CITATION: Richard Turcotte v. Grenville Management Inc., 2025 ONSC 3087
COURT FILE NO.: CV-22-00677141-0000
DATE: 20250528

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
RICHARD TURCOTTE	)	
Plaintiff	)	Jonathan Pinkus and Fiona Martyn, for the Plaintiff
– and –	)	
GRENVILLE MANAGEMENT INC.	)	Paul Schwartzman, for the Defendant
Defendant	)	
	)	**HEARD:** April 7 and 8, 2025

AKAZAKI J.

REASONS FOR JUDGMENT

OVERVIEW

[1] The core issue determining Richard Turcotte's action for constructive dismissal is Grenville Management Inc.'s right to lay him off temporarily during the Covid-19 pandemic. Because of my conclusion that it had no such right, several elements of alternative liability theories, such as the increase of the duration of the layoff and putting Mr. Turcotte on indefinite leave, fall to the side.

[2] Grenville is in the digital print production business. It sells, leases, and services office printers, scanners, and photocopiers. For over 14 years and until March 5, 2021, Grenville employed Mr. Turcotte, initially as a service tech and then as an IT specialist. His final annual salary was $51,569. His only workplace benefit was the ability to draw on a $500 per annum health expense account.

[3] On March 5, 2021, Grenville laid Mr. Turcotte off because of the downturn for office equipment services during Covid. The employment agreement provided it no right do so without his consent. Consequently, he was constructively dismissed. Mr. Turcotte did not appreciate that he had been dismissed and initially assumed he was laid off work. He did not look for alternate employment. By the final quarter of 2021, his health deteriorated. He

became unable to return to work even if Grenville recalled him. Grenville thought it had managed the financial risk of his employment contract and kept him on temporary leave. It also believed that an emergency regulation promulgated by the Ontario government suspended Mr. Turcotte's right to assert he was constructively dismissed in common law. There was little or no communication between them until the lawsuit.

[4] Once he consulted an employment lawyer, Mr. Turcotte realized he had been constructively dismissed. In this action, Mr. Turcotte argued that if he was not constructively dismissed, he was dismissed by operation of s. 56 of the *Employment Standards Act, 2000*, S.O. 2000, c. 41 ("ESA"), because the terms of his extended layoff did not comply with the statutory requirements. Because Grenville assumed he was laid off and never terminated, it never paid Mr. Turcotte even the minimum severance under the ESA. Once Grenville discovered that he was incapable of returning to active duty, it recalled him to work. This recall depended on its position that Mr. Turcotte remained its employee. Alternatively, it argued the disability frustrated the employment contract and relieved it of any severance payment obligation. Mr. Turcotte argued that the recall was a tactical and callous move. When combined with the failure to pay the minimum ESA requirements, he argued Grenville's misconduct entitled him to punitive and moral damages.

[5] The background facts of this case were largely not in dispute. I will outline them below before turning to the issues, which I break down as follows:

1. Frustration
2. Mr. Turcotte's constructive dismissal at common law
3. Impact of ESA Reg. 228/20 on common law constructive dismissal
4. Length of Notice
5. Mitigation
6. Punitive and moral damages

[6] This court's decision is that Mr. Turcotte is entitled to 16 months' pay in lieu of notice as of March 5, 2021. As agreed by counsel, they will complete the damages calculation of the value, based on salary, benefits, and prejudgment interest. Despite my disapproval of the employer's conduct, I decline to award punitive or moral damages because of the substantial disconnect between the misconduct and the effect on Mr. Turcotte. Even in the case of punitive damages, which do not have a compensatory purpose, the misconduct must have some impact on the victim and not reflect disapproval in a general sense.

BACKGROUND FACTS

[7] Much of the following recitation is based on an agreed statement of facts, together with the contents of documents whose authenticity the parties did not dispute. To the extent I have filled them in with the oral evidence at trial, I have only made factual findings on material points. Notably, I have not delved in detail into the stages of temporary leave under the ESA and regulation, because of my determinations that Mr. Turcotte was constructively dismissed, and that the regulation did not affect his right to sue for that dismissal.

[8] Between Grenville and its predecessor company, Mr. Turcotte's term of employment lasted from September 5, 2006, to March 5, 2021. On signing on with Grenville, he executed an employment agreement on December 31, 2014 ("the Agreement"). He received a one-time signing bonus in the amount of $250.00. As of March 5, 2021, he therefore had a recognized tenure of 14.5 years. He was originally a service technician and received a promotion to IT specialist. There was some debate in the trial evidence over the functional difference between the two positions. I interpreted it to mean he became more involved in the network analysis and software of the office equipment and less involved in the mechanical maintenance. The only real significance of the promotion to the outcome is that the base length of notice is on the higher end of the analogous cases cited by the defendant and lower than those cited by the plaintiff.

