

# THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Kular v. Avcorp Industries Inc. (LateCoere  
Aerostructures Canada)*,  
2026 BCSC 794

Date: 20260501  
Docket: S251055  
Registry: Vancouver

Between:

**Harman Kular**

Plaintiff

And

**Avcorp Industries Inc. dba LateCoere Aerostructures Canada**

Defendant

Before: The Honourable Justice Branch

## Reasons for Judgment

Counsel for the Plaintiff:

E. Brandt

Counsel for the Defendant:

J. Wong

Place and Dates of Hearing:

Vancouver, B.C.  
March 23, 2026

Place and Date of Judgment:

Vancouver, B.C.  
May 1, 2026

**Table of Contents**

**I. INTRODUCTION ..... 3**

**II. BACKGROUND ..... 3**

**III. ANALYSIS ..... 8**

    A. Suitability for Summary Trial..... 8

    B. Notice Period..... 8

        1. Character of Employment ..... 13

        2. Length of Employment..... 13

        3. Age ..... 15

        4. Availability of Similar Employment..... 15

        5. Case Law Guidance ..... 15

        6. Conclusion on Notice Period ..... 18

    C. Bonus ..... 18

    D. Vacation Time ..... 21

    E. Medical Benefits ..... 21

    F. Pension ..... 22

    G. Aggravated Damages..... 22

    H. Punitive Damages ..... 24

**IV. CONCLUSION ..... 25**

**I. INTRODUCTION**

[1] What is the proper approach when there are drafting problems in an employment contract that make an employee’s rights on dismissal uncertain? That is the key issue facing the Court in this wrongful dismissal claim.

**II. BACKGROUND**

[2] The defendant is a Canadian aerospace company specializing in the design and construction of major airframe structures for companies such as Boeing and Bombardier.

[3] In the fall of 2021, the defendant offered the plaintiff employment in Vancouver. At that time, the plaintiff was living and working in Toronto. On November 29, 2021, the plaintiff formally accepted the defendant’s offer and signed an employment agreement (the “First Agreement”).

[4] The First Agreement contained the following material clauses :

25. Avcorp may terminate your employment without cause, and without further obligation, by providing you with one (1) months’ notice, plus an additional one (1) month of notice for each complete year of employment with Avcorp, up to a maximum of six (6) months’ notice in total (the “Required Notice Period”). You will not be entitled to notice of termination if your employment is terminated during your probationary period, or for cause.

26. Avcorp may elect to provide you with severance compensation in lieu of all or part of the Required Notice Period, in which case the following terms will apply:

- a. Avcorp will continue to pay your salary, less payroll deductions, on the regular paydays until the end of the Required Notice Period or the date you commence New Employment, whichever occurs first (the “Final Date”);
- b. in this Agreement, “New Employment” means any ongoing activity from which you earn remuneration from the provision of your services, whether as an employee, an independent contractor, a consultant or otherwise;
- c. Avcorp will pay the premiums to continue your group benefit coverage, with the exception of long term disability, until the Final Date;
- d. your long term disability benefit coverage will end on your last day of active employment with Avcorp;

e. you must conduct a reasonable job search, and you must notify Avcorp promptly in writing if you obtain New Employment before the end of the Required Notice Period; and

f. if you obtain New Employment before the end of the Required Notice Period, all salary continuance payments will end effective on the date you commence such New Employment, and Avcorp will provide you with a lump sum severance payment, less deductions required by law, equal to 50% of the remaining salary you would have received if you had remained unemployed until the end of the Required Notice Period.

[5] On January 3, 2022, the plaintiff commenced his employment duties as the Director, Supply Chain, overseeing supply chain management. He was responsible for three plants.

[6] On May 16, 2022, the plaintiff received a \$20,000 transaction bonus.

[7] On January 30, 2023, the defendant informed the plaintiff that his position was being terminated, effective April 1, 2023, for performance reasons. In the same letter, the defendant offered the plaintiff a demotion to Plant Supply Manager, with responsibility for a single plant. His position in the reporting structure would also be downgraded. His bonus entitlement would also be restructured.

[8] The letter was clear that if the plaintiff did not sign a new employment agreement accepting the offer of employment for the new position, the offer would be withdrawn.

[9] The plaintiff was surprised by the allegation of performance concerns, as this was the first time he had been made aware of such issues. Shortly after receiving the letter, the plaintiff asked the defendant for clarification. In response, the defendant stated that the reference to performance concerns was a mistake.

[10] On February 2, 2023, the defendant issued a second letter, which removed the reference to performance concerns. This letter also confirmed that the plaintiff was being provided with two months' working notice of the elimination of his original position.

[11] On February 13, 2023, the plaintiff and the defendant entered into a second agreement under which the plaintiff would begin work in his reduced role as a Plant Supply Manager on a full-time, indefinite-term basis, effective April 1, 2023 (the “Second Agreement”). The Second Agreement includes the following material clauses:

4. PROBATIONARY PERIOD. The probationary period is waived.

...

