IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Sui v. HungryPanda Tech Ltd.,*
2024 BCSC 1856

Date: 20241011
Docket: S248551
Registry: New Westminster

Between:

Xing (Vincent) Sui

Plaintiff

And

HungryPanda Tech Ltd.

Defendant

Before: The Honourable Mr. Justice Blok

Reasons for Judgment

Counsel for the Plaintiff:	J. Wu
Counsel for the Defendant:	M. Bellomo
Place and Date of Hearing:	New Westminster, B.C. December 15, 2023
Place and Date of Judgment:	New Westminster, B.C. October 11, 2024

I. Introduction

[1] This is a wrongful dismissal action.

[2] The defendant, HungryPanda Tech Ltd. (“HungryPanda”), operates an online food delivery platform. The plaintiff, Xing (Vincent) Sui, was employed by the defendant as the general manager of its Canadian operations from May 3, 2021 to October 25, 2022. The defendant gave notice of termination of the plaintiff’s employment, without cause, by an email dated October 11, 2022, thus meaning his employment ended after approximately 18 months.

[3] The issue in this case is the enforceability of the termination clause contained within a document described as an employment agreement, dated April 25, 2021. I will refer to that document as the “Employment Agreement” although its status as the actual employment contract is a central issue in this dispute.

[4] This matter proceeded by way of summary trial. Both parties agree the matter is suitable for disposition in that fashion.

II. Facts

[5] In April 2021, the parties exchanged emails concerning the potential employment of Mr. Sui by HungryPanda. These emails, written in Mandarin and translated for Court purposes, began with an employment offer from HungryPanda dated April 23, 2021.

[6] In that email, HungryPanda confirmed an employment offer as “general manager of Canada”, and outlined its principal terms. Those terms included a fixed salary of $9,600 per month, variable salary of $2,400 per month, a six-day working week, a three-month probationary period and “equity” of $20,000, meaning stock options. The email also gave a deadline for acceptance of April 25, 2021.

[7] The email also stated “After your confirmation we will provide you with an official employment agreement for your signature”.

[8] Mr. Sui responded within the hour, asking whether "there was any room to increase" the stock option or equity. HungryPanda responded the next day with a revised offer (April 24), adding additional equity of $30,000 upon successful completion of the probationary period, and extending the deadline for acceptance by one day. In that email, HungryPanda informed Mr. Sui that this offer was the best they could make, while noting increases in both salary and equity were possible if Mr. Sui performed well. Mr. Sui responded that same day by accepting that offer.

[9] On April 25, 2021, HungryPanda sent to Mr. Sui the Employment Agreement (the "Employment Agreement"). The Employment Agreement was signed by both parties that day.

[10] The Employment Agreement contains the following terms under the heading "Termination" (the "Termination Clause"):

> 6.3 Without Cause
>
> The Employee's employment may be terminated at any time by the Employer by providing to the Employee his/her termination and severance entitlements as prescribed by applicable employment standards legislation, that being at the present time, the Act respecting labour standards ("ESA"), together with any other statutorily prescribed entitlements and benefits, which includes the continuation of the Employee's group benefits (if applicable) throughout the reasonable notice period prescribed by the ESA.
>
> 6.4 The Employee acknowledges that the foregoing provisions of this section 19.3 are in satisfaction of and substitution for any and all statutory and common law rights, including, without limitation, any right to reasonable notice of termination.

[11] The Employment Agreement also contains an "entire agreement" clause as well as the following clause:

> 11.4 If, at the time of execution of this Agreement, there is a pre-existing employment agreement still in effect between the parties to this Agreement, then in consideration of and as a condition of the parties entering into this Agreement and for other valuable consideration, the receipt and sufficiency of which is acknowledged, this Agreement will supersede any and all pre-existing employment agreements between the Employer and the Employee. Any duties, liabilities and obligations still in effect from any pre-existing employment agreement are void and no longer enforceable after execution of this Agreement.

[12] By letter dated October 11, 2022, HungryPanda terminated Mr. Sui's employment, effective October 25, 2022.

[13] Mr. Sui secured alternative employment a little over seven months after HungryPanda terminated his employment. He earned $1,950 in brief, temporary employment before he secured a new full-time position.