[9] The Agreement provided the following, about temporary layoff (underline added):

> It is agreed that the Company reserves the right to ask you … to accept a temporary layoff, during which time you may be eligible for Employment Insurance in accordance with the relevant statutes.

[10] On March 5, 2021, Grenville notified Mr. Turcotte that, due to the impact of Covid-19, it was placing him on a temporary layoff. The layoff notice stated (underlining added):

> Dear Rick,
>
> Re: Notice of Temporary Layoff
>
> In light of the continuing economic circumstances arising from the COVID-19 pandemic, we have determined that we must temporarily reduce our staff at Grenville Management Inc. until the situation stabilizes. We are therefore providing you notice of temporary layoff in accordance with section 56 of the *Employment Standards Act, 2000*. Your temporary layoff will begin on March 5, 2021.
>
> In order to provide additional flexibility to the company to withstand the current drop in business, we are requesting that you agree to increase the period of temporary layoff from a period of 13 weeks of layoff in a period of 20 weeks to a period of 35 weeks in 52, as permitted under the ESA. This means that we will endeavour to recall you back to employment before your layoff reaches the threshold of 35 weeks of layoff in a period of 52 weeks if business circumstances allow for it.

> If you agree to extend your period of temporary layoff as set out in this notice, please sign in the location indicated below. We will be issuing your Record of Employment shortly.
>
> Sincerely,
>
> *"Umair Alsam"*
>
> **Umair Alsam**
>
> Human Resources Manager
>
> **Acknowledgment**
>
> I have read this notice, and agree that my period of temporary layoff may continue for up to 35 weeks of layoff in a period of 52 weeks.
>
> *"R. Turcotte"*
>
> Employee Signature

[11] Three other members of the service team remained actively employed and on reduced hours following March 5, 2021, throughout Mr. Turcotte's layoff.

[12] Grenville did not recall Mr. Turcotte back to work within 35 weeks of March 5, 2021. He has been unable to work since November 5, 2021. He never looked for alternative employment. He did not apply for any jobs since March 5, 2021. Since April 2022, he has received disability benefits under the Canada Pension Plan.

[13] At the time of the notice of temporary layoff, Mr. Turcotte was earning an annual base salary in the gross amount of $51,569.28. He was also enrolled in the company's "CDCS Health Claims Expense Account" from which he could draw up to a maximum of $500.00 per year. Grenville did not contribute monthly premiums to maintain this account.

[14] On January 14, 2022, Grenville wrote to Mr. Turcotte that it considered him to be on an Infectious Disease Emergency Leave ("IDEL"). The letter's stated purpose was to inquire whether Mr. Turcotte wished to be recalled back to work, if work became available, or whether Mr. Turcotte wished to sever ties with Grenville, if he had already secured alternative employment. Mr. Turcotte neither responded to the letter nor contacted Grenville. Grenville did not follow up with him about it, either.

[15] Mr. Turcotte served Grenville with the Statement of Claim on February 22, 2022. In the lawsuit, he stated for the first time that Grenville had constructively dismissed him.

[16] The IDEL expired on July 30, 2022. Grenville did not reinstate Mr. Turcotte to active employment. Nor did it contact him to advise on his employment status. Mr. Turcotte did not contact Grenville, either. As of July 30, 2022, at least one other IT specialist was actively working for Grenville, not on a layoff or IDEL.

[17] At his March 9, 2023, examination for discovery, Mr. Turcotte testified that he was medically unable to work. On March 21, 2023, Grenville, through counsel, sent Mr. Turcotte's counsel a letter recalling Mr. Turcotte back to work. At trial, the Grenville representative admitted having issued this recall letter knowing Mr. Turcotte was physically incapable of returning to duty.

[18] On March 22, 2023, Mr. Turcotte, through counsel, asserted that he was unable to accept the offer of re-employment due to medical issues.

[19] Grenville has not paid any amounts to Mr. Turcotte on account of termination pay or severance pay under the ESA or otherwise.

[20] I will now turn to six issues.

1. FRUSTRATION

[21] Because the frustration issue addresses the root of the contract and one cannot terminate a frustrated employment agreement, I will deal with this issue before turning to constructive dismissal.

[22] Grenville argued that Mr. Turcotte's physical disability frustrated the employment contract. There was some evidence that Grenville could find a place for him in the warehouse prepping equipment to be shipped for clients, and this task did not entail significant movement or physical effort. Mr. Turcotte agreed that he did not have the ability to attend customer premises, even to walk from the parking lot to the offices.

[23] Mr. Turcotte admitted that, after being laid off, he has not worked and has not sought employment elsewhere. It was reasonable for him to have considered himself laid off and subject to recall, because that is what his employer did, albeit without his consent. He then developed a serious lymphedema, eventually necessitating surgery. The surgery was booked for March 2022. However, he went ahead with it on November 5, 2021, because a cancellation made the earlier appointment available to him. The surgery was successful. He healed in about six weeks.

