

Court of King's Bench of Alberta

Citation: Rodrigues v Fort McKay Strategic Services LP, 2025 ABKB 414

Date : 20250708
Docket: 2103 01956
Registry: Edmonton

Between:

Benjamin Rodrigues

Plaintiff

- and -

Fort McKay Strategic Services LP & Fort McKay Strategic Services Ltd.

Defendants

**Reasons for Judgment
of the
Honourable Justice D.J. Kiss**

I. Introduction

[1] The Plaintiff, Mr. Rodrigues, has commenced an action for wrongful dismissal against his former employers. In this application, the Plaintiff seeks summary judgment against the Defendants, Fort McKay Strategic Services LP and Fort McKay Strategic Services Ltd (collectively FMSS) and summary dismissal of the Defendants' counterclaim.

[2] The Plaintiff seeks damages in lieu of reasonable notice in the sum of \$137,505.00, \$2,622.45 in unpaid wages for a period prior to his termination when he was suspended without pay, \$25,000.00 in punitive damages, \$1,000.00 for mitigation expenses, interest pursuant to the *Judgment Interest Act*, RSA 2000, c. J-1 and costs.

[3] The Plaintiff claims that the matter is suitable for summary judgment as, while some of the facts are disputed, the record that is available to the Court is not going to improve by the time of trial, it is sufficient to make the necessary findings of fact and there are no genuine issues for trial.

[4] The Defendants submit that the matter is not suitable for summary judgment as there are material facts in dispute that involve credibility issues and will require a trial to resolve. However, if this Court concludes otherwise, the Defendants have cross-applied for summary dismissal of Mr. Rodrigues' wrongful dismissal action on the basis that he was terminated with just cause and also seek summary judgment in relation to their counterclaim for losses they allege resulted from Mr. Rodrigues' actions in the sum of \$19,419.96, and costs.

II. The Record

[5] For the purpose of these cross-applications, the parties agree that the Record available to the Court consists of the following:

- (a) The pleadings, including the Statement of Claim, Joint Statement of Defence, Counterclaim and Statement of Defence to Counterclaim;
- (b) Affidavit of the Plaintiff, Mr. Rodrigues, filed February 1, 2023 (Plaintiff's Affidavit);
- (c) Affidavit of Jonathan Grant, filed November 27, 2024, on behalf of the Defendants, FMSS. Mr. Grant is the Vice-President of Operations of Fort McKay Group of Companies LP, the parent company of Fort McKay Strategic Services Ltd and the general partner of Fort McKay Strategic Services LP (Grant Affidavit);
- (d) Transcript of the Questioning on Affidavit of Mr. Rodrigues on June 26, 2023 and his Answers to Undertakings filed May 5, 2025; and
- (e) Transcript of the Questioning on Affidavit of Mr. Grant on January 28, 2025 and his Answers to Undertakings filed May 5, 2025.

III. Background Facts

[6] The Defendants, FMSS provide services in the oilfield industry including earthworks, reclamation, process and equipment operation, site services and fuel and lube services.

[7] The Plaintiff commenced employment with FMSS on June 19, 2008 as a Fuel and Lubricant Technician (FLT). An FLT is responsible for supporting the general maintenance, upkeep, troubleshooting and any manual labour tasks associated with vehicles and equipment.

[8] With the exception of a 3 month parental leave in 2017, the Plaintiff worked full-time for FMSS until June 8, 2020, when FMSS terminated his employment.

[9] During the almost 12 years he worked for FMSS, the Plaintiff held two other positions for periods of time, those being a Fuel and Lube Technician Coach and a Shovel Mechanics Helper. However, he returned to the position of FLT in 2017 and remained in this position until the end of his employment with FMSS.

[10] The position of FLT with FMSS is a labourer position that requires only a high school level education and a valid Class 5 driver's license.

[11] FMSS was contracted by Canadian Natural Resources Ltd (CNRL) to provide certain services at the Muskeg River Mine (MRM) north of Fort McMurray, Alberta. FMSS supplied the labour to perform the services, using CNRL's equipment.

[12] On the evening of June 7, 2020, the Plaintiff was working the second night shift from 6:00 pm to 6:00 am at the MRM. He was tasked with servicing generators, light plants and support equipment using a one-ton service truck (Truck) owned by CNRL. The Plaintiff reported to Chad Tucker (Tucker); a Team Leader responsible for directing the Plaintiff's daily work activities.

[13] During his shift, the Plaintiff received a call from Tucker who instructed him to go and assist another FMSS employee, Terry White-Shaw (White-Shaw). The Plaintiff proceeded to the 2C area of the MRM site to refuel a washcar generator.

[14] A significant amount of rain fell for several days leading up to and including the morning of June 7, causing water to accumulate on the roads around the MRM site. The FMSS Dispatch Team notified the Plaintiff and others via radio that water accumulation had blocked a road in the 2C area leading to the washcar generator. As a result, the Plaintiff knew he needed to take an alternative road to service the washcar generator (Alternative Road).

[15] The Plaintiff contacted White-Shaw via the FMSS radio channel to inquire about the condition of the Alternative Road as White-Shaw had driven through the 2C area in a similar vehicle the night before. White-Shaw advised the Plaintiff that there was some accumulation of water on the Alternative Road but that he went through the middle of it and was fine.

[16] The Plaintiff proceeded on the Alternative Road and came upon an accumulation of water. He stopped, put the Truck into four-wheel drive and attempted to slowly drive through the water. When the water became too deep and began to enter the cab of the Truck, the Plaintiff put the Truck into reverse and attempted to back out, but the engine stalled and would not restart.

[17] The Plaintiff contacted Tucker who instructed him to call White-Shaw. White-Shaw attended the scene.

[18] A CNRL supervisor, Derrel Lewis (Lewis) was also contacted and arrived at the scene. Lewis took photographs of the Plaintiff on the partially submerged Truck.

[19] The Plaintiff was eventually picked up by another employee, Alex Cassels (Cassels) in a vehicle with higher clearance that was able to drive into the water to extract the Plaintiff from the Truck.

[20] The Plaintiff immediately filled out a Post-Incident Report. He also completed post-incident drug and alcohol testing, which came back negative.

[21] On June 8, 2020, an Incident Investigation Interview was conducted with the Plaintiff by Trent Scott, a safety representative for FMSS and Kirby Ropson, a superintendent with FMSS. Immediately after the interview, the Plaintiff was advised he was being placed on unpaid suspension while they continued to investigate the incident.

[22] On June 18, 2020, the Plaintiff was contacted by telephone by his manager, Maurice Pitre. The Plaintiff was advised his employment with FMSS was being terminated for cause as a result of his breach of FMSS' "no tolerance" policy.

IV. Issues

[23] The issues to be determined are as follows:

1. Has the Plaintiff satisfied the test for summary judgment? More specifically:
 - (a) Has the Plaintiff met his threshold burden to show there is no defence to the wrongful dismissal claim and no genuine issue for trial?
 - (b) Have the Defendants met their burden to establish a genuine issue for trial?
 - (i) In relation to their just cause defence?
 - (ii) In relation to their claim that the Plaintiff failed to mitigate his damages?
 - (c) Is it possible to summarily resolve the Plaintiff's claim or do the disputed facts and credibility issues require a trial?
2. If necessary, is it possible and/or appropriate to summarily determine the Plaintiff's claim for damages including:
 - (a) Damages in lieu of reasonable notice?
 - (b) Damages for unpaid wages while suspended?
 - (c) Punitive damages?
 - (d) Damages for mitigation costs?
3. Has the Plaintiff satisfied the test for summary dismissal of the Defendants' counterclaim?

