IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Zoehner v. Algo Communication Products Ltd.,* 2023 BCSC 224

Date: 20230215
Docket: S244165
Registry: New Westminster

Between:

Doug Zoehner

Plaintiff

And

Algo Communication Products Ltd.

Defendant

Before: The Honourable Mr. Justice Verhoeven

Reasons for Judgment

Counsel for the Plaintiff:	T.R. Thomas
Counsel for the Defendant:	S.T. Robertson B. Finkelstein, Articled Student
Place and Date of Trial:	New Westminster, B.C. January 16-20, 2023
Place and Date of Judgment:	New Westminster, B.C. February 15, 2023

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I. INTRODUCTION

[1] The plaintiff, Doug Zoehner, claims damages for wrongful dismissal by his employer, the defendant Algo Communication Products Ltd. (“Algo”).

[2] Algo is a closely held company, owned by the plaintiff and his two brothers. The plaintiff and his brother Paul Zoehner each own 44.3% of the shares of Algo. A third brother, Kerry Zoehner, owns 11.34%. Each brother holds his share through his respective holding company.

[3] As the three brothers share the same surname, in these reasons it will sometimes be convenient to refer to them by their first names.

[4] On January 7, 2021 Algo notified the plaintiff that it was terminating his contract of employment, effective immediately. Algo alleged that the plaintiff had abandoned his employment with Algo as of May 14, 2020, and that it had elected to treat his abandonment as a repudiation of his employment obligations. Algo’s directors confirmed the decision in a meeting the same day, by a majority vote of Paul and Kerry. Doug voted against.

[5] The plaintiff alleges that he was dismissed from employment. He denies “abandonment”; that is, he denies that he repudiated his contract of employment.

[6] Algo contends that if the plaintiff establishes that he was wrongfully dismissed, he failed to mitigate his loss.

[7] The defendant concedes that if the court rules in the plaintiff's favour on the abandonment issue, then reasonable notice would be 24 months, subject to its failure to mitigate defence. It argues that the plaintiff's failure to mitigate ought to result in a six-month reduction in the damages. The plaintiff contends that if the court finds that he failed to mitigate his loss, the reduction in damages should be by two or three months.

[8] The issues, then, are as follows:

1. whether the plaintiff was dismissed by Algo, or whether he repudiated his contract of employment, by abandoning it;

2. if the plaintiff establishes wrongful dismissal, whether there should be a reduction in damages as a result of the plaintiff's failure to mitigate loss.

II. BACKGROUND

[9] The parties have provided a helpful statement of agreed facts. The agreed facts are as follows:

> 1. Algo is a closely held family company. It was founded in 1968 by Alma and Gordon Zoehner, the parents of the company's current shareholders: Doug Zoehner ("Doug"), Paul Zoehner ("Paul") and Kerry Zoehner ("Kerry").
>
> 2. By the early 1980s Algo's operations had developed into two separate and distinct divisions within the same corporate entity:
>
> (a) The "Interconnect Division", which installed and serviced phones. The operations of this Division was eventually run exclusively by Doug
>
> (b) The "Manufacturing Division", which develops and manufactures internet protocol based communication equipment. The operations of [this] division was eventually run exclusively by Paul. A combined manufacturing and distribution business evolved into exclusively manufacturing by 1994 and for the past decade manufacturing network based audio products and selling those globally.
>
> 3. The operations of the Interconnect Division was exclusively run by Doug and the operations of the Manufacturing Division was exclusively run by Paul. Doug had no involvement in the operations of the Manufacturing Division and Paul had no involvement in the operations of the Interconnect Division. Interconnect deployed and maintained network infrastructure, servers, wireless, internet and telephone.
>
> 4. The Manufacturing Division and the Interconnect Division shared the same accounting system, including the use of a shared Controller, and shared accounts payable and accounts receivable personnel.
>
> 5. In 1988, Gordon transferred 33% of Algo's shares to each of Doug and Paul. After Gordon passed away in 2009, his remaining 34% of his shares were split equally among all three brothers. As a result, Doug and Paul each control 44.33% of the shares of Algo, and Kerry controls 11.34% of the shares of Algo, all through their respective holding companies as follows:
>
> (a) Parkside Ventures Ltd., owned by Doug;
>
> (b) 0869959 B.C. Ltd. owned by Paul; and
>
> (c) 0824308 B.C. Ltd. owned by Kerry.

6. Kerry is not an employee of Algo, and has no involvement in the day-to-day operations of Algo.

7. The Interconnect Division was sold to Digitcom Telecommunications Inc. (“Digitcom”) pursuant to an asset purchase agreement dated December 31, 2019 (the “Sale”) as reflected in plaintiff’s document 1.3 (the “APA") [Tab 154 of the Joint Book of Documents]. The APA contains all of the terms of the Sale from Algo to Digitcom.

8. The Sale and the APA were approved by a unanimous vote of Algo’s shareholders dated December 31, 2019 as reflected in plaintiff document 1.2 [Tab 153 of the Joint Book of Documents].

9. Between January 1, 2020 and April 30, 2020, Doug provided certain services to Digitcom and Digitcom paid to Algo $8,333 per month for those services.

10. On March 31, 2020, Digitcom advised Doug that it would no longer need his services effective April 30, 2020 as reflected in plaintiff document 1.4 [Tab 155 of the Joint Book of Documents].

11. Algo and Ryan Zoehner ("Ryan”) entered into an employment agreement dated July 27, 2020 as reflected in the defendant’s document 264 [Tab 120 of the Joint Book of Documents], Ryan began employment with Algo on August 4, 2020.

