CITATION: Lachapelle v. St. Laurent Automotive Group Inc., 2025 ONSC 1956
COURT FILE NO.: CV-20-83872
DATE: 2025/03/31

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Jesse Lachapelle, Plaintiff

-and-

St. Laurent Automotive Group Inc., Defendant

BEFORE: Justice Pierre E. Roger

COUNSEL: Daria Strachan, for the Plaintiff

Danesh Rana, for the Defendant

HEARD: January 22, 23, 24 and February 3 and 4, 2025

REASONS FOR DECISION

[1] The plaintiff sues the defendant, seeking damages for wrongful dismissal, as well as aggravated, exemplary, bad faith, and/or punitive damages. A five-day summary trial was conducted. The evidence was presented, as per r. 76 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, by affidavits, with a brief examination in-chief, followed by cross-examination, and re-examination of the affiants, as well as discovery read-ins. The affidavits are for purposes of a trial and must respect the rules of evidence. They should be written using the words of the witness, not those of the lawyer who prepared them, and should, unless the witness is an expert, be confined to relevant statement of facts within the personal knowledge of the deponent.

Background Facts

[2] The plaintiff is a young man, born September 4, 1991. He works as a mechanic, or what was described during the trial as a technician.

[3] The defendant is an automobile dealership in Ottawa.

[4] By way of overview, the plaintiff worked for the defendant as a mechanic for slightly less than six years during two periods of employment. Initially, from September 23, 2013, until his resignation effective April 21, 2018, and then from his return on February 10, 2019, until his layoff on March 24, 2020.

[5] More particularly, the plaintiff started to work for the defendant as a technician apprentice on September 23, 2013. He studied and trained and eventually was promoted to the position of service technician. He was a valued employee.

[6] On April 21, 2018, after four years and seven months with the defendant, the plaintiff left the defendant of his own accord to work as a mechanic for an Ottawa construction company, Taggart Construction. He stayed with Taggard for over nine months and returned to the defendant on February 10, 2019.

[7] It was admitted at trial that the defendant induced the plaintiff to return to their employment.

[8] Mr. Wood, then a service manager with the defendant, actively pursued the plaintiff, calling and sending him text messages. He assured the plaintiff that the plaintiff would have lots of good quality paying work. He offered the plaintiff more money, including a signing bonus. He recognized the plaintiff's prior experience for the purposes of the plaintiff's benefits and vacation. The plaintiff's benefits started immediately, not 90 days after his re-employment, and his vacation pay was set at 6%, rather than the usual starting 4%. Mr. Wood testified that he had been instructed to get the plaintiff back "as though he had never left" as far as his benefits were concerned.

[9] The discussions between the plaintiff and Mr. Wood, and the employment contract eventually concluded, did not address recognizing the plaintiff's prior seniority or experience with the defendant for purposes of termination. Mr. Wood testified that they never discussed a termination package or recognizing the plaintiff's five-year experience for that purpose. The plaintiff also admitted that he and Mr. Wood never discussed considering the two job periods as one for the purposes of termination. The plaintiff agreed that during their conversations leading to his returning to the defendant, they never discussed termination pay, and he agreed that the written contract reflects their discussions. A fellow technician, Mr. Turcotte, was also asked to reach out

to the plaintiff. Mr. Turcotte contacted the plaintiff, suggested that he ask for 6% vacation, and confirmed termination pay was not discussed during their conversations.

[10] As a result of the above discussions, the parties signed an employment contract on January 2, 2019, and on February 10, 2019, following a nine-month absence, the plaintiff returned to his job as a technician with the defendant. The plaintiff then worked for the defendant for slightly more than an additional 13 months, or until March 24, 2020, when he was laid off.

[11] The plaintiff's 2019 employment contract includes a higher base hourly rate, a production bonus of higher hourly rates for 70+ hours billed, 80+ hours billed, and 90+ hours billed, a signing bonus, 6% vacation pay, and benefits, vacation allowance and personal days, all effective immediately.

[12] As well, on May 13, 2019, the defendant offered to its technicians, including to the plaintiff, a construction retention bonus. The president of the defendant, Mr. John Mierins, testified that this was offered as an incentive to their technicians to stay with the defendant throughout the defendant's ongoing renovations and construction. It provides their technicians with additional money for hours sold, but this is only payable if the employee remains a full-time technician employed by the defendant for the following eighteen-month period. It is not disputed that this bonus is not payable if the notice period does not extend to November 13, 2020, and that, if payable, it would be worth $8,777.24 to the plaintiff.

[13] Moreover, effective July 15, 2019, the defendant provided their technicians, including the plaintiff, with a guaranteed minimum of seven hours per day, applicable to any workday during which the technician worked a minimum of eight hours.

[14] With regard to the impact of the COVID-19 pandemic, I prefer the evidence of the defendant because it aligns with the circumstances of that period.

[15] I accept that, because of COVID-19, the defendant asked some of its employees to take time off and, on March 24, 2020, after Premier Ford announced that non-essential businesses would have to close, the defendant decided to lay off most of its employees, including all its technicians and the plaintiff. Further, I accept from the evidence that this was to be a temporary

layoff designed to allow the defendant time to organize its business given the disruptions and various regulations then applicable. Mr. Mierins' evidence about this made sense when he described his actions in response to COVID-19. Everything was happening quickly, with new measures being announced daily. I agree that the defendant reasonably needed time to implement its COVID-19 protocols and adjust its essential business to the constantly evolving situation, to ensure the safety of all involved.