III. Positions of the Parties

A. Plaintiff

[14] Mr. Sui submits the Termination Clause is unenforceable because:

a) He signed the Employment Agreement as a modification to an already-existing employment agreement, and he received no new consideration for doing so;

b) The Termination Clause is drafted in a way that would allow HungryPanda to terminate his employment without cause by giving him notice or pay in lieu of notice that is lower than the legislated minimums to which he is entitled under the *Employment Standards Act*, R.S.B.C. 1996, c. 116 [*BC ESA*].

[15] As to the first point, Mr. Sui submits that the exchange of emails formed a contract between the parties. All the necessary terms were set out, including employment position and location, expected hours of work, salary, opportunity to acquire equity, pay period and probationary term.

[16] This offer and acceptance did not mention a termination clause, but where an employment agreement is silent as to the term of notice on dismissal, the Court will imply a term of notice based on reasonable notice at common law: *Machtinger v. HOJ Industries Ltd.*, [1992] 1 S.C.R. 986 at para. 43.

[17] In answer to HungryPanda's argument that the words "After your confirmation we will provide you with an official employment agreement for your signature" meant the emails were merely an agreement to agree, Mr. Sui submits that this phrase

does not render the contract conditional on signing an employment agreement. On that point, he notes a different clause in HungryPanda's offer that expressly made the making of a contract conditional on Mr. Sui providing documents proving his right to work in Canada ("This offer is also subject to you providing relevant documents to the Company proving your legal right to work in Canada"). By contrast, the reference to providing "an official employment agreement for your signature" does not use any language expressly making the formation of a contract conditional on signing that agreement.

[18] Mr. Sui submits that HungryPanda's reference to sending an "official employment agreement" after he accepted the offer was a matter of "additional formality" and "in furtherance of a commitment already made", and not an agreement to agree: *Leong & Associates Actuaries and Consultants Inc. v. Watt*, 2003 BCSC 1885 at para. 84; *Kirby v. Amalgamated Income Limited Partnership*, 2009 BCSC 1044 at para. 64.

[19] Mr. Sui acknowledges the Termination Clause in the Employment Agreement may still be enforceable if HungryPanda establishes that it offered fresh consideration for a variation of the existing employment contract. However, he argues that this potential argument fails the analysis set out in *Krieser v. Active Chemicals Ltd.*, 2005 BCSC 1370 at para. 24 because here there were 12 new terms contained within the Employment Agreement that were detrimental to the plaintiff, and no new consideration.

[20] Mr. Sui submits the only arguable consideration is the provision concerning health benefits, which reads:

> 6.1 The employee will be entitled to only those additional benefit that are currently available as described in the lawful provisions of the Employer's employment booklets, manuals, and policy documents or as required by law.

[21] Mr. Sui notes this clause is very vague and does not indicate the benefits he will be entitled to receive. The reference to "employment booklets, manuals, etc." does not assist here because HungryPanda's employee handbook mentions nothing

about an extended benefit plan. In any event, there is no evidence he would have been denied these benefits if he had not signed the Employment Agreement.

[22] The plaintiff submits the onus is on HungryPanda to prove that it offered fresh and valid consideration for signing the Employment Agreement, and it has failed to meet that onus.

[23] In the event that the Court finds there was adequate consideration, the plaintiff argues the Termination Clause is nonetheless unenforceable because it refers to the "Act respecting labour standards ("ESA")", a reference to the *Act Respecting Labour Relations*, which is Québec employment legislation that provides a lower level of employee compensation on termination without cause than does the British Columbia legislation. The plaintiff also notes that Ontario has an "ESA", and the defendant carries on business in Ontario. In these circumstances, the plaintiff submits the clause is illegal and therefore unenforceable: *Shore v. Ladner Downs*, 1998 CanLII 5755 (B.C.C.A.) at paras. 14-15.

[24] As to damages, the plaintiff acknowledges the authority of *Saalfeld v. Absolute Software Corporation*, 2009 BCCA 18, where the Court suggested a range of two to three months for a short-service employee (in that case, nine months), but noted that this suggested range has exceptions in the case of senior management positions, inducement cases, specialized employment markets, bad faith, and other good reasons.

[25] Here, the plaintiff argues: (1) he was part of HungryPanda's senior management; (2) his alternative employment prospects were limited because his role at HungryPanda involved dealings primarily in Mandarin and did not require proficiency in English; and (3) there is a non-competition clause in the Employment Agreement. On the latter point, the fact that the Employment Agreement is unenforceable is irrelevant, as HungryPanda emphasized that obligation to Mr. Sui in its termination letter and it was reasonable for Mr. Sui to have believed he was bound by that clause.

