CITATION No.: Chalmers v. Airways Transit Service Ltd. and Badder Capital Group Ltd., 2023 ONSC 5725
COURT FILE NO.: CV-21-76894
DATE: October 11, 2023

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Michael Chalmers, Plaintiff

AND:

Airways Transit Service Limited and Badder Capital Group Limited, Defendants

BEFORE: MacNeil J.

COUNSEL: *Sabatina Vassalli* – Lawyer for the Plaintiff

Nic Preston – Lawyer for the Defendants

HEARD: March 7, 2023 (by videoconference)

REASONS FOR DECISION ON MOTION

INTRODUCTION

[1] The Defendant, Airways Transit Service Limited ("Airways Transit"), is an airport shuttle service that offers transportation services to its air travel clients throughout the Greater Toronto Region. It is owned and operated by the Defendant, Badder Capital Group Limited ("the Badder Group").

[2] In March 2020, as a result of the COVID-19 pandemic, Airways Transit laid off all of its employees, including the Plaintiff, Michael Chalmers, and significantly reduced its operations. As of June 2020, with the exception of Mr. Chalmers, the management team of Airways Transit had been recalled to work and have continued to work full-time with no subsequent layoff periods. Mr. Chalmers has never been recalled to work. Mr. Chalmers commenced an action seeking damages for constructive dismissal and this is a motion for summary judgment arising from that action.

[3] Airways Transit relies on Ontario Regulation 228/20 – Infectious Diseases Emergency Leave ("Regulation 228"), made under the *Employment Standards Act, 2000*, S.O. 2000,

c. 41 (“the ESA”), in support of its position that it was justified in laying off Mr. Chalmers without pay during the entirety of the “COVID-19 period”, as defined in the regulation. It submits that Mr. Chalmers was not constructively dismissed from his position but that he resigned from his position by virtue of his lawyer’s letter to Airways Transit in May 2021.

[4] The parties filed affidavits in support of their positions on the motion and were each cross-examined on their respective affidavits.

AVAILABILITY OF SUMMARY JUDGMENT

Position of Mr. Chalmers

[5] Mr. Chalmers submits that this case is appropriate for summary judgment as per Rule 20.04(2)(a) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194. All of the required evidence, and all the evidence likely to be available for trial, is before the court. There is no triable issue. There are no contentious issues of fact. The only dispute is whether the conduct of Airways Transit constitutes a constructive dismissal, what the reasonable notice period would be in terminating Mr. Chalmers’ employment, and whether the conduct of Airways Transit warrants aggravated, moral or punitive damages. The full rigors of a trial would be unnecessary, expensive and a waste of the court’s resources.

Position of Airways Transit

[6] Airways Transit agrees that the question of liability can, and should, be determined by way of summary judgment. However, Airways Transit submits that the issue of damages will require further evidence in order to determine Mr. Chalmers’ actual date of termination, quantum of damages suffered, and Mr. Chalmers’ mitigation efforts. Accordingly, Airways Transit submits that it is appropriate to split the issues of liability and damages. It relies on *Anjum et al. v. Doe et al.*, 2015 ONSC 5501 (Ont. S.C.J.), at para. 8; and *Ristanovic v. Corma Inc.*, 2021 ONSC 3351 (Ont. S.C.J.), at para. 3, in support of this approach.

Discussion

[7] In *Anjum*, the court was deciding whether to permit a summary judgment motion on a discrete issue in the context of a civil jury trial. There, the parties both accepted that oral evidence was required “to resolve the issue of whether there is a serious issue requiring a trial concerning whether an unidentified driver was involved in the accident”. The issue to be decided by Myers J. was what process should be used to hear that evidence. He found that there was “no apparent overlap between the evidence concerning the plaintiff’s

damages and the evidence of whether there is independent corroboration for the plaintiff's claim that another car was involved in his accident". Examinations for discovery had already been held. At paragraph 30, Myers J. held:

> Like Ground J. in *Scott*, I am not satisfied that leaving the issue of whether to allow oral evidence to the judge hearing the motion will be the most expeditious, affordable, and fair process. By deciding now, the motion will be scheduled and heard just once with the parties, the court, and court administration all prepared for oral evidence. While the motion judge will not have the opportunity to decide the case on the written record with transcripts of cross-examinations taken out of court in advance, the parties acknowledge that *viva voce* evidence is indicated and is likely to be helpful in light of the competing expert evidence expected. While the plaintiff would prefer that the motion for summary judgment be dismissed because of the need for oral evidence, in my view, the appropriate and proportionate outcome is to arm the motion judge with the evidence and leave it to her to determine if she can make the necessary findings or if a more expansive, expensive process is required in the interests of justice. Dismissing the motion now and sending the matter for trial ignores the point that trial is no longer the default procedure. A trial if necessary; but not necessarily a trial.

[8] Unlike in *Anjum*, the parties in the case before me do not have a separate discrete issue that they accept needs to be determined by way of *viva voce* evidence. Evidence of the chronology of events between the parties is before the court such that an actual date of termination can be determined. Evidence of the damages claimed by Mr. Chalmers is also before the court. Finally, in his affidavit, Mr. Chalmers attested to his mitigation efforts. He was cross-examined on his affidavit. Accordingly, Airways Transit had the opportunity to ask the questions it needed in order to know and respond to the issue of mitigation. The situation would have been different if Mr. Chalmers had not provided any evidence as to his mitigation efforts in his affidavit or, perhaps, if he had not been cross-examined on that affidavit. Thus, I find *Anjum* to be distinguishable from the within case.

[9] The *Ristanovic* decision is also distinguishable from the case before me. In *Ristanovic*, Dunphy J. decided to divide the hearing of two summary judgment motions, brought separately by two employees who had commenced wrongful dismissal claims against the same defendant/employer, into two parts: the first dealing with the question of liability and notice period, and the second dealing with the question of mitigation of damages and the final quantification of damages. At paragraph 3, Dunphy J. explained his decision in this regard as follows:

> The reason for the two-part hearing was that the defendant Corma has now decided to recall both plaintiffs to work. In the case of Mr. Ristanovic, it appears that his job responsibilities may be altered somewhat but his pay will not be affected. There were some issues to be overcome regarding this development, not the least of which was that it was occurring more or less in real time during the hearing, there was (at least initially) some question as to what if any strings were attached and there was no evidence of any of this properly before me. Counsel were unable in the time available to arrive at agreed facts sufficient to enable me to complete the motion that day. I decided to have the parties complete their argument on the questions of liability and the notice period and leave to a subsequent hearing the question of mitigation at which point I expect the evidentiary record regarding the recall to work to be assembled and able to be reviewed and dealt with.

[10] Unlike in *Ristanovic*, Mr. Chalmers has not been called back to work by Airways Transit and there were no ongoing developments relating to damages or mitigation during the time of the hearing before me. All of the facts were known to the parties and Airways Transit was able to make its submissions on a full record, one that included the cross-examination of Mr. Chalmers on his affidavit evidence. There was nothing that prevented the parties from being able to complete their argument on all of the issues at the hearing before me.

[11] Courts have recognized that wrongful dismissal without cause cases are "well-suited" for summary judgment disposition: see *Pohl v. Hudson's Bay Company*, 2022 ONSC 5230 (Ont. S.C.J.), at para. 6.

[12] I am satisfied that I am able to make a fair and just determination on the merits in this case respecting both liability and damages based on the record before me and that there is no genuine issue requiring a trial. Airways Transit does not allege cause, the damages claimed are straightforward, and the evidence presented on the motion is sufficient to permit the necessary findings of fact and law to be made. The summary judgment process will provide a more proportionate, expeditious, and less expensive means to achieve a just result than going to trial: *Hryniak v. Mauldin*, 2014 SCC 7 (S.C.C.), at paras. 47-49.

FACTS

[13] In August 1992, Mr. Chalmers began his employment with Airways Transit. He was originally hired in the position of Manager of Accounting.

[14] In or about May 2018, Mr. Chalmers was promoted to Vice-President of Airways Transit. There was no formal written employment contract provided to him when he took on the Vice-President position.

[15] As Vice-President, Mr. Chalmers reported directly to the President and CEO of Airways Transit, Doug Badder ("Mr. Badder"). His job responsibilities included providing operational and programming support to the company. He assisted on strategic and tactical matters as they related to all aspects of the business, including Human Resources, Capital Assets, Operations Finance and Administration. The company had approximately 125 to 150 employees, depending on the season. Several employees reported directly to Mr. Chalmers. Only Mr. Badder and the CFO of the company held positions more superior than Mr. Chalmers.

[16] Airways Transit is part of the Airport Ground Transportation Association ("AGTA"). As part of Mr. Chalmers' position as Vice-President, he also had responsibilities to participate in the AGTA.

[17] As of March 2020, Mr. Chalmers was the highest paid employee in Airways Transit and had one of its longest employment tenures. His compensation package included an annual salary of $116,532.00, enrolment in Airways Transit's executive group benefits plan, annual pension contributions in the amount of $6,000.00, six (6) weeks of annual vacation, a company vehicle, and payment of his CPA professional fees and professional development training.

[18] Airways Transit acknowledges that, for all intents and purposes, Mr. Chalmers ran the company's day-to-day functions. Airways Transit did not identify any performance issues with Mr. Chalmers' employment.

[19] After being laid off, a few of the managers, including Mr. Chalmers, continued to work, unpaid, from March to June 2020. Mr. Chalmers's evidence was that he wanted to support the company, because of his loyalty to it, so he continued to complete duties without pay, despite the layoff.

[20] In late May/early June 2020, Mr. Chalmers researched and encouraged Mr. Badder to apply to the federal government's wage subsidy program created in response to COVID-19 – the Canada Emergency Wage Subsidy ("CEWS") – to "top up" certain of the managers' CERB payments to help compensate them during the pandemic months.

[21] On June 1, 2020, Mr. Chalmers sent to Mr. Badder an email regarding the wage subsidy option and calculations he had done regarding same. Mr. Chalmers also proposed that he

would go back on payroll and have the company apply to CEWS to assist with payment of his salary; Mr. Chalmers offered to return to work at 80% of his salary. (Mr. Chalmers' evidence on cross-examination was that 80% of his salary was basically equivalent to the salary of one of the managers who was recalled in June 2020. Mr. Badder's evidence was that that manager made "probably 60-some percent" of what Mr. Chalmers earned.)