[16] Mr. Mierins directed the defendant's controller to prepare Records of Employment (ROEs) for the defendant's employees and directed another employee to prepare layoff letters. I accept the defendant's evidence that a layoff letter was accidentally not prepared for some of its employees, including for the plaintiff, and that errors were made on the plaintiff's ROE because things were moving quickly. The defendant's employees were unaccustomed with layoffs and were unclear about how to correctly fill out the ROEs. I accept as well, considering how uncertain things were, that this was done to allow the defendant's employees to quickly access available government benefits. Also, I note that the measures put in place by Mr. Mierins impacted all the defendant's technicians, not just the plaintiff.

[17] I do not find the plaintiff's evidence downplaying the impact of COVID-19 on the defendant to be credible, because it fails to account for the circumstances at the time. I appreciate the plaintiff's evidence that he and his colleague, Mr. Turcotte, still had work, but the rigidity of the plaintiff's stated opinion that layoffs were not required fails to account for the COVID-19 pandemic and the uncertainties it created.

[18] Despite not receiving a layoff letter, the plaintiff was informed by the defendant of what was occurring. On April 1, 2020, the defendant's technicians, including the plaintiff, were informed that the defendant was considering re-opening on Monday, April 6, 2020, under a new 30-day pay scheme. On April 2, 2020, the defendant's technicians, including the plaintiff, were told that Mr. Mierins had designed a team pooling system applicable to determine the compensation of all technicians for the next 30-day period. As outlined in a text message sent on April 2, 2020, the team pooling system provided for the same hourly rates but without the minimum 7-hour guarantee, which the defendant suspended. Instead of technicians being paid for the hours they individually sold, their sold hours would be pooled, and they would be paid at their

hourly rate but based upon shared sold hours. I accept Mr. Mierins' explanation that the change occurred because of COVID-19 and the resulting business uncertainties it created, as it makes sense and reflects the evidence of the defendant's other witnesses.

[19] However, I also accept, from the evidence of the plaintiff, of Mr. Turcotte, and from the correspondence sent by a manager of the defendant, that the technicians would have to "agree and sign a contract if you want to come back" reflecting this new and temporary pooling system "[i]f not you stay on EI". That correspondence from the defendant added, "I will prepare the contracts tomorrow". I agree, because it is confirmed by the defendant's communications, with the plaintiff's evidence that a manager for the defendant also mentioned during a telephone conversation that a new employment contract reflecting the above would have to be signed. According to Mr. Mierins no such contract was prepared. However, this is contradicted by the defendant's correspondence and by what the plaintiff and Mr. Turcotte were repeatedly told and led to believe by the defendant's manager.

[20] The plaintiff was concerned that his income would be negatively impacted by the defendant's suspension of the minimum hour guarantee and suggested pooling of the technicians' sold hours. On April 3, 2020, the plaintiff advised the defendant that he would only return "when my original contract will be honored, and all the proper precautions are taken to keep us safe at work from contracting or spreading Covid-19". The plaintiff was informed that he would be contacted when the defendant was prepared to resume paying him based on the terms of his employment contract. Subsequently, by mid-April 2020, the plaintiff received his ROE essentially stating that his employment had been terminated effective March 24, 2020.

[21] The plaintiff consulted his lawyer for advice and a demand letter alleging wrongful dismissal was sent to the defendant on May 25, 2020. In response, on May 29, 2020, through its lawyer, the defendant expressly terminated the plaintiff's employment on a without cause basis effective that day. The defendant paid the plaintiff the statutory minimum of $11,144.15 and his vacation of $7,709.21. Those numbers are not in dispute.

[22] The defendant's premises re-opened in a limited capacity on April 6, 2020, and slowly the defendant brought more employees back as it adjusted to COVID-19. Mr. Mierins explained that

employees came back on modified terms because of COVID-19. These modified terms, including the pooling system, lasted longer than the initially anticipated 30 days, but all were removed, and technicians were paid like before or as per their contract by June 2020.

[23] Meanwhile, the plaintiff unsuccessfully looked for work until December 2020, when he accepted a lower-paying, non-comparable carpenter position. While working as a carpenter, the plaintiff continued looking for work until June 21, 2021, when he was rehired as a mechanic by his previous employer, Taggart Construction, where he remains employed (as of this trial).

Issues

[24] The principal issues are:

a) What is the date of the plaintiff's dismissal?

b) What is the length of notice of termination of employment that the plaintiff should have received?

c) Did the plaintiff fail to mitigate his damages?

d) What was the plaintiff's salary, benefit, vacation, and is he entitled to the construction retention bonus?

e) Is the plaintiff entitled to bad faith, aggravated, and punitive damages?

Analysis

Date of Dismissal

[25] The plaintiff was dismissed when he was laid off on March 24, 2020.

[26] The following principles from the Court of Appeal in *Pham v. Qualified Metal Fabricators Inc*., 2023 ONCA 255, 2023 C.L.L.C. 210-051, at paras. 28, 29, 42, 45, and 46 are applicable. Constructive dismissal can be established by the employer's breach of an essential term of the employment contract, or by a course of conduct by the employer that establishes that it no longer intends to be bound by the employment contract. The court clarifies, "absent an express or implied term in an employment agreement to the contrary, a unilateral layoff by an employer is a substantial change in the employee's employment contract that constitutes constructive

dismissal": at para. 29. This is the case even where the layoff is temporary, and the onus of establishing that the employment contract included a layoff provision is on the employer. As well, an employer may establish that an employee condoned the change if the employer can show, objectively, that the employee freely consented to the change imposed by the employer. The later will be addressed in the next section as it is relevant to the defendant's allegations that the plaintiff failed to mitigate when he refused to return to the defendant under the April 2020 temporary pooling system.

