CITATION: Mittra v. Royal Bank of Canada et al, 2024 ONSC 636
COURT FILE NO.: CV-19-624677
DATE: 20240129

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	
AIDAN MITTRA Plaintiff (Defendant by Counterclaim)	*Soma Ray-Ellis and Kevin Fisher*, for the Plaintiff (Defendant by Counterclaim)
– and –	
ROYAL BANK OF CANADA and RBC INVESTOR SERVICES TRUST Defendants (Plaintiffs by Counterclaim)	*Matthew P. Sammon and David Salter*, for the Defendants (Plaintiffs by Counterclaim)
	HEARD: April 3, 4, 5, 6, 11, 12, 13, 14, 17, 18, 19, 20, 21, 24, 25, and June 9, 2023

CAVANAGH J.

REASONS FOR JUDGMENT

INTRODUCTION

[1] The Plaintiff, Aidan Mittra, was formerly employed by Royal Bank of Canada ("RBC") and RBC Investor Services Trust, a subsidiary of RBC.

[2] In the period from August 2016 to January 2017, Mr. Mittra was employed in the position of Managing Director with RBC Investor Services Trust in London U.K. In January 2017, Mr. Mittra was asked to accept an offer for a temporary expatriate assignment to Toronto for a position of Managing Director with a business unit of RBC Investor Services Trust in Toronto. Mr. Mittra accepted this offer and relocated to Toronto in January 2017.

[3] Mr. Mittra was dismissed from his employment on April 23, 2019. He was working in Toronto at the time of his dismissal.

[4] The termination of Mr. Mittra's employment followed an investigation by RBC into the financial dealings of an RBC employee, Al-Karim Ramji (who had been petitioned into bankruptcy by another RBC employee), with RBC employees. Mr. Mittra had worked

closely with Mr. Ramji. For a time, Mr. Ramji reported to Mr. Mittra. Mr. Mittra was asked to attend interviews with RBC's external investigator, a U.K. law firm, as part of RBC's investigation. Mr. Mittra participated in three interviews with RBC's investigator. In the interviews, Mr. Mittra answered questions about personal money he had given to Mr. Ramji for investment on his behalf.

[5] Following these interviews, Mr. Mittra was notified that he was alleged to have committed misconduct which could result in disciplinary action being taken against him. Mr. Mittra was asked to participate in a disciplinary hearing. He did so. The disciplinary hearing was held on March 20, 2019.

[6] On April 23, 2019, Mr. Mittra was given a letter by the RBC executive who chaired the disciplinary hearing notifying him of the termination of his employment. The chair notified Mr. Mittra that he had upheld two of three allegations of misconduct and that he decided that Mr. Mittra's employment will be terminated on 3 months' notice to be served as "garden leave".

[7] Mr. Mittra brings this action for damages for the wrongful termination of his employment based on unpaid compensation for 24 months, being the period of reasonable notice to which he claims he was entitled under common law principles as they apply in Ontario. Mr. Mittra also claims punitive and aggravated damages.

[8] RBC defended Mr. Mittra's claim and counterclaimed for damages for alleged tax overpayments made by RBC and received by Mr. Mittra.

[9] After Mr. Mittra was examined for discovery, RBC amended its Statement of Defence and Counterclaim to plead after-acquired cause for the termination of Mr. Mittra's employment. RBC pleads that with discovery having been recently completed, it has now become apparent that Mr. Mittra deliberately misled RBC investigators and the RBC disciplinary chair about the nature of his investments with Mr. Ramji and his knowledge and recollection of them.

[10] For the following reasons, I conclude:

a. Under his contract of employment, Mr. Mittra was not entitled to receive reasonable notice of the termination of his employment under common law principles as they apply in Ontario. At the time of Mr. Mittra's dismissal, his contract of employment was subject to the laws of the U.K. unless superseded by the application of the laws of Canada (such as mandatory provisions of the *Employment Standards Act*).

b. RBC had after-acquired cause for the termination of Mr. Mittra's employment.

[11] I dismiss Mr. Mittra claim (except for payment of the unpaid amount of deferred compensation that vested in December 2018). I allow RBC's counterclaim.

BACKGROUND FACTS

[12] The following background facts are established by the evidence.

[13] After his graduation from university, Mr. Mittra was hired by RBC in September 2005 for a position with RBC Capital Markets in London, England. He left employment with RBC in April 2006.

[14] On November 23, 2009, Mr. Mittra was hired by RBC (London Branch) in the position of Vice President, Credit Trader. He held progressively more senior positions until he was promoted to Managing Director in 2015.

[15] Mr. Mittra was based in Luxembourg from Spring 2015 to Fall 2016 where he held the position of Managing Director, Treasury & Market Services ("TMS").

[16] On August 17, 2016, Mr. Mittra accepted an offer of employment dated August 15, 2016 with RBC Investor Services Trust in the position of Managing Director, Global Head of Asset Management and Head of TMS Europe, pursuant to an International Permanent Transfer letter agreement and an Addendum agreement (the "2016 Agreement"). Mr. Mittra's employment under the 2016 Agreement was for a position in London, England.

[17] On January 17, 2017, Mr. Mittra accepted an offer dated January 6, 2017 made by RBC Investor & Treasury Services (U.K.) for a Temporary Expatriate Assignment to RBC Investor & Treasury Services, Canada in the position of Managing Director, Global Head of TMS Asset Management & Regional Head TMS, North America (the "2017 Agreement").

[18] RBC Investor Services Trust is a legal entity indirectly owned by RBC (through a holding company) through which RBC Investor & Treasury Services, a business segment, operated. RBC Investor Services Trust is an Ontario trust company that, through RBC Investor & Treasury Services, operated in branches in certain countries including in the U.K. and Canada. For convenience, I refer to RBC and RBC Investor Services Trust, together, as "RBC", unless the context requires each to be separately described.

[19] Mr. Mittra moved to Toronto following execution of the 2017 Agreement and he began working there.

[20] Al-Karim Ramji was a long time employee of RBC Investor & Treasury Services in London with whom Mr. Mittra had worked closely.

[21] Mr. Mittra provided a total of £430,000 of his personal money to Mr. Ramji for investment. The money was paid, at Mr. Ramji's direction, to Mr. Ramji's associates. The transfers took place in May 2014, August 2014, and January 2015.

[22] In December 2018, Mr. Mittra was informed by his superior, Rob Pomphrett, that RBC was investigating Mr. Ramji's financial dealings with RBC employees. RBC had discovered that Mr. Ramji had been petitioned into bankruptcy by another RBC employee and that a bankruptcy order was made on October 15, 2018.

[23] At the request of RBC, in December 2018, January 2019, and February 2019 Mr. Mittra attended three meetings with representatives of Freshfields Bruckhaus Deringer ("Freshfields"), an external law firm retained by RBC to investigate the circumstances surrounding the bankruptcy of Mr. Ramji and his financial dealings with RBC employees. RBC's internal counsel also attended the meetings, although she was not present throughout all of the meetings.

[24] By letter dated March 6, 2019 from RBC, Mr. Mittra was notified that he was alleged to have committed misconduct which could result in disciplinary action being taken against him. RBC made three allegations of misconduct against Mr. Mittra in the March 6, 2019 letter.

a. Allegation 1 was that Mr. Mittra had failed to disclose his close personal friendship and financial arrangements with Mr. Ramji when Mr. Ramji reported to Mr. Mittra. RBC alleged that Mr. Mittra's relationship with Mr. Ramji while he held a direct oversight role with regard to Mr. Ramji gave rise to a potential or perceived conflict of interest. RBC alleged that this failure to disclose was a breach of RBC's Code of Conduct and other RBC policies.

b. Allegation 2 was that Mr. Mittra failed to provide RBC (through its external law firm) with accurate, complete and timely information in the course of its inquiry and the investigation because his initial disclosures about his financial arrangements with Mr. Ramji were incomplete. RBC alleged that through this failure, Mr. Mittra had breached RBC's Code of Conduct

c. Allegation 3 was that in respect of the £430,000 that he paid to Mr. Ramji and, on his instructions, to friends of Mr. Ramji, Mr. Mittra failed to take reasonable steps to ensure that this money was not being invested in a way that would require approval under RBC's Global Private Investment Policy in force at the time.

[25] In the March 6, 2019 letter, Mr. Mittra was asked to participate in a disciplinary hearing. Mr. Mittra was informed that if the allegations of misconduct were upheld, he may be subject to disciplinary action up to and including termination of his employment.

[26] Mr. Mittra participated in the disciplinary hearing on March 20, 2019.

[27] On April 23, 2019, Mr. Mittra was provided with a letter from Graeme Pearson, the RBC executive who chaired the disciplinary hearing, notifying him of the termination of his employment. Mr. Pearson notified Mr. Mittra that he is upholding Allegation 1 and Allegation 3, that he had lost trust and confidence in Mr. Mittra to perform his role, and

that he had decided that Mr. Mittra's employment will be terminated on 3 months' notice to be served as "garden leave", meaning that Mr. Mittra will remain employed by RBC during the notice period and will continue to be paid his base salary and receive his benefits but, during this time, he is not required to attend at work.

[28] On April 29, 2019, Mr. Mittra gave RBC notice of his intention to appeal the decision to terminate his employment. He sent a letter to RBC dated May 3, 2019 in support of his appeal. Soon after, Mr. Mittra withdrew the appeal.

[29] Mr. Mittra commenced this action by a Statement of Claim issued on July 30, 2019.

[30] RBC defends the action and asks that it be dismissed. RBC counterclaims for damages or restitution for breach of contract and unjust enrichment resulting from tax overpayments by RBC.

ANALYSIS

[31] The main question in Mr. Mittra's action is whether RBC is liable to him for damages for breach of his employment contract and, if so, the amount of such damages. The question in RBC's counterclaim is whether Mr. Mittra is liable to RBC for damages for the claims in the counterclaim and, if so, the amount of RBC's damages.

[32] The answers to these questions depend on the answers to a number of subsidiary questions that arise.

ISSUE # 1 Was it a term of Mr. Mittra's employment contract that it could be terminated only on reasonable notice under common law principles as they apply in Ontario?

[33] Mr. Mittra's position is that a term of his employment contract was that it could be terminated only on reasonable notice under the common law as it applies in Ontario. Mr. Mittra submits that the period of reasonable notice to which he was entitled is 24 months.

[34] RBC s position is that the 2016 Agreement, as amended by the 2017 Agreement, governs the termination of Mr. Mittra's employment and that it is a valid contract under U.K. law. The 2016 Agreement provides for a maximum of 12 weeks' notice on the termination of Mr. Mittra's employment. RBC submits that Mr. Mittra received the notice to which he was contractually entitled. RBC submits that, in any event, Mr. Mittra's contract of employment is governed by the laws of the U.K. and, under common law principles as they apply in the U.K., three months' notice is a reasonable period of notice.

[35] I first refer to the relevant provisions of the 2016 Agreement and the 2017 Agreement. I then address the submissions of the parties with respect to whether it was a term of Mr. Mittra's contract of employment that it could only be terminated on reasonable notice under common law principles as they apply in Ontario.

The 2016 Agreement and the 2017 Agreement

[36] Pursuant to the 2016 Agreement, Mr. Mittra assumed his role in the U.K. from about September/October 2016 through January 2017.

[37] The 2016 Agreement contains a number of provisions including:

a. Mr. Mittra's contract of employment is with RBC Investors Services Trust;

b. The bolded sections of the U.K. Employee Information Handbook referenced in the 2016 Agreement formed part of his contract of employment, provided that to the extent there is any direct conflict between the contractual provisions of the Handbook and the letter, the letter shall prevail.

c. The Handbook and the letter should be read in conjunction with RBC's Code of Conduct. Complying with the Code of Conduct is a condition of employment.

d. Mr. Mittra's continuous service with RBC was recognized from November 23, 2009;

e. Mr. Mittra would receive fixed compensation consisting of base salary, additional fixed pay, and role-based pay which he would receive only while he was "Code Staff" pursuant to FCA regulations;

f. Mr. Mittra was eligible to be considered for an annual discretionary bonus, generally payable in December;

g. The termination of Mr. Mittra's employment would be subject to two months' notice, in writing, on either side. After eight years' service, RBC was required to give one additional week of notice for each additional year of service to a maximum of 12 weeks' notice;

h. Mr. Mittra's normal place of work is RBC's premises in London, England or such other premises as RBC shall determine from time to time;

i. Depending on the location of Mr. Mittra's employment, the terms of the 2016 Agreement shall be construed in accordance with the laws of England.

[38] Under the U.K. Employee Information Handbook, Mr. Mittra would be provided with a position title and level reflecting the responsibilities of his job. In addition, Mr. Mittra would have a position mandate detailing the duties and tasks required in his role. The handbook states that reporting lines and job responsibilities may change due to business needs.

[39] RBC tendered expert evidence from David Reade, a U.K. barrister, that the letter dated August 15, 2016 and the addendum letter, which were accepted by Mr. Mittra, creates a valid employment contract under English law. Mr. Reade testified that there is nothing on the face of the letters which suggested an illegality or a lack of consideration or that the documents were not intended to be effective as a valid contract. I accept this evidence.

[40] On January 17, 2017, Mr. Mittra executed the 2017 Agreement (a letter dated January 6, 2017). The letter was sent by Rob Pomphrett and is on letterhead of RBC Investor & Treasury Services.

[41] The 2017 Agreement states that Mr. Mittra is offered a "Temporary Expatriate Assignment" from RBC Investor & Treasury Services, U.K. (defined as the "home company/country") to RBC Investor & Treasury Services, Canada (defined as the "host company/country") in the position of Managing Director, Global Head of TMS Asset Management & Regional Head TMS, North America (PL05) and reporting to Rob Pomphrett.

[42] The 2017 Agreement states that Mr. Mittra's assignment is expected to commence on January 23, 2017 and is expected to last for three years. The 2017 Agreement states that the terms and conditions of Mr. Mittra's temporary expatriate assignment will be set out in the letter and, in the event that he is required to remain in Canada beyond three years, the terms and conditions of his employment will be reviewed and amended according to RBC policies/practices in effect at that time.

[43] The 2017 Agreement states that Mr. Mittra's assignment compensation will be administered according to the "Home Based Balance Sheet Compensation Approach". Under this approach, Mr. Mittra's compensation, which includes base salary and any applicable short and mid/long-term incentives, is subject to the compensation guidelines and practices of his home country, as amended and in effect from time to time. Mr. Mittra's base salary was GBP 275,000 which, as stated in the 2017 Agreement, is reflective of the market level of the position and in line with the salary structure of his home country. For the duration of the assignment, Mr. Mittra remained eligible for base salary adjustments based on the pool funding and guidelines established in the home country. Mr. Mittra was eligible to participate in the "RBC I&TS Annual Incentive Plan" which provided for individual bonuses.

[44] Under the Balance Sheet Compensation Approach described in the 2017 Agreement, Mr. Mittra was responsible for hypothetical tax on employment income earned during the assignment which is the stay-at-home tax liability that he would pay if he were to remain in the home country and not undertake the assignment. The 2017 Agreement states that, if applicable, RBC will utilize hypothetical tax collected from Mr. Mittra to pay his tax liability on employment income that arises in the host country and RBC would fund income and/or social security taxes arising in the host country on RBC paid employment compensation.

[45] Under the 2017 Agreement, RBC agreed to provide Mr. Mittra with an annual location equalization differential of GBP 20,201 to enable him to maintain purchasing power and offset the difference in costs of goods and services between the home and host countries. Under the 2017 Agreement, Mr. Mittra was entitled to participate in the U.K. pension plan and he received tax consultation services provided by Ernst & Young Inc. as retained and paid by RBC. Mr. Mittra received housing allowance payments subject to deduction (from base salary) of deemed home country housing and utilities costs. He received payment of travel costs for his spouse.

[46] The 2017 Agreement provides for a temporary assignment for Mr. Mittra from the branch of the business segment where Mr. Mittra worked in the U.K. to the branch of this business segment in Canada. The term of the assignment was not fixed, although it was expected to last for three years. The 2017 Agreement contains provisions upon conclusion of the assignment including for repatriation to the home country upon the scheduled or earlier conclusion of the assignment (including on employer initiated termination).

[47] The 2017 Agreement contemplates that Mr. Mittra may transition to local employment status and become an employee of the host company. This is referred to in the 2017 Agreement as "Localization". The 2017 Agreement provides that upon localization, Mr. Mittra will cease employment with the home country and become subject to employment conditions, policies, practices and laws of the hiring country (Canada). Upon localization, Mr. Mittra would pay local taxes on employment and personal income and RBC would pay home/host (U.K.) taxes if applicable on relocation assistance for transition to permanent status.

[48] The 2017 Agreement addresses Mr. Mittra's employment upon the conclusion of the assignment and states:

> If your manager has not done so, you should ensure that post assignment employment search and deployment discussions for a return to RBC employment in the home country upon the conclusion of the assignment are initiated at least 12 months in advance of the scheduled conclusion of your assignment. For both the scheduled or earlier conclusion of the assignment and assuming satisfactory performance, RBC will make every effort to assist you with your job search and placement in a position in the home country commensurate with your experience and position level or equivalent.

[49] Each of the 2016 Agreement and the 2017 Agreement contains provisions addressing choice of law.

[50] The 2016 Agreement provides:

> Depending on your location of employment as stated in your offer above, the terms of this letter shall be construed in accordance with the laws of England and you and the Company submit to the exclusive jurisdiction of the English Courts according to your employment location stated above.

[51] The 2016 Agreement provides that Mr. Mittra's normal place of work is at the London office or such other premises as RBC may determine from time to time. When Mr. Mittra accepted the terms of the 2016 Agreement, he was to be employed in London.

[52] The 2017 Agreement reads:

> Unless superseded by the application of host country laws, your employment relationship during the assignment will remain with RBC Investor & Treasury Services, U.K., and will be subject to the employment laws of the home country.

