

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:)
)
KASHIF SALAM) *Ali Shaikh, for the Plaintiff*
)
)
Plaintiff)
)
– and –)
)
ONTARIO RESEARCH AND) *James D. Heeney & Jessica Elizabeth David*
INNOVATION OPTICAL NETWORK) *Nolan, for the Defendant*
)
Defendant)
)
) **HEARD:** December 1-3, 2024
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PARGHI J.

REASONS FOR JUDGMENT

[1] In 2017, Kashif Salam applied to work for the Ontario Research and Innovation Optical Network (“ORION”) as a Senior Product Sales Solution Manager. ORION is a not-for-profit organization that offers a private research and education network for use by researchers, educators, and innovators at universities, colleges, hospitals, and research institutions in Ontario. After ongoing discussion, ORION provided Mr. Salam with a written offer of employment. He signed it and started working at ORION on July 17, 2017. He was promoted to the role of Director, Products and Business Solutions around March 2018. On October 16, 2019, ORION terminated his employment without cause. Mr. Salam was 49 years old. He now sues for wrongful dismissal and unpaid wages.

- [2] Mr. Salam’s wrongful dismissal claim turns on reasonable notice. When he was terminated, he received statutory entitlements as set forth in the *Employment Standards Act, 2000*, S.O. 2000, c. 41, and an additional two-and-a-half weeks of base salary. This was done in accordance with the termination provisions of the signed offer of employment between ORION and Mr. Salam, which I will refer to as the Employment Agreement. Mr. Salam now states that he was entitled to 12 months of notice.
- [3] I find that he was entitled to six months of notice.
- [4] Mr. Salam’s unpaid wages claim is for \$611,917.00 in commissions that he states ORION owes him. ORION submits that Mr. Salam is owed nothing in commissions because the commission plan on which Mr. Salam relies in support of this claim was a draft plan, circulated for discussion only but never approved or implemented.
- [5] I find that the commission plan on which Mr. Salam bases this claim was never a binding agreement. However, based on the provisions of the Employment Agreement, as interpreted in light of the parties’ subsequent conduct, he was entitled to commissions of to up to 15% of his base salary. He received such commissions for the 2017-2018 and 2018-2019 fiscal years. He is also entitled to receive them for the portion of the 2019-2020 fiscal year during which he worked at ORION, and for the subsequent six-month reasonable notice period.
- [6] In total, Mr. Salam is entitled to \$58,419.52, less statutory deductions.
- [7] Mr. Salam advanced certain claims at trial that were not pleaded in his Statement of Claim, including claims that his termination was pretextual and retaliatory, that ORION breached its duty of good faith and fair dealing, and that he is entitled to special damages of \$50,000.00 for “delayed statutory payments, inaccurate tax reporting, and additional expenses incurred”. Because these claims were not pleaded, I do not consider them here. In any event, little or no evidence was tendered in support of these claims, and I am of the view that they have no merit.

Factual Background

- [8] Mr. Salam applied to work at ORION on the invitation of Delilah Moysich, who at the time was ORION’s Vice President of Business Development and Marketing. She had previously worked with him at another company. Mr. Salam’s evidence was that when he was applying, Ms. Moysich told him that ORION was “looking to aggressively grow its new sales revenues and product portfolio and will be paying higher incentives including sales commission to bring new sales”. Ms. Moysich “explicitly told” him that one of the three components of his compensation would be “a 15% sales commission on salary”. She made him believe that “it was merely a formality to have” the commission plan approved.
- [9] The evidence of ORION’s witnesses was that historically, it never had an employee commission plan in place. Any incentive compensation took the form of bonuses, the payment of which was always discretionary, subject to approval from the President and

Chief Executive Officer, and based on ORION's overall performance and each individual employee's performance.

- [10] Before Mr. Salam joined, internal discussions began at ORION about the possibility of introducing some form of commission plan. Ms. Moysich gave evidence that one of her responsibilities was to explore ways in which ORION might grow, and one of the possibilities under consideration when Mr. Salam joined was a commission plan that might help to incentivize employees to increase revenue for ORION. She described the commission plan as a "desired plan". Her evidence was that she did not tell Mr. Salam that a commission plan would be in place once he was hired and did not commit to getting one in place. Rather, she told him that there was planning within the organization of how to incentivize employees, that a commission program would be one consideration in that discussion, and that nothing had been approved.
- [11] Pursuant to the Employment Agreement, Mr. Salam's compensation had three primary elements: a base salary of \$130,000.00, eligibility for a "commission plan," and eligibility for a "compensation enhancement program" (a discretionary performance-based bonus). The particulars of Mr. Salam's compensation were explained in a section of the Employment Agreement entitled "Base Salary and Bonus," which read (emphasis in original):

ORION shall pay to **SALAM** for his/her services provided under this Agreement an annual salary of **\$130,000.00** ... payable in bi-weekly instalments (the "Base Salary"), ... **plus eligible for commission plan**, payable based on annual sales results at the end of each fiscal year. ORION may increase the salary, in its discretion, in which case the Agreement shall be amended thereby, and the increase if any will form a part of this Agreement without changing any other part. ORION may adjust the commission plan upon completion of agreed to Commission plan. All payments may be pro-rated according to employment start date.

