IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Blomme v. Princeton Standard Pellet Corporation,* 2023 BCSC 652

Date: 20230424
Docket: S211609
Registry: Vancouver

Between:

Karen Blomme

Plaintiff

And

Princeton Standard Pellet Corporation

Defendant

Before: The Honourable Justice MacNaughton

Reasons for Judgment

Counsel for the plaintiff:	D. Balkaran A. Wilson, Articled Student
Counsel for the defendant:	D. Penner M. Monteith
Place and Date of Trial/Hearing:	Vancouver, B.C. January 31 and February 1–3, 2023
Place and Date of Judgment:	Vancouver, B.C. April 24, 2023

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Background

[1] Karen Blomme is 67 years old. She never graduated from high school. Instead, she joined the work force at her family's mushroom farming business. She completed a general education diploma when she was 32 years old.

[2] Ms. Blomme worked for various employers in various jobs prior to joining Princeton Standard Pellet Corporation ("Princeton"), where she worked for over 20 years before her employment ended. Princeton manufactures wood pellets for home heating and animal bedding from waste wood fibres.

[3] As an employer, Princeton experienced low turnover, and many of its employees, union and non-union, worked for it for many years. This may have been, in part, because it offered well-paid jobs in a small town.

[4] At all material times, Dale Andrews was the owner and chief executive officer of Princeton. He has since sold the business to the Drax Group, a multi-national corporation.

[5] Ms. Blomme started with Princeton in a union position as a press operator. At the beginning of July 2013, she was promoted to a plant supervisor, a non-union position. Her responsibilities included: scheduling union employees; supervising those employees; in conjunction with others, hiring entry-level plant employees; providing safety training; purchasing safety equipment; and completing fire extinguisher inspections. Because of her experience, her particular strength was in training press operators.

[6] Ms. Blomme worked four 12-hour shifts, four days on and four days off. She was paid overtime for four hours of each shift. In 2019, her last full year of employment with Princeton, she earned $74,308.49. Princeton also provided her with paid vacation, extended health and dental benefits, and disability and life insurance.

[7] Together with Gary Fraser and Richard Mills, Ms. Blomme was one of three plant supervisors. Mr. Fraser was more senior than Ms. Blomme in terms of his tenure with Princeton and as a supervisor. Mr. Mills was less senior than Ms. Blomme in tenure and as a supervisor.

[8] All plant supervisors reported to Richard White, the plant manager. He reported to Mr. Andrews who did not work on site. Ms. Blomme testified that she worked fairly closely with Mr. White. They worked together for approximately two decades, and, although they did not socialize outside work hours, they had a good relationship. Mr. White agreed with Ms. Blomme's description of their relationship.

COVID-19

[9] The COVID-19 pandemic significantly affected Princeton's business. In the spring of 2020, it laid off a number of union employees, some office employees, Ms. Blomme, and Mr. Mills. Mr. Fraser was not laid off.

[10] There is a dispute about whether Ms. Blomme requested to be laid off. Ms. Blomme testified that Princeton's business was slow; other fibre companies had shut down, and she thought it would create a saving for Princeton if she could afford to take a layoff. She explored that possibility in a meeting with Mr. White and told him that she would consider her financial situation and let him know.

[11] Ms. Blomme concluded that she could not afford a layoff and testified that she intended to tell Mr. White that at their next meeting. However, before she could do so, in an April 2, 2020, phone call, Mr. White told her that he had been directed to lay both her and Mr. Mills off. She did not discuss the terms of her layoff at that time. Her record of employment indicated that she had been laid off effective April 4, 2020, and that her expected date of recall was "unknown".

[12] In her evidence, Ms. Blomme confirmed that she understood that Princeton would decide when she would return to work.

[13] Mr. White testified that Ms. Blomme told him that, after speaking to her financial advisor, she wished to be laid off. I need not resolve this difference in their evidence as there is no dispute that Ms. Blomme was laid off, and Princeton accepts that it had no contractual or common law right to do so. When it did so, she could have asserted that she had been constructively dismissed. It is also not disputed that, initially, Ms. Blomme accepted the layoff.

[14] At Ms. Blomme's request, she and Mr. White met on June 9, 2020. She testified that, by then, she learned that Mr. Mills had been recalled and she was angry as she believed that, based on her seniority, she should have been recalled first. She had run out of money and savings. Ms. Blomme said she asked for the meeting because she wanted to be called back to work.

[15] Mr. Mills told her that she would not be called back before the end of July. She testified that she was livid that Mr. Mills was back at work because his plant skills were far inferior to hers and she believed he had been recalled because of his friendship with Mr. White. She did not tell Mr. White that she was livid because she testified that he intimidates her. She said she started to cry and left the meeting.

[16] Mr. White testified that his June 9 meeting with Ms. Blomme was short. Ms. Blomme told him that she had family coming to town and she wanted to be available for their visit. He told her that he did not see her being recalled before the end of July. He had no recollection of Ms. Blomme's demeanor. There is support for Mr. White's version of the conversation as Ms. Blomme's notes of the meeting refer to a discussion about her visiting family.

[17] Ms. Blomme testified that it was Princeton's policy to recall laid off employees based on seniority. The evidence did not support the existence of such a policy for management employees as, based on the uncontroverted evidence, before the pandemic, there had never been a management layoff. Mr. White was questioned about whether conflicting management vacation requests were dealt with on a seniority basis. He acknowledged that if there had been a conflict, seniority would likely have been used to resolve it, but no such conflict had ever arisen. I accept

Mr. White's evidence that the reason Ms. Blomme was not recalled was because Princeton was not hiring any new press operators in the summer of 2020 and, as a result, her training skills were not then needed.