[27] Applying the above to the facts of this case, the plaintiff was constructively dismissed on March 24, 2020, when he was temporarily laid off by the defendant. A reasonable person in the circumstances of the plaintiff would conclude that he had been temporarily laid off, in breach of his employment contract, as there was no express or implied term allowing a layoff in the plaintiff's employment contract. Even of short duration, an unauthorized layoff is a constructive dismissal.

[28] The defendant's argument of *force majeure* is without factual or legal merit. The defendant was an essential service allowed to stay open during the COVID-19 pandemic. That the defendant chose to temporarily close is understandable but does not constitute a radical change in contractual obligations or *force majeure*. There is no doubt that COVID-19 and its uncertainties constituted hardship and inconvenience for the defendant, but that is insufficient to establish *force majeure*: see e.g., *Aldergrove Duty Free Shop Ltd. v. MacCallum*, 2024 BCCA 28, 85 B.C.L.R. (6th) 224; see also *Webb v. SDT North America*, 2023 ONSC 7170, 92 C.C.E.L. (4th) 235; and *Fogelman v. IFG*, 2021 ONSC 4042.

[29] The above sufficiently answers the first issue.

[30] Nonetheless, as it was argued, the defendant's temporary pooling pay plan, disclosed on April 2, 2020, and starting on April 6, 2020, also constituted constructive dismissal because it breached essential terms of the plaintiff's employment contract. It removed the seven hours guarantee, which could have resulted in the plaintiff working for little pay, and it pooled the technicians' sold hours, which could have reduced the plaintiff's income: see e.g., *Wronko v. Western Inventory Service Ltd.*, 2008 ONCA 327, 90 O.R. (3d) 547, leave to appeal refused, [2008]

S.C.C.A. No. 294. I accept, from the bulk of the evidence, including from that of Mr. Wood, that the plaintiff was a high producer who stood to be disadvantaged by the temporary pooling pay system. The evidence presented by Mr. Mierins, attempting to paint the plaintiff as not a high producer, was selective and not credible. That evidence was contradicted by the evidence of Mr. Wood and, importantly, by the actions of the defendant in inducing the plaintiff to return to their employment. As well, the defendant's evidence, through Ms. Salvi, that the income of some of the defendant's technicians increased in 2020 despite COVID-19 and the resulting implementation of the temporary pooling pay system is not reliable. This evidence is selective, as it was provided for only 4 out of about 12 technicians, and cannot be verified as the defendant refused to provide related information. Indeed, the defendant falsely claimed, in response to a discovery request, that relevant employee documentation was no longer available. Ms. Salvi contradicted the defendant's answer to undertakings when she testified that the information sought by the plaintiff about this *was* available.

[31] Furthermore, although not necessary considering my earlier finding about the date of dismissal, the ROE received by the plaintiff in mid-April 2020 also constituted dismissal. As well, the plaintiff was expressly dismissed by the defendant's letter of May 29, 2020.

Length of Notice

[32] The plaintiff seeks 12 months of common-law reasonable notice based on approximately six years of employment, increased by the defendant's inducement and the impact of COVID-19. The defendant seeks reasonable notice in the range of 3 weeks to 1.33 months, arguing that inducement had minimal effects considering the length of the plaintiff's employment, his young age, and that only the most recent tenure of employment with the defendant, of about 14 months, should be considered.

[33] In awarding damages for wrongful dismissal, the terminated employee is entitled to compensation for all losses arising from the employer's breach of contract in failing to give proper notice. The damages award should place the employee in the same financial position they would have been in had proper notice been given. This includes all compensation and benefits the

employee would have earned during the reasonable notice period: see *Wallace v. United Grain Growers Ltd*., [1997] 3 S.C.R. 701, at paras. 65-66.

[34] In assessing the appropriate period of reasonable notice, the Court considers all relevant circumstances of the case, including the character of the employment, the length of service, the age of the employee, and the availability of other employment. This principle was articulated in the leading decision *Bardal v. The Globe & Mail Ltd*. (1960), 24 D.L.R. (2d) 140 (Ont. H.C.J.), at p. 145:

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

[35] As indicated by the Supreme Court of Canada in *Wallace* at para. 82, *Bardal* factors are not exhaustive, and all relevant factors must be weighed and balanced: "The application of these factors to the assessment of a dismissed employee's notice period will depend upon the particular circumstances of the case". Further, while length of service is a significant factor, it is only one of many to be considered.

[36] The Court of Appeal of New Brunswick notes that "[t]he relevance of any factor is a function of the objectives that the law seeks to attain through notice of termination of employment. The primary objective of notice is to provide the terminated employee with a reasonable opportunity to seek alternate suitable employment….Its secondary objectives include the protection of the reliance and expectation interests of terminated employees, at least in cases where inducements have been offered by the employer, and the satisfaction of certain moral claims by an employee": *Medis Health and Pharmaceutical Services Inc.* v. *Bramble* (1999), 175 D.L.R. (4th) 385 (N.B.C.A.), at para. 57.

[37] Relevant to the circumstances of this case, inducement is a factor which may lengthen the required notice. However, not all inducement carries the same weight and the "significance of the inducement in question will vary with the circumstances of the particular case": *Wallace*, at paras. 83-85. For example, in *Wallace*, considering all factors, the Supreme Court held that the

inducements supported the trial judge's decision to award notice at the high end of the scale. In *Bishop v. Beefeater (Niagara)*, 2002 CanLII 15789 (Ont. S.C.), the Court lengthened the notice period by one month for what it described as the minimal effects of inducement. That case involved what was described as "modest" inducement with minimal effects on a 56-year-old assistant manager dismissed after one year and ten months of employment, however with no demand by the employee for certain wages, benefits, or security. The Court awarded three months notice before considering inducement and lengthened the notice period by one month for its minimal effects. In another decision, *Butcher v. Protagon Display Inc*., 2011 CarswellOnt 7143 (C.J.), a 48-year-old project manager was dismissed after one year and three months of employment. The employee was awarded five months of notice prior to the Court considering inducement. The Court noted that the inducement did not have a major impact and held that it lengthened the notice by "only about one-half month".

