reservation book; Ms. Chapple did everything that was expected for the waiting guests; Ms. Workman’s understanding that her table was given away to another

party was based on information provided by a hostess; and it was Ms. Workman's perception that her table had been given to Mr. Menghi.

[23] Ms. Workman apologized for her conduct and for disturbing Mr. Menghi's evening. She added, "I do hope you will consider your decision to fire Sarah."

[24] Ms. Chapple says she spoke to Mr. Graham several times over the next couple of days about restaurant matters. She says that there was no discussion between them concerning a suspension.

[25] On Tuesday, January 23, 2007, Ms. Chapple called the defendants' senior accountant, Anju Chawla, to organize receipt of her final papers and pay. Ms. Chawla knew nothing about the Workman incident or about Ms. Chapple being fired but said she would check with the senior vice president, Jahan Khazali. Mr. Khazali spoke to Mr. Menghi and then prepared a letter to Ms. Chapple stating that she was suspended for four days from Sunday, January 21, to Wednesday, January 24, 2007. The letter was not sent to Ms. Chapple; instead, it was given to Mr. Menghi to give to Ms. Chapple when he next went to Whistler.

[26] Mr. Menghi received and read the Workman apology letter that had been transmitted to the defendants' head office in Vancouver on Tuesday, January 23, 2007.

[27] Mr. Menghi says that he was intending to go to Whistler on Thursday, January 25, 2007. He wanted to speak with Ms. Chapple and hear her side of the story. He had not made a decision about whether or not he would suspend Ms.

Chapple. Mr. Menghi asked Mr. Graham to arrange a meeting with Ms. Chapple on Thursday, while Mr. Menghi was in Whistler. When Mr. Menghi was in Whistler, Ms. Chapple did not meet him. Mr. Graham says that he tried to get in touch with Ms. Chapple and that he left a message, but he learned that Ms. Chapple was in Toronto.

[28] In the early morning of January 25, 2007, Ms. Chapple left Whistler to fly to Toronto to attend her half-brother's christening. She intended to return on January 29, 2007. Ms. Chapple says that she made the arrangement to go to Toronto after she discussed it with Mr. Menghi and Mr. Menghi approved her leaving for a few days. Mr. Menghi denies that such a conversation occurred.

[29] Mr. Menghi says that before he went to Whistler on Thursday, January 25, 2007, he had not decided whether to impose a suspension on Ms. Chapple. He wanted to meet face to face with her and get her side of the story. They did not meet on January 25, 2007, so he did not give her the letter. He says that he still had not decided to suspend her.

[30] On Friday, January 26, 2007, Ms. Chapple's fiancé, Aaron Harvey, went to the Trattoria to pick up Ms. Chapple's papers and her final cheque. When he saw the cheque, he says he was surprised as he expected it to be bigger and include severance pay. He called Ms. Chawla. Ms. Chawla says she told Mr. Harvey that Ms. Chapple had been suspended. Aaron Harvey disagrees and says that Ms. Chawla did not mention the word "suspension", and that if she had, he would have recalled it as it would have, "changed the whole situation."

[31] By Wednesday, January 31, 2007, Ms. Chapple says that she still had not heard anything about being suspended. She sent a letter to Mr. Menghi that day. Mr. Menghi called her and left a message. She returned the call on February 1, 2007, to head office and left a message that she would call Mr. Menghi when she returned to Whistler from Toronto on February 4, 2007. Ms. Chapple called a second time and left a message that she had reconsidered and that she did not have any reason to speak with Mr. Khazali or Mr. Menghi.

[32] Mr. Menghi responded to Ms. Chapple's letter by letter dated February 1, 2007, which was emailed to Ms. Chapple on February 6. In the first paragraph he says:

[Y]ou have mentioned in your letter that you were advised that your services were terminated but that is not the case, I had asked you that till I get the letter from the customer your services are suspended and not terminated.

[33] Mr. Menghi continues: "I came to Whistler on January 25th and I could not get hold of you." In the last paragraph of the letter, Mr. Menghi says:

As far as I am concerned you were suspended not fired if you do not want to come to work please let me know so that appropriate paperwork is done. If you would like to talk to Jahan or me you are more than welcome.