[26] Mr. Sui submits that eight months is reasonable notice in his case. At his pay level of $12,000 per month ($9,600 + $2,400), the total claim before deductions is $96,000. He acknowledges deductions for amounts earned during the notice period, plus some modest amounts earned in an attempt to mitigate his damages, resulting in a net claim of $84,186.98.

B. Defendant

[27] HungryPanda says the emails exchanged between the parties did not form a binding contract of employment, arguing the law is clear that such an exchange is not enough where, prior to the commencement of employment, an employer has conveyed to the employee that they must execute a full employment contract at a later date: *Bern v. Amec E&C Services Ltd.*, 2007 BCSC 856.

[28] HungryPanda argues, alternatively, that the Employment Agreement is binding because it was supported by fresh consideration in the form of group health benefits, an expense account and paid time off.

[29] As to the Termination Clause, HungryPanda argues that it cannot be reasonably construed to be referring to a Québec employment law statute. A minor misnaming of the statute does not make the clause unenforceable or give rise to any ambiguity or uncertainty regarding the parties' intentions: *Brown v. Utopia Day Spas and Salons Ltd.*, 2014 BCSC 1400 at para. 22.

[30] The defendant notes that the Termination Clause itself contains the abbreviation "ESA", which commonly refers to the *BC ESA*, and the B.C. statute is specifically referred to elsewhere in the Employment Agreement, specifically within Clause 7, a clause dealing with vacation and holidays.

[31] Resort to the surrounding circumstances also leads to the conclusion the B.C. statute was being referred to, as both parties were resident in British Columbia and the place of work was expressly stated to be Richmond, B.C.

[32] On damages, HungryPanda argues that the notice period is generally two to three months in cases involving short periods of employment and skilled employees in their forties who have readily transferable skills: *Saalfeld*; *Hall v. Quicksilver Resources Canada Inc.*, 2015 BCCA 291; and *Cabott v. Urban Systems Ltd.*, 2016 YKCA 291. The burden is on the plaintiff to demonstrate the notice period should be longer due to the unavailability of work: *Munoz v. Sierra Systems Group Inc.*, 2016 BCCA 140.

[33] HungryPanda disagrees that the plaintiff's employment was that of a "senior manager", noting that he did not report to the board of directors and he had no authority to bind the company.

[34] In answer to the plaintiff's argument that Mandarin-speaking jobs are seldom advertised and that employers prefer bilingual candidates, HungryPanda says the plaintiff has not led any evidence on his efforts to find new work and the plaintiff's assertion that Mandarin-speaking positions are hard to find appears to be a mere assumption on the plaintiff's part.

[35] Finally, and in any event, the maximum notice that could be awarded is seven months given that the plaintiff fully mitigated his damages by commencing new employment in May 2023.

C. Plaintiff's Reply

[36] In reply to the defendant's submissions on "fresh consideration", the plaintiff says providing a reimbursement process for employer-related expenses incurred by an employee, and the vacation provision ("paid time off"), are matters that HungryPanda was obliged to provide anyway under the provisions of the *BC ESA*.

[37] As for the group benefits, it is not enough to say that there were benefits being provided because the onus is on the defendant to go further and link the receipt of those benefits to the signing of the Employment Agreement. The defendant has failed to do that here.

IV. Discussion – Contract

A. Formation of Contract

[38] As an opening observation, I note that the Employment Agreement is not well drafted. In addition to the variable references to employment standards legislation, the document has some other drafting flaws including non-sequential numbering of clauses and two separate, and somewhat duplicative, provisions dealing with confidentiality.

[39] The first issue is whether there was a contract concluded between the parties as a result of the emails, with a formal contract merely documenting the contract already in place, or whether the emails merely amounted to an agreement to agree.

[40] The defendant relies on *Bern* where, similarly, the employee knew there would be an employment agreement to sign. There, the employee was presented with an agreement on his first day of work. The court concluded the employee's knowledge that there was a contract to be signed distinguished the case from other cases where subsequent contracts were entered into, namely *Francis v. Canadian Imperial Bank of Commerce*, [1994] O.J. No. 2657 (C.A.), and *Singh v. Empire Life Ins. Co.*, 2002 BCCA 452. In *Francis*, there was no mention of a contract until the plaintiff showed up for his first day of work; in *Singh*, although there was mention that a contract would be coming, the plaintiff had worked with the employer for five months before the contract was executed.

