

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Gent v. Askanda Business Services Ltd.*,
2025 BCSC 1278

Date: 20250709
Docket: S243235
Registry: New Westminster

Between:

Bradley Hunt Gent

Plaintiff

And

Askanda Business Services Ltd.

Defendant

Before: The Honourable Justice Marzari

Reasons for Judgment

Counsel for the Plaintiff:

J. Davidescu

Representative for the Defendant Company,
appearing in person:

J. Hollands

Place and Dates of Trial:

New Westminster, B.C.
April 28–29, 2025

Place and Date of Judgment:

New Westminster, B.C.
July 9, 2025

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INTRODUCTION

[1] The plaintiff, Mr. Bradley Gent, sues his former long-term employer, Askanda Business Services Ltd. (“Askanda”), for wrongful dismissal after he was not called back to work after the COVID-19 pandemic shut down the industry he worked in.

[2] His former employer, Askanda, is in the business of selling and servicing draft beer equipment. Askanda is owned and operated by Mr. Jeremy Hollands. Mr. Gent performed the majority of the servicing work for Askanda, attending at various pubs and restaurants one to four times a month to clean and service their draft beer equipment, and had done so since 1987 when he first met Mr. Hollands and began working for Askanda. He was the sole employee of Askanda for many of these years. He was laid off and ceased to work for Askanda in March 2020, when the COVID-19 pandemic shut down all of Askanda’s clients for an extended period of time. He never returned.

[3] At issue in this short trial was whether Mr. Gent was wrongfully dismissed from Askanda as a result of not being called back after his statutory lay-off period expired, or whether he voluntarily resigned and retired. Mr. Gent says that he never retired and was still waiting for Mr. Hollands to call him back to work more than a year later, when he realized he was probably entitled to severance pay. Mr. Hollands says that Mr. Gent called him in May 2020 to advise him that he had decided to move to Langley with his family and retire. Mr. Hollands says that, had he believed Mr. Gent was still available to work when Askanda’s clientele began operating again a year later, he would have called Mr. Gent back to work.

[4] This trial primarily turns on the question of whether Mr. Gent called Mr. Hollands and resigned in May 2020, as Mr. Hollands says, or whether he did not, as Mr. Gent says. It also turns on what is expected of employers at law in this regard, and what remedies and damages might be available to Mr. Gent should I find that he did not resign. To this end, I consider the following issues:

- a) Did Mr. Gent resign from his employment in May 2020?

- b) Was Mr. Gent wrongfully dismissed?
- c) If Mr. Gent was wrongfully dismissed, what was his termination date?
- d) If Mr. Gent was wrongfully dismissed, what is the reasonable notice period to which he is entitled pursuant to the common law?
- e) How should Mr. Gent's damages be calculated over the reasonable notice period for wrongful dismissal?
- f) Has Askanda met its burden to establish that Mr. Gent failed to mitigate his damages?
- g) Is Mr. Gent entitled to punitive damages for Askanda's breach of its duty of good faith in the manner of termination?

[5] For the reasons set out below, I find that Mr. Gent did not clearly and unequivocally resign in May 2020, and that he was wrongfully dismissed when he was not called back or asked to extend his layoff period at the end of August 2020. Although his termination for the purposes of statutory notice under the *Employment Standards Act*, R.S.B.C. 1996, c. 113 [ESA] is deemed to be his lay off date, determining the date of termination for the purposes of damages in wrongful dismissal is more nuanced. I find Mr. Gent's termination date is the date that he would likely have returned to work had the offer been made to him: September 1, 2021.

[6] Given Mr. Gent's lengthy term of employment and likely difficulty in obtaining other employment, his notice period would ordinarily be a long one. However, I find that Mr. Gent had intended to retire, regardless of Askanda's actions, on or shortly after his 65th birthday in February 2022, and that his damages in wrongful dismissal are therefore limited to 6 months.

DID MR. GENT RESIGN?

[7] Askanda's entire defence to this claim is Mr. Hollands' testimony that Mr. Gent told him he was retiring in May 2020. Mr. Gent denies doing so. Much therefore depends on the credibility and reliability of these two witnesses, who were the only witnesses in this short trial.

Credibility and Reliability

[8] Unfortunately, I did not find either Mr. Gent nor Mr. Hollands to be entirely reliable in their testimonial account of their dealings in 2020 and 2021.

[9] I found Mr. Gent to be a humble and unassuming man, who conceded many points against him without defensiveness, and appeared to bear no grudge against Mr. Hollands or Askanda. However, I find that his memory of events was not always clear, and that he relied significantly on documents to aid his recollection.