[24] On December 16, 2021, he passed out at home while performing rehab exercises. His wife and daughter called an ambulance. He was diagnosed with a double pulmonary embolism.

[25] In a February 6, 2023, letter for use in the case, Mr. Turcotte's family physician wrote:

> Since March 5, 2021 to the present, Richard has suffered from severe and permanent and constant disability pertaining to Spinal stenosis and lymphedema.
>
> The edema extended up both legs to the scrotum and caused pain and poor mobility. He required removal of his scrotum.
>
> His course was complicated by a severe pulmonary embolism from which he almost died.
>
> He suffers from severe limiting back pain from spinal stenosis.

[26] On March 9, 2023, Mr. Turcotte testified on examination for discovery that he was unable to work due to his ongoing pain and disability. Were it not for this evidence, I would not have construed the medical letter as signifying his inability to work at Grenville. There was no evidence of the treatments available for controlling the pain and permitting him to perform functions as an IT specialist.

[27] On March 21, 2023, Mr. Turcotte received a "recall letter" from Grenville asking him to return to work. It is Grenville's position that his job is still open. There is now demand for IT specialists servicing customer office equipment.

[28] An employment contract can be frustrated, if a permanently disabled employee cannot return to work as of the time of termination: *Nagpal v. IBM Canada Ltd*., 2021 ONCA 274, at paras. 33-39, 49.

[29] Although there were many details regarding the 2021-23 interval, Grenville relies on the physician's note that Mr. Turcotte suffered the disability "Since March 5, 2021." Grenville also relied on the agreement regarding the joint book of documents for the truth of the doctor's statement.

[30] Even if that agreement were binding on me, the accuracy of the phrase is both counterfactual and ambiguous. It is counterfactual because March 5, 2021, was the date of the layoff and bore no relation to a change in Mr. Turcotte's health status. He was on active duty until that date. None of the impairments are of the kind that suddenly strikes the victim and changes his status from able to disabled. It is ambiguous, because the meaning of the word "since" is not identical to "from." Reduced to its logical elements, a doctor's note stating *Since he was laid off, Richard has suffered permanent disability* would only denote being stricken by the disability sometime after he was laid off.

[31] Procedurally, I am unable to construe the doctor's note as either a participant expert report or a rule 53 report, as described in *Westerhof v. Gee Estate*, 2015 ONCA 206, at para. 64. As the Court of Appeal reminded in that case, the trial judge cannot abdicate the gatekeeper role of considering and weighing the evidence. The single-page doctor's letter probably meets the formal requirements of s. 52 of the *Evidence Act*, R.S.O. 1990, c. E.23, but that statutory exception to the hearsay rule does not determine what the hearsay evidence means or the weight to be accorded.

[32] No matter the context, the argument that a contract has been frustrated by extenuating or intervening events beyond parties' control bears an onus of proof beyond seizing on the word "since" to mean the employee was permanently incapable of working as of March 5, 2021. Frustration is the ultimate excusal of an employer's failure to honour its common-law and ESA obligations to the terminated employee. Frustration requires cogent and contextually sound evidence of the employee's permanent inability to perform or continue to perform the duties of the job, at the time of termination.

[33] The frustration argument therefore fails because of insufficiency of evidence of Mr. Turcotte's permanent inability to work as of March 5, 2021. In fact, the recall notice issued after learning about Mr. Turcotte's disability and health status will be a factor in considering the appropriateness of an award of punitive damages.

2. MR. TURCOTTE'S CONSTRUCTIVE DISMISSAL AT COMMON LAW

[34] The parties agreed that, at common law, an employer has no right to lay off an employee without an express term in the employment agreement permitting it. A unilateral layoff is a substantial change in employment providing grounds to sue for constructive dismissal: *Elsegood v. Cambridge Spring Service (2001) Ltd.*, 2011 ONCA 831, at para. 14.

[35] The common law operates parallel to the ESA, which provides statutory minimum standards for workplace conditions in Ontario, including the minimum notice period on termination of employment. Subject to its use in the interpretive exercise below, the ESA had no application to Mr. Turcotte's case, because he elected to sue in common law.

[36] The employment agreement did not provide Grenville a unilateral right to lay Mr. Turcotte off, temporarily or otherwise. It only permitted Grenville to ask him for a layoff. The layoff notice given to Mr. Turcotte notified him of the layoff instead of asking him for his agreement to a layoff. It only asked him to agree to an extension of the layoff the employer had no right to impose. By signing the acknowledgement at the bottom of the letter, he confirmed receipt of the notice and agreed to the extension.

[37] I do not construe Mr. Turcotte's signed acknowledgement as an agreement to the layoff. Grenville's counsel submitted that agreement to the extension of the layoff implied agreement to the layoff. He also argued that the notice was drafted by a human resources manager and not a lawyer. Asking for the extension of a layoff presented as a *take-it-or-leave-it* event is not the same as ask asking for consent to a layoff. The nature of the employment relationship entails a command structure that discourages employees from challenging the employer's decision on a given matter.