V. Analysis

[24] Rule 7.3(1) of the *Alberta Rules of Court*, A/R 124/2010 [*Rules of Court*] permits a party to apply for summary judgment in respect of all or part of a claim where there is no defence to a claim or part of it, or no merit to a claim or part of it, or where the only real issue is the amount to be awarded.

[25] The proper approach to summary judgment applications in Alberta was outlined by the Court of Appeal in *Weir-Jones Technical Services Incorporated v Purolator Courier Ltd*, 2019 ABCA 49 [*Weir-Jones*] at para 47. A Court may award summary judgment if the moving party establishes the facts on a balance of probabilities and demonstrates that there is no genuine issue requiring trial. If the plaintiff is the moving party, it must prove "no defence". The party resisting summary judgment need only demonstrate that the record, the facts or the law preclude a fair disposition, or in other words, that the moving party has failed to establish there is no genuine issue requiring a trial: *Weir-Jones*, at para 32.

[26] There will be no genuine issue requiring a trial when the Court is able to reach a fair and just determination on the merits without a trial as the process (1) allows the judge to make the necessary findings of fact; (2) allows the judge to apply the law to the facts; and (3) is a proportionate, more expeditious and less expensive means to achieve a just result: *Hryniak v Mauldin*, 2014 SCC 7, at para 49.

[27] For a non-moving party's case to have merit, there must be a genuine issue regarding a potentially decisive material fact in the case which cannot be summarily found against the non-moving party on the record revealed by a fair and just process. It is not enough for the non-moving party to simply rely on mere allegations or pleadings, or to hope that something further might turn up at a trial. The key is whether the circumstances require *viva voce* evidence to decide the case: *JH Drilling Inc v Barsi Enterprises Ltd*, 2025 ABKB 288 [*JH Drilling*] at para 24.

[28] Summary judgment is not limited to cases where the facts are not in dispute, but the evidence must be such that the Court is confident that the dispute can be fairly resolved: *JH Drilling* at para 27; see also *Weir-Jones*, at para 36.

[29] A successful summary judgment application is a final judgment, as it is a determination of the merits of the claim: *PricewaterhouseCoopers Inc v Perpetual Energy Inc*, 2022 ABCA 111 at para 88.

Issue #1 - Has the Plaintiff satisfied the test for summary judgment?

[30] At the initial threshold stage, a plaintiff applying for summary judgment must prove the factual elements of its case on a balance of probabilities, that there is “no defence” and that there is no genuine issue requiring a trial: *Weir-Jones* at para 32.

[31] However, the allocation of the burden of proof is somewhat more complicated in a wrongful dismissal case. In this case, the Plaintiff must prove on a balance of probabilities that there is no genuine issue for trial with respect to his employment contract and that he was dismissed without notice or payment in lieu of notice. The Plaintiff does not need to disprove positive defences for which the Defendants have the onus of proof, such as a just cause defence or failure to mitigate defence: *McDonald v Sproule Management GP Ltd*, 2023 ABKB 587 [*McDonald*] at paras 55 – 56.

[32] If the Plaintiff can satisfy this initial burden, it will then be up to the Defendants to demonstrate from the record enough evidence in support of their defence of just cause and/or their failure to mitigate defence to show that there is a dispute that cannot be resolved by summary judgment.

[33] If the Defendants are successful in doing so, then in order to obtain summary judgment, the Plaintiff bears the burden of countering the evidence of just cause and/or failure to mitigate to demonstrate, on a balance of probabilities, that there is no issue of merit for trial: *Rudichuk v Genesis Land Development Corp*, 2019 ABQB 133 at paras 37-40, affirmed 2020 ABCA 42

However, as noted by Marion J in *McDonald*, at para 57, it is important that Courts do not make the threshold burden and responding burden analysis overly complicated or formalistic given the direction of the Court of Appeal in *Weir-Jones* (at paras 35 and 47) that their key considerations on a summary judgment application do not need to be addressed in any particular order. In the end, an applicant will always have the ultimate burden to show that a claim or defence has no merit, that there are no genuine issues requiring a trial and that a fair and just adjudication is possible on a summary basis.

Has the Plaintiff met his threshold burden to show there is no defence to the wrongful dismissal claim and no genuine issue for trial?

[34] As already noted, it will usually be sufficient for a plaintiff-applicant in a wrongful dismissal summary judgment application to meet this initial threshold by establishing there is no genuine issue respecting the terms of their employment contract and that they were dismissed without notice or payment in lieu of notice: *McDonald*, at para 56.

[35] In this case, the Plaintiff’s Affidavit indicates that he commenced employment with FMSS on June 19, 2008. This information was corroborated by an Offer of Employment dated June 19, 2008 which was attached as an exhibit to the Grant Affidavit. Also attached to the Grant Affidavit was a second Offer of Employment dated November 2, 2014 in which the Plaintiff was advised his position as a Fuel and Lube Tech Coach was being eliminated but that FMSS was offering him the position of Fuel

and Lube Technician that he previously held. The Plaintiff signed both letters confirming his acceptance of the offers.

[36] The Plaintiff's Affidavit states that he was placed on an unpaid suspension on June 8, 2020 and that he was advised over the telephone on June 18, 2020 by a manager at FMSS that he was being terminated for cause. He did not receive any termination, severance or other pay during the period of his suspension or at the time of his termination.

[37] These undisputed facts are sufficient to discharge the Plaintiff's threshold burden.

Have the Defendants met their burden to establish a genuine issue requiring a trial?

[38] To resist summary judgment, the burden now shifts to the Defendants. FMSS must put its best foot forward and demonstrate from the record a positive defence, or a genuine issue requiring a trial: *Weir-Jones* at para 47(c).

[39] FMSS has raised two positive defences – that of termination for just cause and also the alleged failure of the Plaintiff to mitigate his damages.

[40] FMSS also asserts that the matter is not suitable for summary judgment because the record does not allow the Court to make the necessary findings of fact. More specifically, the Defendants point to the conflicting evidence relating to what occurred when the Plaintiff drove the Truck into the body of water, which the Defendants argue is a material fact and raises issues of credibility. Further, the Plaintiff's explanation of his mitigation efforts raises additional credibility concerns which require *viva voce* evidence. The Defendants submit that because of these issues; the matter cannot be resolved summarily and there is a reasonable expectation that there will be a better evidentiary record available at trial.

i) Does the Defendants' just cause defence raise a genuine issue requiring a trial?

[41] FMSS submits that if this matter is suitable for summary judgment, it had just cause to terminate Mr. Rodrigues' employment as a result of his misconduct in failing to follow safety procedures and failing to exercise common sense and good judgment, which not only resulted in property damage and financial harm to FMSS but also put himself and others at risk.