[34] Mr. Menghi says that this was the first time that he mentioned a suspension, because that was when he decided that a suspension was appropriate. He says that until she received this letter, Ms. Chapple would not have known that she was suspended.

[35] Ms. Chapple responded on February 8, 2007, by letter delivered to Mr. Menghi by fax. In the letter she states she was not told that she was suspended, rather than terminated; she had received no messages from Mr. Menghi or Mr. Graham advising that she should speak with or meet with Mr. Menghi; the word in the restaurant community was that she had been fired and her credibility and work ethic were in question. She requested severance pay of 13 months.

[36] On the same day, in a matter of hours later, Mr. Graham asked Ed Dangerfield to type a letter on his behalf to Mr. Khazali. Mr. Graham says he was instructed to record his attempts to contact Sarah and did so by stating, “an attempt to contact Sarah on the 25th of January was unsuccessful.” Edward Dangerfield says that Mr. Graham told him that the letter was to say that Mr. Graham had suspended her. In fact the letter says: “she was temporarily suspended.”

[37] On February 13, 2007, Mr. Menghi wrote to the plaintiff. He reiterates that she was suspended, not terminated. He directs Ms. Chapple to return to work. Mr. Menghi explains that his delay in “dealing with the matter promptly” was as a result of Ms. Chapple not being available while he was in Whistler on January 25, 2007. The letter says, “as I told you in my earlier letter, your fiancé advised on the following day (January 26) that you were in Toronto”.

Position of the parties

[38] The plaintiff maintains that she was terminated from her employment on January 21, 2007, either expressly or constructively. The defendants’ position is that she was suspended without pay. The distinction is important; if the plaintiff was

wrongfully terminated she is entitled to damages in lieu of reasonable notice of termination; if she was suspended and did not return to work, she is considered to have quit and is not entitled to damages.

Decision

[39] The issue between the parties will be resolved by a determination of what took place on Saturday evening, January 20, 2007, and following. There are essentially two versions: Ms. Chapple's version is that she left the restaurant before the Workman incident occurred and learned about it from Mr. Graham and Mr. Menghi the next day. Mr. Menghi says that he spoke with Ms. Chapple after the Workman incident occurred on Saturday, January 20, 2007, at the restaurant and told her to go home, they would talk tomorrow, and that Ms. Chapple should get an apology letter from Ms. Workman.

[40] Ms. Chapple and Mr. Menghi also differ about the contents of their telephone conversation on Sunday, January 1, 2007. Ms. Chapple says that Mr. Menghi told her that he was through with her and her lies; he did not want Ms. Chapple "or that bitch" in his restaurant again; and the incident had "cost your job and you can tell her that". Mr. Menghi says that during the telephone conversation he told Ms. Chapple that she had to stay home until she provided him with an apology letter from Ms. Workman and he had an opportunity to speak to her about, "problems that were occurring at the restaurant" (which included the Workman incident and another matter which arose on New Year's Eve).

[41] In order to resolve the significant conflicts in the evidence, I must make a finding of credibility. The test for assessing the credibility of witnesses is stated in

Faryna v. Chorny (1952), 2 D.L.R. 354 (B.C.C.A.) as follows at ¶11:

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

[42] In respect of the events of January 20, 2007, at Il Caminetto, Mr. Menghi says that his conversation occurred with Sarah Chapple in front of the bar in the bar/lounge section of the restaurant. No other witness describes seeing Mr. Menghi speaking to Ms. Chapple after the Workman incident at that place, except Marian Menghi, who did not see the conversation, but had that impression. The second conversation, between Mr. Menghi and Mr. Graham, is described in the evidence of Edward Dangerfield and Teri Matthews. They both describe Mr. Menghi as being angry and saying that Ms. Chapple no longer had a job at Il Caminetto, and that she was not welcome in Mr. Menghi's restaurants. Mr. Menghi denies that such a conversation occurred. Mr. Graham's evidence is that he does not recall such a conversation.