[22] By an email dated June 4, 2020, Mr. Badder responded to Mr. Chalmers' inquiry indicating that, since Airways Transit was not generating enough revenue to cover extra wages, they needed to conserve expenses. He explained that while three office staff dealing with reservations could work at keeping the office going and be topped up, Mr. Chalmers' layoff should be maintained for the time being. Mr. Badder asked Mr. Chalmers to send him the contact and log-in information for all company accounts so that Mr. Badder had access to them and would not need to reach out to Mr. Chalmers "for these dealings" while he was on layoff. Mr. Badder stated: "You are certainly … not expected to conduct work while you are laid off. I appreciate what you have been doing over the past few months; this certainly has not been easy". Mr. Badder did not respond to Mr. Chalmers' inquiry about applying for the CEWS for his Vice-President position.

[23] Mr. Chalmers' evidence was that, over a number of months after being laid off, he continued to get emails regarding Airways Transit business as he was the primary contact for many of the company's business partners. However, after Mr. Badder was provided with the information required to respond to such inquiries (i.e., usernames and passwords), Mr. Badder took care of these matters himself.

[24] By an email dated June 20, 2020, Mr. Badder informed Mr. Chalmers that the Hamilton office would be closing for a while and that the company would be using Waterloo as the main office. He commented, "Hopefully things turn around soon and we can turn things around." Mr. Chalmers replied, thanking Mr. Badder for the update and saying that he was available if they required any help with the move. (Mr. Chalmers had been involved in planning previous company moves and so he assumed that he could be useful.)

[25] On or about June 25, 2020, Mr. Chalmers found out that many positions had been returned to full-time work at Airways Transit, including two operations managers, two mechanics, the director of operations and marketing, the manager of accounting, and several drivers.

[26] From June to December 2020, Airways Transit recalled fifty-one employees back to work.

[27] Airways Transit received $799,527.59 from the CEWS program for the period March 15, 2020 to December 18, 2021.

[28] When asked on cross-examination if Airways Transit applied for the CEWS for Mr. Chalmers' position, Mr. Badder responded: "You can only apply for people who are actually working. So we didn't bring him back because we figured with his high salary wage, other people could assume his – part of his responsibilities."

[29] Throughout the early months of the pandemic, Mr. Chalmers had continued his involvement with AGTA to support Airways Transit's business interests. On July 3, 2020, further to a discussion Mr. Chalmers had with Mr. Badder and Neil Badder (who was a co-owner of the Badder companies), Mr. Chalmers emailed both of them to provide an update on the AGTA's executive meetings and to inquire whether he should be continuing in the AGTA position. Among other things, Mr. Chalmers asked if there had been any decision made about recalling him back to work. He noted that working with the AGTA is part of his position with Airways Transit and it had been requested that he not work, as the company did not wish to pay him. He further asked when his expense cheque would be issued, including his CPA professional fees for the year, and advised that his company car was having some issues with the air conditioning.

[30] On July 14, 2020, some 11 days later, Mr. Badder responded to Mr. Chalmers stating that they had talked about him being paid for attending the AGTA meetings and that Mr. Chalmers' expenses had been approved and he should be receiving a cheque; Mr. Badder also confirmed his request that Mr. Chalmers let him know the results of the AGTA meetings. Mr. Badder did not respond to Mr. Chalmers' inquiry about returning to work. Later that same day, July 14th, Mr. Chalmers responded to Mr. Badder providing an update on the AGTA meetings.

[31] Mr. Chalmers' evidence was that he called Mr. Badder and/or Neil Badder on several occasions to inquire whether he would be recalled to work, but those calls and messages went unanswered.

[32] On August 4, 2020, Mr. Badder emailed Mr. Chalmers stating that, since Mr. Chalmers was not being paid by Airways Transit, "it makes sense if we have someone take on the responsibilities of Badder Capital's accounting." Mr. Badder asked Mr. Chalmers to provide him with the relevant software and log-in information. Mr. Chalmers responded that same day, August 4th, asking again, among other things, if Mr. Badder wanted Mr. Chalmers to maintain the AGTA position. Mr. Chalmers also agreed to send the requested accounting information relating to Badder Capital.

[33] In February 2021, Airways Transit did not provide Mr. Chalmers with the $6,000.00 contribution to his RRSP. On February 8, 2021, Mr. Chalmers emailed Mr. Badder asking about his outstanding vacation pay, group RRSP contributions, and what measurement

would determine when he would be called back to work. Mr. Chalmers' evidence is that he did not receive a response to this inquiry.

[34] In his affidavit, Mr. Chalmers attests that, by May 2021, it had become clear to him that his layoff was not temporary. Airways Transit had stopped responding to his inquiries, had refused to make the RRSP contribution, and had failed to pay his outstanding vacation. As a result, Mr. Chalmers retained legal counsel who sent a demand letter, dated May 21, 2021, requesting that Mr. Chalmers be paid his statutory termination and severance pay, among other things.

[35] In or about June 2021, Airways Transit made a request through legal counsel for Mr. Chalmers to return the company vehicle he had in his possession. Mr. Chalmers made arrangements for a personal vehicle and secured personal insurance. By August 2021, however, he still had not heard about arrangements for the return of the company car. Mr. Badder testified that Airways Transit did not ask for the return of its property from Mr. Chalmers earlier because they felt that he "was still part of the team. When we could call him back, we would."

[36] Mr. Chalmers commenced this action on August 26, 2021.

[37] In August 2022, Airways Transit hired a new operations manager who assumed some of the upper management responsibilities that would have been performed by Mr. Chalmers.

[38] Mr. Badder's evidence was that Mr. Chalmers' salary "more than doubled and at times tripled the revenue that [Airways Transit] was generating" during the COVID-19 travel restrictions. On cross-examination, Mr. Badder was asked if the individual salaries of other employees, when tallied together, would total an amount that exceeded the company's revenue. Mr. Badder explained: "Yeah, I'm sure they would, but you can get – if you have three other employees that only make up what Michael makes, you get three times the work done from three people than you do from one, possibly." When asked if those other employees were conducting some of Mr. Chalmers' duties, Mr. Badder answered: "Little parts of it, plus we also pulled some of his duties back into the Badder group of companies and we did them … I did some of them for sure … Our part-time CFO did a little bit of it, some of our HR side. We have an HR person on the Badder group of companies. So she was there to help."

[39] Mr. Badder agreed that Mr. Chalmers made inquiries as to when he could expect to be returned to the workplace. Mr. Badder stated that he "might have responded to some" of those inquiries, however, he was not sure how many, if any.

[40] On cross-examination, Mr. Badder stated that all employees have been called back now "because the IDEL's over", but some applied for other jobs and did not return. When asked if there was any intention to call Mr. Chalmers back to work, Mr. Badder testified that he would have had to have done so with IDEL ending effective July 31, 2022.

[41] On cross-examination, Mr. Badder agreed that the company is legally bound to pay Mr. Chalmers his outstanding vacation; and that it is the company's intention to pay Mr. Chalmers his statutory termination or severance pay, if applicable.

ISSUES

[42] The following are the main issues to be determined:

(a) Does Regulation 228 preclude Mr. Chalmers from asserting a common law claim for constructive dismissal?

(b) If not, was Mr. Chalmers constructively dismissed?

(c) If so, what is the reasonable notice period for Mr. Chalmers?

(d) Has Mr. Chalmers made reasonable efforts to mitigate his damages?

(e) What compensation payments is Mr. Chalmers entitled to receive?

(f) Is Mr. Chalmers entitled to aggravated, moral or punitive damages?

RELEVANT LEGISLATION

[43] Below, I set out the main statutory provisions that are relevant for present purposes.

[44] Section 8(1) of the ESA provides:

> **Civil proceedings not affected**
> 8 (1) Subject to section 97, no civil remedy of an employee against his or her employer is affected by this Act.

[45] In turn, section 97 reads:

When civil proceeding not permitted
97 (1) An employee who files a complaint under this Act with respect to an alleged failure to pay wages or comply with Part XIII (Benefit Plans) may not commence a civil proceeding with respect to the same matter.

Same, wrongful dismissal
(2) An employee who files a complaint under this Act alleging an entitlement to termination pay or severance pay may not commence a civil proceeding for wrongful dismissal if the complaint and the proceeding would relate to the same termination or severance of employment.

(3) Repealed: 2021, c. 35, Sched. 2, s. 20.

Withdrawal of complaint
(4) Despite subsections (1) and (2), an employee who has filed a complaint may commence a civil proceeding with respect to a matter described in those subsections if he or she withdraws the complaint within two weeks after it is filed.

[46] Further, s. 98(2) provides:

Same, wrongful dismissal
98 (2) An employee who commences a civil proceeding for wrongful dismissal may not file a complaint alleging an entitlement to termination pay or severance pay or have such a complaint investigated if the proceeding and the complaint relate to the same termination or severance of employment.

[47] Section 141(2.0.3.3) provides:

Transitional regulations
(2.0.3.3) The Lieutenant Governor in Council may make regulations providing for any transitional matter that the Lieutenant Governor in Council considers necessary or advisable in connection with the implementation of the amendments made by the *Employment Standards Amendment Act (Infectious Disease Emergencies), 2020*.

[48] Section 141(2.0.4) reads:

Conflict with transitional regulations
(2.0.4) In the event of a conflict between this Act or the regulations and a regulation made under subsection (2.0.3), (2.0.3.1), (2.0.3.2), (2.0.3.3),

(2.0.3.4), (2.0.3.5) or (2.0.3.6), the regulation made under subsection (2.0.3), (2.0.3.1), (2.0.3.2), (2.0.3.3), (2.0.3.4), (2.0.3.5) or (2.0.3.6) prevails.

[49] Regulation 228, the infectious diseases emergency leave regulation, reads, in part:

> **Interpretation and application**
> 1. (1) In this Regulation,
>
> "COVID-19 period" means the period beginning on March 1, 2020 and ending on July 30, 2022.
>
> …
>
> **Reduction in hours, wages not a layoff**
> 6. (1) An employee whose hours of work are temporarily reduced or eliminated by the employer, or whose wages are temporarily reduced by the employer, for reasons related to the designated infectious disease during the COVID-19 period is exempt from the application of sections 56 and 63 of the Act for the purposes of determining whether the employee has been laid off, and the employee shall not be considered to be laid off under those sections, other than under clause 63(1)(d) of the Act.
>
> (2) Subsection (1) does not apply to an employee whose employment was terminated under clause 56(1)(c) of the Act or severed under clause 63(1)(c) of the Act before May 29, 2020.
>
> **Reduction in hours, wages not a constructive dismissal**
> 7. (1) The following does not constitute constructive dismissal if it occurred during the COVID-19 period:
>
> 1. A temporary reduction or elimination of an employee's hours of work by the employer for reasons related to the designated infectious disease.
>
> 2. A temporary reduction in an employee's wages by the employer for reasons related to the designated infectious disease.
>
> (2) Subsection (1) does not apply to an employee whose employment was terminated under clause 56(1)(b) of the Act or severed under clause 63(1)(b) of the Act before May 29, 2020.

