Court of Appeal for Saskatchewan
Docket: CACV4377 & CACV4423

Citation: *Saskatoon Minor Basketball Association v MacDonald*, 2025 SKCA 42
Date: 2025-04-17

Between:

Saskatoon Minor Basketball Association

Appellant
(Defendant)

And

Randi MacDonald

Respondent
(Plaintiff)

Before:	Caldwell, Tholl and Bardai JJ.A.
Disposition:	Appeals dismissed
Written reasons by: In concurrence:	The Honourable Justice Naheed Bardai The Honourable Justice Neal W. Caldwell The Honourable Justice Jerome A. Tholl
On appeal from:	CACV4377 – 2024 SKKB 85; CACV4423 – QBG-SA-00890-2021 (Sask KB), Saskatoon
Appeals heard:	January 16, 2025
Counsel:	Joel Seaman for the Appellant Steven Seiferling and Nicholas Hatch for the Respondent

Bardai J.A.

I. INTRODUCTION

[1] This dispute concerns the termination of the working relationship between the respondent, Randi MacDonald, and the appellant the Saskatoon Minor Basketball Association [SMBA]. At issue is whether Ms. MacDonald was an independent contractor, entitled to very limited notice as set out in one of the many unsigned contracts between the parties, or whether she was a long-term employee of SMBA entitled to reasonable notice.

[2] SMBA appeals a summary judgment decision in which a Court of King's Bench Chambers judge found Ms. MacDonald to be an employee entitled to 22 months notice (less working notice given). SMBA further appeals the costs award made by the Chambers judge in a separate decision. See: *MacDonald v Saskatoon Minor Basketball Association*, 2024 SKKB 85, 93 CCEL (4th) 317 [*Merits Decision*]; and *MacDonald v Saskatoon Minor Basketball Association* (13 August 2024) Saskatoon, QBG-SA-00890-2021 (Sask KB) [*Costs Decision*].

[3] For the reasons that follow, both appeals are dismissed.

II. DECISIONS UNDER APPEAL

[4] The Chambers judge found that Ms. MacDonald had worked for SMBA for 16.5 years. During that time, she worked her way up from a part-time administrative assistant to executive assistant, to programs and communications coordinator and, finally, to the position of executive director of SMBA. This is the position she held when she was terminated.

[5] In 2021, due to the worldwide COVID-19 pandemic, SMBA was forced to reorganize its affairs, and Ms. MacDonald was notified on March 9, 2021, that her position would be coming to an end effective May 31, 2021. She was ultimately given three choices by SMBA:

(a) accept a short-term three-month position;

(b) apply for a new restructured position which would nearly double her responsibilities and include bookkeeping duties, something for which she had no experience or training; or

(c) accept six weeks' severance.

[6] Ms. MacDonald accepted the three-month short-term position, without agreeing that this constituted settlement of the matter.

[7] During her career with SMBA, Ms. MacDonald worked exclusively from home and, also, exclusively for SMBA. She would invoice SMBA every month for her services. SMBA's evidence was that Ms. MacDonald filed taxes as an independent contractor and remitted GST.

[8] No signed contract between the parties was ever located for Ms. MacDonald's most recent position, though the parties agree that they signed a contract at some point. SMBA would, on what appears to have been a yearly basis, send Ms. MacDonald a contract but those contracts were usually not signed and returned. The form of contract evolved over time, but certain features and provisions were in all of them. In particular, there was a job description, a non-competition provision, a term (typically 12 months) and termination provisions. The termination provisions changed from initially contemplating one week's average earnings as severance to later specifying one and a half month's notice.

[9] When Ms. MacDonald started work with SMBA, she was earning $10.50 per hour with nothing payable in the event of illness or for office/computer expenses, but SMBA reimbursed her for mileage and its operational costs.

[10] The final unsigned, annual contract that formed part of the evidentiary record, was labelled "Independent Contract of Randi MacDonald". Under its terms, Ms. MacDonald earned "Salary and Benefits" of $48,480 per year, or $4,040 per month, with mileage being reimbursed at $0.44 per kilometre. The termination provisions under this contract provided:

> **4.3** The SMBA may terminate the Executive Director's contract pursuant to this Agreement at its sole discretion for any reason without cause, upon providing to the Executive Director one and one-half (1.5 or 1 and 1/2) months' notice or upon payment of an equivalent amount for one and one-half months' of the monthly payments made to the Executive Director under clause 2.1 of this Agreement.

> For further clarity, the above termination pay in lieu of notice will be calculated on the basis of the Executive Director's annual compensation payable under clause 2.1 of this Agreement as of the date of notice of termination. Reimbursement, mileage, and other forms of additional compensation will not be considered part of the Executive Director's annual compensation.

[11] This final annual contract was followed by a three-month contract at the same salary and which included a similar termination provision.

[12] Notably, Ms. MacDonald was not referred to as an "independent contractor" in any of the agreements, notwithstanding that the last few contracts were entitled "Independent Contract of Randi MacDonald".

[13] The Chambers judge considered these facts in his decision and found Ms. MacDonald to be an employee as opposed to an independent contractor. The Chambers judge further found the termination clauses in the unsigned contracts to be unenforceable as they sought to contract-out of minimum statutory notice entitlements. Ultimately, the Chambers judge found the reasonable notice period was 22 months, with 3 months' working notice having been given, leaving 19 months of pay in lieu of notice owing to Ms. MacDonald. The Chambers judge concluded that, notwithstanding that SMBA had extended certain offers of re-employment to Ms. MacDonald, it had not established a failure to mitigate on her part. Finally, the Chambers judge found no animus in the manner in which SMBA had dealt with Ms. MacDonald and, therefore, he awarded nothing for breach of the duties of good faith and fair dealing as those allegations were not made out on the evidence.