[42] The law relating to just cause was set out by the Supreme Court of Canada in *McKinley v BC Tel*, 2001 SCC 38 and adopted by the Alberta Court of Appeal in *Baker v Weyerhaeuser Company Limited*, 2022 ABCA 83. The applicable principles and the test to be applied when determining whether just cause for termination of an employment contract exists can be summarized as follows:

- (a) A finding of misconduct does not, in and of itself, justify termination of an employee. The sanction imposed for the misconduct must be proportionate. Dismissal is warranted when the misconduct is sufficiently serious that it strikes at the heart of the employment relationship such that the employment relationship could no longer viably exist.
- (b) The assessment of just cause involves three steps and requires (1) determining the nature and extent of the misconduct; (2) considering the surrounding circumstances; and (3) deciding whether dismissal is a proportionate response;

- (c) At the first step, determining the type and degree of the alleged misconduct, it is important to remember that while an employer is entitled to rely upon after-discovered wrongdoing of an employee, it must be conduct that occurred pre-termination;
- (d) At the second step, the particular circumstances of both the employee and employer are considered. For the employee, such things as age, employment history, seniority, role and responsibilities are factored in. With respect to the employer, there should be consideration of things such as the type of business, relevant policies or practices, the employee's position within the organization and the degree of trust reposed in the employee;
- (e) Finally, the third step is determining whether the response of the employer to the alleged misconduct was balanced. This involves an assessment of whether the misconduct is reconcilable with sustaining the employment relationship: *McKinley* at para 57; *Baker* at para 28, citing *Dowling v Ontario (Workplace Safety and Insurance Board)*, 2004 CanLII 43692 (ONCA); *Molloy v EPCOR Utilities Inc.*, 2015 ABQB 356 at para 142.

[43] I will now apply this framework to the evidence contained in the Record before the Court on this application to assess whether FMSS' just cause defence raises any genuine issues for trial. I will identify where there are disputed material facts but for the purpose of assessing the just cause defence on this summary judgment application, I will assume that FMSS' evidence is correct. I will also consider any agreed facts, any admissions that have been made and the Plaintiff's unchallenged evidence on non-contentious matters: *McDonald* at para 104.

Step 1 - Nature and Extent of the Misconduct

[44] FMSS submits that the Plaintiff failed to comply with several safety policies and procedures designed to protect the safety of workers and others on the jobsite. These policies made it clear that the Plaintiff was required to exercise good judgment and common sense with respect to health and safety in the workplace and that failure to do so could be grounds for termination. FMSS argues that the Plaintiff's job, for which he had received considerable safety training, required him to operate equipment, including vehicles in a safe, skillful, reasonable and prudent manner and take care to avoid operating a vehicle in a manner that would result in it being damaged.

[45] More specifically, on June 7, 2020, FMSS submits that the Plaintiff violated numerous safety procedures by:

- a) failing to identify the hazard created by the water on the Alternative Road;
- b) failing to assess or mitigate the hazard created by the water on the Alternative Road, including by failing to operate to road and weather conditions;
- c) failing to report the hazard/unsafe conditions created by the water on the Alternative Road;
- d) waiting until water started flowing into the cab of the truck and reached his calves before reversing the Truck;
- e) not refusing to proceed through the water in light of the unsafe conditions; and

- f) failing to exercise good judgment and common sense with respect to health and safety in the workplace by unnecessarily putting his health and safety, and that of the individuals who attended at the scene to rescue him, at risk.

[46] FMSS also claims the Plaintiff's misconduct damaged the Truck, rendering it out of commission for 61 days while CNRL repaired it. FMSS argues this situation resulted in significant financial loss to the company. However, the Record before the Court lacks evidentiary support for this conclusion. Evidence shows the Truck displayed an "engine repair" indicator light at the start of the Plaintiff's shift and that the Truck stalled while in the water. Yet, the extent of the damage caused by the Plaintiff's actions, if any, and the reasons for the lengthy repair time remain unknown. FMSS chose not to request a copy of the maintenance records for the Truck from CNRL and CNRL never sought reimbursement for any repair expenses from FMSS.

[47] The Plaintiff argues that he did not engage in any misconduct and that his actions were compliant with FMSS' policies and procedures. He notes that FMSS does not actually have a policy dealing with how to assess the depth of bodies of water when driving. Further, when Mr. Grant was asked to identify the specific provisions of the Alberta occupational health and safety legislation the Plaintiff was alleged to have breached, he was unable to do so.

[48] While the Plaintiff also maintains that he did not drive the Truck too deep into the water and that he would have been able to reverse out successfully if the front of the Truck had not dipped down suddenly, or hit a "sink hole", this fact is disputed by the Defendants. Therefore, for the purpose of assessing the Defendants' just cause defence, I will not take into account the Plaintiff's claim that the Truck hit a pothole or sink hole.

[49] Both parties acknowledge that it is common for water to accumulate on the dirt roads at the mine site when it rains. It is also important to note, and undisputed, that FMSS employees generally attempt to drive through the water. Mr. Grant, an FMSS witness with more than 30 years of experience working in the mines in the region, confirmed that upon coming across a large body of water, he would generally start by driving slowly into it and then monitor how high the water was on the tire. In this case, Mr. White-Shaw had driven through water on the Alternative Road the previous evening. Mr. Lewis, the CNRL supervisor who attended the scene after the Plaintiff had called for help, also proceeded to drive his vehicle into the water in an unsuccessful effort to pick up the Plaintiff from the Truck. Mr. Cassels, another employee of FMSS, also drove into the water upon arriving at the scene. However, he was driving a fuel truck, a larger vehicle with higher clearance, and so he was able to successfully extricate the Plaintiff from the partially submerged Truck without difficulty.

[50] When the Plaintiff began his shift that evening, there was a "toolbox" meeting. This is a meeting that occurs at the time of a shift change and where any significant safety concerns are passed on to the next shift. During this meeting, there was no mention of any unsafe conditions on the Alternative Road.

[51] When the Plaintiff came across the water on the Alternative Road, he did not immediately drive into it. First, he reached out to Mr. White-Shaw, who had driven on the Alternative Road the previous evening. Only after confirming that Mr. White-Shaw had successfully driven through the water did he decide to proceed. He put the Truck into four-wheel drive and after assessing the body of water himself, decided to drive through the right side of the water as it did not seem as deep as on the left side.

[52] I therefore do not accept FMSS' position that the Plaintiff failed to identify the accumulated water as a hazard, failed to assess the hazard and ought to have refused to attempt to drive through the accumulated water.

[53] In my view, the Plaintiff was terminated for driving the Truck *too far* into a pool of water that had accumulated on the Alternative Road before determining that it was too deep to cross safely and backing the Truck out. His misconduct was not in *attempting* to drive through the water in the first place. Driving through water at the mine site was a common occurrence, there were no specific policies prohibiting it and it was clearly an accepted practice by FMSS.

Step 2 – Surrounding Circumstances

[54] Next, the Court must examine the overall situation from both the employee and the employer’s perspectives.

[55] From the Plaintiff’s perspective, at the time of the incident he was a long-term employee of FMSS, having worked there for almost 12 years. His skills as an FLT earned him the trust to train and teach other FLTs until the training position was eliminated by FMSS. He received numerous positive performance reviews and only one prior discipline record from 4.5 years prior (in 2016) for storing tools unsafely in a vehicle.