[38] In his evidence, in chief and on cross-examination, he stated he felt compelled to sign the document "as I was not given an alternative." With or without this evidence, the notice letter was unequivocal in the unilateral nature of the layoff. The defence submitted that Grenville was acting in the urgency of the Covid emergency and the sudden drop in business for maintenance of office equipment. A human resources manager should know

the difference between asking an employee to accept a layoff and notifying him he was laid off. The law does not belong to lawyers and courts. Specialized company personnel should be expected to know such legal differences. The HR manager was not called to testify to explain he did not know the difference and be subject to cross-examination. I see no reason in the evidence to relieve Grenville of the consequences of its layoff notice.

[39] I also decline to read the employment contract and the layoff notice leniently in favour of the employer, to the prejudice of the employee. Where the employee took no part in the preparation of the documents defining the start and end of the relationship, it would be hard for the employer to advance a reading of a document contrary to what it says. In the event of ambiguity, the *contra proferentum* rule applies in favour of the employer's rights: *Christensen v. Family Counselling Centre of Sault Ste. Marie and District*, 2001 CanLII 4698 (ON CA), at para. 8.

[40] The uncontested facts of the case made it clear that Grenville constructively dismissed Mr. Turcotte by notifying him of the temporary layoff instead of asking him to accept one. I therefore need not consider the elaborate details of the subsequent length of layoff, of the technical operation of s. 56 of the ESA, or of the IDEL. I only included the basic facts of these irrelevant subsidiary issues, to outline the events in the chronology as they unfolded and to record that I considered the points and found no reason to change the outcome of the trial.

3. IMPACT OF ESA REG. 228/20 ON COMMON LAW CONSTRUCTIVE DISMISSAL

[41] Having determined that Mr. Turcotte's layoff constituted constructive dismissal, I now turn to Grenville's defence that s. 7(1) of O. Reg. 228/20, promulgated under Part XXVII of the ESA, relieved it of liability for constructive dismissal arising from a layoff and leave during the provincial Covid-19 State of Emergency between March 17, 2020, and July 30, 2022.

[42] Counsel agreed there is no decisive appellate authority on whether s. 7(1) of O. Reg 228/20 precluded an employee from asserting a constructive dismissal claim at common law where they were placed on IDEL. That provision stated (underline added):

> **Reduction in hours, wages not a constructive dismissal**
>
> 7. (1) The following <u>does not constitute constructive dismissal</u> if it occurred during the COVID-19 period:
>
> 1. A temporary reduction or elimination of an employee's hours of work by the employer for reasons related to the designated infectious disease.
>
> 2. A temporary reduction in an employee's wages by the employer for reasons related to the designated infectious disease.

> (2) Subsection (1) does not apply to an employee whose employment was terminated under clause 56 (1) (b) of the Act or severed under clause 63 (1) (b) of the Act before May 29, 2020.

[43] There was no serious dispute that Mr. Turcotte's layoff was precipitated by the emptying of customer offices during the Covid emergency and therefore related to the "designated infectious disease." The question the court must answer is whether "constructive dismissal" in the operative sentence above includes the common-law principle of constructive dismissal. If so, the regulation would have suspended the cause of action and Mr. Turcotte's right to sue for it. Despite this plain reading of s. 7(1), one must reconcile it with s. 8(1) of the enabling statute, the ESA:

> 8 (1) Subject to section 97, no civil remedy of an employee against his or her employer is affected by this Act.

Because s. 97 concerns elections to proceed by way of a complaint under s. 96 of the ESA, the exception to s. 8(1) does not apply in cases like Mr. Turcotte's, brought exclusively as a court action. The phrases "constructive dismissal" and its verbal variant "constructively dismisses" appear numerous times in the ESA. For example, it is part of s. 56, containing the defined circumstances for termination under the ESA.

[44] In each of *Fogelman v. IFG*, 2021 ONSC 4042, at para. 49, and *Coutinho v. Ocular Health Centre Ltd*., 2021 ONSC 3076 ("Coutinho"), at paras. 43-49, the court held that s. 7(1) of the regulation must be constrained by s. 8(1) of the ESA and thus did not oust the right to sue for constructive dismissal. The court concluded that s. 7(1) only relieved employers of constructive dismissal provisions in the ESA.

[45] In *Taylor v. Hanley Hospitality Inc*., 2021 ONSC 3135, at para. 22, the court reached the contrary conclusion. The Court of Appeal set it aside on unrelated procedural grounds: 2022 ONCA 376. The judge at first instance reasoned that the plain meaning and effect of s. 7(1) of the regulation was to displace the common law of constructive dismissal by forced layoff during the emergency period of the Covid-19 pandemic:

> [22] I agree with Tim Hortons that exceptional situations call for exceptional measures. The Ontario Government recognized the inherent unfairness in subjecting employers to wrongful dismissal claims as a result of the government imposing a state of emergency. If they did not take action, these claims would only serve to make the economic crisis from the pandemic even worse. It is just common sense. The plaintiff's action is dismissed.

