Court of Appeal for Saskatchewan

Docket: CACV4472

Citation: *Korpan Tractor and Parts (Parriwi Management Inc.) v Denton*, 2026 SKCA 44

Date: 2026-03-27

Between:

Parriwi Management Inc., Atlantis Mercantile Incorporated, Maverick Holdings Corp., and Korie Management Ltd., carrying on a partnership under the business name Korpan Tractor and Parts

Appellants (Defendants)

And

John Denton

Respondent (Plaintiff)

Before:	Schwann, Tholl and Kalmakoff JJ.A.
Disposition:	Appeal dismissed
Written reasons by:	The Honourable Justice Lian M. Schwann
In concurrence:	The Honourable Justice Jerome A. Tholl The Honourable Justice Jeffery D. Kalmakoff
On appeal from:	2024 SKKB 216, Saskatoon
Appeal heard:	November 24, 2025
Counsel:	Jared Epp for the Appellants Grant Richards and Lane Zabolotney for the Respondent

Schwann J.A.

I. INTRODUCTION

[1] Parriwi Management Inc., Atlantis Mercantile Incorporated, Maverick Holdings Corp., and Korie Management Ltd., carrying on a partnership under the business name Korpan Tractor and Parts [Korpan Tractor] appeals from a decision made by a Court of King's Bench judge, who concluded that Korpan Tractor had wrongfully dismissed John Denton: *Denton v Korpan Tractor and Parts (Parriwi Management Inc.)*, 2024 SKKB 216 [*Trial Decision*]. The central issue at trial concerned whether Mr. Denton had resigned from his employment or, alternatively, abandoned his employment relationship. The judge found in Mr. Denton's favour and awarded him damages of $348,450.44 for pay in lieu of notice.

[2] In its appeal from that decision, Korpan Tractor argues the judge erred in concluding that Mr. Denton had neither resigned from nor abandoned his employment. It also asserts a variety of errors, including determinations respecting the appropriate period of notice and the judge's failure to deduct any amount for mitigation or disability payments Mr. Denton had received from the employer's insurer.

[3] I conclude the judge did not err in any of the ways suggested by Korpan Tractor. My reasons follow.

II. BACKGROUND

[4] John Denton began employment with Korpan Tractor in 1996 as an apprentice mechanic. Over time, Mr. Denton obtained his journeyman certificate and progressed within the Korpan Tractor organization, eventually assuming the position of service manager of the repair shop in 2015. Mr. Denton had also been made a partner in the business, along with three other employees (two of whom were owners), but had withdrawn from the partnership prior to the events in question. At the time of his departure from Korpan Tractor in 2020, Mr. Denton was receiving an annual salary of $169,900 per year, plus pension and bonuses, which together totalled $177,725.

[5] Mr. Denton's departure from Korpan Tractor was precipitated by a heated, verbal exchange that took place in a July 15, 2020, meeting. At that meeting were Tyler Korpan and Brian Korpan, who were both directors and part owners of the organization, Paul Lee, head of fleet repairs, Jarrie Hegg, the shop foreman, and Mr. Denton (who arrived late). This was another in a series of meetings that had taken place between those individuals concerning cost overruns on the equipment rental side of the business. Those issues were also overshadowed, if not exacerbated, by the financial pressures brought to bear on the business by the COVID-19 pandemic.

[6] The meeting took place at a time when Mr. Denton was struggling with some mental health issues, of which his employer was aware: Mr. Denton had recently lost his father and was deeply troubled by having to lay off staff because of the financial impact on the business due to COVID-19.

[7] As Mr. Denton approached the meeting room, he could hear harsh language and yelling coming from Brian, who appeared to be addressing Mr. Lee. Mr. Denton testified that Mr. Lee had asked Brian to take a more measured tone and, when that did not transpire, Mr. Lee abruptly said, "I'm done" and walked out. According to Mr. Denton, after Mr. Lee left the room Brian focussed his anger on him: similarly, Mr. Denton said, "I am also done" and left the meeting.

[8] Mr. Denton returned to his office. He was soon joined by Tyler who, according to Mr. Denton, apologized for Brian's behavior. Tyler testified that he said something along the lines of "don't throw your career away. We know you have a problem. We want to help you" and "We have your back and we want you to get better" (*Trial Decision* at para 17). Tyler largely agreed with Mr. Denton's account of their conversation, except for one key point. Mr. Denton testified that he had verbally rescinded or taken back his resignation, but Tyler said he could not recall Mr. Denton doing so.

[9] Mr. Denton left his office later that same day and did not return.

[10] A workplace meeting was held the following day. Two of Korpan Tractor's employees testified that Tyler informed the assembled group that Mr. Denton was on leave for health reasons and that he would return to work when his health improved. Their evidence was not seriously challenged under cross-examination. Both witnesses were adamant about their understanding of Mr. Denton's status as relayed to them by Tyler, which was that the status quo would remain the same.

[11] In the days and months following the July 15, 2020, occurrence, there was minimal contact between Korpan Tractor and Mr. Denton, apart from a few email exchanges between the parties.

[12] According to Mr. Denton, he was without an income flow following those events, and his financial situation was dire. In July of 2020 he claimed and received short-term disability benefits (7 weeks x $1,000/week) under the Korpan Tractor group insurance plan with Empire Life, with "Tyler, on behalf of Korpan" Tractor signing off on the required forms (at para 22). Mr. Denton also sought and received vacation pay from his employer. When those benefits expired, Mr. Denton pursued long-term disability benefits under the group life plan. On October 20, 2020, Empire Life declined his claim, writing that an Empire Life employee had "spoke with your employer and she was advised there was no decline in your ability to perform your job duties leading up to your last day at work, this would not be indicative of an illness being present that interferes with the ability to perform occupational duties" (at para 30).

[13] Mr. Denton commenced an action against Empire Life, which he eventually settled in late 2023 for $25,000. Korpan Tractor was not a party to that action.

[14] Both Mr. Denton and his wife testified at length about how he had suffered from severe depression to the point of near total collapse. According to their evidence, Mr. Denton experienced difficulty regularizing his medication and spent many days in bed unable to get up. Mr. Denton's wife testified that his state of health was so fraught that she and others had to monitor him on a daily basis because he could not be left alone.

[15] Mr. Denton also experienced a series of other physical ailments. He underwent significant back surgery, which had been delayed until August of 2024 because of COVID-19. He also had a tumor that was located between his right ear and his brain removed, which required three operations before the problem was ultimately resolved. Beleaguered by those health issues, Mr. Denton applied under the Canada Pension Plan for a disability payment, which he did not receive until 2024.