[53] The 2017 Agreement addresses termination of employment and reads:

> For RBC initiated involuntary termination, notice of termination and severance entitlement, if any, will be based on RBC policies and practices in effect in the home country at the time notice of termination is given, unless superseded by host country laws.

[54] It is open to an employer and employee to select the law that governs an employment contract. In *Vasquez v. Delcan Corp.*, 1998 CarswellOnt 2784, at para. 31, Swinton J. held:

> In accordance with Canadian conflict of law principles, courts respect the parties' express choice of the law to govern their contract, absent vitiating factors. In the leading case, *Vita Food Products Inc. v. Unus Shipping Co.*, [1939] A.C. 277 (Canada P.C.), the Privy Council held that the parties' expressed intention should determine the proper law of a contract, provided that the application of that law is not contrary to public policy, and the choice was *bona fide* and legal.

[55] I am satisfied that U.K. law governs the 2016 Agreement because the parties selected this law, the application of the law of the U.K. is not contrary to public policy, the choice was *bona fide*, and there are no vitiating factors.

[56] The parties disagree about the law that governed Mr. Mittra's employment while he was working in Toronto.

[57] Mr. Mittra contends that his employment under the 2016 Agreement ceased when he accepted the terms of the 2017 Agreement, and that his employment was then governed by

Canadian statutory and common law, including a presumption that his employment could only be terminated on reasonable notice.

[58] RBC contends that Mr. Mittra was employed by the U.K. branch of RBC Investor & Treasury Services, a business segment of RBC Investor Services Trust, for an indefinite term under the 2016 Agreement, and that under the 2017 Agreement, he was temporarily assigned to work for the Canadian branch of RBC Investor & Treasury Services within RBC Investor Services Trust. RBC contends that Mr. Mittra's employment after the 2017 Agreement was governed by the law of the U.K. unless superseded by the application of the laws of Canada.

[59] Mr. Mittra makes several arguments in support of his submission that his employment agreement was for an indefinite period in Canada and was subject to the presumption under Canadian common law that his employment could be terminated only on reasonable notice. I address these arguments in turn.

Did RBC concede the application of Canadian common law to Mr. Mittra's employment?

[60] Mr. Mittra submits that in the opening submissions made by its counsel at trial, RBC conceded that Canadian common law governs the termination of his employment.

[61] Mr. Mittra refers to RBC's opening submission in which counsel submits that Mr. Mittra's employment is governed by U.K. law unless superseded by Canadian law.

[62] RBC submits that unless Canadian law mandatorily applies to an employment contract because, as a matter of law, it cannot be contracted out of, U.K. law applies. RBC accepts that certain provisions of the *Employment Standards Act* ("*ESA*") cannot be contracted out of and that these provisions apply to Mr. Mittra's employment while he is working in Ontario. RBC submits that the termination provisions in the 2017 Agreement comply with the minimum standards in the *ESA* and, therefore, there are no superseding laws of Canada that govern Mr. Mittra's employment contract.

[63] In response to a question from me during RBC's opening statement, counsel responded that RBC has not led evidence to prove the substantive law of the U.K. with respect to after-acquired cause and, in such circumstances, the court should assume that the law of the U.K. with respect to this matter is the same as the law of Canada and that I should apply the law of the forum, Ontario, to determine the cause issues.

[64] Mr. Mittra submits that it is improper for RBC to seek to rely on U.K. law to validate the 2016 Agreement and then rely on Canadian law for its defence to a claim for damages for wrongful dismissal based on after-acquired cause. Mr. Mittra submits that by agreeing that the law of the forum applies to determine the issues of cause for dismissal without notice, RBC must be taken to have agreed that the law of the forum, Ontario, applies to Mr. Mittra's employment in while he was working in Toronto.

[65] RBC is entitled to rely on the choice of law provisions of the 2016 Agreement and the 2017 Agreement to support its submission that U.K. law governs Mr. Mittra's contract of employment, including during the time he was working in Toronto. If U.K. law applies, this law as it applies to relevant questions may be proven as a fact through a qualified witness. If the foreign law with respect to a relevant issue is not proven through evidence, there is a presumption that the foreign law applicable to this issue is the same as Canadian domestic law. See *Morgardshammar AB v. H.R. Radomski and Company Limited*, 1983 CarswellOnt 1339, at paras. 7-14, aff'd 1984 CarswellOnt 1448 (ONCA); *Tolofson v. Jensen (Litigation Guardian of) v. Gagnon*, 1994 CanLII 44 (SCC), at p. 1053.

[66] RBC has not taken contradictory positions in its submissions, as Mr. Mittra argues.

[67] I conclude that RBC did not concede through its opening submissions that Canadian common law governed Mr. Mittra's employment contract after he began working in Toronto.

Does Canadian common law apply to anyone living and working in Canada?

[68] Under Canadian common law, there is a presumption that an employment contract is terminable by either party only on reasonable notice. This presumption is rebuttable if the contract of employment clearly specifies some other period of notice, whether expressly or impliedly. What constitutes reasonable notice will vary with the circumstances of any particular case. See *Machtinger v. HOJ Industries Ltd*., [1992] 1 S.C.R. 986, at paras. 20-22.

[69] Mr. Mittra submits that Canadian common law applies to anyone living and working in Canada regardless of their citizenship and even temporary workers are entitled to common law wrongful dismissal damages.

[70] In support of this submission, Mr. Mittra cites *Osmani v. Universal Structural Restorations* Ltd., 2022 ONSC 6979. In *Osmani*, an employee who was employed in Canada by a Canadian employer as a temporary foreign worker was held to have been constructively dismissed and awarded damages. There was no employment agreement that contained a choice of law provision and there was no question that the employee's employment was governed by Ontario law, which the trial judge applied. See *Osmani*, at para. 386.

[71] The *Osmani* case is not authority for the proposition that Canadian common law applies to anyone living and working in Canada, regardless of the law that governs the employment contract. No authority has been provided to me in support of this proposition. An employer and an employee are entitled to select the law that governs an employment relationship: *Vasquez*, at para. 31.

Did Mr. Mittra waive his right to apply Canadian common law to his contractual rights upon the termination of his employment?

[72] Mr. Mittra submits that by executing the 2017 Agreement, he did not waive his right to reasonable notice upon termination of his employment under Canadian common law.

[73] RBC does not assert that Mr. Mittra waived a right to common law notice. RBC submits that under his contract of employment, Mr. Mittra is not entitled to reasonable notice of the termination of his employment under Canadian common law.

[74] I do not find that Mr. Mittra waived any contractual rights by signing the 2017 Agreement.

Does the 2017 Agreement provide for Mr. Mittra's employment for an indefinite term and, if so, does this lead to the conclusion that Canadian common law applies to Mr. Mittra's employment contract?

[75] Mr. Mittra submits that the 2017 Agreement clearly contemplates that Mr. Mittra's employment thereunder would be for an indefinite period of time and, as such, Canadian common law applies in determining the notice period.

[76] The 2017 Agreement provides that the assignment is expected to "last for three years". It provides that if Mr. Mittra is required to remain in Canada beyond three years, "the terms and conditions of his employment will be reviewed and amended according to RBC policies/practices in effect at the time". The 2017 Agreement provides for conclusion of the "temporary expatriate assignment" and for "repatriation to the home country" upon the scheduled or earlier conclusion of the assignment due to business circumstances or employer initiated termination.

[77] I accept that Mr. Mittra's employment under the 2017 Agreement (and the 2016 Agreement) was for an indefinite period of time.

[78] I do not accept that this finding leads to the conclusion that Canadian common law applies in determining Mr. Mittra's contractual rights upon termination of his employment. Mr. Mittra's contractual rights depend upon the terms and conditions of his employment contract.

Is it an implied term of the 2017 Agreement that Canadian common law supersedes U.K. Law?

[79] Mr. Mittra submits that the 2016 Agreement is not relevant or enforceable in relation to his termination from his positions in Canada.

[80] Mr. Mittra points to clause 7(a) of the 2017 Agreement which provides:

> For RBC initiated involuntary termination, notice of termination and severance entitlement, if any, will be based on RBC policies and

> practices in effect in the home country at the time notice of termination is given, unless superseded by host country laws.

[81] Mr. Mittra submits that the term "superseded by host country laws" is not restricted to statutory laws. He submits that the word "superseded" must be given its ordinary and grammatical meaning consistent with the surrounding circumstances known to the parties when they entered into the contract. Mr. Mittra cites the dictionary definition of "supersede" in the *Miriam-Webster Dictionary* as "1 a: to cause to be set aside, b:to force out of use as inferior; 2: to take the place or position of; 3: to displace in favor of another." Mr. Mittra submits that Canadian law, both statutory and common law, supersedes U.K. law and applies to his employment in Canada.

[82] Mr. Mittra submits that it is an implied term of the 2017 Agreement that Canadian common law supersedes U.K. law. In support of this submission, Mr. Mittra cites *Machtinger* v. HOJ Industries Ltd., 1992 CanLII 102 (SCC), [1992] 1 S.C.R. 986, at 988 and *Holm v. AGAT Laboratories Ltd.*, 2018 ABCA 23, at para. 23.

[83] In *Machtinger*, the employment contract in question was governed by Canadian law. The question was whether, where a contract of employment provides for a notice period less than the minimum prescribed by provincial legislation, an employee is entitled to reasonable notice of dismissal, or to the minimum statutory notice period. In *Holm*, the question on appeal was whether, assuming the employee established constructive dismissal, he is entitled only to pay in lieu of notice equal to, but not exceeding, the one week minimum set out in Alberta's *Employment Standards Code*. The answer turned on whether the language of the employment contract met the high level of clarity required to extinguish the employee's common law rights.

[84] Neither *Machtinger* nor *Holm* addresses the question of whether Canadian common law principles with respect to employment law supersede foreign law where an employment contract provides that foreign law governs. These authorities do not support Mr. Mittra's submission. It is open to an employer and employee to select the law that governs an employment contract. The selection will be enforced in the absence of a vitiating factor and provided that the application of that law is not contrary to public policy and the choice was *bona fide* and legal. See *Vasquez*, at para. 31.

[85] I do not accept Mr. Mittra's submission that it is an implied term of the 2017 Agreement that Canadian common law supersedes U.K. law. The 2017 Agreement contains a choice of law provision to which the parties agreed, and it has not been shown that their selection of U.K. law (unless superseded by the application of the laws of Canada) should not be enforced.

Is the 2016 Agreement void because it does not provide for severance payments under the *ESA*?

[86] Mr. Mittra submits that the 2017 Agreement does not limit his common law right to reasonable notice of the termination of his employment because the termination provision in the 2017 Agreement is void for failure to comply with mandatory provisions of the *ESA*.

[87] Mr. Mittra points to clause 7(c) of the 2017 Agreement which deals with transition to local employment at the assigned location. Mr. Mittra submits that the definition of "localization" in the 2017 Agreement includes terms required to become an employee of the host company which violate the *ESA* because, as Mr. Mittra testified, his positions while he worked in Toronto were always permanent.

[88] I do not accept this submission. The 2017 Agreement expressly provides for a temporary assignment to Canada while his employment under the 2016 Agreement (for an indefinite period of time) continues. The positions held by Mr. Mittra in Toronto may not have been temporary positions, but Mr. Mittra was never offered permanent employment in any position with RBC in Toronto, and, although Mr. Mittra discussed with Mr. Pomphrett extending the length of his temporary assignment in Toronto, RBC never approved a request by Mr. Mittra to remain in Toronto as a permanent employee for an indefinite period beyond the originally approved period of assignment. The localization provision of the 2017 Agreement does not violate the *ESA*.

[89] Mr. Mittra submits that clause 7(b) of the 2017 Agreement requires Mr. Mittra to reimburse costs associated with a relocation and transfer and that this provision purports to contract out of s. 8 of the *Employment Protection for Foreign Nationals Act, 2009*, S.O. 2009, c-32 (the "*EPFNA*"). He submits that this purported contracting out makes the termination provision in the 2017 Agreement void and RBC is unable to rely on it to restrict the application of Canadian common law as it applies to Mr. Mittra's employment.

[90] In making this submission, Mr. Mittra fails to take into account that the termination provision in the 2017 Agreement expressly provides that U.K. laws, and RBC's policies and practices in effect in the U.K. at the time of termination of employment, apply "unless superseded by the application of host country [Canadian] laws". This language expressly preserves the application of the mandatory provisions of the *ESA* and the *EPFNA* to Mr. Mittra's employment as well as any other laws of Canada, statutory or common law, that cannot be derogated from by agreement.

[91] Mr. Mittra submits that the 2016 Agreement, or at least the termination provision in s. 11, is void under Canadian law, because it violates the *ESA* by not providing for severance payments.

[92] In support of this submission, Mr. Mittra cites several authorities. These cases are authority for the principle that an employer is precluded from contracting out of employment standards in the *ESA* unless it substitutes a greater benefit. Contracting out of even one of

the employment standards in the *ESA* and not substituting a greater benefit would render the termination clause void and unenforceable, in which case the employee would be entitled to reasonable notice of termination of his or her employment at common law. Potential violation in the future is sufficient. See *Wood v. Fred Deely Imports Ltd*., 2017 ONCA, at para. 21; *Garreton v. Complete Innovations Inc*., 2016 ONSC 1178, at para. 27; and *Rossman v. Canadian Solar Inc*., 2019 ONCA 992, at para. 18.

[93] The 2016 Agreement provides that Mr. Mittra's employment will be with RBC Investor Services Trust based in London. While Mr. Mittra was employed in London, the *ESA* did not apply to his employment. When Mr. Mittra was offered and accepted a temporary assignment to a position in Toronto, where the *ESA* would apply, the terms of his employment contract changed and he agreed to the terms of the 2017 Agreement. The 2017 Agreement expressly provides that the laws of the U.K., and the polices and practices of RBC in the U.K. with respect to notice of termination and severance entitlement, apply to Mr. Mittra's employment unless superseded by Canadian laws.

[94] RBC did not contract out of the *ESA* by not providing for severance payments in the 2016 Agreement. The 2016 Agreement was amended by the 2017 Agreement. Through the 2017 Agreement, RBC and Mr. Mittra plainly and unambiguously agreed that the mandatory provisions of the *ESA* would apply to Mr. Mittra's employment while he worked in Toronto, notwithstanding any other provisions of the 2016 Agreement or the 2017 Agreement.

[95] I do not accept Mr. Mittra's submission that the 2016 Agreement is void because it does not provide for severance payments under the *ESA*.

Did the parties agree that the 2016 Agreement was concluded and ceased to be relevant to Mr. Mittra's employment?

[96] Mr. Mittra submits that RBC's witnesses have confirmed that the 2016 Agreement was concluded and ceased to have any relevance to him as of January 22, 2017.

[97] In support of this submission, Mr. Mittra relies on a letter sent by RBC to Mr. Mittra dated February 2, 2017. In this letter, the author, an RBC human resources consultant, writes: "I refer to your recent transfer out of the U.K. and confirm your employment within the U.K. has ended with effect from COB on 22nd January 2017". The author goes on to write that Mr. Mittra was overpaid for a short period (8 days) and will be required to repay the overpayment.

[98] Mr. Mittra relies on evidence given by Emma Dunlop, RBC's head of Human Resources in the U.K., with respect to this letter. Ms. Dunlop testified that the author, Ms. Rebello, was an HR administrator who performed administrative functions within the RBCs human resources group. She was not a managerial employee or a decision-maker of any kind. Ms. Dunlop testified that because Mr. Mittra transferred to Canada on January 22, 2017 and

received his U.K. pay on the regular U.K. payroll until January 31, 2017, he was overpaid for that period of time. Mr. not testified that Mr. Mittra remained on the U.K. payroll and, within the U.K. payroll system because he was on what RBC called a "balance sheet assignment" receiving U.K. compensation. Within the payroll system and process, Mr. Mittra would have transferred from the main U.K. payroll onto an expatriate payroll which has different reporting responsibilities to the authorities.

[99] Mr. Mittra agreed that he did not know who Ms. Rebello was, he had not previously communicated with her, and he did not speak with anyone at RBC about the letter.

[100] RBC applied the terms of the 2017 Agreement throughout Mr. Mittra's tenure in Canada. Effective March 14, 2017, the parties executed an amendment to the 2017 Agreement which provided that RBC would no longer apply the housing deduction for deemed home country housing and utility costs and they agreed that "all other terms and conditions in the letter dated January 6, 2017 [the 2017 Agreement] remain unchanged". The 2017 Agreement expressly provides, at section 8(a), that "unless superseded by the application of host country laws, your employment relationship during the assignment will remain with RBC Investor & Treasury Service, U.K. and will be subject to the employment laws of the home country".

[101] I do not accept Mr. Mittra's submission that through the administrative letter sent by a human resources consultant to address an issue of salary overpayment, the parties intended to alter the contractual terms provided for by the 2017 Agreement.

[102] I do not accept Mr. Mittra's submission that, by virtue of the February 2, 2017, letter, RBC agreed with him that the 2106 Agreement was concluded and ceased to have relevance to his employment relationship as of January 22, 2017.

Did the substratum of Mr. Mittra's employment relationship with RBC change when he relocated to Canada, such that the 2016 Agreement was no longer operative?

[103] Mr. Mittra submits that at the time of the termination of his employment, he did not hold any of the roles as described by the 2016 Agreement. Mr. Mittra relies on documents dated October 2017 and October 2018, each called "Position Description Template", which identify the "Position Title" held by Mr. Mittra in Canada and other information in relation to these positions. Mr. Mittra submits that these documents show that he held significant new roles in Canada that were completely different from positions he had previously held, and that his former position in the U.K. no longer existed, such that there was no position in the U.K. for Mr. Mittra to return to.

[104] The October 2017 Position Description Template describes Mr. Mittra's position title as Managing Director, Global Head TMS FX Execution & Regional Head TMS North America. The document describes the purpose of Mr. Mittra's employment in these roles and describes his primary responsibilities, key relationships, working conditions, and

authorities. The document provides for Mr. Mittra's acknowledgment that he will adhere to the best practices of the industry and any applicable regulatory requirements as well as RBC's policies including the RBC Code of Conduct. Mr. Mittra relies on the October 2018 document that, he testified, reflected his promotion in the fall of 2018 to "Head of CM FX Trading Canada".