In addition to **SALAM's** Base Salary, goals and objectives will be set in consultation with the President/CEO as well as the Vice President Finance and Operations and **SALAM**, and compensation adjustments will be made based upon **SALAM's** performance against targets. **SALAM's** goals and objectives will be mutually agreed upon within 60 days of commencement of employment.

SALAM will be eligible to participate in a compensation enhancement program for each year of employment. The amount of any compensation enhancement payment will be a percentage of Base Salary (pro-rated). The actual payment will be based on the achievement of performance objectives to be mutually agreed upon between **SALAM** and the President/CEO prior to the commencement of each anniversary year. The payout for the achievement of these agreed objectives will not exceed 5% of **SALAM's** Base Salary. The decision on awarding a payment under this plan is within the sole and absolute discretion of ORION.

In order to be eligible for the compensation enhancement program you must be actively employed on the date in which any award is paid. Active employment ceases on the date you receive notice of termination or you provide notice of resignation to ORION. To be clear, active employment does not include any period of statutory notice, reasonable notice, or period after notice of termination is provided whether statutory, common law, or otherwise.

- [12] In November 2017, ORION provided Mr. Salam with an employment confirmation letter that indicated that his “annual compensation is \$130,000.00 plus 15% commission on salary and an additional bonus up to 5%.” It was signed by ORION’s President and Chief Executive Officer.
- [13] In February 2018, ORION provided Mr. Salam with another employment confirmation letter that was worded identically and signed by the President and Chief Executive Officer.
- [14] In April 2018, ORION increased Mr. Salam’s base salary from \$130,000.00 to \$136,500.00 and gave him a “performance bonus” of \$15,600.00. A subsequent email from Ms. Moysich, entitled “Bonus (Commission Calc),” explained that he had achieved 80% of his quota that year, “if your [sic] calculating”.
- [15] The parties construed the \$15,600.00 payment very differently. Mr. Salam’s evidence was that he understood the payment to be his commission. After receiving the payment, he emailed Ms. Moysich to inquire about what he considered to be the missing 5% performance bonus. In his view, he was entitled to both. Ms. Moysich’s evidence was that the payment was a performance bonus and not a commission payment.
- [16] In July 2018, ORION increased Mr. Salam’s base salary to \$143,000.00. Ms. Moysich’s evidence was that this additional payment was made in response to the concerns Mr. Salam had raised about his compensation. In the letter informing Mr. Salam of the additional increase, he was told that effective that fiscal year forward, his “performance bonus will be measured based on a sales commission structure plan to be rolled out for Q2 based on quota target results pending CEO approval.” The letter was signed by the President and Chief Executive Officer.
- [17] In late 2018 or early 2019, Ms. Moysich prepared and circulated a draft commission plan. It does not appear that a copy of this draft plan was circulated to Ms. Salam.
- [18] In early February 2019, Ms. Moysich emailed a second version of the draft commission plan to Mr. Salam and Mark Grant, the Director, Community Development at ORION. It was entitled “Fiscal 2018/19 Community Development Director/Sales Engineering Variable Incentive Plan”. I will refer to this version of the draft plan, on which Mr. Salam’s claim for unpaid wages is based, as the “Draft Commission Plan”.
- [19] The subject line of Ms. Moysich’s email was “Draft Comp Plan”. The Draft Commission Plan bore a large “DRAFT” watermark on every page. It specified that the annual quota for the Community Development Director (Mr. Grant) or Sales Engineer (Mr. Salam) was “\$610,000.00 (New Revenue)”. It contemplated that commissions would be paid on 15%

of an employee's base salary. The amount of commission would vary depending on the extent to which the employee satisfied their "closed new revenue" quota. For example, if an employee achieved less than 50% of their new revenue quota, they would earn no commission. If they achieved 51% to 70% of their quota, they would earn a commission of 60% (on 15% of their base salary).

