CITATION: Chan v. NYX Capital Corp. 2025 ONSC 4561
COURT FILE NO.: CV-22-00675696-0000
DATE: 20250806

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
REGINALD CHAN	)	*David Greenwood*, for the Plaintiff
Plaintiff	)	
– and –	)	
NYX CAPITAL CORP.	)	*Kyle M. Lambert* and *Hamza Bettah*, for the Defendant
Defendant	)	
	)	**HEARD:** April 29 and May 1, 2025

PARGHI J.

REASONS FOR JUDGMENT

[1] Reginald Chan sues his former employer, NYX Capital Corp. ("NYX"), now Montcrest Asset Management Inc., for wrongful dismissal. Mr. Chan began working with NYX, a small real estate investment firm, on October 12, 2021. His job title, according to his written offer of employment dated September 28, 2021 (the "Employment Agreement"), was "Vice President – Acquisitions and Asset Management and Chief Compliance Officer". The Employment Agreement provided that he would have a three-month probationary period. NYX terminated Mr. Chan on January 10, 2022, one day before the end of his contractual probationary period.

[2] Mr. Chan's position is twofold. First, he states that the termination clause in the Employment Agreement, which contains the probationary employment clause, is unenforceable, and that accordingly he is entitled to common law notice in respect of his termination. Second, Mr. Chan states that even if he was a probationary employee, NYX failed to satisfy the common law test for terminating a probationary employee without

notice, because it did not make a good faith determination that he was unsuitable for permanent employment.

[3] NYX states that even if the termination clause of the Employment Agreement is unenforceable, Mr. Chan was a probationary employee because the parties agreed to a probationary period and Mr. Chan knew that there was one. NYX further states that it made a good faith determination that Mr. Chan was unsuitable for permanent employment and thereby properly terminated him without notice as a probationary employee.

[4] For the reasons below, I find for Mr. Chan. The termination clause in the Employment Agreement, which includes the clause that characterizes his employment as probationary, is void and unenforceable. Accordingly, he was not a probationary employee and was entitled to reasonable notice upon termination. I find that a reasonable notice period in all the circumstances was three months.

[5] I accordingly award Mr. Chan $44,644.46 in damages, based on his base salary and benefits for the three-month notice period, and reimbursement for fees he incurred and was to be reimbursed for under the Employment Agreement. I do not award Mr. Chan any amount for his bonus. Nor do I award damages for breach of good faith contractual duty, aggravated damages, or punitive damages.

Analysis

Mr. Chan's employment was not probationary

[6] I find, first, that Mr. Chan was not a probationary employee. Accordingly, he was entitled to reasonable notice upon termination.

The termination clause in the Employment Agreement, including the probationary employment provision, is void and unenforceable

[7] The termination clause in the Employment Agreement, which includes the probationary employment provision at issue before me, runs afoul of the requirements of the *Employment Standards Act, 2000,* S.O. 2000, c. 41 (the "ESA") and is therefore void and unenforceable.

[8] The termination clause provides:

> 10. Termination
>
> Your employment with the Company may be terminated as follows:
>
> (a) The first three months of your employment are probationary, during which time the Company may terminate your employment at any time and for any reason at its discretion, without notice or pay in lieu of notice, or other obligation.

> (b) You may resign from your employment at any time and for any reason upon providing the Company with two weeks of notice in writing of your resignation, which notice may be waived by the Company in whole or in part at its sole discretion save as may be required under the *ESA*.
>
> (c) After you successfully complete the first three months of your employment, the Company may terminate your employment at any time without cause, upon providing you with notice, or pay in lieu of notice, benefits continuation and severance pay (if applicable) and any other benefits or entitlements strictly required in accordance with the minimum requirements set out in the *ESA*. It is agreed and understood that the provision of such notice or pay in lieu of notice, severance pay (if applicable), benefits continuation and any other benefits or entitlements required under the *ESA* shall constitute full and final satisfaction of any claim which you might have arising from or relating to the termination of your employment, whether such claim arises under statute, contract, common law or otherwise, save any claim that cannot be released by operation of a statute of Ontario.
>
> (d) The Company may terminate your employment at any time for cause, without any obligation to you on account of notice or pay in lieu of notice, severance pay, or other obligation, other than accrued amounts owed to the date of termination. [Emphasis Added]

[9] Under the ESA, there is a general prohibition against contracting out of, or waiving, any employment standard established in the ESA. Any such purported contracting out or waiver by an employee or employer is void (s. 5.1).

[10] I find that the Employment Agreement is an improper attempt by NYX to have Mr. Chan contract out of his entitlements under the ESA, in four respects.