[10] I also found elements of Mr. Gent's testimony to be unreliable, including his testimony that he had called Mr. Hollands in August 2020 to discuss Askanda's current business and the time frame for his return to work. I find that this evidence is based almost entirely on a log of his phone calls from that month showing a 1-minute call to Mr. Hollands' number. However, one minute is the same length of call that is shown for several other calls he made to Mr. Hollands in March 2020 which he described as going to voicemail or otherwise not completing. Mr. Hollands denies receiving a call from Mr. Gent in August 2020.

[11] The evidence establishes that Mr. Gent and Mr. Hollands were not only in an employer/employee relationship but were also friendly long-term work colleagues who used to work together every day, attend birthdays and celebrations, and in August 2020, had not seen or talked to each other since May 2020. Mr. Gent is not a blunt or terse man. Overall, I find that it is highly implausible that Mr. Gent could have greeted Mr. Hollands, discussed the state of Askanda's business in light of the pandemic, and the prospects of when he might return to work in the course of this 1-minute call. I reject his evidence in this regard.

[12] As earnest as Mr. Gent presented, I also find that in his testimony he understated a 2013 time-sheet discrepancy as a one-time occurrence, when the evidence establishes that he overbilled Askanda several times for hours that he did not work in 2013. He admitted to doing so when confronted by Mr. Hollands and worked those hours off long before 2020. Nevertheless, I find he was not entirely forthcoming in his testimony regarding the extent of his behaviour at that time.

[13] I therefore find that I cannot entirely rely on Mr. Gent's testimony.

[14] However, I also find that I cannot rely on many aspects of Mr. Hollands' testimony. Repeatedly throughout his testimony, rather than providing evidence of what he actually said or did, he instead made statements about what logically he would have said or done had Mr. Gent not told him he had retired. I found it difficult to extract factual information from his testimony, much of which was argument.

[15] Of particular concern was a set of letters Mr. Hollands presented to the Court dated October 1, 2021. Askanda produced these letters, signed by Mr. Hollands, years later, and Mr. Hollands presented them as evidence on their face that he had cancelled \$1,800/month of work from "good paying customers" that would have been available to Askanda had Mr. Gent still been working for Askanda, but that he was forced to give up and cancel because he could not do the work on his own. He argued these letters were proof that he would have continued to employ Mr. Gent as of October 2021, had Mr. Gent not told him he was retiring in May 2020.

[16] However, on closer look and as established in cross-examination, all of these letters are addressed to clients that Askanda had done no work for since before March 2020. They do not, in fact, cancel any ongoing contracts with "good paying customers". Nor was Mr. Hollands clear in his evidence regarding when he wrote or sent these letters.

[17] I was left with serious doubts that these were anything more than self-serving letters, perhaps even drafted after the fact, to try and prove a point in this litigation, consistent with Mr. Hollands' argumentative pattern of evidence. Even if they were

real letters sent to extant clients, they do not demonstrate the loss of business Mr. Hollands suggests they did.

[18] There were other aspects of Mr. Hollands' testimony, for example about his reaction to Mr. Gent's alleged declaration of retirement in May 2020, that had the tenor of after-the-fact construction, rather than a true recollection of events.

[19] In the end, I find I must approach the testimony of both witnesses in this case with caution. I rely more on their established conduct at the relevant times, the documentary evidence that I have accepted, and how their evidence accords, or does not accord, with the preponderance of probabilities in this case: *Faryna v. Chorny*, [1952] 2 D.L.R. 354, 1951 CanLII 252 (B.C.C.A.).

[20] I turn then to the question of whether Mr. Gent told Mr. Hollands he was retiring in May 2020, as Mr. Hollands says he did, and which Mr. Gent denies.

Factual Findings

[21] In 1987, Mr. Hollands hired Mr. Gent at a time when Mr. Gent was unemployed and seeking work, and Mr. Gent became Askanda's first employee. At one point, Mr. Gent was one of many employees, but for many years before the pandemic, he was the only remaining employee, and he performed the bulk of Askanda's servicing work.

[22] Mr. Gent worked part time and on an hourly basis, and his income depended on the amount of work there was to do. In the three years prior to March 2020, he earned an average of just over \$29,000 annually.

[23] Mr. Gent and Mr. Hollands were friendly with each other. Mr. Hollands would get gifts for Mr. Gent on his birthday and invited him to Christmas dinner when Mr. Gent did not have family around. Mr. Hollands commemorated each decade of Mr. Gent's employment with gifts and acknowledgements.