[41] While the facts in this case are very similar to those in *Bern*, I agree that the defendant's reference in its offer email, that the offer was conditional on the plaintiff providing proof of his legal right to work in Canada, is an important distinguishing feature. The defendant having expressly stated that its offer was conditional in one respect strongly suggests the offer was not conditional in other respects.

[42] In *Francis*, the Ontario Court of Appeal said:

> [30] … I would add that, in cases such as this, employers are able to incorporate the terms of a standard employment agreement into the original contract of employment by saying in their offer of employment that the offer is

> conditional upon the prospective employee agreeing to accept the terms of the employer's standard form of agreement, a copy of which could be enclosed with the offering letter.

[43] In *Ethiopian Orthodox Tewahedo Church of Canada St. Mary Cathedral v. Aga*, 2021 SCC 22, the Supreme Court of Canada said:

> [35] A contract is formed where there is "an offer by one party accepted by the other with the intention of creating a legal relationship, and supported by consideration": *Scotsburn Co-operative Services Ltd. v. W. T. Goodwin Ltd.*, [1985] 1 S.C.R. 54, at p. 63. The common law holds to an objective theory of contract formation. This means that, in determining whether the parties' conduct met the conditions for contract formation, the court is to examine "how each party's conduct would appear to a reasonable person in the position of the other party": *Owners, Strata Plan LMS 3905 v. Crystal Square Parking Corp.*, 2020 SCC 29, [2020] 3 S.C.R. 247, at para. 33.

[44] In the present case, the emails of offer and acceptance contain all of the elements necessary to form an employment contract, including job title, place of employment, start date, salary, pay periods, equity (stock options) and three-month probationary term. Although some terms are absent, for example, vacation entitlement and a notice period in the case of without-cause dismissal, these are addressed either through statutory minimums (in the case of vacation entitlement) or by implying reasonable notice at common law: *Machtinger* at paras. 47-48.

[45] From this, I conclude that on an objective view, and particularly given the absence of conditional language in the offer insofar as the later Employment Agreement was concerned, a reasonable person would conclude that a contract was formed through the offer and acceptance emails, and that the forthcoming "official employment agreement" would merely document those terms.

[46] For these reasons, I conclude that a contract was formed when the plaintiff accepted the defendant's emailed employment offer.

B. Consideration

[47] The next issue is whether there was fresh consideration for the Employment Agreement.

[48] In *Krieser* at para. 24, the Court summarized earlier authorities as having described three steps in determining whether, and to what extent, fresh consideration is required when an employment contract is amended:

a) did the contract contain new terms which were detrimental to the plaintiff?

b) if it did, what is required at law to provide adequate consideration for such changes to the employment relationship?

c) has the defendant established adequate consideration on the facts here?

[49] The first step is not seriously in issue. The Employment Agreement contains post-termination prohibitions against soliciting clients of the employer for 12 months, and against any employment or activities involving similar businesses for six months. In addition, there are the termination provisions, which purport to limit pay in lieu of notice to that prescribed by statute.

[50] The second step requires that there be adequate consideration. It is well-settled that merely continuing the employment is not enough: *Watson v. Moore Corporation Ltd.*, 1996 CanLII 1142 (B.C.C.A.). There must be some "material advantage" passing to or promised by the employer: *Watson* at para. 15. The defendant argues that consideration was given because the Employment Agreement provided extended benefits for the plaintiff and his family, an expense account and paid time off.

[51] This brings us to the third step, which is the essential consideration issue in this case: has the defendant established adequate consideration on the facts here?

[52] I agree with the plaintiff that there is no material advantage passing to the plaintiff in terms of either an expense account or paid time off. The Employment Agreement does not create an expense account, it only provides that "the Employer will reimburse the Employee for all reasonable expenses … in connection with the business of the Employer". This is no more than the law requires: *BC ESA,* s. 21(2).

[53] It is a similar situation with “paid time off”. The Employment Agreement provides (or purports to provide, as the plaintiff submits) paid vacation in accordance with the statutory minimum, so there is no additional entitlement beyond what is statutorily required. There is nothing said about paid sick days other than a requirement that the employer be notified of an absence due to sickness or injury and, if the absence extends beyond seven days, the employee must provide a doctor’s note. Again, the statutory minimums would apply (*BC ESA*, s. 49.1), meaning there was no material advantage given by the defendant here.