[11] First, paragraph 10(a) of the Employment Agreement provides that NYX may terminate Mr. Chan during the initial three-month period "at any time and for any reason at its discretion". This court has held that under the ESA, an employer does not have an absolute right to dismiss an employee (*Dufault v. The Corporation of the Township of Ignace*, 2024 ONSC 1029, at para. 46, aff'd 2024 ONCA 915, leave to appeal refused, [2025] S.C.C.A. No. 41680). For instance, an employer may not dismiss an employee in reprisal for attempting to exercise a right under the ESA (ESA, s. 74). As such, contractual language that purports to give an employer such expansive rights to terminate without cause is contrary to the ESA (*Baker v. Van Dolder's Home Team Inc.*, 2025 ONSC 952, at paras. 9-10).

[12] Second, paragraph 10(c) of the Employment Agreement similarly purports to allow for the termination of Mr. Chan "at any time without cause." For the same reasons, such a provision is in violation of the ESA.

[13] Third, paragraph 10(c) purports to release NYX from any claims Mr. Chan may have arising from the termination of his employment, except in respect of certain minimum entitlements under the ESA. However, certain types of claims arising from the termination of employment may not be contracted out of. For instance, if Mr. Chan were dismissed in reprisal for attempting to exercise a right under the ESA, he could claim damages, and paragraph 10(c) improperly purports to have him contract out of that right.

[14] Fourth, paragraph 10(d) purports to give NYX the right to terminate Mr. Chan "at any time for cause" without any notice of termination or severance pay. "Cause" is not defined in the ESA. However, the ESA only permits the termination of an employee without notice or severance pay in the narrow circumstances set forth in subsections 2(1)(3) and 9(1)(6) of *Termination and Severance of Employment*, O. Reg. 288/01 – namely, where the employee is guilty of "wilful misconduct, disobedience or wilful neglect of duty that is not trivial and has not been condoned by the employer." This is a significantly more onerous test than the common law standard for just cause. If an employee's conduct does not meet this ESA standard, then, upon termination, they must be provided with the minimum notice and severance entitlements established in the ESA. I find that paragraph 10(d) improperly attempts to contract out of the ESA by purporting to give NYX authority to terminate Mr. Chan without notice or severance pay in circumstances that are broader than those provided for in the Regulation. This court has made the same finding with respect to similar "for cause" provisions in *Dufault*, at paras. 31-40, and *Livshin v. The Clinic Network Canada Inc.*, 2021 ONSC 6796, 159 O.R. (3d) 430, at paras. 31-33, 39, and 52-53.

[15] The Court of Appeal for Ontario held in *Waksdale v. Swegon North America Inc.*, 2020 ONCA 391, 446 D.L.R. (4th) 725, leave to appeal refused, [2021] S.C.C.A. No. 39326, that a clause in an employment agreement that purports to afford an employer more expansive termination rights than those established in the ESA will render the entire termination provision in the agreement void and unenforceable. This is so regardless of whether the termination provisions are found in one place or in several places throughout the agreement, and even if the employer adhered to the minimum standards established in the ESA at the time of termination (at paras. 10, 14). *Waksdale*'s approach was recently affirmed by the Court of Appeal in *Dufault v. Ignace (Township)*, 2024 ONCA 915, 504 D.L.R. (4th) 456, at paras. 23-24, leave to appeal refused, [2025] S.C.C.A. No. 41680.

[16] Each of paragraphs 10(a), (c), and (d) of the Employment Agreement is contrary to the requirements of the ESA. Based on *Waksdale* and section 5.1 of the ESA, the termination provision of the Employment Agreement is therefore void and unenforceable in its entirety. This includes paragraph 10(a), which purports to establish that, for the first three months of his employment, Mr. Chan's employment was probationary and could be terminated "at any time and for any reason at [NYX's] discretion, without notice or pay in lieu of notice, or other obligation." Paragraph 10(a) is a termination clause: it identifies a situation in which, according to NYX, it could terminate Mr. Chan.

There is insufficient external evidence to establish Mr. Chan's probationary status

[17] The parties agree that, if indeed Mr. Chan is to be treated as a probationary employee, the legal test governing whether he was appropriately terminated is the one set forth in *Nagribianko v. Select Wine Merchants Ltd.*, 2017 ONCA 540 ("*Select Wine (ONCA)*"). In that case, the Court of Appeal considered the test for terminating probationary employees without notice, albeit in the context of an employee whose probationary status was established in a valid and enforceable agreement, unlike here. The Court held as follows (at para. 6):

> The status of a probationary employee has acquired a clear meaning at common law. Unless the employment contract specifies otherwise, probationary status enables an employee to be terminated without notice during the probationary period if the employer makes a good faith determination that the employee is unsuitable for permanent employment, and provided the probationary employee was given a fair and reasonable opportunity to demonstrate their suitability. [Citations omitted.]