[24] Mr. Gent testified, and I accept, that he firmly intended to retire at 65 when he would be entitled to receive OAS and CPP. However, both he and Mr. Hollands

agree that he never discussed this date with Mr. Hollands specifically. Every now and then retirement would come up, and Mr. Gent had promised he would give Mr. Hollands lots of notice so that he would not be left in the lurch before he retired.

[25] In March 2020, Mr. Gent was 63 years old. He also had three young children: two-year-old twins and a four-year-old.

[26] On or about March 18, 2020, Askanda temporarily laid off Mr. Gent, when bars and restaurants were locked down due to the COVID-19 pandemic. On that date, Mr. Hollands had suggested to Mr. Gent that he do his service rounds in preparation for a possible shut down, but Mr. Gent called Mr. Hollands shortly afterwards to tell him that their clients had all shut down. Mr. Hollands advised Mr. Gent that he would be laid off, and Mr. Gent accepted that situation.

[27] Mr. Hollands prepared and filed a Record of Employment (“ROE”) for Mr. Gent indicating that he was last paid on March 17, 2020, and that his expected date of recall was unknown. Mr. Gent applied for employment insurance and the Canada Emergency Response Benefit (“CERB”) and began receiving CERB payments not long thereafter.

[28] The next time Mr. Gent and Mr. Hollands spoke was May 31, 2020. This date was supported by Mr. Gent’s cell phone records showing a call that day. Mr. Gent says that he called Mr. Hollands to get a sense of when he might be able to return to work. Mr. Hollands testified that Mr. Gent instead told him that he had decided to move with his family to Langley and that “he might as well just retire”.

[29] Mr. Hollands testified that he took those words as Mr. Gent advising Askanda that he was retiring. Although Mr. Hollands testified he was “shocked” by this news, Mr. Hollands agrees he did not ask any follow up questions of Mr. Gent. He did not ask for clarification or for Mr. Gent’s time frame.

[30] After the phone call, neither Askanda nor Mr. Hollands followed up with Mr. Gent with respect to this statement. Nor did Askanda prepare a revised ROE showing Mr. Gent as retired instead of as laid off. Mr. Hollands explained that this

was because it had taken him a long time on the phone in March 2020 to get a hard copy ROE form from the government and he did not want to go through that again. Also, he was aware that an updated ROE might affect Mr. Gent's entitlement to unemployment or CERB benefits.

[31] I find on the evidence that Mr. Hollands was aware that Mr. Gent was receiving CERB and that, for as long as he was laid off (and not retired) Mr. Gent might also be entitled to other benefits like Employment Insurance ("EI") payments.

[32] Mr. Gent's CERB benefits ran out at the end of August 2020, at which point he began receiving EI for one year. Mr. Gent was not sure how much he received in CERB benefits, but he testified to receiving \$20,000 in EI benefits in 2020 for a total income that year of \$28,260. This was not very different from what he had received while working for Askanda, and was, in fact, more than his annual employment income in 2019 and 2018.

[33] The evidence establishes that Mr. Gent received another \$19,000 in EI benefits in 2021 (which was his sole source of income that year). Although the evidence is not entirely clear on this point, I find that Mr. Gent ceased to receive EI benefits on or around September 1, 2021.

[34] Mr. Gent did not email or follow up with Mr. Hollands regarding his return to work after the May 31, 2020 call for more than a year. I find that Mr. Gent and Mr. Hollands did not speak again until early October 2021, when Mr. Gent called Mr. Hollands to see if he might be entitled to severance payments, after his wife mentioned that possibility to him.

[35] On that call, I find that Mr. Hollands told Mr. Gent he thought severance was unlikely, but that he would look into it. Mr. Hollands also told Mr. Gent that he thought Mr. Gent had retired. Mr. Gent did not ask for his job back, and Mr. Hollands did not offer to reinstate Mr. Gent's employment with Askanda.

[36] Mr. Gent then served notice of this claim in November 2021, pleading wrongful dismissal and seeking 2 years wages in lieu of notice and punitive damages.

Determination

[37] Considering all of the above, and despite Mr. Gent’s protestations to the contrary, I find that Mr. Gent likely said the words suggested by Mr. Hollands on the May 31, 2020 phone call to the effect that “he might as well retire”. However, I find that this evidence is not enough to establish that Mr. Gent intended to retire as of that date. Nor was it sufficient for Askanda to assume that Mr. Gent had unilaterally and voluntarily terminated his employment relationship with Askanda going forward.