[54] This leaves employee benefits as the only arguable item of additional consideration. The plaintiff concedes that health benefits, when offered in addition, can constitute fresh consideration, citing *Duprey v. Seanix Technology (Canada) Inc.*, 2002 BCSC 1335, but says there are distinguishing facts in this case. First, in *Duprey* the entitlement to benefits only began after successful completion of the employee’s probationary period. Here, the entitlement to benefits was immediate and so there is nothing to say that the plaintiff would not have received benefits irrespective of the Employment Agreement. Second, the plaintiff notes the nebulous nature of the purported entitlement, as the Employment Agreement refers to “those additional benefits that are currently available as described in the lawful provisions of the Employer’s employment booklets, manuals, and policy documents”, yet the defendant’s employee handbook mentions nothing about a benefit plan.

[55] The defendant responds by noting the plaintiff acknowledged on discovery that he understood he had to sign the Employment Agreement in order to become eligible for employee benefits and, further, that his family members used the dental plan. The defendant also notes that in the amended notice of civil claim, the plaintiff acknowledges that benefits were provided for in the Employment Agreement. Finally, the defendant notes that in the Employment Agreement the plaintiff acknowledged the “receipt and sufficiency” of additional consideration and that “this Agreement will supersede any and all pre-existing employment agreements”.

[56] I begin my analysis of those points by noting that the plaintiff's evidence on discovery was not nearly as clear as the defendant submits. On a fair reading of the discovery questions and answers referenced by the defendant, the plaintiff merely acknowledged that he was provided medical benefits as an employee (Q. 388), he believed, but could not recall, that the benefits included dental benefits (Q. 390), and that the contract (Employment Agreement) was written in a way that required him to sign the contract in order to receive employee benefits (Q. 409).

[57] I digress briefly to discuss some admissibility issues, as the plaintiff objected to certain passages in the affidavit of the defendant's human resources manager. I agree that paragraph 14 of that affidavit is not admissible because it makes assertions concerning some of the ultimate issues before the Court. I agree as well that the statement in paragraph 15 ("Upon signing the Employment Contract, Mr. Sui became entitled to participate in HungryPanda's extended medical and dental plan") is inadmissible insofar as it is conclusory in nature, and conclusory on a key issue in the case, and the deponent fails to provide any facts from which that conclusion is drawn. Finally, the further assertion in paragraph 15 that the plaintiff's family members used medical and dental benefits suffers from an absence of any reference to the source of that information, as it is almost certainly hearsay the deponent will have derived from records, none of which were put in evidence.

[58] It is also convenient at this point to address the argument that the plaintiff acknowledged the "receipt and sufficiency" of additional consideration. This point is addressed in Angela Swan, Jakub Adamski & Annie Y. Na, *Canadian Contract Law*, 4th ed. (Toronto: LexisNexis, 2018):

> §2.40 It is common in many formal agreements drafted by solicitors for the agreement to state something like the following:
>
> > Now therefore this agreement witnesses … that in consideration of the mutual covenants and agreements herein contained and the sum of $10.00 of lawful money of Canada and other good and valuable consideration paid by each of the parties hereto to each of the other parties hereto (the receipt and sufficiency of which are hereby acknowledged), it is agreed among the parties hereto as follows: …
>
> As used in this recital or declaration, the word "consideration" in the first line has two meanings. The first does not refer to the doctrine of consideration but

> to the more colloquial or non-technical use of the word, *i.e*., as "having in mind", or "bearing in mind" the "mutual covenants and agreements". … The second meaning of consideration, referring now to the "$10.00", etc., is its technical, legal one.
>
> §2.41 In all commercial agreements the statement or declaration is unnecessary; it adds nothing to the enforceability of the agreement and does not change a court's approach to its interpretation. Consideration (in the technical sense now being examined) will be supplied by the promises made by the parties or by the payment of the price by one of them.
>
> [Footnotes omitted.]

[59] Ultimately, it is up to the defendant to demonstrate that consideration passed to the plaintiff in return for his signing of the Employment Agreement. It is not enough to say there were benefits available to the plaintiff, or even that he received benefits, because the entitlement to benefits must be linked to the Employment Agreement. The Employment Agreement promised "only those additional benefits" set out in the defendant's employee manual, etc., but there is nothing in the employee manual dealing with benefits. The promise is therefore no more than "a thing writ in water". There is also no admissible evidence to suggest the plaintiff would not have received benefits irrespective of the Employment Agreement.