[16] Roughly four months after the July 15, 2020, meeting, Korpan Tractor sent a letter to Mr. Denton. It read as follows:

> Mr. Denton:
>
> This letter is to acknowledge that Korpan Tractor has accepted your resignation which you John Denton verbally announced to Brian and Tyler Korpan with Jarrie Hegg as witness on July 15, 2020. July 15, 2020 was your last day worked at Korpan Tractor.
>
> Please return all and any property of Korpan Tractor including your company cell phone along with any company passwords needed by the company. You are welcome to come pickup your personal items at a scheduled time or we can arrange for them to be packed up for you and delivered.

[17] Mr. Denton commenced an action against Korpan Tractor for wrongful dismissal, arguing that he was dismissed without cause and entitled to pay in lieu of notice.

III. *TRIAL DECISION*

[18] After canvassing the evidence, the judge addressed the issues before him, beginning with the threshold question of whether Mr. Denton had resigned from his employment following the July 15, 2020, meeting, as alleged by Korpan Tractor. In succinct terms, the judge determined "there is no characterization of the facts which leads to a conclusion that [Mr. Denton] resigned on July 15, 2020" (at para 45).

[19] While the judge acknowledged that the parties' testimony differed as to whether Mr. Denton had rescinded his resignation, it can be inferred from his reasons that he preferred Mr. Denton's version of events over Tyler's (Korpan Tractor's). The judge's decision in that regard appeared to turn on two pieces of circumstantial evidence. The first was a text exchange between the parties, which he interpreted in this way: "it is clear from the texts that both Tyler and Brian sent that [Mr. Denton's] status as an employee was to continue" (at para 43). The judge also found the testimony from two co-workers compelling, writing as follows:

> [44] Further, two co-workers at Korpan … who were employed by Korpan in July 2020, testified that within a day or two of the July 15, 2020 meeting, Brian and Tyler called a meeting of all the employees in the service department. At the meeting, Brian and Tyler advised the group that John had not resigned but he needed some time off for his health. They confirmed Korpan was giving him that time off and he was expected to return.

[20] Moving on, the judge addressed Korpan Tractor's alternative argument: Mr. Denton had abandoned his employment relationship. He rejected that argument as well, writing as follows: "I am of the view that [Mr. Denton] did not consciously leave his employment relationship with Korpan between July 2020 and November 2020. He was focussing on his health, specifically his mental health, and trying to get his medical regime stabilized. I conclude he did not abandon his employment" (at para 48).

[21] In addressing the question of whether Mr. Denton was terminated without cause, the judge found no rational basis to conclude otherwise. He offered two bases for his conclusion. The first was Korpan Tractor's refusal to support Mr. Denton's application for long-term disability benefits, and the second was its November 24, 2020, letter in which it purported to accept Mr. Denton's alleged resignation.

[22] Having determined that Mr. Denton's employment had been terminated without cause, the judge went on to consider the question of reasonable notice in light of Mr. Denton's history and circumstances. After reviewing the jurisprudence for what he regarded to be analogous cases, notably *Ketch v Meadow Lake Mechanical Pulp Ltd*., 2023 SKKB 241 [*Ketch*], the judge concluded that, all things considered, a reasonable period of notice for Mr. Denton was 24 months. The judge rejected both Korpan Tractor's arguments that Mr. Denton had failed to mitigate his loss and Mr. Denton's claim for moral damages.

[23] The last issue confronting the judge was the question of whether any adjustment should be made to the damages award for amounts Mr. Denton received from Empire Life for short- and long-term disability. Although the judge reduced the overall damage award by the amount Mr. Denton had received for short-term disability, he declined to make any adjustment for the $25,000 Mr. Denton had received from Empire Life in settlement of his long-term disability claim. That was because, he said, it "arises in the litigation against Empire Life", which was "sufficiently removed from the relationship between [Mr. Denton] and Korpan [Tractor] that it is not a proper deduction from the judgment" (at para 67).

[24] All told, Mr. Denton was granted judgment in the amount of $355,450.44, less $7,000 (short-term disability), for a net judgment of $348,450.44, plus costs.

IV. ISSUES

[25] Korpan Tractor raises the following questions for determination on appeal:

(a) Did the judge err in concluding that Mr. Denton had been dismissed without cause?

(b) Did the judge err in concluding that Mr. Denton was entitled to 24 months of pay in lieu of notice?

(c) Did the judge err in concluding that Mr. Denton did not fail to mitigate his loss?

(d) Did the judge err in failing to reduce Mr. Denton's damages by the amount he received from Empire Life in settlement of his claim for long-term disability?

V. STANDARD OF REVIEW

[26] The applicable standard of appellate review depends on the issue under review. According to the decision in *Housen v Nikolaisen*, 2002 SCC 33 at paras 26-36 [*Housen*], questions of law are to be reviewed on the standard of correctness, with errors of fact or mixed fact and law, absent an extricable error of law, subject to the palpable and overriding standard.

[27] With respect to the palpable and overriding error standard, an appellate court can intervene only where an obvious error in the decision is made that is determinative of the outcome: see *Benhaim v St-Germain*, 2016 SCC 48 at para 38, and *H.L. v Canada (Attorney General)*, 2005 SCC 25 at para 55 [*H.L.*], i.e., "that an alternative factual finding could be reached based on a different ascription of weight does not mean that a palpable and overriding error has been made" (*Salomon v Matte-Thompson*, 2019 SCC 14 at para 33). If the inferences drawn by the trial judge are reasonable, an appellate court should not interfere with the result just because another inference could also have been reasonably drawn from the evidence: *H.L.* at para 74, *Nelson (City) v Mowatt*, 2017 SCC 8 at para 38, and *Curry v Athabasca Resources*, 2024 SKCA 7 at para 30, leave to appeal to SCC refused 2024 CanLII 80689.

[28] Where, however, the impugned finding "can be traced to an error" in the selection of the legal standard, the correctness standard applies (*Housen* at para 33). As *Housen* summarized, "Where, for instance, an error with respect to a finding of negligence can be attributed to the

application of an incorrect standard, a failure to consider a required element of a legal test, or similar error in principle, such an error can be characterized as an error of law, subject to a standard of correctness" (at para 36): also see *Woelk v Halvorson*, 1980 CanLII 17, [1980] 2 SCR 430 (SCC); *Saskatoon Minor Basketball Association v MacDonald*, 2025 SKCA 42 [*MacDonald*]; *Capital Pontiac Buick Cadillac GMC Ltd. v Coppola*, 2013 SKCA 80 [*Coppola*]; *Elmsdale Landscaping Ltd. v Hiltz*, 2023 NSCA 56 [*Hiltz*]; and *Lau v Royal Bank of Canada*, 2017 BCCA 253.

