IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Basic v. Solid Rock Steel Fabricating Co. Ltd.,* 2025 BCSC 287

Date: 20250224
Docket: S252405
Registry: New Westminster

Between:

Alexander Basic

Plaintiff

And

Solid Rock Steel Fabricating Co. Ltd.

Defendant

Before: The Honourable Justice Giaschi

Reasons for Judgment

Counsel for the Plaintiff:	N. Chinna
Counsel for the Defendant:	J. Yeager
Place and Date of Trial:	New Westminster, B.C. September 18-20, 2024 and January 29-31, 2025
Place and Date of Judgment:	New Westminster, B.C. February 24, 2025

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Introduction

[1] In this wrongful dismissal action, the plaintiff, Alexander Basic was employed by the defendant, Solid Rock Steel Fabricating Co. Ltd. ("Solid Rock") for more than 20 years, ultimately achieving the role of a project manager. In January 2024, the plaintiff's employment was abruptly terminated by the defendant. The defendant cited insubordination and time theft as the grounds for the termination but nevertheless gratuitously paid the plaintiff eight weeks' salary, pursuant to a contractual notice period, less an amount it alleged the plaintiff owed it. The plaintiff denies the allegations of insubordination and time theft and says he was dismissed without cause. He additionally submits that the contract upon which the defendant relies is void for lack of consideration or, alternatively, was repudiated by the defendant. The plaintiff seeks damages for wrongful dismissal based on a notice period of 22 to 24 weeks, or an amount in excess of $200,000, plus aggravated damages of $30,000 and punitive damages of $50,000.

[2] For the reasons that follow, the action is dismissed. The plaintiff's dismissal was "with cause", namely, for insubordination and time theft.

Credibility and Reliability

[3] At the outset, I wish to briefly address the credibility and reliability of the various witnesses that appeared before me. Credibility and reliability are distinct but related concepts, although they are often considered together. Credibility concerns the honesty of a witness. Reliability concerns the ability of an honest witness to provide accurate information.

[4] The factors to be considered when assessing credibility were summarized in *Bradshaw v. Stenner*, 2010 BCSC 1398, at para. 186, aff'd 2012 BCCA 296, where it was stated that the overriding consideration is whether the evidence is consistent with the probabilities affecting the case as a whole and shown to be in existence at the time:

> [186] Credibility involves an assessment of the trustworthiness of a witness' testimony based upon the veracity or sincerity of a witness and the accuracy

> of the evidence that the witness provides (*Raymond v. Bosanquet (Township)* (1919), 1919 CanLII 11 (SCC), 59 S.C.R. 452, 50 D.L.R. 560 (S.C.C.)). The art of assessment involves examination of various factors such as the ability and opportunity to observe events, the firmness of his memory, the ability to resist the influence of interest to modify his recollection, whether the witness' evidence harmonizes with independent evidence that has been accepted, whether the witness changes his testimony during direct and cross-examination, whether the witness' testimony seems unreasonable, impossible, or unlikely, whether a witness has a motive to lie, and the demeanour of a witness generally (*Wallace v. Davis* (1926), 31 O.W.N. 202 (Ont.H.C.); *Faryna v. Chorny*, 1951 CanLII 252 (BC CA), [1952] 2 D.L.R. 354 (B.C.C.A.) [*Farnya*]; R. v. S.(R.D.), 1997 CanLII 324 (SCC), [1997] 3 S.C.R. 484 at para. 128 (S.C.C.)). Ultimately, the validity of the evidence depends on whether the evidence is consistent with the probabilities affecting the case as a whole and shown to be in existence at the time (*Farnya* at para. 356).

[5] A trier of fact may believe all, part or none of a witness's evidence, and may attach different weight to different parts of a witness's evidence: *R. v. R.(D.)*, 1996 CanLII 207 (SCC), [1996] 2 S.C.R. 291 at para. 93.

[6] The witnesses who testified at the trial consisted of: the plaintiff; Nikola Basic, the plaintiff's brother; Peter Steunenberg, the owner of the defendant; Brittany Weir, Mr. Steunenberg's daughter and the Financial Officer of the defendant from 2010 to 2020; and Jose Antonio Hernandez, the General Manager of the defendant from 2022 to 2024.

[7] Each party impugns the credibility of the witnesses of the other party.

[8] The plaintiff was not a credible or reliable witness. In particular:

a) He frequently gave one-sided and incomplete evidence during his direct examination;

b) His evidence in cross-examination frequently contradicted or was inconsistent with evidence he gave in his direct examination;

c) His evidence at trial was inconsistent with his discovery evidence;

d) He was often evasive when answering questions during his cross-examination;

e) He gave evidence that was simply unreasonable and unbelievable, such as his interpretation of an email exchange between himself and Mr. Hernandez in late November, which he said constituted an approval of a vacation request but which clearly was not; and

f) His evidence was not consistent with the documentary evidence that I accept.

[9] In general, I find that the plaintiff was unable to resist the urge to doctor his testimony to promote his own self-interest.

[10] In contrast to the plaintiff, I find that each of Peter Steunenberg, Brittany Weir and Mr. Hernandez gave their evidence in a straightforward, honest and forthright manner. They were not evasive, did not exaggerate, and readily conceded when they could not remember. Additionally, their evidence was also much better corroborated by the totality of the documentary evidence. I acknowledge that Mr. Hernandez gave unnecessarily lengthy answers to questions asked of him in cross-examination but, in my view, this was not because he was being evasive. Rather, he appeared to do so because he wanted to be thorough in his answers by providing examples.

[11] Accordingly, unless otherwise indicated, where there is a conflict between the evidence of the plaintiff and that of Mr. Steunenberg, Ms. Weir or Mr. Hernandez, I prefer the evidence of Mr. Steunenberg, Ms. Weir or Mr. Hernandez.

Facts

[12] The defendant is a family company in the business of steel fabrication. It was founded in 1965 by the father of its current owner, Mr. Peter Steunenberg. Mr. Steunenberg has owned and operated Solid Rock since 2009.

[13] The defendant has both unionized and non-unionized employees. Its shop and field employees are unionized. Its office staff is non-unionized. The plaintiff's positions with the defendant have always been non-union positions.

[14] The plaintiff is 57 years of age.

[15] In 1992, the plaintiff was interviewed by Mr. Steunenberg and hired by the defendant as a draftsman. He remained employed with the defendant until 2000 when he quit his employment and went to work with a competitor.

2004

[16] In 2004 the plaintiff was laid off from his then employer. Mr. Steunenberg learned of this layoff and contacted the plaintiff to inquire if he wished to return to work with the defendant. The plaintiff testified that he and Mr. Steunenberg met and they agreed on a salary and holidays. He said nothing else was discussed between them. In cross-examination, he testified the meeting with Mr. Steunenberg was in August of 2004.