5.3 RRP Plan. You will be continue to be eligible to participate in the optional RRSP plan the Employer makes available to its exempt salaried staff. It is your responsibility to contract the Employer’s Payroll and Benefits office to initiate and maintain the RRSP plan. The Employer reserves the right to amend, alter or vary the terms of the RRSP plan from time to time at its discretion.

5.4 Bonus. The Employee shall be eligible to participate in an Employer bonus plan. The actual amount of the bonus shall be determined by the Employer in its sole discretion and is subject to statutory deductions. Currently, the Employee shall be entitled to a Bonus of 15% with a stretch target 22.5 of base salary. The entitlement to a bonus in one year of employment will not constitute an assurance of bonus payments being provided in future years of employment. The Employer may unilaterally discontinue or amend any bonus plan in its discretion.

5.4.1 To be eligible to receive a bonus, the Employee must be actively employed with the Employer on the date when it was payable. Active employment does not include any period of resignation, notice of termination or applicable period of pay in lieu thereof.

...

6. Vacation: The Employee shall be entitled to 3 weeks of annual vacation time and vacation pay of 6% to be taken at a time or times acceptable to the Employer having regard to the business requirements of the Employer.

...

9.2. Termination Without Cause. The Employer may terminate this Agreement at its sole discretion for any reason, upon providing the Employee the following:

9.2.1. Any accrued and unpaid base salary (subject to normal withholding and other deductions) to the effective date of termination of employment, any vacation pay statutorily due and owing, and any statutory entitlements under Employment Standards Act [RSBC 1996] CHAPTER 113 for notice and/or compensation in lieu of notice and statutory severance.

9.2.2. In addition to the notice and/or pay in 9.2.1. there will be an additional pay and/or notice such that the total notice and/or pay ( the “Severance”); shall be equal to one the obligations outlined in the Employment Standards Act of British Columbia.

9.2.3. The Severance shall be allocated in the Employers discretion as notice, pay or any combination of notice and pay. Pay shall be restricted to base salary plus any accrued vacation pay during the Severance period. For the purposes of Article 9 the Employer recognizes the commencement of employment date of January 3, 2022

9.2.4. The Employee acknowledges and agrees that payment by the Employer as provided for in Employment Standards Act Section 7.2 shall be in full and final settlement of any and all claims, demands, and actions which the Employee has or may have against the Employer. The Employee further agrees to execute a Full and Final Release in favour of the Employer, if, as and when requested by the Employer.

...

10.5 Entire Agreement. This Agreement constitutes the entire agreement between the parties on all subject matters herein and supersedes all prior and contemporaneous agreements, understandings, negotiations and discussions, whether oral or written, of the parties.

...

10.8 Severability. If any provision of this Agreement is determined to be invalid or unenforceable in whole or in part, such invalidity or unenforceability shall attach only to such provision and all other provisions hereof shall continue in full force and effect.

[12] On May 11, 2023, the plaintiff received a \$30,000 bonus reflecting his individual and company performance over the 2022 fiscal year.

[13] On May 29, 2024, the plaintiff received a bonus of \$14,816.79 in recognition of his performance during the 2023 fiscal year.

[14] The defendant faced new financial difficulties in 2024, primarily due to a strike at Boeing.

[15] On December 17, 2024, the defendant dismissed the plaintiff without cause, effective immediately (the “Dismissal”). The defendant only provided the plaintiff with three weeks’ pay in lieu of notice – the basic requirement under s. 63 of the BC *Employment Standards Act*, RSBC 1996, c.113 [ESA].

[16] At the time of the Dismissal, the plaintiff was entitled to the following employment benefits:

- a) an annual salary of \$185,400;

- b) extended health and dental benefits under the executive group benefits plan;
- c) 3 weeks of paid annual vacation;
- d) a potential bonus; and
- e) pension contributions by the defendant equal to 5% of the plaintiff's salary.

[17] In this action, the plaintiff is seeking:

- a) \$264,995.89, being the figure derived from applying the plaintiff's proposed 12-month notice period, which amount is calculated as follows:
  - i. \$185,400 for his annual salary;
  - ii. \$27,810 for his lost previously-earned 2024 bonus;
  - iii. \$27,810 for the loss of his future bonus over the proposed notice period;
  - iv. \$11,124 for the loss of his 6% vacation pay during the notice period;
  - v. \$3,581.89 for medical expenses incurred during the notice period; and
  - vi. \$9,270 for the loss of his ability to participate in the defendant's pension plan during the notice period;
- b) aggravated damages in the amount of \$50,000;
- c) punitive damages in the amount of \$100,000;
- d) interest pursuant to the *Court Order Interest Act*; and
- e) costs.

**III. ANALYSIS**

**A. Suitability for Summary Trial**

[18] Pursuant to Supreme Court Civil Rule 9-7(15)(a), this Court may adjudicate the plaintiff's claim by summary trial unless:

- (i) the court is unable, on the whole of the evidence before the court on this application, to find the facts necessary to decide the issues of fact or law; or
- (ii) the court is of the opinion that it would be unjust to do so.