Complaint deemed not to have been filed

8. (1) A complaint filed with the Ministry that a temporary reduction or elimination of an employee's hours of work by the employer or a temporary reduction in an employee's wages by the employer constitutes the termination or severance of the employee's employment shall be deemed not to have been filed if the temporary reduction or elimination of hours or the temporary reduction in wages occurred during the COVID-19 period for reasons related to the designated infectious disease.

(2) Subsection (1) does not apply if the employee's complaint relates to,

(a) a termination under clause 56(1)(a) of the Act or a severance under clause 63(1)(a), (d) or (e) of the Act; or

(b) a termination under clause 56(1)(b) or (c) of the Act or a severance under clause 63(1)(b) or (c) of the Act before May 29, 2020.

…

ANALYSIS

(a) Does Regulation 228 preclude Mr. Chalmers from asserting a common law claim for constructive dismissal?

Position of Airways Transit

[50] Airways Transit submits that the *Employment Standards Amendment Act (Infectious Disease Emergencies), 2020*, S.O. 2020, c. 3 ("the ESAA"), assented to on March 19, 2020, created a new category of leave in the form of the Infectious Disease Emergency Leave ("IDEL"), and amended sections 50.1 and 141 of the ESA.

[51] Section 50.1 of the ESA provides for job-protected leave to employees who are unable to perform the duties of their position due to declared emergencies and infectious disease emergencies, like COVID-19.

[52] By s. 141(2.0.3.3) of the ESA, the Lieutenant Governor in Council ("the LGIC") is authorized to make regulations providing for any transitional matter that the LGIC considers necessary or advisable in connection with the implementation of the amendments made by the ESAA. Airways Transit argues that, pursuant to those powers, the LGIC passed Regulation 228 on May 28, 2020.

[53] Section 141(2.0.4) of the ESA provides that, in the event of a conflict between the ESA (such as s. 8(1) thereof) or its regulations, and any regulation made under sections 141(2.0.3) to (2.0.3.5) of the ESA, which would include Regulation 228, the latter regulations prevail.

[54] Regulation 228 expressly defines the "COVID-19 Period" as the period between March 1, 2020 to July 30, 2022, during which time the legal character of temporary layoffs due to the pandemic was altered, and instead deemed to be infectious disease emergency leaves.

[55] Airways Transit contends that the context and intent of Regulation 228, in addition to the associated emergency orders and legal powers conferred upon and exercised by the LGIC under the *Emergency Management and Civil Protection Act*, R.S.O. 1990, c. E.9 ("the EMCPA"), prevail over the ESA and its s. 8(1) to the extent of any conflict. Any conflict or contradiction is to be resolved in favour of Regulation 228 owing to section 141(2.0.4) of the ESA and s. 7.2(4) of the EMCPA.

[56] Regulation 228 therefore supersedes any legislative reservation of rights, including those purportedly contained under s. 8(1) of the ESA. Sections 4(1) and (2) of Regulation 228 do not reserve a fall-back position on the common law and, instead, the regulation expressly excludes it. Section 7(1) of Regulation 228 provides that a temporary reduction or elimination of an employee's hours of work for reasons related to a designated infectious disease (i.e., COVID-19), will not constitute a constructive dismissal, if it occurred during the COVID-19 Period.

[57] Airways Transit submits that the purpose of Regulation 228 was "to confer job protected status between employers and employees in order to counter the effects of the Pandemic and the government restrictions introduced". Further, and most importantly for this case, Regulation 228 expressly excludes the possibility of any constructive dismissal claim, even if the IDEL resulted in the temporary reduction or elimination of an employee's hours of work. As a result, Airways Transit argues that Regulation 228 applies so as to preclude Mr. Chalmers from asserting a common law claim for constructive dismissal since his layoff was during the COVID-19 Period and for reasons related to the pandemic.

[58] Airways Transit argues that this court should follow the decision in *Taylor v. Hanley Hospitality Inc.*, 2021 ONSC 3135 (Ont. S.C.J.), reversed on other grounds, 2022 ONCA 376 (Ont. C.A.), wherein the court held, at para. 19:

> All temporary layoffs relating to COVID-19 are deemed to be IDELs, retroactive to March 1, 2020 and prospective to the end of the COVID-19 period. As such, the plaintiff's layoff is no longer a layoff. It is an IDEL and

> the normal rights for statutory leaves are applicable (e.g., reinstatement rights, benefit continuation). This means any argument regarding the common law on layoffs has become inapplicable and irrelevant.

[59] In *Taylor*, Ferguson J. reasoned that the interpretation adopted in *Coutinho v. Ocular Health Centre Ltd.*, 2021 ONSC 3076 (Ont. S.C.J.), wherein the court there found that a temporary layoff pursuant to Regulation 228 did not affect a plaintiff's right to pursue a claim for constructive dismissal at common law, rendered s. 7 of Regulation 228 meaningless.

Position of Mr. Chalmers

[60] It is Mr. Chalmers' position that s. 8(1) of the ESA applies to protect his common law claim for constructive dismissal. While Regulation 228 deems certain actions of an employer made in response to COVID-19, namely, a temporary reduction or elimination of an employee's hours of work or a temporary reduction in the employee's wages, not to be a constructive dismissal, this is for the purposes of the ESA only.

[61] Counsel for Mr. Chalmers argues that the decision in *Taylor* should not be followed. Rather, this court should follow the approach taken in *Coutinho* and *Fogelman v. IFG*, 2021 ONSC 4042 (Ont. S.C.J.) and, based on those two decisions, hold that Regulation 228 does not prevent Mr. Chalmers from pursuing his common law action for constructive dismissal. As was explained in *Coutinho* and *Fogelman*, s. 7 of Regulation 228 relieves employers from liability under the ESA only. As a trite matter of statutory interpretation, regulations are subordinate to the Act which creates them and any inconsistency must be resolved in favour of the statute: see *Matt v. Crawford*, 2010 ONSC 3980 (Ont. S.C.J.), at paras. 12-13. Section 8 of the ESA clearly states that common law remedies are not affected by the Act. Accordingly, to the extent Regulation 228 infringes on common law rights, that infringement is of no force.

[62] It is further submitted that s. 141 of the ESA, the provision that grants authority to create regulations, enumerates the areas under which regulations can be made and none of those apply to allow regulations altering s. 8 of the Act and infringing on the common law right to sue for constructive dismissal. The domain of the ESA regulations is not unlimited, but rather is bounded by the "purpose of the Act". Given the express language of s. 8(1) of the ESA, it is illogical to suggest that one purpose of Regulation 228 is to alter common law rights otherwise available to employees.

[63] Both the ESA and Regulation 228 contemplate a "temporary layoff" or a "temporary reduction" of an employee's hours. Prior to the passing of Regulation 228, the ESA deemed a temporary layoff to constitute constructive dismissal when such layoff lasted

13 weeks in duration and, in other circumstances, up to 35 weeks. While Regulation 228 does not include a time period by which the temporary reduction of hours constitutes a termination, the facts in this case support the premise that Mr. Chalmers has not been temporarily laid off. It has been almost 3 years since his layoff and he has not been recalled to work despite the fact that all of the other employees have been returned to the Airways Transit workplace. This leads to the conclusion that the layoff of Mr. Chalmers was not temporary and was not for reasons related to the COVID-19 pandemic.

Discussion

Section 8(1) of the ESA

[64] By this proceeding, Mr. Chalmers is seeking a civil remedy against his employer, Airways Transit, for constructive dismissal.

[65] Section 8(1) of the ESA expressly provides that, subject to s. 97, Mr. Chalmers' ability to commence civil proceedings against his employer is not affected by the Act.

[66] In *Coutinho*, the plaintiff brought an action against her former employer, Ocular, seeking damages in the sum of $200,000 for constructive dismissal and for punitive or aggravated damages. Ocular defended on the basis that, due to the COVID-19 health crisis, it could not continue to employ all of its employees who had been working at a clinic that it closed and that is why Coutinho had been temporarily laid off. Ocular argued that, pursuant to Regulation 228, Coutinho was deemed to be on emergency leave and the temporary elimination of her employment duties and work hours did not constitute a constructive dismissal and therefore the plaintiff had no cause of action against it for constructive dismissal. The court discussed the effect of Regulation 228 and concluded that it did not affect that plaintiff's right to bring an action for constructive dismissal at common law. At paras. 35-43, Broad J. explained his reasoning as follows:

> 35 It is not necessary for me to determine whether Coutinho's hours of work were eliminated for "reasons related" to COVID-19 as I find that there is no genuine issue requiring a trial with respect to Ocular's defence that it is relieved of liability to Coutinho for constructive dismissal by the IDEL Regulation.
>
> 36 I find, for the reasons that follow, that the IDEL Regulation does not affect Coutinho's right to pursue a civil claim for constructive dismissal against Ocular at common law.

37 Counsel advised that they have been unable to find any reported case interpreting or considering the IDEL Regulation. I likewise have been unable to find any such reported case in my research.

38 The starting point for the analysis is section 8(1) of the *Employment Standards Act, 2000* (the ESA") which provides as follows:

> 8 (1) Subject to section 97, no civil remedy of an employee against his or her employer is affected by this Act.

39 Section 97 of the ESA has no application to the circumstances of the case at bar. Subsection (2) provides that an employee who files a complaint under the ESA alleging an entitlement to termination pay or severance pay may not commence a civil proceeding for wrongful dismissal if the complaint and the proceeding would relate to the same termination or severance of employment.

40 There is no evidence that Coutinho filed a complaint against Ocular under the ESA alleging an entitlement to termination or severance pay.

41 Ms. Allen for Ocular argues that, given the unprecedented emergency brought on by the global COVID-19 pandemic and the severity of its impact on employers and employees in Ontario, section 7 of the IDEL Regulation, which deems a temporary layoff by an employer for reasons related to COVID-19 not to constitute a constructive dismissal, ought to be interpreted to apply to not only constructive dismissals for the purposes of the ESA, but also at common law.

42 In the case of *Bristol-Myers Squibb v. Canada (Attorney-General)*, 2005 SCC 26 (S.C.C.) Binnie, J., writing for the majority, citing Dreidger, *Construction of Statutes* (2nd ed. 1983) observed at para. 38 that

> … in the case of regulations, attention must be paid to the terms of the enabling statute:
>
> > It is not enough to ascertain the meaning of a regulation when read in light of its own object and the facts surrounding its making; it is also necessary to read the words conferring the power in the whole context of the authorizing statute. The intent of the statute transcends and governs the intent of the regulation.

(Elmer A. Dreidger, *Construction of Statutes* (2nd ed.1983), at p. 247)

This point is significant. The scope of the regulation is constrained by its enabling legislation. Thus, one cannot simply interpret a regulation the same way one would a statutory provision.