[17] Mr. Steunenberg's evidence of the plaintiff's rehiring was more complete. He testified that the two of them went for dinner and discussed the plaintiff returning to work for the defendant. He said a formal offer of employment was made to the plaintiff, although he was unsure when. He identified a handwritten note he made of the terms of the plaintiff's employment. Those terms were: that he was to start August 3; he was to be paid an annual salary of $72,800 ($2,800 bi-weekly); the salary was based on him working 40 hours per week; he was entitled to statutory holidays, three weeks vacation and to a benefits package; the defendant would pay for a cell phone, vehicle mileage, education and training courses; and the defendant would provide a gas card. The note also included that the plaintiff was to "keep track of extra hours" and included a calculation of the number of hours per year the plaintiff was required to work taking into account three weeks of vacation and statutory holidays. That number was 1,864 hours. Mr. Steunenberg explained that the plaintiff was required to keep track of his hours worked so that, on an annual basis, a reconciliation could be done to determine whether the defendant owed compensation for extra hours or the plaintiff owed hours to the defendant.

[18] Importantly, neither the plaintiff nor Mr. Steunenberg testified that they discussed paid lunches and coffee breaks and neither testified to an agreement that the plaintiff was entitled to paid breaks. However, Mr. Steunenberg testified that the

defendant never provided paid coffee breaks or lunch breaks to office staff. He testified that employees were expected to generally work from 8:00 a.m. to 4:30 p.m. with a 30-minute unpaid lunch break and no paid coffee breaks.

[19] I accept the evidence of Mr. Steunenberg which is more complete than the evidence of the plaintiff and is supported by the notes he made contemporaneously in 2004. In particular, I find as a fact that, as of 2004, the plaintiff was required to work 1,864 hours, that he was required to keep track of his hours, and that, on an annual basis, he was entitled to be compensated for extra hours, being hours worked above 1,864. I further find that it was not a term of the plaintiff's employment that he was entitled to paid lunch or coffee breaks.

Extra Hours

[20] As indicated, since 2004, it has been a term of the plaintiff's employment that he would receive compensation, in some form, for extra hours worked. Each of the plaintiff, Mr. Steunenberg and Mr. Hernandez acknowledged that this was a form of compensation the defendant provided to all office staff. They further agree that this compensation was administered by the employee keeping track of their hours worked and submitting a reconciliation at the end of each year of the extra hours worked.

[21] I note that the plaintiff testified the extra hours policy of the defendant was an "honour policy". This was also apparent from the evidence of Mr. Steunenberg and Mr. Hernandez, who each testified that it was the employee who kept track of the hours and submitted the reconciliation. I find as a fact that the extra hours policy of the defendant was based on the honour system or on trust. That is to say, the policy was premised on the plaintiff keeping an accurate record of his hours worked and preparing a truthful reconciliation at year-end of hours worked against hours required.

[22] The parties agree that the compensation for extra hours worked was by way of extra wages or extra time off. Additionally, until approximately 2015,

compensation for extra hours was sometimes made by a payment in kind such as a gift card or a credit at the defendant's tool store.

[23] There is no dispute that the plaintiff periodically, although apparently not annually, submitted his reconciliation of hours worked and was compensated for the additional hours. The plaintiff's reconciliations for August 2004 to December 2008, 2013 to 2014 and 2023 are in evidence. The reconciliation for August 2004 to December 2008 merely provides the extra hours per year. The reconciliation for 2013 to 2014 merely provides hours worked and hours paid (presumably on a bi-weekly basis) and calculates the extra hours owed. The reconciliation for 2023 provides somewhat more detail. It provides hours worked per day in 2023.

[24] Importantly, none of the reconciliations disclosed that the plaintiff was recording coffee breaks he did not take as extra hours. More specifically, the plaintiff testified that, if he worked from 8 a.m. to 4 p.m. on a particular day, he would record his hours worked at 8.5 hours because he did not take two 15-minute coffee breaks. It is unclear on the evidence whether he did the same for lunch breaks. In any event, this is something which I will return to later.

[25] There is a dispute on the evidence concerning whether the practice of the defendant of paying wages for extra hours changed during the course of the plaintiff's employment. The plaintiff testified that he was advised by Mr. Steunenberg in 2019 that the defendant would no longer pay for extra hours and that extra hours had to be taken as time off. However, Mr. Steunenberg testified that he was fine with the plaintiff taking time off as compensation for extra hours provided they were not busy. He also testified that the plaintiff was warned in 2022 that he would not always be able to have time off for extra hours. Mr. Hernandez similarly testified that in late 2022 the plaintiff came to him and requested extra time off to compensate him for his extra hours. Mr. Hernandez said that he advised the plaintiff he could not have extra time off and that he would be paid for his extra hours. He testified the plaintiff was adamant that he wanted to take the extra time because he would be taxed if he was paid out for extra hours. Mr. Hernandez testified that he discussed the matter

with Mr. Steunenberg and that they decided to allow the plaintiff to take the extra time off. He further testified that he told the plaintiff that the next time he wanted time off he had to give advance notice because they needed to ensure they had proper coverage in the office.

[26] I prefer the evidence of Mr. Steunenberg and Mr. Hernandez over that of the plaintiff and find that the defendant's practice of compensating for extra hours either by paying extra wages or giving extra time off never ceased. In other words, I reject the plaintiff's evidence that he was told he had take time off as compensation for extra hours.

2015 Agreement

[27] Between 2004 and 2014, the plaintiff received various increases in his salary and vacation entitlement but, otherwise, the terms of his employment did not change from what was agreed in 2004.

[28] In 2010, Ms. Weir, the daughter of Mr. Steunenberg, commenced employment with the defendant. She implemented a practice of using written employment contracts. She and Mr. Steunenberg both testified that the written contracts were initially used for new hires and later expanded to include existing employees when they renegotiated their salaries.

[29] On March 30, 2015, the plaintiff emailed Mr. Steunenberg requesting, *inter alia*, that he have a salary review. Mr. Steunenberg did not initially respond to this request so, on July 13, 2015, the plaintiff sent a reminder. The plaintiff testified that he sent these requests because he had not had a raise in three years and felt he deserved one. Also, he wanted to discuss his holidays.

[30] The plaintiff testified that he and Mr. Steunenberg went for lunch where they negotiated a raise and additional holidays. He said it was a very informal meeting and, initially, he did not recall that anything was discussed other than his salary and holidays. He testified that after the meeting Mr. Steunenberg had put the terms on a piece of paper. He identified the piece of paper as the first page of Tab 56 of Exhibit

#2 but without a date on it. The first page of Tab 56 of Exhibit #2 (which I will hereafter refer to as the "Amended Cover Sheet"), provided as follows:

19-Aug-15	
Base Salary (5 weeks Vacation)	$87,067.14
2% increase	$1,741.34
Gas Adjustment	$7,000.00
New Salary	$95,808.48
+ 1 additional week vacation in lieu of increase (6 weeks total)	
New Bi-weekly salary	$3,684.94

[31] The plaintiff testified that these terms reflected what they had agreed and that there were no missing terms.

[32] The remaining parts of the document at Tab 56, are a three-page employment agreement between the plaintiff and defendant, which was signed by Mr. Steunenberg on August 19, 2015 and by the plaintiff on September 10, 2015. Importantly, the plaintiff testified that the first time he saw this agreement was on September 10, 2015 when Mr. Steunenberg came to his desk, presented it to him and asked him to sign it. The plaintiff testified that he scanned it, saw it contained his raise amount, signed it, and gave it back to Mr. Steunenberg who took it away. He said that he never got a copy of it.