[105] Mr. Mittra testified that these positions were for an indefinite duration. He testified that his variable compensation increased as a result of the promotions. Mr. Mittra submits that these documents are employment agreements which do not speak to a term or period of employment, and do not contain termination provisions. He submits that these employment agreements are governed by Canadian law and that his employment under these employment agreements is only terminable on reasonable notice.

[106] Rob Pomphrett, Mr. Mittra's superior while he was working in Toronto, testified that while RBC did change or expand certain of Mr. Mittra's responsibilities during his assignment in Canada, he was never promoted. He continued to carry out his local responsibilities as Head of Treasury & Market Services (TMS) in North America. Mr. Pomphrett testified that in September 2017, he asked Mr. Mittra to take on a different global role within TMS, as Global Head of TMS FX (Foreign Exchange). Mr. Pomphrett testified that he did so because he thought it would be good for Mr. Mittra to diversify his experience and to create an opportunity to promote one of the team members who worked for Mr. Mittra. Mr. Pomphrett confirmed that Mr. Mittra remained a global head of one of the businesses reporting to Mr. Pomphrett during this time and that Mr. Mittra's position level and title did not change, and he did not move up the corporate hierarchy. Mr. Mittra confirmed that his position level never changed once he became a Managing Director in 2015.

[107] Mr. Pomphrett explained that the October 2018 position mandate reflected a relatively minor expansion of Mr. Mittra's duties, with him taking responsibility for oversight of an additional three to four foreign exchange traders in Toronto who worked within the Capital Markets segment.

[108] I accept Mr. Pomphrett's evidence with respect to the changes to Mr. Mittra's duties and responsibilities while he was working in Toronto. His evidence is consistent with the documents themselves. I find that the two "Position Description Template" documents are not employment contracts that replaced the 2017 Agreement and became standalone employment agreements. These documents are position description documents. Throughout his time working in Toronto, Mr. Mittra was employed as a Managing Director at the same position level, with some variation in his duties and responsibilities. The mandate documents did not change Mr. Mittra's rights on termination of his employment.

[109] The 2017 Agreement provides that if Mr. Mittra does not transition to local employment and become an employee of the 'host company", he should ensure that post assignment employment search and deployment discussions for a return to RBC employment in the home country upon conclusion of the assignment are initiated at least twelve months in

advance of the scheduled conclusion of his assignment. The 2017 Agreement provides that RBC will make every effort to assist Mr. Mittra with his job search and placement in a position in the U.K. commensurate with his experience and position level or equivalent.

[110] If Mr. Mittra's assignment in Canada came to an end with a transition to local employment in Canada, and he was not offered a position in the U.K. commensurate with his experience and position level, such that his employment came to an end, he would be entitled to his contractual rights upon the termination of his employment.

[111] The fact that Mr. Mittra held new positions in Canada and that his former position in the U.K. was no longer available for him to return to does not show that the 2016 Agreement was no longer operative.

Does the fact that the 2016 Agreement provides for a normal place of work in London U.K. lead to the conclusion that when the 2017 Agreement became effective the 2016 Agreement was defunct?

[112] Mr. Mittra refers to clause 7 of the 2016 Agreement which provides that Mr. Mittra's normal place of work is in London. He refers to clause 16.5 of the 2016 Agreement which reads:

> Depending on your location of employment as stated in your offer above, the terms of this letter shall be construed in accordance with the laws of England and you and the Company submit to the exclusive jurisdiction of the English Courts according to your employment location stated above.

[113] Mr. Mittra submits that the 2017 Agreement memorialized the fact that the 2016 Agreement was defunct as it specifically noted that there was no job to go back to him London. Mr. Mittra points to paragraph 8(a) of the 2017 Agreement that provides that he would need to engage in a job search internally at the conclusion of the initial three year term in the event that he was not to remain in Toronto.

[114] The fact that Mr. Mittra would have had to engage in an internal job search for a position in the U.K. at the end of his initial assignment under the 2017 Agreement does not lead to the conclusion that the 2016 Agreement is defunct. If Mr. Mittra was not offered a suitable position at the end of his assignment in Canada and his employment came to an end, he was entitled to the enforce his contractual rights under the terms of his employment contract.

Conclusion on whether it was a term of Mr. Mittra's employment contract that it could be terminated only on reasonable notice under common law principles as they apply in Ontario

[115] When Mr. Mittra returned to London in August 2016 and became employed by RBC Investor Services Trust, he agreed to the 2016 Agreement setting out the terms of his

employment. The 2016 Agreement was lawful and enforceable in accordance with its terms and was consistent with statutory requirements in the U.K. Mr. Mittra assumed his role in the U.K. from in or about September/ October 2016 through to January 2107.

[116] After the 2016 Agreement was made, Mr. Mittra had discussions with his superior, Rob Pomphrett, concerning a temporary assignment to a position in Toronto. The 2017 Agreement was executed by Mr. Mittra on January 17, 2017. The 2017 Agreement expressly provides that it is for a "temporary expatriate assignment" in Canada that was expected to last for three years.

[117] The 2017 Agreement included, in two places, a choice of law provision:

a. Section 7(a) addressed termination, and noted that for "RBC initiated involuntary termination, notice of termination and severance entitlement, if any, will be based on RBC policies and practices in effect in the home country at the time notice of termination is given, unless superseded by host country laws; and

b. Section 8(a) addressed employment status and noted that "unless superseded by the application of host country laws, your employment relationship during the assignment will remain with RBC Investor & Treasury Services, U.K., and will be subject to the employment laws of the home country".

[118] The 2017 Agreement provides that U.K. law applies, unless it is superseded by application of laws of Canada. When the words used in the 2017 Agreement are given their plain and ordinary meaning, having regard to objective evidence of surrounding circumstances known to the parties at the time of the 2017 Agreement, I conclude that U.K. law applies to the 2017 Agreement unless Canadian law applies which cannot be derogated from by agreement. This includes Canadian laws which cannot be displaced or set aside, such as the mandatory provisions of the *ESA*. The law of the U.K. is not superseded by the common law with respect to reasonable notice of termination of employment as it applies in Ontario.

[119] The 2017 Agreement expressly provides that where RBC initiates termination of Mr. Mittra's employment, the notice of termination and severance entitlement, if any, will be based on RBC policies and practices in effect in the U.K. at the time notice of termination is given, unless superseded by the laws of Canada. This contractual term was operative and effective at the time of Mr. Mittra's dismissal.

[120] I conclude that it was not a term of Mr. Mittra's employment contract that it could be terminated only on reasonable notice under common law principles as they apply in Ontario.

ISSUE #2 Did Mr. Mittra have a guaranteed term of employment?

[121] Mr. Mittra submits that there was a verbal agreement between the parties as to a guaranteed term of employment in Toronto and, pursuant to this agreement, Mr. Mittra's employment

in Toronto was extended to January 2022, or at least to January 2021. Mr. Mittra submits that the remaining guaranteed term was 21-33 months at the date of his dismissal. Mr. Mittra claims damages based on 24 months notice so he submits that the floor for calculation of his damages is 21 months (based on a guaranteed term to January 2021) and the ceiling is 24 months (the common law period of notice).

[122] Mr. Mittra testified that in February 2019, he had a conversation with Mr. Pomphrett who told him that he should expect to be in Canada at least five years. Mr. Mittra testified that he understood this was an extension of the term of his employment in Canada from the initial term of three years to five years. Mr. Mittra testified that he understands that RBC does not agree with him with respect to this extension and that Emma Dunlop of RBC says that the extension was to four years, not five years as Mr. Pomphrett told him.

[123] At trial, Ms. Dunlop accepted her evidence given on a cross-examination on an affidavit used for a prior motion that she discussed with Mr. Pomphrett that there had been some discussion between him and Mr. Mittra about an extension beyond the initial three year expected term to January 2021.

[124] Mr. Pomphrett testified that he had a discussion with Mr. Mittra in the January/February 2019 time frame in which Mr. Mittra asked his thoughts about whether or not he would be remaining in Toronto when the three years were up and he recalls that he said that Mr. Mittra should probably think in terms of remaining in Toronto for a further period, but the discussion did not advance further.

[125] The 2017 Agreement states that Mr. Mittra's temporary assignment "is expected to last for three years". The 2017 Agreement states that in the event that Mr. Mittra is required to remain in Canada beyond three years, the terms and conditions of his employment will be reviewed and amended according to RBC policies/practices in effect at the time. The 2017 Agreement states that Mr. Mittra's temporary assignment will conclude "on the scheduled assignment end date as stated in this letter or earlier if necessitated due to changing business circumstances". This language is clear that the temporary assignment was not for a guaranteed, fixed, duration.

[126] The 2017 Agreement expressly provides for RBC to be able to initiate involuntary termination of Mr. Mittra's employment and it provides for notice of termination and severance entitlement, if any, based on RBC policies and practices in effect in the U.K. at the time notice of termination is given, unless superseded "by host country laws". The 2017 Agreement does not provide for notice based on a guaranteed term of the temporary assignment.

[127] I accept that Mr. Mittra had a discussion with Mr. Pomphrett about whether he should expect the three year expected term of the temporary assignment to be extended and that he was told that the expected three year term would likely be extended. Even if Mr. Pomphrett said that Mr. Mittra should expect to be in Canada for five years, this would not

transform the 2017 Agreement to an employment agreement for a guaranteed, fixed, term of 5 years. The 2017 Agreement, as plainly written, provides for the continuation of Mr. Mittra's employment for an indefinite term with his temporary assignment in Canada expected to last three years but could be shorter (or longer).

[128] Mr. Mittra did not have a guaranteed term of employment until any fixed date.

ISSUE #3 Did Mr. Mittra receive the notice to which he was entitled under his employment contract?

[129] The 2016 Agreement, as amended by the 2017 Agreement, continued to apply when Mr. Mittra was on temporary assignment to Canada.

[130] The 2016 Agreement provides that termination of employment will be subject to a maximum of 12 weeks' notice after 12 or more years of service.

[131] The U.K. Employee Information Handbook also states that if RBC wishes to terminate an employee's employment, it will give notice in writing up to a maximum of 12 weeks' notice after 12 or more years' service. The Handbook states that where employees have notice entitlements detailed in their contract letter that differ from the Handbook, the terms in the letter will apply.

[132] In the RBC termination letter dated April 23, 2019, Mr. Mittra was given 3 months notice from the date of the letter. This length of notice complied with the requirements of Mr. Mittra's employment contract (subject to consideration of his entitlements under the *ESA*).

[133] The *ESA*, in section 3(1), provides:

> 3(1) Subject to subsections (2) to (5), the employment standards set out in this Act apply with respect to an employee if,
>
> (a) the employee's work is to be performed in Ontario; or
>
> (b) the employee's work is to be performed in Ontario and outside Ontario but the work performed outside Ontario is a continuation of work performed in Ontario.

[134] Mr. Mittra performed work in Ontario from January 17, 2017 until he was dismissed on April 23, 2019 – a period of two years and three months.

[135] Where an employee subject to the *ESA* is dismissed, they may be entitled to notice of termination and severance pay, in accordance with the applicable provisions of the *ESA*. Notice of termination is required where an employee has been continuously employed for three months or more. The notice period is calculated pursuant to section 57 of the *ESA*, which provides that one week notice shall be given if the employee's period of employment

is less than one year, two weeks between one and three years, and so on, to a maximum notice period of eight weeks if the employee's period of employment is eight years or more.

[136] Pursuant to section 64 of the *ESA*, an employee subject to the *ESA* is entitled to severance pay if the employee was employed by the employer for "five years or more," and, among other requirements, the employer has a payroll of $2.5 million or more. Where there is entitlement to severance pay, the calculation set out in section 64 applies.

[137] In *Singer v. Tullett & Tokyo Forex (Canada) Ltd*., 1998 CarswellOnt 2291, the Divisional Court heard an application for judicial review of a decision of an adjudicator who had reversed the decision of an Employment Standards Officer denying the claim of an employee for severance pay under the *ESA*. At the time of the termination of his employment, the employee was employed (with two years of service) by the Canadian subsidiary of an American company where he had worked for over four years before being transferred to the Canadian operations. The Divisional Court held that the employee's service in New York with the American parent should not be treated as service in Ontario with the Canadian subsidiary and, therefore, the employee did not qualify to receive severance pay because he did not have five years of service. The decision denying the claim for severance pay was restored.

[138] In *Dao v. Brick Warehouse LP*, 2005 CanLII 37984 (ON LRB) an employee was hired by an Alberta employer in 1984 and worked in Alberta. He began working for the employer in Ontario in 2003. The employer terminated his employment in January 2005. The Ontario Labour Relations Board addressed the question of what period of employment should be considered in determining the employee's entitlements to termination pay and severance pay under the *ESA*. The Board held, citing *Singer*, that service outside Ontario cannot be taken into account for purposes of calculating termination pay and/or severance pay.

[139] In *National Automobile, Aerospace Trans-portation and General Workers Union of Canada (C.A.W. – Canada) Local No. 27 v. London Machinery Inc.*, 2006 CanLII 8711, the Court of Appeal for Ontario considered arguments concerning the proper interpretation of a provision of the *ESA*. The Court of Appeal, at para. 52, found support for the union's argument in the Ministry of Labour's Employment Standards Act – Policy and Interpretation Manual, vol. 2, looseleaf (Toronto: Carswell, 2003). The majority of the panel, at para. 54, found the Interpretation Manual instructive but not determinative of the meaning or requirements of the statutory provision in question. The majority of the panel held that it cannot be assumed that the manual reflects the legislature's intent.

[140] The Ministry of Labour's Interpretation Manual includes a section addressing s. 3(1) of the *ESA* and provides examples of the implications of s. 3(1)(b) of the *ESA*, including the following example:

> An employee works for five years for ABC Company in England, then is transferred to Ontario where they work for ABC for two

> years. Because the work in England was not a continuation of the work in Ontario, the employee will have two years' employment with ABC for the purpose of determining the employee's entitlements under the ESA 2000.

[141] The Interpretation Manual is instructive of the interpretation to be given to s. 3(1) of the *ESA* and the example is consistent with the approach followed by the Divisional Court in *Singer*.

[142] I conclude that Mr. Mittra is not entitled to severance pay under the *ESA* because he was not employed by RBC in Ontario for five years or more. Mr. Mittra received notice of the termination of his employment that exceeded the three weeks notice (or termination pay in lieu thereof) to which he was entitled under the *ESA* for his service in Ontario.

[143] RBC tendered evidence from Mr. Reade, a U.K. barrister, of the period of notice that would be reasonable to terminate Mr. Mittra's employment under common law principles as they apply in the U.K. Having found that Mr. Mittra received notice of the termination of his employment that, absent just cause, he was entitled to receive under his written contract of employment, it is not necessary for me to decide what the period of reasonable notice would be under common law principles as they apply in the U.K.

[144] RBC concedes that Mr. Mittra was not paid the amount of compensation that vested in December 2018 and that he is entitled to damages for breach of contract in the amount of this unpaid compensation. I address this issue further when I address Mr. Mittra's claim for damages.

ISSUE #4 Did RBC have just cause to dismiss Mr. Mittra without notice?

[145] RBC submits that, in any event, it had just cause at law to summarily dismiss Mr. Mittra without notice on the basis that he engaged in conduct that was incompatible with the fundamental terms of the employment relationship. Although RBC did not take the position that Mr. Mittra's employment was terminated for just cause at the time he was dismissed, RBC relies on after-acquired cause.

[146] RBC submits that the evidence establishes that Mr. Mittra violated RBC policies and his fiduciary obligations by failing to disclose an ongoing actual or potential conflict of interest arising from his financial entanglements with his subordinate, Mr. Ramji. RBC submits that Mr. Mittra further violated RBC policies and his fiduciary obligations through a persistent pattern of dishonesty by deliberately withholding material information regarding his investments with Mr. Ramji from RBC's external legal counsel and the Chair of the Discipline Committee, and through his appeal letter.

[147] Mr. Mittra denies that he violated RBC's conflict of interest policies. He denies that he deliberately withheld information regarding his real estate investments with Mr. Ramji – information that, he says, could only have assisted him in relation to RBC's investigation.

Mr. Mittra submits that RBC's own misconduct – by failing to provide Mr. Mittra with work tools including access to emails –prevented him from providing full answers that he was able to provide during the discovery process and that this failure led to a deeply flawed and procedurally unfair process. Mr. Mittra submits that the evidence shows that he had no intention to deceive RBC.

[148] Mr. Mittra submits that there is no basis in law or in the evidence for the allegation of after-acquired cause.

[149] RBC submits that if cause is shown, Mr. Mittra's damages are limited to the vested compensation that was not paid in December 2018. RBC submits that if cause is not shown, Mr. Mittra is entitled to these damages and, in addition, he is entitled to damages based on a *pro rata* share of unvested deferred compensation calculated at the end of the garden leave. RBC submits that if a longer period of notice of dismissal is required under Mr. Mittra's employment contract and cause is not shown, Mr. Mittra is entitled to damages based on the longer notice period.

Legal Principles

[150] In *Dowling v. Ontario (Workplace Safety and Insurance Board)*, 2004 CanLII 43692 (ON CA), the Court of Appeal for Ontario addressed the correct legal standard for a court to apply when determining whether an employee's misconduct gives rise to a dismissal for just cause. The Court of Appeal cited the decision of the Supreme Court of Canada in *McKinley v. B.C. Tel*, [2001] 2 S.C.R. 161 that established the standard to be applied when assessing whether an employee's dishonest conduct gives rise to just cause for dismissal and, at paras. 49-51, held:

> [49] Following *McKinley*, it can be seen that the core question for determination is whether an employee has engaged in misconduct that is incompatible with the fundamental terms of the employment relationship. The rationale for the standard is that the sanction imposed for misconduct is to be proportional - dismissal is warranted when the misconduct is sufficiently serious that it strikes at the heart of the employment relationship. This is a factual inquiry to be determined by a contextual examination of the nature and circumstances of the misconduct.
>
> [50] Application of the standard consists of:
>
> 1. determining the nature and extent of the misconduct;
>
> 2. considering the surrounding circumstances; and,
>
> 3. deciding whether dismissal is warranted (i.e. whether dismissal is a proportional response).