[56] The Plaintiff had successfully completed extensive safety training, including both general training as well as some specifically related to the one-ton vehicle he regularly drove.

[57] The Plaintiff had no managerial or supervisory duties at FMSS at the time of the incident and his Team Lead directed his daily activities. On this particular evening, he was told by his Team Lead, Mr. Turner, to assist another employee, that being Mr. White-Shaw.

[58] Mr. Rodrigues’ regular responsibilities included checking and servicing washcar generators and he was aware that if he missed checking one, he could be “written up” or disciplined for not fulfilling his duties. On this particular night, one of the washcar generators in the 2C area of the mine could only be accessed by the Alternative Road. There had been no reported issues with the Alternative Road. No concerns were raised in the cross-shift report provided by the day shift employees that day. Additionally, the “toolbox talk” flagged no issues about the condition of the Alternative Road. There were no pylons or other markers placed at the site to indicate a safety concern.

[59] From FMSS’s perspective, while the company acknowledges that it lacked a specific policy or training on assessing water depth when driving, it views the Plaintiff’s lack of judgment in driving into the large body of water on the Alternative Road as a potential risk for physical harm to himself and those involved in his rescue. FMSS prioritizes the safety of its workers, and all of its written policies and procedures reflect this strong commitment to safety.

[60] The importance of compliance with safety procedures and occupational health and safety legislation was impressed upon the Plaintiff repeatedly throughout his 12 years of employment with FMSS. Its emphasis on ensuring the workplace is safe is reflected in its Termination of Employment Policy which confirms that one of the grounds for which an employee can be fired for cause is a failure to comply with its safety policies.

[61] FMSS also points out that the Plaintiff’s actions caused significant damage to the Truck and a resulting loss of profit to the company for the period it was out of use.

[62] Finally, as an oilfield service provider, FMSS’ safety record is also critical to securing employment contracts. This incident threatened FMSS’ relationship with one of its largest clients, CNRL, who were also the owners of the Truck.

[63] The concerns I have with the position taken by FMSS are twofold. First, although it appears that encountering water on dirt roads at mine sites is a common occurrence for employees, FMSS cannot point to any particular policy or training provided to its employees that addresses this scenario. Second, in concluding that the Plaintiff exercised sufficiently “bad judgment” in attempting to drive through the water to justify terminating his employment, FMSS completely ignores the fact that this was an accepted practice followed by even their most experienced senior management (ie. Mr. Grant). Additionally, the Plaintiff was not the only person (or even the only employee of FMSS) to drive into this body of water that evening. Both the CNRL representative, Lewis and another FMSS employee, Cassels, chose to drive into the body of water *after* the Plaintiff’s Truck had stalled.

Step 3 – Proportionality of Employer’s Response

[64] The final step is to assess whether FMSS’ decision to terminate Mr. Rodrigues was a proportionate response to the alleged misconduct. I find it was not.

[65] In a document prepared later for training purposes, FMSS identified the underlying cause of the incident as being the Plaintiff’s “inability to comprehend the consequences of driving into a large pool of water”. When the Plaintiff was contacted by his manager on June 18, 2020 and advised he was being terminated, Mr. Pitre told him that he had failed to use good judgment to prevent an incident and that FMSS had “zero tolerance” for that kind of behaviour.

[66] The FMSS Corrective Action and Discipline Policy (“Policy”) in effect at that time outlines specific procedures for taking corrective action with respect to an employee. The Policy requires FMSS to arrange a meeting between the employee and the supervisor involved after completing their investigation, giving the employee the opportunity to tell their side. The employee may request the presence of someone from Human Resources at the meeting. During this meeting, applicable policies will be reviewed, and corrective action will be implemented.

[67] The Policy indicates that, in most cases, corrective action will involve a probationary period. In determining what a proportional response is to the misconduct, the Policy notes that FMSS will carefully consider all of the facts and circumstances including whether the conduct was culpable or not; whether the conduct involved issues of trust, honesty or safety; the overall context including the employee’s entire record and the conduct of other employees; and the attitude of the employee, including whether the employee was prepared to acknowledge his error.

[68] The Policy outlines the various levels of corrective discipline that FMSS can impose on an employee. The lowest level consists of a written warning and short probationary period, while each subsequent level escalates in severity, leading to longer probationary periods, periods of suspension, and ultimately, termination. Termination for just cause is reserved for cases of “serious misconduct” or cases “where progressive discipline and performance management has been attempted but the employee refuses or fails to comply”. In those circumstances, the Policy stipulates that the employee will be provided with a written termination letter outlining the reasons for the termination of their employment.

[69] The Plaintiff was a 12-year employee of FMSS. He had a low level, labourer position in the company with no supervisory or management responsibilities. He took direction from his Team Leader. He had numerous positive performance reviews and had been disciplined once before, in 2016, for failing to properly store tools in his vehicle which cracked the windshield of his vehicle. In no way could Mr. Rodrigues be characterized as a “problem” employee.

[70] On this day, the Truck the Plaintiff was driving had a “check engine” light on. FMSS chose not to request any maintenance records for the Truck from CNRL after the incident. Therefore, when FMSS terminated the Plaintiff, it did not even know whether it was the Plaintiff’s actions that had caused the Truck to stall, or some other mechanical problem. Further, no one else was disciplined at all by FMSS in relation to this incident. Yet, no one had reported the unsafe conditions on the Alternative Road that night and at least two other individuals drove into the water *after* the Plaintiff.

[71] In all the circumstances, FMSS’ decision to terminate the Plaintiff was clearly excessive. The Plaintiff’s actions cannot be characterized as “serious misconduct” justifying such extreme corrective action. It was not conduct which could reasonably be viewed as giving rise to a breakdown of the employment relationship.

[72] It is also concerning to note that FMSS did not adhere to its own Policy when dealing with Mr. Rodrigues. The Plaintiff was never afforded the opportunity to meet with his supervisor after FMSS’ investigation was complete. Additionally, the discipline process related to this incident was neither documented nor placed on the Plaintiff’s file. In contrast, when Mr. Rodrigues received a warning in 2016 for storing tools unsafely in his vehicle, a Corrective Action Report was completed and retained in his file. Furthermore, FMSS failed to provide the Plaintiff with a written termination letter outlining the reasons for his employment termination.

[73] I find that FMSS has failed to prove, on a balance of probabilities, that it had just cause to terminate the Plaintiff. Even if I accept only the evidence most favourable to the Defendants on the material facts in dispute (ie. that the Plaintiff drove the Truck too far into the water before trying to reverse out, and that the front end of the Truck did not “nose dive” or hit a sink hole), there is still no merit to the Defendant’s just cause defence and therefore, FMSS has failed to establish a genuine issue requiring a trial.

ii) Does the Defendants’ claim that the Plaintiff failed to mitigate his damages raise a genuine issue requiring a trial?

[74] FMSS also claims that the Plaintiff did not take reasonable steps to find alternate employment and failed to mitigate his damages. FMSS argues that this defence raises a genuine issue for trial and is not suitable for summary judgment as the Plaintiff’s evidence on this issue raises credibility concerns. FMSS argues that there will be a better evidentiary record on this issue available at trial. I disagree.