[38] A finding of resignation requires the consideration of both subjective intent and objective conduct, considering both whether an employee intended to resign, and whether the employee’s words and acts, objectively viewed, support a finding that they resigned: *Beggs v. Westport Foods Ltd.*, 2011 BCCA 76 at paras. 36–37. As confirmed at para. 36 of *Beggs*, “voluntary resignation by an employee requires a clear and unequivocal act by the party seeking to end the employment relationship.”

[39] There is no evidence of such a clear and unequivocal act by Mr. Gent in this case. Neither Mr. Gent’s alleged words, nor his subsequent actions, establish a clear and unequivocal intention to resign at the end of May 2020. While Mr. Gent may have intended to retire in the future, he did not intend to resign as of May 31, 2020, and neither his words or acts, objectively viewed, support a finding that he resigned at that time.

[40] In this case, I find that some further step by Askanda, as the employer, was required to clarify Mr. Gent’s words at that time. With words as ambiguous as Mr. Gent’s were alleged to have been on May 31, 2020, it was incumbent on Askanda to inquire further as to Mr. Gent’s intentions, and to follow up in a timely way to confirm that information.

[41] Furthermore, I find that such an inquiry would likely have resulted in a clarification that Mr. Gent had no intention of resigning and giving up his rights to unemployment benefits at that time. Mr. Gent continued to collect CERB and unemployment benefits to the end of August 2021.

[42] The need to eliminate any uncertainty with regards to a resignation was emphasized in *Bishop v. Rexel Canada Electrical Inc.*, 2016 BCSC 2351. In *Bishop*, after a heated exchange between an employer and an employee, the employee said that he was “*not coming back*”. When asked if he was resigning, he replied “*yes*”, and when prompted by a further confirmation from the employer, he stated: “*yes I’m done*”. The employee even stated that he would draft a letter of resignation that night (but did not do so) and was told that his resignation was accepted: para. 37. The statements of the employee in *Bishop* were much clearer than the words alleged to be uttered by Mr. Gent in this case, but still this Court ruled that no resignation occurred because the employer had a duty to revisit and inquire about the employee’s statement of resignation after a “cooling off period” when the emotions of the exchange had subsided: see paras. 46–51.

[43] I find that Mr. Hollands was not entitled to rely on Mr. Gent’s much more equivocal statement, without clarifying that he was accepting that statement as indicating that Mr. Gent was retiring and, importantly, clarifying as of what date. His own evidence was that he did not ask anything at all in follow up. Mr. Hollands did not file an updated ROE, in part, I find, because he did not believe Mr. Gent actually intended to give up his unemployment benefits at that time, or in the near future. Mr. Gent would likely have been upset had Askanda filed such an ROE jeopardizing his benefits, and I find that Mr. Hollands must have known this too.

[44] Overall, I find that, while Mr. Gent might have been thinking about retirement in May 2020 in light of the COVID-19 pandemic and his decision to move to Langley, and likely mused about this possibility with Mr. Hollands in his May 31 phone call, Mr. Gent did not, in fact, intend to retire on that date. Instead, I accept Mr. Gent’s evidence that his firm intention was to retire when he turned 65, when he would be

able to collect various retirement and age-related benefits. On May 31, 2020, I find that Mr. Gent did not express a clear and unequivocal intention to Mr. Hollands regarding his retirement plans. Nor did Askanda take steps to follow up on this statement, including asking for clarification, confirming an effective date, or preparing a letter or revised ROE setting out Mr. Gent's termination for reasons of voluntary retirement.

[45] In summary, Mr. Gent did not resign.

WAS MR. GENT WRONGFULLY DISMISSED?

[46] I turn then to the question of whether Mr. Gent was dismissed. Dismissal also requires a clear and unequivocal act by the employer: *Beggs* at para. 36.

[47] It has been established in a number of cases that not recalling an employee back after a temporary layoff, where that employee has not agreed to an extension of the layoff period, is not only a statutory deemed termination, but also gives rise to a wrongful dismissal at common law: *Nicolas Jr. v. Ocean Pacific Hotels Ltd.*, 2022 BCSC 1052 at para. 22; *Blomme v. Princeton Standard Pellet Corporation*, 2023 BCSC 652 at para 70–73; *Yates v. Langley Motor Sport Centre Ltd.*, 2022 BCCA 398; and *Andrews v. Allnorth Consultants Limited*, 2021 BCSC 1246.

[48] During the state of emergency related to the COVID-19 pandemic, the maximum temporary layoff period under the *ESA* was extended from 13 weeks to 24 weeks pursuant to ss. 45.01(2) of the *Employment Standards Regulation*, B.C. Reg. 396/95, and up to August 30, 2020, for employees in Mr. Gent's position. Mr. Gent submits that any extension of his temporary lay off beyond that point required his consent, which Askanda did not seek or obtain.

