Court of King's Bench of Alberta

Citation: Stonham v Recycling Worx Inc, 2023 ABKB 629

Date: 20231107
Docket: 2001 12862
Registry: Calgary

Between:

Allan Stonham

Plaintiff

- and -

Recycling Worx Inc.

Defendant

Reasons for Judgment
of the
Honourable Justice M.A. Marion

I. Introduction

[1] The Plaintiff (**Stonham**) applies for a summary trial in his wrongful dismissal action against the Defendant (**RWI**).

[2] Stonham drove commercial trucks for RWI's recycling business. In October 2019 he suffered a workplace injury after he fell off a truck trying to remove a tarp. He lost consciousness and broke his collarbone. He missed work, then performed modified duties which he found menial and tedious. He made a workplace harassment and occupational safety complaint. Then he went on a medical leave as recommended by a registered psychologist. By July and August 2020, Stonham was expected to be ready to return to his full-time pre-accident duties by September 15, 2020, and he was pushing RWI to let him start driving again with a helper while he fully recovered. RWI refused that request. In September 2020, neither party confirmed, one way or the other, whether Stonham was actually ready to return to his pre-accident duties. Stonham did not attend for work on September 15-17, 2020, and on September 18, 2020 Stonham requested reinstatement. RWI took the position that Stonham had resigned based on a RWI policy because he did not attend for work for three days without calling the office, and that RWI accepted his resignation. Stonham sued. In this action, RWI alleges Stonham resigned or abandoned his employment.

[3] For the reasons set out below, Stonham did not resign or abandon his employment. He was wrongfully dismissed without notice. He was entitled to a 2.5-month reasonable notice period and $11,250 in damages plus pre and post judgment interest.

II. Procedural Background

[4] On October 2, 2020, Stonham filed his claim against RWI. In it, he claimed workplace harassment, breach of the duty of good faith, unjust termination, constructive dismissal, and breach of the *Employment Standard Code*, RSA 2000 c E-9, the *Occupational Health and Safety Act*, RSA 2000 c O-2 and the *Alberta Human Rights Act*, RSA 2000, c A-25.5. He claimed $32,000 for damages arising from wrongful dismissal together with an aggregate amount of $75,000 for general, aggravated, exemplary and punitive damages. At the summary trial application, Stonham abandoned any claims for workplace harassment, breach of the duty of good faith, or breach of statutory duty, and further abandoned his claim for aggravated, exemplary, general or punitive damages. Stonham only asserts wrongful dismissal based on the reasonable notice period (plus interest and costs).

[5] On December 8, 2020, RWI filed its defence. It denied Stonham's allegations. In particular, RWI denied that it had terminated Stonham's employment, but rather stated that Stonham resigned his employment, and that Stonham had not suffered any of the losses or damages alleged.

[6] In 2021, the parties conducted some questioning for discovery under Part 5 of the *Alberta Rules of Court*, Alta Reg 124/2010 (*Rules*).

[7] On September 7, 2022, Stonham filed his Application for Summary Trial. On October 5, 2022, RWI filed its Notice of Objection to the matter proceeding by way of summary trial.

III. The Record

[8] Stonham was the only witness in support of his claim. He swore an affidavit dated August 5, 2022. He was questioned on his affidavit on May 29, 2023 and that transcript was before me.

[9] Christopher Jette (**Jette**), RWI's Operations Manager, was the only witness for RWI. He swore affidavits on September 27, 2022 and June 21, 2023. Jette was questioned on his affidavit on August 18, 2023 and that transcript was before me. Stonham's counsel did not file the exhibits from that transcript, but I directed him to do so because exhibits are part of the transcript a party is required to file pursuant to rule 6.7: ***McDonald v Sproule Management GP Limited***, 2023 ABKB 587 at paras 25-27. The contents of the exhibits were before me.

[10] RWI also relies on two overlapping bundles of excerpts from the Part 5 questioning for discovery of Stonham conducted in April 2021, as RWI is entitled to do under rule 5.31. Stonham did not object to the Stonham discovery excerpts and they became part of the record.

[11] At the commencement of the summary trial application, by agreement of the parties, I directed, pursuant to rule 7.11(b), that both Stonham and Jette would provide *viva voce* evidence so they could be cross-examined before me. Additional exhibits were marked by agreement of the parties during cross-examination.

[12] Neither party objected to the admissibility of any of the evidence before the Court.

IV. Factual Background

A. Credibility Assessment

[13] I have given very little weight to Stonham's evidence where it is not supported by objective or corroborating evidence because his evidence was problematic in several respects. It was, at times, fluid and changing "on the fly", evasive, argumentative, and he was impeached several times due to inconsistent statements. He failed to agree to obvious points. His evidence was also at times internally inconsistent, inconsistent with other external evidence, and implausible. I found, for the most part, his testimony to be not credible or reliable.

[14] I have also given reduced weight to Jette's evidence where he purported to speak on behalf of others, or where he was giving in effect a legal opinion about what Stonham was entitled or not entitled to do. At times, Jette's evidence was also inconsistent – for example, in his affidavit he deposed that RWI had decided to terminate Stonham, but at trial he stated that Stonham was not terminated and instead resigned.

[15] However, where Jette and Stonham's evidence conflicted, I generally gave more weight to Jette's evidence.

[16] In that context, I set out below a summary of the factual background, which is based on admitted facts, agreed or undisputed evidence, or the facts as I have found them.

B. RWI and Stonham's Employment

[17] RWI operates a waste recycling business on the outskirts of Calgary. Its employees drive large trucks to collect and remove waste products from its yard.

[18] In 2017, RWI hired Stonham and he commenced full-time employment as a Class 1 driver. He was paid an hourly wage and earned about $54,000 per year. He did not have a written employment agreement.

[19] In August 2019, RWI prepared an "Employee Handbook" (**Handbook**) for its employees. RWI presented the Handbook to, and reviewed it with, its employees, including Stonham. Stonham received and reviewed the Handbook. He signed it on October 2, 2019, and likely initialled every page presented to him. Stonham was specifically aware of (and signed the page containing) a clause (**Resignation Clause**) in the Handbook that RWI relies on in defending this action, which provided:

> Employees are considered to have resigned from the company if they are absent for more than three consecutive working days without contacting the office.

[20] I discuss the Resignation Clause later in these Reasons.

C. Stonham's Workplace Accident

[21] On October 8, 2019, in the course of his employment, Stonham fell off his work truck while trying to remove a tarp and suffered injuries, including a fractured clavicle, which prevented him from performing his job as a Class 1 driver. He qualified for workers' compensation benefits. After being off work for about two weeks, he returned to work on modified duties, which initially involved him riding with another driver and then transitioned to more clerical work at RWI's offices. In December 2019, the parties were looking at a return to Stonham's full-time pre-accident duties by end of January 2020.

[22] In the first week of January 2020, Stonham was cited for three disciplinary events related to being late for work that week and failing to fill out a PPE Maintenance Record in May 2019.