[29] In this case, a determination of the period required for notice of dismissal engages a question of mixed fact and law: *MacDonald* at para 32. In *Naylor Group Inc. v Ellis-Don Construction Ltd.*, 2001 SCC 58, the Supreme Court spoke to the need for appellate deference in relation to such matters, writing as follows:

> [80] It is common ground that the Court of Appeal was not entitled to substitute its own view of a proper award unless it could be shown that the judge had made an error of principle of law, or misapprehended the evidence (*Lang v. Pollard*, [1957] S.C.R. 858, at p. 862), or it could be shown there was no evidence on which the judge could have reached his or her conclusion (*Woelk v. Halvorson*, [1980] 2 S.C.R. 430, at p. 435), or the judge failed to consider relevant factors in the assessment of damages, or considered irrelevant factors, or otherwise, in the result, made "a palpably incorrect" or "wholly erroneous" assessment of the damages (*Andrews v. Grand & Toy Alberta Ltd.*, [1978] 2 S.C.R. 229, at p. 235; *Laurentide Motels Ltd. v. Beauport (City)*, [1989] 1 S.C.R. 705, at p. 810; *Widrig v. Strazer*, [1964] S.C.R. 376, at pp. 388-89; *Woelk*, *supra*, at pp. 435-37; *Waddams*, [*The Law of Damages*, 3rd ed (Canada Law Book, 1997)], at para. 13.420; and H.D. Pitch and R.M. Snyder, *Damages for Breach of Contract* (2nd ed. 1989) 15§5). Where one or more of these conditions are met, however, the appellate court is obliged to interfere.

VI. ANALYSIS

A. Mr. Denton was dismissed without cause

[30] Korpan Tractor submits the judge erred in concluding that Mr. Denton had been wrongfully terminated from his employment. It renews the same arguments it made at trial, namely that Mr. Denton had either resigned from his employment on July 15, 2020, or that he subsequently abandoned it when he did not return to the workplace.

[31] Korpan Tractor anchors its resignation argument on the judge's failure to identify the applicable legal test for his consideration of this issue. It claims the guiding authority and analytical framework on questions of employee resignation is *Beggs v Westport Foods Ltd.*, 2011 BCCA 76 [*Beggs*]. That omission, says Korpan Tractor, was critical because it caused the judge to determine the question of resignation on instinct, unfiltered through any legal framework, which in turn led him to misapply the law respecting the voluntary resignation by an employee.

[32] I will address each prong of the employer's argument in turn.

1. Resignation not demonstrated

[33] An employee is said to have quit their employment on their own initiative where they have "terminated employment after giving due notice … after giving inadequate notice … or given no notice at all, but simply failed to come to work" (P. Barnacle, *Termination of Employment and Wrongful Dismissal in Canada* (LexisNexis, 2020) at p 101 [Barnacle]). An employee quits or resigns "only if (1) the employee genuinely intends to sever the employment relationship, and (2) a reasonable person in the position of the employer would believe that this is the employee's intent" (at p 101).

[34] The law requires a resignation to be clear and unequivocal to be valid: "To be clear and unequivocal, the resignation must objectively reflect an intention to resign or conduct evidencing such an intention" (*Avalon Ford Sales (1996) Limited v Evans*, 2017 NLCA 9 at para 23 [*Avalon*], and *Kieran v Ingram Micro Ltd.*, 2004 CanLII 4852 at para 27, 189 OAC 58 (ONCA), leave to appeal to SCC refused [2005] 1 SCR xi): similarly, see Barnacle at p 109. Where an employer asserts that the employee has resigned, it must lead clear and unambiguous evidence to that effect.

[35] Given the myriad of facts that may arise in an employment context, particularly in a heated moment, it can sometimes be difficult to discern if an employee has quit or has been dismissed. For this reason, courts have adopted a subjective and objective approach to the issue of resignation. The subjective component "requires conduct on an employee's part that unequivocally manifests that he or she had the subjective intention of quitting" (Barnacle at p 109). On the objective side of the equation, the test is whether the employees conduct "would lead a reasonable person in the position of the employer to believe that the employee had carried out his or her subjective intention" (at p 109).

[36] It is also settled law that a resignation may be revoked before it is accepted by the employer: see *Turner v Westburne Electrical Inc*., 2004 ABQB 605 at para 50, and *Kirby v Amalgamated Income Limited Partnership*, 2009 BCSC 1044 at para 130, i.e., "An employee has traditionally been permitted to resile from a resignation if the employer had not relied on it to the employer's detriment" (*Avalon* at para 30) and see S.R. Ball, *Canadian Employment Law* (Thomson Reuters, 2024) (updated 2024, release 1) at p 8-2 [Ball].

[37] As mentioned, Korpan Tractor relies on the decision in *Beggs* for the proposition that an objective approach must be taken to the question of whether an employee has resigned. While I agree that an objective assessment is part of that analysis, *Beggs* makes it clear that, where a voluntary resignation is asserted, a subjective analysis must also be considered. The following passages from *Beggs* speak to this issue:

> [36] It is common ground that both a dismissal by an employer and a voluntary resignation by an employee require a clear and unequivocal act by the party seeking to end the employment relationship. There is a distinction, however, in the tests to be met in order to establish each of these methods for ending the employment relationship. A finding of dismissal must be based on an objective test: whether the acts of the employer, objectively viewed, amount to a dismissal. *A finding of resignation requires the application of both a subjective and objective test*: whether the employee intended to resign and whether the employee's words and acts, objectively viewed, support a finding that she resigned.
>
> (Emphasis added)

Beggs also references D. Harris, *Wrongful Dismissal* (Thomson Reuters, 1989) (updated 2024, release 2) [Harris], which summarizes the distinction between dismissal and voluntary resignation as follows (at pp 4-2, 4-6 to 4-7, 4-21 to 4-22):

> **I. In General**
> **§4.1 Overview**
> Summary: Dismissal is a termination of a contract of indefinite hiring by an employer. It is a matter of substance, not form. It is effective when it leaves no reasonable doubt in the mind of the employee that his or her employment has already come to an end or will end on a set date.
>
> …
>
> The crucial factor in assessing the effectiveness of a dismissal is the clarity with which it was communicated to the employee. Mr. Justice Macfarlane of the British Columbia Court of Appeal stated the law in this regard as follows in *Kalaman v. Singer Valve Co.* (1997), 31 C.C.E.L. (2d) 1 [parallel citations omitted]:

> A notice must be specific and unequivocal such that a reasonable person will be led to the clear understanding that *his or her employment is at an end at some date certain in the future*. Whether a purported notice is specific and unequivocal is a matter to be determined on an objective basis in all the circumstances of each case. (p. 11; emphasis added)

…

II. Dismissal versus Voluntary Resignation
§4:4 Overview

> Summary: The test for voluntary resignation (as opposed to dismissal) is objective. It focusses on the perceptions that a "reasonable employer" may have as to the employee's intentions, as those are evidenced by his or her employment-related acts or omissions. Relevant circumstances include any ambiguities in the conduct alleged to constitute the resignation, and *the employee's subjective state of mind* as it may be apparent. To a certain degree they may also include the employee's timely retraction, or attempted retraction, of his or her resignation.
>
> (Emphasis added)

[38] With those principles in mind, I turn to the matter at hand.