[38] Here, inducement is conceded. However, the plaintiff was 27 years old when he returned to the defendant after working at Taggart Construction for only nine months. He then worked for the defendant for about 14 months until he was laid off because of the COVID-19 pandemic. The plaintiff was not targeted during his termination. This is not a situation where an older employee with significant tenure was lured away from a long-term job and then targeted for termination shortly into his new job. I do not consider, for the truth of its content, the inadmissible hearsay evidence contained in the plaintiff's affidavit relating to Taggart Construction's course of action during the pandemic. However, the plaintiff did return to Taggart Construction once an opening became available, where he remains employed, which provides some evidence of his job security there.

[39] Considering the above, I find that some reasonable credit should be factored into my analysis for inducement.

[40] Also relevant to this case, is the fact that the availability of similar employment may be affected by the prevailing economic circumstances, including by the effects and uncertainties of the COVID-19 pandemic. For example, in *Pavlov v. The New Zealand and Australian lamb Company Limited*, 2022 ONCA 655, 81 C.C.E.L. (4th) 202, the Court of Appeal upheld the trial judge's decision to award ten months' notice to a 47-year-old director dismissed in May 2020 after

less than three years of service. As well, in *Kraft v. Firepower Financial Corp*., 2021 ONSC 4962, 2022 C.L.L.C. 210-002, the Court increased notice by one month because of the impact of COVID-19, allowing ten months pay in lieu of notice to a 5.5-year salesperson dismissed during the second week of March 2020, at the onset of the COVID-19 pandemic: see also *Pohl v. Hudson's Bay Company*, 2022 ONSC 5230, 83 C.C.E.L. (4th) 45, at paras. 71.

[41] Here, similar to the above decisions, the plaintiff was terminated at the onset of the COVID-19 pandemic when parts of the economy were temporarily shutting down during a period of economic uncertainty.

[42] Considering the above, I find that the COVID-19 pandemic should also factor in my analysis with some credit given to the plaintiff for its effects on the availability of employment, particularly early in the pandemic.

[43] Another point argued by the parties is the significance of the break in the employment of the plaintiff with the defendant on the assessment of reasonable notice.

[44] Several cases in this province and in British Columbia have dealt with this issue. They generally stand for the proposition that, in the absence of an express contract term dealing with a break in an employee's term of employment, the issue is to be determined by the circumstances of the case. This includes assessing how the parties conducted themselves at the point of rehire to determine whether the circumstances reveal an intention to credit the employee for the earlier employment period or, as stated differently in some cases, whether the employer effectively recognized continuity of service. There are numerous Ontario decisions on this topic: see *Cronk v. Canadian General Insurance Co.* (1995), 25 O.R. (3d) 505 (C.A.); *Brien v. Niagara Motors Limited*, 2009 ONCA 887, 78 C.C.E.L. (3d) 10; *Theberge-Lindsay v. 3395022 Canada Inc*., 2019 ONCA 469, 55 C.C.E.L. (4th) 1; *Vist v. Best Theratronics Ltd.*, 2014 ONSC 2867, 2014 C.L.L.C. 210-038, at para. 55, aff'd *Vist v. Best Theratronics Ltd.*, 2015 ONSC 2619, aff'd 2015 ONSC 2619; *Day v. JCB Excavators Limited*, 2011 ONSC 6848, 2012 C.L.L.C. 210-005; *Brown v. Law Society of Upper Canada*, [1997] O.J. No. 6548 (C.J.); *Hefkey v. Blanchfield*, 2020 ONSC 2438, 62 C.C.E.L. (4th) 223; and *Skowron v. ABC Technologies Inc*., 2021 ONSC 3734. The British Columbia decisions are sufficiently described in *Dobbs v. The Cambie Malone's Corporation*,

2011 BCSC 1830, 71 C.C.E.L. (4th) 255. Except for *Theberge-Lindsay*, *Brien*, and *Dobbs*, the above cases were found by the Court while working on this decision, and counsel were invited to make additional written submissions.

[45] From my review of the above decisions, the defendant's argument that "in the absence of an agreement that says otherwise, one must only consider the most recent tenure for calculating reasonable notice", is unsupported by the authorities.

[46] Contrary to what is argued by the defendant, *Theberge-Lindsay* and *Hefkey* do not stand for that proposition. Moreover, these two decisions are limited by their facts, which may be distinguished from the facts of this case. *Theberge-Lindsay*, on appeal, was focused on the enforceability of a termination provision signed by the plaintiff which restricted her legal entitlements. As a result, the Court of Appeal in that decision was ultimately unconcerned with the applicability of the *Bardal* factors. Further, *Theberge-Lindsay* did not involve inducement, and did not address or overturn *Cronk* and *Brien*, both of which are on point and stand for the proposition articulated in *Skowron* — that the court has discretion to overlook a break in employment according to the circumstances and the factors highlighted in the earlier decisions referred to above. Also, *Hefkey* may be distinguished from the facts of this case as it did not involve inducement.

[47] Further, contrary to what is argued by the defendant, it is apparent while reading *Skowron* that the Court in that decision was aware of the *Theberge-Lindsay* decision, as it referenced *Hefkey* (which refers to *Theberge-Lindsay*) and addressed the break in employment.