[23] On January 9, 2020, Stonham accepted an offer of modified work at his pre-accident hourly wage to perform clerical work from January 9 to January 24, 2020. Stonham did not enjoy the clerical work and felt he was given menial tasks.

D. Stonham's Workplace Harassment Complaint and Medical Leave

[24] On January 10, 2020, Stonham wrote to RWI asserting bullying and harassment by several RWI employees since his accident. He requested a harassment investigation, and indicated that if it was not commenced within two weeks he would contact Occupational Health and Safety directly. In response, RWI conducted and completed an internal investigation which found Stonham's allegations unsubstantiated. RWI also internally investigated safety issues raised by Stonham.

[25] On January 20, 2020, Lisa Bauche, MA, Registered Psychologist, wrote a letter that Stonham required a two-week medical leave commencing immediately. Stonham ceased his modified duties at this time. On February 4, 2020, Ms. Bauche advised that Stonham required a medical leave until further notice. Based on Ms. Bauche's letters, Stonham was again accepted for workers' compensation benefits. There is no evidence of any further correspondence from Ms. Bauche.

[26] Stonham did not do any work for RWI after January 20, 2020.

E. July 2020: End of WCB Benefits and Stonham Able to do Modified Duties Again

[27] In late June 2020, RWI forwarded Stonham's Workers' Compensation Case Manager, Katelyn Labelle (**Labelle**) a Facebook post RWI believed showed Stonham was offering truck driving services for a fee while he was receiving workers' compensation wage replacement benefits.

[28] On July 24, 2020, Labelle notified Stonham that his wage placement benefits were terminated effective July 24, 2020 and that RWI had confirmed it had a modified position for him because he was not yet able to perform his pre-accident driving duties. That day, RWI provided Stonham an Offer of Modified Work to do yard clean up from July 27, 2020 to September 15, 2020 (**July Modified Work Offer**). At the summary trial Stonham testified that he did not receive

the July Modified Work Offer, even though he had acknowledged in questioning he had received it. Based on all the evidence, including the email evidence, I find he did receive the July Modified Work Offer on July 24, 2020. He complained about it to Labelle.

[29] At the time of the July Modified Work Offer, Labelle, RWI and Stonham expected that Stonham would be ready to resume his pre-accident duties by September 15, 2020. This was based, at least in part, on a July 22, 2020 physiotherapist assessment report which indicated that Stonham was able to sit, stand, walk, bend, twist, kneel, squat, reach overhead, and drive, but was not able to climb, lift or push/pull. The report further indicated that September 15, 2020 was the "estimated date" the therapist expected Stonham to be able to perform pre-accident work. September 15 was described in Labelle's July 24, 2020 letter as the "goal" that they were working toward for his return to full duties.

[30] Stonham did not sign or accept the July Modified Work Offer. He wanted to go back to work at RWI as a driver, but not to do yard work, which he found "tedious and unrealistic". On July 26, 2020, he expressed to Labelle that the July Modified Work Offer caused him anxiety. On July 27, 2020, Labelle confirmed that she could not pay Stonham benefits for his claim for anxiety and depression because there was no diagnosis relating those claims back to his accident – she confirmed it was up to Stonham whether to accept the July Modified Work Offer, which Labelle felt was suitable.

[31] Stonham did not attend at RWI for work on July 27 as contemplated in the July Modified Work Offer or any time thereafter. (I do not accept or give weight to Stonham's evidence that he attempted to attend at work after July 27 but was told to leave, or that he was told by Jette that Jette would advise him when to return to work).

F. August 2020: Stonham Wants Modified Driving Work but RWI Offers Modified Yard Work Until He is Fully Recovered

[32] On August 4, 2020, a physician assessed Stonham and reported (on August 11) that he was able to sit, twist, kneel, squat and drive, but unable to bend, climb, lift (maximum lifting capability 5 lbs), push/pull or overhead reach. The physician again indicated an estimated date of September 15, 2020 for Stonham to be able to perform pre-accident work.

[33] On August 14, 2020, Stonham wrote to RWI and Labelle indicating that his doctor had cleared him for driving duties. He indicated "it is only a few weeks left till I am cleared for full duties and I think that you could give me a helper it's a short time till I am clear for full duties". This was a request, effectively, for different modified duties than what RWI had offered in July.

[34] In response, Labelle reconfirmed that he did not qualify for workers' compensation benefits when suitable modified work exists. RWI reconfirmed that the July Modified Work Offer was still open as offered if he would like to accept it, and that RWI looked forward to Stonham accepting the duties offered and returning to work (**August Modified Work Offer**). RWI rejected Stonham's request to be a driver with a helper because it did not have a helper available, and because it was not consistent with Stonham's abilities at that time (Stonham could not perform his pre-accident duties even though he could drive, since being a driver involved climbing and pulling a tarp).

[35] Stonham did not accept the August Modified Work Offer and did not return to work to do the modified work duties. Accordingly, he was not paid by RWI and did not receive workers' compensation benefits.

G. September 2020: Stonham's Employment Ends

[36] There were no communications between the parties after August 14, 2020 until September 18, 2020. (On this point, I reject Stonham's evidence to the contrary and accept Jette's evidence).

[37] Stonham did not report for work anytime after August 14, 2020. In particular, he did not report for work on September 15, 16 or 17, 2020. And then, on September 18, 2020, the parties exchanged letters.

[38] Stonham's counsel sent RWI a letter enclosing the August 4, 2020 physician's assessment report and requested RWI "reinstate Mr. Stonham back as a Class 1 Driver" no later than October 1, 2020 (**Reinstatement Request**). Jette could not remember when RWI received the Reinstatement Request but deposed that it was "was received after the decision to terminate Mr. Stonham's employment was made". There is fax header evidence indicating the Reinstatement Request was faxed between 12 and 1 pm on September 18, 2020.

[39] RWI sent a letter (**Resignation Acceptance Letter**) addressed to a Stonham mailing address and copied to Stonham's counsel with the re: line "Resignation of Employment":

> This is to confirm Recycling Worx Inc acceptance of your resignation from your employment with our company effective end of day September 17, 2020.
>
> Due to the failure to report for work on September 15, 2020 and as per the Worx Group of Companies Employee Handbook, Page 12, which states "Employees are considered to have resigned from the company if they are absent for more than three consecutive working days without contacting the office", we consider this your resignation and accept it at this time. The Employee Handbook was signed by you, Allan Stonham, on October 2, 2019.
>
> Find enclosed copy of your Record of Employment. [...]

[40] At the summary trial, Jette confirmed that RWI relied on the Handbook's Resignation Clause, Stonham's failure to show up for work, and Stonham's lack of communication, to conclude that Stonham resigned.

[41] Stonham pleads in the Statement of Claim, and deposes in his affidavit, that the Resignation Acceptance Letter was provided in response to his Reinstatement Request. In his Part 5 questioning excerpts read-in by RWI, Stonham confirmed he received the Resignation Acceptance Letter a couple of days after September 18, 2020.