12. Up until November 12, 2020, Doug and Paul were the only directors of Algo.

13. At Algo’s Annual General Meeting on November 12, 2020, Algo’s shareholders unanimously voted to approve the appointment of Kerry as a director of Algo, bringing the total number of Algo directors to three (Doug, Paul, and Kerry).

14. On January 7, 2021, Algo had a meeting of its directors. At that meeting a resolution was passed terminating Doug's employment effective January 7, 2021.

15. It was an express or implied term of Doug’s contract of employment with Algo that:

> (a) he would at all times observe a duty of loyalty and fidelity towards Algo;
>
> (b) he would at all times observe a duty of good faith towards Algo;
>
> (c) he would at all times refrain from taking any action which would be reasonably likely to be detrimental to Algo; and
>
> (d) he would at all times devote his full time and attention to the interest and affairs of Algo, and while employed by Algo, not be involved in any activity that would undermine the interests of Algo.

[10] Kerry is the oldest brother. The next eldest brother is the plaintiff Doug, and Paul is the youngest brother. Doug is currently 64 years of age. There is no evidence as to Paul's exact age.

[11] As noted in the agreed facts, Algo was founded by Alma and Gordon, the parents of the three brothers. The name “Algo” is derived from their first names. Gordon was the president and manager, while Alma took care of administration, and bookkeeping.

[12] Doug obtained a diploma from the British Columbia Institute of Technology sometime in the 1970s. He began working for Algo in the late 1970s or early 1980s. At the time Algo’s business focused on what would later be called the “Interconnect Division” which involves installation and servicing of telephone systems for businesses, and specifically, connecting business telephone systems to a telephone company, such as BC Telephone Company and its successor, Telus. By 1985 he was general manager of the company's Interconnect Division. As general manager, he was responsible for all aspects of the business, including supervising the company's staff of technicians. The company's customers required 24 hour technical support for the telephone systems.

[13] Changes in the telephone industry adversely affected Algo’s Interconnect Division. Its business began to decline in the early 2000's. The decline was particularly notable from about 2005, when the division lost large government contracts. The Interconnect Division began to focus on small businesses.

[14] At one time, the Interconnect Division had about 22 employees. It employed an operations manager, approximately 12 technicians, four salespeople, two customer service employees, a trainer, a purchaser, and some office staff. As the company's business diminished, its staff was reduced.

[15] By mutual agreement, with very limited exceptions the parties have not provided the court with corporate or personal financial information. The documents entered as exhibits have been redacted to remove all such information. They agree

that this information is not relevant to the issues before the court. However, the plaintiff acknowledged that by 2019 the financial performance of the Interconnect Division was “terrible”. The Division was not profitable. It was a drag on the profits of Algo. The defendant agrees.

[16] Paul obtained a bachelor of science degree with a major in physics from the University of British Columbia in 1985. He began working full-time with Algo in 1985. As he explained, in the 80s and early 90s Algo’s business consisted primarily of the telecom or interconnect business. The company also distributed various products.

[17] Paul's role evolved into heading up what later became the “Manufacturing Division”. After he joined the company in 1985, Paul designed an intercom product. He has designed other products since then. He still enjoys designing new products. Algo developed various products which it manufactures. As noted in the agreed facts, the products consist of internet protocol based communications equipment. Its products include things such as intercom devices, speakers, and visual alert lights, used in commercial or industrial settings.

[18] Gordon Zoehner worked for Algo until shortly before his death in April 2009. At that time, his remaining shares were transferred to the three brothers, resulting in equal shareholdings between Doug and Paul, and a smaller shareholding, 11.34%, by Kerry, through their respective holding companies. At the same time Doug was appointed president of Algo, and Paul was appointed secretary. Doug and Paul agree that the titles of “President” and “Secretary” were for corporate registration purposes only and had no practical significance. Doug and Paul were the only two directors of Algo.

[19] In summary, then, in recent years, Algo’s business consisted of two largely independent divisions, the Interconnect Division, managed by Doug, and the Manufacturing Division, managed by Paul. As Doug and Paul were the only directors, a stalemate was guaranteed in the event of a disagreement between them as to the company’s affairs.

[20] The operations of the two divisions were functionally independent. They both operated out of a single shared facility located at 4500 Beedie Street in Burnaby. In addition to operating out of the same facility, they shared some corporate services, such as the services of a controller, and some accounting and other support staff.

[21] Kerry operates his own separate business, Sendum Wireless Corporation, out of the same business premises. However he had no role at any time in the operations of Algo.

[22] The company's business premises are owned by a company called Compak. Compak is owned by the three brothers, in the same proportion as their shares in Algo.

[23] In contrast with the declining fortunes of the Interconnect Division, Algo's Manufacturing Division has been very successful. The Manufacturing Division's business dipped somewhat in 2010 and 2011, but has enjoyed strong growth after that.

[24] With the sale of the Interconnect Division effective December 31, 2019, Algo's business consists of the sale of manufactured products. Currently, the company has 75 or 80 employees.

[25] Doug and Paul's salaries were set by mutual agreement between them. They met with the company's outside accountant annually, and determined their salaries. As of 2020, their salaries were $350,000 per year, each. As shareholders, they also receive dividends from Algo, and from Compak.

[26] As the Interconnect Division and the Manufacturing Division operated independently, Doug and Paul had little or no need to communicate with each other concerning business matters, and did not do so. They tended to communicate by email, only. Doug described his relationship with Paul as being "extremely strained" at the material times. Paul does not disagree with that characterization.

[27] As a result, the relevant communications between them are largely contained in the numerous emails in evidence.

[28] The brothers began discussing a sale of Algo or other means by which their interests could be separated in 2015. Paul sent a letter to Kerry and Doug in which he stated that he wanted to enter into discussions for his “exit strategy from Algo as a minority shareholder”. He suggested various options, including a sale of the company (thus, both the Interconnect and Manufacturing Divisions), or a sale of his shares to a third party, or other options for separating or selling their business and ownership interests.