[18] The concept of good faith in this context was described by this court in *Van Wyngaarden v. Thumper Massager Inc.*, 2017 ONSC 3909, aff'd 2018 ONSC 6622. In that case, the court held that the defendant employer "did not act in bad faith in that [it], honestly and without ulterior purpose, considered matters relevant to suitability for permanent employment in deciding to terminate the plaintiff's employment during the probationary period" (at para. 52). An employer has significant discretion in determining suitability and their exercise of discretion is to be afforded deference by the courts (*Nagribianko v. Select Wine Merchants Ltd.*, 2016 ONSC 490 ("*Select Wine (ONSC)*"), at para. 36). The "matters relevant to suitability" may include "considerations of the probationary employee's character, ability to work with others, and ability to meet the employer's present and future standards" (*Select Wine (ONSC),* at para. 33).

[19] Importantly, neither *Waksdale* nor *Select Wine (ONCA)* addresses the situation in this case, where Mr. Chan's probationary status is articulated in a contractual provision that is void and unenforceable. *Waksdale* does not involve a probationary employee. *Select Wine (ONCA)* involves a probationary employee, but one whose probationary status was established in a valid and enforceable provision of the employment agreement. Indeed, the court in *Select Wine (ONCA)* expressly noted that its finding that the probationary employee could be terminated without notice was predicated on the existence of an enforceable contract (at para. 9). It thus expressly excluded the situation before me from the scope of its finding.

[20] NYX states that Mr. Chan was a probationary employee and therefore could be terminated without notice in accordance with the "good faith determination of unsuitability" test articulated in *Select Wine (ONCA)*. NYX grounds its argument in cases that, like *Select Wine (ONCA)*, involve uncontested employment agreements. In my view, those authorities

are not of assistance in this case, which raises the distinct question of what duties are owed to a purportedly probationary employee whose employment agreement's probationary employment provision is itself void and unenforceable.

[21] In considering this question, I note, first, that there is a presumptive entitlement to reasonable notice under the common law. The Supreme Court of Canada has emphasized that this entitlement governs all employment relationships except where it is properly displaced via contract (*Machtinger v. HOJ Industries Ltd*., 1992 CanLII 102 (SCC), [1992] 1 S.C.R. 986, at p. 998).

[22] I then consider the protections afforded to probationary employees under the ESA and the common law. The ESA does not expressly create a category called "probationary employees". Rather, it provides, in section 54, that "No employer shall terminate the employment of an employee who has been continuously employed for three months or more unless the employer, (a) has given to the employee written notice of termination …; or (b) has complied with" the ESA provisions on pay instead of notice.

[23] The case law is clear that section 54 "cannot properly be interpreted as displacing the common law obligation on an employer who dismisses an employee to give either reasonable notice or pay in lieu of reasonable notice, in the case of employees whose employment is of less than three months' duration" (*Belsito v. 2220742 Ontario Ltd.*, 2017 ONSC 7207, citing *Deacon v. Moxey*, 2013 O.J. No. 2014 (Ont. Sm. Cl. Ct.)). In other words, the fact that the ESA mandates notice or pay in lieu of notice for employees who have been working for three months or more does not somehow do away with the obligation at common law to provide reasonable notice for employees who have been working for less than three months. That latter obligation survives.

[24] The question that this case raises is whether, notwithstanding the unenforceability of the probationary employment clause in the Employment Agreement, Mr. Chan should still be treated as a probationary employee such that NYX may terminate him without notice pursuant to the "good faith determination of unsuitability" test.

[25] NYX answers this question in the affirmative. It frames this as an issue of discerning the parties' intentions. It states that the parties agreed to establish a probationary employment period, and that therefore even if the probationary employment provision in the Employment Agreement is unenforceable, Mr. Chan remains a probationary employee and may be terminated without notice in accordance with the "good faith determination of unsuitability" test.

[26] I do not agree. The Supreme Court, in *Machtinger* (at pp. 1000-1002), has urged against assessing the intentions of the parties in the manner proposed by NYX. The Court held that, where an employment agreement term relating to termination fails to comply with the ESA and is therefore null and void, the common law presumption of reasonable notice should prevail. This is because merely ordering minimum compliance with the ESA does not appropriately incentivize employers to enter into contracts that comply with the ESA (at p. 1004).

[27] Even if I were to look to the parties' apparent intentions, as NYX urges me to do, I cannot rely on the probationary employment provision itself when assessing those intentions. As the Court held in *Machtinger*, "If a term is null and void, then it is null and void for all purposes, and cannot be used as evidence of the parties' intention" (at p. 1001). In the result, NYX must root its argument about the parties' intentions in something other than the probationary employment provision itself.