[19] The factors in determining whether to proceed by summary trial include: the amount involved; the complexity of the matter, and the cost of proceedings by conventional trial compared to the amount involved: *Inspiration Management Ltd., v. McDermid St. Lawrence Ltd.*, 36 B.C.L.R. (2d) 202, 1989 CanLII 229 (B.C.C.A.) at paras. 41, 48-49.

[20] There is no dispute between the parties that this case is suitable for summary disposition. I agree that it is suitable: *Chu v. China Southern Airlines Company Limited*, 2023 BCSC 21 at paras. 46–50.

**B. Notice Period**

[21] Absent an enforceable express contractual term to the contrary, it is an implied term of every employment contract that an employee must be given reasonable advance notice of any termination. Where an employer fails to give sufficient notice, the employee's damages are assessed with reference to the amount of remuneration the employee would have received had the employment continued through the reasonable notice period: *Ensign v. Price's Alarm Systems (2009) Ltd.*, 2017 BCSC 2137 at para. 35; *Egan v. Harbour Air Seaplanes LLP*, 2024 BCCA 222 at para. 24.

[22] The defendant asserts that the termination clause in the Second Agreement displaces the plaintiff's entitlement to common law reasonable notice. As the Court of Appeal noted in *Egan*, a defendant can avoid the application of the common law notice period by including a contractual term to that effect in the employment

contract. However, I agree with the plaintiff that the termination clause in the Second Agreement here is ambiguous and incomprehensible, and therefore fails to displace the implied term of common law reasonable notice: *Briggs v. ABC Insurance Solutions Inc.*, 2024 BCSC 1918 at paras. 91–99.

[23] As the Court of Appeal stated in *Egan*:

[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...

[Emphasis added.]

[24] I find that the Second Contract’s termination provisions were not clear and unambiguous. Applying a “practical, common-sense approach to contractual interpretation”, and looking at the “wording of the clause alone” (*Egan* at paras. 36–37):

- a) Clause 9.2.1 purports to provide at least the *ESA* minimum on a dismissal, but then the immediately following clause 9.2.2 clearly intends to provide something additional when it states:

in addition to the notice and/or pay in 9.2.1 there will be an additional pay and/or notice ...

[Emphasis added.]

However, clause 9.2.2 fails to continue on to set out with any clarity what such additional “pay and/or notice” is, with the result that the clause is both ambiguous and confusing. In particular, the subsequent language describing that the additional benefit “shall be equal to one the obligations outlined” is grammatically incomprehensible.

- b) Clause 9.2.4 references a “Section 7.2” that does not even exist in the *ESA*. The defendant suggested that it was perhaps intended to refer to clause 9.2 of the Second Agreement, but that is far from clear. I note that

the words “Employment Standards Act” immediately precede the reference to “Section 7.2”, suggesting it was supposed to be a statutory reference.

[25] There is a further problem with the termination clause beyond ambiguity. Clause 9.2.4 includes an attempt to make the plaintiff’s entitlement to the notice under the *ESA* conditional on the signing of a release. Such a requirement exceeds what the *ESA* requires from an employee to secure such compensation. As such, its inclusion also renders the clause null and void: *Shore v. Ladner Downs*, 52 B.C.L.R. (3d) 336, 1998 CanLII 5755 (B.C.C.A.) at para. 16. A termination clause that has the potential to not meet the minimum statutory standards applicable to the plaintiff is void and unenforceable: *Hoem v. Macquarie Energy Canada Ltd*, 2025 BCSC 446 at para. 126.

[26] Returning to the question of ambiguity, if it exists and cannot be resolved through a consideration of the parties’ intents and expectations and the surrounding circumstances of the contract (as is the case here), the principle of *contra proferentem* requires that any ambiguity be resolved against the drafter. Furthermore, the principles of employment law generally favour protecting the employee against the employer (and drafter of the contract): *Miller v. Convergys CMG Canada Limited Partnership*, 2014 BCCA 311 at para. 15.

[27] The defendant urges the Court to apply broad principles of contract interpretation to address the drafting difficulties identified in the Second Agreement. However, I find that these principles do not allow the Court to conduct the extensive surgery required to render the clause enforceable. It would be a matter of completely rewriting the termination clause rather than simply performing less significant “blue pencil” adjustments: *Shafroon v. KRG Insurance Brokers (Western) Inc.*, 2009 SCC 6 at paras. 2,3, and 47-50. It is notable that the defendant concedes that its primary position would require the following material adjustments to the most problematic clause:

9.2.2 ~~In addition to~~ [t]he notice and/or pay in 9.2.1 there will be ~~an~~ **additional** pay and/or notice such that the total notice and/or pay (the “Severance”); shall be equal to ~~one~~ the obligations outlined in the Employment Standards Act of British Columbia.

[28] The defendant also suggested that clause 9.2.2 could have been intending to add either an extra week or an extra month to the basic *ESA* entitlement. The defendant was prepared to accept that the intention was for an extra month. But there is simply no “surrounding circumstances” evidence that would allow the Court to pick between one week or one month as part of the defendant’s proposed “patch” to the clause.

