IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Lesinski v. Cartel Communication Systems Inc.,* 2025 BCSC 1533

Date: 20250811
Docket: S247506
Registry: Vancouver

Between:

Adam Lesinski

Plaintiff

And

Cartel Communication Systems Inc.

Defendant

Before: The Honourable Justice Taylor

Reasons for Judgment

Counsel for the Plaintiff:	M. Freedman
Counsel for the Defendant:	M.F. Robinson
Place and Date of Hearing:	Port Coquitlam, B.C. June 5, 2025
Place and Date of Judgment:	Vancouver, B.C. August 11, 2025

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I. INTRODUCTION

[1] The plaintiff, Adam Lesinski, claims damages for wrongful termination from the defendant Cartel Communication Systems Inc. (“Cartel”). Cartel agreed at the hearing that this matter was appropriate for summary determination under Rule 9-7 of the *Supreme Court Civil Rules* but opposed the relief sought by Mr. Lesinski on the merits.

II. BACKGROUND

A. The Parties

[2] Mr. Lesinski is 64 years old. He is trained as an engineer and has during his career held a variety of senior managerial and executive-level positions.

[3] Cartel is a corporation registered in British Columbia that provides products and services for industrial and commercial wireless communications. Cartel describes itself as providing a wide range of products and services for government, industry and enterprise-driven telecommunications applications across Canada, including advanced 4G and 5G wireless coverage enhancement, mission-critical voice logging and dispatch solutions, TETRA and Digital Mobile Radio systems as well as integrated site monitoring command and control systems.

[4] Cartel houses a large warehouse and engineering facility in Langley, British Columbia.

B. The Offer Letter

[5] On or about January 23, 2024, Mr. Lesinski received an offer of employment letter from Cartel (the “Offer Letter”) sent by President and Chief Executive Officer Dave Sanche. The Offer Letter proposed that Mr. Lesinski assume the position of Vice President of Engineering at Cartel, commencing February 12, 2024, and described the role as follows:

> The Director of Engineering will lead a highly skilled team of engineers and technical staff as part of the Company-wide initiative to develop a “Centre of Excellence” mindset and brand. The Director of Engineering is responsible for providing management of the engineering resources, delivering guidance,

> and instilling best practices amongst the team as well as assisting senior management with departmental resourcing. Performance in this role will be measured in the ability to keep the team both on schedule as well as on budget. They will interact on a regular basis with quality management, project management, supply chain, senior management, technology vendors and customers. The Director of Engineering reports directly to the COO.

[6] The Offer Letter stipulated that Mr. Lesinski would receive salary, profit sharing and benefits, including:

a) salary of $180,000.00;

b) profit sharing plan with a target of 30% of base salary; and

c) a package of insurance and health benefits, including dental coverage and extended health coverage.

[7] The Offer Letter contained a “Non-Competition/Non-Solicitation” clause and also a clause entitled “Resignation”. I will address the content and legal import of these clauses more fully below.

[8] Following receipt of the Offer Letter by Mr. Lesinski, there were subsequent discussions and negotiations between Mr. Lesinski and Mr. Sanche relating to terms of employment, which I will address more fully below.

[9] Ultimately, Mr. Lesinski made certain modifications to the Offer Letter, as also discussed below, and signed back his acceptance on January 24, 2024.

C. The Termination

[10] Mr. Lesinski performed the role of Vice President of Engineering at Cartel from February 12, 2024 until August 14, 2024.

[11] Mr. Lesinski deposed that, during that period, his responsibilities at Cartel included not only the responsibilities outlined in the Offer Letter but also reporting directly to the President and Chief Executive Officer, weekly meetings with the executive team, budget responsibility for his department and hire and fire responsibility. None of this was contradicted on the evidence.

[12] In a letter to Mr. Lesinski dated August 14, 2024 (the "Termination Letter"), Mr. Sanche advised Mr. Lesinski that his employment with Cartel was terminated effective immediately, initially with one months' salary in lieu of notice. The Termination Letter did not allege cause and stated in part:

> As you are well aware the last few months have been incredibly challenging for Cartel.
>
> Project delays have caused unsustainable impact to our financial position and I feel it leaves us no option but to reduce our operating overhead. Effective immediately we have made the decision to terminate our VP of Engineering.
>
> I know you are planning some travel this fall and I am sensitive to your request to organize leave to accomplish that, and as such working remote will not be required by the organization. All accrued holidays will be paid out immediately as well as one month salary in lieu of notice and in recognition of your 6 months tenure with our firm.

[13] Subsequently, Cartel paid Mr. Lesinski a further week of severance in addition to the one month of notice referenced in the Termination Letter.

D. Post-Termination Job Search Efforts by Mr. Lesinski

[14] Mr. Lesinski deposed in his affidavit material that he has sent out over a thousand job applications since his termination in August, 2024. He has applied for similar employment positions, and also a variety of different types of positions, in Canada, the United States and Europe.

[15] While he has had a few responses and invitations to interviews from four prospective employers, Mr. Lesinski stated that he has not had any offers and remains unemployed approximately 9.5 months after the termination of his employment by Cartel.

III. ISSUES

[16] The issues at trial were:

1. whether this matter is suitable for summary trial;
2. whether there was a contractual limitation on reasonable notice agreed between the parties;

3. if there was no such limitation, the quantum of reasonable notice to which Mr. Lesinski is entitled; and

4. whether Mr. Lesinski made reasonable efforts to mitigate his damages.

IV. ANALYSIS

1. Whether the Matter is Suitable for Summary Trial

[17] It was common ground between the parties that this matter was indeed suitable for summary trial pursuant to Rule 9-7 of the *Supreme Court Civil Rules*.

[18] Under Rules 9-7(11) and 9-7(15) of the *Supreme Court Civil Rules*, a court has the discretion to deny an application to proceed by summary trial if the court finds one or more of the following factors to be applicable (*Foreman v. Foster*, 2001 BCCA 26 at paras. 17–22):

(a) The issues are not suitable for disposition (R. 9-7(11)(b)(i));

(b) The application will not assist the efficient resolution of the proceeding (R. 9-7(11)(b)(ii));

(c) On the whole of the evidence, the court is unable to find the facts necessary to decide the issues of fact or law (R. 9-7(15)(a)(i)); or

(d) It would be unjust to decide the issues, particularly where there is an absence of cross-examination.

[19] In *Inspiration Management Ltd. v. McDermid St. Lawrence Ltd.* (1989), 36 B.C.L.R. (2d) 202 (C.A.), the Court of Appeal reviewed the principles to be applied in deciding the threshold issue of suitability for summary trial. The factors to be considered include the amount involved, the complexity of the matter, its urgency, any prejudice likely to arise by reason of delay, the cost of taking the case forward to conventional trial, and the course of the proceedings to date.

