Court of King's Bench of Alberta

Citation: Singh v Clark Builders, 2025 ABKB 3

Date: 20250106
Docket: 1903 26131
Registry: Edmonton

Between:

Jamey Dean Singh

Plaintiff

- and -

Clark Builders, CB Partners Corporation, Kennevor Construction Ltd., 1204031 Alberta Ltd., B. Reiger Management Ltd., T. Richelhoff Management Ltd., 1620841 Alberta Ltd., D Brothers Management Ltd. and Turner Partnership Holdings Inc.

Defendants

Reasons for Decision of the Honourable Justice Kelsey L. Becker Brookes

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I. Introduction

[1] The Plaintiff, Jamey Singh, ("Singh") seeks damages for wrongful dismissal against the Defendants, Clark Builders, et al. The parties agree Singh was employed by Clark Builders ("Clark").

[2] The two main issues are: (1) whether the Plaintiff's reasonable notice entitlement is limited by the termination provision in the employment agreement; and (2) the calculation of damages.

[3] In addition to testifying himself, Singh called Dave Brothers, Mark Breslin, Dominic Desmarais, Douglas Haines, Derek Goossen, and John Trapp. Clark called Paul Verhesen and Andrew Ross. Also in evidence at the trial was an Agreed Book of Exhibits, an Agreed Statement of Facts, and four additional exhibits.

II. Undisputed Facts

[4] Clark is an Alberta based construction company that serves institutional, commercial, and industrial clients in Western and Northern Canada. Clark is owned and operated by CB Partners Corporation (and its affiliates), in partnership with Turner Partnership Holdings Inc. (and its affiliates).

[5] Singh has worked in the construction industry in Alberta for over 40 years with a number of different construction companies, in roles with increasing levels of responsibility.

[6] In 2012, Singh was working for Ledcor, as the VP Operations.

[7] In November of 2012, Singh and Paul Verhesen ("Verhesen") met at an industry event where they discussed the possibility of Singh joining Clark. At the time, Verhesen was the President and Chief Executive Officer ("CEO") of Clark.

[8] Between November of 2012 and October 15, 2013, Clark representatives met with Singh in person and over the phone and exchanged email messages to discuss Singh joining Clark.

[9] Singh was looking for a position as Chief Operating Officer ("COO"). During this time, Singh received several written offers of employment, which he rejected. In May of 2013, their negotiations stalled. Clark revived discussions with Singh in June of 2013.

[10] On September 5, 2013, Clark provided Singh with another offer of employment (the "Offer of Employment"). This Offer of Employment was accepted by Singh on September 6, 2013. Singh initialed and signed the document.

[11] Following the acceptance of the Offer of Employment, Clark provided Singh with a formal employment contract, dated October 15, 2023 (the "Employment Contract"). Singh requested certain amendments to the Employment Contract in handwriting, all of which were agreed to by Clark. The requested amendments to the Employment Contract were incorporated into a final version of the Employment Contract, which was initialed and signed by Singh.

[12] Singh's first day of employment with Clark was October 15, 2013.

[13] Singh was hired by Clark into the position of VP Corporate Operations reporting to Bill Giebelhaus ("Giebelhaus"), the COO for Clark. The parties intended from the outset that Singh would be promoted to the role of COO upon Giebelhaus' retirement.

[14] Clark had an Employee Share Ownership Program ("ESOP") where employees were offered the opportunity to purchase shares, which would historically pay out distributions (dividends). When Singh was hired, he was eligible to purchase 40,000 shares.

[15] On November 1, 2015, Giebelhaus retired, and Singh was promoted to the position of COO. The COO position was part of the "C Suite", which included the CEO, the COO and the Chief Financial Officer ("CFO").

[16] In 2018, Andrew Ross (“Ross”) became the President of Clark. Verhesen remained CEO. Singh continued to report to Verhesen. In late 2018, as part of a restructuring, Singh's role was to evolve into COO Major Projects. This change did not take place prior to Singh’s termination.

[17] In early 2019, Ross became aware of concerns about Clark’s financial reporting. Further investigation revealed many projects were overreporting anticipated profit when compared to actual performance. This resulted in a significant profit write-down for Clark.

[18] On June 17, 2019, Ross met with Singh to discuss his concerns about Clark’s financial reporting.

[19] On August 26, 2019, Singh met with Ross and Mark Breslin (“Breslin”), then President of Canadian Turner Construction Company Ltd. to discuss Singh’s exit from Clark. Singh was provided an envelope containing a termination offer and form of release (the “Termination Offer”). Singh was asked to take the day off to consider the Termination Offer and suggest any amendments. A second meeting was scheduled for the next day.

[20] On August 27, 2019, Singh met again with Ross and Breslin. At this meeting, Singh presented a counteroffer. The parties agreed Singh's last day of employment would be September 30, 2019.

[21] Singh continued to work for Clark until September 30, 2019.

III. Issues

[22] The primary issue is whether the termination provision in the Employment Contract is binding. To answer this question, the following issues must be addressed:

(a) Is the termination provision ambiguous and, if so, what is the ambiguity’s impact?

(b) Does the changed substratum doctrine apply and, if so, what is its impact?

[23] Further, in the face of a binding contract, the Court must consider a second issue: whether Clark repudiated the Employment Contract by either:

(a) alleging the existence of just cause in bad faith; or

(b) failing to pay Mr. Singh what he was entitled to receive under the Employment Contract.

[24] If the termination provision in the Employment Contract is binding, then the calculation of damages will be in accordance with the Employment Contract.

[25] If the termination provision in the Employment Contract is not binding, then the Court must determine the appropriate reasonable notice period under the common law, considering the impact of any inducement by Clark, and calculate the damages, taking into consideration any mitigation efforts by Singh.

IV. Law and Analysis

A. Is the Termination Provision in the Employment Contract Binding?

[26] Singh’s position is the termination provision in the Employment Contract is not binding.

[27] His first argument is essentially that the termination provision is ambiguous and ought to be interpreted in favour of the employee. In so doing, he argues the provision either can be interpreted as stating a minimum (i.e., "90 days or more") or is not reflective of Singh's understanding of the termination provision. Singh understood the termination provision to be only a notice provision that did not limit his entitlement to notice or pay in lieu of notice of termination in the event of a without cause termination.

[28] His second argument is that, by virtue of the changed substratum doctrine, Clark can no longer rely on the termination provision contained in the Employment Contract; with promotions and greater responsibilities, the substratum of Singh's original Employment Contract changed, and the termination provision is no longer binding on him.

[29] Clark's position is the termination provision in the Employment Contract is binding because the provision is clear and unambiguous, was inserted by Singh himself, and can only be interpreted one way.

[30] With respect to the changed substratum doctrine, Clark's position is the change from VP to COO was specifically negotiated by Singh and contemplated by the parties during the negotiations. Moreover, the Employment Contract contains clauses which expressly contemplate the evolution of Singh's role with Clark. Therefore, the substratum of his original Employment Contract is unchanged.

1) Is the Termination Provision Ambiguous?

i. Negotiating the Employment Contract

[31] Singh was not looking to leave Ledcor when he was contacted by Clark. He had just been promoted and was working on big projects, like the Royal Alberta Museum. Before considering a position with another company, Singh needed four criteria to be met: culture, role, projects, and compensation. He was not interested in a lateral move and wanted to be in a corporate position.

[32] The first two offers of employment received from Clark were not satisfactory to Singh because they did not adequately address compensation nor Singh's desire to become the future COO of Clark. During the negotiations, Clark would provide an offer in writing and Singh would mark it up and return it.

[33] Singh insisted on receiving something in writing confirming Clark's intention to ultimately move Singh into the COO role, which Clark provided in a series of letters, culminating with a letter from Verhesen dated July 31, 2013. With this confirmation in hand, the parties continued negotiations, culminating with the Offer of Employment, which Singh initialed, signed and returned.

[34] During this phase of the negotiations, the notice provision contained in the offers evolved, from "30 working days' notice to terminate to be provided by the employee" to "90 days' notice to terminate to be provided by the employee and a 90 days' notice period for the employer" contained in the Offer of Employment. The changes to the notice provisions in the offers were at the request of Singh.