[29] The defendant also suggested that the Court could invoke the severability clause to leave the plaintiff with their *ESA* entitlement under clause 9.2.1. I find that this would be grossly unfair and would do violence to the intention expressed in the agreement. In particular, it is clear that the Second Agreement intended to provide some additional benefits beyond the basic *ESA* entitlement, rendering the defendant’s severance solution inappropriate.

[30] Alternatively, the defendant suggests that if the entire termination clause is deemed unenforceable, the Court should revert to the termination provisions in the First Agreement. With respect, this solution is illogical. The one clear intention expressed by the defendant is that it was no longer happy with the First Agreement. The defendant pushed the plaintiff toward a new arrangement, which led to the Second Agreement. Furthermore:

- a) The defendant clearly terminated the First Agreement, as evidenced by its letters to the plaintiff in January and February 2023.
- b) In the preamble to the Second Agreement, the parties confirm they “wish to enter into a new employment relationship”.
- c) Under clause 3 of the Second Agreement, the parties agreed that it would govern their relationship from April 1, 2023, onward.

- d) Clause 10.5 of the Second Agreement contains an “Entire Agreement” clause (thereby displacing the First Agreement).
- e) The defendant only provided the plaintiff 3 weeks’ pay in lieu of notice, not the 3 months’ notice or pay required under the First Agreement, again suggesting an intention on its part to no longer follow the First Agreement: *Klyn v. Pentax Canada Inc.*, 2024 BCSC 372 at paras. 8–9.

[31] In sum, in my view, it is clear on the record that the last place the Court should go for assistance in interpreting the parties’ agreement is the First Agreement, which the defendant clearly brought to an end before the Dismissal.

[32] I find that the termination clause is void for uncertainty. Neither the Court nor the parties could make sense of its language or the parties’ intentions by looking at the words themselves or the surrounding circumstances.

[33] The proper approach is to sever clause 9. Pursuant to clause 10.8 on severability, I can enforce the balance of the Second Agreement without the termination clause.

[34] Where does that leave the determination of appropriate notice? I find that the Court must revert to the default common law notice approach mandated by the presumption discussed above. The Court must determine the length of reasonable notice under the common law with reference to the non-exhaustive *Bardal* factors, being:

- a. the character of the employment;
- b. the length of service;
- c. the age of the employee; and
- d. the availability of similar employment having regard to the experience, training and qualifications of the employee:

*Bardal v. The Globe & Mail Ltd.*, 24 DLR (2d) 140, 1960 CanLII 294 (O.N.S.C.); *Ensign* at para. 35.

## **1. Character of Employment**

[35] In his initial role as Director, Supply Chain, the plaintiff held a global, C-suite-level position and was responsible for the defendant's entire supply chain across three plants in North America. As Plant Supply Chain Manager under the Second Agreement, the plaintiff remained in a senior leadership role with no change to his compensation, and with many of his day-to-day job duties remaining the same as before. He was consistently portrayed as a key operational and strategic leader within the organization. However, his responsibilities were reduced to those involving a single plant, and he no longer reported directly to the CEO.

## **2. Length of Employment**

[36] The plaintiff commenced his employment with the defendant on January 3, 2022 and was dismissed on December 17, 2024. This is a total employment period of just under 3 years.

[37] However, complexity arises from the fact that there was a First Agreement and a Second Agreement, and the plaintiff received working notice at the conclusion of the First Agreement.

[38] The defendant suggests that the better approach is to treat the length of employment as commencing only on the Second Agreement's effective date of April 1, 2023, thereby reducing the length of service to 1 year, 11 months, and 13 days.

[39] The plaintiff responds that there was a common employer throughout, and that the Second Agreement expressly recognized the continued relevance of the plaintiff's original start date of January 3, 2022 in clause 9.2.3: "For the purposes of Article 9, the Employer recognizes the commencement of employment date of January 3, 2022". However, the difficulty with relying on this clause is that the plaintiff requested (and has succeeded) in their argument that the termination clause is void for uncertainty.

[40] The plaintiff also argues that even if clause 9.2 is severed from the Second Agreement, the continuity of the plaintiff's employment from the earlier January 3, 2022 date was recognized in other ways:

- a) The plaintiff was not required to submit a job application or attend an interview prior to receiving or signing the Second Agreement;
- b) There is no evidence that the plaintiff was subjected to a training period for his new role;
- c) Pursuant to clause 4 of the Second Agreement, the plaintiff's probationary period was waived;
- d) There was no waiting period imposed to participate in the defendant's benefits or RRSP programs (as there had been in the First Agreement); and
- e) The letters from the defendant in January and February 2023 described only the plaintiff's "position" as ending, and that he was being offered "continued employment" following the "termination of his role", so that the defendant could "maintain your employment". I agree that the references to "maintaining" and "continuing" the plaintiff's employment effectively represent a concession that the plaintiff's past service would continue to be recognized as material to their ongoing relationship. As a practical example of that recognition, on May 11, 2023, the plaintiff received a bonus attributable to his work prior to the execution of the Second Agreement.