[75] When an employee is wrongfully dismissed, they still have a duty to mitigate their damages by taking all reasonable steps to obtain similar, alternative employment. An employee is not entitled to recover damages for losses that could have been avoided. However, it is the employer, in this case FMSS, who has the onus of proving a failure to mitigate on a balance of probabilities by establishing (1) the employee did not take reasonable steps to search for work after being dismissed; and (2) they would have found a comparable position had they searched for it: see *Richmond v Panther Industries (Alberta) Inc*, 2019 ABQB 705, at para 12.

[76] Mr. Rodrigues was 42 years old at the time of his dismissal. After being terminated by FMSS, he described feeling very vulnerable, depressed and anxious. However, the Plaintiff did not seek medical attention, was not prescribed any medication for his depression and/or anxiety and did not pursue counselling.

[77] The Plaintiff’s evidence is that he diligently searched for other employment. He claims that his unemployment had a significant impact on his family’s financial situation, and they could no longer

afford to pay for childcare. The Plaintiff believes it was sometime in 2021 when he took on the childcare responsibilities himself while he continued to look for a job. During his questioning, the Plaintiff could only recall applying for two FLT positions. When he had no success securing a similar paying job, he began looking for employment in town that would be flexible enough to allow him to continue to provide childcare. The Plaintiff noted that he also applied to become a mail carrier in April and May 2021 but did not pass the required exam.

[78] The Plaintiff argues that his job search was hampered by several factors. First, nearly all the FLT positions available at the time of his termination required applicants to have a Class 1 or Class 3 driver's license. Mr. Rodrigues had only a Class 5 license and after losing his job, could not afford the course fees of \$9,000.00 or so to obtain these additional qualifications.

[79] Second, the Plaintiff submits that because of the Covid-19 pandemic and the significant downturn in the Alberta economy, there were very few postings for comparable employment at that time.

[80] Finally, the Plaintiff alleges that FMSS circulated a photograph that was taken of him standing on the Truck while it was partially submerged in the water to CNRL and also to other employees as part of a PowerPoint that was prepared for training purposes. Mr. Rodrigues claims that people made fun of him after seeing the photograph and that this also made it more difficult for him to get hired by another employer.

[81] On October 29, 2021, 16 months after his termination, the Plaintiff finally secured alternate employment as a taxi driver with an annual salary of approximately \$43,500.

[82] FMSS submits that the Plaintiff's job search did not reflect a genuine attempt to secure new employment and that he effectively removed himself from the comparable job market by choosing to stay home to care for his children.

[83] FMSS argues that there is no evidence that the Plaintiff's decision to become the primary caregiver for his children was necessary because of the termination of his employment. The Defendants point to the fact that the Plaintiff failed to produce any records substantiating the \$2,000 per month the Plaintiff claimed he had been paying his sister to provide childcare while he was working for FMSS.

[84] With respect to the photograph referenced by the Plaintiff, FMSS acknowledges that there was a photograph of the Plaintiff on the partially submerged Truck circulated for training purposes. However, the Plaintiff's face was redacted, and he was unidentifiable in the photo. The Defendants therefore submit that the Plaintiff's claim this photograph made it harder for him to secure alternate employment is unfounded.

[85] Finally, the Defendants submit that the determination of this issue will require *viva voce* evidence and is not suitable for summary judgment, as the Plaintiff's evidence regarding his assumption of childcare responsibilities after he was terminated is not credible.

[86] Once again, to evaluate the failure to mitigate defence raised by the Defendants on this summary judgment application, I will assume that FMSS' evidence on disputed facts is correct. For example, with respect to the issue of the photograph, I must assume that the photograph that was produced by FMSS and in which the Plaintiff's face is obscured was the same photograph that was circulated and therefore, had no impact on the Plaintiff's job search. The Plaintiff did not produce any evidence to the contrary. I will also consider any agreed facts, any admissions that have been made and the Plaintiff's unchallenged evidence on non-contentious matters: *McDonald* at para 104.

[87] In my view, this matter can be resolved without the Court having to make a finding as to whether it was necessary for the Plaintiff to take on childcare responsibilities for the family after he lost his employment.

[88] The undisputed evidence of the Plaintiff is that, prior to starting his employment as a taxi driver 16 months after he was terminated, he applied for just 4 positions in the 12-month period immediately following his termination. This is relevant as 12 months is the reasonable notice period alleged by the Plaintiff in his Statement of Claim. Only two of the applications were for FLT positions and the other two were for mail carrier positions.

[89] It is also undisputed that other FLT positions became available during this period. Mr. Rodrigues attached copies of various job postings to his Affidavit which corroborate his claim that almost every employer required a Class 1 or Class 3 license for this position. Again, the unchallenged evidence of the Plaintiff is that he had a Class 5 license and could not afford the significant cost to complete the additional training and certification required for these positions.

[90] The Plaintiff's evidence was that, while he searched *continuously* for alternative employment, when he was unable to find a similar position that would accept his qualifications, he began to look for a job closer to town and one that was more flexible. Although the Defendants argue that the Plaintiff removed himself from the "comparable job market" by assuming the childcare responsibilities for his family, there is no evidence before the Court to suggest that there actually was a comparable job market. Mr. Rodrigues was not qualified for the other FLT positions that came available and could not afford to obtain those qualifications. I therefore find that the Defendants have failed to satisfy the first step of the test and have not proven, on a balance of probabilities, that the Plaintiff's job search efforts after being terminated by FMSS were unreasonable.

[91] However, even if I had found that FMSS had satisfied the first step of the test, I also conclude that the Defendants have not met the second part of the test. The second step requires that the Defendants also demonstrate, on a balance of probabilities, that the Plaintiff would have found a comparable position had he searched for it. Typically, when the defence of failure to mitigate is raised by an employer in a wrongful dismissal claim, the employer presents the Court with evidence of other job postings during the relevant time period that the former employee was qualified for, but did not apply for. The Defendants in this case have provided no evidence whatsoever in respect of this second step.

[92] I therefore conclude that FMSS has not established, on a balance of probabilities, that the Plaintiff failed to take reasonable steps to secure alternate employment and did not mitigate his damages. I find there is no merit to the Defendant's failure to mitigate argument and therefore, FMSS has failed to establish a genuine issue requiring a trial.

Is it possible to summarily resolve the Plaintiff's claim?

[93] I have already determined that the Plaintiff discharged his initial burden and that FMSS did not establish a genuine issue for trial with respect to either its' just cause defence, or its claim that the Plaintiff failed to mitigate his damages. I must now consider whether it is possible to resolve the Plaintiff's claim on a summary basis and, whether it is appropriate for me to do so. I conclude that is both possible and appropriate.

[94] The Defendants maintain that a trial is necessary due to a dispute over material facts; more specifically, the determination of whether or not the front of the Truck hit a sink hole or dipped down

suddenly which caused it to stall. The Defendants also argue that a trial is necessary to assess Mr. Rodrigues' credibility, particularly in relation to his efforts to secure alternate employment.

[95] For the reasons I have already outlined, I have concluded that it is not necessary to resolve this claim to determine the exact reason the Truck stalled in the water, or to further assess the Plaintiff's credibility in relation to his evidence regarding the childcare responsibilities he took on after he was terminated.