[28] NYX states that there are two such sources of external evidence of the parties' intention. The first consists of provisions of the Employment Agreement that address Mr. Chan's entitlement to benefits and sick leave upon the conclusion of his probationary period. The second is Mr. Chan's evidence at trial that he understood that he was subject to a probationary employment period during which his employment was not secure. NYX submits that, based on this evidence, it is clear that the parties intended for Mr. Chan to be a probationary employee and subject to the limitations associated with that status, even if the probationary employment provision was itself unenforceable. As such, he could still be terminated without notice if the "good faith determination of unsuitability" test is met.

[29] I am unable to agree. Even if I were to try to discern the parties' intentions – and in my view *Machtinger* prevents me from doing so – I am not persuaded that the parties intended for Mr. Chan to be a probationary employee who could be terminated without notice, as NYX claims. As such, his entitlement to reasonable notice under the common law is not dislodged. This is so for three reasons.

[30] First, the benefits- and sick leave-related provisions of the Employment Agreement are too unclear and substantively incomplete to evidence an intention to make Mr. Chan a probationary employee and extinguish his right to reasonable notice at common law. The provisions refer to the existence of a probationary period, but nothing more. They say nothing about the duration of his probationary employment. By contrast, the cases that NYX relies on, *Select Wine (ONCA)* and *Sullivan v. KSD Enterprises Ltd.*, 2019 ONSC 6698, involve employment agreements that expressly state the duration of the probationary period in clauses that were not deemed void and unenforceable. Moreover, while these provisions refer to Mr. Chan having a probationary status, they say nothing about the circumstances in which he could be terminated as a probationary employee.

[31] Indeed, the only elements of his probationary status that Mr. Chan would have understood based on the Employment Agreement are the ones that are expressed in paragraph 10(a) and which are incorrect at law – namely, that he could be terminated without notice for any reason. NYX asks me to infer, based on the fact that Mr. Chan was entitled to benefits and sick leave upon the conclusion of his (unspecified) probationary period, that the parties jointly intended for him to be a probationary employee for a period of time that is not specified in the Employment Agreement, governed by terms that are not contained anywhere in the Employment Agreement, and which are materially different from those that are contained in the Employment Agreement. I am not prepared to draw such an inference.

[32] Second, it would be improper to try to deduce Mr. Chan's intentions in the manner proposed by NYX. Mr. Chan entered into an agreement that, unbeknownst to him, forced him to contract out of his entitlements under the ESA. There is no evidence from which I can adduce what probationary employment terms he would have agreed to, had he understood his actual legal entitlements. And of course, he did not understand his legal entitlements; if he had, he would not have signed the Employment Agreement. Indeed, this imbalance of bargaining power between the employee and employer is an informing principle in much of employment law. NYX in effect asks me to make a finding that Mr. Chan would have agreed to certain contractual terms in a hypothetical scenario in which the Employment Agreement was ESA-compliant. I am not prepared to do so.

[33] Third, the interpretive approach urged by NYX runs contrary to the policy goals underlying the ESA. It is settled law that the ESA is remedial legislation and should be interpreted in a manner that encourages employers to comply with the ESA's minimum requirements and extends its protections to employees (*Machtinger*, at para. 31; *Wood v. Fred Deeley Imports Ltd.*, 2017 ONCA 158, at para. 28). Applying the common law of reasonable notice in the face of a void and unenforceable termination provision is consistent with this principle. It is in keeping with the Supreme Court's holding in *Machtinger* (at p. 1004) that

> an approach more consistent with the objects of the [ESA] is that, if an employment contract fails to comply with the minimum statutory notice provisions of the [ESA], then the presumption of reasonable notice will not have been rebutted. Employers will have an incentive to comply with the [ESA] to avoid the potentially longer notice periods required by the common law, and in consequence more employees are likely to receive the benefit of the minimum notice requirements. Such an approach is also more consistent with the legislative intention expressed by s. 6 of the [ESA], which expressly preserves the civil remedies otherwise available to an employee against his or her employer.

[34] To this I add the observation, discussed above, that the protection of common law reasonable notice has been expressly held by this court in *Belsito* to extend to probationary employees. With the provision in the Employment Agreement that purported to specify otherwise now deemed null and void, this protection comes into force.

[35] For these reasons, I conclude that Mr. Chan is not properly characterized as a probationary employee who could be terminated without notice. He was entitled to reasonable notice under the common law.

Mr. Chan's termination was not retaliatory

[36] Mr. Chan suggests that he was terminated in retaliation for concerns he raised about NYX's compliance with certain regulatory requirements. I am not persuaded of this, on the balance of probabilities.

[37] Mr. Chan says he was fired because of an email he sent to Yashar Fatehi, the President and Chief Executive Officer, on January 10, 2022 voicing concern that an NYX subsidiary was not complying with its obligations under the *Residential Tenancies Act*, 2006, S.O. 2006, c. 17, in respect of a property it held in Mississauga. The email followed a visit to the property by Mr. Chan, Mr. Fatehi, and others the previous workday, during which there was a verbal altercation between Mr. Fatehi and a tenant at the property.