43 In my view, the scope of s. 7 deeming a temporary lay-off for reasons related to COVID-19 to not constitute a constructive dismissal is constrained by s. 8(1) of the ESA. It is not possible to reconcile the interpretation of the IDEL Regulation urged by Ocular with the section of the statute which unequivocally provides that an employee's civil remedy against her/his employee shall not be affected by any provision of the Act.

[67] In *Fogelman v. IFG*, 2021 ONSC 4042 (Ont. S.C.J.), the plaintiff was employed by IFG as Managing Director of Recruiting from July 13, 2009 until he was placed on "temporary lay-off" on March 16, 2020, as a consequence of the downturn in its business resulting from the COVID-19 pandemic. He sued for constructive dismissal. One of the issues before the court was whether IFG was entitled to lay-off Mr. Fogelman pursuant to s. 56(2) of the ESA, which relates to an employer's ability to temporarily lay-off an employee without having that lay-off defined as a termination within the meaning of the ESA, and avoid the common law action of constructive dismissal. In holding that the plaintiff was not barred from bringing an action at common law, Vella J. held, at paras. 49-51:

49 In other words, s. 8(1) provides that the ESA does not supercede [*sic*] the civil remedies otherwise available to an employee at common law or in equity.

50 As Mr. Fogelman was not pursuing his rights under the ESA but rather was pursing his civil remedies, O. Reg. 228/20 does not apply to Mr. Fogelman's claims made under the common law pursuant to s. 8(1) of the ESA.

51 In the alternative, if I am in error regarding my conclusion, then, Mr. Fogelman was not captured by s. 7(1) of O. Reg. 228/20 because he was constructively dismissed within the meaning of s. 56(1)(b) of the ESA. Mr. Fogelman effectively resigned within a reasonable time thereafter (within days), and the constructive dismissal and Mr. Fogelman's response occurred

before May 29, 2020. Therefore, pursuant to s. 7(2) of O. Reg. 228/20, s. 7(1) did not apply to Mr. Fogelman's termination by IFG.

[68] I agree with the decisions made in *Coutinho* and *Fogelman* to the effect that Regulation 228 does not preclude an employee from being able to pursue an action at common law for constructive dismissal due to a COVID-19 pandemic-related layoff during the COVID-19 Period. The ability to pursue civil remedies for wrongful dismissal outside of the purview of the ESA regime, and the difference between the two forums, is well-established in Ontario jurisprudence.

[69] In *Addison v. M. Loeb Ltd.*, 1986 CarswellOnt 836, 53 O.R. (2d) 602 (Ont. C.A.), at paras. 19-20, Dubin J.A., for the Ontario Court of Appeal, affirmed that the availability of a common law remedy was protected under the ESA:

> 19 In this case the employee has resorted to the civil remedy of wrongful dismissal, and his rights must be determined on that basis. Those rights were preserved by s. 6 of the *Employment Standards Act* which reads:
>
> > 6. No civil remedy of an employee against his employer is suspended or affected by this Act.
>
> 20 It was common ground on the appeal that the appellant was entitled to damages for wrongful dismissal in a sum greater than the eight weeks that he had already received, and the issue still remains as to what are the appropriate damages.

[70] In *Stevens v. Globe & Mail (The)*, 1996 CarswellOnt 1590 (Ont. C.A.), at paras. 12, and 19-21, the Ontario Court of Appeal addressed the issue of whether severance payments under s. 58 of the ESA are to be deducted from damages for wrongful dismissal, and Catzman J.A., for the Court, again affirmed the distinction between the statutory benefits available under the ESA and damages for wrongful dismissal at common law.

[71] The import of the ESA compared to an employee's remedies at common law were discussed in detail by the Ontario Court of Appeal in *Rasanen v. Rosemount Instruments Ltd.* (1994), 17 O.R. (3d) 267 (Ont. C.A.), leave to appeal refused [1994] S.C.C.A. No. 152, including the effect of s. 8(1) (then s. 6) of the Act. Abella J., for the majority, at paras. 49-50, wrote as follows:

> 49 The purpose of the Act is "to protect the interests of employees by requiring employers to comply with certain minimum standards, including

minimum periods of notice of termination" (*Machtinger v. HOJ Industries Ltd.*, [1992] 1 S.C.R. 986 at p. 1003, per Iacobucci J.; see also Innis Christie, *Employment Law in Canada*, 2nd ed. (Toronto: Butterworths, 1993) at p. 810; R.J. Adams, "Employment Standards in Ontario" (1987) 42 Industrial Relns. Q. Rev. 46). Section 4 of the Act confirms that these standards are only "minimum requirements" and that any more beneficial employment term provided by law or contract prevails over the statutory minimums delineated in the *Employment Standards Act*. According to the appellant, it is because the remedies available under the Act are minimal that civil — and greater — remedies are simultaneously pursuable in the courts.

50 The fact that an employee is not prevented from seeking a civil remedy does not, it seems to me, lead inexorably to the conclusion that he or she can do so as if no prior proceeding before the tribunal had taken place. If employees wish to pursue a more expeditious route yielding statutory benefits, they have access to the *Employment Standards Act* provisions and scheme. If, on the other hand, they wish to formulate their claim as a civil action seeking broader remedies, this option is equally open to them. Whichever forum is chosen first, issue estoppel is reciprocally available and parties may find, in any subsequent proceeding, that they are bound by a prior determination on the same issue, even if that determination was made by a tribunal.

And at paras. 70-72, Carthy J.A., concurring in the result, wrote:

70 The E.S.A. provisions assure employees that a wide variety of minimum standards of employment are maintained. The Act also provides for quick and efficient administrative procedures to enforce those standards. The Act does not contemplate a wide-open and time consuming confrontation between the contestants. At the hearing stage in the present proceedings, the employment standards officer took control on behalf of the employee, presumably for the sake of efficiency and to save the employee the expense of retaining a lawyer. There is no suggestion in the prescribed procedure that the E.S.A. purports to usurp the normal function of the courts in applying the common law, which includes full discovery and trial, and representation throughout. Section 6 is a positive statement to the contrary.

71 The right of discovery is not a nominal factor. In wrongful dismissal cases oral and documentary discovery can potentially change the entire texture of the factual basis for the claim or defence from what can be identified on a peremptory procedure directed at quick justice. Further, the

> right of personal representation is fundamental to the assertion of common law rights, and its denial, except by discretionary leave, is an indicator that common law rights are not being affected. In my view, it is not a case of conflict between the function of a tribunal and the courts, or a lack of respect of one for the decision of the other. It is rather that a tribunal has been assigned its function of providing expeditious, but limited, relief and the court is left to provide the more thorough and time consuming common law relief.
>
> 72 The evidence of the appellant as to the steps he took fits with my view of the intended operation of the Act. He says that he applied for unemployment insurance but found there would be an extensive waiting period because his employer indicated that he had quit his employment. He therefore applied for the limited benefits under the E.S.A. in order to tide him over. That is what the Act appears to invite.

Finally, also concurring in the result, Morden A.C.J.O. discussed the ESA as follows, at paras. 84-86:

> 84 I shall deal, briefly, with the application of issue estoppel. The effect of s. 6 of the *Employment Standards Act* should be considered first. Its purpose is to make it clear that the minimum employment standards provided for in the Act are not to stand in the way of an employee seeking and obtaining more favourable common law relief. Section 4 of the Act provides that an employment standard shall be deemed a minimum standard only and that, if an employee has more favourable employment benefits than those provided for in the minimum standard, the more favourable benefits are to prevail.
>
> 85 Section 6 indicates, in my view, that an employee is not obliged to choose between proceeding under the Act or seeking a civil remedy in the ordinary courts. One reading of the provision would preclude the application of issue estoppel in a subsequent court proceeding. The section provides that a civil remedy shall not be affected by the Act. It could be said that holding that a decision in a proceeding under the Act gives rise to an issue estoppel in a subsequent court proceeding amounts to the Act affecting a civil remedy. In this regard, I am not concerned with the example of an employee who is required to give credit for the amount of his statutory recovery in a subsequent civil action against his employer. I do not think that receipt of an earlier part payment can be said to affect the employee's common law remedy.
>
> 86 I think, however, that it is appropriate to give s. 6 a narrower interpretation and to conclude that it does not provide that a civil remedy cannot, in proper cases, be affected by a proceeding under the Act, thereby leaving room for

> the application of the doctrine of issue estoppel. Having regard, however, to the policies of ss. 4 and 6, I think that it should be applied with circumspection.

[72] And, finally, in *Boland v. APV Canada Inc.*, 2005 CarswellOnt 532, 250 D.L.R. (4th) 376 (Ont. Div. Ct.), at paras. 23-24, the Ontario Divisional Court affirmed that ESA entitlements are minimum sums payable by an employer to an employee and are not damages, *per se*, like those obtainable at common law:

> 23 I agree with the position of the intervenor. ESA entitlements are not linked, as damages are, to the criteria established in *Bardal* such as the age of the employee, the likely length of time to find another position, the actual finding of another position etc. They are payable in any event. In my view, it is illogical to suppose that the Legislature intended that such payments would become 'damages' if sought in an action, but not when sought administratively. They are minimum sums to be paid by the employer and subjecting them to reduction by reason of sums received from others removes their character as minimum. Their character as minimums was clearly recognized in *Machtinger* and in *Rizzo & Rizzo Shoes Ltd., Re*. In the latter case, Farley J. said at pages 454-5:
>
> > The statutory obligation appears to be absolute; it is not based upon any actual loss. It must be paid in two weekly instalments following termination. There is no statutory provision for repayment if new employment is found after [termination], but within the calculation period. It should also be noted that severance pay is in addition to termination pay. It would not appear to me that the concept of mitigating damages, which might be awarded in a civil action for wrongful dismissal, has any legal relevance to an employer's minimum statutory obligations with respect to termination pay and severance pay.
>
> 24 Therefore, there is no point in sending this case to trial to ascertain if the plaintiff has or reasonably ought to have mitigated his damages and so ought to receive only part, or perhaps none, of the ESA amounts. They simply cannot be reduced in that way. [Citations omitted.]

[73] Clearly then, to accept Airways Transit's interpretation of Regulation 228 would upend decades of jurisprudence interpreting and applying the provision that is now s. 8(1) of the ESA as preserving an employee's right to resort to a civil remedy against his or her employer.

[74] Sections 97 and 98 of the ESA make it clear that proceeding under the ESA by way of a complaint against an employer is *optional* for an employee who alleges they are due termination or severance pay. Counsel for Airways Transit acknowledges this. What an employee cannot do is proceed by way of both the ESA and the common law if the complaint relates "to the same termination or severance of employment".