[18] Ms. Blomme and Mr. White next met on July 2, 2020. Mr. White testified that it was at this meeting that he became aware that Ms. Blomme was angry that Mr. Mills had been recalled before her. He told her that he recalled Mr. Mills before her because he had not asked to be laid off. He understood she was happy to be laid off until the end of July and he did not think to recall her. He testified that she was angry, swore at him, and slammed the door as she walked out.

[19] Ms. Blomme did not agree that she requested a layoff or that she was happy to remain off until the end of July. Her notes of the July meeting indicate that she said she felt like she did not have a job at Princeton any more and that Mr. White said she did not but that when she was needed, he would call her. She said that she lost trust in both Mr. White and Princeton because of the false statements he made in the July 2 meeting.

[20] Perhaps because of a misunderstanding about whether Ms. Blomme had originally requested a layoff, or her anger that Mr. Mills had been recalled before her, Ms. Blomme believed that she could not trust Mr. White.

[21] Mr. White called a meeting with Ms. Blomme on August 6, 2020, to discuss her employment. They both testified about the meeting. Ms. Blomme testified that Mr. White told her that Princeton was going to extend her benefits to the end of the year and, unless she was "hired back" by then, pay her eight-weeks' severance. Mr. White said that Ms. Blomme was unhappy with the offer of extended benefits; she wanted to come back to work. She asked him if she was ever coming back, and he told that she would be, but the date was uncertain.

[22] Ms. Blomme testified that Mr. White's body language (feet up on his desk, leaning back, and smirking) confirmed for her that she was being fired on August 6.

[23] Mr. White was not cross-examined about his body language at the August 6 meeting.

[24] It is not probable that Ms. Blomme was terminated on August 6. It is clear from the evidence that starting on July 23, 2020, Princeton began discussing arrangements to extend Ms. Blomme's benefits to at least the end of 2020. On July 23, 2020, Angie Rorvik, who worked in Princeton's office doing payroll and accounts payable, wrote to her contact at the Benefits Alliance Group asking whether Princeton could extend Ms. Blomme's Manulife benefits to January 5, 2021:

> … We are considering extending benefits for one of our employees who was laid off due to COVID. Karen Blomme, laid off on April 8th. She is one of our oldest employees who would be immune-compromised, and to protect her and other employees, we have not yet called her back. We are hoping for an improvement to the situation surrounding COVID, especially a vaccine, and hope to call her back late in the year. We are considering a return to work date of January 5, 2021.
>
> This is just an inquiry at this time. Could you check with Manulife to see if her benefits could be extended until January 5th?

[25] By July 31, 2020, in advance of Mr. White's and Ms. Blomme's August 6 meeting, Manulife agreed to extend Ms. Blomme's coverage, and a memorandum of agreement was signed. It provided Ms. Blomme with life insurance, accidental death and dismemberment benefits, and extended health and dental care coverage until the earliest of: January 5, 2021; the date she returned to work on a full-time basis; or the termination of the group policy.

[26] I conclude that Mr. White did not conduct himself at the August 6 meeting as described by Ms. Blomme. They had worked together for almost two decades, and both described that they had a good working relationship. There is no evidence that Mr. White had antipathy towards Ms. Blomme. The fact that Princeton took steps to extend her benefits is supportive of Mr. White's version of events. Princeton's correspondence with Manulife supports that they did not intend to terminate Ms. Blomme at that time. I find that Ms. Blomme's judgment about his behaviour and her understanding of what she was being told was clouded by her anger about Mr. Mills being recalled before her. She felt she was not being treated fairly and did

not see anything positive in the fact that Princeton had arranged to extend her benefits to the end of the year.

[27] Ms. Blomme called another meeting with Mr. White on August 12, 2020. Again, their evidence about the meeting differs. However, both agree that Ms. Blomme was concerned that she no longer had a job with Princeton and said so. Mr. White assured her that she did have a job. Ms. Blomme testified that she did not believe him. In any event, at that time, Ms. Blomme still wanted to return to work at Princeton.

[28] The parties had no communication from August 12 until October 1, 2020, when counsel, on behalf of Ms. Blomme, sent a demand letter.

The Demand Letter

[29] On October 1, 2020, through her counsel, Ms. Blomme sent a demand letter ("Demand Letter") to Princeton asserting that she had been terminated by virtue of s. 63(5) of the *Employment Standards Act*, R.S.B.C. 1996, c. 113 [*Act*] and s. 45.01 of the *Employment Standards Regulation*, B.C. Reg. 369/95 [*Regulation*]. The Demand Letter sought damages for wrongful dismissal. The Demand Letter said that by operation of the *Act* and the *Regulation*, Ms. Blomme was deemed terminated on August 30, 2020, when Ms. Blomme's layoff extended beyond a "temporary layoff" under the *Act*.

[30] The Demand Letter read, in part:

> [Princeton] has already terminated Ms. Blomme's employment by operation of law. She does not have to wait until the end of the year to claim her severance entitlements. As she never signed a contract of employment which displaced the presumption of common law notice upon her termination, I have advised my client that [Princeton's] proposed severance package falls well short of her common law entitlements such that she is well-positioned to commence a wrongful dismissal claim.
>
> …
>
> [Princeton's] failure to provide reasonable notice <u>following the Deemed Termination</u> exposes [it] to a claim for wrongful dismissal.
>
> [Emphasis added.]

[31] The Demand Letter said that, under the factors set out in *Bardal v. Globe & Mail Ltd.*, 24 D.L.R. (2d) 140 at para. 145, 1960 CanLII 294 (Ont. S.C.), Ms. Blomme was entitled to common law notice of 18 to 22 months and to compensation for the loss of all components of her remuneration over the notice period, including her vacation pay, benefits, and bonuses. The Demand Letter requested a response by October 8, 2020, and directed that all further communications should be through Ms. Blomme's lawyer.