[29] In 2017 the shareholders retained a business valuator, Crowe MacKay LLP, who prepared a report of fair market value of the company as a whole as at June 30, 2017. The report is not in evidence. After the report was received, in January 2018 Paul reiterated that he was looking for an “exit strategy” that involved the sale of Algo.

[30] However, there was no actual agreement among the shareholders as to what should be done with Algo. On October 24, 2018 Paul sent Doug an email asking him for an update on “winding down interconnect”. Doug responded by saying that Interconnect could not be “wound down” due to Algo’s ongoing customer service agreements as well as employment obligations to its employees.

[31] According to Doug, he believed that the brothers had agreed to sell Algo. Given the Interconnect Division's poor financial performance, and separate business operations, he maintains that it made sense to sell the Interconnect Division, first. He contends that the shareholders had verbally agreed on this plan in a meeting at a golf course in 2015.

[32] On September 10, 2018 the operations manager for the Interconnect Division resigned. Doug advised Paul via email that, given that event, “it is time to begin the divestiture process”.

[33] Doug began exploring a sale of the Interconnect Division. A buyer was found in 2019. Terms of an agreement in principle were agreed to as of November 19, 2019. On Algo's behalf, Doug entered into a “term sheet” with Digitcom Telecommunications Inc. (“Digitcom”), for the sale of the Interconnect Division effective December 31, 2019. It was an asset sale. The price was $60,000, subject to adjustment based upon the working capital of the business, to be later determined. Doug's recollection was that the actual price ended up at about $160,000. The purchase price was paid to Algo.

[34] Paul left the sale of the Interconnect Division almost entirely in Doug’s hands. However he was given the term sheet for review, and provided comments. He questioned whether it might be cheaper to simply cease operations, instead of selling the division. Doug reiterated that the buyer was relieving Algo of liabilities to its employees and customers.

[35] Algo’s shareholders approved the sale of the Interconnect Division in a unanimous shareholders’ resolution dated December 31, 2019.

[36] As part of the sale to Digitcom, Algo agreed to provide transitional services to be performed by Doug for a period of up to nine months, from January 1 to September 30, 2020. The buyer agreed to pay Algo a management fee equal to $8,333 per month (the equivalent of $100,000 per annum) for Doug’s transitional services.

[37] The buyer was entitled to terminate Algo’s transitional services on one month's notice. It provided notice to Doug on March 31, 2020 that his transitional services would no longer be required as of April 30, 2020.

[38] As a result, effective April 30, 2020, Doug had no more work to do relating to Algo’s former Interconnect Division.

[39] However, neither brother was communicating with each other about their respective, differing, beliefs as to their plans for themselves and Algo, going forward.

[40] Doug acknowledges that he did not tell Paul that the buyer had given notice to terminate his services on March 31. Paul learned of this development after the fact. This small point illustrates the poor state of their communications.

[41] While, as noted, Doug states that he believed the sale of the Interconnect Division was simply the first step to the sale of Algo as a whole, Paul testified that he had a different belief. He testified that he believed that Doug would retire once the Interconnect Division was sold, and Algo's transitional services were concluded. He concedes that this was simply an assumption on his part.

[42] Doug and Paul exchanged numerous email messages after April 30, 2020, concerning Doug's role with Algo and payment of his salary, and the sale of Algo or a sale of Doug's shares in Algo and Compak. Doug's position was that as of May 1, 2020, he continued to be employed by Algo, and continued to be entitled to draw his $350,000 per year salary. Paul's position was that, with the sale of the Interconnect Division, Doug had retired, and was obliged to decline payment of his salary.

[43] On May 14, 2020, Paul sent an email to Doug, with a copy to Kerry, stating:

> I wish it was not necessary for me to send this email.
>
> As you no longer have any active role or duties in the company I had expected that you would stop collecting a salary after the April 30, 2020 sale completion of the Interconnect Division. I understood that the reason you arranged the sale of the Interconnect Division was to facilitate your retirement.
>
> Gurinder advises that she has received no instruction from you to stop paying your full salary. It is my position that any salary paid after April 30th is unfairly prejudicial to the other shareholders. If you require income from the company then arrangements will have to be made with approval of all shareholders for either:
>
> 1. A job
> 2. Shareholder loan
> 3. Share buyback program
>
> Please advise within 10 days what action you intend to take in this regard.

[44] Gurinder Badesha is Algo's financial controller.

[45] Doug's email response was sent the same day. He stated:

> The plan, as I recall, that was presented by you at the golf course in Burnaby was for the sale of Algo. I have completed the first step in carving off the Interconnect. I expect you now to proceed with packaging Algo for sale. I will remain on payroll until completion of the sale. Funds received will support my retirement.
>
> Perhaps we need some transparencies with the Board regarding compensation offered to your immediate family.

[46] The reference to "compensation offered to your immediate family" had to do with Paul's announcement to Doug and Kerry via email on May 1, 2020 that Algo would be hiring his son Ryan as a Managing Director, effective July 13, 2020. Doug was not consulted about the hiring of Ryan.

[47] Paul responded on May 27, in part, with an email stating:

> In our golf course meeting of March 2015 to which you refer there was no agreement to sell the company. I put forth seven exit strategy options in the advance agenda you requested and none were adopted. I trust Kerry's recollection will be the same as mine.
>
> …
>
> Your expectation to continue collecting a salary of $350,000 until such time as the company is sold is abusive to the other shareholders.
>
> …
>
> You have been actively engaged in selling the interconnect division to facilitate your retirement since September 2018. The interim 19 months should have been sufficient time for you to organize your departure as an employee of the company since you have known that you would have no active role in the company following the divestment.
>
> Your options remain as stated in my email of May 14. Any salary drawn without working in the company after April 30th will be considered a repayable shareholder loan until this matter can be dealt with at an annual general meeting.