[38] I do not doubt the sincerity of Mr. Chan's belief that his termination was retaliatory. However, there is no evidence to support his belief.

[39] Mr. Chan was responsible for acquiring new investment properties for NYX's portfolio and overseeing the management of existing properties in the portfolio. In this role, his tasks included sourcing potential new properties to acquire, negotiating lease terms, managing third-party property managers, reporting on the financial performance of NYX's properties, and preparing quarterly reports for investors.

[40] NYX's evidence is that Mr. Fatehi and his senior leadership colleagues met together on January 7 to decide whether to employ Mr. Chan permanently. The evidence of Mr. Fatehi and Mr. Vo was that they considered the timeliness of Mr. Chan's work, the quality of his work relative to their expectations, his interactions with other employees, whether his focus was on the right tasks or on tasks outside of his job scope, his ability to execute on new acquisitions and obtain financing for NYX projects, and "whether he would be well-suited to advance the goals of the company, its investors, and its shareholders going forward." They observed that he had not introduced or "sourced" any new acquisitions. He had been tasked with completing one quarterly report and did not complete it on time. He showed significant interest in human resources and operational matters, even offering a detailed email with his insights and recommendations on these issues, but did not engage with or focus on his core responsibilities to NYX's satisfaction. They concluded he "lacked acquisitions experience", "was not strong at sourcing deals or equity," "did not display the acquisition management skills" that NYX anticipated at the time of his hire, and "had not been sufficiently engaged in his actual job duties". As a result, they "lack[ed] faith that [he] could maintain an important role at NYX in a manner that was to the company's benefit." They decided to terminate him.

[41] Neither Mr. Fatehi nor Mr. Vo were cross-examined at trial. As such, their evidence on the decision to terminate Mr. Chan was not challenged. I also note that Mr. Chan does not contest the suggestion that he did not bring in any new acquisitions or that he did not complete the quarterly report on time, although he suggested that it was not unusual for the report to be completed late.

[42] Mr. Fatehi's evidence is that the January 10, 2022 email "did not play any part in the decision to terminate Mr. Chan's employment" and that by the time he received Mr. Chan's email, the decision to terminate Mr. Chan had already been made, on January 7, 2022. He therefore "briefly reviewed and considered it, promptly concluded that [he] disagreed with Mr. Chan's views, and did not consider it further until it was raised" in this litigation.

[43] I accept the evidence before me, which is unequivocal and uncontested, that, in the views of NYX's senior leadership, Mr. Chan did not perform his assigned tasks and carry out his responsibilities satisfactorily, and that these concerns, and concerns about his "fit" with his role and the company, formed the basis for the decision to terminate him. I accordingly do not find that the decision was retaliatory or made in bad faith.

In the alternative, if Mr. Chan was a probationary employee, he was appropriately terminated

[44] As discussed above, I am of the view that Mr. Chan was not properly characterized as a probationary employee and that he was therefore entitled to reasonable notice upon termination.

[45] In the alternative, however, if Mr. Chan was not entitled to reasonable notice and was properly characterized as a probationary employee, I find that he was appropriately terminated without notice. That is, he was terminated in accordance with the requirements set forth in *Select Wine (ONCA)* for terminating a probationary employee without notice: NYX provided him with a fair and reasonable opportunity to demonstrate his suitability for permanent employment and made a good faith determination that he was not suitable.

[46] There is no suggestion before me that Mr. Chan was not given a fair and reasonable opportunity to demonstrate his suitability. Based on the record, I find that he was given such an opportunity. He was, for instance, given opportunities to bring in new acquisitions, and did not bring in any. He was given the opportunity to complete a quarterly report and was unable to complete it on time.

[47] I am also satisfied that NYX's determination that he was not suitable for permanent employment was made in good faith, for the reasons discussed above.

Reasonable notice

[48] Having found that Mr. Chan was not a probationary employee, and was accordingly entitled to reasonable notice on termination, I now consider the period of notice to which he was entitled.

[49] Mr. Chan worked at NYX from October 12, 2021 to January 10, 2022. His job title, according to the Employment Agreement, was "Vice President – Acquisitions and Asset Management and Chief Compliance Officer". He had two direct reports. At the time he was terminated, he had been with NYX for three months less a day. He was 47 years old. Upon termination, he received no salary or other compensation.

[50] Mr. Chan's position is that he was entitled to 12 months of reasonable notice, based on the case law granting short-service employees with senior management positions longer notice periods and the fact that he was a senior manager with significant responsibilities and a compensation package of roughly $230,000.00 per year.

[51] NYX's Statement of Defence takes no position on reasonable notice other than to say that the 12 months sought are excessive. Its position at trial was that Mr. Chan was entitled to two months of reasonable notice.