- [20] Mr. Salam's evidence was that the Draft Commission Plan mirrored the approach that ORION had taken when calculating his "commission" of \$15,600.00 in April 2018. That is, he achieved 80% of his sales target and was paid a commission of 15% on 80% of his salary. Thus, to his understanding, even though the Draft Commission Plan was labelled "draft," it "was being acted upon". It already informed how he was being compensated.
- [21] After the meeting about the Draft Commission Plan, Mr. Salam emailed Ms. Moysich stating that he was "good with" the Draft Commission Plan. He stated that ORION's signing authority on the Draft Commission Plan was missing (this appears to be a reference to the fact that the plan was unsigned), and asked that she send him the updated one.
- [22] On March 12, 2019, ORION provided an employment confirmation letter to Mr. Salam that indicated that his annual compensation was "\$143,000.00 plus up to 15% commission on salary." This letter was also signed by the President and CEO.
- [23] In May 2019, ORION increased Mr. Salam's base salary to \$145,860.00 and gave him a "performance bonus" of \$15,015.00.
- [24] Mr. Salam emailed Ms. Moysich asking, "I assumed my bonus/commission is based on the new comp plan??" The ensuing email exchange suggests, and Mr. Salam indicated in his evidence, that he believed he was entitled to both a 15% commission and a 5% bonus, and that he had not been paid both of these amounts. In his emails, he asked Ms. Moysich for details on his commission calculation. He told her that she had said during their meeting that the Draft Commission Plan was "active" and asked again about getting a signed copy of it.
- [25] Ms. Moysich's evidence was that she understood Mr. Salam's reference to the "bonus/commission" to mean the discretionary 5% bonus, and not a commission. It does not appear that she responded to his inquiries about how his commission was calculated.
- [26] Mr. Salam was terminated five months later.
- [27] There is no documentation to suggest that the Draft Commission Plan was ever formally finalized, approved, or implemented before Mr. Salam was terminated. There are no emails or other communications suggesting that it was ever finalized or approved. There are no "final" or "approved" versions of it in the record.
- [28] ORION's witnesses gave consistent evidence that it was understood in the organization, and reiterated to Mr. Salam after he joined, that the Draft Commission Plan was only in draft and would move forward only if approved.

- [29] Ms. Moysich's evidence was that when she presented the Draft Commission Plan to Mr. Salam and Mark Grant in February 2019, she "repeatedly" told them that the Draft Commission Plan was "a work in progress that was subject to approval." Mr. Salam "kept reaching out" to her about the Draft Commission Plan and she "would tell him ... that the plan was not in place."
- [30] Mr. Grant echoed this. He described the Draft Commission Plan as a "proposal". His evidence was that he "always understood" that it was "subject to approval" and "ultimately never approved." When Ms. Moysich walked Mr. Salam and him through the Draft Commission Plan during their February 2019 meeting, it was "clear" to him that the Draft Commission Plan "was a work-in-progress."
- [31] Likewise, Gabrijela Jevtic, who was ORION's Controller when Mr. Salam joined the organization and became Director, Finance in March 2018, gave evidence that when the Draft Commission Plan was circulated, "we were all advised it [was] subject to approval by" the Chief Executive Officer. Mr. Salam raised with her the issue of getting a commission plan in place, and she "repeatedly made it clear that it was being considered but was not a certainty."
- [32] Mr. Salam disputed this evidence. He denied that Ms. Moysich told him that the Draft Commission Plan would move forward only if it were approved, and stated that in any event she led him to believe that the approval of the Draft Commission Plan was just a formality. He did not remember Ms. Jevtic ever telling him the Draft Commission Plan was just a draft plan.
- [33] ORION's witnesses also gave evidence that the Draft Commission Plan was never approved. Ms. Moysich's evidence was that the Draft Commission Plan was discussed "for some time, until it was dropped entirely without ever being approved or implemented." Ms. Jevtic gave evidence that conversations about "the possibility" of a commission plan "were ongoing for over several years, but nothing was ever put in place." This understanding was shared by Mr. Grant, who gave evidence that things eventually "went silent" about the Draft Commission Plan and they "never heard anything back".
- [34] Mr. Salam disputed this. His evidence was that he was never told the plan was not approved, and that he was being compensated in accordance with the plan, whether it was formally approved or not.
- [35] As detailed below, Mr. Salam seeks commission payments based on the Draft Commission Plan for the 2018-2019 fiscal year, and the portion of the 2019-2020 during which he was employed by ORION, of \$611,917.00.
- [36] ORION's position is that the Draft Commission Plan was never approved or implemented, and that even if it had been, it would not have calculated commissions in the manner now advocated for by Mr. Salam. This is so in at least two respects.
- [37] First, the Draft Commission Plan only contemplated commissions being paid on new regular network connection services – that is, institutions signing up to join ORION's

research and education network. However, Mr. Salam's calculations include revenue that were not to be included in commission calculations under the Draft Commission Plan, such as revenue that came from government funding. Ms. Jevtic's evidence was that she discussed this with Mr. Salam, and explained to him how government funding could never be subject to commission payments because government funding terms would preclude such uses of the money. She told him that the government was not a typical customer. Mr. Grant, too, gave evidence that Ms. Salam's calculations include work and projects that Mr. Grant would not have considered to be network revenue covered by the Draft Commission Plan, including various government-funded projects.