[35] On October 15, 2013, Singh's first day of work with Clark, Singh was provided with an employment contract to sign. Verhesen testified Clark's form of employment contract was boilerplate, which Clark would modify to fit the terms agreed to with the particular employee. Singh made several handwritten changes to the document and returned it to Clark.

[36] A few days later, Clark accepted and incorporated all Singh's amendments and provided Singh with the amended version of the Employment Contract. Singh and Clark initialed and signed both the original Employment Contract with the handwritten changes and the amended version with the updated changes incorporated in type.

[37] Before Singh made the handwritten changes, the employment contract contained the following termination provision:

> *The Company will be entitled to terminate your employment:*
>
> *(a) Immediately for just cause;*
>
> *(b) By providing you with notice of termination, or pay in leu of such notice in accordance with provisions of the applicable Provincial Employment Standards Code.*
>
> *The Employee may terminate their employment by giving ninety (90) days written notice to the Employer.*

[38] After Singh made the handwritten changes, the Employment Contract contained the following termination provision (emphasis added):

> *The Company will be entitled to terminate your employment:*
>
> *(a) Immediately for just cause;*
>
> *(b) By providing you with notice of termination, or pay in leu of such notice in accordance with* ***notice provisions as described in the Offer of Employment letter dated 09/05/2013.***
>
> *The Employee may terminate their employment by giving ninety (90) days written notice to the Employer.*

[39] The parties concede, and I agree, that Singh's employment agreement is comprised of the Employment Contract, dated October 15, 2013, containing Singh's handwritten changes, which incorporates by reference the Offer of Employment, dated September 5, 2013.

ii. Applicable Principles when Analyzing Potentially Ambiguous Contractual Provisions

[40] In ***Holm v AGAT Laboratories Ltd***, 2018 ABCA 23, the Court of Appeal addressed ambiguity in employment agreements:

> [34] ... In employment law, uncertainty ought to be resolved in favour of the employee: ***Wood v Fred Deeley Imports Ltd***, 2017 ONCA 158 at paras 28, 134 OR (3d) 481. Moreover, *contra preferentem* mandates that contractual ambiguities ought to be resolved against the party that drafted the contract. In this case, therefore, uncertainty and ambiguity ought to be resolved against the appellant.
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> [35] At its essence, an enforceable employment contract must contain clear and unequivocal language to extinguish, or limit, an employee's common law rights.

[41] The required approach was expanded upon in ***Bryant v Parkland School Division***, 2022 ABCA 220:

> [12] In Canada, different principles apply to the interpretation of employment contracts as opposed to other commercial contracts: ***Globex Foreign Exchange Corporation v Kelcher***, 2011 ABCA 240 at paras 6-7; ***Wallace v United Grain Growers Ltd***, 1997 CanLII 332 (SCC), [1997] 3 SCR 701 at pp 740-41. Courts recognize the power imbalance and inequality of bargaining power inherent in the employment relationship, and the limited opportunity of employees to negotiate contractual terms. Moreover, courts have repeatedly recognized the significance of work (and the manner in which employment can be terminated) to an individual's life and well-being: see *Reference* ***Re Public Service Employee Relations Act (Alta)***, 1987 CanLII 88 (SCC), [1987] 1 SCR 313 at p 368; ***Machtinger v HOJ Industries Ltd***, 1992 CanLII 102 (SCC), [1992] 1 SCR 986 at para 30; ***Wallace*** at paras 93-95.
>
> [13] Interpretive principles have therefore evolved to protect employees. One such principle is that "in employment law, uncertainty ought to be resolved in favour of the employee": ***Holm*** at para 34. The Ontario Court of Appeal put it this way: "[f]aced with a termination clause that could reasonably be interpreted in more than one way, courts should prefer the interpretation that gives the greater benefit to the employee": ***Wood v Fred Deeley Imports Ltd***, 2017 ONCA 158 at para 28; see also ***Miller v Convergys CMG Canada Limited Partnership***, 2014 BCCA 311 at para 15; ***Singh v Qualified Metal Fabricators Ltd.*** (2016), 33 CCEL (4th) 308 at para 15.
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> [14] Another relevant and long-standing principle is that employment contracts are presumed to contain an implied term requiring an employer to provide reasonable common law notice of dismissal: ***Machtinger*** at 998; ***Globex*** at para 9; ***Howard v Benson Group Inc (The Benson Group Inc)***, 2016 ONCA 256 at para 20. While it is open to an employer to include language in the contract rebutting that presumption, the language must be "clear and unambiguous" to be effective. Courts have also said the contract must contain language that is "clear and unequivocal", or that meets a requirement for a "high level of clarity", to extinguish the common law right to reasonable notice: ***Howard*** at para 20; ***Holm*** at para 21; ***Matthews v Ocean Nutrition Canada Ltd***, 2020 SCC 26 at para 61.
>
> [15] The starting point, then, is that there is a presumption of an implied term requiring the employer to provide reasonable common law notice on dismissal. Only where the employment contract unambiguously limits or removes that right will the presumption be rebutted, and the implied term ousted.

[42] Therefore, the starting point in my analysis must be the termination provision contained in the Employment Contract, as revised by Singh. The question is whether the language is sufficiently clear and unambiguous to rebut or limit the presumption of an implied term requiring Clark to provide reasonable common law notice on dismissal.

[43] In determining whether the language is sufficiently clear and unambiguous, counsel disagreed on the relevance and propriety of considering the negotiations leading to the execution of the Offer of Employment and Employment Contract, and Singh's subjective understanding or intention with respect to the termination provision.

[44] In interpreting a contract, the factual matrix and surrounding circumstances of a contract are relevant and must be considered by the Court, regardless of whether the contract is ambiguous.

[45] Reconciling this approach with the parol evidence rule was considered by the Court of Appeal in ***IFP Technologies (Canada) Inc v EnCana Midstream and Marketing***, 2017 ABCA 157 [***IFP***]:

> [81] Considering the surrounding circumstances of a contract does not offend the parol evidence rule. That rule precludes admission of evidence outside the words of the written contract that would add to, subtract from, vary, or contradict a contract. However, evidence of surrounding circumstances is not used for this purpose but rather as an objective interpretive aid to determine the meaning of the words the parties used: ***Sattva***, *supra* at paras 59-61. Therefore, while the factual matrix cannot be used to craft a new agreement, a trial judge must consider it to ensure the written words of the contract are not looked at in isolation or divorced from the background context against which the words were chosen. The goal is to deepen the trial judge's understanding of the mutual and objective intentions of the parties as expressed in the words of the contract. This approach is in keeping with Lord Steyn's famous admonition in ***Regina v Secretary of State for the Home Department***, ***Ex Parte Daly***, [2001] UKHL 26 at para 28 that "[i]n law context is everything".
>
> [82] Thus, in interpreting a contract, a trial judge must consider the relevant surrounding circumstances even in the absence of ambiguity: Hall, *supra* at 24-25; John D. McCamus, *The Law of Contracts*, 2nd ed (Toronto: Irwin Law, 2012) at 751 [McCamus]; ***Bighorn***, *supra* at para 10; ***Directcash Management Inc. v Seven Oaks Inn Partnership***, 2014 SKCA 106 at para 13, 446 Sask R 89; ***Nexxtep Resources Ltd v Talisman Energy Inc***, 2013 ABCA 40 at para 31, 542 AR 212 [***Nexxtep***], citing ***Dumbrell v The Regional Group of Companies Inc***., 2007 ONCA 59 at para 54, 85 OR (3d) 616; ***Hi-Tech Group Inc. v Sears Canada Inc.***, 2001 CanLII 24049 at para 23, 52 OR (3d) 97 (CA) [***Hi-Tech***]; ***Eco-Zone Engineering Ltd. v Grand Falls-Windsor (Town)***, 2000 NFCA 21 at para 10, 5 CLR (3d) 55.
>
> [83] Determining what constitute properly surrounding circumstances is a question of fact. As to what is meant by surrounding circumstances, this consists of "objective evidence of the background facts at the time of the execution of the contract ... that is, knowledge that was or reasonably ought to have been within the knowledge of both parties at or before the date of contracting": ***Sattva***, *supra* at para 58. Examples of relevant background facts include: (1) the genesis, aim or purpose of the contract; (2) the nature of the relationship created by the contract; and (3) the nature or custom of the market or industry in which the contract was executed: ***Sattva***, *supra* at paras 47-48; ***Geoffrey L. Moore Realty Inc. v The Manitoba Motor League***, 2003 MBCA 71 at para 15, 173 Man R (2d) 300; ***King v Operating Engineers Training Institute of Manitoba Inc***., 2011 MBCA 80 at para 72, 270 Man R (2d) 63; ***Ledcor***, *supra* at paras 30, 106. Ultimately, the surrounding circumstances can include "absolutely anything which would have affected the way in which the language of the document would have been

understood by a reasonable man": ***Sattva***, *supra* at para 58, citing Lord Hoffman in ***Investors Compensation Scheme Ltd. v West Bromwich Building Society***, [1998] 1 WLR 896 at 913 (UKHL).