[48] While the court in *Hefkey* does not explicitly draw the reader back to the list of factors considered in earlier decisions, based on the language used, it is apparent that the court considered these factors, as well as the analysis in *Theberge-Lindsay*, in making its determination. For example, at para. 82, the court set out factors that have been considered in deciding whether employment should be treated as continuous despite a hiatus, including: (1) the length of the break; (2) whether the employee was induced by the employer to return; and (3) whether a distinct, new employment agreement was negotiated upon returning to work. In subsequent paragraphs, the court considered these factors. Specifically, at para. 84, the court took into account that it was not

alleged the employer induced the employee to return. At para. 85 the court also weighed the evidence on whether the employee was "starting fresh" upon his return (i.e., whether a distinct, new employment agreement was negotiated). Further, at para. 88, the court makes note of the fact that the employee assumed a permanent position elsewhere for four months (i.e., the length of the break). The court examined that the employer was under no obligation to re-hire the employee and that that the employee received important consideration from the employer to return to his old job.

[49] As well, contrary to the defendant's arguments, the fact that the 2019 re-employment contract between the plaintiff and the defendant is silent on termination obligations and that there was no meeting of the minds on this issue is not determinative. Rather, these are factors to consider.

[50] Here, the plaintiff voluntarily left his employment with the defendant and assumed a mechanic position for another employer for more than nine months. However, it is admitted that the defendant took steps to induce the plaintiff to return, and the evidence establishes more than "modest" inducement. Mr. Wood aggressively pursued the plaintiff and had been instructed to get the plaintiff back as though he had never left as far as his benefits were concerned.

[51] While discussing re-employment, the parties did not turn their mind to termination or to the relevance of the plaintiff's prior employment. The plaintiff agreed that they never discussed termination pay or considering his two job periods with the defendant as one. However, Mr. Mierins mentioned that they spoke of him returning as though he had never left. Mr. Wood's evidence supports this, and on cross-examination, he stated that the plaintiff returning as though he had never left was only in regard to the plaintiff's benefits. To that end, Mr. Wood agreed to vacation pay at 6%, rather than at 4%, and to benefits, vacation allowances and personal days starting immediately. Mr. Mierins approved the 2019 re-employment contractual terms and in correspondence to Mr. Wood noted "I see we have benefits kicking in right away which in these cases is OK as they are returning to us but for anyone coming to us for the first time ensure the benefits start after 90 days unless preauthorized by me" (emphasis added). In his affidavit and during his testimony, Mr. Mierins said that they make such allowances for experienced technicians because it is difficult to recruit good technicians which, he said, is "a very in-demand position". But, as noted above, in his correspondence to Mr. Wood he linked his acceptance of this term to the fact that the plaintiff was "returning to us".

[52] Job security was not discussed but, considering that subject to the seven-hour minimum guarantee technicians at the defendant were paid on hours billed to clients, the sufficiency and quality of work was discussed. Mr. Wood assured the plaintiff that the defendant "have more work than I know what to do with" and "I also value your attitude and work ethic and will ensure you are fed".

[53] A new re-employment contract reflecting their conversations was concluded in January 2019 and the plaintiff returned to his job as a technician with the defendant on February 10, 2019. Upon returning, the plaintiff was not subject to a probationary period and was given the same employee number.

[54] When considering the above noted decisions, depending on the circumstances of each case, a break of nine months or even longer does not necessarily prevent the court from recognizing the earlier employment. For example, in *Skowron* the break in employment was 11 months and in *Brien* it was two years. As well, all circumstances and factors are considered, including inducement and whether the employee's vacation or other work benefits continued upon returning as if there had been no interruption in the employment relationship. For example, in *Brien* the Court of Appeal stated, at para. 2:

> The gap is only two years and the respondent, having been invited back, was reintegrated into the employer's employment as if she had never left. For example, she was given 2 weeks vacation within the first year without first working for 12 months as a new employee would have to.

[55] Here, inducement is admitted, and the plaintiff was aggressively pursued by the defendant. A new contract was negotiated for more money, and, for the purpose of benefits, it recognized the plaintiff's prior work experience with the defendant "as though he had never left".

[56] Considering the above, including the circumstances of this case, I find that although there was an interruption or a break in the plaintiff's employment with the defendant, the plaintiff should be given some credit for his past services with the defendant.

[57] As Myers J. indicated in *Skowron*, at para. 27:

> But I do not see myself as overlooking a clear break in the defendant's employment. On these facts, I do not see the decision about the plaintiff's length of employment as being quite as binary as the parties argued. The point is not to punish the plaintiff for leaving or to reward the defendant for papering its file properly. The goal it to characterize the length of the plaintiff's employment with the defendant for the purposes of applying the *Bardal* factors to decide on the proper notice period.

[58] The plaintiff was 28 years old when his employment with the defendant was terminated. He was a valued mechanics, a "very in-demand position", with "ample opportunities". He was employed by the defendant for two tenures: the first of less than five years; and the second of about 14 months. His annual income with the defendant at the time of his dismissal exceeded $100,000. The defendant induced the plaintiff to return to their employment; however, in the context of a short stay at the other employer, albeit where the plaintiff returned and is still working. The plaintiff's employment was terminated at the onset of the COVID-19 pandemic with its economic slowdown and uncertainties.

[59] The assessment of reasonable notice is not a precise mathematical exercise. It is focused on the above stated objectives and is more of an art than a science. Having considered the many arguments of the parties, reviewed the relevant jurisprudence (noting that none of the plaintiff's cases about the length of notice include a mechanic, and that the defendant's cases on this point suggest about two months of notice for the plaintiff's second tenure and about five to six months for his full six years with the defendant), the circumstances of this case mentioned above, and having considered the *Bardal* factors and how they apply to the facts of this case, I conclude that the appropriate period of reasonable notice applicable to the plaintiff is seven months.