[33] In cross-examination, the plaintiff's evidence changed significantly.

[34] First, he testified that there was another meeting with Mr. Steunenberg between the meeting at the restaurant and September 10, 2015, but he could not recall when it occurred.

[35] Second, he admitted that there was a prior version of the Amended Cover Sheet that he and Mr. Steunenberg reviewed and made changes to. He was taken to that prior version (which I will hereafter refer to as the "First Cover Sheet"), which consisted of typed text and handwritten changes. The typed text was as follows:

Base Salary (5 weeks Vacation)	$87,067.14
2% increase	$1,741.34
Gas Adjustment	$5,405.41
New Salary	$94,213.89
+ 1 additional week vacation in lieu of increase (6 weeks total)	
New Bi-weekly salary	$3,623.61

[36] The handwritten changes were: the number “5” in “5 weeks Vacation” is circled in red ink and beside it is written “4 weeks”; the numbers $5,405.41, $94,213.89 and $3,623.61 are all struck through in red ink; and beside the gas adjustment the number “7000” is written in red ink. The plaintiff testified that he wrote “4 weeks” on the sheet because “5” was incorrect and that Mr. Steunenberg wrote “7,000” beside the gas adjustment and struck out the other numbers.

[37] Third, he admitted that in addition to salary and holidays, he and Mr. Steunenberg discussed that he would no longer have a gas card but would instead be given an increase in wages to compensate for the loss of the gas card. He also said that Mr. Steunenberg brought the benefits plan up for discussion because he wanted to remove the plaintiff’s ex-spouse from the plan.

[38] Mr. Steunenberg’s evidence of the events leading to the plaintiff’s raise in 2015 is markedly different from the version that the plaintiff gave in his direct examination. Mr. Steunenberg testified that when the plaintiff asked for a raise he thought it was a good time to transition the plaintiff to a written agreement. He testified that the two of them initially attended a lunch meeting at Honeybee restaurant on July 14 where they discussed the raise and other forms of remuneration, including a gas card which the plaintiff wanted to keep.

[39] Mr. Steunenberg testified that after the July 14 meeting, he asked Ms. Weir to do some calculations and to draft an employment agreement for the plaintiff.

[40] Mr. Steunenberg testified that, after he received the First Cover Sheet and a draft employment agreement from Ms. Weir, he and the plaintiff had a second

meeting on August 14. He testified that at this meeting they reviewed both the First Cover Sheet and the draft employment agreement that Ms. Weir had prepared. He testified that he reviewed the entire employment agreement with the plaintiff because it was new to him. He testified that changes were made and noted during the meeting to both the First Cover Sheet and to the draft employment agreement. In particular, he testified the plaintiff's current weeks of vacation was corrected from "5" to "4" and the gas card adjustment was changed from $5,405.71 to $7,000, at the request of the plaintiff. He also testified that the words in the draft employment contract "Benefits to be adjusted if dependents change" were requested to be deleted by the plaintiff because he wanted his ex-wife to remain on benefits. He testified that at the end of the meeting, he told the plaintiff he would have the documents changed and they would meet again.

[41] Mr. Steunenberg testified that after the August 14 meeting, he gave Ms. Weir the First Cover Sheet, with the handwritten notations and the amended draft employment agreement and asked her to make the changes, which she did. He testified that on August 19 he went to the plaintiff's desk and asked him to meet with him in the boardroom. He testified that he and the plaintiff reviewed the Amended Cover Sheet, dated August 19, 2015, and again reviewed the employment agreement. He said the employment agreement was not reviewed to the same extent as it was on August 14. He testified that he signed the completed employment agreement and left the agreement with the plaintiff. He testified it was his practice to give employees a few days to look at the contract. He testified that the plaintiff was late in returning the signed agreement but that Ms. Weir eventually got it from him.

[42] Mr. Steunenberg's evidence is largely corroborated by Ms. Weir. She testified that she prepared a draft of the employment agreement and the First Cover Sheet as instructed by Mr. Steunenberg. The First Cover Sheet included: the plaintiff's base salary at $87,067.14, his current entitlement to 5 weeks vacation; a 2% salary increase of $1,741.34, a "Gas adjustment" of $5,405.41; a new salary of $94,213.89; and vacation entitlement of 6 weeks. She testified that the gas card adjustment was because the plaintiff's gas card was being discontinued and that she calculated an

amount to compensate him for the loss of that perk. The draft of the written employment contract included the new salary of $94,213.89, the effective date of August 1, 2015, and the six weeks vacation entitlement. The benefits section of the employment contract also included the words “Benefits to be adjusted if dependents change”. Ms. Weir testified that she included this wording because she was aware the plaintiff’s relationship status had changed.

[43] Ms. Weir also testified that she was later asked to make changes to the First Cover sheet and to the first draft of the employment agreement. She made the changes requested and gave the revised versions to Mr. Steunenberg. The Amended Cover Sheet noted the gas card adjustment as $7,000 and the new salary as $95,808.48. The amended employment agreement similarly noted the new salary as $95,808.48. She testified that the only other amendment to the employment agreement was the deletion of the words “to be adjusted if dependents change” under the “Benefits” section.

[44] Ms. Weir was not able to fully corroborate all of Mr. Steunenberg’s evidence. In particular, she testified that she did not have a specific recollection of collecting the signed employment agreement from the plaintiff. However, she said it was within the scope of her work to make sure it was signed and that it was likely she followed up with the plaintiff to get the signed agreement.

[45] I prefer the evidence of Mr. Steunenberg and Ms. Weir over that of the plaintiff as to the circumstances and events that led to the signing of the 2015 employment agreement. I prefer their evidence for several reasons.

[46] First, the plaintiff’s evidence changed significantly between his direct examination and his cross-examination. In his direct examination, he testified there was a single meeting and that the only items discussed were his salary and holidays. However, in cross-examination, he admitted there was more than one meeting and that several other things were discussed. When the plaintiff testified in direct examination that there was only one meeting and the only things discussed were his salary and holidays he was either being deliberately vague, suggesting a

lack of credibility, or he had forgotten the entire circumstances, suggesting his evidence is not reliable.

[47] Second, the evidence of Mr. Steunenberg is corroborated by the documentary evidence including the drafts of the cover sheet and of the employment agreement. Additionally, Mr. Steunenberg's calendar entries corroborate his evidence. They show he met with the plaintiff on July 14, August 14 and August 19, 2015.

[48] Third, Mr. Steunenberg's evidence is substantially corroborated by Ms. Weir.

[49] Finally, the payroll records of the defendant corroborate the evidence of Mr. Steunenberg. Those records show that on August 22, 2015, the plaintiff was paid an adjustment to reflect the backdating of his new salary to August 1, 2015. The fact that the new salary was not paid until August 22 corroborates that a final agreement was reached on August 19, 2015, the date of the final meeting and the date that Mr. Steunenberg signed the contract.