[41] On balance, the above factors support using the original start date of January 3, 2022 for the purpose of the length-of-service factor: *Cheong v. Grand Pacific Travel & Trade (Canada) Corp.*, 2016 BCSC 1321 at paras. 34-44,

[42] It should also be noted that employees dismissed in the first three years of their employment are entitled to a proportionately longer period of notice: *Saalfeld v. Absolute Software Corp.*, 2009 BCCA 18 at para. 15.

### **3. Age**

[43] Age affects prospects for similar employment and can be an important factor to consider alongside years of service: *Ensign* at para. 42

[44] At the time of the Dismissal, the plaintiff was 56 years old. This is in the range where finding comparable positions can become more difficult: *Thompson v. Revolution Resource Recovery Inc.*, 2025 BCSC 8 at paras. 61–62; *Corey v. Kruger Products L.P.*, 2018 BCSC 1510 at paras. 47–48. This concern is supported by the plaintiff's own substantial, but unsuccessful, work search efforts. I note that the defendant does not argue that the plaintiff failed to engage in appropriate mitigation efforts.

### **4. Availability of Similar Employment**

[45] In determining the appropriate notice period, courts may consider the availability of similar employment, as indicated by the time taken by the plaintiff to obtain other employment: *Bavaro v. North American Tea, Coffee & Herbs Trading Co.*, 2001 BCCA 149 at para. 7; *Saalfeld* at para. 16; *Corey* at paras. 49-50.

[46] Considering the plaintiff's senior management position (while acknowledging that such seniority was somewhat diminished by the Second Agreement), I accept that finding comparable employment has been and will continue to be challenging. The plaintiff has applied for over 300 jobs in the past 15 months, but has been unable to find new employment since the Dismissal. Again, I note that the defendant does not advance a mitigation argument.

### **5. Case Law Guidance**

[47] The plaintiff submits that a 12-month reasonable notice period is appropriate, based on the following authorities:

- a) *Wright v. Chilliwack Community Services*, 2000 BCSC 972: A 56-year-old chief executive officer with 3 years and 7 months of service was awarded 12 months' compensation in lieu of notice. The defendant notes that the plaintiff was not at this level of seniority. Furthermore, the Court noted that the plaintiff was working in the niche non-profit sector. In addition, the Court considered aggravating factors, such as negative publicity and the employer's failure to honour a promise to help the employee find subsequent work, in calculating the notice period.
- b) *Hill v. Johnson Controls L.P.*, 2006 BCSC 826: A 50-year-old engineer with 3 years and 8 months of service was awarded 12 months' compensation in lieu of notice. The defendant notes that the plaintiff here does not have an engineering degree. Once again, the Court recognized that the plaintiff was working in a highly specialized area. Finally, the Court granted an extension of the notice period to account for the defendant's bad-faith conduct.
- c) *Winterburn v. Domtar*, 2002 BCSC 1418: A 37-year-old chemical engineer with 2 years of service was awarded 10 months' compensation in lieu of notice. Again, the defendant notes that the plaintiff is not a professional engineer and that his skills are broadly transferable rather than being highly specialized. The employer also admitted to having acted improperly during the dismissal process.

[48] The defendant suggests that 3-6 months' notice would be more appropriate, relying on the following authorities:

- a) *Nicholson v. Masonite International Corporation*, 2014 BCSC 1247: A 45-year-old regional controller for western Canada with 2.5 years of service was awarded the 6 months' compensation in lieu of notice sought by the plaintiff. He was able to secure new employment 9 months following his dismissal.

- b) *Linsdell v. Squamish W K Enterprises Inc.*, 2003 BCSC 188: A 52-year-old manager of a Burger King with 3 years and 4 months of service was awarded 6 months' compensation in lieu of notice. His annual income was \$44,000.
- c) *Saalfeld*: A 35-year-old salesperson with 9 months of service was awarded 5 months' compensation. She had secured new employment 10 months after her dismissal. Unlike the plaintiff here, she had no management responsibilities, and she was obviously much younger.
- d) *Firatli v. Kohler Ltd.*, 2008 CanLII 35266 (O.N.S.C.): A 46-year-old director of quality of assurance with 30 months of service was awarded 5 months' compensation in lieu of notice.
- e) *Roberts v. St. Joseph's Healthcare Hamilton*, 2011 ONSC 3885: A 48-year-old redevelopment project manager with 2 years of service was awarded 4 months' compensation in lieu of notice. His salary was \$87,500 per annum, and his position was not considered part of the management team.

[49] The plaintiff notes that the employees discussed in the defendant's authorities are younger than the plaintiff and that several were in non-managerial positions. Further, none of the above cases addresses the situation of a plaintiff who is unable to find new employment for 12 months or more after their dismissal. The closest is *Linsdell*, in which the plaintiff was unsuccessful in finding alternative employment over the 11.5 months between termination and trial.

[50] I also rely on the following case authorities:

- a) *Ellerbe v. KVI Reconnect Ventures Inc.*, 2013 BCSC 1253: A 59-year-old certified management accountant and corporate controller with three and a half years' service was awarded 10 months' notice. She was making just over \$100,000 per year, or about \$135,000 in today's dollars.

