

CITATION: 2025 NBKB 067

Docket: FC-27-2023

IN THE COURT OF KING'S BENCH OF NEW BRUNSWICK
TRIAL DIVISION
JUDICIAL DISTRICT OF FREDERICTON

BETWEEN:

RODERICK MacDONALD,

Plaintiff,

-and-

STARBUCKS COFFEE CANADA INC., a body
corporate,

Defendant.

DECISION

Dates of Hearing: December 4, 2024 & March 18, 2025

Date of Decision: March 31, 2025

Subject Matter: **Wrongful dismissal; medical evidence on mitigation; entitlement to bonus and fringe benefits**

Before: Justice Terrence J. Morrison

At: Fredericton, New Brunswick

Appearances: Jessica Bungay, for the Plaintiff

Mark Heighton, and Lauren Sorel, for the Defendant

DECISION

Morrison, J.

I. INTRODUCTION

[1] This is an action for wrongful dismissal brought by the plaintiff, Roderick MacDonald, against his former employer, Starbucks Coffee Canada Inc. (“Starbucks”). Starbucks admits that Mr. MacDonald was dismissed without cause. Accordingly, the only issues to be determined in this matter is the period of reasonable notice to which Mr. MacDonald is entitled and the quantification of his damages for same. In addition, there is a question of Mr. MacDonald’s entitlement to certain benefits during the reasonable notice period.

[2] The matter first came before the Court by way of a motion for summary judgment brought by Mr. MacDonald. At the hearing of that motion, I determined that there was a genuine issue for trial and I ordered a so-called one-day mini trial pursuant to Rule 22.04(3). The issues to be addressed on the mini trial were Mr. MacDonald’s medical condition and its impact on his ability to search for work, duty to mitigate, entitlement to bonus amounts under an incentive program, and entitlement to certain other fringe benefits.

[3] The mini trial proceeded on December 4, 2024, and the parties submitted post-hearing briefs and supplementary briefs at the direction of the Court.

II. FACTS

[4] Mr. MacDonald commenced employment with Starbucks on February 19, 2015 as a store manager in Toronto, Ontario. During the COVID-19 pandemic, Starbucks began to consider closing several locations in the Toronto area due to a downturn in business. Mr. MacDonald was consulted about the possibility of relocating and was offered an opportunity to relocate to Fredericton, New Brunswick, which he accepted. Mr. MacDonald moved to New Brunswick in February of 2021 and commenced work as a store manager in Fredericton in March 2021.

[5] In September of 2022, Mr. MacDonald oversaw a training program at the Fredericton store wherein staff were provided with t-shirts. A number of female staff who had been provided with size medium t-shirts returned them as they were too small. Subsequently, a staff member who identifies as non-binary requested a medium t-shirt, to which Mr. MacDonald replied, “Is that going to fit the girls?” Mr. MacDonald acknowledged that the reference to “girls” was synonymous with “breasts”. The staff member in question made a formal complaint. Starbucks commenced an investigation in October of 2022. The investigation concluded Mr. MacDonald had breached Starbucks’ anti-harassment standard and the decision was made to terminate Mr. MacDonald for “violation of standards of business conduct”. On November 10, 2022, Mr. MacDonald was terminated on a without-cause basis.

[6] Following his termination, Mr. MacDonald was provided with 4 weeks’ pay in lieu of notice in the amount of \$6,129.30. Subsequently, Mr. MacDonald was provided with a termination letter wherein Starbucks offered to pay him an additional 20.5 weeks of severance,

conditional upon his executing a release. Mr. MacDonald rejected that offer. The parties agree that Mr. MacDonald's salary (excluding bonus) at the time of termination was \$76,604.40.

III. ANALYSIS AND DECISION

A. *Appropriate Period of Notice*

[7] The factors to be considered in determining the appropriate period of reasonable notice were set out in the seminal case of *Bardal v. Globe and Mail Ltd.*, (1960), 24 D.L.R. (2d) 140. The *Bardal* factors, and the law generally governing determination of reasonable notice, was succinctly summarized by Petrie, J in *Slipp v. Woodstock First Nation Economic Development Corporation*, 2020 NBQB 20, at paras. 29-40 (citation references omitted):

29 The Court is governed by the following legal principles:

30 Employment is an essential component of a person's self-worth (...)

31 At common law, an employment contract of indefinite duration obligates the employer, who dismisses that employee without just cause, to provide reasonable notice of termination or pay in lieu (...)

32 The primary objective of reasonable notice is to provide the terminated employee with a reasonable opportunity to seek and find alternative suitable employment (...)

33 Damages for dismissal without reasonable notice are designed to place the aggrieved party in the same position he/she would have been in had the contract been performed, i.e., had the employee been able to work the notice period (...)

34 There is no precise method nor formula to determine the period of reasonable notice for termination of employment (...)

35 The seminal Canadian employment decision in *Bardal* nicely summarizes the correct approach to determining reasonable notice:

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 (...)

36 Character of employment *simpliciter* is generally not a relevant factor unless there is evidence establishing otherwise (...)

37 A determination of reasonable notice is individualized and contextual to the employee and employer's situation (...)

38 An employee must make reasonable efforts to mitigate his/her damages by reasonably seeking alternative employment or sources of income (...)

39 The failure to mitigate is an affirmative defence and must be pled. The onus to establish the defence rests with the employer (...)

40 Termination and severance pay paid by the employer under the *Employment Standards Act* are to be deducted from awards of damages for wrongful dismissal (...)

[8] At the time of his termination, Mr. MacDonald was 50 years old and had been employed by Starbucks for 7 years and 7 months. Mr. MacDonald has a degree in graphic design but has never worked in that field. According to his resume, Mr. MacDonald had experience in restaurant management and retail sales before becoming a store manager with Starbucks.

[9] As mentioned, Mr. MacDonald relocated from Toronto to New Brunswick and assumed a manager's position with Starbucks in Fredericton. On cross-examination, Mr. MacDonald conceded that the decision to move to Fredericton was his choice and was not a transfer, *per se*, by Starbucks. Nonetheless, he was offered the position in Fredericton against the background of likely closure of the location he managed in Toronto.

[10] Mr. MacDonald's counsel submits that the appropriate period of notice in this case is 10 months. In support of that submission, Mr. MacDonald's counsel refers to the following cases:

- (a) *Miller v. Luminultra Technologies Ltd.*, 2022 NBQB 60 – 55-year-old employee with 6 years' service – 10 months' reasonable notice;

- (b) *Boyd v. Wright Environmental Management Inc.*, 2008 ONCA 779 – 55-year-old salesperson with 9 years’ service – reasonable notice period of 10 months;
- (c) *Defaria v. XTRA Canada*, 164 A.C.W.S. (3d) 462 – 50-year-old branch manager with 6 years and 11 months’ experience – reasonable notice of 10 months;
- (d) *Lanteigne v. Caisse populaire de Caraquet Ltée*, 2004 NBBR 14 – 50-year-old loan advisor with 4 years’ service – reasonable notice of 8 months;
- (e) *Lake v. La Presse*, 2022 ONCA 742 – 52-year-old general manager with 5.5 years of service – reasonable notice of 8 months;
- (f) *Morison v. Ergo-Industrial Seating Systems Inc.*, 2016 ONSC 6725 – 58-year-old sales manager with 8 years of service – reasonable notice of 12 months;
- (g) *Fernandes v. Goveas*, 2016 ONSC 1992 – 51-year-old caregiver with 9 years’ service – reasonable notice of 10 months;
- (h) *Larry v. Triple M Metal Inc.*, 151 A.C.W.S. (3d) 1091 – 48-year-old salesperson with 10 years’ service – reasonable notice of 10 months;
- (i) *Power v. Unique Chrysler Plymouth Ltd.*, 162 A.C.W.S. (3d) 611 – parts and service manager with 7 years and 5 months’ service – reasonable notice of 10 months;
- (j) *Barton v. Rona Ontario Inc.*, 2012 ONCSC 3809 – 64-year-old assistant store manager with 10 years of service – reasonable notice of 10 months.