[20] In my view, taking into account the *Inspiration Management* factors, this matter is suitable for summary trial. I have reached this conclusion for the following reasons:

- I am able, based solely on the affidavit materials, to find the facts necessary to decide the issues of fact and law;

- there are no major credibility issues in this case and those that do exist can be resolved with reference to the documents adduced in evidence and without cross-examination. In this regard I note that Mr. Lesinski was discovered in this case and relevant portions of the transcript were made available to the Court by counsel for Cartel;

- Cartel took the position at trial that I should make an adverse credibility finding against Mr. Lesinski on the basis that he had failed to disclose to Cartel that he was not registered as an engineer in British Columbia. In my view this evidence was insufficient to justify the adverse credibility finding sought by Cartel, as Mr. Lesinski's job description at Cartel did not require him to be registered as an engineer; rather, the evidence was that his job was to manage and supervise engineers but not to do engineering work himself. There was also no evidence that Cartel believed that he was registered as an engineer or was paying him to do the work of a registered engineer. Moreover, Mr. Lesinski deposed that he was formerly registered as an engineer for many years in Quebec and that he could have easily reactivated that registration merely by paying a fee. Accordingly, I view this credibility issue to be somewhat tangential to the issues that I need to resolve in this proceeding and this issue, to the extent that it has any direct relevance, is certainly not substantial enough to justify declining to proceed by summary trial;

- The amounts in question are not large and do not in my view, at least taken alone, justify the cost of taking the case forward to conventional trial. This

summary trial application accordingly assists with the efficient resolution of the proceeding; and

- Neither party brought to my attention any reasons why it would be unjust to decide the issues on a summary basis.

2. Whether there was a Contractual Limitation on Reasonable Notice

[21] It is common ground between the parties that Mr. Lesinski was not terminated for just cause. The only question for determination is the amount of notice of termination to which he is entitled.

A. Applicable Law on Contractual Limitations

[22] It is well established that, in the absence of an express contractual limitation, the common law implies a requirement on the employer to provide reasonable notice on a termination without just cause: *Greenlees v. Starline Windows Ltd.*, 2018 BCSC 1457 at para. 36.

[23] The courts have made it clear that the presumption of reasonable notice can only be displaced in a contract of employment where the parties express that displacement "clearly and unambiguously". As stated by the Court of Appeal in *Egan v. Harbour Air Seaplanes LLP*, 2024 BCCA 222:

> [31] There is no question that parties may displace the presumption of reasonable notice through a provision in a contract of employment that clearly specifies "some other period of notice". There is also no question that the intention of the parties to do so must be expressed clearly and unambiguously: *Machtinger* at 998; *Nemeth* at para. 8. …

B. Analysis on Contractual Limitation

[24] Cartel took the position at trial that the employment contract between the parties contained a stipulation that Mr. Lesinski was entitled to only five weeks' notice in the event that his employment was terminated without cause by Cartel. In making that argument, Cartel took the position that the "employment contract" included not merely the Offer Letter but also the subsequent email correspondence

between the parties relating to the Offer Letter wherein Mr. Lesinski and Mr. Sanche allegedly negotiated certain revisions to the Offer Letter.

[25] In my view, Cartel's argument fails on the evidence because the email correspondence relied upon by Cartel in support of the argument did not reveal the type of "clear and unambiguous" contractual language required by the Court of Appeal in *Egan* to displace an employee's common law notice entitlement.

[26] In addressing this issue, I start from the important baseline fact that the Offer Letter signed by both parties contained no termination clause expressly limiting Mr. Lesinski's right to common law notice on a termination without cause, and indeed was entirely silent on that issue.

[27] The Offer Letter did contain a clause granting Cartel the right to 60 days' notice from Mr. Lesinski in the event that he resigned from his position, but that had nothing to do with Mr. Lesinski's common law rights to notice in the event that his employment was terminated by Cartel. This relevant clause in the Offer Letter was entitled "Resignation" (the "Resignation Clause") and stated:

> In the event that you terminate the employment contract with Cartel Communications systems you agree to provide at a minimum 60 days' prior written notice to the president/CEO.

[28] Despite the lack of any language in the Offer Letter addressing a limitation on Mr. Lesinski's common law rights on termination, Cartel took the position at trial that the Resignation Clause was subsequently amended by email correspondence between Mr. Lesinski and Mr. Sanche in which, Cartel argued, Mr. Lesinski agreed to a 5-week limitation on his reasonable notice entitlement.

[29] I am not persuaded by the Cartel argument. The history of correspondence between Cartel and Mr. Lesinski relating to the Offer Letter was as follows:

- In an email dated January 22, 2024 Mr. Sanche attached the Offer Letter and stated:

> Please see attached offer, as requested I will contact reference checks only as a condition once this offer has progressed and committed. Please do not hesitate to ask if you have any questions or concerns.

- The Offer Letter included a digital signature of Mr. Sanche dated January 22, 2024 and an undated blank signature line intended for later signature by Mr. Lesinski.

- In an email to Mr. Sanche dated January 23, 2024, Mr. Lesinski provided detailed blacklined commentary embedded in the text of the Offer Letter. With respect to the Resignation Clause, Mr. Lesinski commented:

> I find that the 60 days is excessive and would prefer a best effort to get a minimum of 60 days' notice but a 5-week notice period would still be acceptable to the company.

- In a response to Mr. Lesinski's email (apparently sent the same day) Mr. Sanche included the following embedded blacklined note underneath Mr. Lesinski's note:

> I could agree to 5 weeks, my objective is to ensure at this level of notice that we would have sufficient time to initiate a recruitment cycle. Any shorter and I would like to get concurrence that the understanding would be reciprocal.
>
> Many Thanks Adam, I will look forward to a time tomorrow to talk.

- There was no direct response by Mr. Lesinski in the correspondence to the above note from Mr. Sanche prior to signature by Mr. Lesinski. There was also no evidence of any verbal discussions on that issue during that time frame.

- Mr. Lesinski signed the Offer Letter on January 24, 2024. In the draft of the Offer Letter that he signed, Mr. Lesinski crossed out the words "60 days'" in the Resignation Clause and inserted in handwriting the words "5 weeks", with his initial adjacent to the revision.

- In an email dared January 24, 2024, attaching the signed Offer Letter, Mr. Lesinski stated:

> Hi Dave,
>
> I have signed off the offer and reduced the notice period to 5 weeks as agreed and initialed. Please initial and return for my records.

- There was no evidence that Mr. Sanche ever subsequently initialed Mr. Lesinski's change to the Offer Letter, or that he added a further revised signature on the Offer Letter to replace the earlier digital signature on the original draft.

[30] Cartel argued at trial that Mr. Sanche's response to Mr. Lesinski's email on January 23, 2024, in which Mr. Sanche stated that he "could agree to 5 weeks" and that "[a]ny shorter and I would like to get concurrence that the understanding would be reciprocal", was a proposal to Mr. Lesinski that he contractually limit his right to common law notice to 5 weeks. Cartel argued that, by subsequently initialling the Offer Letter, Ms. Lesinski accepted the Cartel proposal.

[31] In my view the evidence does not support the Cartel argument for at least three reasons.

[32] First, on a plain reading, I view Mr. Sanche's use of the words "[a]ny shorter" as being intended to modify the words "5 weeks" contained in his immediately preceding sentence, implying that he would be asking for a "reciprocal" understanding from Mr. Lesinski if Mr. Lesinski insisted on the right to terminate with less than 5 weeks notice (which Mr. Lesinski did not). This interpretation is reinforced by Mr. Sanche's use of the words "I could agree to 5 weeks" in the preceding sentence, implying that 5 weeks was immediately agreeable to Mr. Sanche but that anything less than that would require a further concession from Mr. Lesinski.