[52] In determining the reasonable notice period under the common law, I am to rely on the factors set forth in *Bardal v. Globe & Mail Ltd.* (1960), 24 D.L.R. (2d) 140 (Ont. H.C.). These factors consist of the character of the employment, the length of service, the age of the employee, and the availability of similar employment, having regard to the experience, training, and qualifications of the dismissed employee (at p. 145, cited with approval in *Honda v. Keays*, 2008 SCC 39, [2008] 2 S.C.R. 362, at para. 28).

[53] Mr. Chan's credentials included a Bachelor of Arts in economics, a Chartered Financial Analyst designation, and various professional credentials including a practicing certificate in asset management and a post-graduate certificate in real property valuation.

[54] Before joining NYX, he had worked in the real estate and asset management sectors for over 15 years, including as an asset manager at various companies and, prior to joining NYX, as a vice president of asset management and leasing at Artis REIT.

[55] Having regard to the character of Mr. Chan's employment, he was responsible for managing a portfolio of properties, negotiating lease agreements, carrying out financial reporting, interfacing with clients, and analyzing land purchase opportunities. He reported to NYX's Chief Investment Officer. He had two direct reports. In my view, he was in a mid-level managerial position at NYX. I say this having regard to the content of his work, his relatively small number of reports, and the fact that within the small workforce of NYX, he was not part of the leadership team, which consisted of the President and Chief Executive Officer, the Chief Investment Officer, and the Chief Development Officer.

[56] Mr. Chan's job description, as expressed in his Employment Agreement, included the title Chief Compliance Officer. Whether he ever really held this position is disputed: NYX asserted that both Mr. Chan and NYX learned, at the same time, that Mr. Chan lacked the professional qualifications required by the Ontario Securities Commission to be a Chief Compliance Officer for NYX, and accordingly he never held this title or anything close to it. Mr. Chan's evidence was that he understood that he could not become the Chief Compliance Officer, but he nonetheless held an informal compliance role with the organization.

[57] In my view, there was no objective basis on which Mr. Chan could reasonably form the view that he was responsible for compliance at NYX, particularly at a senior level. The content of the work he was asked to do was not compliance-related. While he sometimes offered unsolicited compliance-related advice on matters, he was neither asked nor expected to do so. As such, I do not accept the characterization of his position as a senior one within the organization.

[58] Turning to the second and third *Bardal* factors, at the time Mr. Chan was terminated, he had been with NYX for three months less a day. He was 47 years old.

[59] Finally, I consider the availability of similar employment. In my view, this factor urges toward a longer notice period. The courts have recognized that where an employee has a very short period of employment, a longer notice period may be warranted. In *Grimaldi v. CF+D Custom Fireplace Design Inc*., 2023 ONSC 6708, the court awarded 5.5 months of notice to a plaintiff who had been employed for five months. The court reasoned that the longer notice period was warranted for Mr. Grimaldi, because a very short period of employment, particularly for someone of Mr. Grimaldi's age and experience, made the search for other employment more difficult because it would "require him to explain to prospective employers why he was terminated so soon after being hired" (at para. 49).

[60] In my view, the same considerations would apply here. Mr. Chan's circumstances are similar to those of Mr. Grimaldi. They both had short tenures of employment. They were similar in age (Mr. Grimaldi was 50 years old and Mr. Chan was 47) and experience (Mr. Grimaldi had about 16 years of experience in sales and management and Mr. Chan had over 15 years of experience in real estate and asset management). Mr. Chan, too, would have to explain to potential employers why he was at NYX for such a short period of time.

[61] Mr. Grimaldi had a slightly longer period of service to his employer than Mr. Chan, and was awarded a notice period very slightly longer than his length of service. Taking a similar approach here, and recognizing that there are many cases in which the courts have awarded 2-4 months of notice to individuals close to Mr. Chan in age and with similar levels of job responsibility, salary levels, and lengths of service (see, for example, *Ojo v. Crystal Claire Cosmetics Inc.*, 2021 ONSC 1428; *Harvey v. Shoeless Joe's Ltd*., 2011 ONSC 3242; *Laszczewski v. Aluminart Products Ltd.* (2007), 62 C.C.E.L. (3d) 305), I conclude that three months' notice is appropriate.

[62] Mr. Chan seeks a 12-month notice period. He points to *Antunes v. Limen Structures Ltd*., 2015 ONSC 2163, aff'd 2016 ONCA 509, in which the court granted an 8-month notice period to an employee who had five months of service. However, that longer notice period took into account that the employer had made misrepresentations during contractual negotiations upon which the employee relied. Though there are allegations of bad faith conduct in this case, they relate to the justification for and manner of termination, rather than the formation of the contract. In my view, they therefore fall into the category of "moral damages resulting from conduct in the manner of termination" that would be dealt with through a separate aggravated damages award, rather than an extension of the reasonable notice period (*Honda Canada Inc. v. Keays*, 2008 SCC 39, [2008] 2 S.C.R. 362, at para. 59; *Matthews v. Ocean Nutrition Canada Ltd.*, 2020 SCC 26, [2020] 3 S.C.R. 64, at para. 45).