[38] Second, ORION claims that Mr. Salam's calculations of "new revenue" include, for a single year, the total value of multi-year contracts. Ms. Moysich's evidence was that it would "not make sense" to give commissions based on potential future revenue, because such future revenue is "not guaranteed". Ms. Jevtic echoed this view, stating that the Draft Commission Plan's reference to an "annual quota" for new revenue cannot reasonably be thought of as including "possible revenue that would potentially come into ORION over 3-10 year contract terms".

[39] Having outlined the background facts, I now turn to the issues in dispute.

Legal Issues

[40] The issues before me are:

- a. Whether Mr. Salam was entitled to be paid commissions, and if so on what basis and in what amounts;
- b. What reasonable notice period Mr. Salam was entitled to;
- c. Whether Mr. Salam complied with his duty to mitigate his damages upon termination; and
- d. What damages, if any, Mr. Salam is entitled to, based on the above.

Whether Mr. Salam was entitled to be paid commissions

[41] Mr. Salam submits that the Employment Agreement contained a binding agreement by ORION to pay him commissions, and that that the commissions to be paid to him were the ones discussed in the Draft Commission Plan. In effect, it is his position that ORION is bound by the terms of the Draft Commission Plan. He submits that his annual revenue target was \$610,000.00, that due to his efforts ORION made \$17,401,836.00 during that year, that he achieved 2,853% of his sales target, and that, based on the Draft Commission Plan, he is accordingly owed \$611,917.00 in commissions. His claim is rooted in the Employment Agreement's provision that he is "eligible for commission plan, payable based on annual sales results at the end of each fiscal year."

[42] I consider this claim below.

Mr. Salam was entitled to commissions

- [43] I find, first, that it was an express term of the Employment Agreement that Mr. Salam was eligible to receive commissions.
- [44] The Employment Agreement provides that Mr. Salam’s compensation included base salary “plus eligible for commission plan, payable based on annual sales results at the end of each fiscal year. ... ORION may adjust the commission plan upon completion of agreed to Commission plan.”
- [45] In interpreting this provision, I am to determine the intention of the parties in accordance with the language they have used in the written agreement, based upon the “cardinal presumption” that they intended what they wrote. I must read the text of the written agreement as a whole, giving the words used their ordinary and grammatical meaning, in a manner that gives meaning to all of the agreement’s terms and avoids an interpretation that would render one or more of its terms ineffective (*Weyerhaeuser Company Limited v. Ontario (Attorney General)*, 2017 ONCA 1007, 77 BLR (5th) 175, at para. 65, rev’d on other grounds; *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, [2014] 2 SCR 633, at para. 47).
- [46] Applying these principles here, I am of the view that this language, read as a whole, both established a commission plan (“eligible for commission plan, payable based on annual sales results at the end of each fiscal year”) and provided for future amendments to that commission plan (“ORION may adjust the commission plan upon completion of agreed to Commission plan”).
- [47] The Employment Agreement does not describe the established commission plan with any specificity; it simply says that commissions will be paid based on annual sales results. However, it does clearly provide that Mr. Salam was eligible for a commission plan at the time he joined ORION. The reference to “eligibility” does not diminish this entitlement. It merely reflects the fact that Mr. Salam would be eligible to receive a commission if and only if he met the applicable criteria. That he was entitled to be considered for a commission is, in my view, unambiguous. The parties referred to Mr. Salam being eligible for a commission plan. They are to be presumed to have meant what they wrote. To suggest that Mr. Salam was not eligible for any commission plan at all would render ineffective this express language of the Employment Agreement.
- [48] Mr. Salam’s evidence was that Ms. Moysich told him he would be entitled to receive commissions of up to 15% upon joining ORION. She denied that claim. I make no factual finding as to whether she did indeed make this representation to him. However, if she did, her representation merely reiterated, and quantified, an entitlement to commissions that is already clear from the plain language of the Employment Agreement.