[50] I have taken into account that Ms. Weir was not able to conclusively testify that she was the one who collected the signed employment agreement from the plaintiff on September 10, 2015. However, I am satisfied that she did so as she testified it was part of her job and it was likely she did so. I note that Ms. Weir could have easily testified that she did, in fact, collect the signed agreement from the plaintiff on September 10, 2015. The fact she did not do so illustrates that she was an honest and careful witness who was not willing to modify her testimony to favour the defendant's position.

[51] Accordingly, I make the following findings of fact:

a) The employment agreement was reviewed with the plaintiff in detail on August 14, 2015;

b) The plaintiff and Mr. Steunenberg reached an agreement as to the terms of the plaintiff's continued employment with the defendant on August 14, 2015

but subject to the employment agreement being revised to reflect those terms;

c) The employment agreement was revised to reflect the terms agreed upon on August 14, 2015;

d) Mr. Steunenberg signed the revised employment agreement on August 19, 2015;

e) The revised employment agreement was reviewed by the plaintiff and Mr. Steunenberg on August 19, 2015;

f) The partially signed agreement was given to the plaintiff on August 19, 2015 for him to sign at a later time; and

g) On September 10, 2015, Ms. Weir followed up with the plaintiff to obtain the signed employment agreement and, when she did so, the plaintiff signed the agreement.

[52] I reject completely the plaintiff's evidence that he was first presented with the employment agreement on September 10, 2015, and I reject any suggestion or inference that he did not have the opportunity to review and carefully consider the employment agreement before he signed it.

[53] It is to be noted that the 2015 employment agreement contained the following clauses:

> **Hours of Work**
>
> The company's core hours of operation are Monday to Friday from 7:00 am to 5:00 pm. Employees are expected to work a minimum average of forty (40) hours per week.
>
> Given the nature of this position, adjustable working hours are acceptable; however certain projects may require extended work hours or "off hours" in order to meet the required deadlines.
>
> …
>
> **Termination**
>
> Solid Rock may terminate your employment at any time for cause.

> Solid Rock may terminate your employment without cause at any time by providing you with the minimum notice, or pay in lieu of such notice, and any severance pay required by the Employment Standards Act and no more.
>
> In the event a temporary layoff is ever required, it may be implemented in accordance with the requirements of the Employment Standards Act.

2018 Agreement

[54] It is undisputed that in 2018, the defendant had a new form of employment agreement prepared that it wished to have all employees sign. The plaintiff and several other employees refused to sign the new agreement which led to a meeting in December of 2020. The plaintiff testified that at this meeting Mr. Steunenberg told him he would be terminated if he did not sign the new agreement. Mr. Steunenberg testified that he told the plaintiff he would be given a working notice if he did not sign. However, he also testified that he did not follow through on the threat and did not pursue the matter further.

May 4, 2022 and Coffee Breaks

[55] In January of 2022, Mr. Hernandez was hired as the General Manager of the defendant. One of the new procedures he implemented was performance reviews of employees. The plaintiff's performance review was conducted on May 4, 2022. The review was attended by Mr. Steunenberg, Mr. Hernandez and the plaintiff.

[56] The plaintiff testified in his direct examination that at the beginning of the performance review he was asked about a discrepancy in his time reports of 30 minutes per day. The plaintiff says he explained that the 30 minutes was for two coffee breaks per day of 15 minutes each that he did not take. He testified that "he", presumably Mr. Steunenberg, put his hands in the air and said, "Oh that's where it comes from". He testified that Mr. Steunenberg thanked him for the explanation and that the only other discussion in relation to this was that he suggested they put in a punch clock. He testified Mr. Steunenberg then left the meeting and he and Mr. Hernandez continued with the performance review.

[57] The plaintiff's evidence in cross-examination on this issue differed from the evidence he gave in his direct examination. In cross-examination, he initially

repeated his evidence in direct that Mr. Steunenberg was relieved when he heard his explanation and left the meeting. It was then put to him that he was told at the meeting that he was not entitled to coffee breaks. He denied this. His evidence from his examination for discovery was then put to him where he admitted he was told at the 2022 meeting that he was not entitled to coffee breaks. When asked why he had not mentioned that during his direct examination, he replied that it had slipped his mind. He also testified that Mr. Hernandez was attempting to change the terms of his employment.

[58] Mr. Steunenberg's evidence of the May 4, 2022 meeting and the discussion of coffee breaks was quite different from that of the plaintiff. He testified that he was shocked when he was told by the plaintiff that he was recording 0.5 hours as time worked for coffee breaks he did not take. He testified he told the plaintiff that was not acceptable and it had to stop. He testified that he made a note about this immediately after the meeting with the plaintiff. The note is in evidence and it reads:

> The issue is not taking 2x15 min breaks (?he said we used to do this) So ½ hour a day! I said he can't anymore.

[59] Mr. Hernandez's evidence corroborated the evidence of Mr. Steunenberg regarding the May 4, 2022 meeting. He testified that the issue of coffee breaks was brought up during the meeting and that Mr. Steunenberg told the plaintiff he was not entitled to paid coffee breaks.

[60] I prefer the evidence of Mr. Steunenberg and Mr. Hernandez over that of the plaintiff. Again, the plaintiff's evidence differed significantly between his direct examination and his cross-examination. Additionally, and importantly, Mr. Steunenberg's contemporaneous note corroborates his evidence.

[61] Accordingly, I find as facts that at the meeting on May 4, 2022: the defendant learned for the first time that the plaintiff was counting paid coffee breaks not taken as extra hours; and, the plaintiff was expressly told he was not entitled to paid coffee breaks and he had to stop including coffee breaks in his reconciliation of extra hours.

[62] I further reject the plaintiff's evidence that this was a change to his terms of employment. Both Mr. Steunenberg and Mr. Hernandez testified that the defendant's office staff were not entitled to paid lunch or coffee breaks and, when the plaintiff was re-hired in 2004, there was no discussion of the plaintiff being entitled to paid coffee breaks and certainly no agreement that the plaintiff could add 30 minutes per day to his time reports for coffee breaks he did not take.

[63] I add that the reconciliation reports that the plaintiff submitted from time to time of his hours worked did not disclose that he was adding 30 minutes per day for coffee breaks he did not take. The first and only time Mr. Steunenberg became aware of this was at the May 4, 2022 meeting and his response was to tell the plaintiff the practice had to stop.

[64] I find as a fact the terms of the plaintiff's employment never included that he was entitled to 30 minutes per day in paid coffee breaks and never included a term that he could record 30 minutes per day as working time for coffee breaks he did not take. Moreover, if the plaintiff was ever in any doubt as to this, he was disabused of that doubt at the meeting on May 4, 2022. After that meeting, he knew he was not entitled to paid coffee breaks and was not entitled to record 30 minutes per day as working time for coffee breaks he did not take.

Performance Reviews

[65] It is undisputed that the plaintiff received good performance reviews in May 2022 and May 2023. In the 2023 review, the plaintiff received scores of 4 or 5 out of 5 for "Adherence to company rules and standards", "Attendance", and "Attitude".