Mitigation of Damages

[60] The burden is on the defendant to show the plaintiff failed to mitigate, it is not a light onus: *Red Deer College v. Michaels*, [1976] 2 S.C.R. 324. The defendant must prove: (1) that the plaintiff failed to take reasonable steps to mitigate his damages; and (2) that if he had done so he would

have been expected to secure a comparable position reasonably adapted to his abilities: *Lake v. La Presse*, 2022 ONCA 742, 83 C.C.E.L. (4th) 315, at para. 12.

[61] However, a dismissed employee has no obligation to search for a lesser paying job. The Court of Appeal notes, "[t]he obligation of a terminated employee in mitigation is to seek 'comparable employment', which typically is employment that is comparable in status, hours and remuneration to the position held at the time of dismissal": *La Presse*, at para. 19; see *Carter v. 1657593 Ontario Inc*., 2015 ONCA 823, at para. 6. The duty to act reasonably in seeking and accepting alternate employment is a responsibility to take such steps as a reasonable person in the dismissed employee's position would take in their own interests. It is "not an obligation owed by the dismissed employee to the former employer to act in the employer's interests": *Forshaw v. Aluminex Extrusions Ltd.* (1989), 39 B.C.L.R. (2d) 140 (C.A.), at pp. 143-44; *La Presse*, at para. 19.

[62] In reviewing the evidence, I find that the defendant did not meet its burden of showing that the plaintiff failed to mitigate.

[63] Not contacting the defendant to enquire about his ROE or not returning to work for the defendant under the temporary pooling system does not establish a failure to mitigate. The plaintiff was under no obligation to act in the employer's interest and accept a job with no minimum guarantee and which pooled the employees' sold hours.

[64] As indicated in the background facts section of this decision, I accept that the defendant informed the plaintiff that he could not return to work without signing a new contract. Signing a new contract could have condoned the layoff. In any event, the defendant's temporary employment conditions, including the temporary pooling system disclosed in their correspondence and communications of early April 2020, were not for "comparable employment". The defendant could not impose fundamental changes to the plaintiff's remuneration, in violation of his employment contract, without his consent.

[65] Some of the cases relied upon by the defendant in support of their arguments on this point are distinguishable and inapplicable because their facts involve situations where a reasonable person would have accepted the employment. For example, in *Blomme v. Princeton Standard*

Pellet Corporation, 2023 BCSC 652, 77 B.C.L.R. (6th) 270, the court accepted that a reasonable person in Ms. Blomme's position would have accepted her employer's offer. However, this was in circumstances where "Ms. Blomme was being asked to return to the same position, salary, and benefits": at para. 112.

[66] As well, one of the cases relied upon by the defendant, *Miranda v. Respiratory Services Limited*, 2022 ONSC 6094, factually contradicts their arguments. At para. 87, the Court in *Miranda* notes that, "Ms. Miranda was not required to mitigate her damages by returning to work for RSL because the compensation and working conditions offered by RSL were substantially different from her prior compensation and working conditions".

[67] In that regard, the circumstances in *Miranda* are like those of this case. In its communication of early April 2020, the defendant disclosed new conditions of employment, including the temporary pooling system. These imposed fundamental changes to the plaintiff's remuneration. It is immaterial whether the defendant offered the plaintiff employment at any of its other locations, as all such offers were subject to the temporarily modified terms of employment.

[68] The defendant's evidence and arguments about this fail to prove what is identified above at paras. 60 and 61.

Salary, Benefits, Vacation, and Entitlement to the Construction Retention Bonus

[69] The parties were unable to agree on the plaintiff's salary, benefits, and vacation.

[70] During closing arguments, the defendant accepted the plaintiff's calculations, acknowledging that the plaintiff's annual salary was reasonably valued at $118,327.49. However, in its supplementary written submissions, the defendant performed precise calculations and argues that the plaintiff's salary was $112,474.32 during the preceding one-year period. The plaintiff's responding submissions are not helpful as they refer to the pleadings and to general principles rather than precisely explaining how the defendant's calculations are factually incorrect.

[71] Contrary to what is alleged by the plaintiff, in the defendant's statement of defence, the defendant admitted paragraph 11 of the statement of claim but did not admit paragraph 12,

implicitly denying the plaintiff's salary and benefits. It also pleads that the plaintiff's damages are excessive.

[72] In its calculations, the defendant used the plaintiff's T4s, which are in evidence, showing that the plaintiff earned $105,035.91 in 2019, from the date of his rehire on February 10, 2019. Rather than annualize that result, the defendant considered the plaintiff's actual income at the defendant for a period of 365 days, or up to February 9, 2020. In the circumstances of this case that is fairer than annualizing the 2019 results because there is evidence that January is typically a slow month. The defendant then used the plaintiff's 2020 paystubs up to February 9, 2020, showing $7,439.41, and arrived at $112,474.32.

[73] I accept the defendant's calculations and find that over the preceding year the plaintiff earned $112,474.32.

[74] On the topic of benefits, the plaintiff argues that benefits should be valued at 20% of actual salary, and the defendant argues that benefits should be valued at 10% of the plaintiff's base income, calculated using the minimum hour guarantee.

[75] The plaintiff provided no evidence supporting the 20% valuation that he picked and cited no authority in support of such an assessment.