[75] Here, Mr. Chalmers has not filed a complaint under the ESA alleging an entitlement to termination pay or severance pay. Accordingly, he is free to proceed against Airways Transit by way of a civil proceeding for wrongful dismissal damages.

[76] I reject Airways Transit's submission that Regulation 228 wholly replaced the common law with respect to constructive dismissal and pandemic-related layoffs during the COVID-19 Period. Regulation 228 cannot do what its parent statute, the ESA, expressly does not do. Regulations are a subordinate form of legislation. Subordinate legislation cannot exceed the parent statute's parameters. Nor can a regulation alter or amend the terms of its governing legislation: see *Belanger v. R.* (1916), 54 S.C.R. 265 (S.C.C.), at paras. 5, 34, and 42; and *Authorson (Litigation Guardian of) v. Canada (Attorney General)* (2004), 70 O.R. (3d) 451 (Ont. S.C.J.), at para. 23.

[77] There is a presumption that a regulation has been passed in accordance with the provisions of its parent statute and that there is coherence between the terms used in the statute and those used in the regulation. Section 141(1) of the ESA reflects these principles when it states that the LGIC "may make regulations for carrying out the purposes of this Act". A court must endeavour to interpret the regulation in such a way as to keep it within the confines permitted by the parent statute. Otherwise, the regulation, or part of it, will be declared *ultra vires*: see *Ontario Hydro v. R.*, 1997 CarswellNat 1002, [1997] 3 F.C. 565 (F.C.A.), at paras. 11-12; and *Katz Group Canada Inc. v. Ontario (Health and Long-Term Care)*, [2013] 3 S.C.R. 810 (S.C.C.), at paras. 24-25.

[78] The ESA is not intended to be an exhaustive regime in relation to the termination and severance of employment in Ontario. This is made clear by s. 5 of the Act which provides that the ESA provides *minimum standards* and by s. 8 which provides that civil remedies are not affected by the Act. The Legislature's language is clear and express in these regards.

[79] The very purpose of the ESA – to provide *minimum* employment standards for employees – would be undermined if Regulation 228 was interpreted to displace constructive dismissal at common law and replace it only with the ESA. By the interpretation proffered by Airways Transit, the ESA would instead effectively become the maximum employment standard for constructive dismissal during the COVID-19 Period and

Regulation 228 would preclude such a claim if within its parameters. This is an untenable result.

[80] Finding that s. 7 of Regulation 228 must be interpreted within the confines of its parent statute does not offend the principle that legislation should be interpreted generously. Legislation must still operate validly. A regulation cannot apply to expand the jurisdiction of its parent statute to occupy an area that is specifically exempted by the parent statute. This is also consistent with the principle that language in regulations should be given an interpretation which avoids an absurdity and to give words their appropriate meaning having regard to their context, the purpose of the parent Act, and the intention of the Legislature: see *Blue Mountain Resorts Ltd. v. Bok*, 2013 ONCA 75, 114 O.R. (3d) 321 (Ont. C.A.), at para. 51.

[81] Accordingly, I conclude that s. 7 of Regulation 228 does not operate to displace common law claims of constructive dismissal which are otherwise protected by s. 8(1) of the ESA.

Section 141(2.0.4) of the ESA

[82] Airways Transit argues that, by virtue of s. 141(2.0.4) – which provides that the transitional regulations made under the ESA prevail in the event of a conflict with the Act – s. 7 of Regulation 228 prevails over s. 8(1) of the ESA. I do not agree.

[83] Typically, a "transitional regulation" is enacted to provide guidance or direction on a matter or thing necessary to give effect to the transition from the earlier regime under the parent statute to the parent statute as in force after commencement of the enacted legislative change. Section 142 of the ESA is an example of a provision addressing such a change:

> **Transition**
> 142 (1) Part XIV.1 of the *Employment Standards Act*, as it read immediately before its repeal by this Act, continues to apply only with respect to wages that became due and owing before the Employee Wage Protection Program was discontinued and only if the employee to whom the wages were owed provided a certificate of claim, on a form prepared by the Ministry, to the Program Administrator before the day on which this section comes into force.

[84] I am not persuaded that Regulation 228 is a "transitional regulation" or that s. 7 of Regulation 228 is related to a "transitional matter" or is a provision necessary to implement a transitional change to an existing legislative scheme.

[85] What is more problematic with Airways Transit's argument, however, is that there is no actual conflict between s. 7 of Regulation 228 and s. 8(1), or any other provision, of the ESA. The process of analyzing whether a conflict exists between legislation was discussed in *Thibodeau c. Air Canada*, 2014 SCC 67, [2014] 3 S.C.R. 340 (S.C.C.), at para. 92, wherein the Supreme Court of Canada held:

> First, courts take a restrictive approach to what constitutes a conflict in this context. Second, courts find that there is a conflict only when the existence of the conflict, in the restrictive sense of the word, cannot be avoided by interpretation. Overlap on its own, does not constitute conflict in this context, so that even where the ambit of two provisions overlaps, there is a presumption that they both are meant to apply, provided that they can do so without producing absurd results. This presumption may be rebutted if one of the provisions was intended to cover the subject matter exhaustively. Third, only where a conflict is unavoidable should the court resort to statutory provisions and principles of interpretation concerned with which law takes precedence over the other.

[86] A reading of sections 6, 7 and 8 of Regulation 228 makes it clear that they all relate to the constructs of termination, layoffs and constructive dismissal as found in ss. 56 and 63 of the ESA.

[87] Section 7 of Regulation 228 serves to identify events that will not be considered to be constructive dismissal if they occurred during the defined COVID-19 Period, for the purposes of ss. 56(1)(b) and 63(1)(b) of the ESA, thereby limiting termination and severance complaints that can be advanced under the Act to the Minister on those bases. This intent is clarified and confirmed by s. 8 of Regulation 228.

[88] On the one hand, s. 7 of Regulation 228 impacts on an employee's ability to claim that an event constitutes constructive dismissal as defined under the ESA and applied therein. On the other hand, s. 8(1) of the ESA protects an employee's right to proceed with a common law claim for constructive dismissal to the extent that employee does not also file a complaint under the ESA with regard to the same termination and/or severance event.

[89] The statutory concept of constructive dismissal found in the ESA has existed side-by-side with the common law concept of constructive dismissal for decades, as affirmed by the jurisprudence discussed above. Section 7 of Regulation 228 applies and regulates the statutory "constructive dismissal" as created by the ESA and enforced under the Act's Part XXII - Complaints and Enforcement. This is wholly in keeping with the purpose and

wording of the ESA. Section 7 of Regulation 228 is not inconsistent with s. 8(1) of the ESA. One does not preclude the application of the other. They are not contradictory. Their concurrent application does not lead to unreasonable or absurd results. As I read the two provisions, they can live harmoniously.

Conclusion

[90] For all of the foregoing reasons, Regulation 228 does not preclude Mr. Chalmers from asserting a common law claim for constructive dismissal.

(b) If not, was Mr. Chalmers constructively dismissed?

Position of Mr. Chalmers

[91] Counsel for Mr. Chalmers argues that Airways Transit did not temporarily reduce or eliminate Mr. Chalmers' hours of work or wages due to COVID-19. Both the ESA and the IDEL contemplate a "temporary layoff" or a "temporary reduction" of an employee's hours. Before the IDEL, the point at which a temporary layoff in the ESA was deemed a constructive dismissal was 13 weeks and, in some circumstances, up to 35 weeks. While the IDEL does not include a timeline by which the temporary reduction of hours is deemed a termination, the facts in this case support the premise that Mr. Chalmers has not been *temporarily* laid off.

[92] It has been almost 3 years since Mr. Chalmers was laid off and not recalled to work, despite the fact that all of the other management employees have been returned to the workplace. These circumstances lead to the conclusion that his layoff was neither temporary nor for reasons related to the COVID-19 pandemic. The evidence of Airways Transit confirms that they simply believed Mr. Chalmers earned too high a salary to recall him back to the workplace. In their own words, they could "get three times the work done from three people." The evidence establishes that other people within the Defendants' organizations have assumed Mr. Chalmers' job functions. Airways Transit has thwarted their legal obligations to Mr. Chalmers, a long-term employee, relying on the pandemic and the IDEL as their justification for doing so.

[93] Here, there is no employment contract or agreement between the parties giving Airways Transit the right to layoff Mr. Chalmers. Mr. Chalmers has not resigned nor has he been formally terminated. Airways Transit simply has not recalled him. Mr. Chalmers has been constructively dismissed entitling him to wrongful dismissal damages.

Position of Airways Transit

[94] It is the position of Airways Transit that, since Mr. Chalmers only alleged constructive dismissal on May 21, 2021, the court should find that he has acquiesced to his temporary layoff by the company. Airways Transit submits that Mr. Chalmers was involved in placing a number of other employees on temporary layoff and, accordingly, he supported the legitimacy of the layoffs due to the economic uncertainty created by the pandemic. Mr. Chalmers did not object to his own temporary layoff when it happened. On cross-examination, he confirmed that the layoff had been implemented company-wide and that, at the time, he did not oppose his temporary layoff nor indicate any disagreement. Mr. Chalmers explained in his own words that "everyone had to be laid off in the interest of Airways Transit". Airways Transit further submits that Mr. Chalmers agreed on cross-examination that recalls would not have been possible unless revenue returned to near normal levels.

[95] Given that Mr. Chalmers alleged constructive dismissal through his lawyer, some 14 months after the initial layoff, Airways Transit argues that Mr. Chalmers failed to claim constructive dismissal and notify Airways Transit of his claim within a reasonable period of time, as he was required to do: see *Farquhar v. Butler Brothers Supplies Ltd.* [1988], 23 B.C.L.R. (2d) 89.

[96] Airways Transit submits that it is not true that the majority of its employees had been recalled as of June 2020. Rather, it contends that most employees remained on a temporary layoff and only four employees were initially recalled in order to operate a very limited portion of the business. Given that there had been an approximate 90% decrease in revenue and given the ongoing COVID-19 restrictions, Airways Transit was not in a position to recall its full workforce or Mr. Chalmers. When employees were recalled by the company, it was "limited to supporting pockets of active business".

[97] Airways Transit submits that there was nothing nefarious about Mr. Chalmers not being recalled and not having his salary "topped up". The company simply could not grant Mr. Chalmers' requests to return to work at 80% of his salary, even if the CEWS applied. Since Mr. Badder had no further updates to give Mr. Chalmers, there was no need to respond to each of Mr. Chalmers' inquiries.

[98] Airways Transit did not plan for any of the temporary layoffs to become permanent. Mr. Badder's evidence was that he "remained committed to ensuring that despite the government-imposed restrictions, that there would be a company to return to", including for Mr. Chalmers. At all times, Mr. Chalmers' temporary layoff was deemed to be an

IDEL and, despite this, he chose to deem his employment as being at an end on May 21, 2021, which was tantamount to a resignation.