iii. The Employment Contract is Sufficiently Clear and Unambiguous

[46] I am satisfied Singh is a knowledgeable and sophisticated executive in the construction industry and had experience hiring and firing employees, negotiating employment terms, signing offer letters and employment agreements, and onboarding and recruiting employees.

[47] I find Singh was thorough in his review of the details of the position being offered to him by Clark and satisfied himself as to the terms of employment as set out in the Offer of Employment and Employment Contract. He reviewed and rejected earlier offers, insisted on Clark reducing to writing their commitment to evolving him into the COO position, and revised the Employment Contract himself, including the termination provision.

[48] The Employment Contract was the final product of close to a year of negotiating and many of the terms specifically negotiated by Singh were included in the agreement as a result of Clark agreeing to make amendments to its boilerplate agreement.

[49] This was not a circumstance where Singh was presented with a standard form agreement and told he could take it or leave it; far from it, Singh testified he had time to take the agreement home and make amendments after his first day of employment. There was no allegation and no evidence to support the conclusion Singh was in any way pressured into accepting terms of an agreement which was not satisfactory to him.

[50] Singh's requested amendment to the termination provision in the Employment Contract is more easily understood in the context of the earlier negotiations with respect to the notice provision in the various offers of employment. Having said that, the earlier negotiations must not be used for the purpose of adding to, subtracting from, or varying the agreement.

[51] Clause 9(a) of the Employment Contract contains an entire agreement clause and confirms the agreement "replaces any discussions, correspondence, advertisements, or other communication between [the parties] which may have occurred prior to the commencement of [Singh's] employment".

[52] The termination provision, as amended by Singh, can only reasonably bear one interpretation: Clark is entitled to terminate Singh's employment one of two ways, either immediately for just cause, or by providing Singh with 90 days' notice or pay in lieu of notice.

[53] It was Singh who chose to replace the reference to the *Employment Standards Code* in the termination provision with a reference to the notice provision in the Offer of Employment.

[54] The notice provision described in the Offer of Employment applicable to employer notice is a "90-day notice period for the employer". To interpret this phrase as meaning a minimum 90 days' notice period would require adding words which were not included and is not supported by evidence of any mutual and objective intention of the parties.

[55] Moreover, such an intention is not reflected in the wording in the Offer of Employment or the Employment Contract, when Singh had every opportunity to include those words.

[56] In my view, ***IFP*** does not allow the Court to reimagine contractual provisions in light of one party's subjectively held intention or understanding, both of which may be unreasonably held. Rather, it recognizes the surrounding circumstances may provide important insight into the objective meaning of the words the parties used.

iv. The Parties had Equal Bargaining Power

[57] While I have concluded the termination provision in the Employment Contract is sufficiently clear and unambiguous to displace an implied term requiring Clark to provide reasonable common law notice of dismissal, I note the circumstances leading to execution of the Employment Contract displayed robust negotiations on both sides. Clark wanted Singh and Singh wanted to be COO of Clark; the negotiations were involved and two-sided.

[58] The principle of resolving uncertainty in favour of the employee is rooted in the Court's recognition of the power imbalance and inequality of bargaining power inherent in the employment relationship, where employees often have limited opportunity to negotiate contractual terms.

[59] That is not how I would characterize the parties and the negotiations in this case. This case is more in line with the situation in ***Strench v Canem Systems Ltd***, 2005 BCSC 1736 [***Strench***], where the Court found:

> [69] The Employment Contract in the case at bar can in no way be considered unconscionable, or a product of unequal bargaining power. To the contrary, the handwritten changes to the face of the Employment Contract evidence that the Plaintiff's bargaining power was not only tolerated, but it was also successful.

[60] As in ***Strench***, Singh's practice of taking away offers and marking them up with his desired amendments and his handwritten changes to the standard form Employment Contract, which were incorporated by Clark without amendment, clearly demonstrate that his level of bargaining power was elevated.

[61] Accordingly, even if the termination provision in the Employment Contract was ambiguous, the presumption of resolving the ambiguity in the employee's favor would not apply in this case.

[62] Singh was the party who asked to amend the termination provision in the Employment Contract to specify 90 days' notice or pay in lieu of notice, the amendments were accepted by Clark, and the final product is sufficiently clear to displace the implied entitlement to reasonable notice under the common law.

2) Changed Substratum

i. The Changed Substratum Doctrine

[63] In ***Celestini v Shoplogix Inc***, 2023 ONCA 131 [***Celestini***], the Ontario Court of Appeal summarized the changed substratum doctrine as follows:

> [32] The changed substratum doctrine operates as a limit on when an employee's common law entitlements will be restricted by the express terms of a historical written contract. Given that an employer-employee relationship may evolve in a fundamental way after the written contract was made, the doctrine recognizes the potential inappropriateness and unfairness of applying the

contract's termination provisions to circumstances that were not contemplated at the time of contracting.

[33] In ***Wallace v Toronto-Dominion Bank***, 1983 CanLII 1907 (ON CA), 41 O.R. (2d) 161 (C.A.), at pp 180-81, leave to appeal refused, [1983] S.C.C.A. No. 98, Robins J.A. described the doctrine and its rationale as follows:

> [T]here are readily imaginable cases where an employee's level of responsibility and corresponding status has escalated so significantly during his period of employment that it can be concluded that the substratum of an employment contract entered into at the time of his original hiring has disappeared or it can be implied that that contract could not have been intended to apply to the position in the company ultimately occupied by him.

[34] More recently, Perell J. summarized the effect of the authorities in ***MacGregor v National Home Services***, 2012 ONSC 2042, at paras 11-12:

> The changed substratum doctrine is a part of employment law. The doctrine provides that if an employee enters into an employment contract that specifies the notice period for a dismissal, the contractual notice period is not enforceable if over the course of employment, the important terms of the agreement concerning the employee's responsibilities and status has significantly changed.
>
> The idea behind the changed substratum doctrine is that with promotions and greater attendant responsibilities, the substratum of the original employment contract has changed, and the notice provisions in the original employment contract should be nullified. [Citations omitted.]

[35] The written employment contract may oust the application of the changed substratum doctrine, if it expressly provides that its provisions, including its termination provisions, continue to apply even if the employee's position, responsibilities, salary or benefits change: ***Miller v Convergys CMG Canada Limited Partnership***, 2013 BCSC 1589, 10 C.C.E.L. (4th) 187, at paras 35-36, aff'd 2014 BCCA 311, 16 C.C.E.L. (4th) 49, leave to appeal refused, [2014] S.C.C.A. No. 424. The written employment contract may also have continuing force even if there have been substantial changes in the employee's duties if the parties ratified its continued applicability when those changes occurred: ***Schmidt v AMEC Earth & Environment et al.***, 2004 BCSC 1012, at paras 32-33.