Mr. Salam was entitled to commissions of up to 15% of his salary

- [49] The Employment Agreement does not specify the quantum of the commissions for which Mr. Salam was eligible. It simply provides that the commissions were “payable based on

annual sales results at the end of each fiscal year.” I find, however, that the parties’ subsequent conduct demonstrates that they understood and intended that the commissions would equal up to 15% of Mr. Salam’s base salary. He was therefore entitled to receive commissions on this basis.

- [50] The subsequent conduct of contractual parties can assist in interpreting contracts in certain circumstances. Where the terms of a contract are ambiguous in light of the language of the entire agreement and the factual matrix at the time the agreement was entered into, the parties’ subsequent conduct gives evidence of how the parties interpreted the agreement at the time they executed the agreement, which suggests that they took the same view when entering into the agreement. (*Shewchuk v. Blackmont Inc.*, 2016 ONCA 912, 404 D.L.R. (4th) 512, at paras. 39-46; *Thunder Bay (City) v. Canadian National Railway Company*, 2018 ONCA 517, 424 DLR (4th) 588, at paras. 62-64). Courts have similarly looked to post-contractual conduct as an interpretative aid in certain circumstances in which an agreement is silent on a particular point (*Actuate v. Symcor*, 2015 ONSC 689, at paras. 76-85, rev’d in part, not on this point, 2016 ONCA 217). The conduct of the parties will have more weight where the actions in question are intentional actions of both parties to the agreement that are consistent over time and are acts of individuals rather than corporate agents and where it is unequivocal in providing support for only one of the available interpretations of the agreement (*Shewchuk*, at paras. 53-54).
- [51] Here, the Employment Agreement refers to commission payments based on performance, but gives no particulars as to how much of a commission will be paid. This contractual silence remains even against the context of the entire agreement and the factual matrix at the time it was entered into. That is, the other provisions of the Employment Agreement do not quantify the commission entitlement. Nor does the factual matrix unequivocally do so: Mr. Salam asserts that Ms. Moysich promised him a 15% commission before he joined ORION, but she disputes that claim. It is therefore appropriate to consider whether the subsequent conduct of the parties fills in this contractual silence.
- [52] I begin by observing that ORION prepared three different employment confirmation letters for Mr. Salam over time, all of which stated that Mr. Salam was receiving commission payments on top of his base salary equal to or up to 15% of his base salary. One of the letters was prepared in November 2017, four months after Mr. Salam began at ORION. The second was prepared in February 2018. The third was prepared in March 2019. All three were signed by ORION’s President and Chief Executive Officer. All three were provided to third parties who required accurate information about Mr. Salam’s compensation. ORION presumably understood the importance of the written representations it made regarding Mr. Salam, both to those third parties and to Mr. Salam.
- [53] In my view, the fact that ORION said in all three letters that Mr. Salam was receiving a commission of 15% or up to 15% is significant. It demonstrates that, even if the Employment Agreement was silent on the quantum of Mr. Salam’s commission, ORION understood itself to be giving him a commission of 15% or up to 15% of his base salary. It held itself out to Mr. Salam and the world as doing so.

- [54] Importantly, ORION also paid Mr. Salam commissions of up to 15% for his first (partial) fiscal year with the organization. In April 2018, ORION gave him a “performance bonus” of \$15,600.00. A subsequent email from Ms. Moysich, entitled “Bonus (Commission Calc),” explained that he had achieved 80% of his quota that year, “if your [sic] calculating”. Her email can only be read to mean that the \$15,600.00 payment was calculated based on his having achieved 80% of his quota. Indeed, the math bears this out: the payment was equal to 15% of 80% of Mr. Salam’s salary of \$130,000.00. It thus reflected a commission of 15% of salary, discounted to reflect the extent to which Mr. Salam met his sales quota. Moreover, in quantum, the \$15,660.00 payment far exceeded the 5% limit on performance bonuses established in the Employment Agreement. It therefore cannot reasonably be construed to have been a mere bonus. It can only be understood as a commission payment.
- [55] Thus, ORION, through its post-Employment Agreement conduct – namely, the employment confirmation letters, its April 2018 payment to Mr. Salam of \$15,600.00, and its own description to Mr. Salam of that payment, demonstrated that it believed and intended that Mr. Salam was entitled to commissions of up to 15%.
- [56] Mr. Salam’s conduct also demonstrated that he believed he was entitled to commissions of up to 15%. His emails to Ms. Moysich after he received his compensation letters in both April 2018 and May 2019 reflected his understanding that he was eligible to receive commissions of up to 15% based on his sales.
- [57] This subsequent conduct on the part of the parties bears the indicia of reliability articulated in the case law. ORION acted intentionally in sending out each of the three employment confirmation letters, in paying Mr. Salam the \$15,600.00 payment, and in sending him the subsequent email that characterized the payment as a reflection of his having achieved 80% of his target. It acted consistently over time, by preparing and sending out the three letters over a period of 16 months. The letters were sent by ORION’s Chief Executive Officer and President, who was also the one to communicate the \$15,600.00 payment to Mr. Salam in correspondence. The email attributing that payment to Mr. Salam’s achievement of 80% of his sales target was sent by Ms. Moysich, a vice president at ORION. Both the Chief Executive Officer and President and Ms. Moysich held positions of leadership at ORION, and were not mere corporate agents. Additionally, all this conduct unequivocally supports the view that Mr. Salam was entitled to a commission of up to 15%. It supports no other interpretation.
- [58] I therefore find that the subsequent conduct of parties demonstrates that they intended for Mr. Salam to receive commissions of up to 15%.