[48] Thereafter, Doug and Paul were at a stalemate. Paul was not in a position to dictate terms of employment to Doug, since they were both directors, and equal shareholders. Doug refused to resign or to refuse receipt of his salary. Doug was prepared to resign if Paul would agree to buy out his shares in Algo and Compak, or to a sale of Algo. Paul's view was that the sale of Doug's interests was separate from the matter of his employment with Algo.

[49] Several months went by before Paul could implement a plan of action to terminate Doug's employment with Algo. On September 10, 2020, Paul sent Doug an email enclosing a shareholders resolution to increase the number of directors from two to three, and to appoint Kerry as a director. Paul's intention, of course, was to end the stalemate on the board, and terminate Doug's employment. Doug was hoping for a sale of his interests in the two companies. On November 12, 2020 a shareholder's resolution was approved by the three brothers appointing Kerry as a third director of Algo.

[50] On January 7, 2021, as noted, the directors of Algo, by majority vote, approved resolutions terminating Doug's employment with Algo. Shortly before the meeting, Paul provided Doug with a termination letter, alleging that he had abandoned his employment with Algo as of May 2020. The letter stated:

> When you worked toward divesting the Interconnect Division you were effectively eliminating your own role within Algo as you have not served any functional role within Algo since the divestiture of the Interconnect Division. Your decision to divest the Interconnect Division, and the repeated refusal to provide any services or fulfill a job within Algo since Interconnect's [divestiture] demonstrates an intention that you have abandoned your employment with Algo.

[51] Algo's position at trial aligns with these statements.

III. ANALYSIS

A. Abandonment

1. Legal Principles

[52] Abandonment is a form of repudiation. An employee may repudiate the contract of employment by refusing to perform an essential part of his or her job duties. The employer may elect to accept the employee's repudiation and treat the employment relationship as terminated, because the parties no longer agree on the fundamental terms of the contract: *Roden v. Toronto Humane Society*, 259 D.L.R. (4th) 89, 2005 CanLII 33578 (Ont. C.A.) [*Roden*]; *Pereira v. The Business Depot Ltd*., 2009 BCSC 1178, at para. 29 [*Pereira BCSC*], aff'd on this point 2011 BCCA 361. The test is objective: whether, viewing the circumstances objectively, would a

reasonable person have understood from the employee's words and actions, that he or she had abandoned the contract? See *Pereira v. The Business Depot Ltd.*, 2011 BCCA 361, at para. 47.

[53] I adopt the discussion of repudiation and abandonment in the employment law context set out by Justice Pentelechuk in *Carroll v. Purcee Industrial Controls Ltd.*, 2017 ABQB 211:

> 56 While there are similarities between the two, abandonment and repudiation are distinct concepts in the employment law context.
>
> 57 Repudiation occurs when the employee, viewing the circumstances objectively, unequivocally refuses to perform essential elements of their job going forward: *Roden* at para 46. In this way, repudiation could be characterized as an unequivocal intention by the employee to engage in "future insubordination", so accordingly many of the same considerations that underpin terminations for cause are also relevant when considering repudiations of the employment contract by the employee: Stacey Reginald Ball, Canadian Employment Law (Toronto: Thomson Reuters, 1996) (loose-leaf release No 67, September 2016), ch 8 at 8:20. For example, an indication by an employee that they will not abide by certain directions and instructions given by the employer may constitute repudiation of the employment contract: *Roden*.
>
> 58 Abandonment occurs when the employee unequivocally, through their words or actions and viewing the circumstances objectively, abandons the contract of employment: *Fitzgibbons v. Westpres Publications Ltd.* (1983), 50 B.C.L.R. 219, 3 D.L.R. (4th) 366 (B.C. S.C.) at paras 26-27; *Smith v. Mistras Canada, Inc.*, 2015 ABQB 673, 28 Alta. L.R. (6th) 137 (Alta. Q.B.) at para 33; *Pereira v. Business Depot Ltd*., 2011 BCCA 361, 93 C.C.E.L. (3d) 74 (B.C. C.A.) at para 47. For example, it is an implied term of every employment contract that the employee attend work, so an employer may take the position that the employee has abandoned their employment if they fail to attend work for an extended period without reasonable excuse or explanation.

[54] Cases involving employee repudiation are distinct from cases involving voluntary resignation by the employee, or dismissal by the employer.

[55] Both dismissal and voluntary resignation require a clear and unequivocal act by the party seeking to end the employment relationship: *Beggs v. Westport Foods Ltd.*, 2011 BCCA 76 [*Beggs*], at para. 36.

[56] In the case of employee resignation, there must be a clear statement of an intention to resign, or conduct from which that intention would clearly appear: *Pereira*

BCSC, paras. 28 to 32; *Price v. 481530 B.C. Ltd.*, 2016 BCSC 1940, at para. 144. The employee must also subjectively intend to resign. In other words, the resignation must in fact be voluntary.

[57] In *Beggs*, the court stated:

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

[58] Thus, voluntary resignation requires that the court find both that the employee subjectively intended to resign, and that, objectively viewed, his or her words and conduct support that conclusion. See also, applying *Beggs*: *Avalon Ford Sales (1996) Ltd. v. Evans*, 2017 NLCA 9, at paras. 23–24; *Carroll*, at para. 25.