[96] The Defendants also submit that a better evidentiary record will be available at trial. But what that further and better evidence might be is unclear. This incident occurred 5 years ago. Both the Plaintiff and the representative for the Defendant filed extensive Affidavits and were questioned on those Affidavits under oath. On an application such as this, the Defendants are obligated to put their "best foot forward" and cannot rely on a vague assertion that more, or better evidence might show up before trial as a basis for resisting summary judgment: *Canada (Attorney General) v Lameman*, 2008 SCC 14, at para 19.

[97] I am satisfied that the record before me is sufficient to permit me to make the necessary findings of fact and to apply the law to those facts. I am also satisfied that this process has been fair to both parties and that a summary disposition of this claim will not cause any procedural or substantive injustice to either party. Certainly, it is more expeditious and less expensive than a full trial.

[98] I find that FMSS wrongfully terminated the Plaintiff without notice and that the Plaintiff is therefore entitled to damages.

Issue #2 – Is it possible and/or appropriate to summarily determine the Plaintiff's claim for damages?

[99] In his Statement of Claim, the Plaintiff sought damages in the amount of \$87,017.76, the equivalent of 12-months pay in lieu of notice. However, in the Plaintiff's written argument and at the hearing, the Plaintiff submitted that damages equivalent to 15 months' pay in lieu of notice, or \$137,505.00, is the proper amount.

[100] Additionally, the Plaintiff claims \$2,622.45 for unpaid wages covering the period from June 8 2020 to June 20, 2020 during which he was suspended without pay, \$25,000 in punitive damages and a further \$1,000 in special damages to cover costs of mitigation, specifically for obtaining a Class 4 license for the taxi job.

[101] FMSS did not argue damages could not be assessed summarily, except for its mitigation defence, which I have already dealt with.

[102] I am satisfied, for the reasons below, that it is possible and appropriate to summarily determine the Plaintiff's claim for damages. The record before this Court allows me to make the necessary findings of fact, to apply the law to the facts and summary judgment is a proportionate, more expeditious way and less expensive means to achieve a just result: see *Weir-Jones* at para 21.

[103] I will now address each of the heads of damage sought by the Plaintiff.

A. Damages in lieu of reasonable notice

[104] If wrongful dismissal is proven on a balance of probabilities, the remedy sought is typically damages. The purpose of damages in lieu of reasonable notice is to put the employee in the position they would have been in had they continued to work through to the end of the notice period: see *Matthews v Ocean Nutrition Canada Ltd.*, 2020 SCC 26.

[105] Damage awards in wrongful dismissal cases are determined based on what an appropriate notice period ought to have been for that employee. At its heart, the period of reasonable notice attempts to estimate, as of the date of termination, the time period it will take the employee to find commensurate employment: see *Stonham v Recycling Worx Inc*, 2023 ABKB 629, at para 110 citing *Alberta Computers*, at para 60.

[106] The parties agree that damages in lieu of reasonable notice is the appropriate remedy.

[107] The decision of *Bardal v Globe & Mail Ltd.*, 1960 CanLII 294 (ONSC), 24 DLR (2d) 140 [*Bardal*] at page 145 sets out a list of factors for the Court to consider in determining an appropriate notice period. The considerations underlying these factors were described by Justice Graesser in *Nelson v Champion Feed Services Inc.*, 2010 ABQB 409, at para 87 as follows:

1. the nature of the employment - the more senior the position the longer it is likely to take to find a replacement position;
2. the length of service - the longer an employee has worked for one employer, the more difficult it may be to find an alternate job either because the employee has narrowed his or her skills by working for one employer for a long time, or the employer has been paid more than the job is worth because of long service;
3. the age of the employee - the older the employee is, the less likely they are to find a suitable position, or the longer it is likely to take. Older employees are sometimes perceived as less worthwhile to invest in;
4. the availability of suitable similar employment having regard to the employee's experience, training and qualifications together with surrounding economic circumstances - what is the realistic prospect of this employee getting a similar replacement job? In good economic times, jobs may be plentiful, and the employee may have little difficulty finding a good replacement job; in poorer times, there may be few jobs to be found.

[108] The *Bardal* factors are not exhaustive but provide a framework from which to consider the circumstances of a constructive dismissal case.

i. Nature of the employment

[109] Mr. Rodrigues began his employment with FMSS in 2008 as a FLT. While employed by FMSS, he also held positions as an FLT Coach and as a Shovel Mechanics Helper before returning to his original role as a FLT in 2019 where he remained until his termination. His job responsibilities as a FLT working in the mines included servicing light plants, generators and support equipment; providing training as needed; driving one-ton trucks and wiggle wagons; performing maintenance; operating a bobcat and leader; building and maintaining relationships with external partners.

[110] The position was that of a labourer, with no management or supervisory responsibilities. The skills required are relatively transferrable, not technical or specialized, making it easier to find other

employment. Therefore, the nature of the Plaintiff's job does not warrant an upward adjustment to the reasonable notice period.

ii. Length of service

[111] Length of service is usually a major factor in assessing reasonable notice, with longer services tending to give rise to longer periods of reasonable notice: see *Hunsley v Canadian Energy Services LP*, 2020 ABQB 724 at para 20.

[112] Mr. Rodrigues was employed by the Defendants for approximately 12 years, which is considered a moderate amount of time.

iii. Age

[113] Mr. Rodrigues was 42 years old when he was terminated, making his age a neutral factor. There was also evidence that English was not the Plaintiff's first language and that he had some difficulty communicating effectively in this language.

iv. Availability of Similar Employment

[114] The fourth *Bardal* factor is broad. It overlaps with the other factors because they all relate to the availability of similar employment. Specific circumstances sometimes are considered under this category, such as qualifications, experience, specialization, managerial position, remuneration and economic conditions: see *Hunsley v Canadian Energy Services LP*, 2020 ABQB 724 [*Hunsley*] at para 24.

[115] Mr. Rodrigues argues the Court should consider the impact that the Covid-19 pandemic had on the economy, and the oil and gas sector in particular, when considering the comparable replacement employment that was available at that time.

[116] FMSS submits that no evidence was led of any decline in the oil and gas industry or any challenges experienced by that industry as a result of the Covid-19 pandemic. The Defendants further submit that the Covid-19 pandemic is not a factor that ought to be considered under the *Bardal* factors but rather under mitigation efforts, if at all, citing *Kosteckyj v Paramount Resources Ltd.*, 2021 ABQB 225 [*Kosteckyj*]. I reject that argument. Economic conditions can be considered under the fourth *Bardal* factor. In *Kosteckyj*, the Court found it appropriate to consider that the plaintiff had been constructively dismissed during an economic downturn in the Alberta oil and gas industry in 2020 and during the Covid-19 pandemic in determining the appropriate notice period for the employee.

v. Comparable cases

[117] The Plaintiff relied upon the following case authorities in support of a 15-month notice period:

- a) *Beaudoin v Agriculture Financial Services Corp*, 2018 ABQB 627: a notice period of 14 months was awarded to a 54 year old product specialist after 15 years employment.
- b) *Carbone v Syncrude Canada Ltd*, 1997 CanLII 14863 (ABKB): a notice period of 15 months was awarded to a 47 year millwright/hands on technician who moved up to management after 15 years employment.
- c) *Kraft v Firepower Financial Corp*, 2021 ONSC 4962: a specialized commissioned salesperson was awarded a 10 month notice period after 5.5 years employment.