[42] I find, on the balance of probabilities, that the Reinstatement Request was sent by Stonham's counsel to RWI between 12 and 1 pm on September 18, 2020, and then RWI responded with the Resignation Acceptance Letter.

[43] RWI did not reinstate or continue Stonham's employment as requested in the Reinstatement Request. Jette testified that it was "case closed", "it ended there for us", and that RWI "closed the file" and "moved on"; "It was over".

[44] Stonham did not find employment until April 2021.

V. Issues

[45] In my view, RWI conflated the concepts of resignation, abandonment and absenteeism in both its evidence and its argument. Resignation and abandonment are distinct concepts: ***Carroll v Purcee Industrial Controls Ltd***, 2017 ABQB 211 at paras 56-58; ***Zoehner v Algo Communication Products Ltd***, 2023 BCSC 224 at paras 53-54.

[46] RWI's Statement of Defence only specifically pleads resignation, and Stonham took the position that RWI had not properly pleaded abandonment. However, Stonham put into issue in the Statement of Claim that he did not abandon his employment, and RWI denied that pleading both expressly and pursuant to rule 13.12(1). The issue of abandonment is properly before the court and RWI's reliance on it does not give rise to surprise or a breach of rule 13.6(3).

[47] RWI did not specifically plead just cause as a defence, but it argued that it was entitled to terminate Stonham and relied on cases where absenteeism supported termination for cause.

[48] Therefore, the issues in this summary trial application are:

(a) Is this an appropriate matter for summary trial?

(b) Did Stonham terminate his employment by resigning, and in particular:

(i) Was Stonham deemed to have resigned pursuant to the Resignation Clause in the Handbook?

(ii) Even if not deemed to resign, did Stonham otherwise resign?

(c) Did Stonham's employment terminate because he abandoned his employment?

(d) Was Stonham wrongfully dismissed without reasonable notice?

(e) If Stonham was wrongfully dismissed, what are his damages?

VI. Analysis

A. Is this an Appropriate Matter for Summary Trial?

[49] Part 7, Division 3 of the *Alberta Rules of Court*, Alta Reg 124/2010 (*Rules*) govern summary trials.

[50] The well-established and binding test for whether a summary trial is appropriate is twofold: (1) can the court decide disputed questions of fact on affidavits or by other proceedings authorized by the *Rules* for a summary trial? and (2) would it be unjust to decide the issues in such a way?

See: ***JN v Kozens***, 2004 ABCA 394 at para 40; ***Imperial Oil v Flatiron Constructors Canada Limited***, 2017 ABCA 102 at para 24; ***SHN Grundstuecksverwaltungsgesellschaft MBH & Co v Hanne***, 2014 ABCA 168 at para 9. This test must be viewed through the lens of proportionality: ***Benke v Loblaw Companies Limited***, 2022 ABQB 461 at para 16.

[51] Whether the first part of the twofold test will be met will depend on the nature and quality of the material before the court: ***Compton Petroleum Corp v Alberta Power Ltd***, 1999 ABQB 42 at para 20. Perfect evidence is not required: ***956126 Alberta Ltd v JMS Alberta Co Ltd***, 2020 ABQB 718 at para 225. The evidence need only be sufficient to permit the judge to find the facts necessary to adjudicate the issues of fact or law and reach a just result: ***956126 Alberta*** at para 225; citing ***Beaver First Nation Band v Bulldog***, 2004 ABCA 79 at para 5; ***Goulbourne v Buoy***, 2003 ABQB 409.

[52] With respect to the second part of the test, for many years Alberta courts have frequently referred to a non-exhaustive list of factors to consider whether it would be unjust to proceed by summary trial: ***Schaufert v Calgary Co-Operative Association Limited***, 2021 ABQB 579 at para 4; ***Jagodnik v Oudshoorn***, 2015 ABQB 456 at para 3; ***Factors Western Inc v DCR Inc***, 2019 ABQB 971 at para 35; ***HOOPP Realty Inc v Guarantee Company of North America***, 2018 ABQB 634 at para 17; ***O'Neil v Yaskowich***, 2018 ABQB 599 at para 12; ***Duff v Oshust***, 2005 ABQB 117 at para 24; ***Compton*** at para 21; ***Adams v Norcen Energy Resources Ltd***, 1999 CanLII 19063 (ABQB), 248 AR 120 at para 19.

[53] Those factors are:

(a) the amount involved;

(b) the complexity of the matter;

(c) its urgency;

(d) any prejudice likely to arise by reason of delay;

(e) the cost of taking the case forward to a conventional trial in relation to the amount involved;

(f) the course of the proceedings;

(g) whether all witnesses or only some were (will be) cross-examined in court;

(h) whether there is a real possibility that the defendant can bolster its evidence by discovery of the plaintiff's documents and witnesses; and

(i) whether the resolution will depend on findings of credibility.

[54] RWI objected to the summary trial application on several grounds. However, following the parties' agreement to proceed with *viva voce* cross-examination of both witnesses, RWI effectively withdrew its objection to the matter proceeding by way of summary trial. I had the opportunity to observe both witnesses in this matter through *viva voce* cross-examination to test their credibility,

together with a reasonably robust record which included some key objective documentation. In the circumstances, as illustrated by the factual background and fact findings I have made above, the record was strong enough for me to make factual findings and the first part of the test for summary trial suitability is met.

[55] The second part of the test for suitability is also met in this case. The maximum amount now involved is $54,000 plus interest and costs, the matter is not complex, the cost of proceeding to trial would be prohibitive, and there is a low likelihood that additional material or helpful evidence would be available at trial. The two witnesses were cross-examined in court and so there was a sufficient basis for me to assess credibility. Ultimately, neither party really objected to proceeding by way of summary trial.

[56] The matter is appropriate for summary trial.

B. Did Stonham Terminate his Employment by Resigning?

[57] To support its position that Stonham resigned, RWI relies on the Resignation Clause, Stonham's failure to attend work in September 2020, and Stonham's failure to communicate with RWI about returning to work in September 2020. To assess RWI's defence, I must first consider whether the Handbook's Resignation Clause is binding on Stonham and then consider the resignation question more holistically.

1. Was the Handbook's Resignation Clause Binding on Stonham?

[58] As noted earlier, Stonham did not have a written employment contract. He was not presented with the Handbook when his employment started or as a condition of being hired. It was presented to him later, and I have found he received and signed it. He specifically reviewed and signed the page with the Resignation Clause.

[59] As the party relying on the Resignation Clause (and thereby asserting it is in effect binding on Stonham), and as the employer drafter of the Resignation Clause, the onus is on RWI to prove the Resignation Clause binds Stonham.

[60] The common law requires that an employee obey the lawful orders and instructions of their employer, including the employer's workplace policies: ***Smith v Vauxhall Co-Op Petroleum Limited***, 2017 ABQB 525 at para 28 [***Vauxhall***]; ***Cicalese v Saipem Canada Inc***, 2018 ABQB 835 at para 27; ***Poliquin v Devon Canada Corporation***, 2009 ABCA 216 at para 45.