[32] On October 8, 2020, Mr. White emailed Ms. Blomme. He said that Ms. Blomme had not been terminated by operation of law but that, "[i]n any event the first step in resolving this matter is to determine if [Ms. Blomme] want[ed] to return to work." Mr. White asked her whether she wanted him to consider that alternative. Mr. White was incorrect about the deemed termination.

[33] Later that day, Mr. Andrews wrote to Ms. Blomme's lawyer indicating that any further correspondence or communication should be directed solely to him.

[34] Mr. White followed up with Ms. Blomme on October 23, 2020, indicating that he "would like to move forward as soon as possible" and requesting an indication from Ms. Blomme whether she was interested in returning to work.

[35] Mr. White followed up again on October 26, 2020, indicating that he had been attempting to contact her for a recall date and stating his intention to return her to work as soon as November 3, 2020, on her regular four-on/four-off shift. He explained that, "[w]ith respect to your request for lay-off until such time as the … pandemic is resolved", Princeton had taken steps to mitigate against COVID-19 and were committed to a safe working environment. Mr. White asked Ms. Blomme to reply "at [her] soonest convenience so we can work this out."

[36] Ms. Blomme did not respond to Mr. White's correspondence. She and her counsel did not explore with anyone at Princeton the option of a return to work.

[37] On the evidence, it is clear that Princeton did not understand, until after receiving the Demand Letter, that a termination had occurred by operation of law, or that Princeton had a liability to Ms. Blomme in relation to her layoff.

[38] After Princeton retained legal counsel, in a letter of October 30, 2022, Princeton acknowledged that it owed Ms. Blomme eight-weeks' pay in lieu of notice and repeated the offer for Ms. Blomme to return to work. This offer was not accepted, and there was no evidence that Ms. Blomme seriously entertained it. Through her counsel, Ms. Blomme asserted that returning to work would involve returning to an atmosphere of hostility, humiliation, and embarrassment.

Assessment of the Reliability of the Evidence

Ms. Blomme

[39] For the following reasons, I do not find Ms. Blomme's evidence to be reliable. During her evidence, Ms. Blomme testified that she had memory issues, and I accept that memory issues may explain inconsistencies in her evidence at trial and at her examination for discovery, and the implausibility of some of her evidence.

[40] In my view, it is not plausible that Ms. Blomme never discussed the risks of COVID-19 with Mr. White and was not worried about its impact on her health. Her evidence in this regard was inconsistent with the fact that she requested and took vacation from March 31 to April 3, 2020, as the pandemic was raging in British Columbia and when most people, particularly older workers, were concerned about their health. I did not find it plausible that Ms. Blomme considered taking a voluntary leave to save Princeton money.

[41] Ms. Blomme also testified that she never agreed to be laid off, but she admitted that, in response to Mr. White advising her that she would be laid off, she said "okay". In her counsel's letter of November 13, 2020, it said that, "[h]ad she known in March that Princeton would ultimately terminate her employment in August, she would have rejected the temporary layoff". Implicit in that statement is that Ms. Blomme accepted a temporary layoff.

[42] At trial, Ms. Blomme testified that, as of July 2, 2020, she was aware, and explained to Mr. White, that her temporary layoff would become a termination by operation of law. I did not accept her evidence in that regard. Her notes for July 2 do not reflect that she explained that her temporary layoff would become a termination. Despite being asked at her discovery to recount all that she could recall of her July 2 conversation with Mr. White, she did not mention this. Rather, in her discovery evidence, she suggested that she was not aware of the termination by operation of law until late August or early September and she was not certain until she spoke to a lawyer.

[43] Accepting Ms. Blomme's evidence that she was experiencing financial difficulty as a result of her layoff, if she knew of the termination by operation of law, she would not have waited until October 1, 2020, to demand severance or to begin looking for another job.

[44] Ms. Blomme testified at trial that, for the first time, she understood herself to have been terminated on August 6, 2020. This was contrary to her counsel's Demand Letter, her original notice of civil claim, and some of her discovery evidence. It is also inconsistent with the timing of the Demand Letter and her mitigation efforts, which only started in October.

[45] When asked about Mr. White's October 8, 2020, email inquiring about whether she wished to return to work, Ms. Blomme said she did not respond because she did not understand what he meant. However, Mr. White's email was clear and unambiguous, as were his follow-up emails of October 23 and 26. He was reaching out to her to determine if she wanted to return to work and to discuss dates.

[46] Ms. Blomme testified that she was concerned that Mr. White and Princeton would "punish" her for getting lawyers involved. The only evidence she relied on was her evidence that Mr. White punished a former employee. She testified that Mr. White told her not to train a union employee, who applied for a press operator job. Mr. White wanted to "train [that employee] out" of the job because the employee

had been told not to apply for it on account of his WorkSafe BC complaints and absences due to injury. She said that four days after this conversation, the employee was no longer employed as a press operator. She took from this incident that Mr. White and Princeton would punish those who crossed them.

[47] In direct, Mr. White was asked about Princeton retaliating against employees who grieved a management decision, and he denied it occurred. He was not cross-examined about the specific example given by Ms. Blomme.

[48] There is no reliable evidence on which I could conclude that, if Ms. Blomme had explored Princeton's offer of a return to work, she would have been returning to a hostile work environment or that she would have been punished for retaining counsel. Had she accepted Princeton's offer, and then experienced retaliation or an intolerable work situation, she could have claimed constructive dismissal.

[49] On the evidence, as of August 12, 2020, Ms. Blomme still wanted to return to work at Princeton, and there was no communication between her and anyone at Princeton from that date until the date of the Demand Letter three months later. Princeton had arranged to extend her benefits and continued paying for them. Princeton's initial response to the Demand Letter was simply an email inquiry from Mr. White about Ms. Blomme's interest in returning to work.