[60] For these reasons, I conclude the defendant has failed to prove that the plaintiff received any material advantage from the Employment Agreement. The provisions limiting pay in lieu of notice are therefore unenforceable.

[61] In these circumstances, it is not strictly necessary that I resolve the variable references to employment standards legislation in the Employment Agreement, but for the sake of completeness I will say that the specific reference to the *BC ESA* in clause 7.1 (the *first* clause 7.1, given the irregular numbering) tips the balance in favour of finding the *BC ESA* to be the statute being referred to in the document. While I agree there is ambiguity, I find it possible to resolve that ambiguity.

V. Damages

A. General Principles

[62] The factors applicable to the assessment of reasonable notice include those set out in the seminal case of *Bardal v. The Globe & Mail Ltd.* (1960), 24 D.L.R. (2d) 140 at 143 and 145, 1960 CanLII 294 (Ont. H.C.):

> In every case of wrongful dismissal the measure of damages must be considered in the light of the terms of employment and the character of the services to be rendered.
>
> …
>
> There can be no catalogue laid down as to what is reasonable notice in particular classes of cases. The reasonableness of the notice must be decided with reference to each particular case, having regard to the character of the employment, the length of service of the servant, the age of the servant and the availability of similar employment, having regard to the experience, training and qualifications of the servant.

[63] In *Saalfeld*, the Court said:

> [15] While B.C. precedents are consistent that proportionately longer notice periods are appropriate for employees dismissed in the first three years of their employment, I see little support for the proposition that five to six months is the norm in short service cases for employees in their thirties or early forties whose function is significant for their employer, but not one of senior management. I further see no support for a floor of six months as the trial judge appears to have understood the respondent's counsel to have suggested to her. That proposition was not put to us. Absent inducement, evidence of a specialized or otherwise difficult employment market, bad faith conduct or some other reason for extending the notice period, the B.C. precedents suggest a range of two to three months for a nine-month employee in the shoes of the respondent when adjusted for age, length of service and job responsibility.
>
> [References omitted.]

B. Positions of the Parties

[64] The plaintiff submits he meets several criteria which take him out of the two to three month guideline set out in *Saalfeld*: (1) he was part of the defendant's senior management; (2) there is evidence of a specialized or otherwise difficult employment market; and (3) the Employment Agreement contained a non-competition clause of six months' duration, and it was reasonable for the plaintiff, at that point, to have believed he was bound by it. Indeed, as the plaintiff notes, the defendant reminded

the plaintiff of those post-employment restrictions in its termination letter. On that third criteria, the plaintiff cites *Ostrow v. Abacus Management Corporation Mergers and Acquisitions*, 2014 BCSC 938 at paras. 79-86, which confirms that a post-termination non-competition restriction is a proper factor to consider when assessing the appropriate period of notice.

[65] The plaintiff cites six cases involving short-service employees (eight months to three years) where damages were based on notice periods ranging from five to ten months: *Ostrow*; *Munoz; Haftbaradaran v. St. Hubertus Estate Winery Ltd.*, 2011 BCSC 1424; *Frederiks v Executive TFN Waterpark Limited Partnership*, 2022 BCSC 1725; *Waterman v. Mining Association of British Columbia*, 2016 BCSC 921; *Yates v Langley Motor Sport Centre Ltd.*, 2021 BCSC 2175. Based on those cases, the plaintiff submits that eight months is appropriate here.

[66] The defendant argues that there is nothing in this case that takes it out of the usual range set out in *Saalfeld*, noting that the burden of establishing an evidentiary basis for such a departure is on the plaintiff: *Munoz* at para. 48; *Desaulniers v. Wire Rope Industries Ltd.*, 1995 CanLII 2286 at para. 14 (B.C.S.C.).

[67] The defendant says any award should be no more than the normal *Saalfeld* range of two to three months' salary. The defendant also notes the maximum that could be awarded is seven months pay in lieu of notice, as the plaintiff fully mitigated any further damages by commencing new employment in "May 2023", though here I must note the plaintiff's new employment actually started on June 1, 2023.