[76] The defendant relies on *Wilds v. 1959612 Ontario Inc*, 2024 ONSC 3452, C.L.L.C. 210-002, at para. 86, to support its claim that in circumstances where a defendant provided no evidence of their value, the approach usually adopted for determining the employee's entitlement to benefits is to fix it at 10% of the employee's base salary: see *Groves*, at paras. 95-97; *Ruston v. Keddco Mfg. (2011) Ltd.*, 2018 ONSC 2919, 49 C.C.E.L. (4th) 113, at paras. 114-117, aff'd 2019 ONCA 125; and *Andros v. Colliers Macaulay Nicolls Inc.*, 2019 ONCA 679, 437 D.L.R. (4th) 546, at para. 65.

[77] While the cases refer to base salary, the defendant's stated premise in its submissions about how the plaintiff was paid is contrary to the evidence. As a result, the defendant incorrectly classifies the plaintiff's compensation structure. The defendant acknowledged that the plaintiff was not paid on a time-based system. For example, Mr. Mierins' evidence is clear on this point –

technicians are paid on time billed, or sold hours, not on time worked. Yet, the defendant's submissions on this point do not reflect this reality.

[78] While the plaintiff worked a regular 40-hour work week (Monday to Friday), he was not paid based on time, and could instead be paid for more hours depending on what was billed. As explained by Mr. Mierins, the plaintiff, like all technicians at the defendant, was paid based on time billed to the defendant's customer or sold hours – a very different concept. For instance, while a job (a brake job was mentioned) may take a technician 20 minutes to perform, it may be billed to the customer at two hours, depending on the manufacturer's guidelines. In this example, a technician who worked 20 minutes on this job would be paid for two hours.

[79] As a result, reference to "production bonus" in the plaintiff's 2019 employment contract as not a part of his base salary is a misnomer as the plaintiff was paid on a basis other than time.

[80] Consequently, to calculate benefits, I use 10% of $112,474.32, and assess yearly benefits at $11,247.43. I make no reduction for any period where the plaintiff's benefits might have been still in force as this would be minimal and there is no sufficient evidence to contradict the plaintiff that his benefits lapsed. The plaintiff is entitled to 7/12 of that amount.

[81] On the topic of vacation pay, the amount in issue is $455.35, net of the amount of $165.44 paid by the defendant. I find that no additional amount is owed for vacation pay as the applicable statutory notice period is two weeks, not six weeks.

[82] Vacation pay is a statutory benefit owed on the statutory notice period: see *Cronk v. Canadian General Insurance Co.* (1995), 25 O.R. (3d) 505 (C.A.), at p. 515; *Clark v. Township of Otonabee-South Monaghan*, 2019 ONSC 6978, at para. 35; and *Singh v. RBC Insurance Agency Ltd.*, 2020 ONSC 5368, at para. 82. The plaintiff was not on leave or other inactive employment when he worked at Taggart Construction, such that s. 59 of the *ESA* is not applicable to include the two periods of employment. Further, the plaintiff's periods of employment with the defendant are more than 13 weeks apart, such that the periods of employment cannot be treated as one: O. Reg. 288/01, s. 8(2). Moreover, s. 65(2) of the ESA applies to *severance* pay and not *vacation* pay. The *ESA* makes clear that Part XI of the Act governs vacation pay, while Part XV governs termination and severance of employment.

[83] The plaintiff is not entitled to the construction retention bonus as seven months was awarded for reasonable notice and the plaintiff was terminated on March 24, 2020. As a result, the period of reasonable notice does not extend to November 13, 2020, and the first part of the test in *Matthews v. Ocean Nutrition Canada Ltd*., 2020 SCC 26, [2020] 3 S.C.R. 64, is not met. I note that if the first part of the test had been satisfied, I would have found, considering its wording, that the construction retention bonus unambiguously took away that common law right.

Bad Faith, Aggravated, and Punitive Damages

[84] The plaintiff seeks $100,000 for "aggravated, exemplary, bad-faith, and/or punitive damages".

[85] Bad faith damages related to the manner of dismissal. Bad faith conduct in the manner of dismissal is a factor that is compensated by an addition to the notice period. It may be available in employment cases because of the unique characteristics of a contract of employment, involving unequal bargaining power over what is often an essential component of a person's "sense of identity, self-worth and emotional well-being": *Wallace v. United Grain Growers*, [1997] 3 S.C.R. 701, at paras. 88-98. As indicated by the Supreme Court at para. 98:

> The obligation of good faith and fair dealing is incapable of precise definition. However, at a minimum, I believe that in the course of dismissal employers ought to be candid, reasonable, honest and forthright with their employees and should refrain from engaging in conduct that is unfair or is in bad faith by being, for example, untruthful, misleading or unduly insensitive.

[86] Aggravated damages serve the purpose of compensation for intangible injuries. To establish aggravated damages in a wrongful dismissal action, a plaintiff must establish: (1) that the employer's conduct was "independently actionable"; (2) that it amounted to a wrong that was separate from the breach of contract for failure to give reasonable notice of termination; and (3) that it arose from the dismissal itself, rather than the employer's conduct before or after the dismissal: see *Prinzo v. Baycrest Centre for Geriatric Care* (2002), 60 O.R. (3d) 474 (C.A.), at para. 62.