[39] Korpan Tractor is critical of the judge's failure to set out the operative legal framework for his analysis of this issue. I begin with the observation that a judge's failure to state the governing legal test does not, on its own, give rise to a basis for appellate intervention. As a matter of general principle, "judges are presumed to know the law and are not required to explicitly self-instruct on every principle of law upon which they rely" (*R v Allary*, 2021 SKCA 110 at para 37). The question for appeal purposes is whether a judge erred in their application of the legal criteria to the facts.

[40] In this case, the judge made two key findings of fact that provide a complete answer to Korpan Tractor's argument.

[41] First, although the judge understood that the parties differed on whether Mr. Denton had withdrawn his resignation, there is no way to read the judge's reasons other than that he accepted Mr. Denton's version of what had transpired in the subsequent, one-on-one meeting he had with Tyler, which was that he *rescinded his resignation*. The judge wrote, Mr. Denton "said he rescinded or took back his resignation. Tyler does not remember those words being spoken, but each party understood the status quo would remain as it was before the meeting" (*Trial Decision* at para 19); later in his reasons, the judge added, "there is no characterization of the facts which leads to a conclusion that [Mr. Denton] resigned on July 15, 2020" (at para 45). Apart from Tyler's testimony, Korpan Tractor offered no further evidence to support its assertion that Mr. Denton had not withdrawn his resignation.

[42] Second, without saying so explicitly, I understand the judge to have concluded that Korpan Tractor *had not accepted* Mr. Denton's verbal resignation after the heated meeting on July 15, 2020. He viewed the following as relevant to the issue of acceptance:

(a) "within minutes" of Mr. Denton walking away from the meeting, Tyler "cautioned him not to throw away his career" (at para 42);

(b) "Tyler offered that if John needed time, he should take time" (at para 42);

(c) Tyler's texts in the weeks and months that followed intimated that Mr. Denton's "status as an employee was to continue" (at para 43); and

(d) at a staff meeting that took place with Korpan Tractor employees the day after the purported resignation, Brian and Tyler clarified that Mr. Denton "had not resigned but needed some time off for his health" and that "he was expected to return" (at para 44).

[43] Also significant to the judge's reasoning on the resignation issue was the following exchange between Tyler and Mr. Denton's counsel during questioning that was read into the record:

> [23] On May 11, 2022, Tyler was questioned by counsel for John Denton and he admitted that in that time period after the July 15, 2020 meeting he still considered John an employee. From the questioning of Tyler Korpan (page 56, lines 3-6):
>
> Q Yeah. Up until the November letter, Exhibit P-1, is it accurate to say John was still considered an employee of the defendant?
> A Yes.

[44] The position advocated by Korpan Tractor in this Court is built on the premise that the question of Mr. Denton's resignation should be examined exclusively from its perspective. However, that approach drives past the conundrum that, even *if* there was a valid resignation, it had been withdrawn. As discussed above, the judge accepted Mr. Denton's testimony that he had taken back his resignation. In other words, he found Mr. Denton to be a credible witness. Credibility is a finding of fact which can only be overturned for palpable and overriding error. Furthermore, the objective factors noted by Korpan Tractor appear to be at odds with the implicit inference drawn by the judge: that his findings could not lead a reasonable person in the employer's position to believe that Mr. Denton had intended and did, in fact, resign.

[45] Taken as a whole, I am satisfied that, on the evidence before him, it was open to the judge to prefer Mr. Denton's version of events over Tyler's on the question of whether he withdrew his resignation and that, in any event, Korpan Tractor's words and actions amply demonstrated that it did not accept Mr. Denton's initial resignation. Although Korpan Tractor contends the evidence should be interpreted and weighed differently, that does not give rise to a basis for appellate intervention. It is within the purview of trial judges to place more weight on some parts of the evidence than others: see *Hillmoe v Hillmoe*, 2018 SKCA 92 at para 35, leave to appeal to SCC refused 2019 CanLII 50902. In short, I see no legal error; and, absent palpable and overriding error, there is no room for appellate intervention.

2. Abandonment not established

[46] In the alternative, Korpan Tractor submits that Mr. Denton had abandoned his employment relationship with it, and the judge erred in not concluding otherwise.

[47] The judge did not dwell on the abandonment argument, writing briefly as follows: "I am of the view that [Mr. Denton] did not consciously leave his employment relationship with Korpan between July 2020 and November 2020. He was focussing on his health, specifically his mental health, and trying to get his medical regime stabilized. I conclude he did not abandon his employment" (*Trial Decision* at para 48).

[48] Abandonment arises where an employee demonstrates an intention to no longer be bound by the employment contract: see *Pereira v Business Depot Ltd*., 2011 BCCA 361 at para 47, and *Nagpal v IBM Canada Ltd.*, 2021 ONCA 274 at para 32. This constitutes a repudiation of it by the employee: "The test is whether, viewing the circumstances objectively, a reasonable person would have understood from the employee's words and actions that he or she had abandoned the contract of employment" (Ball at p 8-17).

[49] In support of its position on abandonment, Korpan Tractor points to evidence – or lack of it – relating to Mr. Denton's actions following the July 15, 2020, meeting: "Taken together, it was reasonable for Korpan Tractor to have concluded that Mr. Denton did not intend to return to work" (appellant factum at para 37). In particular, it advances a narrative where a 44-year-old employee purports to resign, then takes disability leave, requests vacation pay, and, upon completion of their disability payments, provides no indication of returning to work for several months. Viewed objectively, it says, leads to the conclusion that Mr. Denton had abandoned his employment.

[50] Korpan Tractor submits the judge erred by not conducting a full objective assessment of the circumstances from its perspective and, implicitly at least, can be taken to argue that the judge's abandonment determination was made without regard to the facts.

[51] The judge's rejection of Korpan Tractor's abandonment argument rests on his assessment of the evidence and the following findings:

(a) the judge noted that the July outburst "was not the first time [Mr. Denton] had been overcome at work" and "sometime in February or March of that year … Tyler became aware of the problem and advised [Mr. Denton] to take the rest of the week off" (*Trial Decision* at paras 20 and 21);

(b) following the July 15, 2020, meeting, Mr. Denton made a claim for short-term disability from the Korpan Tractor employee benefit plan, which Tyler had approved;

(c) under questioning prior to trial, Tyler agreed that Mr. Denton was considered an employee of Korpan Tractor, *up to* its November 24, 2020, letter;

(d) after the July 15, 2020, meeting, Brian sent Mr. Denton a text, saying, "I hope you stay with us. We really do appreciate all that you do" and a second text saying, "Take a break and get better we want you to be happy and healthy not stressed" (at para 25);

(e) in his text of September 21, 2020, Tyler asked Mr. Denton how he was doing, and Mr. Denton outlined some of the difficulties he was experiencing with his medication;

(f) in response to Mr. Denton's text, on September 30, 2020, Tyler wrote, "You[r] health & well being is of utmost importance and it needs to be treated that way. … This may take some time to get sorted out" (at para 27); and

(g) considerable evidence was presented at trial concerning Mr. Denton's many physical and mental challenges, which led the trial, judge to observe that Mr. Denton "continues to grapple with his mental health and his other medical issues. He has not worked since the meeting of July 15, 2020 and he has not looked for a job since then as he is unfit to work" (at para 40).