[46] The *Taylor* court arrived at this conclusion after citing, in para. 21, seventeen grounds for ruling that s. 7(1) suspended the cause of action in constructive dismissal. For ease of analysis, I would group the salient grounds as follows:

1. the court cannot interpret the regulation's suspension of "constructive dismissal" in a manner that renders it meaningless

2. s. 8(1) of the ESA simply means the ESA is not an exclusive forum for employment disputes

3. s. 8(1) does not prevent the Act from displacing the common law

4. the regulation can and did change the common law

[47] Two subsequent decisions have followed *Coutinho*. *Chalmers v. Airways Transit Service Ltd*., 2023 ONSC 5725, at para. 68, agreed with the court in *Coutinho* and rejected *Taylor*. *Webb v. SDT North America*, 2023 ONSC 7170, at paras. 30-31, adopted the *Coutinho* approach without mentioning *Taylor*.

[48] The court in *Taylor* appeared transfixed by the logical conundrum of the "meaningless" effect of s. 7(1) if construed as affecting constructive dismissal only for the purpose of the minimum statutory notice periods under the ESA. In effect, the regulation relieved employers of the minimal statutory obligations but did not diminish the rights of employees to longer notice periods or damages in lieu. I agree with the judge in *Taylor* that this reading of the regulation ran counter to common sense. Nevertheless, regulations do not bear the same weight of infallibility as statutes. The provisions lack harmony but are not contradictory.

[49] Ultimately, the grounds raised in *Taylor* are negated once one reconciles the textual conflict between s. 7(1) of the regulation and s. 8(1) of the ESA through the lens of legislative and delegated legal authority. This analysis entails a two-step process, starting with constitutional authority within the Province of Ontario and applying the rules of construction.

[50] Regulations have proliferated with the growth of the administrative state. Unlike the early city-state, laws in pluralistic democracies are hard to pass in a hurry, without upsetting the existing corpus of statute and judge-made law. Modern legislation tends to lay down general principles and to enable delegated authorities to administer the details through rules and regulations. Unlike the constitutional presumption that parliamentary power is used for the general good, it is open to the judiciary to question the validity of regulations, not only for formal compliance with delegated authority but also for observance of the reasonable boundaries of the enabling statute. The power to delegate does not include the power to delegate legislative authority. Using the delegated power to regulate to initiate legislative instruments would be an extreme step "contrary to the whole scheme and spirit of the B.N.A. Act": *The King v. National Fish Co. Ltd*., 1931 CanLII 726 (CA EXC), [1931] Ex CR 75 at p. 81.

[51] For the present case, the reference to the *British North America Act* is now the *Constitution Act, 1867*, 30 & 31 Victoria, c. 3 (U.K.). In the case of the provinces, Parts III and IV separate the role of Lieutenant Governors in Council as the holders of executive power from that of the legislature as the body passing laws. Section 92 granted the provincial legislature the exclusive authority to make laws in relation to property and civil rights in

the province. Independent of legislation under s. 92, the executive branch of government has no authority to pass such laws.

[52] In this context, I cannot share the court's opinion in *Taylor* that s. 8(1) of the ESA did not prevent the Act from displacing the common law for regulations from changing the common law. By legislating that "no civil remedy of an employee against his or her employer is affected by this Act," the legislature effectively cordoned off actions for wrongful dismissal and constructive dismissal as the domain of the common law. With good reason, the legislature sought to establish minimum standards for the workplace and leave case-by-case determinations of notice of termination and constructive termination to common-law principles. No subordinate regulation could suspend or curtail the common-law causes of action, if the statute expressly declined to affect them.

[53] Having concluded that the regulation cannot be read in a manner inconsistent with the express provision in the ESA stating that the civil remedies are unaffected, the court must then read s. 7(1) of the regulation and address the valid concern of the court in *Taylor* that to hold that it did not suspend the right to sue for constructive dismissal defies common sense or would be nonsensical. The proper method of construing a regulation is to read it harmoniously with the enabling statute: *Friends of the Oldman River Society v. Canada (Minister of Transport)*, 1992 CanLII 110 (SCC), [1992] 1 SCR 3, at p. 38. One cannot simply interpret a regulation the same way one would a statute, because the statute constrains the meaning of the regulation: *Bristol-Myers Squibb Co. v. Canada (Attorney General)*, 2005 SCC 26, [2005] 1 SCR 533, at para. 38.