[64] For the substratum of a written contract to have disappeared or changed to the extent necessary to engage the changed substratum doctrine, "the current employment context must reflect a 'significant', 'radical' or 'dramatic' change as compared to the employee's original hiring date": David Harris, *Wrongful Dismissal*, vol 4 (Toronto: Thomson Reuters, 1990) (loose-leaf updated 2022, release 5) at §IF:485. For example, this may occur where "the employee's level of responsibility and status [has] 'escalated significantly' since being hired": Harris at §IF:485. This significant, radical or dramatic change is necessary because the application of the doctrine effectively requires finding the parties could not have intended the contract to apply to

the position ultimately occupied by the employee at the time of termination: see Harris at §IF:487.

ii. The Substratum of Singh's Employment

[65] Singh was not prepared to consider a move from Ledcor to Clark unless there was a clear path for him to join the C Suite. He had a VP position at Ledcor and was clear with Clark from the beginning that he wanted to replace Geibelhaus as COO.

[66] To avoid any confusion later, Singh insisted on Clark providing something in writing confirming Clark's intention to ultimately move him into the COO role. Clark provided this confirmation in a series of letters, culminating with the July 31, 2013 letter from Verhesen which stated, "It is our mutual goal for you to become the next COO of Clark Builders" to which he attached a chart illustrating Singh's anticipated career path from VP Corporate Operations to COO.

[67] This was the assurance Singh needed, and the parties continued negotiating the terms of Singh's employment, which was shortly thereafter set out in the Offer of Employment and Employment Contract.

[68] When Singh started with Clark, things went well. In addition to his $100,000 signing bonus, he received a prorated bonus from September of 2013 to February of 2014. He was working on big projects, including the Federal Building.

[69] Singh was promoted to COO on November 1, 2015, when Giebelhaus retired. His received positive performance reviews, first from Giebelhaus, then from Verhesen. His last performance review with Verhesen occurred in 2018 and was positive. He received pay raises year-over-year and received performance bonuses every year he was with Clark.

[70] In 2018, Singh was wrapping up the Yellowknife hospital; Clark had been awarded the Grande Prairie hospital and was going after Clifton Place and Garneau Towers. In December of 2018, Ross became President, and roles and responsibilities were restructured. As a result of this restructuring, Singh took on more responsibility and was placed in charge of major projects but retained the title of COO.

iii. Singh's Employment Substratum Did Not Sufficiently Change

[71] Can it be said Singh's employment context changed so dramatically, that his responsibilities and status increased so significantly, that the termination provision in the Employment Contract is not enforceable by Clark?

[72] Singh's career with Clark proceeded pretty much as intended. As was set out in the recitals to the Employment Contract, he started as VP Corporate Operations reporting to Geibelhaus. A little over two years later, as promised by Verhesen in his letter of July 31, 2013, Singh was promoted to COO.

[73] Singh was a member of the C Suite at Clark, bore ultimate responsibility for Clark's operations, and was compensated accordingly through a combination of salary and bonuses. As mentioned, in 2018, Singh's area of responsibility increased to include major projects, but he retained the title of COO.

[74] It is difficult to conclude Singh's ascension to COO in 2015 and increased responsibility as COO in 2018 were a significant, radical or dramatic change in his employment with Clark when the plan all along was for Singh to be the COO and have commensurate responsibilities.

[75] While Singh's responsibilities escalated significantly once he joined Clark, especially for a lateral hire as opposed to someone rising from within Clark's ranks, that was exactly what Singh was looking for in terms of his decision to join Clark. Singh needed to be satisfied with the culture, the role, the projects, and the compensation.

[76] The joint intention that Singh's role with Clark would evolve, and evolve relatively quickly, is not only evidenced in the parties' discussions leading up to the execution of the Employment Contract but also in the Employment Contract itself.

[77] Clause 2(c) of the Employment Contract provides as follows:

> You agree that your duties and responsibilities and reporting relationships may be changed by the employer as we deem appropriate and that these changes will not affect or change any other part of this agreement your initial duties and roles are outlined in the newly created (VPCO) job description stated 08/21/2013.

[78] Where an employment agreement contains a clause stating the provisions of the agreement will continue to apply notwithstanding changes in the duties and responsibilities of the employee, it cannot be implied there was an intention to enter into a new employment agreement if the employee's position changed: ***Strench*** at paras 62-67; ***Celestini*** at para 35.

[79] Counsel was unable to produce any authority where an employment agreement which contained a clause permitting a change in duties, responsibilities, and reporting relationships was set aside pursuant to the changed substratum doctrine when changes in the duties, responsibilities, and reporting relationships subsequently occurred.

[80] I do not accept Singh's argument that not including "title" in Clause 2(c) somehow exempted a change in title from the application of Clause 2(c). That would be putting form over substance. In any event, once Singh was promoted to COO in 2015, which was made a condition of acceptance by Singh, he continued with the title of COO until his employment was terminated in 2019.

[81] The following clauses in the Employment Contract further support the conclusion it was the intention of the parties that the Employment Contract would continue to govern the employment relationship notwithstanding a change in Singh's duties and responsibilities or certain terms of employment:

(a) Clause 2(c): it was Singh who added "… your *initial* duties and roles …"

(b) Clause 3(a): "Base Salary will be reviewed annually."

(c) Clause 3(e): "… subject to the right of the Employer to change or end those benefit plans from time to time as the Employer deems appropriate."

(d) Clause 6(b): "You acknowledge that the Employer's policy on reimbursement of expenses may change from time to time, and you will abide by those policies."

(e) Clause 8: "It is agreed that you will adhere to all of the policies, rules, systems, and procedures of the Employer as are in force from time to time. The Employer reserves the right to change those provisions from time to time."

[82] The wording of the Employment Contract expressly contemplates changes to the terms of Singh's employment in the future, with the clear understanding the Employment Contract will continue in force when such changes occur.

[83] Clause 9 of the Employment Contract does provide, "Any modification of this Employment Agreement must be in writing and signed by you, as Employee, and by an authorized officer of the Employer…".

[84] Changes to the employee's duties, responsibilities, and reporting relationships are not modifications of a term of the Employment Contract because those changes are specifically contemplated in the agreement. This is distinguishable from a change to, for example, Singh's eligibility to purchase ESOP shares, which does not relate to Singh's duties, responsibilities, and reporting relationships, and would therefore require modification of the Employment Contract in writing and signed by an authorized officer.

[85] Counsel for Clark urged me to consider Singh's progression with Clark in terms of constructive dismissal. Constructive dismissal occurs when an employer acts unilaterally to alter the employment terms and conditions such that the employee is entitled to treat the employer's conduct as a termination. In other words, the conduct of the employer amounts to the repudiation of the employment agreement: John Sproat, *Wrongful Dismissal Handbook*, 8th ed (Toronto: Carswell, 2018) at 5-1.

[86] While a fulsome constructive dismissal analysis is not justified in this case, I agree there is an analogy to be made. I found there was a joint intention that Singh's role with Clark would evolve over time, which does not reflect the unilateral action by an employer to alter the terms and conditions of employment that is required to find constructive dismissal.

[87] Ultimately, I find Singh's employment context was not sufficiently changed for the changed substratum doctrine to apply in this context. As such, I find the termination provision in the Employment Contract is enforceable.

B. Did Clark Repudiate the Employment Contract?

[88] Singh's position is Clark repudiated the Employment Contract either: (1) by alleging the existence of just cause in bad faith; or (2) by failing to pay Singh what he was entitled to receive under the Employment Contract. Therefore, Clark cannot rely on the termination provision contained therein.

[89] Clark's position is twofold. Firstly, Clark argues they acted in good faith in alleging just cause at termination and during the litigation. Secondly, Clark argues they did not have an obligation to pay Singh anything under the Employment Contract: initially, because Clark was claiming just cause and, subsequently, because Clark was entitled to wait for a determination on the enforceability of the termination provision.