[43] With regard to the telephone conversation on Sunday, January 21, Ms. Chapple's version is that Mr. Menghi said that he was "finished" with her and the Workman incident had "cost you your job". She says that Mr. Menghi said that

neither she nor Ms. Workman were to come to his restaurant again. Mr. Menghi says he assured Ms. Chapple that she had a job but that she needed to deal with some problems and that he needed a letter of apology from Ms. Workman.

[44] Which version makes sense in the circumstances? I find the evidence supports the conclusion that Ms. Chapple had left the restaurant before the Workman incident took place. She had said goodbye to her coworkers, including Mr. Graham, and Eric Griffith saw her leave the restaurant by the back door. She was picked up by her friend Mr. Desbiens from the back door. All of the witnesses, but for Mr. Menghi, say that they did not see her that evening when the Workman incident occurred or after. As I have found that Ms. Chapple had already left when the Workman incident occurred, I find that Mr. Menghi's version of the events – that he in fact spoke to her after the Workman incident – is unsupportable.

[45] I further find that the conversation that two witnesses heard, between Mr. Graham and Mr. Menghi, did take place. Mr. Menghi denies this. Mr. Graham could only offer that he did not recall it. There is no explanation as to why two independent witnesses would describe the same conversation, occurring at the same place, if it did not occur. Neither Ms. Mathews nor Mr. Dangerfield resiled from their evidence that they overheard the conversation between Mr. Menghi and Mr. Graham, or that the contents of the conversation were as they each described.

[46] I also find that the telephone conversation between Mr. Menghi and Ms. Chapple on Sunday, January 21, 2007, was as Ms. Chapple describes. It is consistent with what Mr. Menghi was overheard to have said to Mr. Graham near the

coat check room the previous evening. Further, Mr. Menghi's version does not make sense in the circumstances. He says that he had not decided to suspend Ms. Chapple at that time. Thus, he would not have told her that she was suspended. Further, Ms. Chapple would have understood, if the conversation occurred as Mr. Menghi describes it, that she had a job and that she was to stay home until she had both obtained an apology letter from Ms. Workman and discussed problems in the restaurants with Mr. Menghi.

[47] Taking a step back from the specific conversations and looking at the circumstances as a whole, Mr. Menghi's version does not harmonize with the preponderance of probabilities. Sarah Chapple was a committed employee at Il Caminetto. Mr. Menghi says that she made a valuable contribution to the restaurant. There is no evidence from which I can conclude that she did not wish to continue in that position. There is no evidence that she was irresponsible. She had a career in the restaurant and hospitality industry with the defendants at Whistler for 13 1/2 years. She lived in Whistler. There is no suggestion that Ms. Chapple was unhappy with her employment conditions. To accept Mr. Menghi's version of his conversation with her at the restaurant just after the Workman incident, or the contents of the January 21 phone call, means that in spite of his assurances that she continued to be employed at Il Caminetto, she refused or neglected to provide what he had asked of her. It means that she simply did not return to her duties as manager of Il Caminetto. If Mr. Menghi considered her services to be valuable, why would he not take active steps to get her back to work immediately? The only explanation for the conduct of both Ms. Chapple and Mr. Menghi following the Workman incident is that

they both knew that their relationship, as employer and employee, was over. There was nothing more to discuss or to do.

[48] The defendants argue that Ms. Chapple's asking Ms. Workman to write a letter of apology supports what Mr. Menghi describes as the contents of the phone call. Why would Ms. Chapple take steps to obtain the apology letter from Ms. Workman if she had been fired? Ms. Chapple agrees that Mr. Menghi asked for a letter of apology from Ms. Workman, which Ms. Chapple asked Ms. Workman to provide. The fact that Ms. Chapple asked Ms. Workman to prepare the letter does not necessarily support a conclusion that Ms. Chapple understood that she was still employed by the defendant. Ms. Chapple thought it was the, "right thing to do." It was not just the right thing to do if she was still employed by the defendants. The fact that she sought the letter from Ms. Workman is not only consistent with the defendants' version of the events; it is also consistent with Ms. Chapple's version.