[11] Counsel for Starbucks submits that the appropriate period of notice (without consideration of its mitigation defence) is 5 to 7 months. In support of that submission, Starbucks refers to the following cases:

- (a) *Gladstone v. Trius Dieppe Taxi Ltd.*, 1998 CanLII 9825 – 45-year-old operations manager with 7 years of service – reasonable notice of 4 months;
- (b) *McKim v. University of New Brunswick*, 1994 CanLII 4449 – director of computer services (unknown age) with 9.5 years of service – reasonable notice of 8 months;
- (c) *Van Smith v. M.F. Schurman Co.*, 1992 CanLII 6816 – 36-year-old sales representative with 10 years of service – reasonable notice of 6 months;
- (d) *Saulnier v. Stitch It*, 2008 NBQB 269 – 54-year-old seamstress and manager with 6 years’ service – reasonable notice of 6 months;
- (e) *Filice v. Complex Services Inc.*, 2018 ONCA 625 – 50-year-old security shift supervisor with 8.8 years’ service – reasonable notice of 7 months.

[12] In addition to the above-noted cases relied upon by Starbucks, its counsel submits that many of the cases relied upon by the plaintiff (*Miller, Defaria, Lanteigne, Lake, Morison, Power, and Barton*) are distinguishable from the facts of the present case because the plaintiffs were awarded an enhanced notice period largely on the basis that they were senior employees and/or engaged in a specialized field.

[13] Having regard to the *Bardal* factors outlined above and reviewing the cases submitted by the parties, I conclude that the reasonable notice period for Mr. MacDonald is 8 months. This, as mentioned, is without any consideration of the issue of mitigation.

B. *Did the Plaintiff Fail to Mitigate?*

[14] Starbucks submits that Mr. MacDonald has not mitigated his loss by failing to take reasonable steps to seek alternate employment. Starbucks points to the plaintiff's evidence that between November 10, 2022 and February, 2023 (the "First Period") he did not actively seek employment because he was suffering from persistent depressive disorder ("PDD"). Starbucks also points to evidence that during the period of May 4th to September 19, 2023 (the "Second Period") the plaintiff made no efforts to find work. Starbucks refers to Mr. MacDonald's testimony on cross-examination that during the Second Period he undertook renovations to his house to attract renters and was considering relocating back to Toronto. Starbucks submits that even if the plaintiff did meet his obligations to mitigate during the First Period (which is denied) it was not reasonable for him to delay his job search during the second period. Starbucks refers to *Doucet v. Spielo Manufacturing Inc.*, 2009 NBQB 196, where the trial judge reduced the notice period where the plaintiffs admitted to focusing on the lawsuit rather than searching for work.

[15] Mr. MacDonald's evidence is that his PDD inhibited his ability to look for work. Starbucks submits that Mr. MacDonald provided no expert medical evidence to support his contention that he was medically prevented from seeking employment. As a result, Starbucks submits that the plaintiff has not shown that he acted reasonably to mitigate his damages.

(1) General Principles

[16] The onus is on the employer to prove that the employee has failed to satisfy his duty to mitigate. The general principles regarding failure to mitigate have been reiterated in

numerous decisions. A concise summary of these principles is found in *Smith v. Aker Kvaerner Canada Inc.*, 2005 BCSC 117, at paragraph 32:

32 The burden of proving that Mr. Smith has failed to mitigate his losses rests with the Defendants: *Red Deer College v. Michaels* (1975), 1975 CanLII 15 (SCC), 57 D.L.R. (3d) 386 (S.C.C.). **There is a heavy onus to demonstrate a failure to mitigate.** In this regard, Edwards J. in *Petersen v. Labatt Breweries of British Columbia* (1996) 1996 CanLII 1059 (BC SC), 25 C.C.E.L. (2d) 241 (B.C.S.C.) stated:

The onus on a defendant alleging a plaintiff has failed to mitigate in an action of this kind is **"by no means a light one"**. See: *Michaels v. Red Deer College* (1976), 1975 CanLII 15 (SCC), 57 D.L.R. (3d) 386. **The defendant must show not only that the plaintiff failed to take steps to mitigate but also that had the plaintiff taken those steps he could likely have found equivalent employment.** See: *Jorgenson v. Jack Cewe Ltd.*, (1978), 1978 CanLII 397 (BC CA), 93 D.L.R. (3d) 464, [1979] 1 A.C.W.S. 138 and *Munana v. MacMillan Bloedel Ltd.*, [1977] 2 A.C.W.S. 364. (at para. 10) [Emphasis added]

[17] In a recent unreported New Brunswick decision issued July 26, 2024, Justice Bourque provided a helpful summary of the principles in *Amy Elliott v. Greenlight Property Management Inc.* MC-466-2023 (unreported) at paragraphs 26-27:

26 In determining the appropriate notice period for a terminated employee, courts are also asked to consider whether the employee made reasonable efforts to minimize their financial losses by seeking alternative employment. This evaluation involves examining the actions taken by the employee to secure new job opportunities, taking into account factors such as their qualifications, job market conditions, and available options. The burden of proving that the employee failed to mitigate falls on the employer, who must demonstrate through evidence that the employee did not make reasonable attempts to find new employment. (See: *Schram v. Nunavut*, 2014 NBCA 53 (N.B. C.A.) and *Morrow v. Aviva Canada Inc.*, 2004 NBCA 100 (N.B. C.A.))

27 In the decision out of Ontario of *Celestini v. Shoplogix Inc.*, 2021 ONSC 3539 (CanLII), the Court provided a helpful review of the law on mitigation at paragraph 84 where it stated:

[84] Ultimately, a dismissed employee is obliged to mitigate his damages by taking reasonable, not perfect, steps. **Even if a defendant employer shows that an employee's efforts at mitigation were modest at best, if the employer fails to prove that the employee could have found similar employment by having acted with greater diligence, then the employer will not have discharged its burden and the employee will not be found to have failed to mitigate:** *Rothenberg v. Rogers Media Inc.*, 2020 ONSC 5853 at para 51 ; *Day v. JCB Excavators Limited*, 2011 ONSC 6848 at paras 109-110. **A terminated**

employee is entitled to consider their own long-term interests and will not fail to mitigate merely by choosing to take some career risks that might not minimize the compensation that a former employer will owe to them: *Brake v. PJ-M2R Restaurant Inc.*, 2017 ONCA 402 at para 94; *Peet v. Babcock & Wilcox Industries Ltd.* (2001), 2001 CanLII 24077 (ON CA), 53 OR (3d) 321 (CA) at para. 8. The mere fact that an employee did not apply for certain positions does not mean that reasonable efforts to mitigate were not made: *Ibid.* **In assessing an employee’s mitigation efforts, the courts are tolerant and the employee need only act reasonably, not perfectly:** *Cormier v. 17 72887 Ontario Limited c.o.b. as St. Joseph Communications*, 2019 ONSC 587 at para 69. [Emphasis added]

[18] In seeking employment, a dismissed employee has no duty to take steps to reduce the claim against his employer. Rather, the employee’s duty is only to act in his own interests. Whether or not the dismissed employee acted reasonably must be judged in relation to his own position and not that of the employer (*Forshaw v., Aluminex Extrusions Ltd.*, 1989 CanLII 234 (BCCA), at para. 16-17; *Van Smith v. M.F. Schurman Co.*, 1992 CarswellNB 392 at para. 27)). Even casual or non-aggressive efforts to find work can discharge the dismissed employee’s duty to mitigate (*Boddington v. Vaughan Electronics Ltd.* (1987), 81 N.B.R. (2d) 272, at paras. 42 and 47).