[61] For a workplace policy to be considered enforceable, and thus constitute an express or implied term of the employment contract, it must be reasonable, unambiguous, well published, consistently enforced, and the employee must know or ought to have known of the policy, including consequences of breach: ***Vauxhall*** at para 29; ***Cicalese*** at para 27; ***Foerderer v Nova Chemicals Corp***, 2007 ABQB 349 at para 67; ***Moyen v DD Investments Inc***, 2005 ABPC 317 at para 41; ***Meaney v Agnes Pratt Home*** (1989), 1989 CanLII 4847 (NLSC), 74 Nfld & PEIR 18, 231 APR 18 at 25 (Nfld TD).

[62] However, where a workplace policy purports to change a fundamental aspect of the employment terms or relationship, to be binding on the employee the employee must have

outwardly assented to the terms of the policy and there must be fresh consideration: ***Vauxhall***, at para 35; ***Globex Foreign Exchange Corp v Kelcher***, 2011 ABCA 240 at paras 91; ***Hobbs v TDI Canada Ltd***, 2004 CanLII 44783 (ONCA), 246 DLR (4th) 43 at paras 35-36; ***Theberge-Lindsay v 3395022 Canada Inc***, 2018 ONSC 3222 at para 36; ***Singh v Empire Life Ins Co***, 2002 BCCA 452 at paras 12-15.

[63] The requirement of consideration to support an amended agreement is especially important in the employment context where, generally, there is inequality in bargaining power between employees and employers: ***Hobbs*** at para 42; ***Holland v Hostopia Inc***, 2015 ONCA 762 at paras 50-55; ***Giacomodonato v PearTree Securities Inc***, 2023 ONSC 3197 at paras 44-45, citing ***Machtinger v HOJ Industries Ltd***, 1992 CanLII 102 (SCC), [1992] 1 SCR 986 at para 31; ***Matijczak v Homewood Health Inc***, 2021 BCSC 1658 at para 31.

[64] Without more, continued employment is not considered fresh consideration – there must be some other benefit that flows to the employee: ***Theberge-Lindsay*** at para 36; ***Braiden v La-Z-Boy Canada Limited***, 2008 ONCA 464 at para 57; ***Giacomodonato*** at paras 47-48; ***Goberdhan v Knights of Columbus***, 2022 ONSC 3788 at para 16; ***Techform Products Ltd v Wolda***, 2001 CanLII 8604 (ONCA) at paras 24-29, 54 OR (3d) 1; ***Globex*** at para 87.

[65] The requirement for fresh consideration is particularly pronounced where the employer seeks to modify the employment contract to limit the notice to be provided upon termination, since that change represents a "tremendously significant modification of the implied term of reasonable notice": ***Theberge-Lindsay*** at para 37, citing ***Francis v Canadian Imperial Bank of Commerce*** (1994), 1994 CanLII 1578 (ONCA), 21 OR (3d) 75 at 84; ***Holland*** at para 51; ***Braiden*** at paras 48, 57.

[66] Stonham received and reviewed the Handbook, then signed and acknowledged the page including the Resignation Clause. Although the fully signed copy was not introduced into evidence, I find that he likely signed every page and in all the places RWI asked him to sign, including page 3 which made compliance with the Handbook compulsory for all employees, and page 4, which provided in part:

> I acknowledge that I have been given a copy of the Worx Group of Companies Employee Handbook. **It is my responsibility to read and understand it and acknowledge that this handbook forms part of the terms and conditions of my employment with the Worx Group of Companies**. [Emphasis added]

[67] Stonham was aware of and assented to the Handbook and the Resignation Clause. However, I find that the Resignation Clause is not binding on Stonham in this matter, including for at least two key reasons.

[68] First, the Resignation Clause is ambiguous. What does the phrase that employees are "considered to have resigned from the company if they are absent for more than three consecutive working days without contacting the office" mean? Does this mean that it is RWI that will have considered the employee to have resigned, or is it intended to deem that the employee has resigned? In either case, does it mean the employment is immediately ended or is it an option for RWI to terminate based on the resignation? This ambiguity is borne out in RWI's approach to this matter.

RWI pleaded that Stonham was not terminated but resigned, yet RWI sent the Resignation Acceptance Letter purporting to "accept" the resignation. Relatedly, the arguments by the parties in this case about what is meant by "if they are absent for more than three consecutive working days" illustrates that this phrase is also subject to different reasonable interpretations and is ambiguous. For example, the Resignation Acceptance Letter was sent on September 18 but states that the resignation was effective September 17, 2020 and the parties disagree as to whether the Resignation Acceptance Letter was sent (or purported to accept the resignation) *before* the "three consecutive working days" had elapsed.

[69] Second, regardless of how it is interpreted on those issues, the Resignation Clause purports to fundamentally change the employee's common law rights in respect of its employment relationship.

[70] The effect of a resignation is serious because an employee who resigns has not been dismissed and has no remedy through a wrongful dismissal claim. Accordingly, any resignation must be "clear and unequivocal" and voluntary based on the employee's free will: ***Schumacher v Alberta (Minister of Sustainable Resource Development)***, 2007 ABCA 359 at para 1; ***Gibb v Palliser Regional School Division No 26***, 2020 ABQB 113 at para 48; ***Palmer v Acciona Infrastructures***, 2018 ABQB 462 at para 37. And, further, this is why there is both a subjective and objective component to the test for assessing whether resignation has occurred. As stated in ***Caroll*** at para 25:

> An employee who voluntarily resigns has not been dismissed and has no remedy through a wrongful dismissal claim. Because of this, the law recognizes that an effective and binding resignation must be clear and unequivocal. In determining whether an employee has resigned, the Court applies a subjective and objective test: subjectively, did the employee intend to resign; and objectively, viewing all the circumstances, would a reasonable employer have understood that the employee had resigned: ***Geddes v Silvestri Holdings Inc***, 2014 ABQB 416, [2014] AJ No 733 (QL) at para 58, citing ***Beggs v Westport Foods Ltd***, 2011 BCCA 76, 14 BCLR (5th) 1; see also ***Robinson v Teamcooper Heat-MQS Canada Inc***, 2008 ABQB 409, 95 Alta LR (4th) 249 at paras 38-42 [***Robinson***]; ***Evans v Avalon Ford Sales (1996) Ltd***, 2017 NLCA 9, [2017] NJ No 41 (QL) at paras 23-24 [***Evans***].

[71] In my view, the addition of an employment policy like the Resignation Clause in the Handbook, which either deems someone to have resigned or gives an employer the right to consider someone as having resigned, even when the employee may not subjectively intend to resign, or even when it is not objectively clear and unequivocal that they intend to resign, is a fundamental change to the employment relationship and removes the employee's common law rights. In my view, it is akin to a provision that reduces or limits the amount of notice required to dismiss and, therefore, the requirement for fresh consideration is pronounced.

[72] In this case, RWI acknowledged in argument that it could not point to any fresh consideration given to Stonham when he reviewed and signed the Handbook. I find that the Resignation Clause was not binding on Stonham.