> [51] The first step is largely self-explanatory but it bears noting that an employer is entitled to rely on after discovered wrongdoing, so long as the later discovered acts occurred pre-termination. See *Lake Ontario Portland Cement Co. v. Groner*, [1961] S.C.R. 553.

RBC amends pleading to allege after-acquired cause

[151] I first explain the circumstances in which RBC amended its pleading to allege after-acquired cause.

[152] Following Mr. Ramji's examination for discovery and provision of answers to undertakings in April and June 2021, RBC amended its defence on November 10, 2021 to allege after-acquired cause.

[153] RBC pleads that with the completion of examinations for discovery, it has become apparent that Mr. Mittra deliberately misled RBC investigators and the RBC disciplinary chair about the nature of his investments with Mr. Ramji and his knowledge and recollection of them. RBC pleads that after his evidence given on his examination for discovery, Mr. Ramji has now testified that:

a. He always understood that Mr. Ramji was using his money to make specific investments in residential development projects in London. The two of them discussed the nature and purpose of the investments many times;

b. Mr. Ramji told him that he had access to significant discounts (30%) on pre-construction residential property;

c. Mr. Mittra provided hundreds of thousands of pounds to Mr. Ramji to make investments into specific residential developments in London called New Providence Wharf and Riverlight.

d. Mr. Mittra understood that he had beneficial interest in the units being purchased by Mr. Ramji and those developments;

e. Mr. Ramji gave him a personal guarantee on the investments, which was an important condition of the investment; and

f. Mr. Ramji told Mr. Mittra that the people to whom he was transferring money were helping make/source the real estate investments. That is why he transferred the funds to them.

[154] RBC pleads that Mr. Mittra failed to disclose these details to RBC investigators or the disciplinary chair and, instead, repeatedly conveyed the false account that he had never discussed with Mr. Ramji where his money was going and did not know what investments Mr. Ramji was making. RBC pleads that Mr. Mittra repeatedly lied or withheld important

information from RBC investigators and the RBC disciplinary chair, thereby destroying the trust at the foundation of the employment relationship.

[155] Mr. Mittra did not deliver an amended Reply pleading but he unequivocally denies the pleaded allegations of after-acquired cause.

[156] Mr. Mittra submits that RBC knew from the investigation that Mr. Mittra had provided hundreds of thousands of pounds to associates of Mr. Ramji to be invested in property and that Mr. Ramji gave him a guarantee on the principal. Mr. Mittra submits that he recollected the details of the two buildings and the 30% preconstruction discounts after receiving access to his emails that RBC had unfairly withheld from him. His evidence is that having reviewed the emails that he was provided with during the documentary production phase of the litigation, he was able to provide more detail with respect to his real estate investments with Mr. Ramji.

[157] I now review the evidence with respect to Mr. Mittra's relationship with Mr. Ramji, his investments through Mr. Ramji, the RBC investigation following Mr. Ramji's bankruptcy (including three interviews with Mr. Mittra), and the disciplinary hearing. This is evidence that provides context for determination of the nature and extent of the misconduct, if any, and of the relevant surrounding circumstances according to the approach to be followed under *Dowling*.

Mr. Mittra's relationship with Mr. Ramji

[158] By March 2015, Mr. Mittra held the position of Managing Director, Head of Treasury & Market Services - Luxembourg of RBC Investor Services bank, a senior management position with significant responsibilities. In September 2015, Mr. Mittra assumed a global leadership position within the Investment & Treasury Services business line, as Global Head of Liquidity Portfolio Management, and was responsible for managing RBC's liquidity portfolio, an approximately $60 billion USD asset pool. He led a team of eight traders and portfolio managers, including Mr. Ramji.

[159] Mr. Mittra testified that Mr. Ramji was a senior and well-respected executive at RBC who acted as a mentor to him beginning as early as 2005. Mr. Ramji was 23 years older than Mr. Mittra. Mr. Mittra testified that Mr. Ramji resumed being his mentor in 2011 when Mr. Ramji was instrumental in getting Mr. Mittra a promotion and became his regional supervisor. Mr. Mittra had a very close working relationship with Mr. Ramji from 2011 until March of 2015 when he left for Luxembourg. Mr. Mittra testified that Mr. Ramji stopped being his mentor in 2018 when he learned that Mr. Ramji had gone bankrupt.

[160] Mr. Mittra testified that in September 2015 he was promoted into a position that meant he was in a "dotted line supervisory position" over Mr. Ramji. Mr. Mittra testified that Mr. Ramji continued to have more actual power and influence than he did and continued to be his mentor, even when Mr. Mittra was promoted to a position that was higher than Mr.

Ramji's position. Mr. Mittra testified that he continued to see Mr. Ramji as part of the management team who was managing and directing his career.

[161] Mr. Mittra testified that Mr. Ramji's title did not accurately describe his position of power and influence at RBC. He testified that Mr. Ramji had a special status at RBC because of his personal relationships with two senior bank executives and, as he put it, was really an institutional mentor of RBC and an instrument of the bank.

[162] Mr. Mittra testified that in 2015 and 2017, he had no input into Mr. Ramji's compensation and that in 2016, Mr. Pomphrett, who was his supervisor, directed him what to put in. On cross-examination, Mr. Mittra agreed that he provided overall comments on Mr. Ramji's performance in his year-end performance assessment in 2015 and 2016 and that he made a recommendation for Mr. Ramji's bonus for 2016 in conjunction with Mr. Pomphrett.

[163] In London, Mr. Mittra and Mr. Ramji sat side by side and had frequent conversations during the day. Mr. Mittra's close working relationship with Mr. Ramji extended to regular social contact outside the work environment. The social contact was more than casual contact between working colleagues. Mr. Ramji gave him a painting (worth about $4,000) in February 2018 and a watch worth a couple of thousand dollars. Mr. Mittra testified that these gifts were not requested and had little or no value to him. They vacationed together in August 2018. Mr. Mittra made real estate investments with Mr. Ramji.

[164] I am satisfied from the evidence that Mr. Mittra had a close working relationship with Mr. Ramji that extended to a close personal relationship outside the office.

[165] I am satisfied from the evidence that Mr. Mittra was Mr. Ramji's direct superior from September 2015 to October 2017 when Mr. Mittra was the Global Head of Liquidity Portfolio management for RBC. Mr. Mittra signed Mr. Ramji's annual performance reviews in fiscal 2015 and 2016 and he participated in setting Mr. Ramji's bonus in 2016.

RBC Code of Conduct and other policies

[166] Mr. Mittra agreed that the RBC Code of Conduct was a foundational guide with which he was required to comply as an RBC employee. He agreed that compliance with RBC's Code of Conduct was a condition of his employment. Mr. Mittra recalled reading Codes of Conduct every year carefully and diligently and he was familiar with its contents each year.

[167] The RBC Code of Conduct for each of 2014, 2015, and 2016 was introduced into evidence. The Code for each year includes a section on avoiding and managing conflicts of interest. The Code states that decisions employees make in their work with RBC must be independent of their personal interests. The Code states that a conflict of interest - actual, potential or perceived - is a situation that could cause others to "doubt our ability to perform our jobs effectively and objectively, without bias". The Code notes that "obligations arising from our other business, family and social relationships must not play a role in our work for RBC". The Code identifies a supervisory relationship with a "close friend" as a

potential conflict, as well as an "outside activity, external directorship or work arrangement that interferes or competes with RBC's business". The Code directs employees to be aware of "actual, potential or perceived conflict of interest related to outside activities" and requires employees to "disclose and obtain approval for them as required".

[168] When Mr. Mittra was dismissed, RBC knew that Mr. Mittra had not disclosed a conflict of interest arising from his financial dealings with Mr. Ramji during the time that Mr. Ramji reported to him and was his subordinate. RBC relied on Mr. Mittra's failure to disclose a conflict of interest as misconduct as a reason for Mr. Mittra's dismissal. RBC did not rely on this misconduct as amounting to cause to justify dismissal without notice. Given the position taken by RBC when Mr. Mittra was dismissed, I do not accept RBC's submission that Mr. Mittra's failure to disclose an ongoing actual or potential conflict of interest arising from his financial dealings with Mr. Ramji should, in this action, be treated as just cause for the termination of Mr. Mittra's employment without notice.

[169] I refer to evidence of Mr. Mittra's financial dealings with Mr. Mittra insofar as they bear on RBC's pleaded assertion of after-acquired cause.

Mr. Mittra's real estate investments with Mr. Ramji

[170] The evidence establishes that Mr. Mittra and Mr. Ramji were involved together in outside real estate investments. Mr. Mittra gave evidence on his examination for discovery (read in as part of RBC's case) and at trial about his investments with Mr. Ramji.

[171] Mr. Mittra testified that in early 2014, he and his common law spouse were considering buying a property in London, but determined that prices were too expensive. He testified that he had not saved up enough money to afford a deposit. Mr. Mittra testified that he told Mr. Ramji that his money was earning very little interest in the bank and Mr. Ramji said it would be good to invest in real estate and that he could help Mr. Mittra because he had connections in the London market. Mr. Mittra testified that given the high prices, he decided to invest the money he had saved in real estate through Mr. Ramji, as a form of hedging.

[172] Mr. Mittra testified that Mr. Ramji told him he would guarantee repayment of the capital given to Mr. Ramji for investment in real estate. Mr. Mittra testified that he expected Mr. Ramji to be able to provide his money back when he required it because he understood that Mr. Ramji was a wealthy individual. This guarantee was required because Mr. Mittra needed to have ready access to the money in case he and his spouse found a home that they wanted. Mr. Mittra agreed that because of this guarantee, Mr. Ramji's liquidity was of interest to him.

[173] Mr. Ramji told Mr. Mittra that he had access to discounted pre-construction buildings in London through his network and that he could obtain up to 30% discounts on pre-construction residential properties.

[174] Mr. Ramji told Mr. Mittra two buildings in which he was going to use Mr. Mittra's money to purchase flats. Mr. Mittra gave the money to Mr. Ramji in trust. Mr. Mittra asked Mr. Ramji to ensure that he had a beneficial interest in the units through his investments and he understood from his discussions with Mr. Ramji that he had a trust interest in the units. Mr. Mittra testified that he used to go past one of the developments, the New Providence Wharf development, as it was being built in London, and he saw that the building was being constructed.

[175] From his discussions with Mr. Ramji, Mr. Mittra understood that when the units were later sold, he would get his proportionate share of the sale proceeds or, if he needed his money back before that, Mr. Ramji would return his principal. Mr. Mittra agreed that based on his discussions with Mr. Ramji, the money he was providing was being used for a specific purpose, to acquire pre-construction units in two specific developments in London for the purpose of ultimate resale.

[176] Mr. Mittra testified that to make the investments, he transferred large amounts to various third parties at Mr. Ramji's direction. Mr. Ramji told him that these third parties had access to the units and were helping him to acquire the units. Ultimately, Mr. Mittra invested £430,000 through Mr. Ramji.

[177] Mr. Mittra testified that he had some prior knowledge as to the identity of one of the third parties, Bill Spreckley. At the time, Mr. Mittra and Mr. Ramji sat beside each other on the trading desk, and Mr. Mittra overheard Mr. Ramji talking to Mr. Spreckley from time to time at work. Mr. Mittra testified that Mr. Spreckley would call the trading desk to reach Mr. Ramji and Mr. Mittra would answer and pass him on to Mr. Ramji. Mr. Ramji told Mr. Mittra that Mr. Spreckley had previously worked at RBC, was involved in the real estate market, and helped him. Mr. Mittra testified that he developed the understanding in 2014 that Mr. Ramji was pursuing real estate ventures with Mr. Spreckley's assistance.

[178] At trial, counsel for RBC questioned Mr. Mittra about emails between Mr. Mittra and Mr. Ramji concerning real estate investment opportunities. RBC submits that the evidence shows that Mr. Mittra and Mr. Ramji were working together in 2014 and 2015 to identify real estate opportunities for investment. The evidence is clear that Mr. Mittra invested his personal money with Mr. Ramji in two specific residential real estate developments. Although the evidence shows that Mr. Mittra and Mr. Ramji often communicated with each other about opportunities for real estate investments, RBC has not proven that they were engaged, generally, in an outside real estate investment business together.

[179] Mr. Mittra testified that in March 2017 he contacted Mr. Ramji to find out the status of his investments in the real estate units acquired by Mr. Ramji for him because he was exploring buying a place. Mr. Mittra asked Mr. Ramji if he could access his money. Mr. Ramji said he would make inquiries and, when he got back to Mr. Mittra, he told him that the funds were not available. Mr. Mittra was left with the feeling, following this conversation, that the units had not been sold. Mr. Mittra testified that he did not give consideration to the

potential lack of liquidity for the return of his capital because he was inundated with work and did not pursue buying his own place.

[180] With Mr. Mittra's evidence of his relationship with Mr. Ramji and his real estate investments with Mr. Ramji in mind, I turn to the Freshfields interviews and the RBC disciplinary hearing.

Mr. Ramji's bankruptcy and the RBC investigation that followed

[181] In October 2018, another RBC employee petitioned Mr. Ramji into bankruptcy, based on unpaid loans. RBC learned of the bankruptcy and commenced an investigation into Mr. Ramji's financial dealings with RBC employees in December 2018. RBC retained Freshfields to conduct the investigation regarding Mr. Ramji and provide RBC with advice with respect to it. The Freshfields partner in charge of the investigation was Christopher Robinson.

[182] Mr. Mittra met with Mr. Robinson (and another Freshfields lawyer) and internal counsel at RBC on December 18, 2018. Two other meetings took place on January 9, 2019 and February 8, 2019.

[183] Mr. Robinson testified that the meetings were conducted as part of an investigation for RBC and that the purpose of the meetings was to establish the facts surrounding financial dealings between Mr. Ramji and other individuals at RBC in order that he would then be able to give the bank legal advice on the facts that were established in the course of that review.

First Freshfield interview

[184] Mr. Mittra testified that he was told prior to his first interview with Freshfields that RBC was investigating Mr. Ramji and his financial dealings. He testified that the scope of the discussions was not identified and he was not told of his right to retain and instruct counsel. He was not told that the discussions could lead to a disciplinary hearing or that he could be reported to the regulator.

[185] Mr. Mittra agreed that he was told that the investigation was a compliance investigation and he knew that a compliance investigation could be serious. Mr. Mittra testified that he knew that Mr. Ramji was bankrupt and that Mr. Ramji had borrowed money from others within RBC.

[186] I am satisfied that Mr. Mittra knew that the Freshfields investigation would involve his financial dealings with Mr. Ramji and he knew that he had not previously disclosed these dealings to RBC (he testified that he was not aware of a requirement to do so). He knew that this was a compliance investigation that could be serious.

[187] Mr. Mittra was questioned at trial about the first Freshfields interview and he was directed to typewritten attendance notes made after the interviews by a Freshfields lawyer in attendance that Mr. Robinson reviewed after they were prepared. The other Freshfields lawyer had taken handwritten notes at the interviews over which RBC claimed privilege.

[188] Mr. Robinson testified that at the December 18, 2018 meeting, he asked Mr. Mittra questions to understand the nature and extent of his financial dealings with Mr. Ramji. Mr. Robinson testified that Mr. Mittra explained that he advanced around £400,000 to Mr. Ramji in 2014 because he had been considering buying property in London, had decided not to do so, and had a relatively large sum on his hands, which is the money he saved to buy a property in London. Mr. Mittra explained that Mr. Ramji suggested that he might look after the money on his behalf. Mr. Robinson testified that Mr. Mittra said he agreed to provide a further sum to Mr. Ramji to look after in the same way towards the end of 2014, after his bonus had been paid. Mr. Robinson testified that Mr. Mittra explained that he thought that the interest he would obtain from the bank was very low and that he had absolute and implicit trust in Mr. Ramji and, therefore, he thought that Mr. Ramji was an appropriate person to have care of the money.

[189] Mr. Robinson testified that at this meeting, Mr. Mittra said that he did not have any recollection of any specific agreement with respect to the money or the terms or conditions that governed the money or the money's use that had been agreed or put in place. It was a relationship of trust, as Mr. Mittra explained it. Mr. Robinson testified that Mr. Mittra did not recount any discussions he had with Mr. Ramji about the investments at the time they were made, beyond his discussion about Mr. Ramji looking after the money for him. Mr. Robinson testified that Mr. Mittra did not tell him at this meeting that he had invested his money in property and he said that he did not know what he had invested in.

[190] Mr. Mittra testified that Freshfields asked him about his investments with Mr. Ramji and he told them that he had given Mr. Ramji £430,000 to invest in real estate, and that Mr. Ramji had promised to give him the principal back. He testified that he said to Freshfields that the investments had been some four to five years earlier and he needed his emails and that he could help more if he could get his emails and provide more details.

[191] Mr. Mittra was not provided with access to his work emails by RBC. Mr. Mittra testified that Mr. Robinson and RBC's internal counsel said that he could not have the emails for confidentiality reasons.

Second Freshfields interview

[192] The second meeting was conducted with Mr. Mittra by videoconference, because he was in Toronto and the Freshfields representatives were in the U.K.

[193] Mr. Robinson testified that after the first meeting, Mr. Mittra provided materials that were discussed at the end of that meeting including bank statements showing payments made

totalling £430,000. Mr. Mittra sent an email to Mr. Robinson on December 24, 2018 with screen shots showing these payments in 2014 and 2015. Mr. Mittra met with Freshfields again on January 9, 2019.