[54] The ESA does refer to constructive dismissal as a creature of common law. Paragraph 56(1)(b) of the ESA deems constructively dismissed employees to have been dismissed for the purpose of the statutory regime. This harmonizes the treatment of constructively dismissed individuals with those who are terminated under para. 56(1)(a). Section 7(1) therefore means that a person who is laid off without prior consent for reasons related to the Covid-19 emergency is not considered constructively dismissed, for the purposes of s. 56. I agree there may be some absurdity, because length of notice in common law is usually longer than the statutory minimum. However, s. 7(1) of the regulation does not derogate from the effect of s. 8(1) that generally separates the ESA regime from civil remedies under common law. I repeat that the lack of textual harmony does not amount to contradiction.

[55] I therefore concur with the reasoning in *Coutinho* and more recent decisions holding that s. 7(1) of the regulation had no effect on the availability of constructive dismissal as grounds for Mr. Turcotte's lawsuit against Grenville. I respectfully disagree with the conclusion in *Taylor* on this subject.

4. LENGTH OF NOTICE

[56] The parties agreed that if I settled the issue of length of reasonable notice, counsel could agree on the monetary value in terms of salary and benefits.

[57] The courts have generally adopted the factors determining the length of notice for an employee whose term has not been fixed by contract contained in McRuer C.J.H.C.'s decision in *Bardal v. Globe & Mail Ltd.*, 24 DLR (2d) 140, at pp. 143-45:

1. nature of the employment
2. length of service
3. age
4. availability of similar employment, having regard to the employee's experience, training and qualifications

[58] Mr. Turcotte's counsel argued entitlement to 20 months of notice. He relied on employment law decisions in suits brought by middle-aged employees in various positions from clerical to managerial and ranging from 15 to 19 years of service, leading to notice in the range of 18 to 20 months.[1] He also relied on the aggravating factor of the termination during the Covid-19 pandemic. In *Kraft v. Firepower Financial Corp*., 2021 ONSC 4962, at para. 22, the court cited evidence that the pandemic impacted the plaintiff's ability to secure new employment and awarded an additional month compared to the average after weighing the *Bardal* factors.

[59] Grenville submitted that the notice period should fall in the range of 7 to 11 months, although 7 was the outlier in a series of cases awarding 10 or 11 months.[2] For the most part, these cases resembled Mr. Turcotte's situation more than those cited by his counsel.

[60] Among the cases cited by the parties, *Benayon v. Total Credit Recovery Ltd.*, [1996] O.J. No. 739, involving a 65-year-old data systems manager, best resembles Mr. Turcotte's case. The court in *Benayon* awarded 10 months. Nevertheless, the value of individual case citations is to provide conventional ranges. Every case turns on its own facts.

[61] Although Grenville's recall of Mr. Turcotte was problematic for other reasons, I believed the evidence of James Burke, when he testified that there is a demand for office equipment service personnel and that Grenville would be happy to have Mr. Turcotte back if were able to resume his duties. I heard little detailed evidence regarding the specific demands of Mr. Turcotte's job, beyond the need to attend at customer sites to service their equipment. The fact that other service persons at Grenville stayed on meant the specific labour market would have been robust, were it not for the pandemic. Therefore, I would set the base notice

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[1] *MacLean v. Audiovox Corp*., 1992 CanLII 149; *Turner v. Inndirect Enterprises Inc*., 2011 ONCA 916; *Headley v. City of Toronto*, 2019 ONSC 4496; and *Parte v. Rogers Cablesystems Ltd*., 1993 ABCA 311.
[2] *Andrews v. Allnorth Consultants Ltd.*, [2021] BCJ No. 1393, 2021 BCSC 246; *Daley v. Depco International Inc.*, [2004] OJ No. 2675; *Benayon v. Total Credit Recovery Ltd.*, [1996] O.J. No. 739; *Connolly v. Regency Import Automobiles Inc.*, [2003] BCJ No. 2019; and *Engel v. Krug Furniture Inc.* (1994), 8 CCEL (2d) 91.

period at 10 months as a reasonable period of notice in comparable labour markets not constrained by the pandemic.

[62] The notice period must be set on an *ex-ante* basis looking forward from the time of the constructive dismissal. The analysis requires no small amount of deduction from available evidence. I agree with the submission by Mr. Turcotte's counsel that the pandemic restrictions would have impacted his ability to find other comparable employment. Grenville can hardly argue against this point, since it laid him off because the demand for in-person technical support dwindled at the time and did not start to recover until 2022.

[63] Because of the specific nature of Mr. Turcotte's job, adding a month to a conventional notice range is likely insufficient. In *Kraft*, the plaintiff was a research analyst and salesperson in a corporate finance company. Financial products and services are inherently intangible, and the effect of the loss of in-person meetings would not have had the same impact in the diminishment of the market for office printing equipment. In the circumstances of a job more closely tied to the gradual reopening of the office environment over the ensuing year, I would add 6 additional months to the 10-month notice period, for a total of 16 months.