[59] In the text *Employment Law in Canada*, by Geoffrey England, Peter Barnacle, and Innis M. Christie, 4th ed., vol. 2, loose-leaf, (Markham: LexisNexis, 2005), the authors emphasize the importance of the subjective limb of the test, in the case of resignation:

> 13.13 The importance of having an objective as well as a subjective requirement is shown in the situation where an employee leaves the job following an emotional confrontation with the employer.
>
> …
>
> 13.16 The importance of the subjective limb is also revealed in the situation where the employer presents the employee with the ultimatum of "resign or be fired". Objectively speaking, it may appear that the employee intends to quit when he or she resigns when faced with such a choice, but the subjective component ensures that a resignation cannot be foisted on an employee against his or her free will—only if the employee genuinely and without duress intends to terminate the contract will a quit be established.

2. Discussion

[60] Algo does not argue that the plaintiff expressly resigned. Clearly, he never did. It argues that he repudiated his employment agreement or abandoned his employment following the conclusion of the services he was providing on Algo's behalf to the buyer of Algo's Interconnect Division on April 30, 2020.

[61] Algo submits that the plaintiff eliminated his own position at Algo by selling the division that he was solely responsible for. Algo further argues that the plaintiff abandoned his employment or repudiated his employment agreement by:

a) failing to report to work without justification and providing no services to Algo in exchange for his salary;

b) refusing to consider working with Algo in order to find a suitable position after the sale of his division; and

c) by attempting to use his salary as leverage "to fund his retirement" until the other shareholders capitulated to his demands by either selling Algo or buying Doug's shares on his terms.

[62] Algo argues that the plaintiff's actions were also a breach of his fiduciary duty to Algo, in that he stopped working, but continued to draw his salary of $350,000.

[63] I do not accept these submissions.

[64] From a legal point of view, Algo chose to sell the Interconnect Division, rendering Doug's position redundant. Fundamentally, this was Algo's doing, not the plaintiff's. Beyond any question, the sale was agreed to by Algo as a corporate entity, and as Doug's employer. Although Paul allowed Doug to take responsibility for arranging the sale and negotiating the terms, he cannot argue that the sale occurred without his approval as a director of Algo. As noted, all three shareholders agreed to the sale, as well.

[65] The sale of the Interconnect Division was advantageous to Algo. The division was unprofitable. The sale relieved Algo of potential liabilities to employees and customers if the business had been shut down. The sale simplified Algo's business, and potentially facilitated a sale of Algo's profitable remaining business.

[66] It would have been obvious to Doug and Paul but also to Algo as the employer that Doug's position with Algo would become redundant once the Interconnect Division was sold, and once the transitional services that Doug provided were concluded.

[67] Paul assumed that Doug would resign once that occurred, but Doug never agreed to that. Doug's understanding that the sale of the Interconnect Division would be a first step to sale of Algo itself was not unreasonable. It was not unreasonable for him to believe that in the meantime he would continued to be employed by Algo.

[68] Unfortunately, as Doug and Paul had a very poor, dysfunctional business relationship, and were practically not communicating with each other except via occasional emails, they failed to reach an agreement between themselves as to what would happen to Doug's position once the sale occurred.

[69] It was open to Algo as the employer to give Doug notice of termination, for example, effective December 31, 2019 when the sale to Digitcom completed. Algo's dysfunctional management precluded this, but Paul could have foreseen the problem, and taken steps to bring in Kerry as the third director earlier.

[70] The burden is on Algo as the employer to establish that Doug repudiated his contract of employment.

[71] It is difficult to see how an employee can be said to have abandoned a job that is eliminated by the employer's decision. As Berger J. stated in *Gillespie v. Bulkley Valley Forest Industries Ltd*., 39 D.L.R. (3d) 586 at 589, 1973 CanLII 1056 (B.C.S.C.), aff'd 50 D.L.R. (3d) 316, 1974 CanLII 1104 (B.C.C.A.):

> The law is that redundancy cannot justify dismissal: *Chadburn v. Sinclair Canada Oil Co*. (1966), 57 W.W.R. 477 (Alta. S.C., Riley, J.); *Paterson v.*

> *Robin Hood Flour Mills Ltd.* (1969), 68 W.W.R. 446 (B.C.S.C., Kirke Smith, J.). The employer has his remedy in case an employee becomes redundant. He can dismiss the employee on proper notice, or he can dismiss without notice if he pays him the wages or salary he would have earned during the period in which notice should run. That would be no breach: Batt, Law of Master and Servant, 5th ed. (1967), p. 249. The dismissal here was wrongful if there was no reasonable notice.

[72] To say that the plaintiff “failed to report to work without justification” is inaccurate. The sale of the Interconnect Division meant that there was very little meaningful work for him left to do. He did, however, perform some minimal services for Algo over the next few months, as requested. This included a number of foreign exchange transactions done at the request of Algo's controller, Ms. Badesha.

[73] There was no need for the plaintiff to physically attend at Algo’s premises. Failing to do so was not abandonment of his duties. In fact, since the events of May through December 2020 took place against the backdrop of the Covid 19 pandemic, applicable public health orders discouraged workers from attending worksites if possible. In short, he did not “fail to report to work”. Rather, Algo had eliminated his position, and provided him with no meaningful work to do, in substitution for the work he had previously been doing.

[74] Paul advised Doug in his May 14, 2020 email, quoted above, that Doug should make arrangements, with the approval of all shareholders, for “a job” with Algo. But no job was ever offered.

[75] Algo argues that the onus was on the plaintiff to somehow find a position within Algo that would justify continuation of his salary.

[76] This is not an argument that the plaintiff repudiated his contract of employment by abandoning his duties. Rather, in effect, the employer argues that the employee repudiated his contract of employment by not somehow finding work with the employer that was commensurate with his senior executive level salary. I do not accept this. In my view, in the circumstances, the onus was on Algo to continue the plaintiff’s employment, in a suitable capacity, or terminate his employment.