[66] Both performance reviews contained a section entitled "Attendance". The plaintiff was given a score of 5 out of 5 for "Attendance" on both performance reviews. The 2022 review described the "Attendance" category as follows:

> The employee consistently reports to work and to meetings on time, is prepared and provides advance notice of need for absence.

Events Leading to Termination of Employment

[67] On October 26, 2023, the plaintiff emailed Mr. Hernandez. He wrote:

> I'll be going through my hours shortly and booking the rest of my holidays for 2023. In a nutshell I have approx. 2 weeks remaining and will be booking around Christmas.

[68] I observe that the plaintiff was entitled to six weeks of vacation per year, had taken four weeks of vacation earlier in 2023, and had two weeks of vacation remaining, as he indicated in the above email.

[69] It is undisputed that the plaintiff was approved to take two weeks of vacation from December 4 to 15, 2023.

[70] The plaintiff subsequently calculated that he had accumulated 50 extra hours in 2023 for which he was to be compensated.

[71] On November 30, 2023 at 4:10 p.m., the plaintiff emailed Mr. Hernandez attaching his calculation of his extra hours for the year. In that email, he also advised Mr. Hernandez that he would come into the office the next day for 4.75 hours but would be taking the rest of the year off. His email provided:

> I have summarized my hours and with my remaining vacation time plus the extra hours I have worked throughout the year (calculated at straight time) I plan on coming in tomorrow for 4.75 hours and I will be off for the rest of this year.
>
> This should work out in Solid Rock favor as I'm in between projects, I'm not a PM on any currently, and my time away should not hinder works in progress.
>
> I have attached my summary sheet for you to review.
>
> Happy to sit down in the morning for a quick discussion before I'm off.

[72] I note here that the plaintiff's calculation of his extra hours included 30 minutes per day for coffee breaks he did not take but this was not apparent from the document he provided to Mr. Hernandez. The document he gave Mr. Hernandez merely listed the total hours worked by date without any breakdown whatsoever.

[73] I also note that in his 4:10 p.m. email, the plaintiff did not request time off but merely advised he would be off for the rest of the year.

[74] Mr. Hernandez responded to the plaintiff at 5:39 p.m. on November 30, 2023, advising that he did not approve of the additional time off and that the extra time would have to be paid out. He also advised the plaintiff that the extra time calculation would be verified and reminded the plaintiff that he was required to work a full 8-hour day with no paid lunches or coffee breaks. His email was as follows:

> Per our previous conversation regarding your remaining 2 weeks vacation, I had agreed that you can take the time off as long as it was before the 2024 New Year. Otherwise, your remaining vacation time for 2023 would have to paid out to you.
>
> However, when you came to me last week asking for this time off, you failed to mention that you had extra time that you had accumulated over 2023 and that you wanted to take this additional time off as well in conjunction with your vacation.
>
> Please understand that we cannot have everyone take time off at the same time. I already voiced to you that there are several individuals already taking time off in December.
>
> Therefore, I still authorize you taking your 2 weeks vacation in December, but I do not authorize you taking the extra time you have accumulated over 2023 in December. This amount will have to be paid out to you.
>
> Also, next time you want time off, please ask do not assume, dictate, or demand. I will also be verifying your accumulated extra time.
>
> Remember that each employee must work a full 8-hour day. All lunch breaks are unpaid and there are no coffee breaks. If employees do not work a full 8-hour day, they must make up the time. This is in accordance with the BC Employment Standards Act.

[75] In addition to the emails exchanged on November 30, the plaintiff and Mr. Hernandez had a meeting on that day. Their respective versions of that meeting are not significantly different. The plaintiff testified the meeting concerned whether his extra hours could be used for additional time off. He described the meeting as “heated”. In cross-examination, it was put to him that during the meeting he told Mr. Hernandez to just fire him. He replied that it was Mr. Hernandez who told him to just quit. He said Mr. Hernandez was “poking” him.

[76] Mr. Hernandez testified that he told the plaintiff that he would have to be paid out for his extra hours and that he could not take the extra time off because it was a last-minute request. He testified the plaintiff said he did not want to be paid out because he would be taxed on the extra money. He testified that he again told the

plaintiff “no”. He testified the plaintiff replied that was too bad and that he should be let go. He replied that was not an option. He testified the plaintiff said he was going to take the time off whether it was approved or not and then left.

[77] On December 1, 2023, at 8:58 a.m., the plaintiff sent another email to Mr. Hernandez advising that he did not wish to be paid out but will take the time off. He also stated, incorrectly, that the defendant was legally required to pay overtime rates. His email was as follows:

> If you have reviewed my spreadsheet, you would see that I have worked over the amount of hours required through the year which is why I have the additional time off, so the comment of I need to make up the time for a few days where I had to leave early makes absolutely no sense and is completely incorrect…. I have and then some. I do not wish to paid out but instead will take the time off.
>
> Please also note as mentioned in yesterday’s email that I am exchanging one extra hour worked to one hour off, I’m not claiming the time and half Solid Rock legally owes every employee who is not under a collective agreement; time and half or double time depending on the amount of extra time worked regardless of hourly, salary, commission based, pay structure. I think I’m being very, very reasonable.

[78] At 2:38 p.m. Mr. Hernandez replied as follows:

> Both Peter and I do not agree with your comments. However, if you are adamant in taking this time off in December, we will see you in the New Year.

[79] The plaintiff testified that he understood from this email that Mr. Hernandez was accepting his vacation request and he, accordingly, went on his holiday for the month of December. He further testified that he understood the comment “Peter and I do not agree” to be a reference to his earlier comment that the defendant was required to pay overtime rates.

[80] I do not accept the plaintiff’s evidence that he “understood” his vacation request was accepted by Mr. Hernandez. To the contrary, I find that the plaintiff knew his request was not approved and went anyway. More specifically, I find that:

a) The plaintiff demanded, without requesting, additional time off

b) The plaintiff was expressly told that he could not have additional time off;

c) The plaintiff told Mr. Hernandez that he was taking the time off whether the request was approved or not; and

d) The plaintiff knew that the 2:38 p.m. email from Mr. Hernandez was not an approval of him taking the extra time off but was merely an acknowledgement that he was taking the time off despite having been told not to.

The Investigation and Firing of the Plaintiff

[81] During the plaintiff's absence from work in December 2023, Mr. Hernandez attempted to verify the plaintiff's claimed extra hours for 2023. He did so by using security camera footage to determine when the plaintiff arrived at work each day, when he went for lunch and when he left work each day. He also cross-referenced his work with the plaintiff's expense reports for mileage. Mr Hernandez quickly discovered that the security camera footage only covered the period from the beginning of October 2023. He was therefore only able to verify the plaintiff's hours worked for the months of October and November 2023 and for December 1, 2023.

[82] Mr. Hernandez prepared a spreadsheet of the plaintiff's hours for October and November 2023. He concluded that, rather than the defendant having extra hours, the plaintiff owed the defendant 28.8 hours of time.

[83] Upon the plaintiff's return to work on January 2, 2024, he met with Mr. Steunenberg and Mr. Hernandez and was told his employment was being terminated for cause. He was presented with a letter entitled "Notice of Termination of Employment", a copy of the 2015 employment contract and a copy of Mr. Hernandez's final spreadsheet of his work hours. Following the meeting, he was escorted to his desk to pack his things. He then said goodbye to his co-workers and left.