[14] In a later, separate decision on costs, having been asked to order double costs on the basis of Rules 4-31, 11-1 and 15-96 of *The King's Bench Rules* and the fact that Ms. MacDonald had offered to settle her claim for $65,000 and was ultimately awarded damages in excess of this amount, the Chambers judge ordered SMBA to pay $11,000 in costs to Ms. MacDonald. It should be noted that the $11,000 costs award, while less than what Ms. MacDonald had sought, is a significant increase from what the Chambers judge was initially prepared to order, being $3,000 prior to learning of the offer to settle.

III. ISSUES ON APPEAL

[15] In its two appeals SMBA identifies a host of issues and sub-issues, but these can be distilled to the following central questions, namely:

(a) Was this an appropriate case for summary judgment?

(b) Did the Chambers judge err in finding Ms. MacDonald to be an employee or, alternatively, a dependent contractor?

(c) Did the Chambers judge err in the determination of the reasonable notice period?

(d) Did the Chambers judge err in finding that the SMBA had not established a failure by Ms. MacDonald to mitigate?

(e) Are the reasons of the Chambers judge sufficient and adequate?

(f) Did the Chambers judge err in finding that Ms. MacDonald was entitled to costs of $11,000?

IV. STANDARD OF REVIEW

[16] The standard of review applicable to the Chambers judge's decision that the matter could be determined through the summary judgment process, as opposed to requiring a trial, was described in *Hryniak v Mauldin*, 2014 SCC 7, [2014] 1 SCR 87 [*Hryniak*] as follows:

> [81] In my view, absent an error of law, the exercise of powers under the new summary judgment rule attracts deference. When the motion judge exercises her new fact-finding powers under Rule 20.04(2.1) and determines whether there is a genuine issue requiring a trial, this is a question of mixed fact and law. Where there is no extricable error in principle, findings of mixed fact and law should not be overturned absent palpable and overriding error: *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, at para. 36.

[17] As for the specific questions determined summarily by the judge in Chambers, the regular standards of review described in *Housen v Nikolaisen* apply. These were aptly summarized by this Court in *616471 Saskatchewan Ltd. (Aalbers Agro) v Aalbers*, 2024 SKCA 60:

> [42] Where a ground of appeal alleges an error of law, the standard of review is correctness: *Housen* at para 8. An appellate court may intervene if a finding of fact is the product of a palpable and overriding error: see *Housen* at para 10; *Hryniak v*

> *Mauldin*, 2014 SCC 7 at para 81, [2014] 1 SCR 87; *Deren v SaskPower*, 2017 SKCA 104 at para 41; *Yorkton (City) v Mi-Sask Industries Ltd.*, 2021 SKCA 43 at paras 22–25, [2021] 6 WWR 18; and *Stromberg* at para 121. Palpable means "'plainly seen', 'plainly identified', or 'obvious'" (*R v Kruk*, 2024 SCC 7 at para 97, 489 DLR (4th) 385); overriding means "shown to have affected the result" (*R v Clark*, 2005 SCC 2 at para 9, [2005] 1 SCR 6): see *Housen* at para 10 and *R v Le*, 2019 SCC 34 at para 206, [2019] 2 SCR 692.
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> [43] Intervention is also permitted where a finding of fact is grounded in an error of law, which includes a finding of fact "(i) based on no evidence, (ii) made on the basis of irrelevant evidence, in disregard of relevant evidence, or upon a mischaracterization of relevant evidence, or (iii) based on an unfounded or irrational inference of fact" (*Lonsdale v Evans*, 2020 SKCA 30 at para 31, 37 RFL (8th) 251): similarly, see *P.S.S. Professional Salon Services Inc. v Saskatchewan (Human Rights Commission)*, 2007 SKCA 149 at para 68, [2008] 5 WWR 440, leave to appeal to SCC refused, 2008 CanLII 32715.

See: *Housen v Nikolaisen*, 2002 SCC 33, [2002] 2 SCR 235; *MacInnis v Bayer Inc*., 2023 SKCA 37 at para 38–39; *Kot v Kot*, 2021 SKCA 4 at para 20, 63 ETR (4th) 161; and *Stromberg v Olafson*, 2023 SKCA 67 at paras 117–124 [*Stromberg*].

[18] In terms of cost awards, decisions on costs are discretionary. Intervention in these awards is rare as noted in *Stromberg*:

> [383] Costs awards are discretionary and attract review on the deferential standard set out in *Rimmer v Adshead*, 2002 SKCA 12, [2002] 4 WWR 119, which reads as follows:
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> > [58] In turning to this issue, it is necessary to bear in mind that the powers in issue are discretionary and therefore fall to be exercised as the judge vested with them thinks fit, having regard for such criteria as bear upon their proper exercise. The discretion is that of the judge of first instance, not ours. Hence, our function, at least at the outset, is one of review only: review to determine if, in light of such criteria, the judge abused his or her discretion. Did the judge err in principle, disregard a material matter of fact, or fail to act judicially? Only if some such failing is present are we free to override the decision of the judge and do as we think fit. Either that, or the result must be so plainly wrong as to amount to an injustice and invite intervention on that basis. (See, for example, *McKinnon Industries Ltd. v. Walker*, [1951] 3 D.L.R. 577, at 579 (P.C.) and *Saskatchewan Power Corporation v. John Doe*, [1988] 6 WWR 634 (Sask. C.A.)).