The Employment Agreement was never amended to incorporate the Draft Commission Plan

- [59] The Employment Agreement contemplated that Mr. Salam’s commission payment plan could be amended over time. It provided, “ORION may adjust the commission plan upon completion of agreed to Commission plan.” Such an amendment was certainly proposed,

in the form of the Draft Commission Plan circulated in February 2019 and discussed with Mr. Salam and others.

- [60] I find, however, that this proposed amendment to Mr. Salam’s commission plan never became binding, because the Draft Commission Plan was never finalized and approved. As a consequence, Mr. Salam’s claim that he is entitled to over \$600,000.00 in commissions, which is predicated on the Draft Commission Plan being a binding agreement, cannot succeed.
- [61] Almost all the evidence supports that the Draft Commission Plan was not implemented. The record does not contain any final, approved, or implemented version of the Draft Commission Plan or any suggestion that one exists. The testimony of ORION’s witnesses is consistent that the Draft Commission plan was never finalized or implemented. That testimony was not successfully challenged on cross-examination.
- [62] The only evidence that the Draft Commission Plan was finalized comes from Mr. Salam himself. He was adamant that the Draft Commission Plan was in force. However, his evidence cannot be reconciled with the documentary record or the evidence of any of the ORION witnesses. He also stood to gain from the approval of the Draft Commission Plan. I do not doubt the sincerity of Mr. Salam’s belief that the Draft Commission Plan was approved. But his belief, however sincere, was mistaken. It is irreconcilable with the weight of the evidence, including that of Mr. Grant, who, like Mr. Salam, had everything to gain by the implementation of the Draft Commission Plan, yet was unequivocal that it was never finalized or put into place.
- [63] I am therefore unable to find that the Draft Commission Plan ever became a binding component of the Employment Agreement.
- [64] My view is underscored by the fact that the essential terms of the Draft Commission Plan cannot be determined with a reasonable degree of certainty. As such, even if the Draft Commission Plan had been approved, it could not be viewed as a binding contract.
- [65] The Court of Appeal for Ontario explained the requirement for certainty of terms in *Bawitko Investments Ltd. v. Kernels Popcorn Ltd.* (1991), 79 D.L.R. (4th) 97 (Ont. C.A.). It held that an original or preliminary agreement “cannot constitute an enforceable contract” if, for example, “essential provisions intended to govern the contractual relationship have not been settled or agreed upon,” the contract “is too general or uncertain to be valid in itself and is dependent on the making of a formal contract,” or the parties understand or intend “that their legal obligations are to be deferred until a formal contract has been approved and executed” (at p. 104). In such circumstances, “the ‘contract to make a contract’ is not a contract at all” (at p. 104). The Court went on to hold that the franchise agreement in that case was a binding agreement in respect of certain essential terms, but not other terms, which remained unsettled because they were the subject of negotiation or discussion and had not been agreed upon (at pp. 105-106; see also *Taylor v Netron Inc.*, [2002] O.J. No. 3121 (S.C.), at para. 85).

- [66] For the same reasons, the Draft Commission Plan does not constitute a proper amendment of the Employment Agreement. Its language does not describe the new, amended commission plan adequately to give the parties any certainty as to its terms. It does not, for instance, specify which customer accounts would be considered when calculating commissions, the percentage rate at which commissions would be calculated, or how the calculations would be performed, including when customers enter into multi-year contracts. Nor is there evidence that Mr. Salam and ORION had a “meeting of the minds” on any of these essential terms, even if the terms were not captured in writing. To the contrary, the record makes clear that the parties have irreconcilable views on these issues.
- [67] For these reasons, Mr. Salam’s claim for unpaid commissions, which is premised on the terms of the Draft Commission Plan, cannot succeed.