[84] The termination letter dated January 2, 2024, accused the plaintiff of theft and dishonesty for falsely reporting his time and of "gross insubordination". It further stated that, even though the plaintiff was being terminated for cause, he was "gratuitously" being given the payment he would have been entitled to under the

2015 employment contract less $1,528.54, which amount was the calculated time the plaintiff had been paid for but had not worked in October and November 2023. The relevant paragraphs of the letter were as follows:

> An extensive review of our video records and your mileage reports has confirmed that since at least October, you have been falsely taking paid time from the company for hours you did not work. You are aware that you are paid to work the full eight-hour day. We therefore conclude that you knew you were not earning the wages we paid to you. According to our calculations, in the last two months alone you were paid for approximately 28.80 hours that you did not work. This equals $1,528.54 in falsely recorded time since October 1. We are certain this behaviour started before October 1, and that more than $1,528.54 has been wrongly paid to you. Any amount of theft fundamentally damages our ability to trust you and is therefore incompatible with your continued employment.
>
> Your conduct amounts to theft and dishonesty, and gives the company cause to dismiss you. You have also demonstrated gross insubordination toward your managers, as well as shockingly unprofessional behaviour towards some of your coworkers and our clients. Despite the company's efforts to reform your behaviour, you have shown no interest in improving. On the contrary, earlier this year you told me that you had given up and were no longer interested in putting any effort into this job or extra time. Aside from the cause that we have now discovered, you have proven to be unsuitable for continued employment with this organization.
>
> Notwithstanding that we have cause to dismiss you and no severance pay is owed, as a sign of our respect for our long history together, the company is gratuitously providing to you the payment you would be entitled to have if you had not given cause to dismiss. According to your contract of August 19, 2015, this amounts to eight weeks' pay in lieu of notice. From this, we are subtracting the $1,528.54 you have improperly received since October 1. Your 2015 contract is attached for reference. This will be paid by direct deposit, less mandatory remittances. Our payment of this amount is not to be taken as a waiver of our right to assert cause. Should you attempt to bring any legal action against the company, we will maintain that you gave cause to dismiss, and we will seek recovery of the amounts you were knowingly overpaid.

[85] Following his termination, the plaintiff prepared a detailed spreadsheet of his hours worked from October to December 1, 2023, in response to the spreadsheet that Mr. Hernandez had prepared. The comparison spreadsheet is most notable for the fact that the plaintiff added 30 minutes each day as working hours for coffee breaks not taken.

[86] The plaintiff also testified that Mr. Hernandez's spreadsheet of his working hours failed to take into account that on certain days he commenced working before he arrived at the offices of the defendant and that on other days he attended job sites after leaving the defendant. He identified a few days where he took work phone calls from home in the early morning and testified that this was the commencement of his working day. He identified a few other days where he attended jobsites after leaving the offices of the defendant and he produced photographs taken at those job sites. Mr. Hernandez agreed in cross-examination that his calculation of the hours the plaintiff worked on October 4, 2023 did not take into account that the plaintiff had visited a job site after 4:30 p.m. He explained that this was because he assumed the plaintiff quit working at 4:30 p.m. He also testified that taking calls from clients outside of normal working hours does not constitute working time.

Summary of Factual Findings

[87] In summary, my findings of fact include:

a) The plaintiff was employed by the defendant from 1992 to 2000 and again from 2004 to January 2024;

b) When the plaintiff was re-hired in 2004 the terms of his employment were entirely verbal and included that he would be compensated annually for extra hours worked beyond 40 hours per week on average.

c) When the plaintiff was re-hired in 2004, there was no discussion and no agreement that he was entitled to paid lunch or coffee breaks;

d) It was the responsibility of the plaintiff to keep track of his hours and to reconcile those hours on an annual basis;

e) The extra hours policy was an "honour policy" based on trust;

f) The plaintiff was compensated for his extra hours by receiving either extra wages or extra time off. He was never told that he must take extra time off as compensation for his extra hours;

g) In 2015, the parties renegotiated the terms of the plaintiff's employment and entered into a written employment agreement the terms of which included an increase in the plaintiff's salary, an increase in the number of weeks of holidays and a clause entitling the defendant to terminate the plaintiff's employment without cause by providing the minimum notice required by the *Employment Standards Act*;

h) The 2015 employment agreement was reviewed with the plaintiff in detail on August 14, 2015 and in lesser detail on August 19, 2015. It was signed by Mr. Steunenberg on August 19, 2015 and left with the plaintiff. The plaintiff signed the agreement on September 10, 2015;

i) In 2018 the plaintiff was presented with a new employment agreement which he refused to sign and which was not further pursued by the defendant;

j) The terms of the plaintiff's employment never included an entitlement to 30 minutes per day in paid coffee breaks and never included a term that he could record 30 minutes per day as working time for coffee breaks he did not take;

k) On May 4, 2022, at a meeting between the plaintiff, Mr. Steunenberg and Mr. Hernandez, the defendant became aware for the first time that the plaintiff was counting paid coffee breaks as extra hours and, at the meeting, the plaintiff was told he must stop doing so;

l) On October 26, 2023, the plaintiff requested two weeks vacation in December which was granted for the period December 4 to 15, 2023;

m) On November 30, 2023, the plaintiff delivered his reconciliation of extra hours to Mr. Hernandez and advised him that he would be taking the rest of the year off as compensation for his extra hours worked. Mr. Hernandez replied that he could not take the extra time off. At a meeting between the two on the same day, the plaintiff was again told by Mr. Hernandez that he could not take the extra time off to which the plaintiff replied that he was going to take the time off whether it was approved or not;

n) The plaintiff took the extra time off despite being told he was not entitled to do so and despite knowing he was not entitled to do so;

o) The plaintiff's reconciliation of his extra hours for 2023 included 30 minutes per day for coffee breaks, despite having been told in May 2022 that he was not entitled to do so; and

p) On January 2, 2024 the plaintiff was summarily dismissed for time theft and insubordination.

Positions of the Parties

[88] In summary, the plaintiff submits that he was wrongfully dismissed from his employment on January 2, 2024. In particular, he submits that there was no just cause for his termination, that he was not given any prior warnings of termination, and that the defendant failed to properly investigate the allegations of just cause. Additionally, the plaintiff submits that the 2015 employment contract is null and void on the grounds that there was no consideration. Alternatively, the plaintiff submits that the defendant repudiated the contract when it unilaterally and wrongfully deducted $1,528.54 from the 8-week payment in lieu of notice. The plaintiff says he was entitled to between 22 and 24 months notice or damages of between $215,000 and $234,000. He additionally claims entitlement to aggravated and punitive damages for the manner in which he was terminated.

[89] In summary, the defendant submits that the plaintiff was dismissed with cause, namely for insubordination and time theft, and further says that due to the grievous nature of the plaintiff's conduct, he was not entitled to warnings. Additionally, the defendant submits that the 2015 employment contract was valid and binding and prescribed the notice to which was entitled upon termination. It says that, despite being entitled to terminate the plaintiff's employment for cause, it gratuitously paid the plaintiff pursuant to the 2015 contract. The defendant denies the deductions from the amount paid to the plaintiff were a repudiation of the contract. The defendant additionally submits that the plaintiff failed to mitigate his damages.