[19] The questions advanced in connection with this appeal largely concern questions of mixed fact and law. These questions are subject to the standard of palpable and overriding error. The one question that is subject to the standard of correctness concerns whether the Chambers judge's reasons are sufficient. If, for example, the reasons prevent meaningful appellate review, then an error of law has been committed. See: *R v Sheppard*, 2002 SCC 26 at para 28, [2002] 1 SCR 869 [*Sheppard*].

V. LAW AND ANALYSIS

A. Was this an appropriate case for summary judgment?

[20] The law as it relates to summary judgment is not in issue. Summary judgment is appropriate where a judge is satisfied that there is no genuine issue requiring a trial. In deciding this question, the judge must determine if they are in a position to confidently make the necessary findings of fact, apply the law to the facts and arrive at a just result that is more proportionate, more expeditious and less expensive than would be the case with a full trial: see *Hryniak* at paras 49–50.

[21] Summary judgment has been the subject of numerous decisions in our province, notably: *Tchozewski v Lamontagne*, 2014 SKQB 71, at paras 27–33, 440 Sask R 34; *White v Turanich*, 2020 SKQB 5 at paras 3–15; *Cicansky v Beggs*, 2018 SKQB 91, at paras 14–25, 25 CPC (8th) 182; *Shephard v 101093126 Saskatchewan Ltd. (Whitewood Inn)*, 2020 SKQB 346 at paras 13–18; *Ter Keurs Bros. Inc. v Last Mountain Valley (Rural Municipality)*, 2019 SKCA 10 at paras 30–31, 429 DLR (4th) 269; *LaBuick Investments Inc. v Carpet Gallery of Moose Jaw Ltd*., 2017 SKQB 341 at para 28; *Smith v Hawryliw*, 2020 SKQB 169 at paras 20–24; *Peter Ballantyne Cree Nation v Canada (Attorney General)*, 2016 SKCA 124 at paras 31–32, [2017] 1 WWR 685; *CE Design Ltd. v Saskatchewan Mutual Insurance Company*, 2021 SKCA 14 at para 103, 455 DLR (4th) 417 [*CE*]; and *Viczko v Choquette*, 2016 SKCA 52 at paras 36–42, 396 DLR (4th) 449.

[22] SMBA contends that the Chambers judge found some facts that were not clearly established in the evidence, for example, the Chambers judge's finding that Ms. MacDonald's age is between 45 and 49 years. It says that the Chambers judge was not in a position to confidently determine those facts. While I agree that the Chambers judge was unable to identify the plaintiff's precise age, he was able to reasonably infer her approximate age from the evidence. Although a trial may involve more exhaustive evidence, the question in a summary judgment application is whether the Chambers judge can confidently decide the necessary facts and legal principles to be applied so as to arrive at a fair, timely, cost-effective and proportionate resolution. If the answer to this question is yes, there will be no genuine issue requiring a trial. See: *Hryniak* at paras 4–5. As noted in CE:

> [103] …the test for summary judgment is not whether all the available evidence has been uncovered but whether the Chambers judge can make the necessary findings of fact and apply the law to the facts …

[23] In this case, the key facts were not dispute. The parties did not dispute:

(a) that Ms. MacDonald worked for SMBA;

(b) which roles she fulfilled;

(c) which communications were exchanged by the parties in terms of her role, responsibilities and proposed contracts;

(d) what work she did and who she reported to;

(e) that she decided how to do the work and worked from home;

(f) that there was considerable integration of her work and the work of SMBA;

(g) the remuneration she received for doing the work of SMBA;

(h) that, while a signed contract was never found, at some point a contract was signed;

(i) the offers of continuing work made by SMBA to Ms. MacDonald after the working relationship was brought to an end by SMBA; and

(j) that the working relationship between SMBA and Ms. MacDonald was a lengthy one, lasting many years.

This case was therefore suited for determination by way of summary judgment. The evidentiary record before the Court allowed the Chambers judge to make the necessary findings of fact (most of which, as noted, were not in dispute), to apply the law to those facts and to arrive at a just result using a more proportionate, expeditious and more cost-effective process than would be the case in a conventional trial. I find no error in the conclusion of the Chambers judge that, in this case, there was no genuine issue requiring a trial. Accordingly, the matter was properly determined by way of summary judgment, and this ground of appeal is without merit.

B. Did the Chambers judge err in finding Ms. MacDonald to be an employee or, alternatively, a dependent contractor?

[24] SMBA contends that the Chambers judge did not assess the subjective intention of the parties at the outset and, as a result, erred in his conclusion that Ms. MacDonald was an employee.