1) Allegations of Just Cause

i. The Interplay of Allegations of Just Cause & Without Cause Termination Provisions

[90] The impact of allegations of just cause on an employer's ability to rely on a contractual without cause termination provision was addressed by the Ontario Superior Court as follows in ***Humphrey v Mene***, 2021 ONSC 2539 (appealed on other grounds) [***Humphrey***]:

[136] In my view, the following principles emerge from the above cases:

> a. Where an employer alleges cause and fails, or withdraws its cause allegation, or repudiates an employment agreement through acts which constitute constructive dismissal, the employer is not precluded from subsequently invoking a without cause termination provision for the purpose of calculating the employee's damages: ***Roden***, ***Moore***, ***Simpson***.
>
> b. However, in all cases, it is a question of construction of the without cause termination provision before the Court as to whether, properly construed, the without cause termination provision applies. Such clauses are subject to strict construction: ***Ebert***, ***Matthews***.
>
> c. Even if the contract, properly construed, permits an employer to terminate without cause after a failed for cause termination, there are some breaches or acts of repudiation which are so significant, or of such an order of magnitude, that they render a without cause termination provision unenforceable: ***Dixon***. Although ***Dixon*** has not specifically been considered and accepted by appellate courts, I find the reasoning compelling. All employment agreements are negotiated and agreed to on the basis of certain implied minimum expectations as to how the employer will conduct itself, the duty of good faith being one. An employee's agreement to accept terms which significantly impact on the employee's common law rights must be taken to be made in the expectation that the employer will comply with these minimum implied expectations. Where the employer significantly departs from such expectations, in my view, the employee should not be held to extremely disadvantageous provisions which he, she or they agreed to. This is not rewriting the contract but giving effect to what the parties must reasonably have intended.
>
> d. However, minor or technical mistakes made in good faith by the employer will not constitute a repudiation sufficient to prevent the employer from relying upon the without cause termination provision: ***Amberer***, ***Oudin***.

[91] Singh argues that by alleging just cause when Clark knew or should have known just cause did not exist, Clark demonstrated an intention to no longer be bound by the Employment Contract, rendering the without cause termination provision unenforceable. Singh bears the onus of establishing repudiation of the Employment Contract.

[92] An employer's failure to establish just cause will not disentitle the employer from enforcing an otherwise valid without cause termination provision provided the allegations of just cause are made in good faith: ***Simpson v Global Warranty***, 2014 ONSC 6916 at para 8.

[93] In my reading of the authorities surveyed in ***Humphrey***, provided there is a good faith basis for the employer to allege just cause, both at termination and during litigation, an employer

who subsequently decides not to pursue just cause or is unable to prove just cause, is not precluded from relying on a without cause termination provision.

[94] The good faith requirement means the allegation of just cause cannot be brought dishonestly or for an improper, dishonest, or fraudulent purpose.

[95] This approach accords with the law on the impact of good faith allegations of just cause on damages. As stated by Justice Côté in ***Merrill Lynch Canada Inc v Soost***, 2010 ABCA 251:

> [21] It is notorious that what is just cause to dismiss in a given case is often very difficult to say. It is hard to predict trial results. Many trial decisions on "wrongful dismissal" (like this one) find the employee guilty of misconduct or poor performance. However, most of those also find that it was not quite bad enough for summary dismissal; or that more warnings or constructive suggestions should have been given; or that there was some sort of apparent condonation. (Whether such near cause can reduce damages directly or indirectly was not argued on this appeal.) In few cases can any solicitor advise an employer that it has ironclad grounds for dismissing a certain employee without notice.
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> …
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> [23] Honest belief, especially with arguable grounds, bars ***Honda*** damages for alleging cause: ***Honda*** at paras. 37-38, 45; ***Desforge v E-D Roofing***, *supra* (paras. 82, 84, 92); ***Mulvihill v Ottawa***, 2008 ONCA 201, 90 O.R. (3d) 285 (paras. 49-51).
>
> [24] What if courts imposed heavy and almost automatic penalties on any defendant who alleged cause in good faith, but then failed to convince a judge or jury that it was bad enough? That would be most unfair to employers. It would deter alleging cause, so that employers with cause would instead have to give pay in lieu of notice (to avoid a second set of damages). This would be the slacker's charter. It would significantly increase the expenses of hiring staff, and hence increase prices charged to innocent customers. I wish to stress that policy consideration.

[96] In my view, the same policy considerations apply in respect of employers who allege just cause in good faith but subsequently decide not to pursue just cause or are unable to prove just cause; it would be unfair to preclude employers from relying on a without cause termination provision.

ii. The Events Leading to the "Just Cause" Allegations

[97] During the trial, much evidence was heard about MORs ("monthly operational reports") and WIP ("work in progress") reports.

[98] MORs are intended to provide a snapshot of Clark's projects. They are prepared by the Project Manager and include the contract value, any change orders, the original fee estimate, the forecast cost to complete, the forecast revised profit or loss, and comments on any project risks with the client or subcontractors, as well as often including photos showing the stage of the project. MORs start one or two months into construction activity on a project and continue until completion.

[99] Singh's involvement with MORs started under Giebelhaus' leadership and Singh was involved in automating the MOR reporting. An MOR prepared by the Project Manager would be sent up to the Senior Project Manager or Project Executive, then to the Operational Managers in the various branches, then, depending on the size and structure of the relevant branch, to the Vice President of Operations, then to Singh as COO.

[100] Singh would then prepare an executive report summarizing the MORs, which he would distribute to Verhesen (the CEO), Ross (the President), and the Board of Directors.

[101] Singh testified he could not change the MORs, but he could make a comment.

[102] In addition to the MORs, Clark produced monthly WIP reports. A WIP report is a spreadsheet listing all the projects, including the contract value, the revised contract value, the cost to date from all invoicing and progress claims, the booked fee on the project, the estimated cost to complete, the estimated profit based on the revised numbers, and a risk or comments column where any issues with the project would be noted.

[103] The booked fee on the project was provided by the Finance Team. The Operations Team would go though the WIP reports with the Finance Team and advise the Finance Team of any required adjustments. The estimated cost to complete the project in the WIP report would come from the MOR. Singh testified the MORs were prepared before the WIP reports.

[104] Singh testified that in 2019, he became aware certain WIP reports were not reflecting the MORs in all cases, specifically with respect to the forecast profit. He testified he did not believe the issue was his responsibility but felt obligated to tell the Finance Team when he saw a discrepancy between WIP reports and MORs.

[105] The CFO, Mark Timberman ("Timberman"), was responsible for the preparation of the WIP reports and financial statements. Singh testified he discussed the forecast profit being too high in the WIP reports with Mr. Timberman at the monthly WIP review meetings. Mr. Timberman's explanation to Singh was that past performance could determine future performance.

[106] In addition to being responsible for operations at Clark, Singh was also directly responsible for certain projects. One of these was the Stanton hospital in the Northwest Territories which was a joint venture with Bird Construction ("Bird"). There were significant issues with this project as the expected profit declined from about $12 million to $8 or $9 million. Singh testified he had discussions with Bird about changing the fee but had no power to unilaterally change the fee.

[107] This occurred just prior to significant financial reporting issues being discovered at Clark. In late 2018, Ross was advised by Brian Lacey of certain discrepancies in the budgeting process. Ross spoke to Timberman, who resubmitted his financial reporting, but Ross still had concerns.

[108] This resulted in Ross taking "a deep dive" into certain projects in January or February of 2019, gathering information from operating teams, operational reports, MORs, WIP reports and various other financial reports.

[109] By April of 2019, Ross and his team realized the difference between Clark's operational and financial reporting was significant. With information which could undermine Clark's financial statements, Ross was unable to sign off on the year end financial statements.

[110] Ross went to New York in May of 2019, met with senior representatives of Turner US (Turner's parent company) and Turner Intl and explained that Clark had a serious problem.

[111] The meeting with the Turner representatives did not go well. The spreadsheet Ross presented showed a discrepancy in financial reporting of approximately $22.8 million. Ross was given both 30 days to go through the remainder of the projects and a team of people to assist him, including Turner's President, Breslin.

[112] Deloitte completed an audit in the Spring or Summer of 2019, and recommended a net income adjustment from $20.7 million to $10.4 million.