Most, if not all, of those facts were known to Korpan Tractor and do not objectively support its assertion that Mr. Denton had abandoned his employment.

[52] It is not uncommon for an abandonment allegation to arise in the context of medical leave. In such circumstances, it may be necessary for the employer to take active steps in resolving uncertainties. Justice Marion spoke to this issue in *Stonham v Recycling Worx Inc*, 2023 ABKB 629:

> [86] While each case turns on its own specific and unique facts, some guidance may be taken from similar cases. Notably, abandonment allegations seem to arise frequently where an employee is away from work for medical reasons. Where an employee expresses an intention to return to work when they are better and there is an expected return date, courts have confirmed in several cases that the objective test for abandonment will not be met where the employee is not yet ready to return to work or where the employer has not taken any steps to clarify, or seek an update on, the employee's expected return date: *Pereira* at paras 55-58; *Lippa v Can-Cell Industries Inc*, 2009 ABQB 684 at para 86; *Fitzgibbons* at para 27; *Starling v Independent Living Resource Centre of Calgary*, 2023 ABPC 31 at paras 34-36; *Koos v A & A Contract Customs Brokers Ltd*, 2009 BCSC 563 at para 18.

[53] Based on the evidence adduced at trial, I see no palpable and overriding error in the judge's findings of fact or in his conclusion that, viewed objectively, Mr. Denton's actions did not reflect a clear intention to no longer be bound by his employment contract. While it might have been open to the judge to draw other inferences from this body of evidence, the fact he drew the opposite inference does not amount to a palpable and overriding error. Neither do I see any error of law.

[54] Korpan Tractor's argument breaks down to an assertion that the judge erred by failing to articulate the legal test or mention evidence that was favourable to its case. As mentioned above, those things alone are not bases for appellate intervention. Its abandonment argument is little more than a backdoor attempt to attack the judge's findings of fact, and the conclusion he drew from those findings regarding whether Mr. Denton had resigned or abandoned his employment.

B. Pay in lieu of notice

[55] In the alternative, if Mr. Denton was wrongfully dismissed, Korpan Tractor submits the judge erred by awarding him 24 months of pay in lieu of notice. There are two prongs to this argument. First, it maintains that a 24-month notice period is too high and not supported by the case law. Second, Korpan Tractor asserts that since Mr. Denton was required to mitigate his loss, the judge failed to account for this critical omission in determining the quantum of damages.

[56] I will deal with each argument in turn.

1. Period of reasonable notice

[57] Korpan Tractor submits the judge erred by failing to undertake a robust consideration of the appropriate period of notice, having regard to the framework established in *Coppola* and Mr. Denton's circumstances. Rather than undertaking a detailed consideration of the matter, Korpan Tractor claims the judge simply deferred to his own decision in *Ketch* (where the plaintiff was awarded 24 months of pay in lieu of notice) and adhered to the anecdotal rule of one month for every year of service. It submits these errors led him to treat 24 months of notice as the starting point, when he should have engaged in a vigorous analysis of the factors at play and relied on case law that was more analogous to the facts at hand.

[58] It is settled law that, absent just cause or an agreement respecting the period of notice, employers must provide employees with reasonable notice or pay in lieu of notice. The measure of damages for wrongful dismissal is the income the employee would have earned had the employee worked during the period of notice to which they were entitled: see, generally, Barnacle at p 7-8. Factors relevant to a determination of reasonable notice in any given case include, among others, the following: "the character of the employment, the length of service of the [employee], the age of the [employee] and the availability of similar employment, having regard to the experience, training and qualifications of the [employee]" (*Bardal v Globe & Mail Ltd.*, 1960 CanLII 294, 24 DLR (2d) 140 at para 21 (WestLaw) (ONHC) [*Bardal*]): see also *Honda Canada Inc. v Keays*, 2008 SCC 39 at para 28, and *Machtinger v HOJ Industries Ltd*., 1992 CanLII 102, [1992] 1 SCR 986).

[59] An assessment of the appropriate period of notice is a fact- and context-specific exercise. No two cases are alike. As such, appellate review of the period of notice selected by a judge calls for deference: see *Coppola* at paras 9-10, *Hiltz* at para 37, and *Humphrey v Mene Inc.*, 2022 ONCA 531 at para 32 [*Humphrey*]. This approach to appellate review is captured in *Minott v O'Shanter Development Company Ltd.*, 1999 CanLII 3686, 168 DLR (4th) 270 (WestLaw) (ONCA), where, speaking for the Ontario Court of Appeal, Laskin J.A. wrote as follows:

> [62] … Determining the period of reasonable notice is an art not a science. In each case trial judges must weigh and balance a catalogue of relevant factors. No two cases are identical; and, ordinarily, there is no one "right" figure for reasonable notice. Instead, most cases yield a range of reasonableness. Therefore, a trial judge's determination of the period of reasonable notice is entitled to deference from an appellate court. *An appeal court is not justified in interfering unless the figure arrived at by the trial judge is outside an acceptable range or unless, in arriving at the figure, the trial judge erred in principle or made an unreasonable finding of fact*: see *Isaacs v. MHG International Ltd.* (1984), 45 O.R. (2d) 693 (Ont. C.A.). If the trial judge erred in principle, an appellate court may substitute its own figure. But it should do so sparingly if the trial judge's award is within an acceptable range despite the error in principle.
>
> (Emphasis added)

[60] On appeal, Korpan Tractor largely focusses on the judge's alleged missteps in determining an appropriate range and the fourth *Bardal* factor: in particular, being the availability of similar employment, having regard to the experience, training, and qualifications of the employee. The purpose of this factor, it says, is to ensure that an employee is provided with a reasonable period to secure comparable employment. All things considered, Korpan Tractor says the judge should have determined the period of notice to be in the range of 12 to 18 months.

[61] Cutting quickly to the chase, I do not accept Korpan Tractor's premise that the judge's determination was guided by the "one month for every year of service" rule of thumb, nor am I persuaded that he erred by ignoring the *Bardal* factors or misread the case law.

[62] While the judge did not conduct a detailed analysis of each factor, a fair reading of the reasons demonstrates that he was alert to the requisite considerations and did not aimlessly adopt an anecdotal rule or rotely apply *Ketch*, as suggested by Korpan Tractor. The judge was aware of the employer's position on notice (12 to 18 months) and the arguments and case law it had put forth in its brief of law: see paragraph 55 of the *Trial Decision*. But he was also alert to the arguments that were advanced by Mr. Denton. Although he drew specific attention to *Ketch*, the judge also referenced five other decisions that addressed parameters such as age, years of service, and the employee's level of responsibility within the organization: see paragraph 57.