[25] The law as it relates to whether an individual is an employee or independent contractor is well settled. The analysis begins with trying to determine the mutual understanding or subjective intention of the parties when they entered into their agreement. Then, the Court looks at whether the objective reality supports that subjective intention. See, for example: *1392644 Ontario Inc. (Connor Homes) v Canada (National Revenue)*, 2013 FCA 85, at paras 38–40, 358 DLR (4th) 363. In assessing the objective reality, the Court considers the totality of the relationship. In *67112 Ontario Ltd. v Sagaz Industries Canada Inc.*, 2001 SCC 59, [2001] 2 SCR 983, Major J. provided guidance in how to assess the factual matrix:

> [47] …The central question is whether the person who has been engaged to perform the services is performing them as a person in business on his own account. In making this determination, the level of control the employer has over the worker's activities will always be a factor. However, other factors to consider include whether the worker provides his or her own equipment, whether the worker hires his or her own helpers, the degree of financial risk taken by the worker, the degree of responsibility for investment and management held by the worker, and the worker's opportunity for profit in the performance of his or her tasks.
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> [48] It bears repeating that the above factors constitute a non-exhaustive list, and there is no set formula as to their application. The relative weight of each will depend on the particular facts and circumstances of the case.

[26] Determining whether an individual is an employee or independent contractor requires an assessment of the totality of the relationship. It is by its very nature a question of mixed fact and law and is, therefore, subject to the palpable and overriding error standard of review, absent an extricable question of law. See: *1536378 Ontario Limited (B-Pro Grooming) v Canada (National Revenue)*, 2007 FCA 334 at para 5, 371 NR 38.

[27] I do not accept that the Chambers judge failed to consider the intention of the parties as suggested by SMBA. The Chambers judge examined at length the language of the various contracts between the parties and how those provisions evolved. The purpose of going through those contracts was to assess what the parties intended in terms of their working relationship at the outset. It is not in dispute that the contracts were prepared unilaterally by SMBA. As for

Ms. MacDonald's intention at the time of contracting, the Chambers judge found as follows (*Merits Decision*):

> [34] …I accept the fact that [Ms. MacDonald] would not have gone through an independent analysis, concluding that she was in business acting as an independent contractor *vis-à-vis* the SMBA.

[28] In short, SMBA's intention could be assessed by the language of the agreement it proposed while Ms. MacDonald's intention could be assessed based on the fact that she would not have undertaken this sort of employee vs. independent-contractor analysis when she started work for SMBA as a part-time administrative assistant, making $10.50 per hour.

[29] It is fair for SMBA to point out that Ms. MacDonald was working remotely, providing her own tools, deciding how the work would be done, and appears to have paid income tax as an independent contractor. That said, her degree of responsibility when she started work was very low, she had no financial risk, she was not hiring her own employees, she was not making any business investment, she was taking direction from SMBA, and there was no opportunity for her to profit beyond her $10.50 per hour remuneration (which increased later to $48,480 a year). Over time, the relationship between Ms. MacDonald and SMBA evolved; however, when one examines the language of the various contracts provided by SMBA, the changes or evolution in the contract language is best described as tweaks, rather than wholesale changes. There were some changes in the contract title, the description of the work, and the non-compete and termination provisions but the work in terms of responsibilities and remuneration evolved only slightly from year to year.

[30] In terms of her position, the various contracts refer to Ms. MacDonald as an administrative assistant, executive assistant, program and communications coordinator, and executive director. Even the contracts labelled "Independent Contract of Randi MacDonald" do not refer to her as an "independent contractor" in the body of the agreements.

[31] There is certainly some evidence that could be construed as giving rise to an independent-contractor relationship, notably, some of the language in the unsigned contracts and the fact that Ms. MacDonald, according to SMBA, had filed taxes as an independent contractor and had provided her own tools, but the weight of the evidence (including the level of remuneration, length of the relationship, level of supervision, power imbalance, role being fulfilled and level of integration between Ms. MacDonald and SMBA) favours the conclusion arrived at by the

Chambers judge. Fundamentally, throughout this relationship, Ms. MacDonald was not in business for herself; she was working as an employee of SMBA. I find no palpable and overriding error in the finding of the Chambers judge, and, accordingly, it is unnecessary to consider whether Ms. MacDonald might be a dependent contractor. On the evidence before him, the Chambers judge did not err in concluding that Ms. MacDonald was an employee.

C. Did the Chambers judge err in the determination of the notice period?

[32] The calculation of reasonable notice is a question of mixed fact and law and therefore is subject to the palpable and overriding error standard of review: see *Lynch v Avaya Canada Corporation*, 2023 ONCA 696 at para 14; and *Carroll v ATCO Electric Ltd.*, 2018 ABCA 146 at para 16, 68 Alta LR (6th) 286.

[33] The purpose of requiring an employer to give reasonable notice to an employee upon termination is to give the employee a reasonable amount of time to find a new job: see *Buchanan (Rural Municipality) v Veldman*, 2024 SKCA 111 at para 60; and *Prinzo v Baycrest Centre for Geriatric Care* (2002), 60 OR (3d) 474 (CA) at para 28. The length of the notice period to which an employee might be entitled at common law is determined by the nature of the employment, the length of service, the age of the employee, the availability of suitable alternate similar employment having regard to the individual's training and capabilities and other relevant circumstances: see *Bardal v Globe & Mail Ltd.* (1960), 24 DLR (2d) 140 (Ont HC); and *Schwann v Husky Oil Operations Ltd.*, 76 Sask R 97 (CA) at para 18.

[34] In determining the length of the reasonable notice, it is important to consider the nature of the employment. Accordingly, in this instance, when looking at comparators, the cases relied on should involve persons doing work similar to that which Ms. MacDonald was doing for a similar employer and requiring similar training.