[194] Mr. Robinson testified that the principal purpose of the second meeting was to discuss the further points that arose from the materials that Mr. Mittra had provided and in particular to understand the transfers and the fact that most of the transfers were to third parties rather than to Mr. Ramji directly. Mr. Robinson testified that Mr. Mittra explained that he did not have a detailed or specific recollection of why the money had been sent to these people, rather than to Mr. Ramji directly. He thought that the instructions to send money to these people would have been given to him by Mr. Mittra orally, or scribbled on a Post-it note. Mr. Robinson testified that Mr. Mittra explained that he had absolute and implicit trust in Mr. Ramji.

[195] Mr. Robinson testified that there was discussion at the second meeting about the reasons why Mr. Mittra chose to invest with Mr. Ramji. Mr. Robinson testified that Mr. Mittra gave the same reason as he gave up the first meeting.

[196] Mr. Robinson testified that Mr. Mittra explained at this meeting that he did have an understanding or assumption that the money would be invested in such a way that would form exposure to property. Mr. Robinson testified that Mr. Mittra identified a number of data points as the basis for this understanding or assumption. Mr. Mittra said that he understood that Mr. Ramji, himself, had an interest in and was experienced in investing in property. Mr. Mittra also explained that some of the money had gone to an individual, Mr. Spreckley, who he identified as being a contact of Mr. Ramji in the real estate business. Mr. Robinson testified that Mr. Mittra recalled requesting the return of funds at some point in 2017 when he was considering buying a property in Toronto and, when he asked for the money, Mr. Ramji told him it was not available, which is consistent with the money being invested in property, which is inherently illiquid. Mr. Robinson testified that at this meeting, Mr. Mittra said he could not recall specific discussions with Mr. Ramji on the subject matter of the investment.

[197] Mr. Mittra testified that at the second meeting he was asked questions about his investments with Mr. Ramji, and he helped them as much as he could. Mr. Mittra testified that he answered questions from the context of Mr. Ramji's bankruptcy. He did not have his emails by the time of the second meeting.

Third Freshfield interview

[198] The third meeting was held on February 8, 2019. Mr. Robinson testified that there were two principal topics of discussion. First, there were some documents, principally transcripts of calls between Mr. Mittra and Mr. Ramji, that Mr. Robinson wanted to ensure he understood properly. Second, there was a more detailed discussion about Mr. Mittra's involvement in setting Mr. Ramji's bonus in 2016. With respect to the bonus, Mr. Robinson

testified that Mr. Mittra explained that the financial performance of the business of which Mr. Ramji was a part had been much better in 2016 than it had been in 2015, and for that reason bonuses for individuals within that business, generally, were significantly higher for the 2016 year than for the 2015 year. Mr. Mittra said that this was not something that was unique to Mr. Ramji or the result of any preferential treatment by Mr. Mittra to Mr. Ramji because of financial arrangements or otherwise.

[199] Mr. Mittra testified that at the third meeting, Freshfields were asking more questions about Mr. Ramji and another RBC senior executive, Mr. Samuel. He did not have access to his emails.

March 6, 2019 RBC Letter

[200] Following the Freshfields meetings, RBC initiated a disciplinary process against Mr. Mittra under its UK disciplinary process. RBC provided Mr. Mittra with a letter dated March 6, 2019 initiating that process and outlining three allegations against him.

[201] The letter attached documents assembled by Freshfields in respect of those allegations, including typewritten attendance notes from the interviews.

[202] In allegation 1, RBC alleged that Mr. Mittra had failed to disclose a conflict of interest arising from his personal relationship and financial dealings with Mr. Ramji. In this letter, RBC wrote that it does not allege, based on the findings of the investigation, that there is sufficient evidence of inappropriate conduct by Mr. Mittra in respect of his oversight of Mr. Ramji in the sense of having given him preferential treatment.

[203] In allegation 2, RBC alleged that Mr. Mittra had failed to provide accurate, complete, and timely information, specifically at the first Freshfields interview. In the letter, RBC recognized that Mr. Mittra had provided useful assistance in the course of the investigation, including by providing personal financial records that would otherwise not have been available to RBC.

[204] In allegation 3, RBC alleged that in respect of the £430,000 that he paid to Mr. Ramji and to various friends of Mr. Ramji (on his instructions), Mr. Mittra failed to take reasonable steps to ensure that this money was not being invested in a way that would require approval under the RBCCM Global Private Investment Policy.

[205] In the letter, RBC asked Mr. Mittra to attend a disciplinary hearing on March 13, 2019. Mr. Mittra requested that a different chair be appointed because he and the assigned chair previously had a professional disagreement over a particular file. RBC granted this request and the hearing was rescheduled to March 21, 2019. The hearing was to be chaired by Graeme Pearson, another RBC Managing Director.

Disciplinary Hearing

[206] Mr. Mittra participated in the hearing virtually from Toronto. With him in Toronto was Teri Dennis-Davies who was head of employee relations. The hearing was chaired by Mr. Pearson from London. Millie Devitt also participated from London. She worked in RBC's human resources group and reported to Ms. Dennis-Davies.

[207] There is an audio recording and a transcript of the disciplinary hearing. The audio recording and the transcript were marked as exhibits at the trial.

[208] For each allegation, Mr. Pearson began by asking Mr. Mittra to provide his narrative response, and then followed up with questions.

[209] In respect of allegation 1, Mr. Mittra explained that his relationship with Mr. Ramji predated the period where he assumed management responsibility for him. He explained that at the time of his promotion, he was working extremely long hours and it did not cross his mind that the relationship with Mr. Ramji was something that he needed to formally disclose to the bank. Mr. Mittra responded that with the benefit of hindsight, he accepts that his relationship with Mr. Ramji fell within the definition of a close relationship that created the risk of a potential conflict. Mr. Mittra added that in practice there were no acts or omissions which suggested that his professional dealings with Mr. Ramji were in any way affected by the close relationship.

[210] In respect of allegation 2, Mr. Mittra expressed surprise that the allegation was included in the letter. He responded that at the December 18 interview with Freshfields, he answered the many questions that were put to him as honestly and as fully as he could. Mr. Mittra said that his recollection was incomplete, although he told Freshfields that he thought the investments might have an underlying exposure or might have been invested in a residential property. He said that he went away from that meeting being aware that there might be more assistance that he could provide and he spent the next couple of weeks going over his records when time permitted. Mr. Mittra told Mr. Pearson that what triggered his further recollection is that he went away and looked at the financial documents and, once he did so, he saw a statement showing a reference to "Bill Spreckley" who Mr. Mittra recalled was in the real estate market, as he said to Freshfields, so he must have been thinking that this is to a certain extent a property investment. Mr. Mittra explained that his recollection on December 18 was what it was, and he was able to go back and try to piece things together once he had been able to check those statements.

[211] In respect of allegation 3, Mr. Pearson asked about the failure to inquire about the nature of the private investments and asked Mr. Mittra to give his side of that allegation. Mr. Mittra responded:

> Yeah. As ... I'd say I never had any deliberate intention to breach any of the bank's policies or procedures. But having had the

> opportunity obviously to consider the position on this one, I do appreciate the allegation in that if I didn't know exactly where the money was investing, I couldn't be entirely certain that I wasn't in breach of the bank's policies, or being compliant with the bank's policies.
>
> Now, I would say that in effect that money was in a blind trust, because I didn't have any - obviously it's an investment, and, in effect, that I trusted Mr. Ramji as a long-standing officer of the bank would stay well within RBC's policies and ultimately would not do anything to get me into regulatory, or worse, trouble. In hindsight, I appreciate that that was just an error of judgement.

[212] Mr. Pearson asked follow-up questions and asked Mr. Mittra what the £430,000 was to be used for. Mr. Mittra responded:

> Again, so my thinking over time is Karim's ... I mean, it's simple as Karim's got some of my money. He'll give it back to me when I need it, which is when I was hoping to return to London to buy a house at some point in the next couple of years or so. I didn't really ... through the period, and obviously we have gone back and, like I say, at least put together that Bill Spreckley is involved in property management. So I obviously had an understanding at the inception that it was going to be in property. My other understanding was that I didn't think you could hold - and I've participated in some private investments in the UK to which I have obviously completed the requirements of the policy and declared them and filled in the form. I didn't actually think that I can break that policy if I didn't actually have - like positively declare high-net-worth individual status or sophisticated status, sophisticated-investor status, or there was some legal kind of document or security or something that I would have as an investment. So I thought I was - I thought the policy over the period was not applicable. I didn't think it would put us into conflict, again, with the bank and its clients. And I certainly didn't think it would obviously affect my behaviour or objectivity to my work. But I do appreciate that - like I say, I appreciate that I didn't actually have a clear understanding of what Mr. Ramji was doing. I just trusted him to return my money when I needed it. And again, that's kind of based on the trust I had with him. You know, this is someone that comes from an independently wealthy family and I think you have probably seen this in the note.

[213] Following this answer, Millie Devitt asked "Did you ever ask him exactly where that money was going?". Mr. Mittra responded: "No. No, I didn't. And that comes out through obviously through this whole process. I'm obviously keen to find out as well".

[214] Mr. Pearson asked whether Mr. Mittra asked Mr. Ramji questions around what he was investing in or about property deeds, whether the investments were "buy to let", or the rental income on the investments. Mr. Mittra responded that he did not ask any of those questions and he expected Mr. Ramji to give the money back when he needed it.

[215] Mr. Pearson asked Mr. Mittra to explain his relationship with the four individuals to whom he had sent the money and whether he understood their role, or whether he knew these people or had met these people. Mr. Mittra responded that, as he said to Freshfields, he did not know any of these individuals at the time of making transfers over to them. He transferred the money to them solely under the instruction of Mr. Ramji in a relatively informal manner, based on the level of trust that he had in Mr. Ramji. Mr. Mittra responded that he thinks he had heard Bill's Spreckley's name at the time of doing it but he never had any direct contact with Mr. Spreckley. He responded that he thought he had met one of the other individuals but he had not met the others.

[216] Mr. Mittra was asked whether there is anything else about the actual transfer of funds that Mr. Pearson should be aware of and he responded that he thinks that they had covered pretty much everything. At the conclusion of the disciplinary hearing, Mr. Pearson asked whether there is anyone else who Mr. Mittra would recommend that he speak with and he responded that he did not think so. Mr. Pearson explained that the allegations are very serious and again asked Mr. Mittra if there is anything else he should be doing or that Mr. Mittra thinks would be relevant to the allegations. Mr. Mittra responded that a lot has been gone through by Freshfields and during the meeting and he did not think there is anything additional.

Letter of termination and appeal

[217] On April 23, 2019, RBC communicated the disciplinary findings to Mr. Mittra in a letter written by Mr. Pearson. The letter was provided to Mr. Mittra at a meeting at the London offices of RBC (at which Mr. Pearson and Mr. Pomphrett were present).

[218] In respect of allegation 1, Mr. Pearson concluded that Mr. Mittra's friendship and his financial arrangements with Mr. Ramji that existed at the time he was Mr. Ramji's direct supervisor clearly gave rise to a significant potential or perceived conflict of interest which was required to be disclosed under RBC policies, which Mr. Mittra failed to do. Mr. Pearson did not accept Mr. Mittra's explanation that he did not feel conflicted, or that it did not cross his mind that he was required to disclose his relationship with Mr. Ramji following his promotion into a position that had direct oversight of him. Mr Pearson wrote that he considered that Mr. Mittra should have been aware of his requirement to disclose such a relationship upon assuming oversight and responsibilities of an employee.

[219] In respect of allegation 2, Mr. Pearson concluded that the allegation that Mr. Mittra breached Clause 2.3 of the RBC Code of Conduct is not substantiated.

[220] In respect of allegation 3, Mr. Pearson concluded that the allegation that Mr. Mittra failed to take adequate steps to ensure that he was not in breach of RBCCM Global Private Investment Policy is substantiated. Mr. Pearson explained:

> You paid a large sum of money to Mr. Ramji and other individuals (on Mr. Ramji's instructions) on the understanding your money would be invested but you took no steps to understand how this money would be invested. You did not undertake any due diligence in respect of the investments. You transferred money to individuals you had never met, on Mr. Ramji's instructions, without making any inquiries into who they were. Your investments were not documented in any way. No details of the investments appear ever to have been discussed or agreed with Mr. Ramji. You never asked Mr. Ramji how the money would be invested, and you still do not know where your money went.

[221] Mr. Pearson wrote that he had decided in the circumstances that he has lost trust and confidence in Mr. Mittra to perform his role, and therefore the appropriate sanction to be imposed is that Mr. Mittra's employment will be terminated on three months' notice from the date of this letter, in accordance with his employment contract, to be served as "garden leave". Mr. Pearson also advised that an assessment Mr. Mittra's fitness and propriety will be undertaken for the purpose of any regulatory reference and, in addition, consideration will be given to whether his conduct constitutes a breach of the FCA's conduct rules and therefore triggers a notification obligation. Mr. Pearson advised that a review of this matter will be undertaken under the relevant RBC Forfeiture and Clawback Policy which may affect Mr. Mittra's deferred compensation.

[222] On April 29, 2021, Mr. Mittra gave notice to RBC of his intention to appeal. RBC introduced the letter of appeal into evidence as part of its case. The letter is dated May 3, 2019 and directed to RBC's Head of Human Resources in the UK.

[223] In his appeal letter, in response to the finding in respect of allegation 3, Mr. Mittra repeated that he did not ensure that he knew where his money was being invested and he wrote that this was an oversight and not a deliberate policy of concealment. Mr. Mittra wrote that he made a serious error when he agreed to let Mr. Ramji look after his money without carrying out proper due diligence.

[224] Mr. Mittra subsequently withdrew the appeal. He commenced this action on July 30, 2019.

Analysis of RBC allegations of after-acquired cause for dismissal

[225] I first address Mr. Mittra's submission that the court should draw an adverse inference against RBC with respect to all aspects of the investigation related to Mr. Mittra by Freshfields and RBC for their failure to comply with disclosure obligations in the termination process pursuant to RBC's Code of Conduct and its Investigation Policy and its common law obligations.

[226] Mr. Mittra submits that RBC's failure to produce actual notes from the interviews with Mr. Mittra require an adverse inference that such evidence would adversely affect RBC's case.

[227] RBC claims privilege over the handwritten notes (the evidence was that two sets of handwritten notes are no longer available) and work product of Freshfields in respect of interviews with Mr. Mittra on the basis that work product of solicitors (including notes) created during an investigation in respect of which legal advice is provided is subject to privilege. RBC did not claim privilege over the contents of the interviews. RBC provided typewritten attendance notes prepared by Mr. Robinson's colleague after each interview and RBC does not claim privilege over these attendance notes which were provided to Mr. Mittra with RBC's March 6, 2019 letter.

[228] At the trial, Mr. Mittra objected to the admissibility of Mr. Robinson's evidence concerning what was said during the interviews on the ground that RBC had claimed privilege over the original notes and other work product of Freshfields and Mr. Mittra would be prejudiced if this evidence were to be given. Mr. Mittra relied on rule 31.07 of the *Rules of Civil Procedure*. RBC opposed this objection and maintained its claim to privilege over the records from the Freshfields investigation (other than the attendance notes).

[229] In my ruling, I accepted that there may be a legitimate basis, supported by jurisprudence, for RBC's assertion of privilege. I ruled that RBC's assertion of privilege over the handwritten notes means that RBC may not introduce these notes at trial, but that RBC is not precluded from tendering evidence from Mr. Robinson about what was said during the interviews. Mr. Mittra did not seek a ruling that the handwritten notes are not subject to privilege or that privilege was waived. Mr. Mittra did not seek an order requiring production of the notes. As a result, I made no ruling in these respects. I did not allow Mr. Mittra's objection.

[230] It was always open to Mr. Mittra, both before and at trial, to move to challenge RBC's assertion of privilege and seek production of the Freshfields records. Mr. Mittra chose not to so move and no determination was made that RBC's claim of privilege is not valid or that it was waived. I do not agree that Mr. Mittra is prejudiced by having Mr. Robinson's testimony about what was discussed at the meetings admitted, even though the Freshfields records were not produced. Mr. Mittra attended these interviews. Mr. Mittra was provided with attendance notes. He testified about what was said.

[231] I do not agree that here, where RBC claims privilege over the handwritten notes and other Freshfields records, and Mr. Mittra declined to seek a determination of whether the privilege was properly claimed or whether it was waived, it would be proper for me to draw an adverse inference against RBC for failing to produce to Mr. Mittra the documents over which RBC claims privilege. I do not agree that the fact that the RBC personnel in the U.K. did not provide Mr. Mittra with a copy of RBC's Canadian investigation policy when he was interviewed justifies an adverse inference against RBC. I decline to draw an adverse inference against RBC that would affect my treatment of the evidence of what was said during these interviews.

[232] Mr. Mittra submits that the evidence of what was said during the interviews and at the disciplinary hearing should be the subject of an adverse inference because Mr. Mittra was not told that RBC was also investigating him. Mr. Mittra relies, in part, on the following evidence from the examination for discovery of Mr. Pomphrett that was read in as part of his case:

> 623. Q. That is it. So, it says:
>
> "... Notes of the investigation meetings you attended as summarized by Freshfields on December 18th, 2018, January 9th, 2019, February 8th , 2019 ..."
>
> So do you confirm that those were investigation meetings of Mr. Mittra?
>
> A. I am not sure if ... at what point they became about Mittra. My general understanding of the processes that Freshfields would have commenced an investigation, let's call it early to mid-January, and that investigation would've taken them, I would think, to speak to a ... You know, perhaps a relatively large number of RBC employees. And that, initially, I would think, is a fact-finding mission to try and understand what happened. And then there would have been subsequent decisions taken as to whether any of the employees interviewed could then potentially be subject to their own investigation, and potentially to their own disciplinary situation.
>
> So, I am not sure which of the meetings cited there would be correctly characterized as an investigation on Mittra, versus the investigation on Ramji, or overall fact-finding.
>
> 624. MS. RAY-ELLIS: As you can appreciate, that is a very significant distinction, so may I get an undertaking as to when it is that RBC says it started investigating Mr. Mittra?