Damages

[63] I award Mr. Chan damages of $44,644.46. As detailed below, this number reflects his entitlement to his base salary and pay in lieu of benefits during the three-month notice period, and reimbursement for expenses he incurred for which the Employment Agreement provided he would be reimbursed. I do not grant Mr. Chan any amount for bonus during

the notice period; nor do I award damages for breach of good faith contractual duty, aggravated damages, or punitive damages.

Base salary, benefits, and bonus

[64] Mr. Chan's annual base salary was $175,000. For his three-month notice period, he is entitled to $43,750.

[65] Mr. Chan is also entitled to the pay in lieu of benefits for the three-month notice period. While he opted out of his health and dental benefits, he did receive life insurance, accidental death and dismemberment insurance and long-term disability benefits, which were valued at $53.32 per month. For his three-month notice period, he is entitled to $159.96.

[66] He is not entitled to any amount by way of bonus. In determining whether a terminated employee would have earned a bonus during the reasonable notice period, the courts may consider whether a bonus was integral to the employee's compensation (*Matthews*, at para. 58). A bonus may be considered integral, even if discretionary, if there is a history of the bonus being paid out each year (see, for example, *Gazier v. Ciena Canada, ULC*, 2024 ONSC 865, at paras. 30-34; *Herreros v. Glencore Canada*, 2021 ONSC 5010, at para. 41).

[67] Mr. Chan's bonus was discretionary. NYX's evidence, uncontested on this point, is that Mr. Chan was not automatically entitled to a bonus. There was no previously established long-term practice of paying him a bonus, given that he was new to NYX. In these circumstances, I am of the view that his bonus would not have formed part of his compensation during the three-month notice period. This is consistent with the principle that discretionary bonuses are not generally considered an integral part of an employee's compensation and are therefore not awarded upon termination (see, for example, *Ellerbeck v. KVI Reconnect Ventures Inc.*, 2013 BCSC 1253, at para. 62; *Pirani v. CIBC*, 2023 ONSC 5991 at para. 198; *Milwid v. IBM Canada Ltd.*, 2023 ONSC 490, at para. 106).

Mitigation

[68] There is no issue as to mitigation on these facts. Mr. Chan found new employment after five months, after the reasonable notice period had concluded. In any event, NYX has not advanced the claim that he failed to properly mitigate his damages.

Reimbursement for expenses

[69] Mr. Chan took a qualifying exam to become a chief compliance officer, for which he paid out of pocket in the amount of $734.50. The Employment Agreement provides that NYX would reimburse him for all fees he incurred to qualify himself for the chief compliance officer role. Yet NYX has resisted reimbursing him this very modest amount on the basis that he did not make a formal claim for reimbursement with the company. This response strikes me as bureaucratic at best. Mr. Chan is entitled to recover these fees, which he incurred in good faith and based on the plain language of the Employment Agreement.

Damages for breach of good faith contractual duty

[70] Mr. Chan seeks additional damages due to what he calls NYX's breach of good faith contractual duty. I am provided with no authority in support of the claim that damages can be awarded in the employment law context for a specific breach of the organizing contractual principles of good faith and honest performance articulated in *Bhasin v. Hrynew*, 2014 SCC 71, [2014] 3 S.C.R. 494. While NYX did commit an ordinary breach of its agreement with Mr. Chan, the resulting damages are already captured by the reasonable notice salary damages to which I have held he is entitled. To the extent that there was any impropriety in how NYX terminated him, that amount would be properly compensated through an aggravated damages award (see, for example, *Matthews*, at para. 45; *Alberta Computers.com Inc. v. Thibert*, 2019 ABQB 964, at para. 156, aff'd 2021 ABCA 213).

Aggravated damages

[71] Mr. Chan claims aggravated damages, sometimes referred to as moral damages. Such damages are compensatory. To recover them, an employee must show that they suffered mental distress above and beyond the normal distress suffered as a result of termination, and that that increased distress must have been in the reasonable contemplation of the employer. The employer's conduct must have been "unfair or in bad faith by being, for example, untruthful, misleading or unduly insensitive" (*Wallace v. United Grain Growers Ltd.*, [1997] 3 S.C.R. 701, at p. 704).

[72] I find that Mr. Chan has not demonstrated that he suffered distress beyond the normal distress one would suffer as a result of termination. He therefore has not made out his claim of aggravated damages. Mr. Chan's only evidence on the distress he suffered was that the termination was "devastating" and it "blindsided" him. He does not elaborate on these claims, or assert that he suffered any of this harm due to the manner of termination and not just from the fact of the termination itself.