[35] Ms. MacDonald started as a part-time administrative assistant, earning $10.50 per hour. By the time she finished working with the SMBA, she was earning $48,480 per annum as the executive director and was performing the following work according to the most recent annual contract:

> 3.3. Additional responsibilities, duties, and obligations of the Executive Director under this Agreement include but are not limited to:

3.3.a Acting as liaison between the SMBA, its Board, and/or the Board's sub-committees and stakeholders in furthering the vision and long-term goals of the SMBA including, but not limited to:

• Attending meetings between the SMBA's stakeholders and the SMBA, Board, and/or the Board's sub-committees; and

• Assisting the SMBA and its Board in the facilitation, coordination, and organization of the planning, development, and construction of a basketball facility in Saskatoon;

3.3.b Maintaining positive working relationships with internal and external stakeholders;

3.3.c Participating in Board planning and executing actionable items and goals as a result of the Board's planning;

3.3.d Acting as liaison between customers and the Board, including acting as liaison between customers and/or the Board and community associations with respect to SMBA registration and other SMBA programming;

3.3.e Overseeing and engaging in advertising and marketing for the SMBA;

3.3.f Development of new policies for consideration by the Board;

3.3.g Collecting and making payments, including reconciliation and accounting of all the SMBA's programs, revenues, and expenses;

3.3.h Applying for grants available to the SMBA;

3.3.i Operating within budgets as put forward by the Board;

3.3.j Maintaining and regularly updating the SMBA's website except for such updates carried out by the SMBA's League Administrator;

3.3.k Establish and maintain a social media presence for the SMBA, including regularly updating the SMBA's social media accounts or pages;

3.3.l Maintaining accurate minutes and records of SMBA regular meetings and Annual General Meetings, including distributing minutes to the Board prior to the Board's next meeting;

3.3.m All other matters and duties directed by the Board or the Board's sub-committees not stated above.

[36] As noted, the Chambers judge did not have definitive evidence of Ms. MacDonald's age at the time of termination but found her to be between 45 and 49 years of age. It is not clear why direct evidence on this point was not adduced, but, in any event, the range determined by the Chambers judge is in keeping with the evidence relevant to that issue, including her years of service to SMBA and the year of Ms. MacDonald's high school matriculation set out in her resume appended to Greg Jockim's (SMBA President) affidavit. Which is to say that it was reasonable for the Chambers judge to draw an inference about Ms. MacDonald's approximate age from the evidence.

[37] Determining reasonable notice is a fact specific exercise and there are rarely perfect comparators, but the relevant jurisprudence provides some guidance on what might be appropriate in the circumstances:

Case Name	# of Years on Job	Job Description	Age of Employee	# of Months Severance Awarded	Salary
Lemay v Canada Post Corp., 2003 CanLII 36637 (Ont Sup Ct)	16	- Manager, Sales Direct Marketing - Does not manage other employees or assume responsibility for a department - Supports a sales team with a target of $120 million - Conducts research to provide customers with trends and directions - Presents at seminars in the U.S.A. - Provides direct marketing advice and guidance to U.S.A. customers	43	16	$74,594
Steinbach v Clean Energy Compression Corp., 2015 BCSC 460	19.5	- Vice President Business Development Canada - Direct the business unit - Manage all business activities - Achieve sales goals - Collaborate with the executive team to develop strategic business plans - No supervisory responsibilities	49	16	$72,100
Bain v UBS, 2016 ONSC 5362	14	- Managing Director, Head of Canadian Mergers & Acquisitions - Highest position in Canada in the Mergers & Acquisitions department - On numerous committees, one of which is responsible for the annual performance reviews of employees	45	18	$385,000

Case Name	# of Years on Job	Job Description	Age of Employee	# of Months Severance Awarded	Salary
Keenan v Canac Kitchens, 2015 ONSC 1055, aff'd 2016 ONCA 79	Mr. K: 32 Ms. K: 25	Mr. K. - Installer (7 years) - Foreman/Delivery and Installer Leader (25 years) - Supervise the delivery, installation, and service of kitchen cabinets Ms. K: - Foreman - Supervise the delivery, installation, and service of kitchen cabinets	Mr. K: 63 Ms. K: 61	26	Not specified
McMichael v The New Zealand & Australian Lamb Company, 2018 ONSC 5422	12.5	- Vice President of Operations - Senior employee who reported directly to COO and President - Oversees all production and distribution operations associated with Los Angeles facility (sales totalling $200 million CAD)	63	22	$190,100 USD
Motta v Davis Wire Industries Ltd., 2019 ABQB 899	17	- General Manager and Territorial Manager - Responsible for all day-to-day operations, sales, and business development of Calgary and Edmonton locations (manufacturing) - Report directly to defendant's controller - Responsible for hiring and firing of employees - Order and stock materials - Manage sales relationships and set prices	67	22	$95,973

Case Name	# of Years on Job	Job Description	Age of Employee	# of Months Severance Awarded	Salary
Swidrovich v Saskatchewan Place Association Inc., 2019 SKQB 50	Mr. S: 26 Mr. A: 22	Mr. S: - Director of Business Development - Develop sponsorships with organizations - Sale of corporate suites - Help facilitate event creation - Cultivate relationships Mr. A: - Director of Ticketing and Business Projects - Management of central business, accounting, administrative, secretarial, and Box Office functions - Provide technical advice to managerial and professional staff re: financial responsibilities	Mr. S: 56 Mr. A: 62	Mr. S: 20 Mr. A: 24	Not specified
Wilkinson v Valgold, 2021 BCSC 572	12	- President and CEO	68	18	$210,000
Pohl v Hudson's Bay Company, 2022 ONSC 5230	28	- Sales Manager (8 years) - Interviewing and hiring new sales associates - Creating schedules for staff - Supervising sales associates, providing feedback and discipline - Liaison between store and executive team - Implementing product recalls - Responding to customer complaints	53	24	$61,254