[49] Both Mr. Menghi and Mr. Graham state in their letters that they tried to contact Ms. Chapple following the Workman incident and particularly in order that she could meet with Mr. Menghi on January 25, 2007. Neither refers to having left her a message. Ms. Chapple says that she did not receive any messages from Mr. Graham or Mr. Menghi. I cannot accept that Ms. Chapple was difficult to contact. Her employer had her home phone number, her cell phone number, her email address, and her home address. There is no evidence that a voicemail was left for her, that she was contacted by email, or that an attempt was made to deliver a letter to her home.

[50] Further, as I have found, Ms. Chapple was a serious, committed, and responsible employee. If she knew she was suspended, or even if she knew there were some things Mr. Menghi required before she could return to work (the apology letter and a discussion of the “problems”), she would have moved on getting things straightened out. She would have been in contact with Mr. Graham and Mr. Menghi. She would not have left Whistler five days later without resolving the outstanding matters.

[51] The evidence is clear that Ms. Workman provided a letter of apology and that it was delivered to the restaurant on Sunday, January 21, 2007. Mr. Menghi says he did not read it until he went to work at the head office in Vancouver on Tuesday, January 23, 2007. The contents of the letter make it clear that Ms. Chapple had nothing to do with the Workman incident. Ms. Workman took the blame and provided an apology. Ms. Workman’s letter says that Ms. Chapple had done everything to ensure that the Workman party was satisfied. It also made reference to Ms. Chapple having been fired. Yet, in Mr. Menghi’s email of February 6, 2007, to Ms. Chapple (attaching Mr. Menghi’s letter dated February 1, 2007), he suggests that she was suspended from the time of the incident until he received the apology letter. He had the apology letter for two weeks by this time. The apology letter gave Ms. Chapple’s side of the story. It exonerated Ms. Chapple’s conduct on the evening of January 20, 2007, completely.

[52] I find that Ms. Chapple was expressly dismissed by Mr. Menghi. Mr. Menghi’s intentions were made clear to Mr. Graham in the conversation they had in front of

the coat check room on January 20, 2007, and communicated to Ms. Chapple during the telephone conversation she had with Mr. Menghi on January 21, 2007.

[53] The defendants are not asserting that Ms. Chapple was terminated with cause. Thus, I find that she was wrongfully dismissed.

2. *Was the defendant permitted to suspend Ms. Chapple?*

[54] Having found that Ms. Chapple was wrongfully dismissed from her employment with the defendants, it is not necessary for me to consider whether a disciplinary suspension is an implied term of her employment, or whether there was justification for a suspension. Therefore, the remaining issue is the damages she is entitled to in lieu of reasonable notice of termination.

3. *What are Ms. Chapple's damages?*

(a) Reasonable notice

Facts

[55] Ms. Chapple was employed by the defendants for 13 1/2 years. From 1999 to 2005 she was the restaurant manager at the Trattoria, and since 2005 at Il Caminetto. Her annual base salary was \$50,112.50. Ms. Chapple is currently 38 years old.

[56] Ms. Chapple found a job as restaurant director of La Rua restaurant on May 10, 2007, which started in mid-June. The job is part time and administrative; mainly public relations. She has some opportunity to work in the restaurant to relieve the

manager or on busy nights. She says that her opportunity to earn income through gratuities is limited and is significantly less than she earned through gratuities at Il Caminetto.

Position of the parties

[57] In this case, Ms. Chapple asserts that her age, her length of service and her management position with the defendants attracts a period of 15 months in lieu of reasonable notice. The defendants assert that 10 or 11 months is appropriate for the calculation of severance pay. The parties have provided several authorities to support their positions.

[58] Both the plaintiff and the defendants refer to ***Rowe v. Keg Restaurants Ltd.***, [1996] B.C.J. No. 13 (S.C.), where the 31 year-old restaurant manager, employed for nine years, received 10 months pay in lieu of reasonable notice.