[49] I find that Mr. Gent was not recalled on or before the statutory deadline of August 30, 2020. Nor was he recalled at a later date. I find that Mr. Gent was constructively dismissed by Askanda. The only reason for this dismissal was Mr. Hollands' incorrect belief that Mr. Gent had resigned in May 2020, and no notice was provided. The dismissal was therefore wrongful.

WHAT WAS MR. GENT’S TERMINATION DATE?

[50] Sections 1(1) and 63(5) of the *ESA* provides that, where an employee is not recalled to work at the expiry of their temporary lay-off period, their termination is effective as of the date of their initial lay-off. Mr. Gent submits that s. 63(5) of the *ESA* deems his termination date to be the beginning of his layoff period on March 18, 2020, at least for the purposes of a statutory remedy under the *ESA*.

[51] Mr. Gent acknowledges, however, that in British Columbia the deemed termination date in s. 63(5) applies only to *ESA* termination entitlements: *Nicolas Jr.* at para. 22; and *Blomme* at paras. 70–73. Pursuant to s. 63(3) of the *ESA*, Mr. Gent would be entitled to statutory damages of eight weeks wages as a result of such a breach. However, Mr. Gent is not pursuing this statutory remedy; he pursues instead a remedy at common law for wrongful dismissal.

[52] In British Columbia at common law, the termination date of an indefinite layoff is determined with regard to the reasonable expectations of, and fairness to, the parties, rather than the deeming provisions of s. 63 of the *ESA*: *Blomme* at paras. 70–79. The protection of the reasonable expectations of the parties is the overarching principle for determining a termination date for the purposes of the common law. This was explained by Justice MacNaughton in *Blomme* as follows as follows:

[75] In constructive dismissal cases, the employer has repudiated the contract of employment by its actions, and the employee accepts that repudiation as a termination. The termination date is the date the employee accepts the repudiation and that triggers the employer’s duty to offer pay in lieu of notice.

[76] The underlying principle is to protect the reasonable expectations of, and ensure fairness to, the parties. What amounts to a reasonable expectation depends on the circumstances: *Ansari v. British Columbia Hydro and Power Authority*, 2 B.C.L.R. (2d) 33 at 43, 1986 CanLII 1023 (S.C.), aff’d 55 B.C.L.R. (2d) xxxiii, [1986] B.C.J. No. 3006.

[...]

[78] Because the overarching principle is to protect the parties’ reasonable expectations, the court is not bound by a purely technical analysis of hiring and termination dates. In this case, August 30, 2020—the date of the deemed termination—is a reasonable date for the analysis.

[53] In *Blomme*, MacNaughton J. found the deemed termination date of August 30, 2020 for a COVID-related lay off under the *ESA* was a fair and reasonable date of termination at common law, even though neither Ms. Blomme nor her employer had intended to end her employment at this time, and Ms. Blomme's acceptance of the repudiating conduct (not recalling her before August 30, 2020) occurred nearly a month later. In *Yates*, the Court accepted the layoff date pursuant to the deeming provisions of the *ESA* (though in that case the wrongful dismissal was uncontested). In *Nicolas Jr.*, the Court did not accept the plaintiff's assertion that the date of termination was the date on which he was temporarily laid off; rather, the deemed termination date of August 30, 2020, was found to be the date of termination.

[54] Mr. Gent argues that using his original layoff date of March 18, 2020, or his deemed termination dates under s. 63(5) of the *ESA* would be reasonable and fair in his circumstances. He argues that fairness dictates that the employer should not benefit from knowingly disregarding its obligations under the *ESA* and leaving Mr. Gent in limbo about his employment status. He argues that by failing to request an extension to the layoff from Mr. Gent, Askanda tacitly acknowledged that (1) a longer layoff would serve no purpose as there was no intention of recalling Mr. Gent; and (2) that the Askanda knew that Mr. Gent would not agree to a longer period of layoff if he was made aware of his rights, and if Askanda complied with the *ESA*.

[55] I find that the evidence does not establish either of these propositions. I am not convinced that a longer lay off would have served no purpose in this case. Askanda had little to no work until May 2021 due to the COVID-related restrictions on draft beer services provided by its restaurant customers. The majority of the work Askanda did was servicing work, and that work was performed primarily by Mr. Gent.