- b) *Corey*: A 58-year-old machinist and power engineer who was working as a maintenance supervisor with two years and seven months of service was awarded 8 months' notice. He was making \$100,000 at termination.
- c) *Mitchell v. Paxton Forest Products Inc.*, 2001 BCSC 1802, appeal dismissed 2002 BCCA 532: A 53-year-old sales manager with 23 months of service at a wood fibre mill was awarded 9 months' notice. He was making \$72,000 per year and was unsuccessful in finding a job between his termination and the case being heard. He had previously worked as a forestry consultant and had been employed by the employer as a mill manager before being promoted to sales manager.

## **6. Conclusion on Notice Period**

[51] I conclude that nine months is a reasonable notice period. The ten months awarded in *Ellerback* is a reasonable comparable on the facts, but the plaintiff's service period here was somewhat shorter. The decision in *Corey* is also close on the facts, but the service length was slightly longer here, supporting a nine-month award rather than the eight months awarded in that case.

### **C. Bonus**

[52] The plaintiff seeks bonuses for his last year of employment and for his proposed one-year notice period, calculated at 15% of 12 months' annual salary,

[53] The Supreme Court of Canada's decision in *Matthews v. Ocean Nutrition Canada Ltd.*, 2020 SCC 26, discusses the principles applicable to such a request:

[49] Insofar as Mr. Matthews was constructively dismissed without notice, he was entitled to damages representing the salary, including bonuses, he would have earned during the 15-month period (*Wallace [v. United Grain Growers Ltd.*, [1997] 3 S.C.R. 701], at paras. 65-67). This is so because the remedy for a breach of the implied term to provide reasonable notice is an award of damages based on the period of notice which should have been given, with the damages representing "what the employee would have earned in this period" (para. 115). Whether payments under incentive bonuses, such as the LTIP in this case, are to be included in these damages is a common and recurring issue in the law of wrongful dismissal. To answer this question, the trial judge relied on *Paquette [v. TeraGo Networks Inc.]*, 2016 ONCA 618] and

*Lin* [v. *Ontario Teachers' Pension Plan Board*, 2016 ONCA 619] from the Court of Appeal for Ontario. I believe he took the right approach.

...

[55] Courts should accordingly ask two questions when determining whether the appropriate quantum of damages for breach of the implied term to provide reasonable notice includes bonus payments and certain other benefits. Would the employee have been entitled to the bonus or benefit as part of their compensation during the reasonable notice period? If so, do the terms of the employment contract or bonus plan unambiguously take away or limit that common law right?

[54] The challenge for the plaintiff here arises from the discretionary nature of the bonus. In *Nicholls v. Columbia Taping Tools Ltd.*, 2013 BCSC 2201, the Court outlined the proper approach to such bonuses:

[267] Whether damages will be awarded for bonuses payable during the notice period depends on whether there is a contractual right to the bonus. Where the bonus at issue is discretionary, in that payment depends on the performance of the employer and/or the employee, a dismissed employee will not be entitled to a bonus payment.

[268] The onus is on the plaintiff to persuade the Court that had he or she worked out the notice period, he or she would have been entitled as a matter of contract to receive a bonus, and to show the basis for assessing the amount of such bonus.

[Emphasis added.]

[55] Accordingly, where the bonus is discretionary, the persuasive burden lies upon the plaintiff to demonstrate the bonus would have been paid, but for the wrongful termination.

[56] In *Leclair v. Patel Pharma Inc.*, 2021 BCSC 1904, the Court stated:

[50] Where the payment of a bonus is discretionary and there is doubt as to whether the employee would have received a bonus during the notice period, the Court must assess whether the benefit or bonus is "integral" to the employee's compensation: *Matthews* at para. 58.

[51] The factors to consider when determining whether a bonus is integral to the employee's compensation were discussed in *Gillies v. Goldman Sachs Canada Inc.*, 2000 BCSC 355 at para. 63 [*Gillies*] and include the following:

- 1) a bonus is received each year although in different amounts;
- 2) bonuses are required to remain competitive with other employers;

- 3) bonuses were historically awarded and the employer had never exercised his discretion against the employee; and
- 4) the bonus constituted a significant component of the employee's overall compensation.

[57] The plaintiff seeks \$27,675 for the 2024 bonus he says he earned under the defendant's Group Management Bonus Plan. The plaintiff says he expected to receive a bonus in 2024 that was similar to the amounts he received in 2022 and 2023 fiscal years. He also seeks the same amount for the proposed notice period.

[58] Again, the onus falls to the plaintiff to establish that the bonus was a regular component and integral to his compensation.