[19] Based on the above, it seems to me that the burden on the employer to show that the employee failed to mitigate is a heavy one, while the burden on the employee to show that he discharged his obligations is a relatively light one.

(2) Medical Evidence

[20] The affidavit filed by Mr. MacDonald in support of his Motion asserted that he suffered from PDD. Mr. MacDonald deposed that he was completely disabled and as such was

unable to search for new employment until his mental health improved. Mr. MacDonald's affidavit did not set out the symptoms he suffered or how such symptoms had an impact on his ability to search for work. The affidavit also did not contain any medical opinions or other evidence to corroborate Mr. MacDonald's assertion. This paucity of detail, together with other evidentiary issues, led me to order a "mini trial" pursuant to Rule 22.04(3).

[21] At the mini trial Mr. MacDonald testified with respect to his symptoms and their impact on his ability to search for work. He did not, however, provide a medical report or other expert medical evidence. Starbucks submits that Mr. MacDonald's failure to adduce medical evidence means the plaintiff has failed to demonstrate that he has mitigated his damages.

[22] Counsel for Mr. MacDonald submits that expert medical evidence is not required to establish a mental injury. In support of that position, the plaintiff referred to several cases. In *Saadati v. Moorhead*, 2017 SCC 28, the Court stated that a mental injury may be established in the absence of expert evidence. The Court observed that expert evidence may often be very helpful, but it is open to the trier of fact to find on other evidence adduced by the plaintiff whether the mental injury is proven on the balance of probabilities (see paras. 37-38).

[23] The plaintiff also refers to *Krmpotic v. Thunder Bay Electronics Limited*, 2024 ONCA 332. In that case, the dismissed plaintiff claimed aggravated damages for mental distress. Also at issue was whether the plaintiff failed to mitigate his damages. The evidence at trial was that the plaintiff's efforts to find alternative employment were "scant at best". Nevertheless, the trial judge found that the plaintiff's ability to look for work was significantly limited due to a back

injury. The Court of Appeal upheld the trial judge’s finding even though there was no medical evidence to support physical incapacity.

[24] Counsel for Starbucks says that *Krmpotic* is distinguishable because the Court was dealing with a physical injury, not mental distress. He submits that this is important because the Court in *Krmpotic* distinguished two previous decisions on the basis that, in those cases, “the claims related to non-physical injuries that were unsupported by any evidence” (paras. 24-25). However, in *Krmpotic*, the Court also had to address the plaintiff’s claim for aggravated damages for mental distress. The Court upheld the trial court’s finding that the plaintiff suffered anxiety, depression and feelings of helplessness and awarded of aggravated damages based on the testimony of the plaintiff, his wife and son in the absence of any medical evidence.

[25] In *Cottrill v. Utopia Day Spas and Salons Ltd.*, 2018 BCCA 383, the issue before the Court was whether the trial judge erred in awarding aggravated damages for mental suffering. The British Columbia Court of Appeal overturned the trial judge and stated at paragraph 18:

In this case, as in *Lau*, there was no evidence from the plaintiff or from family members, friends or third parties concerning the impact of the termination on Ms. Cottrill and her mental state. **Although not required, there was no expert evidence, medical or otherwise.** The only evidence of mental distress is that Ms. Cottrill cried during the March meeting, following which she had to go home early because she was so upset, and that at the June meeting, she went numb and could not take anything in. The evidence of Ms. Cottrill’s reactions at the two meetings at its highest establishes a transient upset. It falls well short of the legal standard that requires a serious and prolonged disruption that transcends ordinary emotional upset or distress. [Emphasis added]

[26] Counsel for Starbucks submits that *Krmpotic* and *Cottrill* are distinguishable from the present case. Regarding *Krmpotic*, Starbucks submits it dealt with a physical injury and not mental distress. While it is generally accepted that physical injuries are more easily established

than mental injuries, in my view that is an evidentiary matter and not a rationale for differing legal treatment. In *Saadati* the court acknowledged the evidentiary challenges of establishing a mental injury but clearly stated that that did “not connote distinct legal treatment of mental injury relative to physical injury” (para. 37).

[27] As for *Cottrill*, Starbucks submits it dealt with a claim for aggravated damages for which there is a different test from a “mitigation case”. I agree that there is a different test, but it seems to me that the onus is even higher with respect to a claim for aggravated damages than it is in a mitigation case. In my view, it may be much easier to establish a physical injury without medical evidence than to establish a mental injury, but that does not necessarily mean that medical evidence is required in the latter case.

[28] Starbucks also relies on *Ram v. The Michael Lacombe Group Inc.*, 2017 BCSC 212, for the proposition that medical evidence is required where a plaintiff relies on a mental condition for their failure to mitigate. In *Ram*, the plaintiff was seeking aggravated damages for mental distress and depression arising from her dismissal. In the course of the case, the issue of mitigation arose. The Court rejected the submission that the plaintiff’s “psychiatric symptoms” prevented her from searching for work. The Court stated, at paragraph 93:

Next, I consider the availability of similar employment, taking into consideration Ms. Ram's training, experience and qualifications. There is no evidence regarding the availability of similar employment. As just mentioned, the defendant led no such evidence. Neither did Ms. Ram. Her counsel submitted that she did not have the opportunity to test the job market because she was rendered disabled by her "psychiatric symptoms" following the dismissal. I do not accept that submission. The record does not support the conclusion that Ms. Ram ever suffered from disabling "psychiatric symptoms". **There is no medical evidence at all. Her testimony was limited to vague assertions to the effect that that her pre-existing, but well-managed depression worsened after the accident, that she remains anxious about the fact that the theft allegation has tarnished her name, and that she continues to see her doctors.** [Emphasis added]

[29] When one reads the *Ram* case in its entirety, it is clear that the Court had serious concerns about the plaintiff's credibility, reliability and tendency to embellish. The court went so far as to conclude that she gave intentionally misleading testimony (paras. 47- 51). With respect to the evidence of her mental condition, the Court had this to say at paragraph 45:

Ms. Ram's own evidence about her ability to work after the termination of her employment by the defendant was vague. In her direct evidence she said only that she has continued to see her doctor regularly. In cross-examination she said that after the termination she was very upset, depressed and crying, but she did not describe how long these symptoms persisted or whether they worsened or improved. She said that she continues to suffer from stress and anxiety as a result of her name being tarnished by the theft allegation, but she provided no details that would permit me to make findings concerning the intensity of the symptoms or the impact they have on her ability to function. She said she sees a psychiatrist once a month or once every two months but she did not give any evidence about having been diagnosed with any particular psychiatric illness. [Emphasis added]

[30] In my view, *Ram* does not support Starbucks' position. It is apparent that the Court rejected the argument that the plaintiff's mental condition prevented her from looking for work because the plaintiff's testimony was vague about her symptoms and she was generally an unreliable witness. That, coupled with the lack of medical evidence, led the Court to its conclusion. In my view, the Court was open to a different conclusion had the plaintiff provided credible and detailed evidence of her symptoms.