> MR. SAMMON: I will take that question as posed under advisement.

The answer was provided and reads:

> As set out in the Invitation to Disciplinary Hearing letter produced at Tab 45 of the RBC Affidavit of Documents, facts relevant to the Plaintiff were established by RBC's investigation of the circumstances surrounding the bankruptcy of Mr. Ramji, which began in December 2018 and included interviews of the Plaintiff on December 18, 2018, January 9, 2019, and February 8, 2019.

[233] RBC's discovery answer does not say that Mr. Mittra was under investigation when the interviews were held. The answer responds that the facts relevant to Mr. Mittra were established during RBC's investigation of the circumstances surrounding Mr. Ramji's bankruptcy.

[234] Mr. Mittra also relies on evidence from Mr. Robinson where he agreed that he did not tell Mr. Mittra that he was under investigation.

[235] After giving this answer, Mr. Robinson went on to testify that Mr. Mittra was not the subject of investigation. He testified that the subject of the investigation was Mr. Ramji's financial dealings or arrangements with employees within the bank. Mr. Robinson testified that the purpose of the investigative process was not to make allegations or charges against anybody. The purpose was to gather the facts that relate to that subject. He testified that the process of making allegations or charges against somebody on the basis of the facts gathered is an entirely separate matter, the disciplinary process, which is separate from the investigation process.

[236] I accept Mr. Robinson's evidence about the subject of the Freshfields investigation. I decline to draw an adverse inference against RBC based on RBC's failure to tell Mr. Mittra before he was interviewed by Freshfields that RBC was investigating him.

[237] With respect to the disciplinary hearing, Mr. Mittra submits that Mr. Pearson misled Mr. Mittra about Mr. Pearson's independence because Mr. Pearson was briefed by Freshfields and RBC personnel before the hearing and because Mr. Pearson was the disciplinary chair to another process for another RBC employee in relation to Mr. Ramji and knew of others who had provided money to Mr. Ramji and he said otherwise to Mr. Mittra. Mr. Mittra also relies on RBC's failure to provide the Freshfields handwritten notes of the interviews justifies an adverse inference against RBC.

[238] I do not agree that this evidence shows that Mr. Pearson lacked independence or that the disciplinary hearing was unfair to Mr. Mittra. Mr. Mittra was notified of the allegations against him and given a fair opportunity to respond to these allegations at the hearing. The procedure allowed for a right of appeal. I decline to draw an adverse inference against RBC in relation to the disciplinary hearing.

[239] I now address whether RBC has shown, as it alleges, that Mr. Mittra violated RBC policies and his fiduciary obligations through a persistent pattern of dishonesty by deliberately withholding material information regarding his investments with Mr. Ramji from RBC's external legal counsel and the Chair of the Discipline Committee, and through his appeal letter.

Was the information provided by Mr. Mittra at the Freshfields interviews and at the disciplinary hearing regarding his investments with Mr. Ramji complete and accurate?

[240] With respect to the evidence of what was discussed during the three Freshfields interviews, I accept Mr. Robinson's evidence. Mr. Robinson's evidence about what was said during the meetings was much more detailed than Mr. Mittra's evidence. Mr. Robinson's evidence was not undermined on cross-examination. Mr. Mittra challenged, generally, the accuracy of the typed attendance notes. He testified that he does not recall making the statements in the attendance notes that he inferred from other information that his investment was in real estate. Mr. Mittra did not directly contradict Mr. Robinson's testimony about what was said at the meetings in any material respect.

[241] When the evidence of what Mr. Mittra told Mr. Robinson at the interviews and what he told Mr. Pearson at the discipline hearing is compared with Mr. Mittra's evidence, given on his examination for discovery (proven by read-ins) and on cross-examination at trial, of his dealings with Mr. Ramji in respect of the investments with him, it is clear that Mr. Mittra's evidence of such dealings (at discovery and at trial) differs in significant respects from what Mr. Mittra told Mr. Robinson at the Freshfields meetings and what he told Mr. Pearson at the disciplinary hearings.

[242] Mr. Mittra told Mr. Robinson at the first interview that he did not have any specific recollection of any specific agreement with Mr. Ramji with respect to the money or the terms or conditions that governed the money or the money's use that had been agreed or put in place. It was a relationship of trust, as Mr. Mittra explained it. In fact, Mr. Mittra had agreed with Mr. Ramji on details of the investments to be made. Mr. Mittra and Mr. Ramji had communicated about real estate investments in 2014 and into 2015. Mr. Ramji told Mr. Mittra that he was going to invest the money in real estate. Mr. Mittra spoke with Mr. Ramji face-to-face in 2014 about the investment. They had identified two developments, Riverlight and New Providence Wharf, in which to purchase units. Mr. Mittra had paid money to third parties who worked with Mr. Ramji to acquire the units. Mr. Ramji agreed to hold Mr. Mittra's interest in the units in trust for him. Mr. Mittra understood that he would earn a profit on the re-sale of the units. Mr. Mittra agreed with Mr. Ramji that Mr. Ramji would return his capital on demand, so he had no downside risk. Mr. Mittra's evidence is that he told Mr. Robinson at the first interview about the guarantee of repayment. He did not provide the other information.

[243] At the second interview, Mr. Mittra explained that he did not have a detailed or specific recollection of why the money had been sent to the third parties. In fact, Mr. Mittra had

been told by Mr. Ramji that these people were involved with him in making real estate investments. Mr. Mittra explained at this meeting that he did have an understanding or assumption that the money would be invested in such a way that would form exposure to property. This was explained by Mr. Mittra as an inference he drew from other information. I accept Mr. Robinson's evidence in this respect. In fact, Mr. Mittra had many specific discussions with Mr. Ramji about the investments and he had discussed with Mr. Ramji that the investments were in units in two specific residential developments.

[244] At the disciplinary hearing, Mr. Mittra stated that he had been able to "piece together" from his records, and further recollections these triggered, that he must have been thinking at the time that his investments were in property. In fact, Mr. Mittra had discussed with Mr. Ramji that his investments were in property. Mr. Mittra stated that he didn't know exactly where his money was invested. In fact, Mr. Mittra had been told that the money was invested with Mr. Ramji in units in two real estate developments and his interest in these units was to be held by Mr. Ramji in trust for him.

[245] Mr. Mittra told Mr. Pearson that he did not have a clear understanding about what Mr. Ramji was doing. In fact, Mr. Mittra had discussed with Mr. Ramji how his money would be invested. Mr. Mittra responded to a question from Ms. Devitt about whether he asked Mr. Ramji exactly where the money was going and he responded: "No. No I didn't" and that he was keen to find out. In fact, Mr. Mittra had discussed with Mr. Ramji where his money was going.

[246] Mr. Mittra told Mr. Pearson that if he did not know exactly where his money was invested, he could not be certain that he was not in breach of the bank's policies. He described the money he gave to Mr. Ramji as, in effect, being in a blind trust, and he trusted Mr. Ramji with this money. Mr. Mittra described his conduct as an error in judgement. In fact, Mr. Mittra had not given the money to Mr. Ramji to be held as if it was in a blind trust. He gave the money to Mr. Ramji for investment with him in units in two specific residential developments, with the investments to be held by Mr. Ramji in trust for him.

Mr. Mittra's explanations for the inaccuracies

[247] In his evidence at trial, Mr. Mittra was adamant that he answered the questions asked of him truthfully, that he told RBC that his investments were in real estate, and he told RBC that he could give more details if he was given access to his emails, because it had been four to five years earlier when he had made his investments in the U.K. Mr. Mittra testified that he only recollected the details of his investments with Mr. Ramji that he did not disclose at the Freshfields meetings or the disciplinary hearing after receiving access to his emails during the documentary discovery phase of this litigation and refreshing his memory. Mr. Mittra testified that he could have given RBC the same information he gave at his examination for discovery if RBC had given him access to his emails.

[248] Mr. Mittra testified that his review of emails helped him recollect what that period in his life was like. He testified that the emails were from his time in Luxembourg and that during his time in Luxembourg, he recalled that there were two buildings, because he would go past one of them when he was in London. He testified that he then recalled the two buildings and was able to discover what they were called.

[249] Mr. Mittra was cross-examined about his review of emails provided in the documentary discovery process in this litigation. Mr. Mittra agreed that the emails that RBC produced did not record the names of the buildings. He agreed that none of the emails produced by RBC recorded Mr. Ramji saying that he had access to pre-construction discounts. Mr. Mittra agreed that the emails that RBC produced did not contain any information of any kind about the transactions.

[250] Mr. Mittra acknowledged on cross-examination that he understood from discussions with Mr. Ramji, at the time of the investments, that his money would be used to acquire units in real estate investments in London. Importantly, when he was cross-examined, Mr. Mittra acknowledged that he had not forgotten by the time of his meetings with Freshfields, or his interview with Mr. Pearson, that there had been direct discussions between him and Mr. Ramji about investing in real estate. He agreed that this was not something he understood, or pieced together, by inference from other information, as he had told Mr. Robinson and Mr. Pearson. Mr. Mittra acknowledged that going into the meeting with Mr. Pearson, he understood that it was not true that, as he had told Mr. Robinson, he had not had an explicit discussion with Mr. Ramji about where he was investing his money. Mr. Mittra agreed that his answer at the second Freshfields interview about how he had determined that his investment had exposure to property, and his answers repeating these responses at the disciplinary hearing, were not accurate or correct.

[251] After agreeing that these answers were not correct, Mr. Mittra added that this information is not material in relation to a private investment in securities because it is a real estate investment.

[252] After giving these answers on cross-examination, it was put to Mr. Mittra that he understood going into the meeting with Mr. Pearson it was important for him not to repeat to Mr. Pearson a fact that he knew from his review of the Freshfields attendance notes to be false. Mr. Mittra responded that he answered as best he could, and truthfully. He explained that he was saying to Mr. Pearson that he did not know exactly where his money had ended up because Mr. Ramji had gone bankrupt. He explained that he did not get into details of the investments because he trusted Mr. Ramji implicitly. He explained that he did not believe these details were necessarily relevant.

[253] Mr. Mittra testified under cross-examination that he did not tell Mr. Pearson about the errors he had identified in the Freshfields attendance notes, which were reviewed at the disciplinary hearing, because he understood that the disciplinary hearing was not going to be a serious matter that would lead to the termination of his employment. Mr. Mittra agreed

that at no point following the termination of his employment, either in connection with his appeal or in any other communication, did he identify or disclose any errors in the Freshfields notes. He explained that he did not have in mind to do so because any errors or misrepresentations were not relevant to an RBC private investment and securities policy, given that his investment was in real estate.

[254] The information given by Mr. Mittra at these interviews omitted significant information of his dealings with Mr. Ramji that Mr. Mittra has acknowledged he remembered when he answered questions asked of him. Most importantly, Mr. Mittra did not disclose that he had direct face to face discussions with Mr. Ramji about investing in real estate. Mr. Mittra's knowledge of this fact was not pieced together from other information. This information, had it been given, would have shed a very different light on their financial dealings. Mr. Mittra was not simply entrusting Mr. Ramji with a significant amount of his personal funds to take care of for him as a trusted colleague without being told how Mr. Ramji would use the money. Mr. Mittra was actively engaged with Mr. Ramji in investments in residential real estate units in two developments in London.

[255] Had Mr. Mittra truthfully disclosed that he had direct discussions with Mr. Ramji about investing his money in units in real estate developments, this undoubtedly would have led to further questions about the nature of their financial dealings. By withholding this information, Mr. Mittra avoided a more detailed investigation into these dealings. If Mr. Mittra had disclosed at the second Freshfields interview that his answers at the first interview were not correct, because he knew that he had invested in real estate units with Mr. Ramji, he would have had to explain why he had not given this information at the first interview. If Mr. Mittra had been fully forthcoming at the disciplinary hearing, he would have had to explain why he had not truthfully disclosed his knowledge of his real estate investments with Mr. Ramji to Mr. Robinson. By answering as he did, Mr. Mittra avoided these further inquiries.

[256] Mr. Mittra's admission under cross-examination that he had not forgotten that there had been direct discussions between him and Mr. Ramji about investing in real estate directly contradicts his evidence in chief. This admission undermines the credibility of Mr. Mittra's evidence as a whole. When I consider this admission in the context of Mr. Mittra's evidence as a whole, I do not accept that Mr. Mittra only recalled details of his investments with Mr. Ramji after reviewing his emails. This explanation is not credible having regard to Mr. Mittra's admission, especially given Mr. Mittra's testimony that the emails he reviewed did not contain any information about his investments. I find that Mr. Mittra's explanation that he only remembered details of his investments, such as the locations of the specific developments and the 30% pre-construction discount, after reviewing his emails is not credible.

[257] Mr. Mittra made a very substantial investment, £430,000, which he knew was a real estate investment with Mr. Ramji. He had ample time to reflect on this investment before the Freshfields interviews and the disciplinary hearing. I regard it as highly unlikely that Mr.

Mittra could have forgotten how or where he had invested such a large amount of his savings. The fact that Mr. Ramji had access to a 30% pre-construction discount to acquire the units would have been an important feature of the investment. It is not plausible that Mr. Mittra would forget these details, or that his memory would be refreshed by emails that do not refer to these details.

[258] Mr. Mittra submits that RBC's position that Mr. Mittra deliberately withheld information regarding his real estate investments is not plausible because the information he allegedly withheld could only have assisted him, given that RBC did not have a policy at the relevant time with respect to investing in real estate with a co-worker or a direct report. Mr. Mittra has acknowledged that his statement (at the second Freshfields interview and at the disciplinary hearing) that he only pieced together from other information (and not from his direct dealings with Mr. Ramji) that his investment was in real estate was, to his knowledge, untrue. His explanation, after the fact, that his untrue statements were, in his view, not material does not explain or justify his failure to provide full and truthful answers to questions asked of him.

[259] On a number of occasions when he was testifying, Mr. Mittra explained that he was answering questions at the Freshfields interviews and the disciplinary hearing, after Mr. Ramji's bankruptcy was known, from his perspective that the questions were directed to his knowledge of the current whereabouts of his investments, as opposed to inquiring into his actual dealings and discussions with Mr. Ramji.

[260] When I consider the evidence given by Mr. Robinson, Mr. Pearson, and Mr. Mittra, I do not accept that Mr. Mittra did not understood that he was being asked about his prior financial dealings with Mr. Ramji, and thought he was being asked where his money ended up. Mr. Mittra's understanding that he was being asked about his prior financial dealings with Mr. Ramji is shown by his production of bank records recording his advances for the investments. The questions asked at the Freshfields interviews and at the disciplinary hearing were directed to Mr. Mittra's prior dealings with Mr. Ramji in respect of financial matters and not to the current location of the money he had given to Mr. Ramji. I do not accept Mr. Mittra's evidence that he answered questions from his perspective that the questions were directed to the current whereabouts of his money. I find that Mr. Mittra's explanation in this regard, given several times during his testimony, was constructed to try to excuse his failure to provide full and honest answers.

[261] I find that Mr. Mittra remembered the factual circumstances of his real estate investments with Mr. Ramji when he attended at the Freshfields interviews and the disciplinary hearing, but he did not disclose them fully and honestly, even though he was asked clear and direct questions that called for him to do so.

Surrounding circumstances

[262] In *Dowling*, the Court of Appeal, at para. 52, held that the second step in the analysis is intended to be a consideration of the employee within the employment relationship. The particular circumstances of both the employee and the employer must be considered. In relation to the employee, one would consider factors such as age, employment history, seniority, role and responsibilities. In relation to the employer, one would consider such things as the type of business or activity which the employer is engaged, and any relevant employer policies or practices, the employee's position within the organization, and the degree of trust reposed in the employee.

[263] Mr. Mittra is well-educated and had worked with RBC since 2005 (with a hiatus between September 2006 and November 2009). Mr. Mittra held increasingly responsible positions at RBC and was highly regarded. He was a dedicated and hard working employee who willingly accepted assignments asked of him. At the time of his dismissal, Mr. Mittra held a senior and responsible management position at RBC. It is not unfair to characterize Mr. Mittra as a "rising star" at RBC.

[264] Mr. Mittra held a position as a fiduciary employee of RBC. Over and above the general duties of good faith and fidelity owed to his employer, Mr. Mittra, as a fiduciary, owed RBC duties of loyalty, candour, and scrupulous avoidance of actual or perceived conflicts of interest, including a duty to disclose all material information that may affect his employer's decisions. A fiduciary employee cannot have interests that conflict with their employer without making full disclosure and obtaining the employer's consent. See *Canadian National Railway Company v. Holmes et al*., 2022 ONSC 1682, at para. 152.

[265] Mr. Mittra was employed by a regulated bank. RBC reposed significant trust, authority, and discretion in Mr. Mittra. He had discretion to make trades in the tens of millions of dollars. At the time of his investments with Mr. Ramji, Mr. Mittra was a senior manager responsible for managing liquidity portfolios worth approximately $60 billion USD.

[266] In *Carias v. CIBC*, 2003 BCSC 587, the Court, at para. 82, held that the role of a banker is different even from other forms of employment where honesty may also be held in high esteem. The Court cited *Vaillancourt v. National Bank of Canada* (February 1984) referred to in *Evans and Royal Bank of Canada* ,[1996] C.L.A.D. No. 1125 where the adjudicator noted that "the world of banking is very different from other areas because it requires at all levels absolute transparency, unimpeachable financial morality and complete objectivity". In *Rowe v. Royal Bank of Canada*, 1991 CanLII 912 (BC SC), the Court held that banking is a business where "caution is the norm and trust and confidence by the employer in the employee are essential".

[267] I accept that in the banking sector, a senior employee such as Mr. Mittra is subject to an exceptionally high level of integrity and honesty.