Mr. Salam is entitled to certain additional commissions in accordance with the applicable commission plan

- [68] Additionally, I find that, because the commission payment plan in the Employment Agreement was never amended, the only agreement in place regarding commission payments was the initial agreement entitling Mr. Salam to commissions of up to 15% of his base salary.
- [69] I find that, for the 2017-2018 fiscal year, Mr. Salam received commissions in accordance with that agreement. As discussed above, he received a commission of 15% on his base salary, prorated to reflect that he achieved 80% of his target.
- [70] For the 2018-2019 year, Mr. Salam received a “performance bonus” of \$15,015.00 on a base salary of \$143,000.00. ORION has pleaded that this means Mr. Salam met 69.5% of his target for that year, and this amount accordingly reflects 15% of 70% of his base salary of \$143,000.00. There is no evidence before me to this effect. Regardless, however, the payment of \$15,015.00 works out to 10.5% of his base salary (and to 15% of 70% of his salary). It falls squarely within Mr. Salam’s “up to 15% of base salary” commission entitlement. Accordingly, I find that Mr. Salam received a commission for the 2018-2019 year in accordance with the existing commission payment plan in the Employment Agreement. He is not entitled to further commissions for that year.
- [71] However, for the 2019-2020 fiscal year, Mr. Salam received no commission. He is entitled to commissions for the portion of the 2019-2020 fiscal year during which he worked at ORION, and for any subsequent reasonable notice period. He worked for just over half of that fiscal year before being terminated. He was eligible for commissions of up to 15% of his base salary for that time frame. As discussed below, I grant him this amount, calculated based on the average of the commissions he received for the two prior years, for the time he was actively employed at ORION plus any notice period. This approach would place him in the position he would have been in had he not been terminated.

What reasonable notice period Mr. Salam was entitled to

- [72] Mr. Salam worked at ORION from July 2017 to October 2019, initially as Senior Product Sales Solution Manager and then as Director, Products and Business Solutions. At the time he was terminated, he had been with ORION for two years and three months. He led a small team. He was 49 years old. Upon termination, he received statutory entitlements as set forth in the *Employment Standards Act, 2000*, and an additional two-and-a-half weeks of base salary, all in accordance with the Employment Agreement.
- [73] Mr. Salam's position, in his Statement of Claim and at this trial, was that he was entitled to 12 months of reasonable notice, with the result that he is now entitled to one year's base salary as damages for wrongful dismissal.
- [74] In its Statement of Defence, ORION pleaded that Mr. Salam was not entitled to any payments beyond what he received at termination. I do not accept this position. It is clear at law that Mr. Salam was entitled to reasonable notice under the common law, notwithstanding the provisions of the Employment Agreement. Indeed, ORION ultimately recognized that its pleaded position was untenable and submitted at trial that Mr. Salam is entitled to five months of notice. ORION did not amend its Statement of Defence before trial. While this approach may have cost consequences, that matter is for another day.
- [75] In determining the reasonable notice period under the common law, I am to rely on the factors set forth by this court in *Bardal v. Globe & Mail Ltd.* (1960), 24 D.L.R. (2d) 140 (Ont. H.C.)). These factors consist of the character of the employment, the length of service, the age of the employee, and the availability of similar employment, having regard to the experience, training, and qualifications of the dismissed employee (at p. 145, cited with approval in *Honda v. Keays*, 2008 SCC 39, [2008] 2 SCR 362, at para. 28).
- [76] Applying these factors here, I observe the following:
- a. There is little evidence of Mr. Salam's educational and professional experience, training, or qualifications. All that the record indicates is that he worked with Rogers for several years, and also ran his own consultancy, before joining ORION.
 - b. Having regard to the character of Mr. Salam's employment, he was a sales engineer in a leadership position. He worked initially as Senior Product Sales Solution Manager and then was promoted to Director, Products and Business Solutions. He had a small team working for him by the time of his termination.
 - c. At the time he was terminated, Mr. Salam had been with ORION for two years and three months.
 - d. He was 49 years old when he was terminated.
 - e. There appears to be similar employment available, based on the fact that he worked in this field, broadly defined, before joining ORION and found new employment within four months of leaving ORION, as discussed below. That said, there is little evidence before me on the specific content of Mr. Salam's job duties and the job

market in that field generally, and I therefore do not place much weight on this particular *Bardal* factor.