[50] In my view, there was nothing sinister or inappropriate about Princeton communicating directly with Ms. Blomme about her interest in returning to work. It was consistent with the fact that Princeton had just learned about its error with respect to the deemed termination provision of the *Act* and was seeking to resolve matters directly with Ms. Blomme, whom it considered to be a continuing employee.

Mr. White

[51] Mr. White no longer works for Princeton. He is now employed by the Drax Group as plant manager at its Princeton operation. He is not beholden to Princeton or Mr. Andrews for his employment.

[52] His evidence was clear and consistent. He said that Ms. Blomme initially requested a layoff but changed her mind by July and August 2020. He assured her that she would not be returning before the end of July when she said she had relatives who were going to visit her.

[53] When Ms. Blomme expressed concern that she had been fired in August, Mr. White assured her that she had not and that Princeton would decide about the status of her employment by the end of the year and, if it decided to terminate her, would work out a severance package. In the meantime, Princeton continued her benefits.

[54] Mr. White said that the first time Ms. Blomme took the position that she had been terminated was in the Demand Letter. The fact that Princeton did not intend to terminate Ms. Blomme is clear in the emails between Princeton and its benefits consultant and the memorandum of agreement it negotiated with Manulife.

[55] I accept Mr. White's evidence that his offer to recall Ms. Blomme in October 2020 was genuine. His explanation for why she had not been recalled earlier made sense. Her strongest skill related to training new employees and, during the pandemic, no new employees were hired by Princeton. As the company emerged from the pandemic, Princeton's use of other bargaining unit employees to train was not perfect. Bargaining unit employees trained other employees with their own bad habits.

[56] I accept that Princeton always intended to rehire Ms. Blomme. The issue was the timing.

[57] Once Princeton received the Demand Letter, it realized that it would have to decide, earlier than it had planned, about when to recall Ms. Blomme if she wished to return.

Analysis

[58] In the circumstances of this case, the relevant termination date for a wrongful or constructive dismissal is either:

a) April 4, 2020, the effective date Ms. Blomme's layoff, due to s. 63(5) of the *Act*;

b) August 30, 2020, the date Ms. Blomme's termination was effective by operation of s. 1 of the *Act* and s. 45.01(2) of the *Regulation*; or

c) October 1, 2020, the date of the Demand Letter.

[59] I find, on all of the evidence, that Ms. Blomme first learned that she had been terminated by operation of the *Act* and the *Regulation* after speaking to a lawyer and that, on her instruction, the Demand Letter was sent relying on the August 30 date as the date of termination. On that date, based on her length of service, she was entitled to eight-weeks' wages under the *Act.* A statutory termination did not entitle her to common law damages. Her entitlement to common law notice was triggered when she first took the position that her employment contract at common law came to an end. I find that Ms. Blomme first took that position in the October 1 Demand Letter and said her termination was on August 30.

[60] Ms. Blomme's revised position that she had been terminated on August 6 is inconsistent with Mr. White's testimony and his reassurance to her that she had not been terminated when they met on August 12. It is also inconsistent with Princeton's negotiation of an extension of her benefits to January 5, 2021.

[61] In the October 1 Demand Letter, Ms. Blomme took the position that she had been terminated by operation of the *Act.* The original notice of civil claim pleaded August 30 as the termination date as a result of the *Act*, and Ms. Blomme confirmed that this was her position at her examination for discovery.

[62] In the circumstances of this case, I conclude that the termination date for the purposes of the *Act* and at common law was August 30, 2020.

Relevant Provisions of the *Act*

[63] The provisions of the *Act* and their interaction with the common law are important to determining the date on which Ms. Blomme was terminated, calculating any damages to which she is entitled, and determining whether she was appropriately compensated for any losses she may have suffered from her termination up to the date on which she could have mitigated her losses by returning to work at Princeton.

[64] Princeton submits that Ms. Blomme was appropriately compensated for any losses she alleges by the eight-weeks' pay in lieu of notice that she received under the *Act* and an offer to return to work, which it says should have been accepted.

[65] The *Act* does not provide that there is a deemed termination after a layoff or a termination for common law purposes. Section 63 provides:

> **63** (1) After 3 consecutive months of employment, the employer becomes liable to pay an employee an amount equal to one week's wages as compensation for length of service.
>
> (2) The employer's liability for compensation for length of service increases as follows:
>
> (a) after 12 consecutive months of employment, to an amount equal to 2 weeks' wages;
>
> (b) after 3 consecutive years of employment, to an amount equal to 3 weeks' wages plus one additional week's wages for each additional year of employment, to a maximum of 8 weeks' wages.
>
> (3) The liability is deemed to be discharged if the employee
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> (a) is given written notice of termination as follows:
>
> (i) one week's notice after 3 consecutive months of employment;
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> (ii) 2 weeks' notice after 12 consecutive months of employment;
>
> (iii) 3 weeks' notice after 3 consecutive years of employment, plus one additional week for each additional year of employment, to a maximum of 8 weeks' notice;
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> …
>
> (4) The amount the employer is liable to pay becomes payable on termination of the employment and is calculated by

> (a) totalling all the employee's weekly wages, at the regular wage, during the last 8 weeks in which the employee worked normal or average hours of work,
>
> (b) dividing the total by 8, and
>
> (c) multiplying the result by the number of weeks' wages the employer is liable to pay.
>
> (5) For the purpose of determining the termination date under this section, the employment of an employee who is laid off for more than a temporary layoff is deemed to have been terminated at the beginning of the layoff.
>
> (6) If, after 3 consecutive months of employment, an employee gives notice of termination to the employer and the employer terminates the employment during that notice period, the employer is liable to pay the employee an amount equal to the lesser of
>
> (a) an amount in money equal to the wages the employee would have earned for the remainder of the notice period, or
>
> (b) an amount in money equal to the amount the employer is liable to pay on termination.
>
> [Emphasis added.]