Case Name	# of Years on Job	Job Description	Age of Employee	# of Months Severance Awarded	Salary
Rutledge v Markhaven Inc., 2022 ONSC 3183	21	- Executive Director - Establish high standard of care at facility - Implement and enforce policies of board of directors - Highest ranking employee and member of senior management - Authority over all employees and contractors - In a fiduciary relationship with defendant	43	22	$117,000
Ayalew v The Council for the Advancement of African Canadians in Alberta, 2023 ABKB 113	10	- Executive Director	62	14	$83,130
Ketch v Meadow Lake Mechanical Pulp Ltd., 2023 SKKB 241	24	- Shift Supervisor (6 years)	45	24	$128,317

[38] The foregoing cases suggest that over the past two decades there has been a gradual increase in the amount of reasonable notice courts have been prepared to award. In my view, an appropriate range in this case would be anywhere between 16 and 22 months. The determination of 22 months (less three for working notice) made by the Chambers judge is on the higher end of the range, but it is still within the appropriate range. Accordingly, it cannot be said that the Chambers judge made a palpable and overriding error that would justify the intervention of this Court. This ground of appeal cannot be given effect.

D. Did the Chambers judge err in finding that SMBA had not established a failure by Ms. MacDonald to mitigate?

[39] The law as it relates to mitigation in situations where an employer offers a dismissed employee a job was aptly set out by the Supreme Court of Canada in *Evans v Teamsters Local Union No. 31*, 2008 SCC 20, [2008] 1 SCR 661 [*Evans*]:

> [30] I do not mean to suggest with the above analysis that an employee should always be required to return to work for the dismissing employer and my qualification that this should only occur where there are no barriers to re-employment is significant. This Court has held that the employer bears the onus of demonstrating both that an employee has failed to make reasonable efforts to find work and that work could have been found (*Red Deer College v. Michaels*, [1976] 2 S.C.R. 324). Where the employer offers the employee a chance to mitigate damages by returning to work for him or her, the central issue is whether a reasonable person would accept such an opportunity. In 1989, the Ontario Court of Appeal held that a reasonable person should be expected to do so "[w]here the salary offered is the same, where the working conditions are not substantially different or the work demeaning, and where the personal relationships involved are not acrimonious" (*Mifsud v. MacMillan Bathurst Inc.* (1989), 70 O.R. (2d) 701, at p. 710). In [*Cox v Robertson*, 1999 BCCA 640, 181 DLR (4th) 214], the British Columbia Court of Appeal held that other relevant factors include the history and nature of the employment, whether or not the employee has commenced litigation, and whether the offer of re-employment was made while the employee was still working for the employer or only after he or she had already left (paras. 12-18). In my view, the foregoing elements all underline the importance of a multi-factored and contextual analysis. The critical element is that an employee "not [be] obliged to mitigate by working in an atmosphere of hostility, embarrassment or humiliation" ([*Farquhar v Butler Brothers Supplies Ltd.* (1988), 23 BCLR (2d) 89], at p. 94), and it is that factor which must be at the forefront of the inquiry into what is reasonable. Thus, although an objective standard must be used to evaluate whether a reasonable person in the employee's position would have accepted the employer's offer (*Reibl v. Hughes*, [1980] 2 S.C.R. 880), it is extremely important that the non-tangible elements of the situation — including work atmosphere, stigma and loss of dignity, as well as nature and conditions of employment, the tangible elements — be included in the evaluation.
>
> [31] I note that the nature of this inquiry increases the likelihood that individuals who are dismissed as a result of a change to their position (motivated, for example, by legitimate business needs rather than by concerns about performance) will be required to mitigate by returning to the same employer more often than those employees who are terminated for some other reason. This is not, however, because these individuals have been constructively dismissed rather than wrongfully dismissed, but rather because the circumstances surrounding the termination of their contract may be far less personal than when dismissal relates more directly to the individuals themselves. This point is illustrated by [*Michaud v RBC Dominion Securities Inc.*, 2002 BCCA 630] in which a bank executive was constructively dismissed as a result of an organizational restructuring. The evidence showed that the bank offered the employee another executive position and was anxious to have him continue working for them. Importantly, there was no evidence that the relationship between the employee and the bank was acrimonious or that he would suffer any humiliation or loss of dignity by returning to work while he looked for new employment. As a result, mitigation was required.

[40] As noted in *Evans* at paragraph 35, the decision of a trial judge – or, in this case, a Chambers judge – concerning whether an employee ought to have returned to work is a question of mixed fact and law and, therefore, appellate intervention would only be appropriate where there has been a palpable and overriding error committed by the judge.

[41] In this case, SMBA does not suggest that Ms. MacDonald did not do enough to find work, rather, it says that it offered her a job for a period of nine months that she ought to have taken.