[113] At the end of the day, 44 projects were impacted, the profit write-down was around $36 million, 40 to 50 people lost their jobs and ESOP shareholders lost more than half their investments when Clark's share price plummeted.

[114] When Ross returned from New York in May of 2019, he continued his investigation. Immediately before returning to New York a second time, he met with Verhesen, Timberman and Singh, individually.

[115] Ross met with Singh on June 17, 2019, and made notes after the meeting. His notes indicate Singh: (1) was shocked the discrepancy was $22.8 million; (2) knew Clark had a problem but did not know how to address it; (3) saw the MORs and WIP reports were not lining up and brought it to Timberman's attention but was told not to worry about it; and (4) admitted he saw an issue but did not dig in and recognized he had a role to play in the issue.

[116] Singh testified that he did not recall saying he knew there was a problem but did not know how to address it, that he was shocked the discrepancy was $22.8 million, or that he had a role to play in it.

[117] Singh testified it was his understanding the decline was from $21.7 to $10.4 million, a net reduction of $11 million. Singh recalled telling Ross if the WIP report did not reflect the MORs that they would correct it during WIP meetings but did not recall saying he was told not to worry about it. Singh testified that he wanted Ross to know he supported his vision as President and wanted to help Clark recover the profit decline but did not recall saying he would work past 2022.

[118] Singh did recall Ross saying two major claims were being resolved and Ross wanted to write down both claims to losses reported so they could be added to the books as profit when they were resolved. The two claims were a $12 million claim in relation to the Sahtu Health Centre in Yellowknife and a $750,000 claim in relation to EPCOR.

[119] I prefer Ross's recollection of the meeting with Singh on June 17, 2019, because he made notes immediately afterwards and Singh professed little recollection of what was actually said at the meeting, just that he did not recall saying the things in Ross' notes.

iii. Singh's Awareness of the Potential "Just Cause"

[120] Singh testified that he first became aware of Clark's concerns with his performance in August of 2019, while he was on vacation. He received a text asking to meet on Monday morning. On Monday, August 26, 2019, Ross and Breslin met with Singh to discuss the termination of his employment.

[121] According to Singh, Ross said, “we are here today to discuss the conclusion of your employment with Clark; Clark is restructuring and there is no position for you. The new team and new structure will be announced at the Townhall meeting on August 28, 2019.” Singh was devastated. Ross suggested he go home and handed him Clark’s Termination Offer in a sealed envelope, directing Singh to come back tomorrow to discuss next steps.

[122] Singh testified Breslin and Ross did mention the profit write-down but did not allege Singh was responsible, mention Singh’s house construction, nor use the words “for cause”. Singh indicated he did not open the envelope until later in the day.

[123] Breslin and Ross were relatively consistent in their evidence with respect to the meeting on August 26, 2019. I accept their evidence and find Breslin and Ross followed the letter when they spoke to Singh, with Ross addressing the profit write-down and its significant financial consequences on Clark, and Breslin addressing the Termination Offer.

[124] I accept the evidence of Breslin that it was made clear to Singh the reason for the termination of his employment was the profit write-down and while Clark believed it had just cause for termination, Clark wanted to find a way to terminate Singh’s employment by agreement.

[125] If Singh did not appreciate that Clark believed it had just cause for the termination during the meeting on August 26, 2019, when he opened the envelope that evening, there could no longer have been any confusion. The second paragraph of the Termination Offer clearly states: “Despite the very serious concerns we have discussed with you, and as a means of avoiding a possible for-cause termination, we propose as follows…”

[126] At this point in time, Singh was aware Clark held him at least partially responsible for the profit write-down and believed it had just cause for termination but was looking to proceed by agreement.

[127] This conclusion is reinforced by earlier comments made to Singh by Ross, when Ross returned from New York in May of 2019 and relayed that Karen Gould “wanted to fire the whole C Suite” because of the profit deterioration.

[128] At subsequent meetings, Singh, Ross and Breslin were able to agree on Singh’s last day of employment. While Clark offered to proceed with termination not for cause and pay Singh 90 days’ salary plus a bonus if certain conditions were met, they were not able to reach a settlement. At the Townhall meeting on August 28, 2019, it was announced Singh was moving into a consulting position and Clark would be one of his clients.

[129] Singh’s last day of work with Clark was September 30, 2019.

[130] While employed by Clark, Singh built a house using certain Clark resources. He broke ground in 2017 and moved in 2018. Clark had a Code of Ethics Policy which addressed personal building projects. It was not a secret Singh was building a house and using certain Clark resources. Singh provided Verhesen with documentation related to the construction and Verhesen once visited the house. There was uncontradicted evidence Singh’s personal building project was held up as an example to others under the Code of Ethics Policy.

[131] While Ross became aware of concerns about Singh’s use of Clark resources in early 2019 in the construction of his house, no concerns with respect to Singh’s house were brought to

Singh's attention until the litigation. Singh's house was not raised during the meeting on August 26, 2019.

[132] On December 20, 2019, Singh sued Clark and its affiliates.

[133] In its Statement of Defence, Clark alleged misconduct and gross negligence, including willful misconduct for his own personal gain, inappropriate use of company resources for his own gain, and general poor performance. Clark amended its Statement of Defence on July 27, 2020, to remove the allegations pertaining to just cause for dismissal.

2) Just Cause for Dismissal

[134] Was there a reasonable basis for Clark to allege just cause, both at termination and during litigation? For the following reasons, I find there was.

[135] To found just cause for dismissal, the acts of the employee must constitute a repudiation of the employment agreement. While not every act of misconduct or impropriety will give rise to just cause for dismissal, misconduct which is fundamentally or directly inconsistent with the employee's obligations to his employer will give rise to just cause: Sproat at 4-3.

[136] The difficulty in defining just cause was addressed by the Court in ***Whitehouse v RBC Dominion Securities Inc***, 2006 ABQB 372 [***Whitehouse***] at paras 25 to 28. Courts must take a contextual approach to assessing whether an employee's act provides just cause for dismissal as the required degree of misconduct depends on the employment relationship, the nature and circumstances of the act, and the consequences of the act on the employer: see also ***McKinley v BC Tel***, 2001 SCC 38 at paras 29, 48-49; ***Baker v Weyerhaeuser Company Limited***, 2022 ABCA 83 at para 28; ***McDonald v Sproule Management GP Limited***, 2023 ABKB 587 paras 63-70.

[137] Furthermore, the "principle of proportionality" requires a balance be struck between the severity of the employee's misconduct and the sanction imposed: ***Whitehouse*** at para 29.

[138] This contextual approach was confirmed in ***Haack v Secure Energy (Drilling Services) Inc***, 2021 ABQB 82:

> [408] An employer need not continue an employee's employment indefinitely. And, of course, an employee need not continue working for an employer. Ordinary employment relationships are indefinite contracts that either side has the freedom to end when they choose. The termination of that contractual relationship brings with it, however, some basic obligations. For the employer, those obligations include providing an employee with notice that the relationship is ending, either working notice or payment in lieu: ***Honda Canada Inc. v Keays***, 2008 SCC 39 at para 50; ***Merrill Lynch Canada Inc. v Soost***, 2010 ABCA 251 at paras 9-10; ***Molloy v EPCOR Utilities Inc.,*** 2015 ABQB 356 at para 139.
>
> [409] An employer may avoid that obligation, and terminate the employment contract without notice, if the employee gives the employer cause to do so. An employer may terminate the employment without notice where the "employee's alleged misconduct is so serious as to constitute a repudiatory breach of the employment agreement": ***Smith v Vauxhall Co-op Petroleum Limited***, 2017 ABQB 525 at para 12; ***R v Arthurs, Ex p. Port Arthur Shipbuilding Co.***, 1967

> CanLII 30 (ON CA), [1967] 2 OR 49 at para 11, rev'd on other grounds 1968 CanLII 29 (SCC), [1969] SCR 85.
>
> [410] Cause must be assessed objectively and contextually, taking into account the nature of the employer's business and the employee's position: ***Foerderer v Nova Chemicals Corporation,*** 2007 ABQB 349 at para 63.
>
> [411] An employer may reasonably expect high standards of performance of an employee in a position of trust and responsibility: ***Molloy v EPCOR Utilities Inc.***, 2015 ABQB 356 at para 188.
>
> [412] In general, the Court should take into account the "nature of the employment and the consequences of the act on the employer: [*sic*] ***Whitehouse v RBC Dominion Securities Inc.***, 2006 ABQB 372 at para 25.