Discussion

[99] At common law, if a condition of employment is substantially altered, the court may determine that the employment of the employee has been terminated by way of constructive dismissal. The question is whether the facts support a conclusion that Mr. Chalmers' employment was so terminated.

[100] The test for constructive dismissal was set out in *Potter v. New Brunswick (Legal Aid Services Commission)*, 2015 SCC 10 (S.C.C.). The *Potter* test was summarized in *Brake v. PJ-M2R Restaurant Inc.*, 2017 ONCA 402 (Ont. C.A.), at paras. 64 to 66, as follows:

> 64 The test that *Potter* establishes for constructive dismissal consists of two branches. Satisfaction of either branch is sufficient for a finding of constructive dismissal.
>
> 65 The first branch of the *Potter* test has two steps. First, the Court must determine objectively whether a breach has occurred. To do so, the Court must ascertain whether the employer has unilaterally changed the contract. If an express or an implied term gives the employer the authority to make the change or if the employee consents or acquiesces in it, the change is not a unilateral act and will not constitute a breach. To qualify as a breach, the change must also be detrimental to the employee. Second, once it has been objectively established that a breach occurred, the Court must ask whether a reasonable person in the same situation as the employee would have felt that the essential terms of the employment contract were being substantially changed (*Potter*, at paras. 37-39).
>
> 66 The second branch of the *Potter* test necessarily requires a different approach. On this branch, constructive dismissal consists of conduct that, when viewed in light of all the circumstances, would lead a reasonable person to conclude that the employer no longer intended to be bound by the terms of the contract (*Potter*, at para. 42).

[101] The fact that a layoff may be conducted in accordance with the ESA is irrelevant to the question of whether it is a constructive dismissal at common law: see *Bevilacqua v. Gracious Living Corporation*, 2016 ONSC 4127 (Ont. S.C.J.), at para. 9. At common law, an employer has no right to layoff an employee. Absent an agreement to the contrary,

a unilateral layoff by an employer is a substantial change in the employee's employment and would be considered a constructive dismissal: see *Elsegood v. Cambridge Spring Service (2001) Ltd.*, 2011 ONCA 831, at para. 14; *McLean v The Raywal Limited Partnership*, 2011 ONSC 7330, at para. 19; and *Bevilacqua*, at para. 9.

[102] The onus is on Mr. Chalmers to prove on a balance of probabilities that he has been dismissed. I find that Mr. Chalmers has met that onus.

[103] In or about June 2020, the Director of Operations and Marketing (Robinson), the Hamilton Operations Manager (Crolla), the Waterloo Operations Manager (Wadel-Turcotte), and the Manager of Accounting (King), among others, had all been recalled to work.

[104] I do not accept Airways Transit's submissions that a recall of Mr. Chalmers was not possible or required during the COVID-19 Period. The evidence of Mr. Badder was that *ad hoc* requests were made to Mr. Chalmers for information or log-in details so that Airways Transit could continue to manage portions of its business. I find that this means that Mr. Chalmers' job functions were relevant and necessary to keeping the operations of the company going.

[105] I am satisfied that Airways Transit decided to not recall Mr. Chalmers to the workplace solely due to the cost of his salary, which the company believed was too high. This is not a valid reason to dismiss an employee.

[106] With respect to the March 27, 2020 layoff at the start of the pandemic, I accept that it is arguable that there may be a triable issue as to whether Mr. Chalmers acquiesced and accepted the initial layoff as part of his employment agreement. It has not been argued on Mr. Chalmers' behalf that Airways Transit was not acting *bona fide* when issuing the initial layoff of all of its employees due to the pandemic. In any event, I am not persuaded that the initial layoff in or about March 27, 2020 was termination of Mr. Chalmers' employment. This is supported by the evidence of the parties that Mr. Chalmers continued to work on certain matters for Airways Transit through the early months of the pandemic, without pay.

[107] However, in my view, by June 4, 2020, there can be no doubt that Airways Transit had constructively dismissed Mr. Chalmers from his job. The evidence supports that June 4th was the day that Mr. Badder requested the contact and log-in information for "all accounts" so that Mr. Badder would not need to reach out to Mr. Chalmers for assistance anymore, and confirmed that Mr. Chalmers was not to perform work for Airways Transit anymore as he was laid off.

[108] There is no contract term, either express or implied, entitling Airways Transit to layoff Mr. Chalmers for any period of time. Given that a reduction in an employee's pay and/or responsibilities can constitute constructive dismissal, clearly an indefinite layoff with no pay can also constitute constructive dismissal. I find that the layoff of Mr. Chalmers, without pay, was a fundamental change in the employment relationship that was imposed unilaterally by Airways Transit and not accepted by Mr. Chalmers and, therefore, constitutes wrongful dismissal: see *Potter*, at paras. 43-45.

[109] I conclude that Mr. Chalmers has proven that he was constructively dismissed.

(c) If so, what is the reasonable notice period for Mr. Chalmers?

Position of Mr. Chalmers

[110] It is Mr. Chalmers' position that an appropriate and reasonable notice period for his circumstances is 24 months. He bases this on the following:

(a) He was an employee with long service (28 years).
(b) He was in senior management (Vice-President).
(c) He was older (53 years old as of the date of termination).
(d) The COVID-19 pandemic caused a downturn in the travel industry causing him to have difficulty finding another position.
(e) It took him 20 months to secure a job, which did not work out.
(f) It took him 23 months to find his current position, wherein he earns significantly less income than he did with Airways Transit.

[111] Mr. Chalmers also submits that any assessment of reasonable notice should take into consideration a "covid bump". He relies on the decision in *Kraft v. Firepower Financial Corp.*, 2021 ONSC 4962 (Ont. S.C.J.), at para. 22, wherein the court added one month of notice to the reasonable notice award in recognition of the impact of the pandemic on the plaintiff's ability to secure new employment. The court in *Kraft*, at para. 18, noted that the pandemic caused an "inevitably prolonged job search" resulting from the "uncertainty in the economy and the job market and fewer employers were looking to fill positions". Mr. Chalmers also cites *Iriotakis v. Peninsula Employment Services Limited*, 2021 ONSC 998 (Ont. S.C.J.), at para. 19, wherein the court found that the economic downturn caused by the COVID-19 pandemic could extend the reasonable notice period because the depressed economy makes it more difficult to find similar alternative employment.

Position of Airways Transit

[112] Airways Transit argues that a reasonable notice period is 16 months to 22 months.

[113] Airways Transit acknowledges that Mr. Chalmers was a 53-year-old Vice-President, with approximately 28 years of service.

[114] Mr. Chalmers' assertion that he was constructively dismissed on March 27, 2020 is simply not plausible. During the months of May and June 2020, Mr. Chalmers monitored the financials of the business, attended to a propane licensing issue in Waterloo, and offered to assist Airways Transit with the closure of its Hamilton office, among other things. Mr. Chalmers did all of these things because he still considered himself an employee.

[115] Mr. Chalmers failed to allege a constructive dismissal in a timely manner. And when he finally did, he continued to retain the use and enjoyment of his company laptop, cellphones and company car for a further 14 months.

[116] Airways Transit further argues that Mr. Chalmers has not established any facts that would support an inflated notice period due to the COVID-19 pandemic. It relies on the decision in *Flack v. Whiteoak Ford Lincoln Sales Limited*, 2021 ONSC 7176 (Ont. S.C.J.), wherein that court declined to grant a longer notice period based only on the employee's alleged but unparticularized delays due to the pandemic. And in *Marazzato v. Dell Canada Inc.*, 2021 ONSC 248 (Ont. S.C.J.), wherein the court held that employees seeking a longer notice period must provide actual evidence of any alleged "economic downturn" caused by the pandemic; it is not appropriate to speculate about the pandemic's impact.

Discussion

[117] While Airways Transit's financial circumstances may have warranted the initial stopping of pay and benefits of Mr. Chalmers, given the severe economic downturn in the air shuttle industry due to the COVID-19 pandemic, the consequences of Airways Transit's poor financial situation should not be imposed on Mr. Chalmers. As the court said in *Farquhar*, the purpose of an award of damages in these types of cases is to compensate the former employee for the loss caused by the employer's breach of the implied term of the employment contract to give reasonable notice of termination and "neither adverse economic circumstances generally nor the poor financial position of the employer should affect the damages to which a wrongfully dismissed employee is entitled." In *Anderson v. Haakon Industries (Canada) Ltd.* (1987), 48 D.L.R. (4th) 235, 23 B.C.L.R. (2d) 166 (B.C. C.A.), cited in *Farquhar* at 93, the court there commented that unfavourable economic circumstances will not serve to reduce the reasonable period of notice but they may actually serve to extend the reasonable period of notice if, as a result, the employee is unlikely to find similar employment readily and his or her loss is thereby increased.

[118] An employer who fails to provide adequate notice of termination must compensate the wrongfully dismissed employee for all losses that flow from its failure to do so; recoverable losses include benefits that the employee would have earned throughout the common law notice period: see *Paquette v. TeraGo Networks Inc.*, 2016 ONCA 618 (Ont. C.A.), at para. 16.

[119] In a wrongful dismissal, the length of notice to be given to an employee is determined according to the specific facts of the case. The factors to be considered are as set out in the seminal decision of *Bardal v. Globe & Mail (The)*, [1960] O.W.N. 253, 24 D.L.R. (2d) 140 (Ont. H.C.), at para. 21, being: 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. No one *Bardal* factor is to be given disproportionate weight: *Keays v. Honda Canada Inc*., 2008 SCC 39, 2 S.C.R. 362, at para. 32.

[120] The Court in *Paquette v. TeraGo Networks Inc.*, 2015 ONSC 4189 (Ont. S.C.J.), appeal allowed on other grounds 2016 ONCA 618 (Ont. C.A.), at paras. 22 to 31, identified the following additional factors to take into consideration:

(a) A longer notice period will usually be justified for older long-term employees.
(b) The longer the duration of employment, the longer the notice period.
(c) A longer notice period is provided for senior management or highly skilled and specialized employees.
(d) Economical factors such as a downturn in the economy or in a particular industry or sector of the economy may indicate that an employee may have difficulty finding another position and may justify a longer notice period.

[121] Reasonable notice is assessed as of the time the decision to terminate is made: *Iriotakis*, at para. 20. See also *Yee v. Hudson's Bay Company*, 2021 ONSC 387 (Ont. S.C.J.), at para. 22.

[122] Mr. Chalmers was 53 years old when he was laid off and he had been employed for 28 years. Mr. Chalmers was a senior member of management and held a vice-president position. He had a number of employees who reported to him and he had substantial responsibilities.