[31] Starbucks also relies on *Pohl v. Hudson's Bay Company*, 2022 ONSC 5230, where the Court concluded that the plaintiff's mental condition prevented him from finding work. Counsel for Starbucks points out that there was extensive evidence from the plaintiff, describing feelings of humiliation, diminished self-worth, anxiety and depression, and a diagnostic quiz and

a medical diagnosis. Counsel for Starbucks submits that *Pohl* strongly suggests that medical evidence is required to counter a mitigation defence.

[32] I disagree. In *Pohl*, the Court made the following observation at paragraph 68:

68 Society's understanding of mental health has developed significantly over the past decades. Our jurisprudence must assist to break down myths and stereotypes surrounding mental illness. I do not think it is helpful to analyze mental health as a binary construct where a person is either completely incapable of working or is totally fine. **Where a plaintiff has presented evidence of mental illness, particularly where the plaintiff's symptoms are triggered or exacerbated by the termination of employment, the court should adopt a nuanced approach and assess the extent to which that health condition affected the plaintiff's job search.** [Emphasis added]

[33] In *Pohl*, unlike *Ram*, the Court had credible evidence from the plaintiff **and** a medical report. In *Ram*, the Court had neither. It is not clear that the medical evidence was the deciding factor in *Pohl*. As mentioned in *Saadati*, while expert evidence is not required, it may often be very helpful in determining whether a plaintiff had proven a mental injury. The Court also stated that, in the absence of medical evidence, it is open to the trier of fact to look to other evidence to see if the plaintiff established the injury on a balance of probabilities. In *Saadati*, the trial judge relied on other non-medical evidence of symptoms including personality changes, cognitive difficulties and slowed speech. The Supreme Court of Canada found that the trial judge was correct to do so and upheld his finding that the plaintiff suffered a mental injury.

[34] There are some themes which emerge from these cases. First, medical evidence is not required to establish a mental injury. Second, expert medical evidence may be very helpful in establishing the injury, and the plaintiff who proceeds without it runs the risk of having their claim

rejected. Third, it is up to the trier of fact to determine if other, non-medical evidence is sufficient to establish the mental injury on the balance of probabilities.

[35] Mr. MacDonald testified that he had a history of depression and was diagnosed with PDD in 2010. He testified that he had received therapy from Dr. Sarah Lyons beginning in 2016 but explained that while he was employed by Starbucks his condition had no impact on his ability to do his job. He testified that that all changed when he lost his job. Mr. MacDonald testified that his termination triggered a major depression and that he was in “rough shape” emotionally. His symptoms included apathy, lack of motivation, constant rumination, fatigue, lack of appetite, inability to focus and social isolation. Mr. MacDonald testified that he started feeling better in the spring of 2023 after he accessed medication to increase his dopamine. Despite beginning to feel better in the spring of 2023, he testified on cross-examination that he was still not well and that his symptoms persisted into the summer of 2023.

[36] Mr. MacDonald testified that after his termination he could not afford to pay for his therapy sessions with Dr. Lyons. However, Dr. Lyons agreed to continue therapy on a *pro bono* basis. Mr. MacDonald entered into evidence the account statement of Dr. Lyons, showing the number and dates of Mr. MacDonald’s therapy sessions (Exhibit P-5).

[37] Mr. MacDonald testified that he was prescribed the anti-depressive medication Sertraline and a dopamine-inducing drug called Vyvanse. Mr. MacDonald submitted into evidence a summary from his pharmacist, confirming the said prescriptions (Exhibit P-4).

[38] With respect to the effects of his termination on his mental health, I found Mr. MacDonald's evidence to be credible. While no expert medical opinion was placed into evidence, Mr. MacDonald's testimony is supported by Exhibits P-4 and P-5, referred to above.

[39] The evidence is that Mr. MacDonald has a history of PDD, which he has been able to manage for a number of years. He also testified that his termination exacerbated his symptoms. I reject the suggestion by Starbuck's counsel that because Mr. MacDonald was able to manage his depression prior to termination the inference should be that he was not limited in his ability to seek alternate employment post-termination.

[40] I am satisfied that Mr. MacDonald was suffering mental distress that precluded his ability to seek alternative employment. Courts have recognized that a dismissed employee may require an amount of time to recover from the emotional upset from termination (*Robertson v. Team Cooperheat-MQS Canada Inc.*, 2008 ABQB 409; *Johnson v. Top-Co LP*, *supra*). Courts have allowed for even longer recovery periods where the plaintiff suffered medical conditions which limited their ability to search for work (*Reid v. Stratford General Hospital*, 2007 CanLII 58483; *Pohl*). The scope of the plaintiff's duty to mitigate is judged from the perspective of a reasonable person in the plaintiff's circumstances. The plaintiff's efforts to find work must be viewed through the lens of the plaintiff's capabilities. As mentioned earlier, the onus on the plaintiff is a fairly low standard and even casual, non-aggressive efforts have been found to discharge the plaintiff's duty to mitigate.

[41] Counsel for Starbucks points to Mr. MacDonald’s testimony that during the Second Period he devoted time to renovating his house in order to attract renters. Starbucks submits that Mr. MacDonald was not entitled to pause his search for work to focus on renovating his house. Counsel for Starbucks likens the situation to that in *Doucet v. Spielo Manufacturing Inc.*, *supra*, where the notice period was reduced because the plaintiffs focused on their lawsuit rather than look for work.

[42] In my view, the present case is distinguishable from *Spielo*. In *Spielo*, the plaintiffs started a small business and abandoned it to devote their time to the litigation. In the present case, Mr. MacDonald testified that the “renovation” was really limited to painting and other cosmetic improvements. There is no evidence that this consumed all of his time. Further, Mr. MacDonald testified that he was in dire financial straits and the tenant income would be of assistance. Mr. MacDonald testified that despite working on the property he still suffered from the symptoms of his depression. In my view, it was not unreasonable for Mr. MacDonald to attempt to alleviate his financial woes by making efforts to attract tenants. Arguably, this itself was a form of mitigation.

[43] It is clear from the evidence that Mr. MacDonald was effectively prevented from making meaningful efforts to look for work during the First Period (November 10, 2022 – February 2023) due to his depressive symptoms. Starbucks points to the evidence that Mr. MacDonald started feeling better in the spring of 2023. Between May 4, 2023 and the end of September 2023 (the end of the period of reasonable notice proposed by the plaintiff) Mr. MacDonald applied for 8 jobs (Exhibit P-6). However, the job applications are not indicative of Mr. MacDonald’s entire efforts to find work. Despite his improved state, Mr. MacDonald still suffered from symptoms of

depression. He testified that during this period he regularly conducted internet job searches including the Government of Canada job bank and a site called “Career Hub”. In light of his capacity, in my view, Mr. MacDonald made reasonable efforts to find alternative employment. The defendant, Starbucks, has failed to establish that Mr. MacDonald failed to make reasonable efforts to find work during the notice period (which I have determined is 8 months, ending July 10, 2023).

(3) Alternative Work Available

[44] As mentioned, Starbucks has the burden not only to establish that Mr. MacDonald failed to make reasonable efforts to find work but also to demonstrate that if he had made such efforts that work could have been found.

[45] Given my conclusion that Mr. MacDonald made reasonable efforts to find work, I need not address the second aspect of the test. I note, however, that the only evidence offered by Starbucks to demonstrate that alternative work was available are two tables a legal assistant downloaded from the Statistics Canada website which purport to depict employment data for New Brunswick in the “Accommodation and food services” and “Other services” categories for the periods January 2022 to November 2022, and November 2022 to August 2023 (Supplemental Record, p. 145-150). These tables are attached to the affidavit of Hannah Sullivan, a legal assistant to Starbucks’ counsel. No explanation is provided in the affidavit and no witness was called to explain to the Court what the various data entries mean. I accept that the Court is entitled to take judicial notice of the reliability of Statistics Canada data (*Warkentin Building Movers Verdin Inc.*

v. LaTrace, 2021 ABCA 333, at para. 34). However, that does not assist the Court. Absent an explanation of what the data depicts, the two tables are meaningless to me.