[33] Counsel for Cartel argued that the words "[a]ny shorter" should instead be interpreted to apply to the original 60 days period in the Offer Letter and not the

words “5 weeks”. While this is a plausible interpretation, I do not agree that it is the most compelling interpretation. Moreover, to the extent that this was Mr. Sanche was actually intending, it is undeniable that his phraseology was at best ambiguous and did not meet the standard for clear and unambiguous contractual language required by the Court of Appeal in *Egan*. To the contrary, in my view Mr. Sanche’s counteroffer was fundamentally ambiguous because:

- it did not make it clear whether a “reciprocal” understanding would be established upon the precondition that Cartel agree to either 5 weeks’ or 4 weeks’ notice from Mr. Lesinski (which was never clarified at the time between the parties) and therefore Mr. Lesinski could not have been certain as to what precise precondition he was agreeing to;

- Mr. Sanche’s previous sentence referenced only the “level of notice” that Cartel would require to have “sufficient time to initiate a recruitment cycle” and made no reference whatsoever to imposing a limit on Mr. Lesinski’s right to reasonable common law notice or a rationale for doing that. In this context it would have been easy for Mr. Lesinski to have misunderstood Mr. Sanche’s meaning and to fail to appreciate that Mr. Sanche was (as argued by Cartel at trial) raising an entirely new issue in their negotiations, never previously discussed, relating to Mr. Lesinski’s own separate right to reasonable common law notice from Cartel; and

- In my view a reasonable inference can further be drawn from the fact that Mr. Lesinski never subsequently objected, raised questions or sought to negotiate about this new significant issue that Mr. Lesinski did not in fact understand Mr. Sanche to be referring to Mr. Lesinski’s right to common law notice at all, but instead to Mr. Lesinski’s obligation to provide notice to Cartel. Mr. Lesinski confirmed that this was his understanding, deposing in his affidavit that “I agreed to provide five weeks notice of resignation and did not agree to any limit on my entitlement to common law notice of termination.”

[34] Second, Mr. Sanche's conduct at the time of termination and following was not consistent with belief on his part that Mr. Lesinski and Cartel had agreed to limit Mr. Lesinski's common law right to termination to five weeks. In the Termination Letter, Cartel agreed to pay Mr. Lesinski four weeks' severance, and not five weeks as asserted at trial, which is at least a *prima facie* indication that Mr. Sanche himself did not believe that they had agreed to a five-week limitation. In an affidavit sworn in this proceeding, Mr. Sanche deposed that the offer of four weeks notice was a "mistake" and that he subsequently corrected it by paying Mr. Lesinski another week of severance.

[35] However, this explanation in his affidavit is not consistent with the content of Mr. Sanche's letter dated October 10, 2024, where he set forth a different rationale for paying Mr. Lesinski an additional week of severance:

> As you are aware recent correspondence on your behalf has caused me to conduct a assessment and review of our engagement. Upon doing so I was reminded that you asked for and I agreed that should you terminate your employment with Cartel five weeks' notice was required of you. I believe it to be only fair that you are provided with the same consideration, therefore I enclose a cheque.

[36] As argued persuasively by counsel for Mr. Lesinski at trial, it is notable that Mr. Sanche made no reference in the above letter to an alleged contractual arrangement on the part of Cartel to pay five weeks' notice to Lesinski, instead referring only to the contractual obligation of Mr. Lesinski to give notice to Cartel in the event of a resignation. Mr. Sanche in his letter also did not reference any alleged "mistake" relating to the prior payment of four weeks (as he later did in his affidavit at trial), instead justifying his decision to pay an additional week on the basis of "fairness" as opposed to a contractual obligation. Obviously, if Mr. Sanche had believed that the payment of five weeks was a contractual obligation, there would have been no need for Mr. Sanche to provide a different rationale relating to "fairness". It is also notable, in my view, that the Cartel response to the notice of civil claim also contained no reference to the alleged contractual limitation on reasonable notice.

[37] Third, even if I were to accept Cartel's argument that the words "[a]ny shorter" were clearly intended to modify the reference to the original 60 days (and not the words "5 weeks"), I would still find that no binding contractual obligation limiting Mr. Lesinski's right to reasonable notice was created in this case. This is because Mr. Lesinski and Mr. Sanche never clearly and mutually manifested their intent to be bound by the alleged amendment to the Resignation Clause in the Offer Letter.

[38] Recall that Mr. Sanche prefaced his counteroffer to Mr. Lesinski with the words "I could agree to 5 weeks" but he never stated that he "did" agree to 5 weeks, leaving the matter open to further negotiation. When Mr. Lesinski returned the signed Offer Letter on January 24, 2024, he crossed out the words "60 days'" in the Resignation Clause and inserted in handwriting the words "5 weeks", with his initial adjacent to the change. In an accompanying email he stated that he had "signed off the offer and reduced the notice period to 5 weeks as agreed and initialed". He also stated: "Please initial and return for my records". This was a clear indication in my view that Mr. Lesinski considered Mr. Sanche's prior commitment to 5 weeks as being uncertain and that he required confirmation from Mr. Sanche that they were *ad idem* on the suggested revision.

[39] Mr. Sanche never subsequently confirmed (either by email, initial or subsequent signature) that there was in fact a meeting of the minds between the parties relating to Mr. Lesinski's revisions to the Offer Letter. This is significant because it was made clear by Mr. Lesinski in the email attaching the signed Offer Letter that an express condition of him agreeing to the change to 5 weeks was that Mr. Sanche also initial the change (reflecting Cartel's agreement to the change), which never happened. I conclude that the parties never reached a clear meeting of the minds on the change in the Offer Letter to "5 weeks" and therefore that Cartel's argument cannot succeed.

C. *Employment Standards Act*

[40] In the alternative, Mr. Lesinski submits that, even if the parties did agree to limit employment notice to five weeks, such a clause is void pursuant to the *Employment Standards Act*, R.S.B.C. 1996, c. 113 [*ESA*].

[41] Given my finding above, it is not strictly necessary for me to address this alternative argument. However, if I am wrong in my finding that the Offer to Settle did not contractually limit Mr. Lesinski's right to reasonable notice, I would have found in the alternative that his argument under the *ESA* has merit.

[42] This argument has merit because s. 63 of the *ESA* states that an employee may be entitled to up to 8 weeks' notice after 8 years of service, which exceeds the five-week limitation alleged by Cartel in this case. In *Shore v. Ladner Downs* (1998), 52 B.C.L.R. (3d) 336 (C.A.), the Court of Appeal held that a termination provision is void if it would have become contrary to the statutory minimums at a future date even if it complied at the time of termination (as in this case). This principle was cited and applied more recently in comparable circumstances in *Nowak v Biocomposites Inc.*, 2018 BCSC 785 at paras. 33-37:

> [37] In this case, the service agreement is inconsistent in that it refers to a two week notice period while also stating that employment is at will, which implies no right to any notice. On the most favourable interpretation – that it required the employer to give two weeks' notice – it complied with the *ESA* at the time of Mr. Nowak's termination, but would have violated the minimum notice provisions following three years of consecutive employment. As in *Shore*, the notice provisions in the service agreement would be void from the outset even if the service agreement formed part of the employment contract. It follows that a choice of law clause in favour of North Carolina, which would give effect to those provisions, must also be held unenforceable for failing to comply with the *ESA*.