[73] In my respectful view, that evidence is not sufficient to demonstrate that aggravated damages are warranted. In cases where aggravated damages have been awarded, the courts have found, for instance, that terminated employees were "plagued by anxiety, depression, fear, poor sleep, frustration, and feelings of helplessness" (*Krmpotic v. Thunder Bay Electronics Limited*, 2024 ONCA 332, 495 D.L.R. (4th) 701 at para. 27); were "put … in an exceptionally vulnerable position" and experienced "significant stress … on top of the stress" they were already experiencing having been terminated (*Telieur v. Aurora Hotel Group*, 2023 ONSC 1324, aff'd 2024 ONCA 213, at paras. 66-67); "felt betrayed, abused, sad and upset", needed "medication for anxiety as [they] had been shaking constantly", suffered from "migraines, chest pains and sleep disturbances", were placed under the care of a psychiatrist, had "significant sleep issues, including nightmares" about some of the events at issue, and were diagnosed with major depressive disorder with anxiety (*Doyle v. Zochem Inc.*, 2017 ONCA 130, at para. 11); or gave evidence that their employer's conduct at termination "felt like a kick in the gut" and experienced "feelings of humiliation, diminished self-worth, anxiety, and depression" (*Pohl v. Hudson's Bay Company*, 2022

ONSC 5230, at paras. 61-63). I am not satisfied, based on the record before me, that Mr. Chan has experienced the type of distress required by law to ground a finding of aggravated damages.

Punitive damages

[74] Finally, Mr. Chan claims punitive damages. The principles governing punitive damages are articulated in *Whiten v. Pilot Insurance Co.*, 2002 SCC 18, [2002] 1 S.C.R. 595. In *Whiten,* the Court held (at para. 94) that punitive damages are very much the exception rather than the rule and are to be imposed only if there has been high-handed, malicious, arbitrary or highly reprehensible misconduct that departs to a marked degree from ordinary standards of decent behaviour.

[75] In my view, punitive damages are not appropriate in this case. I have found that NYX's termination of Mr. Chan was not retaliatory.

[76] I do find that NYX's manner of terminating Mr. Chan was somewhat insensitive. Both Mr. Fatehi and Mr. Vo were in contact with Mr. Chan over the course of the day on January 10, 2022 to discuss other work-related matters. Neither of them told him about his termination, even though by this time the decision had been made. Instead, NYX only informed him when the work day was over and Mr. Chan had gone home, by sending him a termination letter to his personal email address.

[77] Nonetheless, I am of the view that NYX's conduct, insensitive though it was, did not rise to the level required to ground an award of punitive damages. It was not high-handed, malicious, arbitrary, or highly reprehensible. The courts have awarded punitive damages in wrongful dismissal termination cases where, for instance, an employer refused to pay the employee the wages they were owed in a timely manner and issued falsified Records of Employment (*Pohl,* at paras. 108 and 118); asked the terminated employee to continue working without pay, refused to pay outstanding vacation pay, failed to make contributions to the employee's RRSP plan, threatened "recovery" of property that the employee had already returned, and refused to inform the employee about when he might be recalled to work (*Chalmers v. Airways Transit Service Ltd. and Badder Capital Group Ltd.*, 2023 ONSC 5725 at para. 159); and "embarked on a malicious campaign to undermine the plaintiff's ability to carry out his job functions and attempted to destroy his reputation with customers and clients of the defendant by making bizarre and defamatory statements about the plaintiff, accusing him of criminality and dishonesty, without a shred of justification", and "pursued a baseless counterclaim in this action and … sought repayment of the eight weeks severance the defendant paid out at the time of termination" (*Koshman v. Controlex Corporation*, 2023 ONSC 7045, at para. 24). NYX's conduct did not rise to this level. I am therefore not persuaded that punitive damages are appropriate.

Conclusion

[78] Accordingly, I grant Mr. Chan's action for wrongful dismissal. I find that he was entitled to notice upon termination and award him $44,644.46 in damages, plus attendant interest. This damages amount breaks down as follows:

a. Base salary for his three-month notice period of $43,750;

b. Benefits for his three-month notice period of $159.96;

c. Reimbursement of the fees for the qualifying exam to become a chief compliance officer of $734.50.

[79] The parties are to work together to resolve costs. If they are unable to do so within 30 days, they are to contact my judicial assistant and I will set a timetable for the exchange of costs submissions.

Parghi J.

Released: August 6, 2025

CITATION: Chan v. NYX Capital Corp. 2025 ONSC 4561
COURT FILE NO.: CV-22-00675696-0000
DATE: 20250806

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

REGINALD CHAN

Plaintiffs

– and –

NYX CAPITAL CORP.

Defendants

REASONS FOR JUDGMENT

Parghi J.

Released: 20250806