[66] Section 1(1) of the *Act* defines certain terms, including temporary layoff, termination of employment, and wages:

> "**temporary layoff**" means
>
> (a) in the case of an employee who has a right of recall, a layoff that exceeds the specified period within which the employee is entitled to be recalled to employment, and
>
> (b) in any other case, a layoff of up to 13 weeks in any period of 20 consecutive weeks;
>
> "**termination of employment**" includes a layoff other than a temporary layoff;

[67] As a result of the COVID-19 pandemic, s. 45.01 of the *Regulation* extended the maximum period an employee could remain on a temporary layoff for layoffs beginning on or after June 1, 2020. The definition of a temporary layoff was extended from 13 consecutive weeks to 24 consecutive weeks, with a maximum end date of August 30, 2020: s. 45.01(2).

[68] A natural inference from these definitions is that a statutory termination, at least for the purposes of s. 63 of the *Act*, occurs after a layoff extends beyond the period of a temporary layoff: *Yates v. Langley Motor Sport Centre Ltd.*, 2022 BCCA

398 at paras. 2, 57. Thus, Ms. Blomme's statutory entitlement to wages was triggered on August 30, 2020, by operation of the *Act* and the *Regulation.*

[69] Presumably, because Ms. Blomme wanted to retain her right to be recalled, she does not argue that her common law entitlement to damages in lieu of notice dates back to the date on which her temporary layoff was effective.

[70] Section 63(5) deems the termination date only for statutory compensation as the date on which the employee was first laid off. However, that termination date applies only to claims under s. 63 and is not wholly determinative of the date for claims to common law damages.

[71] In this regard, British Columbia has not adopted the approach taken in Ontario that a statutory termination is a termination for all purposes: see *Elsegood v. Cambridge Spring Service (2011) Ltd.*, 2011 ONCA 831 at paras. 5–6, followed in *Jadubir v. Martinrea*, 2012 ONSC 1367 at para. 15.

[72] In *Nicolas Jr. v. Ocean Pacific Hotels Ltd.*, 2022 BCSC 1052, the court considered a COVID-19 layoff. In that case, the layoff extended past August 30, 2020. The parties were aware of the August 30 deadline, and the defendant accepted that date. The plaintiff submitted that, for the purpose of a wrongful dismissal analysis, the beginning of the layoff should be used as the termination date. The court rejected that position:

> [22] … As noted, the plaintiff's pleading alleges that his employment was terminated as of August 30. In this regard, I accept the defence submission that deeming provision of s. 63(5) of the *Act* is limited to claims made under the *Act* and within that section. If an employee claims compensation under the *Act* after a temporary layoff, then the parameters of [their] employment are to be determined under s. 63. In contrast, Mr. Nicolas seeks common law damages for wrongful dismissal. Hence, s. 63(5) of the *Act* does not apply.

[73] Instead, the August 30 termination date was determined by reference to the "tacit agreement" between the parties that they were no longer bound by the employment agreement as of August 30, 2020: paras. 21, 23–24.

[74] A wrongful dismissal occurs when an employer terminates an employment relationship without reasonable notice or pay in lieu thereof: *Preuss v. Dr. P. Safari-Pour Inc. (I.Q. Dental)*, 2021 BCSC 973 at para. 59, citing *Matthews v. Ocean Nutrition Canada Ltd.*, 2020 SCC 26 at paras. 43, 74. In the absence of a written employment contract, the implied term of reasonable notice protects employees' reasonable expectations when they are terminated without cause. In the absence of an express contractual term, at common law, an employee also owes their employer reasonable notice of termination: *Consbec Inc. v. Walker*, 2016 BCCA 114 at paras. 67, 73; *Sure-Grip Fasteners Ltd. v. Allgrade Bolt & Chain Inc.* (1993), 45 C.C.E.L. 276, 46 C.P.R. (3d) 443 (Ont. Ct. J. (Gen. Div.)). The implied term of reasonable notice is a mutual obligation.

[75] In constructive dismissal cases, the employer has repudiated the contract of employment by its actions, and the employee accepts that repudiation as a termination. The termination date is the date the employee accepts the repudiation and that triggers the employer's duty to offer pay in lieu of notice.

[76] The underlying principle is to protect the reasonable expectations of, and ensure fairness to, the parties. What amounts to a reasonable expectation depends on the circumstances: *Ansari v. British Columbia Hydro and Power Authority*, 2 B.C.L.R. (2d) 33 at 43, 1986 CanLII 1023 (S.C.), aff'd 55 B.C.L.R. (2d) xxxiii, [1986] B.C.J. No. 3006. For example, in *See Thru Window Cleaners Inc. v. Mahood*, 2016 BCSC 2134, a window cleaner was laid off seasonally. He was found to have been terminated between each season. The employer argued that each layoff should not be treated as a "full termination" so that a non-competition agreement survived termination.

[77] In *See Thru Window Cleaners Inc*., Justice Burke wrote:

> [26] These principles, as reflected in *Dobbs v. The Cambie Malone's Corporation*, 2011 BCSC 1830 at paras. 48, 38, and *George v. Cowichan Tribes*, 2015 BCSC 513 at para. 215 are:
>
> > i) the court has the discretion to disregard interruptions in service when determining the reasonable notice period, and will examine the

> break in the context of the full period of employment (*George* at para. 215);
>
> ii) in the absence of an express contract term dealing with a hiatus in an employee's term of employment, the question is whether the employee and employer have conducted themselves at the point of rehire in a manner consistent with the employee being given credit for the entire employment (*Dobbs* at para. 48); and
>
> iii) this is a question of fact to be determined on all the evidence, and each case is fact specific (*Dobbs* at paras. 48, 38).