[59] I find that there should be no amount awarded for bonus here because:

- a) there is only a short history on which to rely in terms of whether the bonus was "received each year";
- b) there is no evidence that the defendant had to pay bonuses in order to remain competitive with other employers;
- c) the amount of the bonus varied quite widely in the years it was paid;
- d) the target amount of the bonus shows that it was not intended to operate as a major component of the employees' compensation; and
- e) the financial condition of the company was such that I find that it is more likely than not that no bonus would have been payable: *Nicholson* at para 45. Indeed, no bonus for fiscal 2024 was apparently paid to any employee, as the division did not achieve performance targets. Furthermore, there was downsizing at the end of 2024 after sustaining a net loss of \$23.578 million.

[60] In relation to the notice period bonus request, clause 5.4.1 of the Second Agreement contractually excludes any entitlement to a bonus over the notice period.

**D. Vacation Time**

[61] The plaintiff seeks \$11,124 for the alleged loss of his 6% vacation pay over the requested 12-month notice period. Given that I have found that only 9 months are payable, this aspect of the claim must be reduced by at least 25%.

[62] More importantly, however, I find that the plaintiff is not entitled to compensation for vacation pay. Wrongfully dismissed employees in these circumstances are not generally entitled to additional compensation for vacation pay during a notice period: *Burry v. Unitel Communications Inc.*, 46 B.C.L.R. (3d) 349, 1997 CanLII 4088 (B.C.C.A.) at paras. 16-17; *Grimaldi v. CF+D Custom Fireplace Design Inc.*, 2023 ONSC 6708 at para. 101. There was no evidence that vacation time had already been accrued and was simply unused: *Lischuk v. K- Jay Electric Ltd.*, 2025 ABKB 460. It does not appear that, in the present case, vacation pay was treated as a separately paid out entitlement on each paycheque: *Grimaldi* at para. 100.

**E. Medical Benefits**

[63] With respect to benefits lost as a result of a wrongful dismissal, a plaintiff must adduce evidence that they have suffered an out-of-pocket loss during the notice period. If a plaintiff fails to show that he has paid out or lost money by reason of the absence of benefits, his claim cannot succeed: *O.W.L. (Orphaned Wildlife) Rehabilitation Society v. Day*, 2018 BCSC 1724 at paras. 274–275.

[64] The plaintiff says that he incurred \$4,173.31 in medical expenses in the 12 months following the Dismissal that would otherwise have been covered by the defendant's extended benefits plan.

[65] Given that I have found that only nine months' notice was required, this amount must be reduced to \$2,254.31 to restrict it to medical expenses incurred over this period. The defendant did not challenge this claim on other grounds.

[66] The expenses claimed were broken down as follows:

- a) Expenses which the plaintiff paid for directly: \$339.14, of which I find only \$26 was incurred before the end of the notice period on September 17, 2025;
- b) Expenses which the plaintiff claims were paid on top of his wife's benefits plan, which the defendant's extended benefits plan would otherwise have covered: \$1,826.85, all of which were incurred before the end of the notice period; and
- c) The expenses of obtaining extended coverage after his wife's coverage ended: \$2,007.31, of which I find only \$401.46 was incurred for coverage before the end of the notice period.

#### **F. Pension**

[67] The plaintiff seeks \$9,270 for loss of pension benefits, equal to 5% of 12 months' annual salary. I accept that such claims may be advanced where the plaintiff establishes that the pension contribution would have continued during the notice period: *Okano v. Cathay Pacific Airways Limited*, 2022 BCSC 881 at para. 49; *George v. Cowichan Tribes*, 2015 BCSC 513 at para. 227; *Corey* at para. 79.

[68] Again, given my finding that nine months' notice would have been adequate, this figure must be reduced by 25%, to \$6,952.50. The defendant did not challenge this claim on any other grounds.

#### **G. Aggravated Damages**

[69] The plaintiff seeks \$50,000 under this head of damages on the basis that the defendant's manner of dismissal was unduly insensitive, high-handed, and in breach of the duty of good faith and fair dealing. He argues that:

- a) Prior to the Dismissal, the defendant terminated the plaintiff's role while initially dishonestly or negligently alleging performance concerns.
- b) The defendant asserted that the plaintiff's role and title change was a demotion, which was humiliating for the plaintiff.

- c) The defendant's conduct caused the plaintiff significant distress and anxiety, necessitating professional counselling.
- d) The defendant further exacerbated the plaintiff's distress by dismissing him one week before Christmas Eve, and providing only three weeks' pay, after he had relocated his family from Ontario (incurring substantial personal and financial hardship) to accept his position with the defendant. The plaintiff was abruptly left unemployed during the holiday season, a time that was supposed to be a festive celebration with his mother and other visiting relatives. Instead, his Dismissal caused him feelings of depression and anxiety for which he received psychiatric treatment, including prescription medication, that he continues to receive.
- e) The defendant relies on ambiguous, incomprehensible, and unenforceable contractual provisions.

[70] In *Chu*, the Court outlined the proper approach to such aggravated damages claims:

[146] I adopt the statement of the relevant legal principles set out by Justice Horsman in *Hrynkiw v. Central City Brewers & Distillers Ltd.*, 2020 BCSC 1640, as follows:

[190] The common law imposes an obligation on an employer to act in good faith in the manner of dismissal. Failure to do so can lead to foreseeable, compensable damages. If an employee can prove that the manner of dismissal caused mental distress that was in the contemplation of the parties at the time of the contract, then damages for the mental distress (often referred to in the case law as "aggravated damages") may be recoverable: *Honda Canada Inc. v. Keays*, 2008 SCC 39 at paras. 58-59 [Honda].