[59] Ms. Chapple refers to ***Morgan v. Chukal Enterprises Ltd.***, 2000 BCSC 1163, where the plaintiff, a beverage room manager, received 13 months pays in lieu of notice after 13 years of employment; and to ***Wells v. Patina Salon Ltd.***, 2003 BCSC 1731, where the 38 year-old spa manager employed for 12 years, was awarded damages of 14 months pay in lieu of reasonable notice.

[60] The defendants refer to ***Clarke v. North 102 Developments Ltd.*** (1997), 162 N.S.R. (2d) 367 (S.C.), where the restaurant manager of a truck stop, employed for 12 1/2 years was awarded 11 months notice or wages in lieu of notice; and to ***Wiens v. DVMH Holdings Ltd.***, 2005 M.B.Q.B. 257, 198 Man. R. (2d) 223, where the 57

year-old restaurant supervisor was terminated after 22 years of employment and the court fixed the notice period at 15 months.

Decision

[61] An employee who is fired, without cause, is entitled to reasonable notice of termination. In this case, Ms. Chapple is entitled to damages in lieu of reasonable notice.

[62] There is no precise measure of reasonable notice. In ***Bardal v. Globe & Mail Ltd.*** (1960), 24 D.L.R. (2d) 140 (Ont. H.C.), McRuer C.J.H.C. says at p. 145:

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 [employee], the age of the [employee] and the availability of similar employment, having regard to the experience, training and qualifications of the [employee].

[63] The factors enumerated in ***Bardal*** are not necessarily exhaustive: ***Gillespie v. Bulkley Valley Forest Industries Ltd.*** (1974), 50 D.L.R. (3d) 316 (B.C.C.A.).

[64] Based on the evidence before me and the authorities to which I have referred, I find that the cases relied on by the plaintiff provide a more reasonable comparison to Ms. Chapple's circumstances. Ms. Chapple's length of service with the defendants is 13 1/2 years; she is 38 years old. She has devoted a large part of her productive working years into her career with the defendants. Ms. Chapple did not find another position until May 2007. That position does not expose her to the level of gratuities she earned at Il Caminetto or to the same level of responsibility. I find

that her position as a manager in a busy, fine-dining restaurant in Whistler is not easily replicated in that community. These features are, in my view, sufficient to award the plaintiff somewhat more than her length of service with the defendants justifies. I agree with the plaintiff's position that damages in lieu of notice amounting to 15 months pay is appropriate. Ms. Chapple is entitled to damages in lieu of reasonable notice of \$62,641.

(b) Compensation for gratuities

Facts

[65] Ms. Chapple's remuneration included cash gratuities. Each night she worked at Il Caminetto she received a cash payout, which was a percentage of the nightly restaurant sales. Until November 2006, the percentage paid to the manager or managers (referred to as the "house") was 2.5%. That percentage was changed to 2% in December 2006. When there were two managers on duty, the house payout would be split between them. If there was only one manager, that manager would keep the entire amount. The house was responsible for "tipping out" the hostess or hostesses. The amount of money provided to the hostesses depended on how busy the restaurant was, how many hostesses were on duty, how much money the hostesses made from their own tips at the door, and their seniority. Hostesses worked on weekends but not during slower periods. Over the holiday period when the restaurant was busiest, there would be several hostesses on duty.

[66] Ms. Chapple describes receiving cash tips directly from customers. This occurred more frequently during the holidays and could be in any amount from \$20 up to \$100.

[67] In 2006, Ms Chapple signed for 275.5 days of work but during the busy season, she would frequently work seven days a week. She estimates that she worked the seventh day in ten work weeks.

[68] The defendants say they only permitted their employees to sign in for employment for six days. They would receive their base salary plus gratuities for those six days. Ms. Chapple and other employees, including Eric Griffith and Edward Dangerfield, state that they often worked seven days a week. On the seventh day, they would not receive salary from the defendants but would receive a share of the gratuities.

[69] Ms. Chapple testified that on average she received \$200 per shift in cash gratuities. The defendants did not keep any record of the cash gratuities that was paid out to its employees. Ms. Chapple did not keep records of the money that she received as gratuities.