- d) *Hunsley v Canadian Energy Services LP, 2020 ABQB 724*: an 8 month notice period was determined appropriate for a 34 year old, technical qualified oilfield employee after 7 years, 7 months employment.

[118] FMSS submitted three cases in support of a notice period of 8 months:

- a) *Panimondo v Shorewood Packaging Corporation, 2009 CanLII 16744 (ONSC)*: a 46 year Pressman was given a notice period of 9.5 months after 11 years employment.
- b) *Schmidt v Saskatchewan Oil & Gas Corp, 1993 CanLII 8966 (SKKB)*: a 47 year old Senior Operator employed for 12 years was given a notice period of 10 months.
- c) *Morris v Rockwell International of Canada Ltd, 1993 CarswellOnt 950, [1993] OJ N 875 (ONSC)*: a 50 year old Laboratory/Test Technician with 11 years of service was given a notice period of 10 months.

vi. Reasonable notice period for Mr. Rodrigues

[119] In Alberta, a notice period of 24 months is the informal upper limit recognized by our Courts: *Carroll v Atco Electric Ltd., 2018 ABCA 146* at para 40.

[120] Ultimately, the determination of the reasonable notice period in a wrongful dismissal case is very fact specific. In this case, the most significant factor that tends towards a shorter notice period for Mr. Rodrigues is the nature of his employment, which did not require a specific skill set and had no management or supervisory responsibilities. In my view, the Plaintiff's age at the time of his dismissal is a neutral factor. The factors which support a longer notice period include that his dismissal came during the Covid-19 pandemic and that there were only a limited number of similar positions that the Plaintiff was actually qualified for. Additionally, Mr. Rodrigues worked for FMSS for 12 years, which is a fairly length period of time. For these reasons, I set the notice period at ten (10) months.

vii. Calculation of damages during notice period

[121] The best evidence before the Court is the Plaintiff's 2020 T4 slip from FMSS which confirms total earnings of \$49,051.77 to June 7, 2020, a period of approximately 23 weeks. This extrapolates to \$110,899.65 for the year, or \$9,241.64 per month.

[122] There is no evidence before the Court that overtime would have been paid to Mr. Rodrigues, or in what amount. I decline to award any.

[123] I have determined that the Plaintiff was entitled to a notice period of 10 months starting on June 18, 2020. This I therefore award the Plaintiff damages for loss of pay in the sum of \$92,416.40.

B. Damages for unpaid wages

[124] Mr. Rodrigues claims the further sum of \$2,622.45 for unpaid wages between the dates of June 8 and June 18, 2020 when he was suspended without pay while FMSS completed their investigation. FMSS did not dispute the quantum of the Plaintiff's unpaid wage claim, just his entitlement to it.

[125] Absent there being just cause to dismiss an employee, the common law provides "if there [is] no agreement to such an effect, no employer [has] a right to suspend an employee for a breach of a term of

his employment and deprive him of his wages for the period of his suspension": *Earle et al v Liquor Control Commission (NB)*, (1969) 5 DLR (3d) 743 (NB CA) at 748; see also *Rooney v GSL Chevrolet Cadillac LTD*, 2022 ABKB 813 [*Rooney*] at para 62.

[126] I have found that FMSS did not have just cause to terminate Mr. Rodrigues. I must therefore determine whether FMSS had the authority, under any express or implied terms of Mr. Rodrigues' employment contract, to suspend him without pay: see *Rooney* at para 60. I conclude they did not. FMSS' Policy does indicate that if circumstances warrant it, an employee may be placed on suspension pending the outcome on an investigation. However, the Policy does not expressly state that the suspension can be *without pay*. Nor did FMSS argue that there was an implied term in the Plaintiff's employment contract which would allow this. Therefore, I find that Mr. Rodrigues is entitled to the further sum of \$2,622.45 for unpaid wages during his period of suspension.

C. Punitive damages

[127] The Plaintiff is seeking \$25,000.00 in punitive damages from the Defendants. A claim for punitive damages is distinct from a claim for aggravated damages.

[128] Aggravated damages are available to an employee where the employer engages in conduct during the course of dismissal that is "unfair or is in bad faith by being, for example, untruthful, misleading or unduly insensitive": see *Keays v Honda Canada Inc.*, 2008 SCC 39 [*Keays*] at para 57. They are still compensatory in nature.

[129] Until *Keays*, aggravated damages were commonly referred to as "Wallace damages" (following the Supreme Court of Canada's decision in *Wallace v United Grain Growers Ltd*, 1997 CanLII 332 (SCC), [1997] 3 SCR 70) and justified an extension to the reasonable notice period. However, since *Keays*, damages for bad faith are not provided by extending the reasonable notice period and instead, are calculated as a separate amount.

[130] In *Gerling v Camrose Regional Exhibition & Agricultural Society*, 2022 ABCA 210, at paras 45-46 [*Gerling*], our Court of Appeal explained this shift in approach:

[45] The Supreme Court in *Wallace v United Grain Growers Ltd*, 1997 CanLII 332 (SCC), [1997] 3 SCR 701, paras 91-95, 98, 103, 152 DLR (4th) 1, determined that an employer has an obligation of good faith and fair dealing when terminating an employee as a result of the power imbalance between the two, the breach of which justifies an extension to the reasonable notice period. Resulting damages are commonly known as "Wallace damages". In the course of dismissal, "employers ought to be candid, reasonable, honest and forthright . . . and should refrain from engaging in conduct that is unfair or is in bad faith by being, for example, untruthful, misleading or unduly insensitive."

[46] In *Honda Canada Inc v Keays*, 2008 SCC 39, paras 50-56, [2008] 2 SCR 362, the Supreme Court determined such injuries would not be compensated in the form of an extension to the notice period, but calculated as a stand-alone sum. It said that such damages would not arise from the "normal distress and hurt feelings resulting from dismissal" but only if the conduct of the employer at the time of the dismissal was egregious or outrageous. The shift from the Wallace to Keays approach represents a tightening of the circumstances in which employees may be awarded such damages. For example, in *Lavallee v Siksika Nation*, 2011 ABQB 49, paras 141-142, [2011] 6 WWR 122, the court refused to award additional damages, despite the method of dismissal

being disproportionately severe, as there was no evidence the employee had suffered mental distress as a result of the employer's misconduct.

[131] Punitive damages are restricted to advertent wrongful acts that are so malicious and outrageous that they are deserving of punishment on their own. Punitive damages are exceptional and the Court's discretion to award them is to be cautiously exercised. Conduct meriting such an award must be harsh, vindictive, reprehensible and extreme: is": *Keays*, at para 62.

[132] The Plaintiff's claim in this case is for punitive, not aggravated damages. Mr. Rodrigues notes that FMSS failed to provide him with the opportunity to provide his side of the incident; terminated him over the telephone rather than providing a written notice of termination; terminated him without cause and knew as much by making reference to a "no tolerance" policy that did not exist; disseminated a photograph of Mr. Rodrigues standing on the partially submerged Truck that caused emotional distress and humiliation; and terminated him during the Covid-19 pandemic.