[191] As set out by our Court of Appeal in *Lau v. Royal Bank of Canada*, 2017 BCCA 253 [Lau] at para. 17, an employee seeking to recover aggravated damages must establish two conditions:

- i. the employer has breached its duty of good faith and fair dealing in the manner of dismissal, and
- ii. the employee suffered compensable damages as a result of breach.

[192] Examples of conduct that may constitute a breach of the employer's duty of good faith and fair dealing include being untruthful, misleading or unduly insensitive in the course of dismissal, or attacking the employee's reputation by declarations made at the time of dismissal: *Wallace v. United Grain Growers Ltd.*, 1997 CanLII 332 (SCC), [1997] 3 S.C.R. 701 at para. 98; *Honda* at para. 59. The employer's dealings with the employee after dismissal, including its conduct in litigating the employee's claim, may be considered as an aspect of the manner of dismissal provided it is conduct that relates to the dismissal: *Acumen Law Corporation v. Ojanen*, 2019 BCSC 1352 at para. 126; *O.W.L. (Orphaned Wildlife) Rehabilitation Society v. Day*, 2018 BCSC 1724 at para. 286.

[193] To establish the second condition of the test, the plaintiff must prove something beyond the normal distress and hurt feelings that invariably accompanies the loss of employment: *Cottrill v. Utopia Day Spas and Salons Ltd.*, 2018 BCCA 383 at paras 14-15, leave to appeal ref'd [2018] S.C.C.A. No. 533 [*Cottrill*]; *Quach v. Mitrix Services Ltd.*, 2020 BCCA 25 at paras. 26-27. Medical evidence is not required to establish that the employee has suffered emotional or health consequences but there must be some evidence of serious and prolonged disruption that transcends ordinary emotional upset or distress: *Cottill* at para. 18; *Lau* at para. 49; *Saadati v. Moorhead*, 2017 SCC 28 at para. 40.

[71] I find that the conduct here did not meet the requisite standard for an award of aggravated damages. I have no reason to believe that the defendant's initial reference to performance concerns was anything other than an innocent administrative error. Furthermore, this conduct was quite distant in time from the actual Dismissal. A demotion cannot be treated as humiliating in and of itself. Otherwise, a great proportion of constructive dismissal claims would require aggravated damages awards. Furthermore, I do not accept that there must be a "no-go" period for dismissals around Christmas. Finally, I do not find that the defendant's interpretive arguments were so offensive as to meet the test.

#### **H. Punitive Damages**

[72] Punitive damages are not compensatory, but are instead aimed at deterring unfair conduct that is deserving of punishment. Punitive damages may be awarded where the employer's conduct is harsh, vindictive, reprehensible and malicious: *Chu* at para. 161.

[73] In *Chu*, the court confirmed the following examples of conduct by an employer that can justify punitive damages (at para. 164):

1. ... knowingly fabricating allegations of serious misconduct or incompetence against an employee to support dismissal;
2. ... utilizing “hardball” tactics to intimidate the employee into withdrawing or settling his or her wrongful dismissal suit; or
3. ... implementing the dismissal in a manner designed to disparage the employee’s capabilities or honesty in the eyes of other employees or future employers.

[74] The plaintiff argues that deterrence is required in this case and supports an award of \$100,000 in punitive damages.

[75] I find that the high bar for punitive damages is not met. I see no evidence of knowing fabrication of misconduct allegations or hardball tactics.

#### **IV. CONCLUSION**

[76] In conclusion, I find that the plaintiff has been successful in his claim, and that, considering all the relevant circumstances, he is owed pay in lieu of 9 months’ notice.

[77] He is also entitled to compensation for the loss of the 5% pension contribution he would have received over that notice period, as well as for medical expenses incurred during those months.

[78] This leads to the following award:

- a) 9 months of base pay: \$139,050.00;
- b) 9 months of a 5% pension contribution: \$6,952.50; and
- c) 9 months of medical expenses: \$2,254.31.

[79] It is somewhat ambiguous whether the plaintiff already received the three-week notice payment that the defendant initially offered at the time of the Dismissal.

If this has been paid, then the amount owed for the 9 months of base pay should be reduced by such amount.

[80] I find that the plaintiff is not entitled to any compensation for bonuses he claims he was owed, nor any additional compensation for vacation pay. Furthermore, I find that the defendant's conduct did not rise to such a level that an award of aggravated or punitive damages is merited.

[81] If the parties are unable to agree on costs, then the parties may make written submissions of no more than ten pages each on the following schedule:

- a) plaintiff's submission: 30 days from the date of these reasons;
- b) defendant's response: 30 days from receipt of the plaintiff's submission;  
and
- c) plaintiff's reply: 10 days from receipt of the defendant's response.

"The Honourable Mr. Justice Branch"