[70] Regarding payment of income tax on the gratuities received, Ms. Chapple states that it was her practice, while she was employed by the defendants, to declare 10% of her salary as gratuities and pay income tax on that amount. Mr. Dangerfield adopted the same practice. Both witnesses say that, as far as they are aware, that is the practice of the other staff at Il Caminetto. None of the other

witnesses were asked about their practice with regard to the payment of income tax on gratuities.

[71] Michael Graham states that from the time of his arrival at Il Caminetto the managers received gratuities of 2% of the gross revenue. He says that the hostesses were tipped out in the amount of about 25% of the gratuities that the manager received. Mr. Graham says that he did not receive cash tips directly from customers at any time.

[72] Mr. Graham states that an accurate reflection of tip income would be 2% of the annual gross revenue of the restaurant, divided by two to represent the payout to both managers, and reduced by 25% as a tip out to the hostesses. In 2006, the annual gross revenue of Il Caminetto was approximately \$2,600,000. Two percent of that is \$52,000 reduced by 25% reflecting the payment to hostesses. The hostesses would thus receive \$13,000 per year leaving \$39,000 to be split between two managers, or approximately \$19,500 for each of the managers.

[73] Mr. Graham did not provide evidence about what he has received in cash gratuities as a manager of Il Caminetto since January 2007, nor did he describe his practice regarding his reporting of gratuities received and payment of income tax upon them in his income tax returns.

Position of the parties

[74] Dealing first with the amount of gratuities the plaintiff ought to be awarded, there are two methods proposed by Ms. Chapple. The first is based on her

calculation that she made approximately \$200 per shift in gratuities. Her remuneration on the seventh day was gratuities only. Based on that, the plaintiff asserts that her annual gratuities would amount to 275.5 x \$200 which equals \$55,100. She asserts that there should be ten additional days (the seventh day) in which she worked but did not sign in and therefore the amount should be increased by \$2,000 (10 x \$200), for a total of \$57,100. The plaintiff relies on the case of ***Minns v. 943372 Ontario Inc.*** (1999), 103 O.T.C. 276, 48 C.C.E.L. (2d) 207 (S.C.) , where the court accepted the plaintiff's evidence that she received at least \$200 in tips per shift despite there being no record.

[75] The second method proposed by the plaintiff and by the defendants is gratuities based on a percentage of sales. Ms. Chapple asserts that the calculations proposed by the defendant does not properly reflect what she received in gratuities. First, she says, that the percentage should be considered at 2.5% rather than the 2% which was implemented in December 2006. She asserts that to estimate tips based on the 2007 gross income of the restaurant is speculative; rather, the calculation of gratuities should be made on the 2006 gross income of the restaurant, when the percentage tipped out to the house was 2.5%: ***Patriquin v. Pan Pacific Holdings Ltd.***, 2006 BCPC 308. She also asserts that she did not split the house payment with another manager as she was the sole manager on staff at the Trattoria for 21 days in October 2006 and 21 days at Il Caminetto in December 2006. She also asserts that she received cash tips directly from customers during holiday periods, which she argues are 45 days between Christmas and New Year's Eve, Easter, Canada Day, Labour Day, Thanksgiving, Martin Luther King Weekend,

President's Day, US Spring Break and Canada Spring Break. Furthermore, the defendants' method does not calculate gratuities earned on the seventh day.

[76] In addition, the plaintiff seeks additional lost revenue due to tax. She asserts that the standard in the service industry is to declare and pay tax on gratuities at 10% of base salary, rather than the full amount of gratuities received. As gratuities will be awarded as part of this judgment, Ms. Chapple will be required to pay tax on the whole amount awarded at a rate of approximately 30%. She therefore argues that she should be awarded additional lost revenue due to the tax consequences on her award of damages for wrongful dismissal, which would not arise if she was not wrongfully dismissed and received the gratuities in cash.