5. MITIGATION

[64] In employment law, mitigation is generally considered a positive defence to a claim based on damages for pay in lieu of reasonable notice. The employer bears the burden of proving the employee failed to mitigate damages by pursing alternate employment: *Red Deer College v. Michaels*, 1975 CanLII 15 (SCC), [1976] 2 SCR 324, at p. 332.

[65] Ostensibly, Mr. Turcotte's case fits into the classic mold of employee claim eligible for curtailment of the notice period. He did not seek other work. This would ordinarily mean the court need not delve into other details regarding the reasonableness of a job search.

[66] The mitigation argument suffers from a basic unfairness of the unlawful unilateral layoff, at least for the initial few months. In his evidence, Mr. Turcotte did not come across as a terribly savvy or entrepreneurial person. He was evidently personable and good at his job – otherwise Grenville would not have recalled him back to work. Until he consulted a lawyer about his legal rights, and certainly during the immediate aftermath of the March 5, 2021, layoff notice, he accepted the employer's decision and had every reason to believe he was on a proper temporary layoff. He also signed off on an extension of the layoff. He therefore had every reason to expect that he should be ready and available to return to work soon, or when the company was better able to restore its workforce. I would not credit Mr. Turcotte with any more knowledge than what everyone else knew globally about the projected end of the disease's effect on people's lives and places of work.

[67] Beyond the circumstances of the layoff, the evidence of what was going through Mr. Turcotte's mind transitioned to the supervening events of his health status. Since Grenville accepted and emphasized his pain and disability for the frustration argument, it was unable

to argue very forcefully that from mid-2021 onward, that Mr. Turcotte was a malingerer waiting for compensation from his employment law claim. The evidence of Mr. Turcotte's disability would likely not have met the criteria of a threshold claim in an auto accident action. The evidence of his impairment was simply quite thin. I accept for the purposes of this suit that his level of physical impairment rebutted any argument that he failed to mitigate his joblessness after the spring and summer of 2021 when he legitimately believed he was properly laid off.

[68] I therefore conclude that the period of notice to be used to calculate Mr. Turcotte's damages is not subject to the defence that he failed to mitigate the length of time without work.

6. PUNITIVE AND MORAL DAMAGES

[69] Mr. Turcotte claimed punitive damages and moral damages. The factual basis for the claims were common, but in law the categories serve different purposes.

[70] Punitive damages are available for breach of an employment contract, in the same manner as any other contract: *Honda Canada Inc. v. Keays*, 2008 SCC 39 (CanLII), [2008] 2 SCR 362, at paras. 62-78. Generally, these awards are intended to punish a party for egregious or outrageous conduct. One important factor in the case law is that the conduct must constitute an independent legal wrong in addition to the breach of contract.

[71] In contrast, moral damages are compensatory and reflect recognition of the mental distress arising from employer misconduct in executing termination of employment: *Galea v. Wal-Mart Canada Corp.*, 2017 ONSC 245, at para. 233. The misconduct can occur after the termination: *Gismondi v. Toronto (City of)*, 2003 CanLII 52143 (ON CA), at para. 23.

[72] Mr. Turcotte relies on *Fogelman v. IFG*, 2021 ONSC 4042, at para. 120, for the proposition that the failure to provide reasonable notice under the ESA is an independent wrong that is outrageous and reprehensible behaviour warranting punitive damages. I agree with Vella J. in *Fogelman* that an employer's failure to adhere to the minimal statutory standard could justify such sanction. I do not, as some litigants and their lawyers have since argued, consider *Fogelman* as standing for the principle that failure to comply with the ESA automatically supports a claim for punitive or moral damages. One needs to consider the nature of the breach and the employer's basis for belief that there was no breach.

[73] Mr. Turcotte's argument that Grenville breached the ESA stems from the basic fact that Grenville has paid him no termination pay and has not even tendered such payment. Grenville's response to that argument was that he was never terminated and arguably remains employed. That argument depends on the validity of the argument that s. 7(1) of the emergency regulation suspended the common law right to claim constructive dismissal. Because of the unfortunate ambiguity of that regulation and the existence of case law

supporting Grenville's position, I will analyze this point assuming that it was advanced in good faith.

[74] Grenville argues that it did comply with s. 56 of the ESA, in the manner of its handling of the temporary leave and extensions, if the employer had the right to lay off Mr. Turcotte unilaterally. It considered the CDCS Health Claims Expense Account of $500 available for health expenses as an "employee insurance plan" under s. 56(2)(b)(ii) as one of the several conditions of a permissible extended layoff of up to 35 weeks. Because Mr. Turcotte's punitive damage claim requires consideration of adherence to the ESA requirements, even though the ESA is immaterial to the constructive dismissal, I will address this point. The relevant text of s. 56(2)(b)(ii) states:

> (ii) the employer continues to make payments for the benefit of the employee under … a legitimate group or employee insurance plan

[75] Given that the purpose of a layoff is to relieve the employer of the financial obligations of employment contracts during periods of diminished revenues, it would be harsh to expect this to mean more than the employer's contributions to benefit plans. It cannot be read to mean continuing the worker's wages or salary – an absurd interpretation. It must be a benefit separate from wages or salary. The amount of the contribution, whether $500 or $50,000, is of no import. Compliance with s. 56(2)(b)(ii) is neither qualitative nor quantitative.