[42] It is not in dispute that on June 18, 2021, the following offer was made by SMBA to Ms. MacDonald:

> We are in receipt of your letter dated June 9, 2021. We disagree with your assessment of the matters concerning Randi MacDonald set out therein for reasons already communicated to Ms. MacDonald. In addition to the reasons already communicated, Ms. MacDonald has failed in her duty to mitigate her losses including (but not limited to) applying to the two position recently posted by SMBA. Ms. MacDonald would have been a strong candidate for both positions but failed to apply. The SMBA has filled one of the two available positions.
>
> The SMBA, being a non-profit organization, will not consider paying the amount demanded in your June 9, 2021 letter. However, in an effort to resolve matters, on a WITH prejudice basis, the SMBA is offering to extend Ms. MacDonald's most recent contract for a 9-month period commencing July 1, 2021 and expiring on April 1, 2022.
>
> This offer is conditional upon Ms. MacDonald signing a full and final release from the SMBA in relation to any and all claims Ms. MacDonald has against the SMBA and will specifically acknowledge that Ms. MacDonald is not entitled to any further severance or other payment from the SMBA (other than payments contemplated to be made in the 9 month contract).
>
> This offer is open for acceptance for ten (10) days from the date of this letter. We look forward to hearing from you.

[43] It is solely on the basis of this offer that SMBA argued on appeal that Ms. MacDonald had failed to mitigate. There are two fundamental problems with SMBA's position. First, the offer contemplates that Ms. MacDonald accept a position for which she had no training or qualifications. Second, the offer requires that Ms. MacDonald release SMBA and accept nine-months' working notice when she had been claiming to be owed in excess of this amount.

[44] Given these two facts, it cannot be said that a reasonable person in Ms. MacDonald's shoes would have taken this offer of employment. To take this offer would be to give up a significant portion of her claim for reasonable notice. Accordingly, there is no room for appellate interference under this ground of appeal.

E. Did the Chambers judge provide sufficient reasons?

[45] The test for sufficiency of reasons is well established and was set out by the Supreme Court of Canada in *R v R.E.M.*, 2008 SCC 51, [2008] 3 SCR 3. Reasons will be sufficient where they

show why the judge made the decision. The reasons must tell the parties what the judge has decided and why they have made that decision. The reasons given must be sufficient to provide public accountability and permit meaningful appellate review. Reasons will only be inadequate where these objectives are not met. See: also, *R v Sheppard*, 2002 SCC 26, [2002] 1 SCR 869.

[46] In this case, SMBA argues that the reasons are inadequate because they are contradictory. SMBA points to paragraph 55 and 56 of the *Merits Decision* and says that these paragraphs are at odds with the finding made at paragraph 61. These paragraphs provide:

> [55] [Ms. MacDonald's] counsel responds to these comments starting at paragraph 38 of his reply brief:
>
> > [38] The Defendant claims that the Plaintiff's failure to apply for their offer, open to all applicants and without guarantee, of the newly restructured Director of Operations position demonstrates that she failed to mitigate. The record of Mr. Jockim's questioning shows that both the organization and the president himself understood that the new Director of Operations position incorporated the duties of both the former Executive Director position that Ms. MacDonald had occupied as well as the Program Coordinator position. The new Director of Operations position held twice the duties, responsibility, and work of Ms. MacDonald's old position. It simply could not be characterized as similar work for similar pay. In addition, the Plaintiff was expected to take on a second role, without additional compensation, if she applied for the new role. The Plaintiff was not in a position to take on a second role, especially one she did not have training for.
> >
> > [39] The Defendant asserts that the Plaintiff took employment with the Living Skies Basketball League ("Living Skies") for the 2022-2023 season. The Defendant cites the affidavit of Brad Smith which in turn swears the evidence of her employment came from a conversation with the co-founder of Living Skies. The Defendant's evidence, though in the form of an affidavit, is nonetheless hearsay. If the Defendant wished to submit an affidavit from an authorized agent of Living Skies to attest to Ms. MacDonald's employment with their organization, they should have done so.
> >
> > [40] In the alternative, the Defendant could simply have asked for Ms. MacDonald's records on mitigation, rather than including a hearsay affidavit of Mr. Smith.
> >
> > [41] Finally, the Defendant asserts that the Plaintiff failed to accept a new offer of employment starting on July 1, 2021, and for a term lasting until April 1, 2022. <u>The Plaintiff replies that this belated offer of employment, after she had been fired in a manner evincing bad faith, could not be accepted.</u> <u>The Plaintiff argues that the guidance of the Supreme Court of Canada in *Evans* [2008 SCC 20, [2008] 1 SCR 661] applies and she was not required to accept such an offer where she would be working in an atmosphere of hostility, embarrassment or humiliation.</u>

> [56] I agree with [Ms. MacDonald's counsel's] position. SMBA has not met the requisite burden of proof to establish inadequate mitigation. In fact, other than the offers SMBA made, there is no evidence respecting mitigation. Accordingly, there will be no adjustment to the reasonable notice of 19 months.
>
> …
>
> [61] There is no question that the termination of [Ms. MacDonald's] contract could have been handled with more clerical exactitude. However, there is absolutely no evidence, or even suggestion, that the SMBA evidenced or manifested any animus *vis-à-vis* [Ms. MacDonald]. The sad fact is that it had to bring a long-term relationship to an end. Respectfully, I see no grounds on which to award damages for breach of duty of good faith and fair dealing.
>
> (Emphasis added)