[46] I also note that Mr. MacDonald could not find alternate work until August 28, 2024, despite having submitted some 60 job applications between September 2023 and February 2024 (Exhibit P-6). This can be important evidence regarding whether or not a plaintiff would have secured alternate employment had reasonable efforts been made (*Pohl*, para. 75).

[47] Starbucks has failed to demonstrate that Mr. MacDonald failed to mitigate his damages. Accordingly, Starbucks' submission that two to three months should be deducted from the plaintiff's reasonable notice period is rejected.

C. *Bonus Payments*

[48] During the course of his employment, Mr. MacDonald was eligible for bonus payments pursuant to Starbucks' "Retail Store Management Incentive Plan" ("RMIP"). Starbucks submits that Mr. MacDonald is not entitled to recover damages for the loss of bonuses during the notice period because he does not meet the eligibility criteria of the RMIP. Specifically, Starbucks submits that Mr. MacDonald engaged in misconduct that disentitled him to bonus payments and relies on a misconduct clause found in the RMIP.

[49] Counsel for Mr. MacDonald points to the evidence that during Mr. MacDonald's period of employment there were two relevant RMIPs in place. There was one in place at the time

Mr. MacDonald became employed in 2015, dating from 2013 (“RMIP-2013”). The plan in place at the time of Mr. MacDonald’s termination was introduced in 2022 (“RMIP-2022”). Counsel for Mr. MacDonald submits that these two incentive plans are in conflict in that the RMIP-2022 contains a misconduct clause that arguably could take away Mr. MacDonald’s right to incentive pay, and the RMIP-2013 does not take away that right. Counsel for Mr. MacDonald submits he was not made aware of the changes in the policy, did not agree to the changes and was given no fresh consideration. As a result, Mr. MacDonald submits that the RMIP-2022 misconduct clause is not binding on him.

[50] The starting point for this part of the analysis is an examination of the relevant provisions of RMIP-2022 and RMIP-2013. The pertinent provisions of RMIP-2022 are as follows:

Incentive Plan Policies

Eligibility

A participant’s eligibility for an incentive payout under this Incentive Plan (“the Plan”) is determined at the end of the Plan Period. **To be eligible, the partner must meet one of the following criteria:**

- Be in a covered position during the entire Plan Period;
- Be hired, promoted or transferred into a covered position after the beginning of the Plan Period and remain in the covered position until the end of the Plan Period;
- Be in a covered position at the beginning of the Plan Period, but separated from employment prior to the end of the Plan Period due to death, disability or retirement;

And all criteria below:

- Maintain satisfactory overall performance while in the covered position;
- **Refrain from engaging, directly or indirectly, in any activity that competes with Starbucks field of business, and refrain from any activity that could be construed as misconduct, as determined by Starbucks in its sole discretion; and**
- Has not been subject to a Performance Plan (PIP) or **has not been issued a Final Correction Action at any time during the quarter.**

A partner is not eligible for participation in the Incentive Plan if, prior to the end of the Plan Period, the partner transfers to a position not covered by any other incentive plan or separates from employment for any reason other than death, disability or retirement. [Emphasis added]

(...)

Termination of Employment

The plan is not a contract of employment for any period of time. Either the participant or the company may terminate the employment relationship at any time for any lawful reason, with or without notice.

Participation will conclude upon termination of the participant's employment. **If a participant's employment is terminated for a reason other than disability, death or retirement, no incentive will be paid for the Plan Period.** [Emphasis added]

[51] The relevant clauses in RMIP-2013 are:

Eligibility

A Participant's eligibility for an Incentive Payout under this Plan is determined as of the end of the Plan Period.

Starbucks will pay the Incentive Payout according to the Plan if the Participant, throughout the Plan Period:

1. Demonstrates "meets expectations" (or better) performance through the Plan Period, as determined by the Participant's Manager. A performance assessment is required each Plan Period before an incentive may be paid. Performance during the Plan Period will be assessed on a variety of factors, including but not limited to store profitability, key scorecard metrics, turnover, labor variance and Customer Voice. A Participant's most recent performance review may not necessarily be determinative of the Participant's performance during the Plan Period. A Partner must not be on a Performance Improvement Plan for any part of the quarter or have received their Final Corrective Action;
2. **Remains a Starbucks Partner in an eligible position through the end of the Plan Period, unless employment is terminated prior to the end of the Plan Period due to death or disability.** "Disability" will be defined by Starbucks in its sole discretion.
3. Refrains from engaging, directly or indirectly, in any activity that competes with Starbucks, and **refrains from engaging in any activity that could be**

construed as misconduct, as determined by Starbucks in its sole discretion; and

Is a Partner has satisfied the eligibility requirements set forth in 1) and 2) above, but is found to have engaged in misconduct prior to the issuance of the Incentive Payout, the final decision as to whether the Participant will receive the Incentive Payout will be made by the appropriate RVP in his or her sole discretion.

If a Participant changes from an eligible position to an ineligible position during the Plan Period, Incentive Payout eligibility is determined at the sole discretion of the appropriate RVP.

Participation will conclude upon termination of the Participant's employment, or termination or amendment of the Plan by Starbucks (if the Plan is amended, participation will continue under the amended Plan).

[52] The wording in the two incentive plans is somewhat different, but in my view, it is a difference without a distinction. The clear intent of both plans is the same. To be eligible, Mr. MacDonald must have:

- (1) Refrained from misconduct "as determined by Starbucks in its sole discretion"
- (2) Had his employment terminated for reasons of death, disability or retirement.

[53] In my view, there was no material change in the "misconduct clause" or in the essential eligibility requirements from RMIP-2013 to RMIP-2022. Mr. MacDonald acknowledged in his testimony that he had notice of RMIP-2013. Accordingly, Mr. MacDonald's submission that there was a material change made without notice and consideration rendering the RMIP-2022 unenforceable is without merit.

[54] Although not necessary to my conclusion, I also find that Mr. MacDonald had actual or constructive knowledge of the RMIP-2022. In his direct testimony, he professed to having no knowledge of RMIP-2022 and that, "I did not turn my mind to the bonus much". Given

the significant contribution of the bonus to Mr. MacDonald's salary, it seems implausible that he would take no interest in its entitlement criteria. Further, on cross-examination, Mr. MacDonald was asked specifically whether he ever saw RMIP-2022. His response was a less-than-emphatic "I don't think so". Also, emails sent by Mr. MacDonald to Starbucks management when he noticed a discrepancy in his bonus statements belies his profession of disinterest in the bonus program (Exhibit D-1).

[55] I turn now to whether the plaintiff is entitled to recover damages for loss of bonus income under RMIP-2022.

[56] The leading case interpreting a dismissed employee's entitlement to bonuses is *Matthews v. Ocean Nutrition Canada Ltd.*, 2020 SCC 26, where the Court adopted the two-part test set out in *Paquette v. TeraGo Networks Inc.*, 2016 ONCA 618, and *Lin v. Ontario Teachers' Pension Plan*, 2016 ONCA 619. The two-step analysis requires the Court to answer two questions:

- (a) Would the employee have been entitled to the bonus or benefit as part of their compensation during the reasonable notice period;
- (b) If so, do the terms of the employment contract or bonus plan unambiguously take away or limit that common law right?