[56] I find that Mr. Gent would most likely willingly have extended his layoff to the end of August 2021 had he been asked by Askanda to do so, and while he was still able to collect employment benefits roughly commensurate with his former employment income. Mr. Gent made no contact with Askanda after May 2020 to follow up on the availability of work or the end of his layoff. Instead, he testified he

was content to wait for Mr. Hollands to call him when work was available again, knowing it could be some time. Although Askanda may be faulted for not asking Mr. Gent to consent to this extended layoff, Mr. Holland's belief that Mr. Gent had retired, although incorrect at law, provides a reasonable explanation in this regard.

[57] I accept Mr. Hollands' evidence that had Mr. Gent been called back to work as a part-time, as needed, hourly employee, there would have been little work in his particular field of servicing draft beer equipment before bars and restaurants reopened for indoor eat-in services in May 2021. Even after that date, I accept Mr. Hollands' evidence that the demand for Askanda's services and availability of working hours came back slowly.

[58] In addition, Mr. Gent had moved to Langley with his young family, taking him much further from Askanda's clients, and I find that his call to Mr. Hollands in May 2020 was in part to communicate this decision.

[59] Mr. Gent testified that he was aware of the closures and limited work available but continued to believe that he might be called back to work all through 2020 and through most of 2021. Mr. Gent testified that it was not until October 2021 that he concluded that he would not be called back and considered that he had been dismissed. He gave many reasons for assuming that he was still going to be called back when there was enough work, and his general acceptance of that situation given the lack of work.

[60] Mr. Hollands points to the fact that, other than his phone call in May 2020, Mr. Gent did not call him again to ask about availability of work or coming back to work for the remainder of 2020 up until October 2021.

[61] I find that this was because Mr. Gent was receiving EI benefits roughly equivalent to his working salary, and there was no reason for Mr. Gent to insist on a return to work up before September 2021. He was content, throughout that time, to continue his lay-off and receive EI benefits. However, once those benefits ceased,

Mr. Gent realized that he had not, in fact, been called to back to work, and might be entitled to severance pay on that basis.

[62] I accept Mr. Gent's evidence that he did not realize that his job had been terminated until October 2021, and it was only at that point that he accepted the repudiation of his employment contract with Askanda.

[63] Overall, I find Mr. Gent would have willingly extended his layoff period had he been asked, based on his testimony that he was willing to wait throughout his benefits period until Mr. Hollands called him to tell him that work was available; the fact that his EI benefits were roughly equivalent to his pre-COVID part-time income; his income would likely have been less than his EI had he returned to work in 2020 or the first half of 2021; and that he was a primary caregiver to three pre-school age children in 2020.

[64] This is effectively a constructive dismissal case, where no dismissal was made but the employment contract was repudiated by Askanda failing to call Mr. Gent back to work. Ordinarily, the date of acceptance of that repudiation would be the date of termination.

[65] I find that the reasonable expectations of the parties and fairness dictate a later termination date than the termination date that arises by operation of the *ESA*, but earlier than the date that Mr. Gent accepted the repudiation of the employment contract by Askanda in October 2021.

[66] In this case, I find that the effective date for Mr. Gent's termination in this case is most equitably set at the date which I find he would most likely have agreed to continue the lay-off: September 1, 2021. Beyond that date, I consider that Askanda should be responsible for Mr. Gent's losses.

WHAT IS THE REASONABLE NOTICE PERIOD AT COMMON LAW?

[67] It is well established in British Columbia that employees are entitled to reasonable notice of termination of employment, both under the common law and

pursuant to the *ESA*. In British Columbia, an employee's *minimum* entitlements in this regard are guaranteed by way of the *ESA*. Absent an express contractual term to the contrary, an employee is also entitled to reasonable notice of termination pursuant to the common law, which often provides for a more extensive notice period and damages.

[68] The purpose of providing an employee with notice is to provide that employee “with an opportunity to take preparatory measures and seek alternative employment ... [and] is intended to “cushion” employees against the adverse effects of economic dislocation”: *Ostrow v. Abacus Management Corporation Mergers and Acquisitions*, 2014 BCSC 938 at para. 37, quoting *Ansari v. British Columbia Hydro and Power Authority*, 2 B.C.L.R. (2d) 33 at 43, 1986 CanLII 1023 (S.C.).

[69] Mr. Gent had no written employment agreement, and there is no evidence of an agreement that would oust his common law right to pursue damages in lieu of notice in an action for wrongful dismissal.

[70] Mr. Gent argues that he is entitled to a reasonable notice period of two years. Askanda pleads in its response to civil claim that a 1-year notice period would be reasonable, but Mr. Hollands withdrew that position at trial on behalf of Askanda, not willing to argue an alternative position beyond its primary position that Mr. Gent retired in May 2020.