- [77] Considering these factors, I am of the view that six months' notice is appropriate. There are numerous cases in which the courts have awarded five or six months of notice to individuals close to Mr. Salam in age and with similar levels of job responsibility, salary levels, and lengths of service (*Nassar v. Oracle Global Services*, 2022 ONSC 5401; *Nicholson v. Masonite International Corporation*, 2014 BCSC 1247; *Capital Pontiac Buick Cadillac GMC Ltd v Coppola*, 2013 SKCA 80, 364 DLR (4th) 351). In my view, it is appropriate to do the same here. While the case law also shows examples of shorter notice periods being awarded (*Roberts v. St. Joseph's Healthcare Hamilton*, 2011 ONSC 3885; *Anstead v. Park Royal Homes Inc.*, 2009 ABQB 179, 470 AR 124; *Wilkinson v. Pharma*, 2022 CanLII 120475 (ON SCSM)), those examples are less applicable here, given Mr. Salam's level of professional qualification and salary level, and the fact that he led a small team.

Whether Mr. Salam Complied with his Duty to Mitigate Damages

- [78] It is uncontested that Mr. Salam obtained new employment in February 2020, about four months after he was terminated by ORION. His new job paid \$135,000, which was \$10,860.00 per year less than he had been earning at ORION at the time of his termination.
- [79] The standard approach would be to deduct from the six months of notice owed to Mr. Salam whatever he earned from his new job during the six month notice period – that is, from the time the new job began in February 2020, until the termination of the six month notice period in mid April 2020.
- [80] Mr. Salam urges me not to take this standard approach, on the basis that mitigation should not be factored in because of the manner of Mr. Salam's termination and how he was treated by ORION. This position is not pleaded, and it is not clear to me that ORION was ever put on notice of it. It may be a variation on the allegation of bad faith by ORION, which is also not pleaded. In any event, the position is without merit. I see no basis in the record for determining that Mr. Salam was treated improperly or in such a way as to override the general rule on how mitigation is to be addressed in damages calculations.

The Damages to which Mr. Salam is Entitled

- [81] Mr. Salam is entitled to be paid his base salary for the reasonable notice period of six months (or 26 weeks). His base salary at the time of termination was \$145,860.00. He was unemployed from the date of his termination, October 16, 2019, to February 10, 2020. For this "unmitigated" portion of the notice period, he is entitled to his full base salary of \$46,282.50. For the balance of the notice period, he is entitled to the difference between his base salary with his new employer and his base salary at ORION, of \$1,984.08. In total, he is entitled to \$48,266.58 for damages in lieu of notice.
- [82] Mr. Salam is entitled to damages for his loss of benefits. The courts have generally provided awards for lost benefits based on 10% of base salary. Mr. Salam was given two

weeks of benefits upon termination. He is accordingly entitled to 10% of his base salary for his loss of benefits during the remainder of the notice period, *i.e.* 24 weeks. This amounts to \$6,732.00.

[83] Mr. Salam is entitled to an annual commission for the 2019-2020 fiscal year, based on the average of the commissions he received in the two preceding fiscal years (\$15,600.00 and \$15,015.00). He is entitled to this commission for the portion of the 2019-2020 fiscal year during which he worked at ORION, *i.e.* April 1, 2019 to October 16, 2019, and for the six month reasonable notice period thereafter, *i.e.* to mid April, 2020. This amounts to \$16,043.44.

[84] From these amounts, I deduct the pay in lieu of notice that was provided to Mr. Salam when he was terminated, of \$12,622.50. This amount was based on the two weeks of pay granted to him under the *Employment Standards Act*, plus the additional 2.5 weeks of pay in lieu of notice paid to him.

[85] From that total, I deduct applicable statutory deductions.

[86] These numbers work out as follows:

Damages in lieu of notice, based on six month (26 week) notice period	\$48,266.58
Damages for loss of benefits during notice period, based on 10% of salary	\$6,732.00
Commission, based on portion of 2019-2020 fiscal year worked plus six month notice period	\$16,043.44
Less pay in lieu of notice paid upon termination	(\$12,622.50)
Total	\$58,419.52, less statutory deductions

Conclusion

[87] Mr. Salam is accordingly entitled to damages in the amount of \$58,419.52, less statutory deductions.

[88] The parties are to work together to resolve costs. If they are unable to do so within 30 days, they are to contact my judicial assistant and I will set a timetable for costs submissions.

Released: April 1, 2025

CITATION: Salam v. Ontario Research and Innovation Network, 2025 ONSC 1839
COURT FILE NO.: CV-20-00634072-0000
DATE: 2025-04-01

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

KASHIF SALAM

Plaintiff

– and –

ONTARIO RESEARCH AND INNOVATION
OPTICAL NETWORK

Defendant

REASONS FOR JUDGMENT

Parghi J.

Released: April 1, 2025