Proportionality of dismissal as a response

[268] In *Dowling*, the Court of Appeal, at para. 53, held that the third step in the analysis is an assessment of whether the misconduct is reconcilable with sustaining the employment relationship. This requires a consideration of the proved dishonest acts, within the employment context, to determine whether the misconduct is sufficiently serious that it would give rise to a breakdown in the employment relationship.

[269] In RBC's letter dated April 25, 2019 written by Mr. Pearson, RBC notified Mr. Mittra that it was upholding allegation 1 and allegation 3 in the earlier letter dated March 6, 2019. Mr. Pearson advised in the letter that he has lost trust and confidence in Mr. Mittra to perform his role and that his employment will be terminated on 3 months' notice in accordance with his employment contract, with the notice period to be served as "garden leave" without Mr. Mittra being required to attend at work.

[270] In respect of allegation 1, Mr. Pearson wrote that he considered that Mr. Mittra's friendship and his financial arrangements with Mr. Ramji that existed at the time he was his direct supervisor clearly gave rise to a significant potential or perceived conflict of interest and were required to be disclosed under RBC's Code of Conduct and other policies. Mr. Pearson wrote that he does not accept Mr. Mittra's explanation that he did not feel conflicted or that it did not cross his mind that he was required to disclose this relationship following his promotion into a position that had direct oversight of him.

[271] In respect of allegation 3, Mr. Pearson wrote that, in his view, the allegation that Mr. Mittra failed to take adequate steps to ensure that he was not in breach of the RBCCM Global Private Investment Policy is substantiated. Mr. Pearson wrote that, in his view, Mr. Mittra had shown a reckless disregard for the requirements of this policy in a manner that undermines the trust and confidence that RBC placed in him as a senior employee.

[272] In the letter, Mr. Pearson expanded on his concerns:

> You paid a large sum of money to Mr. Ramji and other individuals (on Mr. Ramji's instructions) on the understanding your money would be invested but you took no steps to understand how this money would be invested. You did not undertake any due diligence in respect of the investments. You transferred money to individuals you had never met, on Mr. Ramji's instructions, without making any enquiries into who they were. Your investments were not documented in any way. No details of the investments appear ever to have been discussed or agreed with Mr. Ramji. You never asked Mr. Ramji how the money would be invested, and you still do not know where your money went.

[273] RBC did not take the position in this letter that it had just cause to terminate Mr. Mittra's employment without notice.

[274] I have found that Mr. Mittra failed to fully and honestly disclose to Mr. Robinson, who led the Freshfields investigation, and Mr. Pearson, the chair of the disciple committee who presided at the disciplinary hearing, facts within his knowledge about his investment of money with Mr. Ramji, through payments to persons he knew to be associates of Mr. Ramji involved in real estate investments, in units in two specific residential real estate developments in London, as described more fully above, including the 30% pre-construction discount, and his agreement with Mr. Ramji that he would hold Mr. Mittra's interest in the units in trust.

[275] Mr. Mittra was not forthcoming about his knowledge of these matters at the first Freshfields interview, and he continued to mislead Mr. Robinson, and then Mr. Pearson, at subsequent interviews. After receiving the termination letter, when Mr. Mittra knew that RBC had been misled about his failure to ask Mr. Ramji how the money would be invested, and had taken its decision on a wrong understanding of the facts, Mr. Mittra made no effort to correct RBC's understanding in his letter of appeal and he repeated the same account.

[276] Mr. Mittra's employment contract with RBC required him to be honest with his employer with respect to matters arising from the employment relationship. This obligation was of heightened importance for Mr. Mittra, who was a senior manager of a regulated bank with responsibilities involving the exercise of discretion and judgment in decisions that could affect the business and reputation of RBC.

[277] The investigation into Mr. Ramji's financial dealings with RBC employees was an important one for RBC. If he made an error in an initial response, or recalled additional information, he was required to provide corrected information during the investigation. At the disciplinary hearing, Mr. Mittra was given an opportunity to respond to serious allegations against him and, in doing so, he was required to be honest and forthcoming.

[278] Mr. Mittra maintains that the Freshfields investigation and the disciplinary hearing were unfair, and that the alleged unfairness should preclude RBC from relying on Mr. Mittra's conduct during the investigation and the disciplinary hearing as just cause for dismissal. I disagree. Any unfairness or perceived unfairness in the process did not relieve Mr. Mittra from his obligation to be scrupulously truthful in his responses during the investigation and the disciplinary hearing.

[279] In these circumstances, where Mr. Mittra was not honest with RBC in the course of a serious investigation into Mr. Ramji's financial dealings with RBC employees, given his senior position of trust and responsibility with a regulated bank, I conclude that his misconduct was sufficiently serious that, had it been known to RBC at the time of Mr. Mittra's dismissal, it would have fundamentally undermined RBC's trust in Mr. Mittra and resulted in an irreparable rupture of the employment relationship. I conclude that Mr.

Mittra's dishonesty was such that had it been known by RBC when Mr. Mittra was dismissed, termination of his employment for just cause would be a proportionate remedy.

ISSUE #5 Mr. Mittra's Claim for Damages

Unpaid deferred compensation that vested in December 2018

[280] RBC accepts that Mr. Mittra is entitled to an award of damages for his claim in respect of unpaid deferred compensation that had vested in December 2018. The amount of this claim is $239,844.40 CAD.

[281] Mr. Mittra submits that the amount of this claim is $244,431.64.

[282] RBC accepts, for purposes of this action, Mr. Mittra's calculation of the amount of this claim because the difference between the two calculations is small.

[283] Mr. Mittra seeks a "tax equalization gross-up" of $146,796.85 in respect of this amount. He submits that he was entitled to receive compensation in the form of this gross-up under his contract of employment.

[284] As I have noted, under the Balance Sheet Compensation Approach described in the 2017 Agreement, Mr. Mittra was responsible for hypothetical tax on employment income earned during the assignment which is the stay-at-home (U.K.) tax liability that he would pay if he were to remain in the home country (the U.K.) and not undertake the assignment. The 2017 Agreement states that, if applicable, RBC will utilize hypothetical tax collected from Mr. Mittra to pay his tax liability on employment income that arises in the host country and RBC would fund income and/or social security taxes arising in the host country on RBC paid employment compensation.

[285] RBC tendered evidence from Laura Assal, a partner of Ernst & Young, who works in its "people advisory services and mobility tax" group. Her area of expertise is assisting employers and their employees with cross-border tax implications of moving or employment purposes, whether temporarily or permanently. Ernst & Young has provided services to RBC since 2017 in connection with international assignments. By 2019, Ms. Assal was overseeing all of the Canadian and U.S. tax compliance for this group, as well as foreign compliance which included accountants in the United Kingdom.

[286] Ms. Assal testified that one type of temporary assignment used by RBC is what RBC refers to as the "balance sheet policy". She testified that under the balance sheet policy, the employee remains on their home country payroll and they continued to get paid in their home country currency. Ms. Assal testified that under this compensation approach, RBC is responsible for paying all actual taxes on behalf of an employee and, when it does so, that in itself is considered a taxable benefit which is referred to as "gross up". The taxable benefit is subject to tax, which the employer will pay tax on. The term "gross up" refers to the tax and the tax on the tax that the employer pays on the employee's behalf, and it is

part of taxable income for Canadian tax purposes. Ms. Assal testified that in order to fund the taxes in Canada, RBC has to pay gross amount that would yield a net amount sufficient to pay the tax, not just on the compensation employee receives, but on all other benefits and incidentals. Ms. Assal testified that the gross up amount was shown on Mr. Mittra's T4 slip as part of his taxable income, but did not reflect an amount actually paid to him.

[287] I accept Ms. Assal's evidence. The gross up amount was not an independent benefit received by Mr. Mittra. It was an amount calculated and used to equalize the tax burden arising from RBC's payment of actual taxes owing.

[288] Mr. Mittra has not suffered a loss as a result of not receiving compensation for the tax gross up.

[289] I conclude that Mr. Mittra is entitled to payment of the agreed amount for unpaid deferred compensation that vested in December 2018, $244,431.64, but he is not entitled to receive an additional amount for the tax gross up, as claimed.

Mr. Mittra's claim for other variable compensation during the period from November 1, 2018 to April 23, 2019

[290] Mr. Mittra submits that he is also entitled to damages for unpaid compensation from November 1, 2018 to April 23, 2019 being the "stub period" (after the end of the fiscal year to the date of dismissal). He claims $637,928.33 plus net tax equalization of $387,222.50 for a total of $1,025,150.83.

[291] RBC submits that Mr. Mittra has not established any claim or damages in respect of deferred compensation (other than the amount that vested in December 2018).

[292] Mr. Mittra confirmed that variable compensation was determined by the fiscal year end of RBC and depended in each year on factors which included the performance of the bank, the performance of Investor and Treasury services, personal performance of the employee, and whether the employee had taken on additional responsibilities, among other factors. RBC assessed personal performance through the review process in completion of annual performance reviews.

[293] The 2017 Agreement includes a provision with respect to bonuses that reads:

- *Discretionary Incentive Plan*

> You will be eligible to participate in the RBC I&TS Annual Incentive Plan (AIP). All individual bonuses are determined at the sole discretion of management, and are depended upon your individual performance, the overall performance of RBC I&TS, and the size of the overall bonus pool. Bonuses are paid annually in December and are subject to your continued satisfactory

> employment. Receipt of any bones payment is conditional on you not being under notice of termination of employment and you being in the employee of RBC up to and including the date that bonuses are paid in the normal course of business, which shall be no later than December 31.

[294] Mr. Mittra's deferred compensation is subject to the RBC Investor & Treasury Services Incentive Program. Section 1 of this written program dated August 2015 reads:

> **1**. **Eligibility**
>
> > All full and part-time employees of RBC Investor & Treasury Services (RBC I&TS), including employees on approved leaves of absence, such as maternity and disability leave, and who are not subject to a business-specific bonus plan are eligible to participate, subject to the terms of the Plan. Any bonus allocation to an employee under this Plan is at the complete discretion of RBC I&TS and any amounts payable under the Plan are earned only when they are paid to the employee.

[295] Emma Dunlop, an employee in RBC's London office, who is a senior human resources business partner for RBC Investor and Treasury Services, testified at trial. Ms. Dunlop was asked how RBC, within the I&TS business segment, granted deferred compensation for the period 2016 through 2018. She responded that the variable compensation incentive amount is granted or awarded. The portion that is deferred is based on a deferral grid, based on the level of compensation being awarded. The deferred amount is in notional units, which track to the RBC share price. One notional unit is the equivalent of one share. The number of units established is based on the amount being deferred, and taking the RBC share price into consideration, the number of units awarded is then matched to the amount that is being deferred.

[296] Ms. Dunlop testified that there is no formula used in the process for setting variable compensation and the incentive compensation awarded is purely discretionary. RBC took into account individual and institutional performance in determining the amount of the bonus each year. Bonus awards (including deferred compensation) were memorialized each year in I&TS Compensation Statements, which were introduced into evidence at trial.

[297] The principal means through which Mr. Mittra received the deferred compensation was through "share units", which were created and governed by plans. There were also deferred cash awards granted in 2016 (in connection with his role as a UK employee) for regulatory reasons, pursuant to specified terms.

[298] Ms. Dunlop testified that there are plans regarding these notional units. Ms. Dunlop was asked about the process for an employee to receive or accept units. She testified that the

number of units is entered into an online third-party tool called Solium , and employees are asked to enter into Solium's system, and to acknowledge the awards. In so doing, the employee is asked to review the plan documents and to acknowledge that they have read the terms of the plan which they acknowledge in the system.

[299] In her evidence, Ms. Dunlop identified the acknowledgements executed by Mr. Mittra, records of which were maintained in the Solium system, and required Mr. Mittra to expressly acknowledge the terms governing the awards to receive the awards, or to confirm that he had read the relevant plan language. Ms. Dunlop testified that:

a. The 2016 share units awarded were governed by the Royal Bank of Canada Investor and Treasury Services Share Unit Program UK effective December 1, 2013 ("2013 Share Unit Plan") and Forfeiture and Clawback Policies for Code Staff in the UK and for regulated employees in Luxembourg;

b. The 2017 and 2018 share unit awards were covered by the Royal Bank of Canada Investor and Treasury Services Share Unit Program dated July 1, 2017 ("2017 Share Unit Plan") and Forfeiture and Clawback policies dated September 2017 (for the 2017 award) and October 2018 (for the 2018 award).

[300] I accept Ms. Dunlop's evidence in these respects.

[301] The 2017 Share Unit Plan provides, in section 7.4, that if a participant's employment is terminated "without cause" such participant's entitlement to receive any cash payment for the share units recorded in such participant's account shall terminate in accordance with stated provisions. Mr. Mittra submits that this "without cause" standard in the termination provisions of the 2017 Share Unit Plan violates the *ESA*, rendering the provision void. I disagree. While Mr. Mittra was working in Ontario, where the *ESA* applied to his employment, the 2017 Agreement was part of Mr. Mittra's contract of employment. The 2017 Agreement expressly provides that for RBC initiated involuntary termination, notice of termination and severance entitlement, if any, will be based on RBC policies and practices in effect in the UK at the time notice of termination is given, "unless superseded by host country laws". The mandatory provisions of the *ESA* applied to Mr. Mittra under his employment contract with RBC and, by the terms of the 2017 Agreement, were not contracted out of by any plan applicable to him, including the 2017 Share Unit Plan.

[302] Mr. Mittra acknowledged that to accept an award of share units or notional share units, he was required to access the Solium platform and click "yes" to accept the award. Mr. Mittra testified that he recalls that there was numerical information with respect to the number of share units in the value of the award and he does not recall other information than that. He testified that he does not recall explicitly accepting the program award acknowledgements.

[303] After giving this evidence, Mr. Mittra was shown an affidavit he had sworn earlier in this proceeding (in connection with a motion by RBC to address issues of jurisdiction). In that

affidavit, he deposed that he executed two Investor and Treasury Services share unit program award acknowledgements for the RBC deferred compensation plan which relates to the RBC Investor and Treasury share unit program in Canada. His affidavit appended the form of the 2017 and 2018 acknowledgements and the 2017 Share Unit Plan, which Mr. Mittra testified he downloaded (from Solium) after his departure from RBC. Mr. Mittra agreed that there was text on the screen when he clicked to accept the awards which, he assumed, was available to him as he was doing so. Mr. Mittra testified that he assumed that he had to accept and click on an award acknowledgement every year which had text with terms and conditions. He testified that he did not go through them in any detail.

[304] In *Battiston v. Microsoft Canada Inc.*, 2021 ONCA 727, leave to appeal ref'd, 2022 CanLII 67610 (SCC), an employer appealed from the trial judge's conclusion that the dismissed employee is entitled to unvested stock awards after the termination of his employment. The applicable stock award agreement provided that any unvested stock awards do not vest to an employee if employment ends for any reason. The trial judge found that the termination provisions in the agreement were not drawn to the employee's attention and could not be enforced because they were harsh and oppressive.

[305] The Court of Appeal addressed the evidence that each year, for many years, the employee received an email indicating that to accept his stock award, the employee had to complete the online acceptance process and indicate that he had read, understood and accepted the stock award agreement and accompanying plan documents. The employee's evidence was that he did not read the agreement and did not know about the termination provisions. He thought he would get the unvested stock if his employment was terminated. The Court of Appeal held that the trial judge erred by finding that the employee did not receive notice of the termination provisions in the agreement where (i) he had expressly agreed to the terms of the agreement; (ii) he made a conscious decision not to read the agreement despite indicating that he did read it by clicking the box confirming such, and (iii) by misrepresenting his assent to the employer, he put himself in a better position than an employee who did not misrepresent, thereby taking advantage of his own wrong.

[306] I find that Mr. Mittra must be treated as having read and understood the terms governing his entitlement to receive the awards.

[307] All of the share unit acknowledgements that Mr. Mittra executed made clear that the units were being granted conditionally, subject to the terms and conditions of the plan documents and the RBC Forfeiture and Clawback policies. Each grant (of share units and cash) is subject to a three-year vesting schedule, based on the definition of "Entitlement Date", defined as:

a. in respect of 25% of the Award, the day of the first anniversary of the Grant Date;

b. in respect of the next 25% of the Award, the day of the second anniversary of the Grant Date; and

c. in respect of the remaining 50% of the Award, the day of the third anniversary of the Grant Date, but any event no later than the Deadline, all as stipulated in the Participant's Award Acknowledgement.

[308] Both the 2013 and 2017 Share Unit Plans expressly addressed the effect of employment termination on unvested awards. Where an involuntary termination of employment occurred "without cause" then the participant was entitled to a *pro rata* portion of share units (with the remainder to be terminated).

[309] Each plan provided that for termination for reasons other than those specified (which would encompass a "for cause" termination), then all unvested share units immediately terminated. The deferred cash awards granted in 2016 expressly provided, in the acknowledgements Mr. Mittra executed, that they would terminate in the event of a for cause termination.

[310] Mr. Mittra introduced into evidence an Award Summary Report which shows that RBC treated the unvested awards as forfeited following the effective date of Mr. Mittra's dismissal.

[311] I have concluded that RBC had cause to dismiss Mr. Mittra based on his conduct that RBC learned about after the dismissal. Under the applicable plans, in such circumstances, upon the termination of Mr. Mittra's employment, all unvested awards for deferred compensation would have been forfeited and terminated.

Calculation of Mr. Mittra's entitlement to a pro-rata share of unvested awards (if RBC did not have cause to terminate Mr. Mittra's employment)

[312] If RBC had not proven cause for the termination of Mr. Mittra's employment, he would have been entitled to a *pro-rata* shares of the unvested awards.

[313] The evidence shows that in respect of the 2016 share unit awards, Mr. Mittra received 1,017.20676 units (as Code staff) and 1,883.71622 units (as regulated staff for his time in Luxembourg), for a total of 2,900.9228 share units. The grant date was December 12, 2016, making the vesting dates December 12, 2017, December 12, 2018, and December 12, 2019.