Issues

[90] The issues for determination are:

a) Was the plaintiff terminated for cause?

   i. Did the defendant condone the alleged wrongful conduct?

   ii. Was the plaintiff entitled to warnings?

b) Is the 2015 employment contract enforceable?

   i. Was there consideration for the contract?

   ii. Did the defendant repudiate the contract?

c) If the 2015 contract is not enforceable, what notice was the plaintiff entitled to and what are the damages?

d) Is the plaintiff entitled to punitive or aggravated damages?

Analysis

Was the plaintiff terminated for cause?

[91] It is trite law that, at common law, an employer may dismiss an employee, without notice, at any time for just cause. However, where there is not just cause, the employee is entitled to reasonable notice or payment in lieu of reasonable notice. The burden of proving just cause is on the employer: *Hawkes v. Levelton Holdings Ltd.*, 2012 BCSC 1219, at para. 28

[92] The defendant alleges that it had just cause to dismiss the plaintiff. In particular, for time theft and insubordination. I will address the allegations of time theft first and will then consider whether insubordination gave the defendant cause to dismiss the plaintiff.

Time Theft

[93] In *McKinley v. BC Tel*, 2001 SCC 38, the Supreme Court of Canada rejected the notion that dishonest conduct gave an employer an automatic right of dismissal without cause. At paras. 48-51 and 53, Justice Iacobucci held that a trial judge or jury must consider the entire context and proportionality in determining whether the dishonesty gave rise to a breakdown in the employment relationship.

> [48] In light of the foregoing analysis, I am of the view that whether an employer is justified in dismissing an employee on the grounds of dishonesty is a question that requires an assessment of the context of the alleged misconduct. More specifically, the test is whether the employee's dishonesty gave rise to a breakdown in the employment relationship. This test can be expressed in different ways. One could say, for example, that just cause for dismissal exists where the dishonesty violates an essential condition of the employment contract, breaches the faith inherent to the work relationship, or is fundamentally or directly inconsistent with the employee's obligations to his or her employer.
>
> [49] In accordance with this test, a trial judge must instruct the jury to determine: (1) whether the evidence established the employee's deceitful conduct on a balance of probabilities; and (2) if so, whether the nature and degree of the dishonesty warranted dismissal. In my view, the second branch of this test does not blend questions of fact and law. Rather, assessing the seriousness of the misconduct requires the facts established at trial to be carefully considered and balanced. As such, it is a factual inquiry for the jury to undertake.
>
> [50] While ample case law supports this position, as discussed above, a second line of jurisprudence seems to run counter to it, suggesting that dishonest conduct always, irrespective of its surrounding circumstances, amounts to cause for dismissal. However, a closer inspection of these cases reveals that they actually support a contextual approach. As noted, these judgments involved dishonesty that was symptomatic of an overarching, and very serious misconduct. In most cases, the courts were faced with allegations to the effect that an employee had intentionally devised to extract some financial gain or profit to which he or she was not entitled, at his or her employer's expense. Such conduct was frequently tantamount to a serious form of fraud, and explicitly characterized by the courts as such.
>
> [51] This being the case, I conclude that a contextual approach to assessing whether an employee's dishonesty provides just cause for dismissal emerges from the case law on point. In certain contexts, applying this approach might lead to a strict outcome. Where theft, misappropriation or serious fraud is found, the decisions considered here establish that cause for termination exists. This is consistent with this Court's reasoning in Lake Ontario Portland Cement Co. v. Groner, 1961 CanLII 1 (SCC), [1961] S.C.R. 553, where this Court found that cause for dismissal on the basis of dishonesty exists where an employee acts fraudulently with respect to his employer. This principle necessarily rests on an examination of the nature

> and circumstances of the misconduct. Absent such an analysis, it would be impossible for a court to conclude that the dishonesty was severely fraudulent in nature and thus, that it sufficed to justify dismissal without notice.
>
> …
>
> [53] Underlying the approach I propose is the principle of proportionality. An effective balance must be struck between the severity of an employee's misconduct and the sanction imposed…
>
> [Emphasis added.]

[94] In *Roe v. British Columbia Ferry Services Ltd*., 2015 BCCA 1, Justice D. Smith phrased the applicable test as follows:

> [26] In *McKinley v. BC Tel*, 2001 SCC 38 at para. 49, the Court set out a two-part test for determining whether an employer is justified in dismissing an employee on the grounds of dishonesty. The court must determine: (i) whether the evidence establishes the employee's deceitful (dishonest) conduct on a balance of probabilities; and (ii) if so, whether the nature and degree of the dishonesty warrant the employee's dismissal. Both parts of the test involve factual inquiries (paras. 48-49). Absent palpable and overriding error, it is common ground that an appellate court may not interfere with a trial judge's findings of fact.
>
> [27] In particular, the test requires an assessment of whether the employee's misconduct gave rise to a breakdown in the employment relationship justifying dismissal, or whether the misconduct could be reconciled with sustaining the employment relationship by imposing a more "proportionate" disciplinary response (paras. 48, 53 and 57). A "contextual approach" governs the assessment of the alleged misconduct at this stage of the test (para. 51). That assessment includes a consideration of the nature and seriousness of the dishonesty, the surrounding circumstances in which the dishonest conduct occurred, the nature of the particular employment contract, and the position of the employee (paras. 48-57). The ultimate question to be decided is whether the employee's misconduct "was such that the employment relationship could no longer viably subsist" (para. 29).

[95] Accordingly, I must first consider whether the plaintiff engaged in deceitful or dishonest conduct and then I must consider whether the proven misconduct warranted the dismissal of the plaintiff. In doing so, I must consider the entire context and proportionality.

[96] I have little difficulty in determining that the defendant has proven on a balance of probabilities that the plaintiff engaged in dishonest conduct, namely time theft.

[97] First, it is agreed that the terms of the plaintiff's employment required that he work 40 hours per week on average and, if he worked more than the required hours on an annual basis, he was entitled to extra compensation for the extra hours worked.

[98] Second, it was never a term of the plaintiff's employment that he was entitled to paid coffee breaks or to record 30 minutes per day as time worked for coffee breaks that he did not take. The defendant's time policy was that office staff, including the plaintiff, were to generally work 8 hours per day with a half-hour unpaid lunch break and no paid coffee breaks. Moreover, the plaintiff was expressly told on May 4, 2022, that he was not entitled to paid coffee breaks and his unauthorized practice of recording 30 minutes per day as time worked for coffee breaks not taken had to stop.

[99] Third, although there was much evidence about the accuracy or inaccuracy of the spreadsheet prepared by Mr. Hernandez of the plaintiff's hours worked from October to December 1, 2023, the fact is that the plaintiff continued throughout 2023 to record 30 minutes per day as time worked for coffee breaks not taken. The plaintiff's 2023 reconciliation of hours worked included 30 minutes per day as hours worked for coffee breaks not taken.