[123] Mr. Chalmers' age is a factor, but he still has a number of years before the typical age of retirement at 65 years.

[124] The 28 years of service is a substantial factor entitling Mr. Chalmers to significant notice.

[125] Mr. Chalmers' status within the company is a factor which increases the period of notice to some degree as it was a significant managerial position.

[126] Mr. Chalmers' experience in the transportation industry was specific to the type of operations at Airways Transit; he lacked experience in cost and inventory accounting. And the qualifications of his CPA designation had changed over time. These considerations also serve to increase to some degree the period of notice.

[127] After considering all of the *Bardal* factors and having reviewed the various authorities submitted by the parties, I accept the submissions of counsel for Mr. Chalmers and find that the appropriate reasonable notice period is 24 months in the circumstances. In my view, this aligns with the applicable and relevant case law.

[128] With respect to Mr. Chalmers' request for a "covid bump", I find the cases relied on by Airways Transit against granting such an award to be distinguishable and decline to follow them. With respect to *Flack*, in that case the plaintiff was terminated a number of months prior to the start of the COVID-19 pandemic in March 2020, and the court found that he began his job hunt soon after being dismissed, that he had early success in obtaining job offers, and that he was reemployed by June 2020. In *Flack*, the court held, at para. 29: "COVID was clearly a subsequent event in this case and ought not to impact the determination of the period of reasonable notice." That is not this case. And in *Marazzato*, the court found that there was no evidence that the plaintiff's skill set in the computer business was not of benefit during the COVID-19 pandemic "and its resulting greater use of computers for access to the internet and remote practices". That is also not this case.

[129] I accept and adopt the approach taken in *Kraft* and in *Iriotakis* and find that the assessment of reasonable notice should be increased by a "covid bump". I am satisfied that the evidence establishes that the airport shuttle transportation industry was severely affected by the COVID-19 pandemic and the resultant border shutdowns and restrictions on travel. Mr. Chalmers had spent 28 years working in that industry and his experience was fairly specialized to it. Airways Transit placed Mr. Chalmers into the precarious pandemic and post-pandemic job market by its conduct. I find that a "covid bump" of 1 month is appropriate in all of the circumstances.

[130] Accordingly, I conclude that the appropriate reasonable notice period for Mr. Chalmers is 24 months plus a "covid bump" of 1 month, for a total notice period of 25 months.

(d) Has Mr. Chalmers made reasonable efforts to mitigate his damages?

Position of Airways Transit

[131] Airways Transit argues that Mr. Chalmers failed to provide notice of his constructive dismissal claim within a reasonable period of time, as he was required to do. It relies on the notification obligation as described by Lambert J.A. in *Farquhar*, at para. 18:

> The legal position in a constructive dismissal is that the employer commits a present breach or an anticipatory breach of a fundamental term of the employment contract, and the employee thinks it over and decides to accept the immediate termination of the contract. He must notify the employer of his decision to do so within a reasonable time. Often he does so simply by leaving the place of employment and failing to return, but he can do so in any other way. At that stage, the wrongful constructive dismissal is complete, and the obligation to mitigate arises.

[132] Airways Transit alleges that Mr. Chalmers did not do enough to mitigate his damages and, as a result, it contends that the reasonable notice period should be reduced accordingly. It submits that Mr. Chalmers has failed to provide sufficient detail of his mitigation efforts and has not provided details about his mitigation income with the funeral home where he is currently employed. Airways Transit also submits that Mr. Chalmers confirmed that he received the CERB from March 27, 2020 until approximately September 2020 when he then began receiving EI benefits.

Position of Mr. Chalmers

[133] Mr. Chalmers denies his mitigation efforts were not reasonable. First and foremost, Mr. Chalmers offered to return to work at 80% of his salary and Airways Transit refused this offer. He also made diligent mitigation efforts for many months. He started looking for other employment during 2020 but there were not a lot of active jobs available because of the COVID-19 pandemic. He worked with an organization to help him update his resume and put together a job package. Mr. Chalmers searched for jobs himself and launched his job package with various online platforms. He also started working on fulfilling his professional development hours. He tried to educate himself and he began reviewing job postings.

[134] Mr. Chalmers' evidence was that he first secured a position in November 2021 but states that he resigned after 3 days due to the stress levels involved and because he had been misled by the company about the requirements of the position. He secured a second position in January 2022 but that job also did not work out for him. It was a startup

company, there were on-boarding issues and relevant information about the company had not been shared with him. Finally, on February 7, 2022, Mr. Chalmers took a position with a funeral home, where he remains employed. There, he earns $85,000.00 annually and has 3 weeks of vacation.

Discussion

[135] In *Michaels v. Red Deer College*, [1976] 2 S.C.R. 324 (S.C.C.), at para. 11, the Supreme Court of Canada held that the employer bears the burden of proving a failure to mitigate in wrongful dismissal cases. This means that the employer must prove that the employee failed to take reasonable steps to find "a comparable position reasonably adapted to his abilities": see *Link v. Venture Steel Inc.*, 2010 ONCA 144 (Ont. C.A.), at para. 73; and *Beatty v. Best Theratronics Ltd.*, 2015 ONCA 247 (Ont. C.A.), at paras. 12-13, leave to appeal refused 2015 CarswellOnt 5254 (S.C.C.A.). Therefore, the onus with respect to the question of mitigation rests on the Defendants. In my view, they have not met their onus.

[136] I am satisfied that Mr. Chalmers acted reasonably to mitigate his loss. During the early months of the pandemic, he performed work duties as required and fulfilled all requests to provide information made of him by Mr. Badder, including the accounting, software, passwords and log-in information. He researched the availability of CEWS to supplement his salary. He offered to return to work with a substantial cut in pay. Mr. Chalmers searched for a job in 2020 but was negatively impacted by the economic slowdown caused by the COVID-19 pandemic. He subsequently sought assistance in updating his resume and then posted on various platforms in an effort to find new employment. He tried two positions until he finally found a job with his current employer in February 2022.

[137] There was no evidence led by Airways Transit establishing that there were other reasonable job search steps Mr. Chalmers failed to take or that there were similar jobs available to Mr. Chalmers that he could have taken and instead ignored.

[138] With respect to Airways Transit's reliance on *Farquhar*, I find that decision does not assist it. In *Farquhar*, the court held that, following a constructive dismissal, an employee may have an obligation to continue to work for the employer, under a new employment relationship, for the period equal to reasonable notice while he looks for other work, as part of the employee's duty to mitigate. Lambert J.A. held, at para. 19, that the employee is only required to take the steps in mitigation that a reasonable person would take. In this case, Mr. Chalmers did offer to work for Airways Transit at a reduced salary and he remained open to returning to work for many months into the reasonable notice period. It was Airways Transit that did not offer to Mr. Chalmers a position. In my view, there was no obligation on Mr. Chalmers to mitigate any differently than he did.

[139] I find that Airways Transit has not discharged its onus to show that Mr. Chalmers failed to take reasonable steps to find comparable alternate employment. I am satisfied that Mr. Chalmers has made reasonable efforts to mitigate his damages in the circumstances.

(e) What compensation payments is Mr. Chalmers entitled to receive?

[140] Mr. Chalmers' compensation package was comprised of an annual salary of $116,532.00, enrolment in Airways Transit's executive group benefits plan, annual pension contributions in the amount of $6,000.00, six (6) weeks of annual vacation, a company vehicle, and payment of his CPA professional fees and professional development training.

[141] Earlier on in this decision, I fixed the termination date as June 4, 2020. I find that Mr. Chalmers is entitled to his compensation package for the total reasonable notice period of 25 months from that termination date.

[142] While Mr. Chalmers earned income from AGTA for the provision of separate accounting services, in addition to his Airways Transit salary, this was known to Airways Transit. I order that the amount owing to Mr. Chalmers by Airways Transit shall not be reduced for payments made to Mr. Chalmers by AGTA for compensation after March 27, 2020.

[143] EI benefits are not to be deducted from damages awarded for wrongful dismissal: see *Brake v. PJ-M2R Restaurant Inc.*, 2017 ONCA 402 (Ont. C.A.), at paras. 101-107.

[144] I also decline to deduct CERB payments from the damages awarded: see *Iriotakis v. Peninsula Employment Services Limited*, 2021 ONSC 998 (Ont. S.C.J.), at para. 21.

[145] Where an employee is dismissed and the employer fails to pay benefits to which the employee is entitled under the ESA, the employee may claim both those benefits and common law damages in a single civil action, so long as there is no double recovery: *Stevens*, at paras. 27-28; and *Boland*, at paras. 19-20. Accordingly, I make the 25 months' compensation in lieu of notice inclusive of any statutory benefits as required by the ESA.

[146] I do impose a trust in favour of Airways Transit for Mr. Chalmers to account for all income earnings he has received from new employment within the 25-month reasonable notice period.

(f) Is Mr. Chalmers entitled to aggravated, moral or punitive damages?

Position of Mr. Chalmers

[147] Mr. Chalmers seeks an award of combined aggravated, moral and/or punitive damages from Airways Transit in the amount of $200,00.00.

[148] Counsel for Mr. Chalmers relies on *Fogelman v. IFG*, 2021 ONSC 4042 (Ont. S.C.J.), at paras. 120 to 122. In that case, the plaintiff was awarded punitive damages on the basis that the employer failed to provide the plaintiff any statutory entitlements under the ESA once it received notice that he considered the layoff to be a constructive dismissal. The employer had not behaved well in its dealings with the plaintiff including by changing its position in the litigation, not advising the plaintiff of his prospects for being recalled to work, and not responding to demand letters from the plaintiff's counsel. Here, Airways Transit's conduct is even more reprehensible and high-handed than that of the employer in *Fogelman*. Airways Transit laid Mr. Chalmers off and failed to recall him using the COVID-19 pandemic as the excuse. By returning all of the other employees and not Mr. Chalmers, Airways Transit misled him and breached its duty of good faith and fair dealing. Airways Transit chose not to apply to the wage subsidy program for financial assistance to bring Mr. Chalmers back to work because of his high salary and they had others assume his responsibilities. Mr. Chalmers offered to return to work at 80% of his salary and Airways Transit refused, simply because it considered his salary too high. Airways Transit was not responsive to Mr. Chalmers' requests to return to work or to his requests about updates on his employment status. Airways Transit placed Mr. Chalmers into the volatile pandemic and post-pandemic job market. More significantly, Airways Transit refused to pay Mr. Chalmers his accrued statutory vacation or make the annual contributions to his RRSP. Mr. Chalmers' request for payment of his statutory termination and severance pay was ignored. Finally, in defending against the statement of claim, Airways Transit pled that Mr. Chalmers had failed to return their property and threatened to sue him for recovery of same along with associated damages, even though there had been discussions between the parties' counsel about return of the property and Mr. Chalmers was awaiting direction on when to return it. Airways Transit's conduct has caused Mr. Chalmers severe anxiety and stress over the financial future of his family.