[77] Based on the percentage of total sales approach plus the variables to which Ms. Chapple refers, she estimates her total lost income from gratuities as \$55,701 and claims \$15,207 as compensation for lost revenue due to tax (the difference between her paying 30% tax on gratuities and 30% tax on 10% of her base salary).

[78] The defendants base their submission of the amount of gratuities the plaintiff would have received based on the method that Mr. Graham described: 2% of gross sales of the restaurant less 25% paid out to the hostesses. On that basis, the amount of gratuities which Ms. Chapple would have received is \$19,500 per year.

[79] The defendants also assert that the court should award Ms. Chapple the amount of gratuities that she declared on her tax return and paid taxes upon, which is \$5,000 per year (10% of her base salary). The defendants argue that if Ms. Chapple's assessment of her gratuity income is accurate, she is withholding

information from Canada Revenue Agency about her actual income and is depriving the tax department.

Decision

[80] There is no dispute that gratuities formed part of Ms. Chapple's remuneration. The dispute concerns the amount of gratuities that Ms. Chapple would have received during the notice period and whether she should be compensated for the amount she would have received or the amount that she claimed as part of her taxable income (10% of the base salary).

[81] It is clear from the evidence that a substantial portion of Ms. Chapple's income was gratuities. It is common in an industry where gratuities form part of an employee's remuneration that there is no record of gratuities income: ***Minns*** at ¶¶35-38.

[82] The authorities referred to by both parties do not support a conclusion that where the plaintiff's earnings are in part from cash gratuities, damages reflecting that lost income should be assessed as the amount that the plaintiff declares and pays taxes upon. To the contrary, the court in ***Wells, Minns, and Patriquin*** held otherwise. In ***Cardenas v. Clock Tower Hotel Ltd. Partnership*** (1993), 120 N.S.R. (2d) 49 (S.C.), the court found at ¶49:

With respect to tips Mr. Cardenas' 1989 income tax return reports income for tips of \$500 and for 1990, \$400. The amount he reports is a matter between him and Revenue Canada. I am satisfied ... that for the four and one half months he ought to have received notice, an amount of \$400.00 per month for lost tips is appropriate, for a total recovery of \$1,800.

[83] In regard to the method of assessing loss of income from gratuities, there are certain features that lead me to conclude the gratuity income is equal to or greater than the income Ms. Chapple earned in base salary, which was \$165 per night. First, she was prepared to work a seventh day for tip income only. The amount of the gratuities would have to be sufficient to attract her to continue to work a seventh night rather than taking the night off. If her annual tips were \$19,500 and she worked all the shifts that she signed in for (275.5 days) and the seventh day in 10 work weeks, her nightly gratuities would amount to \$68 or approximately \$8.50 per hour based upon an eight hour shift. It is not realistic to assume that Ms. Chapple would be prepared to work an extra shift at that rate of pay.

[84] Second, the method proposed by the defendants, based on Mr. Graham's evidence, calculates gratuities at 2% of the gross and thereby necessarily excludes many variables that ought to be considered in properly estimating the amount of gratuities Ms. Chapple received. Mr. Graham did not provide evidence about what he actually received in gratuities, nor the method he uses for the declaration of the amount for tax purposes. Mr. Graham's experience in receiving gratuities may have been different than Ms. Chapple's experience; however, I have no evidence upon which to base any comparison.

[85] In the circumstances, I find that \$200 a night is a reasonable estimate of gratuities Ms. Chapple would have received had she continued to be employed at Il Caminetto.

[86] I decline to award to the plaintiff damages in lieu of lost revenue due to tax. I accept that the plaintiff will be required to pay income tax on the damages I award, which she would likely not have paid had she received the gratuities in cash. However, I have not reduced the amount of the gratuities because the payment of tax upon them is a matter between Ms. Chapple and Canada Revenue Agency. Similarly, the amount that Ms. Chapple pays as tax on this judgment is a matter between her and Canada Revenue Agency.

[87] The plaintiff's loss of gratuities, based on her income in 2006, is \$57,100. This amount, on a monthly basis, is \$4,758.33. For a period of 15 months, I assess the loss as \$71,375.