[43] Cartel argued at trial that Mr. Lesinski is excluded from the *ESA* because he is a registered engineer. In my view this argument fails for two reasons. First, in Part 1, para. 2 of the response to civil claim, which was never amended, Cartel stated expressly that notice to Mr. Lesinski was paid "in compliance with the requirements of the [*ESA*]", which expressly contradicts the position taken by Cartel at trial.

[44] Second, as argued by counsel for Mr. Lesinski, the Regulation under the *ESA* stipulates that only engineers who hold a registration with the Association of Professional Engineers and Geoscientists of the Province of British Columbia (the "Association") are excluded from the *ESA*: *Advanced Systems Inc. v. The Director of Employment Standards*, BC EST #D106/15 at para. 53. There was no evidence at trial that Mr. Lesinski was ever registered with the Association or that he carried on the occupation of a professional engineer in his employment (as opposed to merely managing engineers) at Cartel.

[45] Thus I conclude that the alleged limitation on reasonable notice was, in the alternative, void under the *ESA*.

[46] Taking into account all the foregoing, the Cartel claim that Ms. Lesinski's right to reasonable notice was contractually limited is therefore dismissed.

3. Mr. Lesinski's Entitlement to Reasonable Notice

[47] In the absence of a contractual limitation, Mr. Lesinski asserts that he is entitled to salary in lieu of reasonable notice in the amount of $150,000 (10 months x $15,000/month) less the net severance received. Cartel opposes the relief sought by Mr. Lesinski and asserts that an award in the range of 2 to 3 months' salary is more appropriate.

A. Applicable Law on Reasonable Notice

[48] In the absence of a binding contractual exclusion, there is an implied contract term within an indefinite contract of employment that employment can only be terminated if reasonable notice is given: *Machtinger v. HOJ Industries Ltd.,* [1992] 1 S.C.R. 986 at 997.

[49] In *Ostrow v. Abacus Management Corporation Mergers and Acquisitions*, 2014 BCSC 938 at paras. 35-38, Justice Watchuk helpfully summarized the applicable analysis with regard to reasonable notice:

> [35] The general principles governing the assessment of reasonable notice are well established. The purpose of reasonable notice is to provide the

employee with a fair opportunity to obtain similar or comparable re-employment (*Bishop v. Carleton Co-Operative Ltd.*, [1996] N.B.J. No. 171 (C.A.), at para. 10).

[36] In *Bardal v. Globe and Mail Ltd.* (1960), 24 D.L.R. (2d) 140 (Ont. H.C.) [*Bardal*], at p. 145, the factors to be considered when determining reasonable notice were described in the following oft-cited paragraph:

> There can be no catalogue laid down as to what is reasonable notice in particular classes of cases. The reasonableness of the notice must be decided with reference to each particular case, having regard to the character of the employment, the length of service of the servant, the age of the servant and the availability of similar employment, having regard to the experience, training and qualifications of the servant.

This passage was quoted with approval by the Supreme Court of Canada in *Machtinger v. HOJ Industries*, [1992] 1 S.C.R. 986, at pp. 998-999.

[37] The British Columbia Court of Appeal adopted the *Bardal* approach in *Ansari v. British Columbia Hydro and Power Authority* (1986), 2 B.C.L.R. (2d) 33 [*Ansari*], which is the leading case in this province. In *Ansari*, Chief Justice McEachern stated at p. 43:

> At the end of the day the question really comes down to what is objectively reasonable in the variable circumstances of each case, but I repeat that the most important factors are the responsibility of the employment function, age, length of service and the availability of equivalent alternative employment, but not necessarily in that order.
>
> In restating this general rule I am not overlooking the importance of the experience, training and qualifications of the employee but I think these qualities are significant mainly in considering the importance of the employment function and in the context of alternative employment.

[38] The *Bardal* factors are not exhaustive, and no single factor is determinative (*Wallace v. United Grain Growers Ltd. (c.o.b. Public Press)*, [1997] 3 S.C.R. 701 at para. 82 [*Wallace*]). When assessing these factors the court must not apply a formulaic approach, but must assess the relevant factors on a case by case basis, looking at recent precedents from the court to determine an appropriate range (*Kerfoot v. Weyerhaeuser Co.*, 2013 BCCA 330 at para. 47 [*Kerfoot*]; and *Wallace* at para. 82). In *Honda Canada Inc. v. Keays*, 2008 SCC 39, the Supreme Court of Canada has made clear that, like all damages for breach of contract, in damages for wrongful dismissal the court must look at the reasonable expectation of the parties at the time the contract was made (paras. 55-56).

[50] In *Saalfeld v. Absolute Software Corp.*, 2009 BCCA 18 at para. 15, the Court of Appeal made it clear that employees dismissed in the first three years of their employment are entitled to a proportionately longer period of notice.

[51] Subsequently, in *Pakozdi v. B & B Heavy Civil Construction Ltd.*, 2018 BCCA 23, the Court of Appeal further elaborated upon the principles set out in *Saalfeld*, suggesting that the range of notice for specialized employees in short term positions is two to three months, as adjusted for age, length of service and job responsibility, with five months being on the "high side" and with eight months being "outside the range of reasonableness unless there are very special circumstances":

> [25] The appellant's position is that for a short-term employee of a year or less, a notice period of two to three months is the range of reasonableness that has been established in this jurisdiction. There is support for that position in the jurisprudence.
>
> [26] In *Saalfeld v. Absolute Software Corporation*, 2009 BCCA 18, a nine month employee was awarded damages based on five months' notice. This court reviewed the recent jurisprudence in this province and made the following comment:
>
> > [15] … Absent inducement, evidence of a specialized or otherwise difficult employment market, bad faith conduct or some other reason for extending the notice period, the B.C. precedents suggest a range of two to three months for a nine-month employee in the shoes of the respondent when adjusted for age, length of service and job responsibility…
>
> [27] Notwithstanding this comment, the five month notice period was upheld, primarily as the employee had required nine months to find employment after her termination. This Court regarded the notice period as "on the very high end of an acceptable range" but not unreasonable (at para. 18).
>
> [28] The two or three month range was applied by this Court in *Hall v. Quicksilver Resources Canada Inc.*, 2015 BCCA 291, in which a seven month notice period for a nine month employee was reduced to three months.
>
> [29] More recently, a 14 month employee who had been awarded damages based on a six month notice period had the period reduced to four months in *Cabott v. Urban Systems Ltd.,* 2016 YKCA 4. The Court commented that:
>
> > [18] … Accepting the description of the range of notice for specialized employees in short term positions as two to three months as observed in *Saalfeld* and *Hall,* the character of this employment would justify an award modestly beyond that range.
>
> [30] In my view, the initial assessment by the trial judge that the applicable notice period is five months is within the range of reasonableness having regard to this jurisprudence, though perhaps on the high side. Adding three months for the respondent's vulnerability takes the notice period outside the range of reasonableness unless there are very special circumstances that could support this assessment.