[100] The plaintiff's 2023 reconciliation records that up to December 1, 2023, he worked 1,694 hours, over 210 days. This means that, up to December 1, 2023, and in respect of coffee breaks only, he overstated his hours worked by 105 hours (210 x 0.5). Further, if the coffee breaks are removed from the plaintiff's hours, the plaintiff worked only approximately 1,589 hours (1,694 – 105) during the relevant time period, whereas he was required to work 1,680 hours (210 x 8). In other words, not only did the plaintiff not have 50 extra hours as of December 1, 2023, he was well below the number of hours he was required to have worked.

[101] Accordingly, taking into account only coffee breaks, the plaintiff overstated his hours worked from January 1 to December 1, 2023, by approximately 105 hours.

Moreover, the plaintiff hid the overstatement of his hours by not disclosing in his reconciliation that he was adding 30 minutes per day for coffee breaks not taken.

[102] In the circumstances, I find that the plaintiff was deliberately deceitful and dishonest in the reporting of his hours worked.

[103] I now turn to whether the plaintiff's deceitful conduct warranted the plaintiff's immediate dismissal.

[104] In my view, there are several factors that are particularly significant, being:

a) First, the defendant's practice of compensating employees for extra hours was unique and a significant perk of employment. Mr. Steunenberg and Mr. Hernandez both testified that the defendant was unique in offering compensation for extra hours;

b) Second, the recording of hours worked was based on an honour system, which the plaintiff admitted. The defendant did not carefully monitor the hours worked by office staff but trusted the employees to accurately record and submit their hours; and

c) Third, the plaintiff was expressly told in the meeting of May 4, 2022, that he had to stop recording 30 minutes per day as time worked for coffee breaks not taken.

[105] In my view, in these circumstances, there was a breakdown in the employment relationship justifying the immediate dismissal of the plaintiff for his conduct. The plaintiff's conduct was deliberate, flagrant and serious. It was not merely dishonest but was fraudulent. The plaintiff had been expressly told he was not entitled to record 30 minutes per day as time worked for coffee breaks not taken. Despite this, he submitted a time report for 2023 that did exactly what he was told not to do. He knew that his time report overstated his hours. He further knew that the defendant had a limited ability to verify his time given that he was trusted to accurately record his hours.

[106] The plaintiff submits that his conduct was condoned by the defendant. I reject this submission outright. The defendant was not aware of the plaintiff's practice of recording 30 minutes per day as time worked for coffee breaks until the May 4, 2022 meeting and at that meeting the plaintiff was told to stop his practice. The conduct was not condoned but was expressly forbidden.

[107] The plaintiff submits that his termination was wrongful because he was not given any warnings and was not expressly told that his employment might be terminated. I likewise reject this submission. The defendant did give a warning in the meeting of May 4, 2022. The plaintiff was under no misapprehension. He knew he was not entitled to treat coffee breaks as extra hours worked but did so anyway. He also knew he was in a position of trust and knew he was abusing that trust. The circumstances here are so egregious that no more warnings were required.

Insubordination

[108] I now turn to insubordination as a ground of dismissal.

[109] There is no doubt that insubordination is grounds for dismissal and, in appropriate circumstances, a single act of disobedience can be grounds for summary dismissal. In *Holden v. Metro Transit Operating Co.*, [1983] B.C.J. No. 1783, Justice Callaghan wrote:

> [20] The plaintiff wilfully and deliberately disregarded the essential conditions of his employment contract by refusing to comply with the orders of his superior, not only once but on numerous occasions over a protracted period of time. The plaintiff knew that his refusal to comply with the direct orders of his superior could result in summary dismissal. He said as much when he indicated that he would seek legal advice. It was a flagrant act of insubordination and consequently the defendant was entitled to dismiss the plaintiff summarily.
>
> [21] As Lord Evershed M.R. said in delivering the judgment of the Court of Appeal in *Laws v. London Chronicle (Indicator Newspapers) Ltd*., [1959] 2 All E.R. 285, [1959] 1 W.L.R. 698 at 700:
>
> > It is no doubt, therefore, generally true that wilful disobedience of an order will justify summary dismissal, since wilful disobedience of a lawful and reasonable order shows a disregard — a complete disregard — of a condition essential to the contract of service, namely, the condition that the servant must obey the proper orders of

> the master, and that unless he does so the relationship is, so to speak, struck at fundamentally.
>
> [22] With regard to a single act of disobedience, the following statement of Lord Evershed M.R. at p. 701 is particularly apposite:
>
> > I think it is not right to say that one act of disobedience, to justify dismissal, must be of a grave and serious character. I do, however, think (following the passages which I have already cited) that one act of disobedience or misconduct can justify dismissal only if it is of a nature which goes to show (in effect) that the servant is repudiating the contract, or one of its essential conditions; and for that reason, therefore, I think that you find in the passages I have read that the disobedience must at least have the quality that it is 'wilful': it does (in other words) connote a deliberate flouting of the essential contractual conditions.
>
> [Emphasis added.]

[110] The defendant submits there are two aspects to the plaintiff's insubordination. First, the defendant submits that the plaintiff deliberately disobeyed the instruction that he was not to record coffee breaks as time worked. Second, it submits that the plaintiff was flagrantly insubordinate when he took additional time off in December 2023 after being told he was not permitted to do so.

[111] I agree with the defendant's submissions on both counts but, as I have already addressed coffee breaks, I confine myself to the plaintiff's conduct in December 2023.

[112] I have found as facts that: on November 30, 2023, the plaintiff demanded additional time off in December 2023 as compensation for his extra hours; he was expressly told by Mr. Hernandez, both in writing and verbally, that he could not have the time off; and, in the meeting between the two on November 30, 2023, the plaintiff told Mr. Hernandez that he was taking the time off whether it was approved or not. I have rejected the plaintiff's evidence that he "understood" his time off request was accepted by Mr. Hernandez and have found he knew his request was not approved but took the time off anyway.

[113] I further note that in the meeting of November 30, 2023, when Mr. Hernandez told the plaintiff he could not have the extra time off, the plaintiff replied that was too bad and that he should be let go.

[114] In my view, the plaintiff was clearly insubordinate and this insubordination was wilful, flagrant grave, and serious. The plaintiff took time off despite being told he was not to do so. The plaintiff was openly defiant to his superior, Mr. Hernandez, and was goading him to “let him go”. Such conduct strikes at the very root of an employment contract and wholly undermines the employer/employee relationship.

[115] Accordingly, the defendant was justified in summarily dismissing the plaintiff for insubordination.

[116] In view of my determinations that the defendant was entitled to summarily dismiss the plaintiff for dishonesty and insubordination, I do not need to consider whether the notice provision in the 2015 contract was void for lack of consideration or whether the defendant repudiated the contract. However, based on my findings of fact, there was clearly consideration for the 2015 contract. Moreover, in my view, the deduction by the defendant of $1,528.54 from the gratuitous 8-week payment in lieu of notice did not amount to a substantial failure of performance.

Disposition

[117] The action is dismissed.

[118] The parties have leave to speak to me regarding costs.

“Giaschi J.”