[76] Nor does the provision specify what type of group or employee insurance qualifies. Insurance is a regulated industry in Ontario, Part III of the *Insurance Act*, R.S.O. 1990, c. I.8, governs all contracts of insurance except for accident and sickness insurance, life insurance, and marine insurance. Regulated group policies exist in various contexts, but group policies for life insurance and accident and sickness insurance are specifically regulated under Parts V and VII. However one reads the above text, it must be a contribution to insurance. I do not construe Grenville's self-insured health benefit account of $500 to be "insurance" in respect of which the employer makes payments for the benefit of the employee. If I am wrong in this reading, Grenville introduced no evidence of any fund or reserve on its balance sheet allocated to the $500 account, or any fronted insurance policy stepping into Grenville's role if it became insolvent. Nothing about the account bore the features of insurance, in the sense of a fund to which the employer contributed anything resembling a premium.

[77] Had Grenville conferred on Mr. Turcotte a standard group insurance benefits plan and maintained payments, the argument that it complied with s. 56, but for the unlawfulness of the layoff at common law, could have held water.

[78] Despite the strong element of tactical reliance on statutory technicality, I do not construe Grenville's conduct of the layoff itself worthy of an award of punitive or moral damages. I would include in this assessment the recall notice it sent Mr. Turcotte after it discovered that Mr. Turcotte felt he was physically unable to return to work. Recalling him to work

shortly after it learned at his examination for discovery that he felt unable to return to work was, by any measure, an act of bad faith to the point of being cynical.

[79] What tips the scales against awarding punitive or moral damages is Mr. Turcotte's silence throughout the period from his layoff to the commencement of litigation. While it is true that Grenville adopted an off-side position regarding the layoff, without much regard for Mr. Turcotte's rights as its employee, the employer did not know of Mr. Turcotte's permanent disability until the discovery phase of the litigation. Mr. Turcotte's legal position is not to be prejudiced by post-termination events regarding his physical ability to return to work, but the employer's unrelated post-termination misconduct is factually difficult to cite as a justification for punishment or for a finding of infliction of moral distress or employability. Despite the lack of a need for legal causation in the sense of distinct causes of action, both punitive and moral damages require some substantive nexus between the misconduct and the employee's prejudice or plight.

[80] The knowledge lacuna or disconnect between the employer's conduct while taking the position that Mr. Turcotte was laid off and the employee's silence about his inability to return to work makes it hard to connect Grenville's wrongful conduct to Mr. Turcotte's situation. The lack of connection distinguishes the case from the typical award of punitive damages, exemplified by *Whiten v. Pilot Insurance Co*., 2002 SCC 18, [2002] 1 SCR 595, wherein a fire insurer provided no help to the suddenly homeless policyholders, while it doggedly pursued an unfounded arson exclusion case. It also makes it difficult to connect Grenville's tactical conduct with any basis in mental distress, loss of identity and impairment of employability, as described in *Keays*.

[81] Mr. Turcotte was within his rights to reject re-employment with Grenville, even during the evidence of such an offer during the trial. Even if his perception of Grenville's bad faith is justified, his employability was diminished by his health condition and not by the employer's conduct. Receiving a recall notice after the examination for discovery probably upset him, but the rough and tumble of employment litigation can entail insults and ill-considered tactics.

[82] I therefore hold that Grenville's misconduct in the handling of Mr. Turcotte's employment does not form a basis for either punitive or moral damages. This does not mean similar conduct will not attract these categories of damages in other cases. Had Mr. Turcotte's personal circumstances been different, it is likely that the court could have awarded damages on either or both heads.

CONCLUSION

[83] I therefore award Mr. Turcotte damages for breach of his employment contract with Grenville, to be measured by the value of 16 months' notice. I decline to award damages of a punitive or moral nature. Counsel are to settle the economic effect of this decision,

including the prejudgment interest calculation, at first instance. If they are unable to reach a consensus calculation, they may contact my judicial assistant for judicial assistance.

[84] Likewise, if the parties are unable to resolve the costs of the action, counsel may approach my judicial assistant with a reasonable schedule for exchange of bills of costs and submissions.

Akazaki J.

Released: May 28, 2025

CITATION: Richard Turcotte v. Grenville Management Inc., 2025 ONSC 3087
COURT FILE NO.: CV-22-00677141-0000
DATE: 20250528

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

RICHARD TURCOTTE

Plaintiff

– and –

GRENVILLE MANAGEMENT INC.

Defendant

REASONS FOR JUDGMENT

Akazaki, J.

Released: May 28, 2025