B. Analysis on Reasonable Notice

[52] In determining the issue of reasonable notice on the facts of this case, I will proceed to address each of the *Bardal* factors in turn.

(a) Length of Service

[53] Mr. Lesinski started work on February 12, 2024 and was terminated without cause on August 14, 2024, approximately six months after he started.

[54] *Saalfeld* makes it clear that employees dismissed in the first three years of their employment are entitled to a proportionately longer period of notice. In *Saalfeld*, the Court of Appeal observed that "B.C. precedents suggest a range of two to three months for a nine-month employee in the shoes of the respondent when adjusted for age, length of service and job responsibility", absent special circumstances. The length of the notice will depend upon the nature of employment role and the other *Bardal* factors.

(b) Character of Employment

[55] As noted in *Ostrow* at paras. 39-40, factors to be taken into account in addressing the character of employment include supervisory or managerial responsibility, professional skill, advanced training and the salary of the plaintiff.

[56] In this case, Mr. Lesinski had a senior position at Cartel as Vice President of Engineering, reporting directly to the COO, and periodically to the President and CEO, having weekly meetings with the executive team and a hire and fire responsibility. Mr. Lesinski's responsibilities, as set out by Cartel in the Offer Letter, were clearly at the level of a senior executive with a high level of professional skill and training, responsible for managing a team. These responsibilities included:

- Provide engineering leadership across the organization with a focus on Quality and a mindset of "Centre of Excellence";
- Responsible for the daily management of a broadly skilled and diverse team of engineers and technical resources;

- Leads by example and promotes a quality culture within the engineering team; and

- Hands-on approach to leading the engineering department. This will mean performing a broad range of tasks from reviewing project deliverables, to developing solutions for complex problems.

[57] The relevant skills and qualifications listed in the Offer Letter for Mr. Lesinski's position included training and experience as an engineer and also experience managing a team of over 10 people:

- Relevant engineering or technical related post-secondary education;

- Minimum 5 years of engineering related experience;

- Minimum 5 years of experience managing a headcount of 10 people;

- Entrepreneurial spirit. Ability to design quality solutions that are cost effective, align and scale within a growing small/medium sized organization; and

- Exposure to ISO 9001:2015 certification or equivalent.

[58] Professional development requirements in the Offer Letter included:

- Maintains professional and technical knowledge by attending educational workshops, reviewing report publications, attending sales and product training seminars; and

- Stays apprised of technical developments in the industry.

[59] Mr. Lesinski's compensation package with Cartel was substantial, involving a salary of $180,000.00, profit sharing plan with a target of 30% of base salary, and a package of insurance and health benefits.

[60] Prior to accepting the role at Cartel at the age of 63, Mr. Lesinski was clearly a very experienced executive with longstanding professional and business

experience. In the resume he provided to Cartel while applying for the position he described himself as follows:

> A dynamic executive with multidimensional manufacturing knowledge credited with nine successful turnarounds and transformations. Strong knowledge of all business functions including Strategic Planning, Quality, Manufacturing, Engineering, Finance, ERP, Project/Program management, Facilities, Supply Chain, Cost Accounting, ad MRO. Led successful LEAN implementations that led to significant process and P&L improvements.

[61] Mr. Lesinski included in his resume his prior relevant executive experience that included significant senior management and executive roles, including experience as a Chief Executive Officer:

- President of Automation West Technologies from 2021-2024;
- Chief Executive Officer of Con-Tech Systems Ltd from 2019-2021;
- Plant Manager of Varsteel Ltd., from 2017 – 2018;
- President of the Canada Pipeline Accessories (1986) Corp. from 2013 – 2015; and
- other managerial roles dating back to 1997, and before that, professional engineering roles dating back to 1985.

[62] In *Saalfeld* the employee was 35 years old when dismissed from a role as a senior software salesperson after being employed for nine months. The judge described the employee's position with the defendant as responsible and relatively senior, although one without management responsibilities. The facts in *Saalfeld* must therefore be distinguished from those relating to Mr. Lesinski who, as a Vice President, was clearly a more senior and seasoned executive than the employee in *Saalfeld*.

[63] Another comparable case is *Cabott v. Urban Systems Ltd.*, 2016 YKCA 4, where the employee was a 53-year old who was terminated without cause from her position as professional planner and supervisor for her employer in Whitehorse, just

short of 14 months after commencing employment. In *Cabott*, the Court of Appeal overturned a decision of the trial judge awarding six months' notice, and substituted an award of four months. In so doing, the Court of Appeal addressed and rejected the argument that the range should be substantially higher than the *Saalfeld* range due to the employee's more senior position and advanced age, instead finding that only a "modest" upward adjustment was justifiable:

> [16] On behalf of Ms. Cabott it is said that this case is unlike *Saalfeld* and *Hall* because those cases concerned younger employees in less responsible positions, and thus this case warrants the award based on six months' notice.
>
> …
>
> [18] … there is some force to the submission that Ms. Cabott's position in Whitehorse, described by the judge as senior and supervisory management, involved somewhat greater responsibility than the positions discussed in *Saalfeld* and *Hall*. Accepting the description of the range of notice for specialized employees in short term positions as two to three months as observed in *Saalfeld* and *Hall*, the character of this employment would justify an award modestly beyond that range.

[64] Thus while the Court of Appeal recognized in *Cabott* that a more senior and supervisory role would justify "an award modestly beyond [the *Saalfeld*] range", the Court of Appeal also found that a six-month award in those circumstances was beyond the reasonable range.

[65] That said I note that Mr. Lesinski's role at Cartel was clearly more senior than the role of the employee in *Cabott*, who was a "planner and supervisor" but not a senior executive such as Mr. Lesinski. I also note the comment of Chief Justice McEachern in *Ansari* (at p. 43) that one of the most important factors in the *Bardal* analysis is the "responsibility of the employment function", and this is a factor which weighs in Mr. Lesinski's favour.

[66] In *Greenlees*, for example, Justice Gomery (then a judge of this Court) found that the plaintiff's greater seniority as compared to the employee in *Saalfeld* was one of the important factors justifying an increase in the notice period to six months although, as I note below, there were other factors that Justice Gomery considered in reaching that decision.

[67] Taking the above authorities into account, the seniority of Mr. Lesinski's employment function at Cartel suggests that an upward variation in the amount of notice awarded beyond the two to three month starting point discussed in *Saalfeld* is appropriate in my view, subject to the concerns set out by the Court of Appeal in *Cabott*.

(c) Age of the Employee

[68] Mr. Lesinski was terminated at the age of 64 years.

[69] In *Corey v. Kruger Products L.P.*, 2018 BCSC 1510, Justice Gomery referenced the fact that persons in their late 50s and 60s may face more challenges in obtaining new employment:

> [47] The inference drawn in many cases, including judgments of the Supreme Court of Canada, that persons in their late 50s and 60s may expect to have greater difficulty finding alternate employment, is often a matter of common sense. Such persons have fewer years of service to offer prospective employers.