[87] Punitive damages are not meant to compensate the plaintiff, their purpose is the punishment of the defendant. Such damages may be awarded when the defendant's actions amount to an

independently actionable wrong, this "can be found in breach of a distinct and separate contractual provision or other duty such as a fiduciary obligation": *Whiten v. Pilot Insurance Co.*, 2002 SCC 18, [2002] 1 S.C.R. 595, at para. 82. To establish punitive damages, a plaintiff must meet two requirements. First, that the defendant's conduct was reprehensible - "malicious, oppressive and high-handed" and "a marked departure from ordinary standards of decent behaviour": *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130, at para. 196; *Whiten*, at para. 36. Second, "that a punitive damages award, when added to any compensatory award, is rationally required to punish the defendant and to meet the objectives of retribution, deterrence, and denunciation": *Boucher v. Wal-Mart Canada Corp*, 2014 ONCA 419, 120 O.R. (3d) 481, at para. 79. There must be evidence of more than hurt feelings: *Honda Canada Inc. v. Keays*, 2008 SCC 39, [2008] 2 S.C.R. 362, at paras. 56-59. Similarly, to award "exemplary damages", the defendant's conduct must be "malicious, high-handed, arbitrary, oppressive, deliberate, vicious, brutal, grossly fraudulent, evil, outrageous, egregious, callous, disgraceful, willful, wanton, in contumelious disregard of the plaintiff's rights, or in disregard of ordinary standards of morality or decent conduct": see *Canadian Microtunnelling Ltd. v. Toronto (City)* (2002), 28 M.P.L.R. (3d) 109 (Ont. S.C.), at para. 134, aff'd 4 M.P.L.R. (4th) 120 (Ont. C.A.), leave to appeal refused, [2005] S.C.C.A. No. 36.

[88] Considering the facts of this case, the plaintiff has established none of the above. Oddly, on these points, the plaintiff fails to account for the circumstances and the novelty and uncertainties of the COVID-19 pandemic.

[89] As indicated above, I accept the defendant's evidence that their employees were asked to stay home on March 24, 2020, because of the pandemic. The defendant was an essential service and could have remained open, but it was reasonable for the defendant to take a few days to assess the situation to ensure the safety of its employees and customers before re-opening on April 6, 2020.

[90] The plaintiff was treated the same as his fellow technicians. Errors occurred with some of the layoff letters and ROEs, but, as per the evidence of the defendant's witnesses, these were unintended errors made in exceptional circumstances. Moreover, none of this targeted the plaintiff, who was a valued employee of the defendant.

[91] The layoff, although a breach of contract constructively terminating the plaintiff's employment, was, for the reasons indicated above, reasonable in the circumstance. In addition to allowing time to understand and implement COVID-19 safety protocols, it allowed the defendant's employees to apply for government benefits. We can all remember, almost precisely five years ago, the chaos and uncertainty present at the start of the pandemic.

[92] The temporary conditions and pooling system, although imposing fundamental changes to the plaintiff's remuneration, were created because of the economic uncertainties confronting the defendant. I accept from the evidence that Mr. Mierins' reactions to the pandemic were well intentioned. His reactions considered not only the financial viability of the defendant, but also the economic interests of the technicians in providing what he considered to be an element of fairness amongst technicians, aimed at ensuring a sharing of sold hours, potentially avoiding the resentment which could arise from lack of work and perceived unfair work allocation.

[93] Further, in the circumstances of this case, too much is made of any delay in paying the plaintiff his statutory entitlements. The defendant's measures, instituted on March 24 and early April 2020, were meant to be temporary. The defendant communicated with the plaintiff and reasonably assumed, considering their early communications, until May 25, 2020, when the defendant received the plaintiff lawyer's letter, that he would be returning. Once the defendant was aware of the plaintiff's position on May 25, 2020, and communicated its intention to terminate the employment of the plaintiff on May 29, 2020, there is and could be no dispute that the defendant, through their lawyer, acted reasonably in paying the plaintiff his statutory entitlements. Similarly, the defendant did not terminate the plaintiff's benefits – they lapsed because of unintended errors in communication which occurred because of the defendant's unfamiliarity with what was required because of COVID-19, and because of how quickly everything was unfolding.

[94] The cases relied upon by the plaintiff in support of his arguments for these damages may be distinguished from the facts of this case.

[95] The plaintiff testified that he suffered from stress but provided no independent evidence of this. He said that it related to his unsuccessful efforts at finding employment, not to the manner of termination. This is not compensable.

[96] There is no evidence of an independent actionable wrong.

[97] There is no evidence of malicious, oppressive, and high-handed misconduct.

[98] Considering the evidence, it is not bad faith to lay off or to terminate without cause employees, as the defendant did in such circumstances.

[99] Consequently, none of these damages is available to the plaintiff and this part of his claim is dismissed.

Conclusion

[100] The plaintiff's employment with the defendant was terminated when he was laid off on March 24, 2020. The period of reasonable common-law notice is seven months. The amount payable for notice is calculated on the plaintiff's annual salary of $112,474.32, such that the amount of common-law notice is $65,610.02. The plaintiff's benefits are assessed at $6,561 (7/12 of $11,247.43), and no additional vacation pay is owed. The statutory minimum amounts paid by the defendant are not in dispute and shall be deducted from amounts payable as required. Amounts payable to the plaintiff shall be paid by the defendant within the next 30 days.

[101] The parties shall make best efforts to resolve the issue of costs, failing which, written submissions not exceeding five pages plus costs outline and required enclosures shall be provided by email to my assistant by the plaintiff by April 18, 2025, by the defendant by April 25, 2025, and only if required a brief reply not exceeding two pages by May 2, 2025.

[102] The parties may request an appointment before me if they require assistance to finalize the order.

Justice Pierre E. Roger

Date: March 31, 2025

CITATION: Lachapelle v. St. Laurent Automotive Group Inc., 2025 ONSC 1956
COURT FILE NO.: CV-20-83872
DATE: 2025/03/31

ONTARIO

SUPERIOR COURT OF JUSTICE

RE: Jesse Lachapelle

Plaintiff

-and-

St. Laurent Automotive Group Inc.,

Defendant

COUNSEL: Daria Strachan, for the Plaintiff

Danesh Rana, for the Defendant

REASONS FOR DECISION

Roger J.

Released: March 31, 2025