[73] Even if I am wrong in that conclusion, and the Resignation Clause did bind Stonham, I would find that it was not engaged in any event. Given the inequality of bargaining power, employer policies imposed on employees should be construed strictly to determine if they actually apply to situation at hand and any ambiguity should be resolved in favour of the employee.

[74] I find that the Resignation Clause was not engaged here, even if it was enforceable against Stonham. RWI failed to prove, on a balance of probabilities, that September 15-17, 2020 were "working days" as contemplated in the Resignation Clause. The evidence from July and August 2020 indicated that there was an expectation or goal that Stonham would be ready to return to his pre-accident duties on September 15, 2020. However, there is no further medical evidence indicating that he was actually cleared and ready for pre-accident duties on September 15, 2020. Stonham admitted in questioning he was ready, but his evidence is unreliable and there is at least some evidence in the discovery excerpts, read-in by RWI, that Stonham may not have been expected to be able and ready for pre-accident duties until September 20, 2020.

[75] In any event, whether or not he was able to perform pre-accident duties on September 15, 2020 is not determinative, because neither party communicated with the other to confirm whether Stonham was or was not ready on September 15, 2020, and whether or not that would be his return date. I reject RWI's suggestion that the onus was only on Stonham to communicate with RWI. RWI did not discharge its burden to prove on the balance of probabilities that September 15-17, 2020 were "working days" which engaged the Resignation Clause.

[76] In conclusion, the Resignation Clause does not support RWI's position that Stonham resigned.

2. Even if the Resignation Clause was not Binding on Stonham, Did Stonham Otherwise Resign?

[77] As noted above, in determining whether an employee has resigned, the Court applies a subjective and objective test: subjectively, did the employee intend to resign; and objectively, viewing all the circumstances, would a reasonable employer have understood that the employee had resigned? Ordinarily, there must be a clear and unequivocal *act* in the form of a statement of an intention to resign or positive conduct from which that intention would clearly appear: ***Palme*** at paras 37-44; ***Geddes*** at paras 58-60; ***Zoehner*** at para 56; ***Beggs*** at paras 36, 41. An employee's timely retraction or attempted retraction may be considered: ***Beggs*** at para 37.

[78] I find on the balance of probabilities that Stonham did not subjectively intend to resign: rather, he wanted to return to work as a Class 1 driver as soon as he was able, and even sooner if RWI would give him a helper pending his full recovery from his accident. This is clear from his mid-August emails and his Reinstatement Request. I find that the vacuum of communications between the parties from mid August 2020 to September 18, 2020 does not outweigh this clear subjective intention.

[79] At the summary trial, Jette testified that RWI assumed Stonham resigned due to the Resignation Clause, Stonham's failure to show up for work on September 15-17, 2020, and Stonham's lack of communication about his return to work. However, I find on the balance of

probabilities that no reasonable employer would have understood Stonham to have resigned, even factoring in RWI's evidence and arguments.

[80] There is no evidence Stonham ever articulated any intention to resign, and as I have just noted his emails objectively indicate an intent to return. Although not determinative, he did not use the words "resign" or "quit" at any time. Further, the Reinstatement Request, which I have found was likely received by RWI before it sent the Resignation Acceptance Letter, is clear evidence of an intention to continue his employment. I reject RWI's suggestion and argument as speculation that Stonham sent the Reinstatement Request only to leverage a settlement – when, on its face, it asks to continue his employment.

[81] Provided this context, and regardless of when the Reinstatement Request was received, a reasonable employer would not have assumed or understood that Stonham had resigned. A reasonable employer would have followed up with its employee to clarify whether the employee was ready to return to work on September 15, 2020 as had been the previously expected goal.

[82] I find that Stonham did not resign.

C. Did Stonham's Employment Terminate Because He Abandoned his Employment?

[83] It is an implied term of every employment contract that an employee must attend work. When an employee fails to comply with that term, she or he will be taken to have abandoned or repudiated the contract, entitling the employer to treat the contract as being at an end: ***Smith v Mistras Canada, Inc***, 2015 ABQB 673 at para 33 [***Mistras***].

[84] Abandonment occurs when the employee unequivocally, through their words or actions and viewing the circumstances objectively, abandons the contract of employment: ***Carroll*** at para 58; ***Fitzgibbons v Westpres Publications Ltd (1983)***, 1983 CanLII 645 (BCSC), 50 BCLR 219, 3 DLR (4th) 366 (SC) at paras 26-27; ***Mistras*** at para 33; ***Pereira v Business Depot Ltd***, 2011 BCCA 361 at para 47.

[85] Whether there has been abandonment will depend on all the circumstances. The test is whether, viewing the circumstances objectively, a reasonable person would have understood from the employee's words and actions, that she or he had abandoned the contract of employment: ***Mistras*** at para 33; ***Pereira*** at para 47; ***Danroth v Farrow Holdings Ltd***, 2005 BCCA 593 at paras 7-8. The test may be met where an employee fails to attend work for an extended period without reasonable excuse or explanation: ***Carroll*** at para 58; ***Deakin v Northern Telecom Canada***, 1992 CarswellAlta 633, 129 AR 28 at para 68.

[86] While each case turns on its own specific and unique facts, some guidance may be taken from similar cases. Notably, abandonment allegations seem to arise frequently where an employee is away from work for medical reasons. Where an employee expresses an intention to return to work when they are better and there is an expected return date, courts have confirmed in several cases that the objective test for abandonment will not be met where the employee is not yet ready to return to work or where the employer has not taken any steps to clarify, or seek an update on, the employee's expected return date: ***Pereira*** at paras 55-58; ***Lippa v Can-Cell Industries Inc***, 2009 ABQB 684 at para 86; ***Fitzgibbons*** at para 27; ***Starling v Independent Living Resource***

Centre of Calgary, 2023 ABPC 31 at paras 34-36; ***Koos v A & A Contract Customs Brokers Ltd***, 2009 BCSC 563 at para 18.

[87] RWI points to Stonham's overall conduct since January 2020 as illustrating an intention to abandon his employment. I disagree that Stonham's conduct objectively shows abandonment. Stonham performed modified work duties until he went on medical leave, supported by a professional psychologist and received workers' compensation benefits.

[88] When Stonham was cleared for modified duties in July and August 2020, RWI acknowledged in its evidence and its argument that Stonham was not obligated to accept the offers of modified work; that is, RWI did not itself believe Stonham was required to accept those duties and, therefore, could not believe that his refusal in any way indicated abandonment. Stonham made it clear in July and August 2020 that he was keen to return to his job and perform pre-accident work.

[89] For some of the same reasons I have already given in the resignation analysis, I find that no objective person would have concluded that Stonham had abandoned his job. This was further made abundantly clear in his Reinstatement Request, which RWI ignored because it had already decided to close its file and move on from Stonham (based on his three days of non-attendance, even though it was not clear whether Stonham was actually able to return to his pre-accident duties at that time).

[90] I find Stonham did not abandon his employment.