(c) Mitigation

Facts

[88] Ms. Chapple was able to obtain employment with La Rua restaurant, as a restaurant director, in May 2007. She started her employment there in June 2007. In that position she earned \$45,578 during the 15 month period.

Position of the parties

[89] The defendants argue that Ms. Chapple had an obligation to consider returning to work for the defendants in order to mitigate her loss of employment income.

[90] The basis of the defendants' position is that the rumours in the restaurant community were that Ms. Chapple was both fired and suspended. However, Mr. Menghi's letter of February 13, 2007, makes it clear that she was entitled to return to work at Il Caminetto. Ms. Chapple did not attempt to speak with either Michael Graham or Mr. Menghi about regaining the respect of the employees, if she did return to work. Mr. Menghi testified that he saw no reason why Ms. Chapple could not return to work after the Workman incident.

[91] Ms. Chapple asserts that her returning to work at Il Caminetto would require a close working relationship between herself and Mr. Menghi. In the circumstances, there would be an atmosphere of hostility, embarrassment, and humiliation. She also asserts that the dismissal was acrimonious and personal. Ms. Chapple does not believe that she could go back to the restaurant and, "have the same magic as [the employees'] leader".

[92] In **Cox v. Robertson**, 1999 BCCA 640, 69 B.C.L.R. (3d) 65, the court considered whether the plaintiff, who had been terminated from employment and refused to accept re-employment from her employer until she found other work, had mitigated her losses. The court, quoting from **Farquhar v. Butler Brothers Supplies Ltd.** (1988), 23 B.C.L.R. (2d) 89 (C.A.), observed at ¶11 that:

...while an employee may be under a duty to accept re-employment on a temporary basis in some circumstances, such obligation will arise infrequently because "[v]ery often the relationship ... will have become so frayed that a reasonable person would not expect both sides to work together in harmony..." (per Lambert J.A., writing for the Court, at 94).

[93] In ***Evans v. Teamsters Local Union No. 31***, 2008 SCC 20, the court affirmed at ¶28 that in some circumstances, “assuming there are no barriers to re-employment”, it may be necessary for a dismissed employee to mitigate her damages by returning to work for same employer.

[94] One barrier to re-employment is considered by the court at ¶30:

...The critical element is that an employee "not [be] obliged to mitigate by working in an atmosphere of hostility, embarrassment or humiliation" (*Farquhar*, at p.94), and it is that factor which must be at the forefront of the inquiry into what is reasonable... [I]t is extremely important that the non-tangible elements of the situation - including work atmosphere, stigma and loss of dignity, as well as nature and conditions of employment, the tangible elements - be included in the evaluation.

[95] In light of my conclusions regarding the circumstances surrounding Ms. Chapple's termination, and the fact that the employee/employer relationship was over, I find that Ms. Chapple's failure to return to work at Il Caminetto is not a failure to mitigate her damages. I have determined that Mr. Menghi stated, in front of other employees, that Ms. Chapple was not welcome in any of his restaurants. He advised Ms. Chapple during their telephone conversation of January 21, 2007, that he did not want Ms. Chapple setting foot in his restaurants again.

[96] Finally, I have determined that if Mr. Menghi considered that Ms. Chapple's services were valuable and that he wanted her to return to work, he would have taken active steps to get her back to work immediately.

[97] I find that Ms. Chapple's damages should be reduced by the amount of income she was able to earn at La Rua as mitigation in this case.

Summary

[98] In summary, my conclusions are:

1. Ms. Chapple was wrongfully dismissed from her employment with the defendants.
2. Ms. Chapple is entitled to an award of damages equivalent to 15 months salary and gratuities in the amount of \$62,641 and \$71,375 respectively.
3. Ms. Chapple mitigated her loss in the amount of \$45,578.
4. Ms. Chapple is entitled to court order interest on her damages.
5. The parties may seek directions in the event of any disagreement as to the precise calculation of these damages.

Costs

[99] Unless there is something of which I am not aware, the plaintiff is entitled to her costs at Scale B.

“Gropper J.”