[71] It is well established that the purpose of reasonable notice is to provide the employee with a fair opportunity to obtain similar or comparable re-employment. An award of damages is intended to put the employee in the position they would be in if they had received proper notice.

[72] The factors to be considered, when determining reasonable notice under the common law, were adopted by the Court of Appeal for British Columbia in *Ansari*. What constitutes reasonable notice will ultimately come down to what is objectively reasonable in the circumstances of each case. Key factors include the degree of

responsibility of the employment function, the employee's age, length of service and the availability of equivalent alternative employment.

[73] No single factor is determinative. The court must assess all relevant factors that are appropriate in the individual case: *Ostrow* at para. 38.

[74] Economic factors such as a downturn in the economy or in a particular industry or sector of the economy that indicate that an employee may have difficulty finding another position may justify a longer notice period: *Paquette v. TeraGo Networks Inc.*, 2015 ONSC 4189 at para. 27, rev'd on other grounds, 2016 ONCA 618. Employees in a niche industry may also have reduced opportunities for re-employment: *Nassar v. Oracle Global Services*, 2022 ONSC 5401 at para. 35. The availability of comparable employment is closely related to the character of the plaintiff's employment. Courts may infer that available similar employment is scarce where an employee's position is specialized in nature and where the employee required a significant amount of time to find alternative work: *Ostrow* at para. 54.

[75] A number of these factors tend to support a longer period of notice for Mr. Gent, including his age at the time of the termination (64 years old), and the length of his employment of over 30 years. Mr. Gent's work experience was also somewhat niche and was not clearly transferable to other sectors. I also infer from Mr. Hollands' testimony that there was reduced demand for this work experience across the entire beverage sector in 2021 and 2022.

[76] However, I must also consider Mr. Gent's evidence that he had firm plans to retire when he turned 65, even though he had not expressed those plans specifically to Mr. Hollands. Mr. Gent testified to his reasons for having those plans, including that he was the primary caregiver for three young children, that he had moved to Langley, and that he needed to wait until he was 65 before he could qualify for CPP and OAS. He gave this testimony, in part, to support his evidence that he was not subjectively intending to retire during his conversation with Mr. Hollands in May 2020.

[77] Had Mr. Gent been less firm about his intended retirement date in his evidence, I would likely have awarded him a significant notice period. However, I do not consider that Askanda should be required to pay damages in lieu of notice after March 1, 2022, when Mr. Gent no longer intended to work or to be looking for work.

[78] Mr. Gent is entitled to be put in the same position he would have been if Askanda had not wrongfully dismissed him, and he had been given appropriate notice before the termination of his employment. However, he is not entitled to be put in a better position. This is the rare case where Mr. Gent, who had a firm intention to retire when he turned 65, and relied upon the firmness of that intention to establish that it was not his intention to retire at 63 when he discussed retirement with his employer. I find on Mr. Gent's own evidence that he would not have worked beyond March 1, 2022, even had he been given the opportunity.

[79] Given his termination date of September 1, 2021, and his 65th birthday in February 2022, I find Mr. Gent is entitled to 6 months of wages in lieu of notice.

CALCULATION OF DAMAGES

[80] Pay in lieu of notice should reflect, to the extent possible, what the employee would have earned over the notice period had they been provided with reasonable notice of termination.

[81] This Court in *Hawes v. Dell Canada Inc.*, 2021 BCSC 1149, stated the following in relation to income related to commissions:

[27] It is clear from the authorities that, where an employee's earnings are variable, there is no set formula. The court must award what is fair in the circumstances to approximate what the employee would have earned during the notice period. Sometimes courts have used the average of the past five years of commission earnings: *Veach v. Diversey Inc.*, [1993] B.C.J. No. 2420. Where an employee's commission earnings have been on an increasing or declining trend in the years prior to dismissal, it may be preferable to use only the last year's earnings: *O'Reilly*, at para. 43. Where the past is not a reliable indicator, the court has made an estimate based on the whole evidentiary record.

[Emphasis added.]

[82] Because Mr. Gent was not a salaried employee, but an hourly one whose wages varied with the availability of working hours, Mr. Gent suggests the fairest way to value his notice period would be to average his annual income in the three years prior to his lay-off. As stated above, Mr. Gent earned approximately \$29,000 per year on average during this period. Askanda does not object to this method of valuation, and I endorse it.

[83] Mr. Gent is therefore entitled to half that amount, representing 6 months notice, or \$14,500.

DUTY TO MITIGATE

[84] In its response to civil claim, Askanda plead that Mr. Gent failed to mitigate his damages on the basis that his job search efforts were unreasonable and that better, reasonable efforts would have yielded more positive results. That pleading was not pursued at trial.