[149] In addition, Mr. Chalmers argues that Airways Transit's conduct in the course of the litigation has also been malicious, oppressive and high-handed. The summary judgment motion was originally scheduled for the week of July 5, 2022. While Mr. Chalmers' materials were served on March 25, 2022, Airways Transit did not serve its materials until July 18, 2022, and those materials were deficient as they lacked financial disclosure about Airways Transit's business post-March 2020. When Mr. Chalmers sought to adjourn the summary judgment motion to permit cross-examinations on affidavits,

Airways Transit contested the adjournment. This was despite the fact that the need for the adjournment was created by Airways Transit's late service of their summary judgment materials. Airways Transit's conduct is outrageous and reprehensible behaviour deserving of punitive sanctions.

Position of Airways Transit

[150] Airways Transit submits that there was nothing reprehensible or misleading about its conduct. It found itself in circumstances far beyond its control. It relied on Regulation 228, which was purposely created to regularize the temporary circumstances that the parties found themselves in. It is the position of Airways Transit that it would have recalled Mr. Chalmers at the end of the COVID-19 Period but he deemed his employment to be at an end by claiming constructive dismissal in the May 2021 correspondence from his lawyer. Mr. Chalmers ended the employment relationship by claiming constructive dismissal. As a result, he could not be recalled.

Discussion

Aggravated/moral damages

[151] The purpose of an award for aggravated/moral damages in employment law is to compensate the plaintiff for the manner of his or her dismissal: *Honda*, at para. 60. Employers have an obligation of good faith and fair dealing in the manner of dismissal: *Wallace v. United Grain Growers Ltd.*, [1997] 3 S.C.R. 701 (S.C.C.), at para. 95. Moral damages are recoverable if the employer breaches that obligation by behaving in a way that is "unfair or is in bad faith by being, for example, untruthful, misleading or unduly insensitive" during dismissal: *Honda*, at para. 58; citing *Wallace*, at para. 98. Moral damages are separate and above the normal negative impacts that result from one's employment being terminated: *Honda*, at para. 56.

[152] In *Galea v. Wal-Mart Canada Corp.*, 2017 ONSC 245 (Ont. S.C.J.), at para. 232, Emery J. summarized the following factors to be considered when assessing a claim for aggravated or moral damages:

(a) Where an employer has breached its duty of good faith and fair dealing in the manner in which the employee was dismissed.

(b) Conduct that could qualify as an employer's breach of good faith or the failure to deal fairly in the course of a dismissal includes an employer's conduct that is untruthful, misleading or unduly insensitive, and a failure to be candid, reasonable, honest and forthright with the employee.

(c) Where it was within the reasonable contemplation of the employer that the manner of dismissal would cause the employee mental distress.

(d) The wrongful conduct of an employer must cause the employee mental distress beyond the understandable distress and hurt feelings that normally accompany a dismissal.

[153] In *Honda,* at para. 59, the Supreme Court gave the following examples of behaviour that merits aggravated damages: "attacking the employee's reputation by declarations made at the time of dismissal, misrepresentation regarding the reason for the decision, or dismissal meant to deprive the employee of a pension benefit or other right, permanent status for instance".

[154] In my view, Airways Transit did engage in "untruthful, misleading or unduly insensitive" conduct towards Mr. Chalmers. However, I am not satisfied that there is sufficient evidence to establish that Mr. Chalmers suffered mental anguish over and above the ordinary distress and hurt feelings that result from a dismissal, to warrant an aggravated/moral damages award.

[155] Accordingly, I decline to award aggravated/moral damages.

Punitive damages

[156] Punitive damages seek to punish and denunciate inappropriate or unfair conduct. The purpose of punitive damages is the punishment of the defendant, not the compensation of the plaintiff, and so they are an exception to the general rule that damages are meant to be compensatory in nature. The Supreme Court of Canada set out the principles surrounding the award of punitive damages in *Whiten v. Pilot Insurance Co.*, 2002 SCC 18, [2002] 1 S.C.R. 595 (S.C.C.) and *Keays v. Honda Canada Inc.*, 2008 SCC 39, [2008] 2 S.C.R. 362 (S.C.C.). Those principles can be summarized as follows:

(a) Punitive damages are awarded to sanction conduct that represents a marked departure from ordinary standards of decent behavior: *Whiten,* at para. 36.

(b) The function of punitive damages is not to compensate but to demonstrate retribution, deterrence and denunciation: *Whiten*, at para. 43; *Honda*, at para. 68.

(c) The quantum of punitive damages awards must be rational and proportional to the objectives for which they are awarded (retribution, deterrence and denunciation): *Whiten,* at para. 74.

(d) Conduct that underlies compensatory damages may also underlie an award of punitive damages. If this is the case, a court must ask itself whether punitive damages remain necessary for purposes of denunciation, deterrence and retribution in light of the compensatory award: *Honda*, at para. 69.

[157] The quantum of punitive damages will be informed by factors such as the financial vulnerability of the plaintiff and the consequent abuse of power by the defendant where there is a power imbalance. The quantum of damages must be proportionate to the level of blameworthiness of the defendant's conduct: see *Whiten v. Pilot Insurance Co.*, [2002] 1 S.C.R. 595 (S.C.C.), at para. 111 to 126. As the Supreme Court explained in *Whiten*, at para. 124:

> A traditional function of punitive damages is to ensure that the defendant does not treat compensatory damages merely as a licence to get its way irrespective of the legal or other rights of the plaintiff. Thus in *Horseshoe Bay Retirement Society*, *supra*, a real estate developer cut down mature trees on the plaintiff's property to improve the view from neighbouring lots which it was developing for sale. The defendant appeared to have calculated that enhanced prices for its properties would exceed any "compensation" that it might be required to pay to the plaintiff. Punitive damages of $100,000 were awarded to reduce the profits and deter "like-minded" developers (p. 50). For a similar case, see *Nantel v. Parisien* (1981), 18 C.C.L.T. 79 (Ont. H.C.), per Galligan J., at p. 87, "... the law would say to the rich and powerful, 'Do what you like, you will only have to make good the plaintiff's actual financial loss, which compared to your budget is negligible'". In *Claiborne Industries Ltd.*, *supra*, an award of punitive damages was made against the defendant bank in an amount sufficient to ensure that it did not profit from its outrageous conduct (p. 106).

[158] I find that Airways Transit did not satisfy its duty of good faith in its dealing with Mr. Chalmers and recalling him to work. Mr. Badder's evidence was that he intended to return Mr. Chalmers to work at the end of the COVID-19 Period. I find Mr. Badder's statement in this regard to be a feeble attempt to justify the inexcusable failure to recall Mr. Chalmers in a timely manner or, in the alternative, to lawfully terminate his employment. Airways Transit knew or ought to have known that stringing Mr. Chalmers along to believe that it could potentially recall him at some unknown point in the future, when things had sufficiently improved for the company, was placing him in an impossible situation. He would have to sit and wait quietly "in the wings", with no pay or benefits, for an indeterminate duration and rely on the limited communication or feedback offered

by Airways Transit. This is completely unreasonable and unacceptable behaviour on the part of an employer.

[159] In my view, by the manner in which it treated Mr. Chalmers, Airways Transit engaged in sufficiently harsh and outrageous conduct that it merits a punitive damages award, including the following grounds:

(a) When initially laid off, Mr. Chalmers was asked to work without pay.
(b) In or about June 2020, Airways Transit had recalled several senior managers but not Mr. Chalmers.
(c) Airways Transit contacted Mr. Chalmers in the months subsequent to his layoff to ask questions regarding operations, procedures, contacts and staffing matters. He was also asked to provide passwords. I find that this conduct was an obvious attempt by Airways Transit to phase Mr. Chalmers out of his role as Vice-President.
(d) Mr. Chalmers followed up with Airways Transit multiple times about returning to work and Airways Transit failed to respond to his inquiries.
(e) Airways Transit refused to pay Mr. Chalmers his outstanding vacation pay in contravention of the ESA.
(f) Airways Transit failed to make contribution to Mr. Chalmers' RRSP plan.
(g) As of the motion hearing date, Airways Transit had not paid Mr. Chalmers his statutory entitlements pursuant to the ESA.
(h) Despite attempts by Mr. Chalmers to return Airways Transit's property, Airways Transit pled that he had failed to return said property and threatened "recovery" of damages for same.
(i) Airways Transit's conduct, including its silence and failure to provide relevant information in a timely manner, severely harmed Mr. Chalmers' ability to make informed decisions concerning his employment and career.
(j) By its actions, Airways Transit also failed to assist Mr. Chalmers with a new job search or to give him a letter of reference.

[160] Employees depend on employment not only for their financial survival but also for a sense of self-worth. Conduct of the employer that negatively impacts on those two essential elements warrants condemnation and punishment.

[161] I find that the circumstances justify an award of punitive damages in the amount of $30,000.00.

DISPOSITION

[162] In the result, there will be summary judgment granted in favour of Mr. Chalmers as follows:

(a) A declaration is made that Mr. Chalmers was constructively dismissed as of June 4, 2020.

(b) Airways Transit shall pay to Mr. Chalmers damages in the amount of 25 months' salary and employment benefits; said amount being subject to deduction of any income earned by Mr. Chalmers from new employment within the 25-month reasonable notice period.

(c) Airways Transit shall pay to Mr. Chalmers damages in the amount of his unpaid vacation pay accrued over the course of the 25-month reasonable notice period.

(d) Airways Transit shall pay punitive damages to Mr. Chalmers in the amount of $30,000.00.

[163] Mr. Chalmers also seeks pre-judgment and post-judgment interest. He is entitled to both.

[164] The parties may address me in writing about anything they cannot agree on regarding the amounts owing to the Plaintiff.

COSTS

[165] I urge the parties to agree on costs. If they are unable to do so, then costs submissions may be made as follows:

(a) By November 1st, 2023, Mr. Chalmers shall serve and file his written costs submissions, not to exceed three pages, double-spaced, together with a draft bill of costs and copies of any pertinent offers; and

(b) The Defendants shall serve and file its responding costs submissions of no more than three pages, double-spaced, together with a draft bill of costs and copies of any pertinent offers, by November 15th, 2023; and

(c) Mr. Chalmers' reply submissions, if any, are to be served and filed by November 22nd, 2023 and are not to exceed two pages.

(d) If no submissions are received by November 22nd, 2023, the parties will be deemed to have resolved the issue of the costs and costs will not be determined by me.

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MacNEIL J.

Released: October 11, 2023