[77] The law of constructive dismissal provides guidance.

[78] Where the employer unilaterally changes an essential term of the contract of employment in an objectively substantial manner, detrimental to the employee, without contractual authority, the court may find that the employer has repudiated the contract of employment: *Potter v. New Brunswick Legal Aid Services Commission*, 2015 SCC 10, at paras. 32, 37–40; *Farber v. Royal Trust Co.*, [1997] 1 S.C.R. 846, 1997 CanLII 387, at para. 33.

[79] Algo's decision to sell the Interconnect Division eliminated the plaintiff's position as general manager of that division. Algo could not and did not offer him a reasonable alternative position. This was a substantial change in the plaintiff's employment that would constitute grounds for a claim of constructive dismissal. As a shareholder in Algo and as a director of Algo, the plaintiff agreed to the sale. However, as an employee of Algo, he did not agree that his employment as a senior executive with Algo would be terminated.

[80] Since the plaintiff did not accept Algo's repudiation of the contract of employment, there was no constructive dismissal and no termination of the contract of employment.

[81] At trial, Paul suggested that there were tasks that Doug could have done, or projects he could have undertaken, such as:

1. managing or supervising the company's transition from Accpac accounting software to another system, QuickBooks;

2. assisting the company with managing the effects of Covid 19;

3. addressing deficiencies in the company's financial statements and reports;

4. compliance certification for a US government mandate to ensure Algo's manufactured products did not contain conflict minerals.

[82] Except for the last matter, Paul and hence Algo (since only Paul remained in control of Algo's operations) did not request that Doug undertake these tasks at the material time. While it may be that Doug could have performed some useful services for Algo if he had been asked to do them, he was never offered a position of employment with Algo reasonably equivalent to his previous position or, even, meaningful roles to fulfil. These suggestions are only tasks or projects. They do not constitute an offer of a position of employment. No executive role was available for Doug with Algo, and none was never offered to him.

[83] It is also quite clear that Paul did not want Doug's continued participation in the management of Algo. Paul had wanted to sever their business relationships since at least 2015.

[84] With Doug's redundancy on the horizon, rather than hiring Doug for a senior executive position with Algo, on Algo's behalf, Paul hired his son Ryan, as a managing director, with responsibility for growth, administration, operations and marketing. This was not nepotism. Ryan was well-qualified for these roles. He had obtained a Masters of Business Administration from McMaster University, and had spent several years successfully working for global corporations in marketing roles. Ryan's duties included some minor roles that Doug had previously been responsible for. However, Ryan's hiring further demonstrates that Paul had no interest in continuing with Doug's employment in a senior executive capacity, and that there was no such position available.

[85] Algo relies on *Cruickshank v. Jordan Petroleum Ltd.,* 1999 ABQB 499 for the proposition that an employee who fails to respond to an offer of alternative employment may be considered to have resigned. However in that case, the employer, which was the buyer of the former employee's business, offered the employee alternative employment that the court held was substantially equivalent to his pre-takeover position. The case is distinguishable, in that Algo did not offer the plaintiff a reasonably equivalent position, or in fact, any position at all.

[86] Algo relies on cases in which the employee was held to have repudiated the contract of employment by refusing to perform an essential part of his or her job duties in the future, unless the employer agreed to the employee's unjustified demands: *Gould v. Hermes Electronics Ltd.*, 34 N.S.R. (2d) 321, 1978 CanLII 3868 (S.C.); *Roden*. However, in these cases, repudiation was found based on the employee's refusal to abide by the employment contract, not simply the employee's demands. These cases are distinguishable. In this case, the plaintiff did not refuse to perform an essential part of his employment duties. After the sale of the Interconnect Division he had no substantial duties to fulfill.

[87] Algo also relies on other, somewhat similar cases, in which courts held that the employee had resigned, on the facts. In *Billows v. Canarc Forest Products*, 2003 BCSC 1352, the employee gave the employer an ultimatum which the court held amounted to a resignation: para. 58. The employee stated that he refused to comply with the employer's policies. In *Conway v. Griff Building Supplies Ltd*., 2020 BCSC 1899, the employee said that he would resign if his proposal for reorganizing the business and putting him in charge of a separate company in which he would have an equity interest was not accepted. The employer refused to accept his proposal, and accepted his resignation. The court held that the parties had mutually agreed to terminate the employment contract: paras. 52, 62, 73.

[88] These cases are also distinguishable. In this case, the plaintiff did not threaten to resign if his demands were not met. There was no mutual agreement to terminate the plaintiff's contract of employment.

[89] On the facts of this case, the defendant has not established that the plaintiff repudiated his contract of employment.

[90] Algo's real complaint is that the plaintiff refused to resign. His refusal to resign was not a repudiation of his contract of employment. In practical terms, his position was that he was not going to resign voluntarily, unless his shareholdings in Algo and Compak were bought out. It was not a breach of his employment agreement to take this position. In the circumstances of this case, he was entitled as an employee to

insist that his salary continue to be paid to him until Algo terminated his employment. Relying on his employment rights to apply pressure to induce Paul or Algo to agree to terms to acquire his shares was not a repudiation or breach of his employment contract. This was not a refusal to perform duties that he was required to undertake under the terms of his employment contract.

[91] Similarly, the fact that Doug was a director of Algo does not mean that he could not insist on his rights as an employee. Algo's argument of breach of fiduciary duty does not assist its claim that as an employee, Doug abandoned or repudiated his contract of employment.