[70] However, this inference has not been consistently applied by the courts and each case turns on its own facts. In *Cabott*, for example, the Court of Appeal did not accept the argument that the more advanced age of a 53-year old employee should increase the range, reasoning that her age and experience could in fact make her more marketable:

> [17] It is true that Ms. Cabott is somewhat older than the employees in the cases just mentioned. It is not apparent to me, however, that the notice period should be extended in this case for that reason. It is not invariable that a mature person will have difficulty securing a new position. Some occupations by their nature are more likely to be occupied by individuals who, as a consequence of wisdom, experience and reputation acquired over the years, are older. This is demonstrated by the manner in which Ms. Cabott was engaged by the appellant. From the description of her position one may conclude that her prior contacts and experience, gained over her working life, made her candidacy attractive. It is not apparent on the record that Ms. Cabott's field of expertise is a "young person's game", and this was not the subject of comment by the judge. I cannot conclude that Ms. Cabott's age, which is some distance from the common age of retirement, favours a longer than usual notice period, or is a basis to distinguish Saalfeld and Hall.

[71] In *Sciancamerli v. Comtech (Communication Technologies) Ltd*., 2014 BCSC 2140 at paras. 29-31, Justice Sharma emphasized, with respect to age as a factor, that "individual circumstances and evidence regarding the impact of age in each case is more important that following any particular rule":

> [29] There is case law that supports the plaintiff's position that employees in their 50s and 60s will face more difficulty finding employment because of their age even if it cannot be demonstrated that the industry is dominated by younger workers: *Pollack* v. *Cotter*, 2005 BCSC 1799 at 27-28.
>
> [30] In *Matusiak v. IBM Ltd.*, 2012 BCSC 1784, the court was urged to view the impact of age from a "modern perspective" and no longer assume that age will be a detrimental factor on a person's job search. In that case, the defendant pointed out that mandatory retirement has largely been eliminated and that, among other things, justifies a re-examination of how age is factored into determining the length of proper notice. Justice Silverman acknowledged a modern approach was appropriate but also noted that at the end of the day, the court makes an evidentiary based enquiry on a case-by-case basis. In that light, the traditional judicial approach that views age as a detrimental factor should not be completely discarded.
>
> [31] Reading the cases together, I consider that the individual circumstances and evidence regarding the impact of age in each case is more important that following any particular rule.

[72] With respect to the individual circumstances and evidence in this case, I note that Mr. Lesinski is nearly a decade older than the plaintiffs in *Corey* and *Sciancamerli* and only a year away from the age of 65, which is often been considered a benchmark age for retirement and also the threshold entry-point for the category of "senior citizen". These facts are relevant in my view and add weight to the inference that Mr. Lesinski's advancing age may cause him to have greater difficulty finding alternate employment.

[73] That said, I note that there was no statistical or affidavit evidence adduced by Mr. Lesinski at trial concerning the detrimental impact of Mr. Lesinski's age on his job prospects in the relevant industries, including the communications and engineering fields specifically and the technology industry generally. Thus it is difficult to reach any firm evidentiary conclusions on the statistical impact of Mr. Lesinski's age, other than in relation to the general inference referenced in *Corey*.

[74] Absence such evidence, some courts have chosen to treat age as a relatively neutral factor. For example, in *Ewach v. Whiteoak Ford Lincoln Sales Ltd. (c.o.b. Whiteoak Ford Lincoln)*, [2021] O.J. No., 2021 ONSC 7206 at paras. 8-10 the court found that the plaintiff's age of 61 years, taken alone, was an insufficient basis to justify a lengthier notice period:

> [8] Mr. Ewach was 61 years of age at the time. I was asked to make assumptions that this factor alone – without more – requires a lengthier notice period than might otherwise be the case. I cannot agree with that bald statement.
>
> [9] Age is a factor but the impact of that factor is one that must be assessed in combination with all other relevant factors and in the particular circumstances of the individual in question. Age may be a desirable attribute for some positions and an impediment for others. The job requirements of a Walmart greeter and a bicycle courier suggest quite different conclusions when it comes to the impact of age to pick two relatively extreme examples.
>
> [10] There is simply nothing in the evidence that persuades me that there was any reason to believe that the plaintiff's age would be a particularly material impediment to his job prospects at the time of the termination of his employment.

[75] Further, I note that Mr. Lesinski was first hired by Cartel in 2024 at the age of 63 to take on a senior role at the company, which indicates that his advanced age was not recently a barrier to obtaining new employment at that time. Prior to being dismissed from his employment at Cartel, Mr. Lesinski has also been employed in a series of senior executive roles without significant interruption since 2013, indicating that his advancing age was also not a barrier to finding employment prior to working at Cartel.

[76] Finally, as noted in *Sciancamerli*, where the plaintiff's specialization and experience were found to justify an increase in the applicable notice (as in this case), taking age into account was found to be "double counting":

> [34] Given that I have already found the plaintiff's specialization (based primarily on his extensive experience) does justify an increase in the applicable notice, I find it would be "double counting" to then also find his age to be a factor increasing the length of notice. …

[77] I therefore consider age to be a largely neutral factor in the context of this case, or at most a modest factor in Mr. Lesinski's favour, particularly given the lack

of empirical evidence adduced at trial concerning the impact of age on job prospects for individuals with experience comparable to Mr. Lesinski and my finding that Mr. Lesinski's seniority and experience justify an increase in the applicable notice.

(d) Availability of Similar Employment

[78] Mr. Lesinski deposed in his affidavit material that he has applied for over 1,000 jobs locally, nationally and internationally since his termination in August, 2024. In general, he stated, he has applied for any positions available at a senior level and paying a comparable amount to his job with Cartel. He deposed that he has applied for positions in Canada, the United States and Europe and noted that, because he has a European Union passport he does not need a visa or sponsorship to work in the European Union.

[79] Mr. Lesinski adduced evidence of correspondence indicating that he has been offered job interviews with four different prospective employers. However, Mr. Lesinski deposed that he has not had any job offers and remains unemployed approximately 9.5 months after the termination of his employment by Cartel.

[80] Mr. Lesinski submits that, although there he has adduced little direct evidence of the availability of similar employment, this Court may make inferences regarding the lack of similar employment from the length of time it has taken Mr. Lesinski to find alternative work. I agree that the jurisprudence supports such an inference. For example, in *Saalfeld* at para. 16, a nine-month job search was found to justify adding two to three months to the notice period. Similar considerations have been applied in other cases: e.g. *Ostrow* at paras. 54-57 (6-month job search*); Bavaro v. North American Tea, Coffee & Herbs Trading Co. Inc.*, 2000 BCSC 419 at para. 7 (10.5-month job search); *Sciancamerli* at paras. 36-39 (11-month job search); *Corey* at para. 49 (5-month job search).