[57] With respect to the first step in the analysis, the question is, absent the exclusionary language in RMIP-2022, would Mr. MacDonald have been entitled to the bonus as part of his overall compensation package? The evidence is that the RMIP is based on store performance and paid quarterly. There also appears to be a discretionary component to the bonus in that the

employee must “maintain satisfactory overall performance” (Amended Record, p. 110). However, an employee can recover for a discretionary bonus as long as it is an integral part of the employee’s compensation package (*Paquette*, para. 17).

[58] In his affidavit (Amended Record, p. 9) Mr. MacDonald deposes that he received a total of \$11,767.96 in retail bonuses in 2022. Aleena Zafar, on behalf of Starbucks, testified that the Fredericton store was doing well and there were no issues with Mr. MacDonald’s performance. In his *viva voce* testimony, Mr. MacDonald testified that he regularly received quarterly bonus payments. His evidence is that only on one occasion in 2016 did he not receive a bonus payment. Exhibit P-2 demonstrates regular bonus payment to Mr. MacDonald from 2019 to 2022. This evidence was not contradicted by Starbucks.

[59] With respect to the first stage of the *Matthews* test, it is clear that the RMIP bonus was an integral part of Mr. MacDonald’s compensation. Leaving aside the exclusionary provisions of RMIP-2022, I conclude that Mr. MacDonald would have been entitled to the bonus during the period of reasonable notice.

[60] The question then becomes whether the terms of the RMIP unambiguously take away Mr. MacDonald’s right to recover damages for loss of the bonus income.

[61] Starbucks submits that, based on the provisions of the RMIP, there are two bases which disentitle Mr. MacDonald to the bonus. First, Starbucks points to the threshold requirement that participation in the program concludes upon the termination of employment and further that

no bonus is payable if the employee is terminated for reasons other than disability, death or retirement. With respect to the employment requirement, similar clauses that require active employment or similar employee status have been held to be insufficient to disentitle a terminated employee to damages for a lost bonus (*Paquette*, at para. 47; *Lin*, at paras. 86-89; *Celestini v. Shoplogix Inc.*, 2023 ONCA 131, at paras. 50-55; *Wilds v. 1959612 Ontario Inc.*, 2024 ONSC 3452). As stated in *Paquette*, such clauses, without more, are not sufficient to deprive a terminated employee a claim for lost bonus.

[62] However, in this case there is more. As mentioned earlier, Starbucks determined, after an investigation, that Mr. MacDonald engaged in misconduct. The misconduct clause is, in effect, an eligibility criterion. One must refrain from engaging in misconduct to be eligible for a bonus. The RMIP goes further. It addresses a bonus entitlement upon termination including without cause. For convenience, I reproduce the relevant portions of the RMIP again here:

(...)

A partner is not eligible for participation in the Incentive Plan if, prior to the end of the Plan Period, the partner transfers to a position not covered by any other incentive plan or separates from employment for any reason other than death, disability or retirement.

(...)

Participation will conclude upon termination of the participant's employment. **If a participant's employment is terminated for a reason other than disability, death or retirement, no incentive will be paid for the Plan Period.** [Emphasis added]

[63] In *Dawe v. The Equitable Life Insurance Company of Canada*, 2019 ONCA 512, the plan in question contained an “active employment” eligibility requirement. The trial judge, relying on *Paquette*, found that the “active employment” clause was not sufficient to disentitle the plaintiff to damages for loss of bonus income. The Ontario Court of Appeal took no issue with

that finding. However, the trial judge went on to find that other terms, including provisions which limited bonuses in circumstances of termination without cause, were too imprecise to oust the plaintiff's bonus entitlement. In overturning the trial judge, the Court properly noted the question to be asked at paragraph 62:

62 As van Rensburg J.A. said in *Paquette*, at para. 31, “[t]he question is not whether the contract or plan is ambiguous, but whether the wording of the plan unambiguously alters or removes the appellant’s common law rights”. See also *Taggart*, at paras. 12, 19-20. In my view the LTIP and STIP do so limit Mr. Dawe’s entitlement.

[64] The Court considered the terms of the plan as a whole and concluded at paragraph 65:

65 In this case, the LTIP and the STIP went well beyond stipulating “active employment” as a precondition for bonus entitlement. The terms reproduced above address, with great precision, what happens to an eligible participant’s bonus entitlement upon termination without cause. To repeat the words of van Rensburg J.A. in *Paquette*, the LTIP and STIP “anticipated the very event that occurred” – Mr. Dawe’s dismissal without cause. This language unequivocally restricted his common law rights upon termination. The motion judge erred in finding otherwise. However, this does not end the inquiry. It is necessary to determine whether Mr. Dawe was properly informed of the termination provision unilaterally imposed by Equitable Life.

[65] In this case, the RMIP provides for a pro-rated payment when “separation” (termination) is due to death, disability or retirement (see “Incentive Payout Proration”, Amended Record, p. 110), but excludes payment “if a participant’s employment is terminated for a reason other than disability, death or retirement”. In my view, the language of the RMIP is clear: one is entitled to a prorated bonus if termination is due to death, disability or retirement but no bonus is payable otherwise. Further eligibility for a bonus is forfeited upon engaging in misconduct. I agree with the submission of Starbucks’ counsel that, read as a whole, the RMIP “anticipated the very event that occurred”, being Mr. MacDonald’s termination without cause for misconduct. Further,

the language of the RMIP unambiguously removes Mr. MacDonald's common law right to recover damages for loss of bonus income during the period of reasonable notice.

[66] Before leaving the issue of bonus entitlement, I wish to briefly address an issue raised by Mr. MacDonald's counsel. In his post-hearing brief, Mr. MacDonald submits that Starbucks has not established that his behaviour rises to the level of misconduct that could reasonably warrant dismissal. Counsel for Mr. MacDonald cites several cases where allegations of misconduct arose in the context of human rights complaints. In my view, none of those cases are relevant. Where misconduct is relied upon by an employer to establish just cause for dismissal, the Court must engage in an assessment to determine the seriousness of the misconduct. That is not the case here. Starbucks is not alleging just cause for dismissal. In fact, it has conceded that Mr. MacDonald was dismissed without cause.

[67] Further, the misconduct is relevant only with respect to the bonus entitlement under the RMIP. Recall that the RMIP provided that the finding of misconduct is to be "determined by Starbucks in its sole discretion". Starbucks conducted an investigation and determined there was misconduct. This case is not, and cannot become, a judicial review of that decision.

D. *Does RMIP-2022 Contravene the Employment Standards Act?*

[68] Counsel for Mr. MacDonald submits that the provisions of RMIP-2022 which purport to eliminate entitlement to the bonus are unenforceable because they are an impermissible attempt to contract out of the minimum entitlements required by the *Employment Standards Act*,

SNB 1982, c. E-7.2 (the “ESA”). Counsel argues that bonuses are “pay” within the meaning of section 34(1). Accordingly, Mr. MacDonald is entitled to 4 weeks’ notice or pay in lieu thereof, including bonuses he would have otherwise been entitled to during the statutory notice period. Counsel for Mr. MacDonald submits that the limiting provisions of the RMIP remove that entitlement and are therefore void as offending the *ESA*. In support of his position, Mr. MacDonald relies on *Abrams v. RTO Asset Management*, 2020 NBCA 57.