[78] Because the overarching principle is to protect the parties' reasonable expectations, the court is not bound by a purely technical analysis of hiring and termination dates. In this case, August 30, 2020—the date of the deemed termination—is a reasonable date for the analysis.

[79] Ms. Blomme's reasonable expectations of notice or pay in lieu thereof were triggered on August 30, 2020. When she retained counsel, she learned of the deemed termination, and relied on it for the basis of her wrongful dismissal claim. Although it is clear on the evidence that Princeton did not consider Ms. Blomme to have been terminated before it received the October 1 Demand Letter, in the circumstances of this case, I find that a termination date of August 30 is fair to both parties' reasonable expectations. As the employer, Princeton should have been aware of the deemed termination provisions of the *Act* and the *Regulation.*

The Reasonable Notice Period

[80] The parties disagree about the notice, or pay in lieu thereof, to which Ms. Blomme is entitled. The determination of notice in each case is fact specific. In *Bardal*, the court considered the plaintiff's age, length of service, level of responsibility, and the availability of equivalent alternative employment as key factors.

[81] Ms. Blomme says that when she was terminated she was 64 years old and had been employed by Princeton for over twenty years. At termination, she was a plant supervisor.

[82] Ms. Blomme lives in a small town where comparable jobs are difficult to find. As of the date of trial, she had not worked in over two years except in a part-time cleaning job. Her prospects of finding comparable employment in Princeton were not good. At trial, she submits that she was entitled to a 24-month notice period.

[83] Princeton submits that the reasonable notice period should be in the range of 12 to 15 months.

[84] I have considered the three cases relied on by Ms. Blomme and the seven cases relied on by Princeton. Ms. Blomme was older than all of the other workers terminated in those cases. Although she held a supervisory position, she was one of three supervisor s reporting to Mr. White, a plant manager. She lacked formal education. Her job duties did not include general hiring or financial responsibilities. Only one of the ten cases I was referred to resulted in 24 months notice. The cases that were most similar to Ms. Blomme's ranged between 12 to15 months although she was older than most of the plaintiffs and had less prospects of re-employment.

[85] Applying the *Bardal* factors, and in the circumstance of this case, the range of reasonable notice is between 15 and 16 months.

Mitigation and Reasonableness of Returning to Work

[86] There is no disagreement that an employee has a common law duty to take reasonable steps to mitigate the loss or damage they may experience as a result of a wrongful termination: *Coutts v. Brian Jessel Autosports Inc.*, 2005 BCCA 224 at paras. 22–23.

[87] Damages for wrongful dismissal can be reduced or eliminated if the plaintiff did not take adequate efforts to secure alternative employment or did not accept an offer to return to employment, provided that it is a reasonable working situation: *Fredrickson v. Newtech Dental Laboratory Inc.*, 2015 BCCA 357 at para. 18; *Cho v. Café La Foret Ltd.*, 2022 BCSC 1560 at para. 165, citing *Cimpan v. Kolumbia Inn Daycare Society*, 2006 BCSC 1828 at para. 109.

[88] In this case, the main factual issue is whether it was reasonable for Ms. Blomme to return to work at Princeton in mitigation of her damages.

[89] Princeton acknowledges that comparable employment opportunities for Ms. Blomme were relatively scarce during the relevant times. Nonetheless, it is noteworthy that Ms. Blomme first began looking for work on October 2, 2020, after consulting her counsel and sending the Demand Letter.

[90] The extent of Ms. Blomme's mitigation effort was to create a chart of all available jobs in Princeton posted in "Indeed" and "Job BC" alerts. In her direct evidence, she referred to a list of 15 available positions that she reviewed between October 2, 2020, and January 23, 2021. She did not apply to any of them. Instead, she indicated on her chart that she did not have the necessary experience or skills or was not physically capable of performing the tasks. She did not testify that she contacted the employers in question to discuss whether her experience would be of interest to them or to canvas the physical requirements of the jobs. On two additional occasions in November 2021, Ms. Blomme checked all the Indeed jobs and said that there was nothing new. Since then, and since accepting her current part-time work, there is no evidence that she has taken further steps to mitigate her damages.

[91] I take this into account when assessing whether Ms. Blomme really wanted or needed to return to work and her failure to even consider or explore what Mr. White was asking of her in his October 8, 2020, email and his October 23 and 26 follow-up emails.

[92] As the Supreme Court of Canada explained in *Evans v. Teamsters Local Union No. 31*, 2008 SCC 20, where an employer offers an employee a chance to mitigate their damages by returning to work, the key issue for determination is whether a reasonable person would accept that opportunity. The Court said, in part:

> [28] … in some circumstances it will be necessary for a dismissed employee to mitigate his or her damages by returning to work for the same employer. Assuming there are no barriers to re-employment (potential barriers to be discussed below), requiring an employee to mitigate by taking temporary work with the dismissing employer is consistent with the notion

> that damages are meant to compensate for lack of notice, and *not* to penalize the employer for the dismissal itself …
>
> [29] … It is likewise appropriate to assume that in the absence of conditions rendering the return to work unreasonable, on an objective basis, an employee can be expected to mitigate damages by returning to work for the dismissing employer. …
>
> [Italic emphasis in the original.]