[133] Following the incident, FMSS did conduct an investigation. Mr. Rodrigues provided a Witness Statement on June 7, 2020 and an Incident Investigation Interview was conducted on June 8, 2020. While I accept that the Defendants did not follow their own policy and Mr. Rodrigues was not given the opportunity to meet with a supervisor after their investigation was completed to provide his side of the story, I do not find the conduct of FMSS to be so egregious that it would justify an award of punitive damages.

[134] Regarding the photograph, there is no evidence to substantiate the Plaintiff's claim that an unredacted photograph showing Mr. Rodrigues' face was disseminated by FMSS.

[135] I do accept that Mr. Rodrigues felt some humiliation, anxiety and stress following his dismissal. However, he did not seek treatment from a doctor or a counsellor to address any of these conditions and, these assertions, without more, are insufficient to justify punitive damages.

[136] I conclude that Mr. Rodrigues has not demonstrated that FMSS' conduct was so malicious or outrageous to award punitive damages. For the same reasons, the evidence before the Court would not justify an award for aggravated damages, had they been claimed.

D. Mitigation expenses

[137] Mr. Rodrigues needed to obtain a Class 4 drivers' licence in order to work as a taxi driver. He commenced this new job 16 months after his termination by FMSS. The Plaintiff argues that the cost of obtaining the Class 4 drivers' license was a mitigating step and therefore, he should be reimbursed \$1,000 for expenses he incurred to obtain that license.

[138] During his cross-examination on Affidavit, Mr. Rodrigues stated that a knowledge test and a road test were required for him to obtain the license. He successfully passed both exams and secured the Class 4 licence.

Other than his testimony at the questioning on Affidavit, Mr. Rodrigues did not provide any evidence to support the \$1,000 expense claimed. I also note that this expense appears to have been incurred well outside what I have determined was the reasonable notice period, that being 10 months. For these reasons, I decline to award damages for mitigation costs.

Issue #3 – Has the Plaintiff satisfied the test for summary dismissal of the Defendants' counterclaim?

[139] FMSS has counterclaimed for \$19,419.96 in damages against Mr. Rodrigues resulting from the Truck being out of service for 61 days. The damages are strictly for the Defendants' alleged loss of profit as a result of not being able to use the Truck during this period, not for any damages to the Truck, or repair expenses for the Truck. As previously noted, the Truck was owned by CNRL and the Defendants acknowledge that CNRL did not seek reimbursement for repair expenses, or compensation for any damage that may have been caused to the Truck as a result of this incident.

[140] FMSS seeks summary judgment under rules 7.2 and 7.3 of the *Rules of Court* for the full amount claimed of \$19,419.96. Mr. Rodrigues seeks summary dismissal of the counterclaim.

[141] FMSS concedes that although typically an employer cannot bring a claim against an employee for "ordinary negligence", in this case Mr. Rodrigues expressly agreed to comply with FMSS' Damage to Company and Personal Property Policy which provides that employees will be held personally responsible for indemnifying FMSS for any losses or damages caused by the employee's negligence or intentional acts. FMSS therefore submit that the standard of "ordinary negligence" should apply to Mr. Rodrigues' conduct in this case and that his decision to drive the Truck into the water was negligent, intentional and reckless and clearly meets this test.

[142] Given my findings above, I do not find that FMSS has demonstrated that Mr. Rodrigues' conduct rises to the level of negligence, either "ordinary negligence" or an intentional negligent act. Even if FMSS had proven that the terms of the Policy were enforceable and had proven negligence, FMSS failed to provide sufficient evidence to support their claim for damages for loss of profit.

[143] In *Tesla Exploration Ltd v Encana Corporation*, 2018 ABQB 286 the Court noted that the "best foot forward principle" in the context of summary judgment applications is very much part of the law in Alberta. Similar to that case, both parties here are facing summary judgment applications and therefore, both parties have an obligation to put their best foot forward in response and to ensure that the record is sufficient to dispose of the case in their favour.

[144] FMSS' damages for loss of use of the Truck were calculated using an hourly rate of \$15.16 multiplied by 21 hours per day for 61 days, for a total loss of \$19,419.96. Mr. Grant's evidence is that \$15.16 is an estimate of FMSS' approximate profit per hour. The actual hourly amount that they charge CNRL has other components built into it such as wages for the FLT, benefits and overhead costs.

[145] The 21 hours a day estimated by Mr. Grant assumes the Truck is used during both 12-hour shifts every day. Mr. Grant reduced the total of 24 hours per day by 2 hours for anticipated breaks and a further 1 hour for "toolbox talks" and travel time. He indicated that charging CNRL 21 hours per day would be fairly typical for billing purposes.

[146] Other than this calculation offered by Mr. Grant in his Affidavit, no further evidence as to quantum of damages is before the Court. FMSS did not provide any documentary evidence to support how the hourly rate was arrived at. No evidence was tendered showing that the Truck would have been utilized for 21 hours a day during this time period, or any evidence of prior billing for the Truck.

[147] CNRL completed the repairs on the Truck. FMSS claims that the uncontested evidence is that the Truck was out of service for 61 days. However, FMSS was unable to provide any evidence to support how long it actually took CNRL to complete the repairs. Additionally, no evidence was tendered showing the extent or nature of the repair work performed.

[148] Mr. Rodrigues had completed a pre-trip inspection of the Truck and noted that the “check engine” light was on. The logbook confirmed that this indicator light being on had previously been reported as well. No evidence was tendered showing the nature and extent of the repair work that was ultimately performed on the Truck, or whether the required repairs were even related to any actions taken by Mr. Rodrigues.

[149] Finally, during cross-examination on his Affidavit, Mr. Grant acknowledged he was unaware of whether or not there were other trucks available for use during these 61 days, or whether or not any efforts were made to rent or acquire a different truck.

[150] FMSS must put its best foot forward in bringing its application for summary judgment. I find that the Defendants have not met their initial burden of establishing that the Plaintiff’s actions were the cause of any damages they suffered and further, that the Defendants have not proven what those damages were. The evidence provided by FMSS is insufficient to establish a claim against Mr. Rodrigues. It is therefore unnecessary for me to decide what impact, if any, FMSS’ Policy had on the standard of negligence that would be applicable in this case.

[151] I find that Mr. Rodrigues has satisfied the test for summary dismissal of the Defendants’ counterclaim.

VI. Overall Conclusion

[152] In summary, I find that:

- a) The Plaintiff was wrongfully dismissed by the Defendants.
- b) The reasonable notice period is 10 months.
- c) The Plaintiff is entitled to damages in lieu of reasonable notice in the sum of \$92,416.40.
- d) The Plaintiff is entitled to \$2,622.45 for unpaid wages.
- e) The Plaintiff’s claim for punitive damages is dismissed.
- f) The Plaintiff’s claim for mitigation costs is dismissed.
- g) The Plaintiff is entitled to pre-judgment interest pursuant to the *Judgment Interest Act*.
- h) The Defendants’ counterclaim is dismissed.

[153] The parties did not make submissions on costs. If they cannot agree, they are to contact my Judicial Assistant within 30 days so that arrangements can be made for further submissions on that issue.

[154] I would like to thank counsel for the professional and respectful manner in which the hearing was conducted and also for their very well-drafted written materials.

Heard on May 16, 2025.

Dated at the City of Edmonton, Alberta this 8th day of July 2025.

D. J. Kiss
J.C.K.B.A.

Appearances:

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