D. Was Stonham Wrongfully Dismissed Without Reasonable Notice?

[91] Having found that Stonham did not resign or abandon his employment, and in light of RWI's Resignation Acceptance, the question is whether Stonham was dismissed and, if so, whether he was wrongfully dismissed.

[92] A finding of dismissal is based on an objective test: whether the acts of the employer, objectively viewed, amount to dismissal: ***Beggs*** at para 36; ***Bohnet v Rebel Energy Services Ltd***, 2018 ABPC 131 at para 30.

[93] Stonham sent the Reinstatement Request, which was not responded to and was effectively rejected by RWI. By that time, according to Jette: "the decision to terminate Mr. Stonham's employment" had already been made, RWI decided close its file and move on from Stonham. It sent him the Resignation Acceptance Letter, even though Stonham exhibited no objective intention to resign and was not bound by the Resignation Clause. On balance, I find RWI's conduct objectively amounted to dismissal.

[94] The next question is whether the dismissal was wrongful in the sense that it gives rise to a claim for damages. At common law, an employer has a right to terminate an employment contract without cause, subject to an implied term of the contract which imposes a duty on the employer to provide reasonable notice; if reasonable notice is not provided, the employee is entitled to damages for breach of contract: ***Matthews v Ocean Nutrition Canada Ltd***, 2020 SCC 26 at paras 38 and 43; ***Honda Canada Inc v Keays***, 2008 SCC 39 at para 50 [***Keays***].

[95] RWI did not provide notice of termination and Stonham is entitled to damages unless RWI has a defence.

[96] RWI did not expressly plead in its Statement of Defence that it had just cause to terminate Stonham's employment.

[97] In ***Armstrong v Gula***, 2023 ABKB 270, at paras 18-21, I recently discussed that courts should decide cases based on the pleadings, construed liberally, and mindful of potential prejudice:

> [18] Courts have emphasized that, as a fundamental principle of fairness, lawsuits are to be decided within the boundaries of the pleadings: ***Malton v Attia***, 2016 ABCA 130 at para 39; ***Rodaro v Royal Bank (2002)***, 2002 CanLII 41834 (ONCA) at para 60; ***Motkowski Holdings Ltd v County of Yellowhead***, 2010 ABCA 72 at para 20. Accordingly, it is generally inappropriate for a judge to decide a case on a basis not pleaded by the parties: ***Sumner v PCL Constructors***, 2011 ABCA 326 at para 26.
>
> [19] Basing a decision on an issue not raised in the pleadings deprives the other party of the opportunity to address that issue in the evidence at the trial; it is particularly problematic when a theory of liability is raised for the first time in the reasons for judgment: ***Malton*** at para 39; ***MNP (Next Friend of) v Bablitz***, 2006 ABCA 245; ***Rodaro*** at paras 61-62. Proceeding this way deprives a party from knowing the case they have to meet: ***Rodaro*** at para 61.
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> [20] However, pleadings are to be interpreted liberally and generously, not restrictively,: ***PricewaterhouseCoopers Inc v Perpetual Energy Inc***, 2021 ABCA 16 at para 74; ***Tottrup v Lund***, 2000 ABCA 121 at para 9. This interpretive approach applies in the context of summary resolution proceedings: ***Amyotte v Kawartha Haliburton Children's Aid Society***, 2021 ONSC 7378; ***Popescu v Wittman Canada Inc***, 2017 ONSC 3252 at paras 30-32; ***Link v Venture Steel Inc***, 2010 ONCA 144 at para 36.
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> [21] Further, a judicial decision may be reached on a basis which does not "perfectly accord" with the pleadings if no party to the proceedings is surprised or prejudiced: *Rules*, rule 1.3; ***Tervita Corporation v Canada (Commissioner of Competition)***, 2013 FCA 28 (CanLII), [2014] 2 FCR 352 at para 72, reversed on other grounds, 2015 SCC 3; ***CSX Transportation, Inc. v. ABB Inc.***, 2022 FCA 96 at para 12; ***Canada (Commissioner of Competition) v Rogers Communications Inc***, 2023 FCA 16 at para 12. [...]

[98] Further, rule 13.6(3) provides that a "pleading must also include a statement of any matter on which a party intends to rely that may take another party by surprise" including a non-exhaustive list of matters which must be specifically pleaded: ***Carroll*** at para 61.

[99] In my view, a defence of just cause expands the scope of relevant and material information, and the onuses, in a wrongful dismissal case, and failing to expressly and clearly plead it could take a plaintiff by surprise and cause prejudice. It is something that should be expressly pleaded in accordance with rule 13.6(3).

[100] Even interpreted liberally, RWI's Statement of Defence cannot be said to have pleaded a just cause defence, and RWI made no application to amend its pleading. Accordingly, I find that RWI is not permitted to rely on a just cause defence and, therefore, on the cases it relies on for the proposition that absenteeism can form the basis for termination with cause.

[101] In case I am wrong, I will briefly address RWI's argument that Stonham's absenteeism gives rise to a right to terminate for cause.

[102] I recently summarized the legal framework for a just cause defence in ***McDonald*** at paras 63-70:

> [63] Terminating an employee for just cause has been referenced as the "capital punishment" of employment of law: ***Ross v IBM Canada Limited***, 2015 ABQB 563 at para 30. The onus is on the employer to prove just cause: [***Haack v Secure Energy (Drilling Services) Inc***, 2021 ABQB 82] at para 110; ***Whitford v Agrium Inc***, 2006 ABQB 726 ... at para 30.
>
> [64] A finding of misconduct does not, in and of itself, give rise to just cause for termination of employment - the employee's behaviour must be such that gave rise to the breakdown of the employment relationship so that the employment relationship could no longer viably subsist: [***Baker v Weyerhaeuser Company Limited***, 2022 ABCA 83] at para 28, citing ***McKinley v BC Tel***, 2001 SCC 38 (CanLII), [2001] 2 SCR 161 at paras 29, 48-49. The core question is whether the employee has engaged in sufficiently serious misconduct that is incompatible with the fundamental terms of, that strikes at the heart of, or is a repudiatory breach of, the employment relationship: ***Baker*** at para 28, citing ***Dowling v Ontario (Workplace Safety and Insurance Board)*** (2004), 2004 CanLII 43692 (ON CA), 192 OAC 126; ***Haack*** at para 409; [***Vauxhall***] at para 12.
>
> [65] The ***McKinley*** framework involves a factual inquiry to be determined by a contextual examination of the nature and circumstances of the misconduct: ***Baker*** at para 28; ***Dowling*** at para 49. It involves consideration of (1) the nature and extent of the misconduct; (2) the surrounding circumstances; and (3) whether dismissal is a proportional response: ***Baker*** at para 28.
>
> [66] At the first step, an employer is entitled to rely on after-discovered wrongdoing: ***Baker*** at para 28; ***Lake Ontario Portland Cement Co v Groner***, 1961 CanLII 1 (SCC), [1961] SCR 553, at 563-64; ***Haack*** at para 414. However, the employer cannot rely on the employee's conduct *after* the termination: ***Baker*** at para 28; ***Haack*** at para 415; ***Underhill v Shell Canada Limited***, 2020 ABQB 341 at para 48; ***Gillespie v 1200333 Alberta Ltd***, 2012 ABQB 105 at para 29.
>
> [67] The second step considers the particular circumstances of the employee (including age, employment history, seniority, role and responsibilities) and the employer (including its type of business, relevant policies or practices, the employee's position within the organization, and the degree of trust reposed in the employee): ***Baker*** at para 28.