C. Discussion

[68] I begin by outlining some of the *Bardal* factors. The plaintiff was 40 years old at the time of his dismissal. His time of service was 17 months and 23 days, which I round to 18 months for the purpose of this analysis. His job title at HungryPanda was "general manager of Canada", and he was paid $144,000 per year.

[69] On the issue of "senior management", the plaintiff said the following in his affidavit:

> As General Manager of Canada, I occupied a senior management position where I was responsible for managing all of HungryPanda's operations in Canada and, in particular, their profit, revenue, cash, quality targets, and regional managers and city managers.
>
> This entailed me travelling frequently across HungryPanda's other five (5) Canadian offices of Calgary, Edmonton, Winnipeg, Toronto and Montreal.

[70] The defendant denies that the plaintiff was "senior management", noting that, according to a job description signed by the plaintiff, he reported to a vice president, not the board of directors, and there was no evidence he had the authority to bind the company. Notably, however, aside from the job description the defendant did not lead any evidence suggesting the plaintiff's management role was not "senior".

[71] I am satisfied the plaintiff's role with the defendant was one of senior management. He was responsible for managing all aspects of the defendant's multiple operations in Canada and responsible for managing regional and city managers. This seems to describe a position of substantial responsibility and authority. The defendant alludes to some limitation of the plaintiff's authority insofar as the plaintiff's job description has him reporting to a vice president, but the defendant led no evidence to put any flesh on the bones of that point. Without more, I am unable to conclude from the fact the plaintiff reported to a vice president somewhere, perhaps even somewhere else in the world, that the plaintiff ought not be considered "senior management".

[72] The plaintiff also argues that his "reemployment prospects were dim at best", given that comparable employment would have to involve a senior management position involving Mandarin as the primary working language, and where proficiency in English was not required.

[73] In his affidavit, the plaintiff said he is not proficient enough in English to work in a primarily English-language position. He also said senior manager positions that are primarily Mandarin-speaking are seldom advertised and even where they are advertised, the preferred candidate is one who is bilingual in Mandarin and English.

[74] The defendant emphasizes that the plaintiff led no evidence concerning the job applications he made following termination or of other aspects of any employment search. The defendant also notes that the plaintiff's job description at HungryPanda described the position as "bilingual".

[75] On that latter point, I note the job description requires the person to be English and Mandarin *speaking*. This seems to be roughly in line with the plaintiff's self-description of his language skills.

[76] In any event, on the evidence I am unable to draw the conclusion that similar jobs are scarce. The plaintiff invites me to infer that comparable-level jobs would be hard to find because there would be few Mandarin-language, senior management jobs where a person with limited English could get by. I decline to draw that inference. The fact that the plaintiff secured similar work seven months after being terminated is evidence suggesting the inference sought should not be drawn.

[77] As for the cases cited by the plaintiff in terms of notice awards, four of the cases involved longer service at three years each, with slightly older plaintiffs (mid-40s) in three cases, but they also resulted in longer notice awards that ranged from eight to ten months.

[78] In assessing the award on reasonable notice, I have given full regard to the general guidance provided by the Court of Appeal in *Saalfeld*, but my conclusion that the plaintiff's employment involved a senior management position takes this matter outside the two to three month notice range. I note that in *Saalfeld* itself the Court departed from that range in affirming a five month period of notice for a 35 year old senior software salesperson, who had no managerial responsibilities and just eight months' service. The Court found the departure from the range justified primarily on the basis that it had taken the plaintiff nine months to find new employment.

[79] Here, it took the plaintiff seven months to find new employment, but because of the scant evidence about the level of the plaintiff's diligence in that search, I do not consider this a strong factor in terms of determining appropriate notice. Instead,

I conclude the factors having the most weight are the senior management level of the plaintiff's employment and the fact that he was specifically reminded of the six month non-competition restriction when he was terminated.

[80] Having considered all factors relevant to notice, I conclude that reasonable notice in this case is six months.

[81] The calculation of damages is as follows:

Six months pay at plaintiff's monthly income of $12,000, in lieu of reasonable notice:	$72,000.00
Less 14 days of working notice ($144,000/365 x 14 days):	-$5,523.29
Less earnings during the notice period:	-$1,950.00
Total:	$64,526.71

VI. Summary

[82] The plaintiff is awarded damages in lieu of notice in the amount of $64,526.71, based on a reasonable notice period of six months.

[83] Unless there are matters that the parties wish to bring to my attention, the plaintiff will have his costs at Scale B.

"Blok J."