[63] As indicated, Korpan Tractor submits the range of reasonable notice for Mr. Denton should have fallen between 12 and 18 months. The decision in *MacDonald* is instructive on this issue. There, a 16-year employee, who had worked her way up to the executive director position within the organization, had her position terminated due to restructuring. The judge awarded Ms. MacDonald 22 months of pay in lieu of notice. That decision was affirmed on appeal.

[64] Several other keys points can be drawn from *MacDonald*. First, based on its review of 11 wrongful-dismissal cases, this Court noted a general trend towards increasing the period of notice, writing, "over the past two decades there has been a gradual increase in the amount of reasonable notice courts have been prepared to award" (at para 38). Second, given Ms. MacDonald's circumstances, the Court found the range for pay in lieu of notice in her case was between 16 to 22 months. Third, in a nod to deference owed to trial judges and the related standard of appellate review regarding the period of notice, the Court said it was not prepared to intervene, even though it considered 22 months in Ms. MacDonald's case was on the high side of the range: see, generally, paragraph 38.

[65] Summing up, I am not persuaded that the judge's decision concerning the appropriate period of notice for Mr. Denton is tainted by any palpable and overriding error. Nor do I see any error of law embedded in that conclusion. While Mr. Denton's age (relatively younger compared to other plaintiffs) and level of employment might have been weighed differently, the question of weight to be given to the *Bardal* factors remains a matter of discretion.

[66] A 24-month period of notice falls within the acceptable range for an employee of similar age, years of service, and position as Mr. Denton. At bottom, Korpan Tractor asks this Court to review the evidence de novo on the question of notice and come up with a different number. That approach ignores the standard of review.

2. Duty to mitigate

[67] It is trite law that an employee has an obligation to take reasonable steps to mitigate their damages by pursuing alternate employment during the period of notice. Harris provides the following succinct summary of this principle (at p 8-1):

§ 8:1 Introduction

Summary: The employee's duty to mitigate spans a reasonable period of time after dismissal, or after an election to treat unilateral changes to his or her employment duties as constructive dismissal. It obliges the employee to make reasonable efforts to become financially self-sufficient, whether as an employee or an entrepreneur. The concept of a duty to mitigate is unique: Although the benefit accrues to the employee, if he or she fails to mitigate then the employer may plead that fact in abatement of either wrongful dismissal or constructive dismissal damages.

[68] It is also established law that the employer bears the onus of demonstrating that an employee failed to make reasonable efforts to find work *and* that suitable replacement work could have been found had the employee made reasonable efforts to find it: see *Red Deer College v Michaels*, 1975 CanLII 15, [1976] 2 SCR 324 at para 13 (WestLaw) (SCC), and *Porcupine Opportunities Program Inc. v Cooper*, 2020 SKCA 33 at paras 11, 14. In that regard, "'[c]omparable employment' does not mean 'any employment' but comprehends employment comparable to the dismissed employee's employment with his or her former employer in status, hours and remuneration" (*Dussault v Imperial Oil Limited*, 2019 ONCA 448 at para 5). These questions engage findings of fact.

[69] Korpan Tractor draws attention to the evidence led at trial to establish that Mr. Denton had made no attempt to find alternate employment. Specifically, it says, the judge's finding ignored the fact that, over the period of notice, Mr. Denton failed to apply for any job, explore the job market, or enroll in any course. Korpan Tractor also asserts that the judge erred by accepting Mr. Denton's evidence about his state of ill health, alleging the judge failed to consider medical evidence that was unhelpful to Mr. Denton's case and that he overlooked the fact that Mr. Denton failed to disclose records from his psychologist to support his claimed mental health issues. Finally, Korpan Tractor points to the fact that Mr. Denton's multiple surgeries occurred well after the notice period, and that Empire Life had determined that he was capable of working.

[70] I am not persuaded by these arguments. Korpan Tractor does not point to any error of law or palpable and overriding error of fact that merits appellate interference with the judge's decision on the mitigation issue. As I see it, there are four reasons why this specific argument cannot succeed.

[71] First, the *Trial Decision* discloses that the judge was aware of the governing legal principle respecting the duty to mitigate: see paragraph 59 of the *Trial Decision*. There is no suggestion made by Korpan Tractor, nor do I see one from the judge's reasons, that the judge ignored the operative legal framework.

[72] Second, there is nothing in the record to suggest that the judge misapprehended the evidence. Korpan Tractor's argument is implicitly underpinned by the proposition that Mr. Denton was able to look for work and able to perform it. However, whether a dismissed employee took reasonable steps to mitigate their loss is a question of fact. Absent an error in principle, this Court can only intervene in the face of a palpable and overriding error. As mentioned, the judge determined that Mr. Denton was "unfit to work" (at para 40).

[73] Korpan Tractor's argument proceeds on the premise that Mr. Denton's state of health was not a factor in resolving the mitigation issue or that Mr. Denton should not have been believed, at least not without corroboration. The difficulty with this argument is that it drives past Mr. Denton's evidence, which was corroborated by his wife, and further suggests the judge erred in how he handled this body of evidence, without pointing to any palpable and overriding error.

[74] There was ample evidence led at trial that Mr. Denton was unable to work after July 15, 2020, because of his serious and significant mental and physical health issues. The judge accepted Mr. Denton's testimony, supplemented by that of his wife, that his state of ill health prevented him from getting out of bed most days, much less to seek alternate employment. He was similarly found unfit to work at November 24, 2020, and thereafter. Although Mr. Denton was challenged on his testimony, the judge found him to be credible. As credibility is a finding of fact, it is subject to the palpable and overriding error standard of review. Other than picking away at the medical evidence in the hope this Court would weigh the matter differently, no palpable and overriding error is suggested here.

[75] Third, there is support in the case law for the proposition that where an employee's state of health during the notice period is a factor, "the mitigation defence is either weakened or demolished" (Harris at s 8-2): similarly, see *Rothenberg v Rogers Media Inc.*, 2020 ONSC 5853 at para 54, and *Brito v Canac Kitchens*, 2012 ONCA 61 at para 16.

[76] Finally, Korpan Tractor bore the onus of establishing that Mr. Denton could have taken reasonable steps to obtain equivalent employment or to retrain. That question cannot be evaluated in a vacuum; it must be assessed in the context of available opportunities. Korpan Tractor led no evidence of employment opportunities of commensurate positions that were available to Mr. Denton. Apart from pointing to third-hand office gossip about another heavy-equipment business that purportedly considered Mr. Denton to be a desirable employee, it adduced no evidence of other positions that came open for someone with Mr. Denton's qualifications. Simply put, it failed to meet its onus in this case.