> [68] The third step, proportionality, is an assessment of whether the misconduct is reconcilable with sustaining the employment relationship, which requires a consideration of the proved conduct, within the employment context, to determine whether the misconduct is sufficiently serious that it would give rise to a breakdown in the employment relationship: ***Baker*** at para 28; ***Vauxhall*** at paras 119-20; ***Jegou v Canadian Natural Resources Limited***, 2021 ABQB 401 at para 255[.]
>
> [69] Given the identity and self-worth individuals frequently derive from their employment, an effective balance must be struck between the severity of an employee's conduct and the sanction imposed: ***McKinley*** at 52-53. Except for the most serious circumstances, an employer should use progressive discipline or alternative sanctions before terminating an employee for misconduct: ***Mack v Universal Dental Laboratories***, 2020 ABQB 738 at para 101; ***Underhill*** at paras 100-01; ***OWL (Orphaned Wildlife) Rehabilitation Society v Day***, 2018 BCSC 1724 at para 144; ***Henson v Champion Feed Services Ltd***, 2005 ABQB 215 at paras 34, 56; ***Cumberland v Maritime College of Forest Technology***, 2023 NBKB 65 at para 69.
>
> [70] As discussed below, in the application of the ***McKinley*** framework over time, certain principles have developed to further guide or refine the contextual analysis in respect of different types of employee misconduct.

[103] In ***Whitford v Agrium Inc***, 2006 ABQB 726 at para 34, Justice Sulyma cited ***Fleming v JF Good & Sons Stationers & Office Supplies Ltd***, 1994 CanLII 4361 (NSSC), 132 NSR (2d) 84, which described contextual factors to consider in relation to absenteeism. RWI relies on this list, and also ***MacBurnie v Halterm Container Terminal Limited Partnership***, 2013 NSSC 361 at para 83 which provides that a deliberate breach of an employer's rule or policy about notice of absence can give rise to just cause.

[104] I would recast the list of considerations from these cases to the following, which are specifically relevant to absenteeism (as opposed to general wrongful dismissal principles which are already encompassed in the ***McKinley*** framework), namely whether the employee's absence:

(a) occurred after a leave of absence and the employee failed to promptly return to work without advising his employer;

(b) occurred under false pretences;

(c) occurred despite a direct order not to be absent;

(d) occurred in breach of known and enforceable contractual provisions or employer policies related to notice of absences;

(e) was the employee's fault rather than something that was reasonably explained or excusable (for example, something out of the employee's control or accidental);

(f) was intentional rather than based on a misunderstanding;

(g) was part of a history or pattern of absenteeism rather than only a few instances; and

(h) caused harm or prejudice to the employer's interest.

[105] In this case:

(a) as noted earlier, it is not clear whether Stonham was ready and able to return to pre-accident duties by September 15, 2020. He did not reasonably communicate with RWI after the mid-August email exchange (I reject Stonham's evidence that he could not, or was not able to, communicate with RWI or Labelle during this period). However, RWI also failed to reasonably communicate with Stonham because it never followed up with him to clarify when he would be physically able to return to perform his pre-accident work;

(b) RWI acknowledged that it believed Stonham was not legally required to accept the modified work offers, and there was no direct order required Stonham to report to work on a specific day;

(c) RWI has not proven that Stonham's absences occurred under false pretences. By July 24, 2020, Stonham was cleared and able to return to modified duty. RWI offered Stonham optional modified duty work in July and August 2020, but he chose not to exercise that option. Even if he was doing something else during that period, RWI's Handbook did not prohibit employees from having other jobs or other income unless it was in competition with RWI or if it affected the employee's performance (none of which RWI proved in this case);

(d) there is no evidence of any prejudice or harm caused to RWI by Stonham's absence;

(e) Stonham did not have any history of absenteeism prior to his workplace injury and medical leave;

(f) there is insufficient evidence to conclude, on a balance of probabilities, that Stonham's absence was intentional. RWI has not proven its allegation that Stonham never wanted to return to RWI and structured his dealings with RWI (or his absences) to leverage a buyout. For example, Stonham's January 10, 2020 letter cannot be construed as an invitation to terminate Stonham as suggested by RWI. Further, my finding that Stonham was not a credible or reliable witness does not, in this case, lead to an inference that he was falsely remaining absent from work – he appears to have attended numerous medical appointments, as required by WCB, and RWI has not provided any medical evidence to refute the psychologist, physician and physical therapist's information that both parties agreed should be admitted into evidence;

(g) despite RWI's efforts to cast blame for the accident, the record does not permit me to make (and I need not make) any findings about the cause of Stonham's fall;

(h) Stonham's absences from RWI were initially related to the injury, then due to a medical leave supported by a professional psychologist, and then his decision not

to return to optional modified work duties pending his complete recovery (which RWI acknowledged was a decision he was entitled to make); and

(i) as noted, his ability to perform his pre-accident duties after mid-August 2020 is not clear and has not been proven. It cannot be said that his absences were his "fault".

[106] I find that Stonham's absences (or other conduct) was not misconduct of such a nature that struck at the heart of or was a repudiation of the employment relationship. Further, I have considered the ***McKinley*** framework noted above. Having regard to Stonham's conduct, and his and RWI's circumstances, I find that RWI's response to Stonham's absence on September 15-17, 2020 was not proportionate. Further, it was not compliant with RWI's own "Discipline Policy and Procedure" in its Handbook which provided for progressive discipline including verbal and written warnings.

[107] While Stonham's approach and lack of communication was questionable, a reasonable employer in RWI's circumstances would not have attempted to rely on the Resignation Clause to justify "closing the file" on its employee – it would have made an inquiry about Stonham's recovery to determine whether he was ready for pre-accident duties and, if so, to advise him of his required date of return to work. And, a reasonable response would not include sending the Resignation Acceptance Letter at the very moment the employee expressed readiness and ability to return to their pre-accident duties.

[108] Accordingly, even if RWI had pleaded a just cause defence, based on the record before me it would have failed.

[109] I find that RWI wrongfully dismissed Stonham because it failed to provide him any notice of termination.