[139] Singh was the COO and a member of the C Suite. Singh was aware there were issues with the financial reporting in the WIP reports and inconsistency with the MORs. While he raised this with Timberman, he did not take it any further. In particular, he did not report the issue to the Board of Directors.

[140] Singh's position seems to be that his responsibility for the profit write-down was limited to that portion of the profit write-down attributable to the projects for which he was directly responsible. He viewed responsibility for the larger profit write-down issue as being the responsibility of the entire organization.

[141] While I was not provided with a description of job duties and responsibilities for the COO, the July 31, 2013 letter from Verhesen to Mr. Clark, which was the letter which gave Singh sufficient assurance of Clark's intention to transition him from the VP position to the COO position, makes plain Clark's expectations of the COO: "Our COO is ultimately accountable for the P&L of our business, thus your role would be measured against this outcome too". "P&L" refers to "profit and loss".

[142] I accept that, as COO and member of the C Suite, reporting to the CEO and with direct access to the Board of Directors, Singh was ultimately responsible for overseeing profit and loss in terms of Clark's operations. The fact Singh's bonus entitlement was weighted 50% on the Commercial Division's performance, 30% on Clark's performance, and only 20% on Singh's personal performance supports this conclusion.

[143] In ***Molloy v EPCOR Utilities Inc***, 2015 ABQB 356 at para 210, Justice Topolniski said:

> Employers are entitled to hold high expectations regarding the trustworthiness of their senior or managerial employees. When a senior employee's conduct reveals character traits that undermine the employer's trust in the employee, summary dismissal may be warranted ... [citations omitted]

[144] Similarly, in ***Poliquin v Devon Canada Corporation***, 2009 ABCA 216 at para 37, Chief Justice Fraser (as she then was) said, "[a]n employee is expected to provide loyal and faithful service to his or her employer. The intensity of that obligation increases with the degree of responsibility attached to the employee's position".

[145] Singh's responsibility for Clark's operations was commensurate with the senior position he held with Clark. He was responsible for reviewing the MORs and for preparing an executive summary which accurately represented Clark's operational position.

[146] As COO, he reviewed the WIP reports and, if he noticed a discrepancy between the MORs and the WIP reports, he had a responsibility to raise the issue with the CFO and to take the issue further if the response was inadequate.

[147] The consequences of significant and ongoing inaccuracies in Clark's financial reporting, particularly the forecasted profit or loss on a project-by-project basis as set out in the WIP reports, was substantial and went to the heart of the responsibilities born by the entire C Suite, including Singh. The C Suite was ultimately the collective responsible for Clark's performance.

[148] I accept Breslin's description of the COO role. Namely, the COO is the final backstop on the project, responsible for assessing the risk and the financials, digging into the reports and validating their accuracy, and determining the real status of the project to share with leadership.

[149] Clark was entitled to trust the members of its C Suite would be meticulous and transparent in their management and reporting of Clark's operations and finances.

[150] Therefore, while I am not required to determine if there was just cause for dismissal, I conclude Clark had reasonable grounds for alleging just cause for termination both at termination and during litigation in relation to the profit write-down.

[151] There is no evidence to support a finding Clark was acting in bad faith or for some improper purpose. Clark, on the understanding a more timely and economic resolution might be possible, dropped the allegations of just cause in July of 2020.

[152] While there was no reasonable basis for Clark to rely upon the construction of Singh's house as giving rise to just cause for summary dismissal as the issue was never raised with Singh, the inclusion of the house as an additional ground for just cause is not sufficient to establish bad faith for alleging just cause when other, more prominent, grounds existed.

[153] I am cognizant of the fact Singh would not have been required to effectively defend the allegation of just cause if he had not raised repudiation of the Employment Contract. His performance would not have been an issue at trial.

[154] For the foregoing reasons, I find Clark did not repudiate the Employment Contract by claiming just cause and is not, on this basis, precluded from relying on the without notice termination provision in the Employment Contract.

3) Failure to Pay under the Termination Provision

[155] Upon the termination of Singh's employment on August 26, 2019, despite believing it had just cause for dismissal, Clark offered to pay Singh $87,175, less required deductions and withholdings, the equivalent of 90 days' salary, plus a bonus payment conditional on the commencement of construction of the Garneau Towers and Clifton Place projects.

[156] Subsequently, offers of settlement were exchanged which included varying amounts in lieu of a bonus, with the last offer coming from Clark through Singh's legal counsel on September 25, 2019. The offers were contingent on Singh signing and returning a release.

[157] Singh sued Clark for wrongful dismissal on December 20, 2019.

[158] Counsel for Singh referred me to ***Perretta v Rand A Technology Corporation***, 2021 ONSC 2111 and ***Klyn v Pentax Canada Inc***, 2024 BCSC 372. Singh relies on these cases for the proposition that an employer who fails to unconditionally pay an employee the pay in lieu of

notice to which they are contractually entitled demonstrates an intention to no longer be bound by the contract.

[159] In my view, this case is distinguishable from the cases relied upon by Singh. In the case at bar, the parties were engaged in settlements negotiations, where the existence of just cause was a live issue. Effectively, the parties disputed what amount, if any was contractually required to be paid: see e.g., ***Kerzner v American Iron & Metal Company Inc***, 2017 ONSC 4352.

[160] Therefore, I prefer the approach taken in ***Egan v Harbour Air Seaplanes LLP***, 2024 BCCA 222 at para 78:

> … An employer's failure to comply with a contractual notice requirement does not render a termination clause unenforceable, it constitutes a breach of contract. What flows from that is not a finding that the contract is void but rather a measure of damages for the breach.

[161] I conclude Clark's failure to pay Singh 90 days' pay in lieu of notice under the Employment Contract was not a repudiation of the Employment Contract because Clark believed in good faith there was just cause for dismissal and the parties were in the process of attempting to negotiate a settlement.

[162] Once Singh filed the Statement of Claim, Clark was entitled to wait for a determination on the enforceability of the termination provision.

[163] For the foregoing reasons, I find Clark did not repudiate the Employment Contract by failing to pay Singh 90 days' pay in lieu of notice under the Employment Contract and is not, on this basis, precluded from relying on the without notice termination provision in the Employment Contract.

C. Damages

1) Damages in Accordance with the Termination Provision

[164] Having concluded Singh's entitlement to notice or pay in lieu of notice is governed by the without notice termination provision in the Employment Contract, I am not required to determine the reasonable notice period under the common law.

[165] At the time of his termination, Singh's compensation from Clark included: a base salary of $343,000, participation in an annual bonus program, a vehicle allowance of $500 per month, and health dental and other insurance benefits. In addition, Singh was entitled to participate in the ESOP.

[166] Clark's fiscal year end is February 28th. For the fiscal year ending February 28, 2019, Singh was paid his ESOP dividend in accordance with the program.

[167] Singh is entitled to pay in lieu of notice in accordance with the termination provision in the Employment Contract, which provides Clark may give notice of termination, or pay in leu of such notice, in accordance with notice provisions as described in the Offer of Employment, which includes a 90-day notice period for the employer.

[168] On August 27, 2019, the parties agreed Singh's last day of employment would be September 30, 2019. Clark argues Singh received 35 days working notice and is, therefore, entitled to 55 days' pay in lieu of notice.

[169] The termination provision in the Employment Contract provides Singh is entitled to 90 days' notice or pay in lieu of notice. It does not say Clark could provide 90 days' notice or pay in lieu of notice, *or a combination thereof*.

[170] Therefore, I interpret the termination provision as requiring Clark to make an election – 90 days' working notice or 90 days' pay in lieu of notice.