[85] The burden to establish a failure to mitigate is on Askanda, and that burden was not met.

[86] I note that the CERB benefits are not deductible from an employer's obligations in a wrongful dismissal case, but EI payments are less clear, and there may be a subrogated claim against them: *Yates*. I need not deal with whether Mr. Gent's EI receipt of EI benefits might reduce his available recovery, because I have set the termination date after he ceased to receive those benefits.

[87] While I have found that Mr. Gent did not seek out alternative work for over a year, I have also found that this is because he still considered himself to be only temporarily laid off. His duty to mitigate, if proven, would not have arisen until September 2021, at which point he was only 6 months from his intended retirement date, and it was very unlikely that he would have found an employer prepared to hire him for such a short term, even had he looked: *Szczypiorski v. Coast Capital Savings Credit Union*, 2011 BCSC 1376 at para 98.

PUNITIVE DAMAGES

[88] Mr. Gent says that he is entitled to punitive damages on account of Askanda’s conduct in the manner of his termination and disregard for the statutory requirements of the *ESA* to recall employees laid off during the pandemic. He suggests an amount of \$15,000 would be appropriate for this Court to express its condemnation of Askanda’s conduct. Askanda opposes any award for punitive damages in these circumstances.

[89] General damages in wrongful dismissal are in lieu of notice. No additional damages are available for the actual loss of employment or the ordinary distress that an employee may suffer as a consequence of being terminated: *Honda Canada Inc. v. Keys*, 2008 SCC 39 at para. 50 [*Honda*]. *Honda* provides that compensatory damages beyond damages in lieu of notice, often referred to in BC as aggravated damages, may be awarded in the context of a wrongful dismissal case, but the entitlement to these damages must arise from the manner of dismissal and are compensatory in nature. Mr. Gent does not seek aggravated damages in this case.

[90] Unlike aggravated damages, punitive damages are not compensatory in nature. The objects of punitive damages are retribution, denunciation and deterrence, not compensation for breach or injury.

[91] Punitive damages are an exceptional remedy and are restricted to cases where an employer's conduct is so malicious and outrageous that it is deserving of punishment: *Whiten v. Pilot Insurance Co.*, 2002 SCC 18 at paras. 36–37; *Vernon v. British Columbia (Liquor Distribution Branch)*, 2012 BCSC 133 at paras. 381–384; *Ram v. Michael Lacombe Group Inc.*, 2017 BCSC 212 at para. 112; and *Honda* at para. 62. They are also limited to cases where the general and aggravated damages awarded are insufficient to express the court’s condemnation of the defendant’s actions, including where the compensatory awards alone would be insufficient to deter the conduct of a “moneyed defendant”: *Whiten* at para. 119.

[92] In *Yates*, the Court of Appeal considered an appeal on the issue of punitive damages in a case similar to this one in that an employer was found to have

wrongfully dismissed an employee by failing to call her back from a covid-related layoff before August 30, 2020. In that case, as in this case, punitive damages were said to have been warranted by the failure to comply with *ESA* requirements, and the need to send a message to employers about this requirement.

[93] In upholding the trial judge’s finding that neither aggravated nor punitive damages were warranted, the Court of Appeal in *Yates* at para. 71 quoted from *Honda and Vorvis v. Insurance Corporation of British Columbia*, [1989] 1 S.C.R. 1085 at 1108, 1989 CanLII 93, that: “[c]onduct meriting punitive damages awards must be ‘harsh, vindictive, reprehensible and malicious’, as well as ‘extreme in its nature such that by any reasonable standard it is deserving of full condemnation and punishment’”.

[94] I do not consider that the evidence before me meets the high bar of misconduct required for an award of punitive damages.

[95] I find that Askanda offered no payments, even the eight weeks statutory payment required under the *ESA*, when it was brought to its attention in October 2021 that Askanda had failed to recall Mr. Gent or to request an extension of his lay-off. However, I also accept Mr. Hollands’ evidence that he believed Mr. Gent had expressed a desire to retire in May 2020. While I find that Askanda was obliged to clarify that intention and its intended effective date, and in the absence of doing so, was obliged to recall or seek an extension from Mr. Gent before the end of August 2020, I do not find that Askanda’s conduct was so egregious as to warrant an award in punitive damages.

CONCLUSION AND COSTS

[96] Mr. Gent has been substantially successful in this claim. Should the parties wish to speak to costs, they are directed to advise scheduling within 30 days to arrange to appear before me.

“Marzari J.”