[93] Justice Bastarache advocated "a multi-factored and contextual analysis", applying "an objective standard … to evaluate whether a reasonable person in the employee's position would have accepted the employer's offer":

> [30] … Where the employer offers the employee a chance to mitigate damages by returning to work for [them], the central issue is whether a reasonable person would accept such an opportunity. In 1989, the Ontario Court of Appeal held that a reasonable person should be expected to do so "[w]here the salary offered is the same, where the working conditions are not substantially different or the work demeaning, and where the personal relationships involved are not acrimonious" …. [O]ther relevant factors include the history and nature of the employment, whether or not the employee has commenced litigation, and whether the offer of re-employment was made while the employee was still working for the employer or only after he or she had already left (paras. 12-18). In my view, the foregoing elements all underline the importance of a multi-factored and contextual analysis. The critical element is that an employee "not [be] obliged to mitigate by working in an atmosphere of hostility, embarrassment or humiliation" … and it is that factor which must be at the forefront of the inquiry into what is reasonable. Thus, although an objective standard must be used to evaluate whether a reasonable person in the employee's position would have accepted the employer's offer … it is extremely important that the non-tangible elements of the situation — including work atmosphere, stigma and loss of dignity, as well as nature and conditions of employment, the tangible elements — be included in the evaluation.
>
> [Citations omitted; emphasis added.]

[94] Justice Bastarache observed, at para. 31, that persons who are dismissed because of legitimate business needs as opposed to concerns over their performance are more likely to be required to mitigate their damages by returning to work with their former employers. This is "because the circumstances surrounding the termination of their contract may be far less personal than when dismissal relates more directly to the individuals themselves": *Evans* at para. 31.

[95] Reframed for the circumstances in this case, the issue is whether Ms. Blomme, who was terminated by operation of statute after a temporary layoff that she initially agreed to, and who by October 1, 2020, took the position that she had been terminated, was required to mitigate by returning to work for Princeton in the same job as she had before the termination. Ms. Blomme's circumstances are far-removed from a termination based on concerns about her performance. There was nothing personal about the decision to lay off Ms. Blomme, and I have accepted that Princeton had a legitimate reason for deciding to recall Mr. Mills before her. Even if Princeton was wrong in that assessment, it was not a decision made with the intent to humiliate Ms. Blomme.

[96] In this case, Ms. Blomme was not singled out for layoff. She was one of a number of management and union staff at Princeton who were laid off as a result of the unprecedent global pandemic faced by many employers.

[97] In the absence of conditions that would render her return to work unreasonable, on an objective basis, Ms. Blomme was expected to mitigate her damages by returning to work for Princeton. A reasonable person would be expected to do so.

[98] *Evans* and the cases relied on by Ms. Blomme arise in the context of a termination of employment. More relevant to the analysis here are the cases that have applied the *Evans* considerations in the context of temporary layoffs.

[99] In *Besse v. Dr. A.S. Machner Inc*., 2009 BCSC 1316, the court determined that placing the plaintiff on a temporary layoff amounted to constructive dismissal but that the plaintiff's rejection of an offer to return to work was a failure to mitigate. The court commented on the defendant's financial motivation, the fact that the temporary layoff was done in good faith, and when the defendant's legal error was pointed out to him, he responded courteously and respectfully with an offer to have the plaintiff return to work on the same terms as previously applied and to make good on any loss of income in the interim: paras. 90–91. The court said:

> [92] Even if Dr. Machner, had, in the several weeks between taking over the dental practice and Mrs. Besse's departure on medical leave, inquired of her intentions by reference to her age, and any obligation that may exist to make a severance payment, his actions between mid-December and February 14th, viewed objectively, reveal no good reason why a reasonable person in Mrs. Besse's specific circumstances would have experienced stigma or loss of dignity, or have valid concerns for the workplace atmosphere on a return to her previous employment.

[100] In a similar Ontario case, *Gent v. Strone Inc*., 2019 ONSC 155, a 50-year-old employee with 23 years of service was placed on a temporary layoff because of a decline in business. At the time, the employee was told he would be recalled as soon as possible after business improved.

[101] After about two weeks, the plaintiff's lawyer sent a demand letter claiming constructive dismissal. Within a few days, the employer's lawyer advised that there was a possibility that the plaintiff would be recalled shortly. The plaintiff's lawyer advised that his client felt the relationship had broken down and he would not be returning to work at the employer.

[102] Less than two weeks later, the plaintiff was recalled to "active employment": para. 23. He refused the recall on the basis that it would have been "embarrassing and degrading" for him to return to work for the employer: para. 28. He commenced an action alleging constructive dismissal.

[103] The court found that the plaintiff had been constructively dismissed, as the employer had no contractual right to temporarily lay off the plaintiff (para. 30), but that he should have accepted the recall (para. 57).

[104] Relying on *Evans*, the court looked at whether the salary offered was the same, the working conditions were substantially similar, the work was not demeaning, and the relationships involved were not acrimonious: *Gent* at para. 32, citing *Evans* at para. 30. It determined that a reasonably objective individual in the plaintiff's circumstances would not have concluded that returning to work after a 3.5-week layoff was too embarrassing, humiliating, or degrading: para. 43. The plaintiff

had failed to mitigate and he was only entitled to damages for the 3.5 weeks between his layoff to the date he was offered re-employment: para. 45.

[105] Similarly, in *Hooge v. Gillwood Remanufacturing Inc.*, 2014 BCSC 11, the plaintiff had worked at a mill for 36 years when a new owner, Mr. Gill, advised him he was being laid off due to a shortage of work. The plaintiff advised Mr. Gill that he would seek damages for what he believed was fundamental breach of the employment relationship and sued for constructive dismissal. The court found constructive dismissal (para. 38) but that it had been unreasonable for the plaintiff to reject the offer of re-employment (para. 90).