[69] Counsel for Starbucks points out that *Abrams* dealt with a termination clause in an employment contract that purported to contract out of statutory entitlements accrued prior to termination. Starbucks argues that Mr. MacDonald was paid his bonus earned prior to termination on October 26, 2023 (Exhibit P-2). Upon termination, Mr. MacDonald was denied further payments. As mentioned earlier, RMIP-2022 contains proration provisions upon termination due to death, disability or retirement. Those circumstances did not apply to Mr. MacDonald. Finally, Starbucks points out that the *ESA* does not create the statutory right to a bonus unless it is provided in an employment contract and subject to the terms of the contract. In summary, Starbucks submits that if the employment contract did not provide for a bonus (as the RMIP-2022 does not in the case of Mr. MacDonald’s cessation of employment) the *ESA* does not require an employer to pay one, unlike the statutory entitlements that were at issue in *Abrams*.

[70] I agree with that submission.

[71] Further, in the course of writing these reasons I reviewed many cases (all of which are not referred to herein) where the issue of bonus entitlement was canvassed. I have not found

one case, nor has the plaintiff's counsel referred to any, where an argument similar to that raised by plaintiff's counsel was canvassed or considered. I agree with the submission of Starbucks' counsel that if the plaintiff's argument was well founded then there would be no need for the *Matthews* test at all because any bonus plan purporting to remove entitlement post-termination (during the reasonable notice period) would be contrary to the *ESA*. Surely the Supreme Court of Canada was alive to such an issue in *Matthews* and declined to address statutory compliance (*Matthews*, para. 76).

[72] In conclusion on this issue, I find that Mr. MacDonald is not entitled to recover damages for the bonus he would have received during the notice period as part of his damages for wrongful dismissal.

E. *Damages for Loss of Fringe Benefits*

[73] Mr. MacDonald submits that he is entitled to damages for lost CPP contributions, group benefits, RRSP contributions and vacation pay/vacation entitlement. Starbucks submits that Mr. MacDonald is not entitled to recover for the alleged loss of these fringe benefits except for amounts actually paid by him as a result of the loss of group benefits.

[74] The purpose of a damage award for wrongful dismissal is to put the dismissed employee in the position they would have been in but for the employer's failure to give reasonable notice. The focus is on the loss to the employee rather than what the employer would have been responsible to pay for the benefit during the notice period (*Schurman v. Covered Bridge Recreation*

Inc., 2009 NBCA 1, at para. 41). The burden of proof is on the dismissed employee to provide evidence of the value to him or her of the benefits during the notice period. Where the evidentiary record does not allow the Court to put a dollar value on the loss of employment-related benefits no damages will be awarded for the loss (*McWilliams v. AMEC Americas Limited*, 2012 NBCA 46, para. 63; *Abrams*, para. 108).

(1) CPP Contributions

[75] Starbucks submits that Mr. MacDonald is not entitled to CPP contributions during the notice period because he has adduced no evidence to establish the value to him.

[76] Courts have awarded the value of the employer's CPP contributions which would have been made during the period of reasonable notice, although there is considerable inconsistency between jurisdictions on the issue (Stacy Ball, *Canadian Employment Law* (Toronto): Thomson Reuters, 2021, Looseleaf, at paras. 24-40). Although Mr. MacDonald did not refer the Court to any New Brunswick cases directly on point, his counsel relies on *Bagby v. Gustavson International Drilling Co. Ltd.*, 1980 ABCA 227, where the Court affirmed the award of CPP contributions as part of the award of damages. Counsel for Mr. MacDonald also relies on *Reotech Construction Ltd. v. Snider*, 2022 BCSC 317, where the Court rejected the employer's argument that the absence of evidence showing the plaintiff suffered any loss arising from the non-payment of CPP contributions during the notice period precluded recovery. The Court determined that the plaintiff was entitled to compensation for the loss of CPP contributions during the notice period.

[77] In *McWilliams*, relied upon by Starbucks, the Court appears to have rejected the plaintiff's claim to CPP contributions on the basis that the Court was not referred to pertinent statutory and regulatory provisions that would enable it to assess the value to the plaintiff of the CPP contributions (*McWilliams*, para. 63). That is not the case here. In their supplementary post-hearing briefs, both counsel referred to and relied upon the relevant regulatory provisions (pages 4-6 of the plaintiff's supplementary brief, and page 4 of the defendant's supplementary brief). In fact, both counsel agree that, if CPP contributions are recoverable, the value is \$3,754.45.

[78] In my view, the plaintiff is entitled to recover the value of CPP contributions that would have been made by Starbucks during the notice period in the amount of \$3,754.45.

(2) Group Benefits

[79] Mr. MacDonald is claiming for expenses he incurred for psychotherapy sessions and prescription medication that otherwise would have been covered by his group benefit coverage during the notice period. It is clear that he is entitled to recover for these expenses (*Abrams*, para. 108).

[80] The evidence is that during the notice period (November 10, 2022 to July 10, 2023) he expended \$163.47 on prescription medication (Exhibit P-4) and \$1,350.00 for psychotherapy (Exhibit P-5). Mr. MacDonald is entitled to recover \$1,513.47 for loss of group benefits.

(3) RRSP Contributions

[81] Mr. MacDonald is entitled to recover damages for the loss of RRSP contributions during the notice period (*McWilliams*, para. 63). Mr. MacDonald's salary, without bonus, at the time of termination was \$76,606.40. Starbucks' contributions to the RRSP was 4% or \$3,064.26 per year. Accordingly, Starbucks' contribution during the notice period would have been \$2,042.80 ($\$3,064.26 \div 12 \times 8$). Mr. MacDonald is entitled to recover the sum of \$2,042.80 for loss of RRSP contributions.

(4) Loss of Vacation

[82] With respect to vacation entitlements, the plaintiff is seeking payment for accrued vacation pay as of the date of termination and damages for lost vacation time during the notice period. Starbucks maintains that Mr. MacDonald was paid all outstanding and accrued vacation on termination as part of his final pay cheque. With respect to vacation pay during the notice period, Starbucks maintains that it is not recoverable.

[83] Regarding the outstanding accrued vacation at the time of termination the only reference to the evidence made by Mr. MacDonald's counsel is to the final pay sub where there is a reference to "VACATION ACCRURTAL REMAING – QTD Hours 296.0 (Amended Record, p. 60). Mr. MacDonald's counsel suggests that this means that Mr. MacDonald had 296 hours of accrued unpaid vacation at the time of termination and is seeking compensation in the amount of \$10, 901.68 ($296 \times \$36.83/\text{hour}$). The plaintiff has the onus of proving this claim. However, Mr.

MacDonald did not address the issue in either his affidavit or *via voce* evidence. There is no evidence explaining what the various entries on the final pay stub mean. Further, there is no evidence from Mr. MacDonald on what vacation he took before termination and what remained at the time of termination.

[84] The Starbucks policies manual entered into evidence by the plaintiff (Exhibit P-1) provides that Mr. MacDonald was entitled to four weeks vacation per year with no ability to carry over unused vacation time. If the plaintiff's submission is correct that would mean that Mr. MacDonald would have had almost two years' worth of unused vacation at the time of his termination. Not only does that seem implausible, but it is also inconsistent with the vacation entitlement set out in the policies manual. Further, when one looks at previous pay statements it appears that Mr. MacDonald was paid for accrued vacation on an on-going basis. For example, the pay statement for the period September 19 – October 2, 2022 (Amended Record, p. 51) indicates payment of "retail vacation" pay for 48 accumulated hours of \$1,733.28 for a Year To Date total of \$5,391.20. In the absence of evidence explaining the documents it is impossible to draw any firm inferences from the pay statements. However, the evidence in the record seems more in accord with the proposition that Mr. MacDonald did not have 296 hours of accumulated and unpaid vacation at the time of his termination. He has failed to prove this claim.