[92] Algo also argues that:

> Doug operated the failing Interconnect Division for more than 10 years before he sold it, and yet his salary increased along with Paul's, as did his shareholder dividends. Doug had ceased drawing any connection between his contributions to Algo and his remuneration.

[93] This point seems to have more to do with fairness as between Doug and Paul than anything to do with employment law. It is not relevant.

3. Conclusion

[94] I conclude that Algo has not established that the plaintiff repudiated his contract of employment. He did not abandon the contract, or resign. Accordingly, I find that Algo terminated the plaintiff's employment effective January 7, 2021, without providing reasonable notice of dismissal.

B. Failure to Mitigate Loss

1. Legal Principles

[95] As a general rule, a plaintiff will not be able to recover for losses that he could have avoided by taking reasonable steps. Where it is alleged that the plaintiff has failed to mitigate his loss, the burden of proof is on the defendant, who must prove both that the plaintiff has failed to make reasonable efforts to mitigate the loss, and that mitigation was possible: *Southcott Estates Inc. v. Toronto Catholic District*

School Board, 2012 SCC 51, at para. 24; *Cellular Baby Cell Phones Accessories Specialist Ltd. v. Fido Solutions Inc.*, 2017 BCCA 50, at para. 74.

[96] The first part of the test, whether the plaintiff failed to take reasonable steps to mitigate the loss, involves consideration of past facts, and must be demonstrated by the defendant on a balance of probabilities. The second aspect, whether the loss could have been avoided had the plaintiff taken the reasonable steps that he failed to take, involves a consideration of hypothetical past events, and therefore must be weighed and assessed according to its relative likelihood, provided the possibility is real and substantial: *O'Grady v. Virk*, 2023 BCSC 48, at paras. 61–64.

[97] What is meant by "reasonable steps" in the case of a dismissed employee was discussed by G.C. Weatherill J. in *Okano v. Cathay Pacific Airways Limited,* 2022 BCSC 881 [*Okano*]:

> [23] The onus is on the defendant to demonstrate the plaintiff has failed to mitigate her loss. The onus is a high one. The defendant must establish both a failure on that part of the plaintiff to take reasonable steps to mitigate her loss and that alternative employment could have been found had she done so: *Smith v. Aker Kvaerner Canada Inc. and Kvaerner Power Inc.*, 2005 BCSC 117 at paras. 31–36; *Ensign v. Price's Alarm Systems (2009) Ltd.*, 2017 BCSC 2137 at para. 47.
>
> [24] The duty to "act reasonably" is to take such steps a reasonable person in the dismissed employee's position would take in her own interests—to maintain her income and her position in her industry, trade, or profession: *Forshaw v. Aluminex Extrusions Ltd.* (1989), 39 B.C.L.R. (2d) 140 (C.A.) at 143-144.
>
> [25] It is not necessarily a failure to mitigate where a plaintiff has not immediately commenced a job search. Employees should be given a reasonable period of time to process the shock of the termination, plan their next steps with respect to obtaining new employment, and undertake the necessary research and preparation of résumés so they can compete for available positions: *Smith* at para. 35.

[98] Courts have acknowledged that employees generally require a period of readjustment and regrouping before pursuing reemployment strategies: *Okano*, at para. 25; *Stuart v. Navigata Communications Ltd.,* 2007 BCSC 463, at para. 43; *Systad v. Ray-Mont Logistics Canada Inc.,* 2011 BCSC 1202, at para. 31.

2. Discussion

[99] As a preliminary matter, Algo argues that if the court finds that the plaintiff was constructively dismissed in May 2020, then his damages should be reduced by seven months, to account for the continuation of his salary from May 2020 until January 7, 2021. However Algo concedes that if there was no constructive dismissal in May 2020, then no such reduction applies. I have found that the grounds existed in May 2020 for the plaintiff to claim constructive dismissal, but he did not do so. In legal terms, he did not accept Algo's repudiation of his contract of employment. Emphatically, he chose to demand that his employment be continued. "An unaccepted repudiation is a thing writ in water and of no value to anybody: it confers no legal rights of any sort or kind": per Lord Asquith in *Howard v. Pickford Tool Co. Ltd.*, [1951] 1 K.B. 417 (C.A.) at 421.

[100] In some cases, the employer offers the employee a chance to mitigate damages by returning to work for the employer, by providing the employee with reasonable alternative employment with the employer. Circumstances of this nature were discussed by the Supreme Court of Canada in *Evans v. Teamsters Local Union No. 31,* 2008 SCC 20, at para. 30:

> [30] I do not mean to suggest with the above analysis that an employee should always be required to return to work for the dismissing employer and my qualification that this should only occur where there are no barriers to re-employment is significant. This Court has held that the employer bears the onus of demonstrating both that an employee has failed to make reasonable efforts to find work and that work could have been found (*Red Deer College v. Michaels*, [1976] 2 S.C.R. 324). Where the employer offers the employee a chance to mitigate damages by returning to work for him or her, 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" (*Mifsud v. MacMillan Bathurst Inc.* (1989), 70 O.R. (2d) 701, at p. 710). In *Cox*, the British Columbia Court of Appeal held that other 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" (*Farquhar*, at p. 94), 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 (*Reibl v. Hughes*, [1980] 2 S.C.R. 880), 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.

[101] The above-noted paragraph was applied by the British Columbia Court of Appeal in *Beggs*, at para. 44.

[102] Since, as I have said, Algo did not offer the plaintiff a reasonable alternative position of employment, these principles are inapplicable in the circumstances of this case. It is also unnecessary to consider whether the “non-tangible elements of the situation” would have rendered acceptance of any offer objectively unreasonable.

a) Did the plaintiff fail to take reasonable steps to find alternative employment?