[47] It is a fair criticism to say that the Chambers judge could have been more surgical in the extracts taken from counsel's brief and that he could have been clearer in setting out exactly which arguments he was adopting and what findings of fact were entailed. That being said, I do not see a direct conflict between the paragraphs of the *Merits Decision* that SMBA has identified. While Ms. MacDonald's counsel submitted that she had been "fired in a manner evincing bad faith" and that she "would be working in an atmosphere of hostility, embarrassment or humiliation" if she accepted an offer of re-employment (at para 41), those submissions were made in furtherance of her position that she had not failed to mitigate her losses. Notably in that regard, her counsel's reference to an "atmosphere of hostility, embarrassment or humiliation" was prospective in nature—it is what her counsel said would have happened if she had accepted the offer. The Chambers judge's later statement—that "there is absolutely no evidence, or even suggestion, that the SMBA evidenced or manifested any animus *vis-à-vis* [Ms. MacDonald]" (at para 61)—was made with respect to an entirely different issue, namely, the duties of good faith and fair dealing. Here, the Chambers judge must be taken to have examined the evidence through a different legal lens and to have drawn his own finding that the evidence did not support Ms. MacDonald's claim of bad faith.

[48] Reasons need not be perfect. They will only be inadequate where they fail to fulfill the objectives for which they are intended. In this case, the *Merits Decision* sets out who was successful on each issue and why. It provides for public accountability and has permitted meaningful appellate review. Accordingly, this ground of appeal must fail.

F. Did the Chambers judge err in finding that Ms. MacDonald was entitled to costs of $11,000?

[49] The concern raised by SMBA under this ground is that, while the Chambers judge had discretion on the issue of costs, he fettered it by applying an inapplicable presumption. Alternatively, SMBA says he gave too much emphasis to the fact that a written offer to settle had been made.

[50] In the *Merits Decision*, the Chambers judge ordered costs of $3,000 payable to Ms. MacDonald. However, after making that decision, he learned of the offer from Ms. MacDonald dated February 3, 2022, in which she had offered to settle her claim for $65,000. The Chambers judge thereafter increased the costs award to $11,000 by way of the *Costs Decision*.

[51] I do not find that the Chambers judge began with a presumption in favour of double costs as there was no bill of costs before him upon which to base such a presumption. Rather, he applied Rule 11 and noted:

> [12] *Prima facie*, that triggers consideration of awarding double costs for all attendances after the Offer to Settle which was dated February 3, 2022. *Prima facie*, the [Ms. MacDonald] is entitled to what she asks.

[52] The Chambers judge gave consideration to whether or not double costs was appropriate but did not in fact order double costs. As noted, his decision was based on Rule 11 which provides in part:

> **Discretion of Court**
>
> 11-1(1) Subject to the express provisions of any enactment and notwithstanding any other rule, the Court has discretion respecting the costs of and incidental to a proceeding or a step in a proceeding, and may make any direction or order respecting costs that it considers appropriate.
>
> …
>
> (4) In exercising its discretion as to costs, the Court may consider:
>
> (a) the result of the proceeding;
>
> (b) the amounts claimed and the amounts recovered;
>
> (c) the importance of the issues;
>
> (d) the complexity of the proceedings;
>
> (e) the apportionment of liability;
>
> (f) any written offer to settle or any written offer to contribute;

> (g) the conduct of any party that tended to shorten or to unnecessarily lengthen the proceeding;
>
> (h) a party's denial of or refusal to admit anything that should have been admitted;
>
> (i) whether any step in the proceeding was improper, vexatious or unnecessary;
>
> (j) whether any step in the proceeding was taken through negligence, mistake or excessive caution;
>
> (k) whether a party commenced separate proceedings for claims that should have been made in one proceeding or whether a party unnecessarily separated his or her defence from that of another party; and
>
> (l) any other matter it considers relevant.

[53] The rule places considerable discretion in the presiding judge on the issue of costs. In this case, the Chambers judge did not award full indemnity costs or even, double costs. Instead, the Chambers judge considered the positions of both parties and balanced their interests in light of the arguments advanced. This is apparent from a review of the *Costs Decision* wherein the Chambers judge stated:

> [13] However, with the greatest of respect to [Ms. MacDonald], my appetite to award costs is moderated by the circumstances of the [SMBA]. It was not a sophisticated employer, nor was it in the business of regularly dealing with employee issues. The [SMBA] thought it was contracting with [Ms. MacDonald] on an annual basis which meant she was not an "employee" but rather an independent contractor. Thus no notice was required. As my judgment reflects, I concluded the [SMBA's] analysis was incorrect.

[54] The Chambers judge considered the fact that Ms. MacDonald was successful on the summary judgment application, that the position of SMBA, while ultimately incorrect in law, was not motivated by malice or bad faith, and that Ms. MacDonald had clearly surpassed the offer she had made.

[55] I do not find the Chambers judge erred in principle, disregarded a material matter of fact or failed to act judicially. As noted in *Rimmer v Adshead*, 2002 SKCA 12, [2002] 4 WWR 119, the discretion lies with the judge of first instance. This Court can only intervene in limited circumstances, circumstances which are not present in this case. Accordingly, this ground of appeal cannot be given effect.

VI. CONCLUSION

[56] In the end result, I would dismiss the SMBA's appeal and award Ms. MacDonald her costs calculated in the usual way.

"Bardai J.A."

Bardai J.A.

I concur.

"Caldwell J.A."

Caldwell J.A.

I concur.

"Tholl J.A."

Tholl J.A.