[77] For the aforesaid reasons, there is no basis for appellate intervention on the mitigation issue. I do not take Korpan Tractor to challenge the findings of fact made by the judge regarding mitigation nor does it identify any legal error in his analysis. At bottom, what it seeks is for this Court to conduct a trial de novo on the reasonableness of Mr. Denton's mitigation efforts. The standard of review does not permit us to do that.

C. Adjustment for disability payment

[78] As outlined above, the judge awarded Mr. Denton 24 months of pay in lieu of notice, which translated to $355,450.44. While the judge deducted $7,000 from that amount for the short-term disability benefits Mr. Denton had received, he declined to make any adjustment for Mr. Denton's $25,000 settlement with Empire Life, which related to his claim for long-term disability benefits. The judge's reasoning on this point is captured in a single sentence (repeated here for reference): "In my view, that sum of money that arises in the litigation against Empire Life is sufficiently removed from the relationship between [Mr. Denton] and Korpan [Tractor] that it is not a proper deduction from the judgment" (*Trial Decision* at para 67).

[79] Korpan Tractor asserts the judge erred in law by failing to deduct the settlement proceeds. Relying on the Supreme Court's decision in *Sylvester v British Columbia*, 1997 CanLII 353, [1997] 2 SCR 315 (CanLII) (SCC) [*Sylvester*], it says that, as a matter of law, disability benefits must be deducted: otherwise, the employee receives more compensation than would a dismissed employee who is not disabled.

[80] Before addressing Korpan Tractor's argument, I will touch on the law as it pertains to the deductibility of benefits received during the notice period.

1. The legal principles on deductions

[81] Speaking generally, collateral benefits paid pursuant to employment plans are deductible from a damage award for loss of earnings. Harris captures the principle of law as it emerged from the Supreme Court's decision in *Sylvester* (at s 6:61):

> The clear message of *Sylvester* is, therefore, that an employer which is paying wholly employer-funded short term or long term disability benefits to an employee is not liable to pay an additional sum upon dismissing him or her without reasonable notice, to the extent that the applicable notice period coincides with the benefit period. The exception to this rule is where *an opposite intention was stated in, or could be inferred from*, the employment contract (at [para 20]).
>
> (Emphasis in original)

See also Barnacle at pp 252-260.

[82] The facts in *Sylvester* are these. The plaintiff became ill in June of 1992. He received short-term disability benefits from his employer's plan, totalling $33,688. Although he sought long-term disability benefits, he did not receive them. Both plans were funded solely by the employer, and the employee did not contribute, directly or indirectly, to either plan. On July 23, 1992, while the employee was receiving short-term disability benefits, he was given notice that his position was being terminated due to a reorganization and that he would no longer be employed. The employer offered to pay the employee 12.5 months of pay in lieu of notice at 100% of his salary, less the amount of any short- and long-term benefits he had received. The employee disagreed with the proposal and sued for wrongful dismissal.

[83] The trial judge in *Sylvester* agreed with the employer's position on deduction. However, the British Columbia Court of Appeal set aside that decision, holding that the employee was entitled to benefits under both the short- and long-terms plans, without deduction from the damages award.

[84] The Court of Appeal's decision was reversed on further appeal to the Supreme Court of Canada: "If disability benefits are paid in addition to damages for wrongful dismissal, the employee collecting disability benefits receives more compensation than the employee who is

dismissed while working" (*Sylvester* at para 21). Speaking for the Court, Major J. affirmed the long-standing principle of law that employees who are wrongfully dismissed without adequate notice are entitled to damages for the salary they would have received had the employee worked during the notice period. Justice Major's analysis on deductibility was informed by the case at hand, the nature of the benefit, the intentions of the parties (as reflected in the employment contract), and broader policy considerations: "There may be cases where an employee will seek benefits in addition to damages for wrongful dismissal", but "The issue whether disability benefits should be deducted from damages for wrongful dismissal where the employee has contributed to the disability benefits plan was not before the Court" (at para 22).

[85] Bearing those considerations in mind, the Supreme Court concluded the disability benefits in Mr. Sylvester's circumstances were "integral components" of the employment contract and "were intended to be a substitute for the respondent's regular salary" in the event of disability (at paras 13, 14). The contractual language in *Sylvester* stipulated that benefits were only payable when an "employee is unable to work due to illness or injury" (at para 16). Justice Major reasoned that the contractual right to damages for wrongful dismissal and the contractual right to disability benefits arise in opposite circumstances. The former, for lost income the employee was entitled to receive had they worked; and the latter paid because the employee was unable to work. But those opposing situations, in the circumstances of that case, were not indicative of an intention to provide both a salary and disability benefits contemporaneously. Thus, the central question to be explored in the analysis hinges on the intention of the parties. Absent an intention to preclude deductibility, the general rule is that "an employee who is dismissed while not working but receiving disability benefits and an employee who is dismissed while working should be treated equally" (at para 20).

[86] Courts have since found ways to distinguish *Sylvester*. For instance, in *Sills v Children's Aid Society of the City of Belleville*, 2001 CanLII 8524, 198 DLR (4th) 485 (CanLII) (ONCA), the Ontario Court of Appeal declined to deduct disability credits where the employee "effectively paid for the benefits in question" (at para 45). And, in *McNamara v Alexander Centre Industries Ltd*., 2001 CanLII 3871, 199 DLR (4th) 717 (CanLII) (ONCA), leave to appeal to SCC refused [2001] 3 SCR v, the Ontario Court of Appeal distinguished *Sylvester*, writing as follows: "It is important to note that in *Sylvester* the employer paid both salary and disability benefits. Moreover, the terms

of the disability plans established that disability benefits were intended to be a substitute for salary" (*McNamara* at para 18).

[87] The Supreme Court revisited the deductibility issue, this time in the context of pension benefits, in *IBM Canada Limited v Waterman*, 2013 SCC 70 [*Waterman SCC*]. In *Waterman SCC*, the plaintiff was a 65-year-old employee with 42 years of service. He was terminated without cause, and, as a result, retired and began drawing on his pension. He also sued the employer for pay in lieu of notice. One of the issues at trial was whether his pension benefits should be deducted from the pay in lieu of notice. The trial judge declined to make that deduction. The British Columbia Court of Appeal affirmed the trial decision, holding that pension benefits differed from other deductible benefits (e.g., disability benefits), since they were not intended to constitute a replacement for income: "The disability benefits dealt with in *Sylvester SCC* … were found to be a form of salary replacement", leading to the observation that "[a]lthough pension benefits provide an income stream when paid, they are not a substitute for salary" (*Waterman v IBM Canada Limited*, 2011 BCCA 337 at para 46 and at para 61).