[103] As to the first part of the test, I am satisfied that the plaintiff did not take reasonable steps to find reasonable alternative employment, following termination.

[104] The plaintiff had no sincere desire for further employment. Rather, he made plain that his intention was to retire, provided that he was paid for his interests in Algo and Compak. Notably, although the “writing was on the wall” in terms of his employment with Algo, he made no efforts during the period May 2020 through January 7, 2021 to find alternative employment. He was not interested in another job or career.

[105] In totality, the plaintiff presented minimal evidence that he made sincere efforts to find alternative employment.

[106] In early July 2021, approximately seven months after his dismissal, and well after he initiated these legal proceedings on February 25, 2021, the plaintiff subscribed to an online employment service called “JobLeads”. This was a paid service. The service provided the plaintiff with various posted job opportunities

matching whatever criteria he utilized. In the plaintiff's view, none of the leads that were provided matched his skill set or his salary requirements. The plaintiff did not pursue any opportunities provided by "JobLeads".

[107] The plaintiff did not contact any employers directly, and did not obtain any interviews for any positions. He did not retain any local recruitment agency to assist him in his job search.

[108] The plaintiff was almost 63 years of age by July 2021. He planned to retire at age 65. He will be 65 years of age in 2023. He had worked for one company, Algo, for all of his working life. His experience was limited to the operations and affairs of Algo. In his view, no employer was about to hire him, at his age, for any job matching his skill set, or pay $350,000 per year remuneration. These are all valid considerations. Nonetheless, the fact remains that the plaintiff did not make any genuine efforts to obtain reasonable alternative employment.

[109] The plaintiff did some consulting work for a landscaping company in the period September through November 2021. The work involved establishing a website for the company. It was a limited term project, for which he was paid, in total, $2,800. This opportunity arrived through happenstance, when the plaintiff noticed that the landscaping company was doing some work at a neighbouring property. There is no evidence that the plaintiff made any efforts to find other such consulting work.

[110] The plaintiff did not testify that he is now looking for work. A fair inference is that he is not looking for alternative employment presently. This tends to show that he continues to have no interest in re-employment.

[111] The plaintiff did not apply for work in the telecom industry, the only industry in which he had substantial experience. He claims that a five-year non-competition agreement in the Digitcom "term sheet" meant that he was prohibited from seeking work with a company that competed with Digitcom. However, no non-competition term was carried through into the purchase and sale agreement between Algo and

Digitcom. The plaintiff argues that he is morally bound by the non-competition agreement. I do not accept that he was bound by a non-competition agreement, or felt morally bound by it. He never approached the purchaser to discuss the matter. This matter reinforces my view that the plaintiff was not really interested in re-employment.

[112] In summary, I conclude that the plaintiff failed to take reasonable steps to find alternative employment.

b) Could the plaintiff have obtained reasonable alternative employment?

[113] However, there was little likelihood that the plaintiff could have actually found reasonable alternative employment. As he noted, he was on the brink of retirement, and his professional skills were of limited scope, in that he had worked for a single employer for his entire career.

[114] An employee who has devoted a large part of his working life to one employer and whose knowledge and experience is tailored to the needs of that employer may be less marketable as an employee and may have more difficulty in obtaining alternative employment: *Carey v. F. Drexel Co.*, [1974] 4 W.W.R. 492, 1974 CanLII 1733 (B.C.S.C.).

[115] The plaintiff had health issues which limited his employability. He suffers from chronic low back pain with sciatica, caused by compressed discs in his lower back. He has limited tolerance for standing and walking. He is scheduled for vascular surgery. He takes medication, gabapentin, for his medical conditions. The medication causes fatigue and affects his mental alertness.

[116] It is quite unlikely that any employer would hire the plaintiff for a senior executive position paying anything like the salary he previously earned. Such jobs generally involve highly specialized services, with heavy demands and responsibilities. An older employee on the brink of retirement with significant health issues is not likely to obtain such employment.

[117] However, given his retirement plans, it would have been reasonable for him to seek work at a lower salary, perhaps for a limited term. He might have been able to obtain some reasonable work, perhaps similar to the consulting work that he did, that might have brought in at least some income.

3. Conclusion – Failure to Mitigate

[118] I conclude that the plaintiff had no interest in alternative employment, and made little or no effort to find reasonable alternative employment. However, there was little chance he could have found employment commensurate with his position at Algo, even with sincere efforts on his part. There was a reasonable possibility that he could have obtained some income if he had made real efforts.

[119] The plaintiff mitigated the loss by earning $2,800 working for the landscaping company. With real effort, in all circumstances, I consider that the plaintiff could have avoided approximately 20% of the loss. This equates to 4.8 months of salary.

IV. CONCLUSIONS

[120] The plaintiff has established that he was wrongfully dismissed. The defence concedes that, in that event, reasonable notice is 24 months, subject to the issue of failure to mitigate.

[121] I found that the plaintiff could have mitigated loss to the extent of the equivalent of 4.8 months of salary.

[122] Therefore, the plaintiff is entitled to damages based upon salary for 19.2 months. This amount is $560,000.

[123] The plaintiff is also entitled to reimbursement for the cost of replacing extended health insurance, during the notice period. Algo extended his group benefits to April 7, 2021. The plaintiff obtained replacement insurance effective April 7, 2021, at a cost of $403.94 per month. He is also entitled, therefore, to damages for the cost of replacement personal health insurance. As I consider it unlikely that any alternative position or work would have replaced this loss, he is entitled as

damages to the cost of the replacement insurance for the entire notice period of 24 months, minus three months. This amount is $8,482.74. The total damages to which the plaintiff is entitled is $568,482.74.

[124] The plaintiff has been successful, and is also entitled to costs of the action.

"Verhoeven J."