[85] In support of its position that damages for lost vacation entitlement during the notice period are not recoverable, Starbucks relies on the *Preuss v. Dr. P. Safari-Pour Inc. (I.Q. Dental)*, 2021 BCSC 973, where the Court stated, at paragraphs 107-108:

107 In addition, the plaintiff seeks nine percent vacation pay during the notice period. However, the case law is well settled that vacation pay to a dismissed employee during the

notice period cannot be claimed. The Court of Appeal made the point clear in *Burry*, at paras. 16–17:

16 . . . Instead, the dissent in *Stauder* and the judgment of this court in *Scott* (which is obviously binding on us), appear to rest on the conclusion that **it would be unjust to expect an employer to provide additional compensation in respect of vacation pay, to an employee who has not in fact been obliged to work at all during his notice period and who is being compensated for the entire period nevertheless.**

17 In these circumstances, I conclude that regardless of the factual evidence as to what Mr. Burry would have done had he been permitted to "work through" a notice period, the clear implication of *Scott* and of the dissent in *Stauder* is that he is not entitled to additional compensation for vacation pay during that period. I would therefore dismiss Mr. Burry's cross-appeal.

108 The plaintiff's claim for vacation pay for the notice period must therefore be dismissed. [Emphasis added]

[86] The case law on the issue is inconsistent across jurisdictions and even within jurisdictions. For example, in *Oxman v. Dustbane Enterprises Ltd.*, 32 OAC 154, the Ontario Court of Appeal concluded that the dismissed employee should have been awarded damages for lost vacation entitlement during the notice period (para. 12). However, in *Cronk v. Canadian General Insurance Company*, 85 OAC 54, the Ontario Court of Appeal followed the reasoning adopted in *Preuss* and concluded that one is not entitled to vacation pay during the notice period (para. 14). In *Canadian Employment Law, supra*, the author acknowledges that not all jurists have viewed pay accrued during the notice period as being recoverable yet noted that it has been awarded in numerous cases (para. 24:38, at p. 24-74).

[87] Counsel for Mr. MacDonald referred the Court to several decisions where the Court awarded damages for lost vacation entitlement during the notice period (*Martin, et al. v. Total Credit Recovery*, 2019 NBQB 102, reversed on other grounds at 2020 NBCA 8; *MacDonald-Ross*

v. Connect North America, 2010 NBQB 250; *MacBeth v. Heart and Stroke Foundation of New Brunswick*, 2012 NBQB 87; *Malloy v. Vipond Inc.*, 2005 NBQB 149). While in all of the above-mentioned cases lost vacation entitlement during the notice period was awarded, there is no analysis in the cases on the question of entitlement. The Courts seem to have accepted entitlement as a given.

[88] One can easily conclude that there is significant judicial disagreement on the appropriate approach to this issue. However, in a recent decision this court has embraced the approach espoused by Starbucks as outlined in *Preuss*. In *Richard v. Matrix SME Canada ULC* SCJ-279-2021 issued on April 22, 2022 (unreported) Justice Stephenson analyzed the conflicting authorities on this issue. The court concluded that the plaintiff was not entitled to be compensated for loss of vacation pay on top of an award of salary for the notice period. In doing so, Justice Stephenson followed the reasoning of the British Columbia Court of Appeal in *Scott v. Lillooet School District 29*, 1991 CanLII 740. The decision in *Scott* underpinned the decisions in *Preuss* and *Cronk*. At paragraph 36 of his decision in *Richard* Justice Stephenson adopts the following passage from *Scott*:

To award the respondent damages for vacation pay, on top of an award of full salary for the period of notice to which he was entitled, (which necessarily includes payment of his salary for any vacation he may have taken had he worked during the notice period), is to provide double indemnity, or put another way, to provide compensation for loss that he has not suffered.

[89] To make it perfectly clear that the court was adopting the line of cases stemming from *Scott*, Justice Stephenson stated at paragraph 41:

...**The *Cronk* decision, which followed the earlier *Scott* decision and was, in turn recently followed in *Morrow*, seems logical.** It directs that a terminated employee receive any statutory vacation pay to which they are entitled upon termination, but no further vacation pay during the notice period because they are

expected to take time off during that period. **None of the cases cited by counsel for Mr. Richard articulate a rationale for why vacation pay should be separately recoverable during the notice period.** [Emphasis added]

[90] I accept Starbucks' evidence that the vacation pay owed to the plaintiff that accrued up to the time of termination has been paid. Based on the foregoing, Mr. MacDonald is not entitled to lost vacation pay during the notice period.

[91] At this juncture I will address an issue regarding disclosure to the court. Subsequent to the mini trial in this matter I directed counsel to specifically address the question of the plaintiff's entitlement to certain benefits including the loss of vacation entitlement. Counsel submitted supplementary briefs. In her written submission on this issue, counsel for Mr. MacDonald referred to cases that supported the position that her client was entitled to compensation for vacation pay during the notice period. She did not bring to the court's attention any cases that were contrary to her position. In the course of an appearance before the court to address the vacation entitlement issue (March 18, 2025) counsel for Starbucks provided the court with the above-mentioned unreported decision of Justice Stephenson in *Richard v. Matrix SME Canada ULC*. That was the first time I was made aware of the case, and I read it the next day.

[92] The *Richard* case is very significant in that it is the first case of which I am aware that a New Brunswick court clearly adopted the position, set out in *Scott*, that a plaintiff is not entitled to recover for lost vacation during the notice period. Under the second branch of *stare decisis*, sometimes referred to as the doctrine of "comity" or "horizontal precedent", I am bound to follow *Richard* (*Higgins Estate v. Arsenault*, 2013 NBQB 332; *R. v. Oland*, 2018 NBQB 251). In *Richard* Justice Stephenson conducted a detailed analysis of the case law on the very issue

which is before the court in the present case. The case is directly on point and directly contrary to the position advanced by the plaintiff's counsel. However, the plaintiff's counsel did not bring the case to the attention of the court despite the fact that she was counsel for the employer in the *Richard* case and therefore was aware of it.

[93] Members of the Bar are also officers of the court. As such, they have a fundamental obligation to uphold the integrity of the judicial process which includes a duty of candour to the court. Regardless of whether or not *Richard* is a binding precedent, it is a case directly on point and should have been brought to the court's attention by the plaintiff's counsel.

(5) Repayment of Employment Insurance Benefits

[94] The evidence is that Mr. MacDonald received Employment Insurance benefits following his termination. Starbucks requests that Mr. MacDonald be ordered to obtain a statement of overpayment from Service Canada and provide that statement to Starbucks to determine whether Starbucks has a repayment obligation. I decline to issue such an order. The legislation outlines the respective obligations of the parties and there is no requirement that this Court intervene.

IV. CONCLUSION

[95] The plaintiff is entitled to an award of damages as follows:

(a)	General damages for loss of income for the 8-month notice period (\$76,604.40/12 x 8)	51,069.60
	Less payment of 4-weeks pay in lieu of notice	<u>(6,129.30)</u>
		44,940.30
(b)	CPP Contributions	3,754.45
(c)	Loss of Group Benefits	1,513.47
(d)	RRSP Contributions	<u>2,042.80</u>
	Total Damages	52,251.02
(e)	Interest at the rate 4% per annum from the date of termination	

[96] I will make no costs award at this time. Counsel for Starbucks submits that pursuant to Rule 49 of the *Rules of Court* a decision on costs must be reserved until after this decision on quantum of damages is rendered. Accordingly, the parties are directed to arrange through the Clerk's office a suitable date to make submissions on costs.

[97] In the event that I have made any mathematical errors in my calculation of damages, the parties may come back before the court on short notice to address those issues.

Terrence J. Morrison
Justice of the Court of King's Bench