[88] The Supreme Court upheld the Court of Appeal decision. Speaking for the majority in *Waterman SCC*, Cromwell J. confirmed the principle against double compensation, subject to two exceptions, which I address below. As Cromwell J. observed, the analytical framework begins with an inquiry into whether a person received a collateral benefit, which he defined in this way:

> [15] A collateral benefit is a gain or advantage that flows to the plaintiff and is connected to the defendant's breach. …
>
> …
>
> [20] In general terms, there is a collateral benefit when a source other than the damages payable by the defendant ameliorates the loss suffered by the plaintiffs as a result of the defendant's breach of legal duty: J. Cassels and E. Adjin-Tettey, *Remedies: The Law of Damages* (2nd ed. 2008), at p. 416. For example, if an employee is wrongfully dismissed, but receives employment insurance benefits, those benefits are a collateral benefit.

[89] However, as Cromwell J. went on to point out, not all benefits raise a compensating advantage problem. That is to say, there must be a link between the benefit and the breach: "Before there is any question of deduction, the receipt of the benefit must constitute some form of excess recovery for the plaintiff's loss and it must be sufficiently connected to the defendant's breach of legal duty" (at para 23). The connection needed to raise the required link is said to be "either because there is a 'but for' causal link between the breach and the receipt of the benefit *or* because

the benefit was intended to provide the plaintiff with an indemnity for the type of loss caused by the breach" (emphasis added, at para 15). As the majority went on to discuss, the latter contingency arises "where the benefit and the breach are connected in the sense that the benefit is intended to indemnify the type of loss caused by the breach" (at para 30).

[90] Put succinctly, if a sufficient connection exists, the collateral benefit is deductible, subject to the recognized exceptions. If it does not, a deduction is not warranted.

[91] As mentioned, the court in *Waterman SCC* went on to discuss the two known exceptions: charitable gifts and private insurance. In analyzing whether private insurance payments should be deducted, Cromwell J. stated that judges should focus on the *nature and purpose of the benefit*. A fact-finder must ask "whether the benefit is an indemnity for the loss caused by the defendant's breach and whether the plaintiff has directly or indirectly paid for the benefit" (at para 55).

[92] After reviewing the policy objectives for deduction and the jurisprudence, the Supreme Court summarized the operative factors for assessing when a benefit should be deducted:

> [76] From this review of the authorities, I reach these conclusions:
>
> > (a) There is no single marker to sort which benefits fall within the private insurance exception.
> >
> > (b) One widely accepted factor relates to the nature and purpose of the benefit. The more closely the benefit is, in nature and purpose, an indemnity against the type of loss caused by the defendant's breach, the stronger the case for deduction. The converse is also true.
> >
> > (c) Whether the plaintiff has contributed to the benefit remains a relevant consideration, although the basis for this is debatable.
> >
> > (d) In general, a benefit will not be deducted if it is *not an indemnity* for the loss caused by the breach and the plaintiff *has contributed* in order to obtain entitlement to it.
> >
> > (e) There is room in the analysis of the deduction issue for broader policy considerations such as the desirability of equal treatment of those in similar situations, the possibility of providing incentives for socially desirable conduct, and the need for clear rules that are easy to apply.
>
> (Emphasis in original)

2. The principles on deduction applied

[93] The questions posed on this appeal are twofold: (a) whether the judge was correct in concluding that the settlement funds were not captured by the general principle favouring deduction for collateral benefits, and (b) if he did err on that point, whether the judge was correct in determining that Mr. Denton's situation fell within the private insurance exception.

[94] Embedded within the first question is the threshold issue of whether Mr. Denton's settlement was a collateral benefit within the meaning of *Waterman SCC*.

[95] The evidence led at trial about Mr. Denton's settlement with Empire Life is sparse. Mr. Denton testified about his inability to work from the time he left the office on July 15, 2020, and that he had received short-term disability benefits from Empire Life (capped at $7,000) and some vacation pay from Korpan Tractor. Alert to Mr. Denton's testimony about being financially strapped during this time frame, the judge asked him how he paid his rent. Mr. Denton responded by stating that he had pursued long-term disability benefits from Empire Life after his entitlement to short-term benefits ran out.

[96] Under cross-examination Mr. Denton testified that he had sought, but was denied, long-term disability benefits from Empire Life, presumably "when Korpan [Tractor's] personnel refused to support [Mr. Denton's] application" (*Trial Decision* at para 50). That ultimately led him to commence an action against the insurer in 2021. Korpan Tractor was not named as a party to that action. As mentioned above, Mr. Denton eventually settled with the insurer in November of 2023 for $25,000. Apart from the terms of a garden-variety settlement and release, no further evidence was adduced on this issue.

[97] Korpan Tractor posits that the judge erred by not applying the principle against double compensation. I will use the *Waterman SCC* framework to assess that issue.

[98] Examined contextually and based on the evidence adduced at trial, I understand the judge to have implicitly concluded that the settlement was not a collateral benefit within the meaning of *Waterman SCC*. I say this for several reasons.

[99] Although the settlement funds related broadly to Mr. Denton's employment, it can be inferred that, as an indemnity for loss of wages due to being unfit to work, Mr. Denton's right to long-term disability benefits had to vest while he was employed or would have been employed, but for the wrongful dismissal.

[100] However, there was no clear evidence before the Court as to what the settlement covered. While the release alludes to Mr. Denton's claim under the policy, it is entirely unclear whether the agreed amount was meant to cover damages for loss of income, legal fees, expenses, or if it was a nuisance payment. This information was important to the judge's assessment of whether the settlement was a collateral benefit within the meaning of *Waterman SCC*.

[101] Further, the absence of evidence about the scope of coverage under the disability plan (i.e., the period covered by the plan) leads directly to a linkage problem as defined by the majority in *Waterman SCC*. Simply put, Korpan Tractor has not satisfied me that Mr. Denton would not have received the settlement funds *but for its breach* (i.e., wrongful dismissal) or that the Empire Life settlement was *intended to be an indemnity* for the sort of loss resulting from Korpan Tractor's breach, i.e., as a salary replacement.

[102] Finally, the decision in *Sylvester*, on which Korpan Tractor relies, is distinguishable on its facts. *Sylvester* concerned non-contributory disability benefits that the employee received during the notice period. In contrast, the Empire Life settlement and release in Mr. Denton's case was executed in late November of 2023, a year beyond the 24-month notice period, which had commenced on November 24, 2020.

[103] Pulling this together with an eye toward the *Waterman SCC* framework, based on the facts of this case or, more precisely, the absence of an evidentiary foundation, I cannot conclude that the judge erred by not deducting the settlement funds. There had to be a sufficient evidentiary foundation for Korpan Tractor to make the case that these funds amounted to a collateral benefit. In accordance with *Waterman SCC*, unless it constitutes a collateral benefit, deduction is not warranted.

[104] Having reached that conclusion, there is no need to go on to examine the question of whether the private insurance exception applied to the settlement in question.

VII. CONCLUSION

[105] I would dismiss Korpan Tractor's appeal in its entirety and award Mr. Denton costs, which I fix at $8,500.

"Schwann J.A."

Schwann J.A.

I concur.

"Tholl J.A."

Tholl J.A.

I concur.

"Kalmakoff J.A."

Kalmakoff J.A.