[171] In Clark's Termination Offer, Clark elects to provide 90 days' pay in lieu of notice. This conclusion is supported by the fact Clark indicated that Singh would receive "the equivalent to (90) days' compensation" while in the same letter leaving the final day of employment to be determined as between Clark and Singh. I also note Singh staying on until September 30, 2019, was a benefit to Clark as it tried to retain the Garneau Towers and Clifton Place projects.

[172] Therefore, Singh was entitled to receive 90 days' pay in lieu of notice. As the termination provision in the Employment Contract does not specify that Singh would receive salary only, he is entitled to receive an amount equivalent to the compensation he would have received if he had continued to work with Clark for the next 90 days.

[173] Singh's base salary at the date of termination was $343,000 per year, which equals $939.73 per day. Singh received a vehicle allowance of $500 per month, which equals $16.67 per day. And Singh received benefits of $207.94 per month (after 50/50 split with Clark), which equals $6.93 per day.

[174] Therefore, Singh's total outstanding pay in lieu of notice for 90 days is $86,699.70.

[175] As a result of the profit write-down, no one at Clark received a bonus in 2019. Therefore, Singh would not have received a bonus either and is not entitled to one prorated over the 90-day notice period.

[176] With respect to Singh's ESOP shares, Singh argues that he ought to have been paid out his ESOP shares upon termination, at the value assigned as of June 30, 2019, and the delay in payment resulted in loss of share value.

[177] Employees' rights and shareholders' rights are distinct. This is confirmed by Principle 2 on page 3 of the Offer of Employment which provides: "Total compensation does not include return on ESOP shares as these are an investment."

[178] In any event, Singh has not advanced a claim for loss of share value against the Defendants and such claim would, presumably, be against CB Employees Corporation.

[179] Therefore, as against Clark, any shortfall in Singh's share payout is not included in the calculation of pay in lieu of notice.

2) Alternate Finding on Damages

[180] If I am incorrect in finding Singh's entitlement to notice or pay in lieu of notice is governed by the without notice termination provision in the Employment Contract, Singh would be entitled to reasonable notice under the common law. The factors for determining reasonable notice are set out in ***Bardal v Globe & Mail Ltd*** (1960), 24 DLR (2d) 140 (ONSC) at 145:

> 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.

[181] Singh was 60 years old and had worked for Clark for six years when he was terminated on August 26, 2019. He was the COO, responsible for major projects, and reported to the CFO. He was the senior employee responsible for Clark's operations. Taking into consideration these factors, I conclude Singh would be entitled to a reasonable notice period of 12 months, with all the factors except for length of service indicating a longer notice period.

[182] In coming to this conclusion, I considered the following cases relied upon by counsel, giving more weight to recent cases from Alberta as being more reflective of the job market in Alberta, and cases decided in the context of the pandemic: ***Ayalew v The Council for the Advancement of African Canadians in Alberta***, 2023 ABKB 113 (14 months); ***Parish v Alberta***, 1987 CanLII 3563 (ABKB) (12 months); ***McGregor v Lethbridge College***, 2016 ABPC 72 (12 months); ***Teljeur v Aurora Hotel Group***, 2023 ONSC 1324 (7 months) and ***Lake v La Presse (2018) Inc***, 2021 ONSC 3506, not disturbed on appeal at 2022 ONCA 742 (8 months).

[183] The 12-month reasonable notice period includes an increase for inducement, but only a modest increase given the length of time Singh was employed with Clark: ***Firatli v Kohler Ltd***, 2008 CanLII 35266 (ONSC). This recognizes that Clark first approached Singh in 2013 and reignited negotiations in June of 2013. It further recognizes Singh exercised considerable due diligence in deciding to join Clark and had every reason to believe his employment with Clark would be long-term.

[184] Therefore, the relevant period over which to calculate damages under the common law is 12 months starting from October of 2019. Singh's base salary at the date of termination was $343,000 per year and he received a vehicle allowance of $500 per month and benefits of $207.94 per month (after 50/50 split with Clark). Therefore, Singh's total outstanding pay in lieu of notice for 12 months would be $351,495.28. No executive bonuses were paid in 2019 and 2020.

[185] Any amounts earned by Singh in mitigation of his damages during this time is deducted from the reasonable notice payable. Clark's position is Singh fully mitigated his damages after the first four months.

[186] To earn income after his termination, Singh began construction consulting services through his company JS Advisors Corp. ("JS"). JS has a financial year end of March 31st. In the financial year ending March 31, 2020, JS earned gross revenue of $64,319 and income before taxes of $36,156. In the fiscal year ending March 31, 2021, JS earned gross revenue of $463,295 and its income before taxes was $248,338.

[187] From February to December of 2020, JS paid Singh a monthly salary of $8,876. From January to May of 2021, JS paid Singh a monthly salary of $11,514.00.

[188] Where "single person" corporations are used by an employee who is attempting to mitigate the damages of wrongful dismissal, the general rule is the corporation should be disregarded for the purposes of mitigation and the income of the corporation, after deducting reasonable expenses, should be treated as that of the employee: ***Sumner v PCL Constructors Inc***, 2011 ABCA 326 at para 35.

[189] Clark takes the position JS's income, after deducting reasonable expenses, should be treated as that of Singh, and the monthly salary of $4,000 paid to Singh's wife is excessive and

should be reduced to $1,000 a month, which would increase JS's and, consequently, Singh's income.

[190] Singh takes the position Singh's salary is the salary paid to him by JS. He argues that after the first four months where Singh earned no income, there was a monthly difference of $20,415.27 between his income at Clark and his income with JS from April 2020 to December of 2020 (when his JS income increased).

[191] The financial statements for JS cover three months ending March 30, 2020, and 12 months ending March 31, 2021. Singh testified his wife issued invoices and did other administrative tasks. I agree $4,000 a month is high for these tasks. I am prepared to find a reasonable expense for Singh's wife's salary is $2,880, which is the equivalent of 160 hours a month at $18/hour.

[192] JS's total revenue over the 15 months covered by the financial statements is $527,614. Deducting the general and administrative expenses excluding salary and dividends ($11,726 for year ending March 30, 2021, and $27,347 for year ending March 31, 2021) and $43,200 for Singh's wife's salary over 15 months, the total income for JS over the 15 months is $445,341. This equals $29,689.40 per month. Singh's income with Clark during this time was $29,291.27 per month.

[193] Therefore, after termination, Singh experienced four months with no income and then fully mitigated his damages. Accordingly, Singh's entitlement to damages under the common law would be $117,165 (i.e., four months multiplied by $29,291.27).

V. Conclusion

[194] In conclusion, I find:

(a) The termination provision in the Employment Contract is binding;

(b) Clark was entitled to terminate Mr. Clark's employment one of two ways, immediately for just cause, or by providing Singh with 90 days' notice or pay in lieu of notice;

(c) Clark did not repudiate the Employment Contract and was not precluded from relying on the without notice termination provision in the Employment Contract; and

(d) Singh was entitled to receive 90 days' pay in lieu of notice.

[195] As such, I award the following to Singh:

(a) Damages in the amount of $86,699.70; and

(b) Pre-judgment interest pursuant to the *Judgment Interest Act*, RSA 2000, c J-1.

VI. Costs

[196] I did not hear submissions form the parties on the issue of costs at trial.

[197] If counsel cannot resolve the issue of costs, counsel for Singh shall submit written costs submissions not to exceed five pages with a Bill of Costs and any Offer to Settle attached within 30 days of the issuance of these written reasons. Counsel for Clark shall submit their written

response not to exceed five pages with any Offer to Settle and a Bill of Costs, if desired, within 21 days of receipt of Singh's costs submissions.

[198] All submissions are to be filed, and copies provided to me through my Judicial Assistant.

Heard on the 4th to the 8th and the 18th days of November, 2024.
Dated at the City of Edmonton, Alberta this 6th day of January, 2025.

Kelsey L. Becker Brookes
J.C.K.B.A.

Appearances:

Wilson McCutchan
Taylor Janis LLP
for the Plaintiff

Ronald Smith
Smith Labour & Employment Law
for the Defendants