[81] In response, Cartel argues that the inference to be drawn from the length of Mr. Lesinski's job search is weak because that job search has not been diligent. In particular, Cartel argues that:

- Mr. Lesinski's job searches were confined solely to two online platforms: LinkedIn and Indeed. Many of these applications required nothing more than a single mouse click;

- Mr. Lesinski did not include cover letters with his applications and merely sent a boilerplate resume relating to each job opening;

- Mr. Lesinski has applied for approximately 4920 jobs on LinkedIn over the years (dating back to before his employment with Cartel) and applied for jobs through these platforms whether currently employed or not, including while employed at Cartel. This, Cartel argued, indicates that he did not modify his job search behaviour and techniques after his termination by Cartel;

- Mr. Lesinski has not engaged independently with any recruiting firms to seek replacement employment and has not attempted to reach out to any professional network to secure alternate employment;

- Mr. Lesinski's applications were not targeted – he has applied to jobs for which he lacked the required qualifications but which he considered suitable as alternate employment under the circumstances; and

- Mr. Lesinski's efforts have only resulted in a small number of interviews and no job offers.

[82] Mr. Lesinski admitted during examination for discovery that he has not retained a recruiting consultant or career coach (which was a consideration discussed in *Corey* at paras. 14 and 49). He also admitted that he has not drafted bespoke or tailored cover letters or resumes and he has not kept a detailed job search log. He also adduced no evidence at trial of the number of jobs which he has applied that have actually been filled.

[83] However, he did explain in an affidavit that he does not send a cover letter with the CV in his job applications as a practice because the purpose is for the recruiter to see the experience from his CV right away and he has a paragraph in his

CV that essentially serves the function of a cover letter. He stated: “My approach has resulted in many jobs over the years”.

[84] In *Moore v. Instow Enterprises Ltd*., 2021 BCSC 930 at paras. 37 and 39, Justice Walkem made reference to some of the steps that may indicate that a job search is reasonable under the circumstances:

> [37] Mr. Moore’s evidence was that he created a resume and did computer searches for available jobs. There is less evidence that he actively applied for those jobs. Mr. Moore testified that he sent his resume, without a cover letter, in response to several postings that he saw within the tire industry. He did not reach out personally to pursue these employment opportunities, nor did he otherwise reach out to contacts. Mr. Moore relies on *Forshaw* for the proposition that mitigation efforts are required to be reasonable, but they are not required to be perfect.
>
> …
>
> [39] A job search is an active prospect, and it can be a difficult and onerous one. It requires more than creating a resume and conducting computer searches. Looking at job postings, absent further action, is not sufficient to fulfill the requirement that a person undertake a reasonable job search. A reasonable job search may include activities such as reaching out to contacts within the industry, writing cover letters setting out why you qualify for a position, following up with telephone calls, or email correspondence.

[85] While it is true, as alleged by Cartel, that Mr. Lesinski has not taken some of the steps outlined in *Moore* that can be the hallmarks of a reasonable job search, I note that *Moore* is to be distinguished from Mr. Lesinski’s case in the sense that there was no evidence in *Moore* that the plaintiff had actually applied for any jobs (as opposed to merely doing computer searches for available jobs).

[86] By contrast, Mr. Lesinski has applied for over a thousand jobs in North America and Europe. Mr. Lesinski has not turned down any job offers nor has he unreasonably limited his job search to a particularly narrow geographic or industry scope. To the contrary, he has cast his net widely to include not only comparable positions but also different roles in a range of industries.

[87] It is also notable, in my view, that Mr. Lesinski has applied the same job search methodology that has apparently worked well for him in the past. The fact that this methodology has not worked following his termination by Cartel may be a

reflection of a change in the economy or, as discussed above, a reflection of the impact of his advancing age or other factors.

[88] I conclude that a material inference can be drawn from the length of Mr. Lesinski's search concerning the lack of availability of comparable employment but that the strength of this inference is attenuated to a degree by Mr. Lesinski's failure to take all of the proactive job search steps discussed in *Moore*.

(e) Additional Factors

[89] In *Saalfeld* at para. 15 and later in *Pakozdi*, the Court of Appeal recognized that an extension of the notice period may be justifiable under special circumstances which may include, for example, inducement, evidence of a specialized or otherwise difficult employment market and bad faith conduct. An extension of the notice period may also be justified where a non-compete clause in the employment contract impacts the ability of the employee to find alternative work: *Ostrow* at para. 59.

[90] In my view there was no compelling evidence of such special circumstances justifying an extension of the notice period in this case.

[91] For example, in *Greenlees*, Justice Gomery justified an increase in the notice period to 6 months in part with reference to evidence of that the employee had been induced by the employer to accept the employment position. There was no evidence of such an inducement in this case.

[92] In *Taner v. Great Canadian Gaming Corporation*, 2008 BCSC 129, the court found that an increase to the notice period was justified because the plaintiff gave up secure employment in Memphis, Tennessee to relocate to Vancouver. There was no evidence of this in Mr. Lesinski's case, as he was already living in the Vancouver area when he accepted employment with Cartel.

[93] In *Ostrow*, there was evidence of assurances given by the employer of job security, both at the initial contract negotiation stage as well as during the term of employment secure. No such evidence was adduced in this case.

[94] Mr. Lesinski argued that the "Non-Competition/Non-Solicitation" clause in the Offer Letter may have hindered his job search but in my view this argument is not persuasive for two reasons.

[95] First, this clause was very narrowly tailored in the Offer Letter and did not in any way purport to restrict Mr. Lesinski from pursuing other jobs in his chosen field or in any particular jurisdiction; it simply restricted him from soliciting customers from Cartel and inducing other employees to leave Cartel.

[96] Specifically, the "Non-Competition/Non-Solicitation" in the Offer Letter clause restricted Mr. Lesinski for a period of 12 months following termination from:

> a. soliciting orders from any customers doing business with Cartel for the same products or services as sold or provided by Cartel;
> b. soliciting customers or prospective customers for whom a bid was being prepared by Cartel for at the time of termination; and
> c. inducing or attempting to induce employees of Cartel to leave the employment of Cartel.

[97] In this respect, Mr. Lesinski's situation can be distinguished from a case such as *Thompson v. Revolution Resource Recovery Inc.*, 2025 BCSC 8, where the non-compete and non-solicitation clause was, in the words of Justice Tucker, "extremely broad, both in terms of territory and application" and the employer had made it clear to the employee that it intended to enforce that clause:

> [65] Non-compete and non-solicitation agreements can potentially have a deleterious effect of an employee's ability to find alternative work: *Munoz v. Sierra Systems Group Inc.*, 2015 BCSC 269 at paras. 91-92. The Restrictive Agreement contains both non-compete and non-solicitation clauses.
>
> [66] The non-compete clause in the Restrictive Agreement is extremely broad, both in terms of territory and application. Ms. Thompson is not allowed to:
>
> > … carry on or be engaged in any activity … that is competitive with the Business, directly or indirectly, and in any manner including, without limitation as an employee …
>
> …
>
> [69] Ms. Thompson testified that she was very concerned about the possibility of being accused of a breach of the Restrictive Agreement given the aggressive tone of the Cease and Desist Letter. She did not want to have to defend herself against an allegation of breach. Given the breadth of the non-

> compete clause and the tone of the Cease and Desist Letter, I find that it was reasonable for Ms. Thompson to be hesitant to take any work that might give Revolution a basis for making a claim against her. (Mr. O'Hara's view of the scope of restriction at trial only buttresses this further.) I find that the impact of the Restrictive Agreement did significantly impact her ability to look for alternative employment.