E. If Stonham was Wrongfully Dismissed, what are his Damages?

[110] In ***McDonald***, I recently summarized the principles of reasonable notice, at paras 132-135:

> [132] As noted earlier, the common law implies a term of the employment contract to provide reasonable notice, failing which the employee is entitled to damages: ***Matthews*** at paras 38 and 43; ***Keays*** at para 50. That is, the common law "implies a term of reasonable notice, or pay in lieu": ***Styles v Alberta Investment Management Corporation***, 2017 ABCA 1 at para 34.
>
> [133] The purpose of the implied term of reasonable notice is to enable the terminated employee to obtain other employment: ***Lavallee v Siksika Nation***, 2011 ABQB 49 at para 116, citing ***Bramble v Medis Health & Pharmaceutical Services Inc***, 1999 CanLII 13124 (NBCA), 2014 NBR (2d) 111 at para 57 (NBCA); ***Steinebach v Clean Energy Compression Corp***, 2016 BCCA 112 at paras 15-17; ***Sumner v PCL Constructors Inc***, 2010 ABQB 536 at para 12. Therefore, at its heart, the period of reasonable notice attempts to estimate, as of the date of termination, the time period it will take the employee to find commensurate employment: ***Alberta Computers.com Inc v Thibert***, 2021 ABCA 213 at para 60; ***Humphrey v Mene Inc***, 2022 ONCA 531 at para 48.

> [134] The calculation of reasonable notice is *not* a calculation of damages, but rather is a question of interpretation and determination of the implied term of contractual notice required: ***Carroll*** at para 17; ***Baker*** at para 25. This means it is a question of mixed fact and law governed by the Supreme Court of Canada's approach to contractual interpretation in ***Sattva Capital Corp v Creston Moly Corp***, 2014 SCC 53 at para 50: ***Carroll*** at para 17.
>
> [135] The determination of the reasonable notice period is highly fact dependent: ***Carroll*** at paras 20-21 and 40. Courts continue to generally apply a non-exhaustive list of factors, including the character of the employment, length of service, age, availability of similar alternative employment, having regard to the employees experience, training and qualifications: ***Alberta Computers.com*** at para 60; [***Wallace v United Grain Growers Ltd***, 1997 CanLII 332 (SCC), [1997] 3 SCR 701] at paras 81-82, citing ***Bardal v Globe & Mail Ltd***, 1960 CanLII 294 (ONSC), (1960), 24 DLR (2d) 140 (Ont HC); ***Keays*** at paras 25, 28-32.

[111] Stonham was employed as a Class 1 driver, although at times he performed other driving duties involving a variety of different trucks. At the time of his termination, Stonham was 54. He had been employed for 3 years. He was a wage-earner and the parties agree he earned approximately $54,000 per year.

[112] Stonham claims $27,000 damages based on a 6-month notice period. He claims no other damages, aside from interest and costs. He highlighted the COVID pandemic as affecting his ability to find employment, but provided no evidence of that or of any details about his job search efforts.

[113] RWI challenges Stonham's damages. It did not plead a lack of mitigation. Even if it had, proving lack of mitigation has a two-part onus, demonstrating that (1) an employee has failed to make reasonable efforts to find employment; and (2) comparatively similar employment could have been found: ***Evans v Teamsters Local Union No 31***, 2008 SCC 20 at para 30; ***Red Deer College v Michaels***, 1975 CanLII 15 (SCC), [1976] 2 SCR 324; ***Magnan v Brandt Tractor Ltd***, 2008 ABCA 345 at para 30; ***Christianson v North Hill News Inc***, 1993 ABCA 232 at para 11; ***Cochrane v Western Energy Services Corp***, 2021 ABQB 808 at para 19; ***Schaufert v Calgary Co-Operative Association Limited***, 2021 ABQB 579 at paras 129-130.

[114] RWI did not prove a lack of mitigation. It did not prove on the balance of probabilities that Stonham was earning other cash income from his own truck operations during any notice period that should be taken into account. RWI argued that the impact of COVID on employment doesn't apply to truck drivers, but it too provided no evidence about that.

[115] RWI suggests that, if Stonham is entitled to damages, it should be $9,000 to $13,5000 based on a 2-or-3-month notice period.

[116] Determination of the notice period is not formulaic but considering precedent may be helpful and is the usual practice of parties and courts: ***McDonald*** at para 150, citing ***Hodgins v St John Council for Alberta***, 2008 ABCA 173 at para 7.

[117] The parties rely on seven cases on the question of a reasonable notice period.

[118] Stonham's cases:

(a) ***Lalonde v Sena Solid Waste Holdings Inc***, 2017 ABQB 374 (56-year-old millwright with 4.3 years of service: 6 months);

(b) ***Hickaway v Riddell Kurczaba Architecture Engineering Interior Design Ltd***, 2019 ABQB 646 (54-year-old salaried architectural technician with 3.5 years of service: 7 months);

(c) ***Schlachter v Westlock Chevrolet Oldsmobile Ltd***, 2007 ABQB 481 (52-year-old retail sales representative with 4.5 years of service: 4 months);

(d) ***Stea v Kulhawy,*** 1996 CanLII 10586 (ABQB) (52-year-old Chief Financial Officer with 2.9 years of experience: 9 months).

[119] RWI's cases:

(a) ***Spencer v Tim Horton's***, 1995 CanLII 17953 (AB Prov Ct) (52-year-old bus driver with 4 years of service: 2 months);

(b) ***Qubti v Reprodux Ltd,*** 2010 ONSC 837 (50-year-old driver with 7 years of service: 4 months);

(c) ***Mcgilvery v Ace Explosives Eti Ltd***, 1996 CanLII 776 (BCSC) (51-year-old driver with 2.5 years of service: 2 months).

[120] In my view, RWI's cases are more pertinent because they better reflect the nature of the employment. In all the circumstances, I find that a 2.5 month notice period is appropriate in this case. Stonham is entitled to damages in the amount of $11,250.

VII. Conclusion

[121] Based on the foregoing, Stonham is granted judgment for wrongful dismissal in the amount of $11,250, plus pre-judgment interest calculated at the prescribed rates under the *Judgment Interest Act*, RSA 2000, c J-1 from September 18, 2020 to the date of this decision, plus post-judgment interest to the date of payment.

[122] In the event the parties are unable to reach agreement on costs arising out of this decision, the following process shall apply:

(a) within 30 days of this decision, Stonham shall file and serve on RWI and submit to my office a written cost submission setting out his costs position;

(b) within 45 days of this decision, RWI shall file and serve on Stonham and submit to my office a written costs submission setting out its costs position;

(c) each party's costs submission will be a maximum of 3 pages (excepting attachments, including authorities, draft proposed bill of costs, or reasonable and proper costs summary), single spaced in letter format, and shall provide:

(i) their position with respect to the factors set out in rule 10.33;

(ii) any formal offer under the *Rules* or other offer they wish considered;

(iii) a draft proposed bill of costs pursuant to Schedule C; and

(iv) a summary of their actual reasonable and proper costs incurred in respect of the application and the action.

[123] If no submissions are received pursuant to this direction, there shall be no order as to costs.

Heard on the 19th day of October, 2023.
Dated at the City of Calgary, Alberta this 7th day of November, 2023.

M.A. Marion
J.C.K.B.A.

Appearances:

Daniel Hermann and Charles Osuji
for the Plaintiff

Peter R.S. Leveque
for the Defendant