[106] The evidence established that Mr. Gill was concerned about the financial viability of the company and was looking for ways to improve productivity: para. 88. While he may have had a different management style from the previous owners, the evidence did not establish any acrimony, mistreatment, belittling, or embarrassing actions of such a nature that a reasonable person would refuse to mitigate their losses by returning to the workplace. The court said:

> [89] Even if the offer to re-employ was motivated by a desire to avoid the payment of damages in lieu of severance, that does not make it reasonable to decline the offer. …

[107] In *Chevalier v. Active Tire & Auto Centre Inc.*, 2012 ONSC 4309, aff'd 2013 ONCA 548, the plaintiff had been employed by the defendant for 33 years when he was told he was being laid off. The layoff decision was made for economic reasons and under the employer's mistaken belief that it had the right to lay the plaintiff off. The plaintiff sued for wrongful dismissal. A few days later, the employer offered a return to work on the basis that it had made a mistake in laying him off. The plaintiff refused to return on the basis that he had been constructively dismissed.

[108] The employer agreed that the plaintiff was constructively dismissed: paras. 10, 13. The court found that the evidence established that a reasonable person would have accepted the opportunity to return to work and, as a result, the plaintiff had failed to mitigate his damages: para. 44. The employer had not

subjected him to demeaning or humiliating conduct. The employer's mistaken belief was not sufficient to ground a claim that the workplace would be hostile, embarrassing, or humiliating.

[109] In *Davies v. Fraser Collection Services Limited*, 2008 BCSC 942, the plaintiff, who was hired in April 2001, was laid off due to the loss of a major client in September 2006. He was recalled in November 2006, but he ignored the recall notice and sued for damages. He took the position that he did not want to be in a situation where he could be laid off again and he felt humiliated as a result of being laid off.

[110] The court determined that the layoff was a constructive dismissal entitling the plaintiff to damages of six and a half months but that, by declining to return to work, the plaintiff failed to mitigate and reduced his damages to two-months' salary from the date of the layoff until the date of the recall: para. 50. The court said:

> [43] … [T]here were no conditions arising out of factors such as humiliation, embarrassment, or hostility in the workplace that would render the return to work unreasonable, despite Mr. Davies' statement to the contrary. …

[111] In *Oostlander v. Cervus Equipment Corporation*, 2022 ABQB 200, rev'd on other grounds 2023 ABCA 13, an employee worked for the defendant company at one location for 36 years. The company centralized its equipment servicing to a facility 50 km away. The plaintiff received a letter of termination as the company planned to close the old location but offered the plaintiff a job at the new location to do the same work for the same pay. The plaintiff rejected the offer and sued for constructive dismissal. The employee argued, in part, that it would have been unreasonable to expect him to return to work given the dynamics of his relationship with the employer following these disputes. The court said:

> [28] I recognize that the personality conflicts and changing dynamics that can accompany an offer of re-employment with the same employer will often mean it is not reasonable to expect the employee to stay with the same employer. However, I would not have found it reasonable for Mr. Oostlander to reject this offer based solely on his treatment by Cervus.

> [29] I understand his frustration at receiving one months' notice of termination after 36 years of employment and his skepticism of an offer to relocate … only after he retained counsel, if the offer had not required him to relocate or undertake a daily and significant commute, absent other factors I would have thought it unreasonable to refuse.
>
> [30] There was no evidence of any animus whatsoever between Mr. Oostlander and any of his superiors. While I do not sanction the way Cervus tried to implement its business decision to move the servicing operations … without recognizing the financial obligations it had to Mr. Oostlander as a result, the decision itself was a *bona fides* business decision; *Evans v Teamsters Local 31*, 2008 SCC 20 at para.31. There was clearly no "atmosphere of hostility, embarrassment or humiliation" as referenced in the *Evans* case.

[112] I conclude that, in the circumstances of this case, a reasonable person in Ms. Blomme's position would have accepted Princeton's offer. Although the specific terms of her re-employment were not set out in Mr. White's October 8, 23, and 26 emails, it was incumbent on her to at least explore the option of returning to work. Ms. Blomme was being asked to return to the same position, salary, and benefits, which had never been cut off: see e.g. *Davies* at para. 43. There was no evidence to support that she would be returning to an atmosphere of hostility, embarrassment, or humiliation. There was no evidence that either Mr. White or Mr. Andrews bore Ms. Blomme any animus. Ms. Blomme's mistrust of Mr. White appears to have been an unfortunate result of their miscommunication and misunderstanding.

[113] In any event, on October 26, 2020, Mr. White wrote to Ms. Blomme, suggesting a return to work as soon as November 3, 2020, on her regular shift. Again, Ms. Blomme did not respond.

[114] While it is true that some of Mr. Andrews' comments to Ms. Blomme's counsel were unfortunate, those comments were directed at counsel and not at Ms. Blomme, and were made after Mr. White reached out to Ms. Blomme about her interest in returning to work. Those comments cannot have informed her decision not to explore that possibility with Mr. White.

[115] Even if Princeton's decision to offer Ms. Blomme the option of returning to work was triggered by the Demand Letter and its wish to avoid litigation, it was an

offer she should have considered: see *e.g.*, *Hooge* at para. 89. Her failure to do so resulted in a failure to mitigate.

[116] The layoff occurred in the context of a global pandemic during which many employees were laid off, including many others at Princeton. There was a reasonable explanation for why Ms. Blomme was not recalled when other employees were.

[117] Alternatively, Ms. Blomme should have accepted Princeton's offer of eight weeks' pay in lieu of notice and re-employment set out in its letter dated October 30, 2020.

[118] Had Ms. Blomme returned to work as offered, and based on a termination date of October 1, 2020, she would have been made whole.

Conclusion

[119] For the foregoing reasons, Ms. Blomme's claim is dismissed.

[120] Princeton is not seeking its costs.

"MacNaughton J."