[98] Second, there was no evidence adduced at trial that "Non-Competition/Non-Solicitation" clause in the Offer Letter, as in *Thompson*, created an issue for Mr. Lesinski with any prospective employers or that it hindered Mr. Lesinski's pursuit of his job opportunities in any specific manner. In contrast to *Thompson*, for example, Cartel in this case did not threaten that it would enforce the clause against Mr. Lesinski.

[99] In this respect, this case is also to be distinguished from *Ostrow* at para. 85 where the non-competition clause was more restrictive and there was evidence that the employer had sent the employee a letter reminding him of that clause in the contract.

C. Assessment and Conclusion on Notice Period

[100] Mr. Lesinski cites four comparable decisions in support of his claim for notice in the range of 8-10 months: *Ostrow* (9 months' length of service, 6 months' notice), *Greenlees* (6 months' length of service, 6 months' notice); *Harris v. Hay River (Town)*, 2024 NWTSC 47 (18 months' length of service, 8 months' notice) and *Taner* (6 months' length of service, 10 months' notice).

[101] With respect to both *Ostrow* and *Greenlees*, Mr. Lesinski had a more senior role at Cartel than the employees in those two cases, and is also older, but there were other relevant factors in those cases not present in this case. For example, in *Ostrow* there was a non-competition clause that the court found had impacted the employee's job search and also assurances of job security. In *Greenlees* the employer had induced the employee to enter into the employment agreement. In both *Ostrow* and *Greenlees*, the employees engaged in more diligent job searches than Mr. Lesinski, lending more credibility to their assertions concerning the lack of availability of comparable employment.

[102] The decisions in *Harris* and *Taner* made no reference to the Court of Appeal decisions in *Saalfeld* and *Cabott* discussed above and therefore must in my view be approached with caution. I consider them to be of limited persuasive value on the issue of the range of reasonable notice for that reason. I also note that *Ostrow* was decided prior to the decisions of the Court of Appeal in *Pakozdi* and *Cabott*, where the principles in *Saalfeld* were further elaborated upon, and therefore must be read in light of the subsequent appellate guidance.

[103] As noted above, in *Saalfeld* the plaintiff was a 35-year old software salesperson employed for nine months and her job search lasted nine months. The employee in *Saalfeld* received five months' notice and the Court of Appeal did not interfere with that determination.

[104] In *Sciancamerli,* the plaintiff was a 57-year old senior sales executive employed for ten months. Following a job search of 11.5 months, the plaintiff remained unemployed at the date of the hearing. The plaintiff in *Sciancamerli* received five months' notice.

[105] Taking into account all the foregoing, I conclude that an upward adjustment to the notice period from the two to three month starting point identified in *Saalfeld* to five months is justified in this case for two principal reasons: (1) the senior responsibility and importance of Mr. Lesinski's employment function; and (2) the limited availability of alternate employment, even after accounting for the deficiencies in Mr. Lesinski's job search techniques. In my view the Court of Appeal guidance does not support an adjustment above five months, as the requisite special circumstances are not present in this case.

4. Mitigation of Damages

[106] Cartel argues that Mr. Lesinski has failed to mitigate his damages by diligently seeking alternative employment and that a reduction in the notice period of two to three months is therefore appropriate.

[107] In *Luchuk v. Starbucks Coffee Canada Inc*., 2016 BCSC 830 at paras. 36-38, Justice Gray explained that the plaintiff's obligation to mitigate is a duty to take such steps as a reasonable person in the dismissed employee's position would take in his own interests (not his former employer's interest) to maintain his income and his position in his industry, trade or profession.

[108] Justice Gray explained that the burden on the defendant to prove a failure to mitigate is a "high one" and involves two components:

> [39] In summary, the burden on a defendant to prove that a plaintiff failed to mitigate is a high one. The defense has to prove not only that the employee did not take such steps as a reasonable person in the dismissed employee's position would have taken in their own interests, but must also show that if the plaintiff had taken those steps, the employee likely would have found equivalent employment.

[109] I have reviewed the steps taken by Mr. Lesinski to locate alternative employment above and will not repeat that evidence here. Even though I have found that Mr. Lesinski did not perhaps take all steps that a reasonable person in his position could have taken in his own interests, the Cartel argument fails in my view at the second stage of the analysis because Cartel has adduced no evidence that would support the finding or inference that Mr. Lesinski could have found work sooner if he had taken additional steps.

[110] In *Luchuk,* Justice Gray cited two example of cases in which defendants were able to adduce such evidence:

- In *Dodge v. Signature Automotive Group Ltd*., 2014 BCSC 1452, a notice period was reduced by three months owing to a failure to mitigate in a circumstance where there was evidence of a "host of similar positions that became available, but the plaintiff did not apply for any of them". There was no such evidence in this case.

- In *Steinebach v. Clean Energy Compression Corp.*, 2015 BCSC 460, the plaintiff had "not applied for any jobs and had not made any inquiries by the time of the hearing". Again this is to be contrasted to this case where

> Mr. Lesinski has made applications for over a thousand jobs in North America and Europe and, where companies have expressed interest, he has followed up to schedule interviews.

[111] With respect to *Luchuk* my view is that the plaintiff's efforts in that case to locate alternative employment were no more diligent or energetic than those of Mr. Lesinski. The plaintiff in *Luchuk*, as with Mr. Lesinski, relied on internet employment websites to look only for local and equivalent work (Mr. Lesinski has cast a wider geographical and job-type net in his search) and applied for only four positions. Unlike in this case, the employer in that case had provided outplacement services and sent over job postings that it thought would be equivalent, whereas Cartel has done nothing to facilitate Mr. Lesinski's job search.

[112] Nonetheless, Justice Gray found in that case that the employer had not met the high onus:

> [43] In this case, as I have discussed, Mr. Luchuk has made some applications. He has had an interview. He is monitoring websites. I am satisfied that he is taking reasonable steps to try to find a new job.
>
> [44] There is a genuine disagreement about whether Mr. Luchuk should have pursued further jobs suggested by Ms. Tsze, but my conclusion is that it was reasonable for Mr. Luchuk to assume that he was overqualified for those two jobs I mentioned.
>
> [45] I am not satisfied that Mr. Luchuk acted unreasonably, nor am I satisfied that he would have obtained another job if he acted in a different way. As a result, I will not make any reduction to the award on the basis that he failed to mitigate his damages.

[113] For similar reasons to those set out in *Luchuk*, I conclude that Cartel has not met the onus to demonstrate that Mr. Lesinski had failed to mitigate his damages.

V. ORDER

[114] Mr. Lesinski is awarded judgment against Cartel for wrongful dismissal. I conclude that Mr. Lesinski was entitled to a notice period of five months, less the amount of severance already received.

[115] The parties have leave to speak to the issue of costs. In the event that leave is not sought, Mr. Lesinski, as the substantially successful party, shall have his costs at Scale B.

"M. Taylor J."