[314] At the time of Mr. Mittra's dismissal, 1,660.255943 units were unvested/forfeited, corresponding to the third tranche of units. Assuming an effective termination date of July 23, 2019 (three months from April 23, 2019), then Mr. Mittra had completed 953 days of the 1,095 days of the "Entitlement Period" for the third tranche of units, or 87%. A *pro rata* allocation of the unvested units would, therefore, be1444.42267041. The average of the closing prices of the shares on the TSX for the five days preceding the termination date was $104.576. Accordingly, a *pro rata* valuation of the 2016 units is $151,051.95 as of July 23, 2019.

[315] The UK deferred cash awards also contained *pro rata* allocation provisions in the event of termination without cause. Applying the same methodology, a *pro rata* valuation is 87% of the unvested cash awards of £53,058.5752, or £46,160.96.

[316] In respect of the 2017 share unit awards, Mr. Mittra initially received 5,963.2773760 units. The grant date was December 11, 2017, making the vesting dates December 11, 2018, December 11, 2019, and December 11, 2020. At the time of the termination of Mr. Mittra's employment, 4,747.28161607 units were unvested/forfeited, corresponding to the second (1,536.600551) and third (3,210.0681056) tranche of units. Based on the last day of the three month notice period (July 23, 2019), Mr. Mittra had completed the following "Entitlement Periods" for the second and third tranches: second tranche: 589 of 730 days, or 80.7%; and third tranche: 589 of 1,095 days, or 53.8%.

[317] Accordingly, on a *pro rata* basis, Mr. Mittra would have been entitled to 80.7% of the second tranche, which is 1,240.036644657 units, and 53.8% of the third tranche, which is 1,727.0166408128 units, for a total of 2,967.0532854698 units. A *pro rata* valuation of 2017 units (based on average share price above) is, therefore, $310,282.56 as of July 23, 2019.

[318] In respect of the 2018 share unit awards, Mr. Mittra initially received 6248.463410 units. The grant date was December 10, 2018, making the vesting dates December 10, 2019, December 10, 2020, and December 10, 2021. At the time of the termination of Mr. Mittra's employment, all those units were unvested/forfeited,. Based on the last day of the three month period of notice (July 23, 2019, Mr. Mittra had completed the following "Entitlement Periods" for those tranches: first tranche: 225 of 365 days, or 61.6%; second tranche: 225 of 730 days, or 30.8%; and third tranche: 225 of 1095 days, or 20.5%.

[319] Accordingly, on a *pro rata* basis, Mr. Mitchell would have been entitled to 61.6% of the first tranche, which is 1,000.578129936 units, 30.8% of the second tranche, which is 522.669543088 units, and 20.5% of the third tranche, which is 720.482580875 units, for a total of 2,243.730253899 units. *A pro rata* valuation of the 2018 units (based on average share price above) is, therefore, $234,640.34 as of July 23, 2019.

[320] Therefore, if RBC had not established cause for Mr. Mittra's dismissal, Mr. Mittra's damages in respect of his claim based on unvested deferred compensation (assuming a three month period of notice) would be:

a. $151,015.95 CAD (2016 share units);

b. $310,282.56 CAD (2017 share units);

c. $234,650.34 CAD (2018 share units); and

d. £46,160.96 GBP (2016 cash awards).

[321] Had RBC not established cause, Mr. Mittra would not have been entitled to damages for bonus or future deferred compensation over the three month notice period because RBC did not award bonuses until after fiscal year-end and, pursuant to the terms of the 2017 Agreement, Mr. Mittra was not eligible to receive a bonus unless he was employed up to and including the date that bonuses are paid in the normal course of business. I conclude that Mr. Mittra has no contractual entitlement to a *pro rata* discretionary bonus for partial completion of a fiscal year.

Period of notice under common law principles as they apply in Ontario

[322] I have concluded that the period of notice to which Mr. Mittra would have been entitled if his employment had been terminated without cause does not exceed 12 weeks under his contract of employment. I have also held that RBC has established that it had after-acquired cause to terminate Mr. Mittra's employment.

[323] If I had not so concluded, I would be called on to determine the period of notice under common law principles as they apply in Ontario.

[324] Mr. Mittra cites the seminal authority with respect to notice, *Bardal v. Globe & Mail Ltd.*, 1960 CanLII 294. In *Bardal*, the Court held, at p. 145:

> There can be no catalogue laid down as to what is reasonable notice in particular classes of cases. The reasonableness of the notice must be decided with reference to each particular case, having regard to the character of the employment, the length of service of the servant, the age of the servant and the availability of similar employment, having regard to the experience, training and qualifications of the servant.

[325] Mr. Mittra submits that when the *Bardal* factors are applied and other relevant factors are taken into account, Mr. Mittra is entitled to damages based on a period of notice of 24 months.

[326] RBC submits that a reasonable notice range would be ten to twelve months.

[327] Mr. Mittra was a senior employee of RBC who worked continuously with RBC for 10 years beginning in 2009. In determining the period of reasonable notice, I do not take into account Mr. Mittra's prior employment with RBC which he left voluntarily. At the time of his dismissal, Mr. Mittra was 37 years old. Mr. Mittra was highly compensated for the important and specialized role he held, which involved significant responsibilities. I am satisfied that Mr. Mittra was a dedicated employee who worked very hard and performed valuable services for RBC. I am satisfied that it would be difficult for a person with Mr. Mittra's experience and qualifications to easily find a position similar to the one he held with RBC. Since the termination of his employment, Mr. Mittra has not found similar employment, or other employment, with another employer.

[328] If I had concluded that Mr. Mittra was entitled to reasonable notice according to common law principles as they apply in Ontario, I would have concluded that Mr. Mittra was entitled to fifteen months notice of the termination of his employment.

Did Mr. Mittra fail to take reasonable steps to mitigate his damages?

[329] A wrongfully dismissed employee cannot recover compensatory damages from the employer for losses that he or she could reasonably have avoided: *Red Deer College v. Michaels*, [1976] 2 S.C.R. 324, at pp. 330-332.

[330] RBC submits to Mr. Mittra failed to take reasonable steps to mitigate his damages. Mr. Mittra's evidence is that he did not take steps to seek other employment until October 6, 2019 and that he did not effectively seek reemployment until December 2019. RBC submits that the evidence shows that Mr. Mittra appears to have turned down comparable employment and withheld evidence regarding business ventures undertaken during the notice period.

[331] RBC cites Mr. Mittra's contemporaneous notes (which were produced during the trial) of his job search which indicate that on August 12, 2020, Mr. Mittra participated in an interview for the role of Director, Treasury Management, at the Ontario Teachers' Pension Plan with, according to Mr. Mittra's notes, "expected compensation ~$600K". His note states that "[i]nterview went well". The note indicates that on August 19, 2020, Mr. Mittra declined further consideration for the role because it is not comparable to his prior employment role or responsibilities, and the compensation is not comparable. The note records that the role does not appear to provide a path back to a similar compensation level.

[332] This role was not for a position with responsibility or compensation that were comparable to the position Mr. Mittra held with RBC. I do not agree that he failed to mitigate his damages by not pursuing this role.

[333] RBC relies on evidence that in March 2020 Mr. Mittra founded and served as the President and Director of a tech startup called OrderGrid which now carries on a successful global business. RBC submits that Mr. Mittra has failed to produce full and complete information relating to OrderGrid.

[334] Mr. Mittra testified that he resigned as President and Director of OrderGrid in August or July 2021. He testified that the position was an unpaid one in which he was doing a few activities on a weekly basis, a few hours a week. He described it as an investment. Mr. Mittra testified that this role was a backup plan if he could not return to his field and industry. RBC has not shown that this evidence is untrue or that Mr. Mittra, in fact, earned money from his role with OrderGrid.

[335] Although Mr. Mittra and took a number of months following the termination of his employment to actively seek other employment, I am not satisfied that, in all of the

circumstances, RBC has shown that Mr. Mittra failed to take reasonable steps to mitigate his damages.

Mr. Mittra's claim for aggravated and punitive damages

[336] Mr. Mittra submits that the evidence presented at trial, and RBC's conduct throughout the trial, justifies an award of aggravated and punitive damages.

[337] Mr. Mittra submits that litigation misconduct can be an independent actionable wrong that can give rise to an award of punitive damages and this misconduct may include abusive "hardball" litigation tactics. Mr. Mittra submits that the failure to produce and disclose relevant documents can be a breach of the implied obligation of good faith and fair dealing, constituting an independent actionable wrong that warrants aggravated and punitive damages.

[338] Mr. Mittra, in his closing submissions, relies on a list of 28 facts that, he contends, justify an award of aggravated and punitive damages. These fall into several categories including:

a. Actions taken by RBC in relation to Mr. Mittra's involvement in the Freshfields meetings.

b. Actions taken by RBC in relation to the disciplinary proceedings, including conducting the investigation under UK policies and procedures instead of RBC policies in Canada.

c. RBC making a report to the regulator in the U.K., FCA, without advising Mr. Mittra that he had been reported or providing him with an opportunity to respond.

d. Failing to provide training to Mr. Mittra with respect to the new FCA Code of Conduct or to provide him with a copy of the new code.

e. Failure to pay compensation owed to Mr. Mittra for vested deferred compensation for the period November 1, 2018 to April 23, 2019.

f. Arranging to notify Mr. Mittra of the termination of his employment in London, instead of in Ontario, and cancelling his hotel and return flight.

g. Actions taken by RBC in the litigation process including challenging the jurisdiction of the court and requiring Mr. Mittra to bring various motions to require RBC to comply with its obligations under the procedural rules, and taking positions that resulted in a delay if the trial.

h. Claiming after-acquired cause and taking a "scorched-earth" approach to this litigation by alleging that Mr. Mittra had been dishonest in the Freshfields meetings and the disciplinary hearing.

i. Issuing a counterclaim against Mr. Mittra claiming amounts it knew were not owed and withholding information and documents related to those claims until weeks prior to trial.

j. Failing to provide proper and timely disclosure and production of relevant documents.

k. Refusing to issue a Record of Employment to Mr. Mittra until October 21, 2021.

l. Using the litigation process to intimidate Mr. Mittra including alleging that he engaged in dishonest conduct when he was simply seeking his entitlements under the law.

[339] Mr. Mittra seeks a substantial award of punitive and exemplary damages. In support of this submission, Mr. Mittra relies on *Boucher v. Wal-Mart Canada Corp*., 2014 ONCA 419.

[340] In *Boucher*, the Court of Appeal heard an appeal from a jury's award of punitive damages in the amount of $150,000. The Court of Appeal, at para. 59, held, citing *Whiten v. Pilot Insurance Co*., 2002 SCC 18, at para. 36, that punitive damages are meant to punish the defendant in exceptional cases where the defendant's misconduct has been "malicious, oppressive and high-handed" and "represents a marked departure from the ordinary standards of decent behaviour".

[341] I do not agree that the evidence shows that Mr. Mittra was treated during the Freshfields interviews or during the disciplinary process that followed in ways that qualify as malicious, oppressive or high-handed, or that represent a marked departure from the ordinary standards of decent behaviour.

[342] Mr. Mittra was given a full opportunity to explain his financial dealings with Mr. Ramji in the course of the three Freshfields interviews. The disciplinary hearing was conducted cordially and professionally, after RBC agreed to change the chair of the committee at Mr. Mittra's request.

[343] I do not regard the fact that RBC conducted the disciplinary process according to the procedures it follows in London to amount to misconduct, especially since Mr. Mittra had been working in the London office before his assignment to Toronto, and the assignment to Toronto was temporary and not permanent.

[344] RBC established at trial that Mr. Mittra was a "regulated person" pursuant to FCA regulations at two time periods overlapping with the conduct that resulted in Mr. Mittra's dismissal. I am not satisfied that the actions taken by RBC, a regulated financial institution, to make a report to the regulator, even without prior notice to Mr. Mittra, amounts to malicious, oppressive or high-handed conduct that justifies an award of punitive or aggravated damages.

[345] With respect to the Record of Employment, when she was cross-examined, Emma Dunlop was presented with a copy of an email from former legal counsel for RBC dated October 25, 2019 responding to a letter from Mr. Mittra's counsel asking about the Record of Employment. RBC's former counsel advised that they will look into this matter and respond in due course. Mr. Mittra testified that he received the Record of Employment approximately 2 ½ years after the termination of his employment. Although Mr. Mittra testified that he did not receive employment insurance, it has not been shown through evidence that this was because of the delay in receiving the Record of Employment. I do not excuse RBC's failure to provide a Record of Employment to Mr. Mittra upon the termination of his employment, as required by law. I am not satisfied, however, that RBC's failure to do so was a malicious or oppressive act intended to harm Mr. Mittra that would justify an award of punitive or aggravated damages.

[346] RBC acknowledges that it did not pay approximately $240,000 in vested deferred compensation to Mr. Mittra in December 2018. RBC notes that it did pay further vested deferred compensation to him in July 2019, during the notice period. RBC submits that this shows that the failure to pay the December 2018 compensation was inadvertent.

[347] RBC's failure to pay the amount of deferred compensation that vested in December 2018 is a clear breach of contract. I do not excuse this breach of contract, which has heightened importance in the context of an employment contract. I am not satisfied that RBC intentionally failed to make this payment for the purpose of putting financial pressure on Mr. Mittra. Even if Mr. Mittra had proven an independent actional wrong, I am not satisfied that RBC's conduct in this respect qualifies as malicious, oppressive, or high-handed such as to justify an award of punitive or aggravated damages.

[348] Mr. Mittra has failed to show that an award of punitive or aggravated damages against RBC should be made.

ISSUE #6 Is RBC entitled to an award of damages for its counterclaim?

[349] RBC counterclaimed for two tax amounts that it alleges were overpaid to Mr. Mittra: (i) £98,363.98 GBP in relation to the 2017/18 UK tax year based on a mistaken overpayment to Mr. Mittra, and (ii) $94,840 CAD in relation to the 2019 Canadian tax year.

<u>Counterclaim in respect of 2017/18 UK tax year</u>

[350] RBC relies on the following facts supported by the evidence of Laura Assal, a tax accountant with Ernst & Young Inc. ("EY"), in support of its counterclaim.

a. On January 23, 2019, EY provided a letter to Mr. Mittra setting out the tax equalization calculation for the 2017/18 UK tax year pursuant to the home-based balance sheet compensation approach under the 2017 Agreement;

b. EY determined that RBC had over-withheld £101,455.08 at source for Mr. Mittra and, accordingly, would reimburse that amount to him;

c. EY determined that the funds had been over-withheld on the basis of a compensation summary document provided to it by third-party payroll provider, Weichert Mobility Services, which summarized the compensation paid, hypothetical taxes withheld, and actual tax payments made on Mr. Mittra's behalf during the UK tax year. The Weichert compensation summary incorrectly indicated that RBC had withheld hypothetical taxes of approximately £102,000 in relation to the December 2017 bonus payment, but that Mr. Mittra had personally funded the actual taxes on that bonus payment (under the 2017 Agreement, RBC was to fund actual tax);

d. Accordingly, EY determined that Mr. Mittra had £101,455.08 of taxes over-withheld from him when the bonus was paid in December 2017, and directed RBC to make the payment to Mr. Mittra;

e. On March 14, 2019, RBC paid Mr. Mittra this amount as part of the equalization process;

f. Subsequently, EY determined that an error had been made. By reviewing Mr. Mittra's actual pay slips, EY determined that RBC, not Mr. Mittra, had funded the actual tax payments on the December 2017 bonus payment, such that the correct amount of hypothetical tax had been withheld under the 2017 Agreement;

g. EY subsequently calculated that Mr. Mittra owed RBC a total of £98,363.98 taking into account subsequent tax equalization calculations for the 2018/19 and 2019/20 UK years, to Mr. Mittra's benefit; and

h. EY informed Mr. Mittra of the error and the fact that he was obligated to return the mistaken payment to RBC.

[351] RBC submits that it is entitled to damages in an amount equal to the overpayment under common law principles or on the basis of unjust enrichment. RBC cites the decision of P.J. Flynn J. in *Ontario Pension Board v. Hosack* in support of its counterclaim. In *Hosack*, the Ontario Pension Board (the "Board") made a mistaken payment from the pension of the defendant's husband to the defendant's RRSP account and overpaid the defendant. Flynn J. held that the defendant was enriched by the amount of the overpayment, there was a corresponding deprivation to the Board, and there was no juristic reasons to allow the enrichment. Flynn J. held that the Board was entitled to judgment for the amount of the overpayment either based on common law principles or on the basis of unjust enrichment.

[352] Mr. Mittra defends RBC's counterclaim on various grounds. I address each in turn.

Should RBC's counterclaim be dismissed because RBC does not come to court with clean hands, since its counterclaim it was made in bad faith to intimidate and harass Mr. Mittra?

[353] Mr. Mittra submits that the counterclaim should be dismissed because RBC seeks an equitable remedy and does not come to court with clean hands. Mr. Mittra submits that RBC made its counterclaim to intimidate and harass Mr. Mittra and that the Court should not reward RBC for such conduct.

[354] Mr. Mittra submits that RBC withheld information relevant to the counterclaim and did not provide full details until after the trial had commenced. He submits that it was only from these late productions that he learned that RBC and EY had engaged in communications regarding Mr. Mittra without advising him, contrary to his instructions and EY's obligations. Mr. Mittra submits that when RBC's counterclaim is viewed in the context of this litigation as a whole, the counterclaim was intended to intimidate and silence a former employee from seeking recovery in his wrongful dismissal claim so as to create a chilling effect for him and other employees who may seek similar redress.

[355] In support of this submission, Mr. Mittra cites *Ruston v. Keddco Mfg. (2011) Ltd.*, 2018 ONSC 2919, aff'd 2019 ONCA 125. In *Ruston*, the defendant in a wrongful dismissal action alleged that there was just cause for the dismissal. The defendant alleged that the same conduct of the plaintiff that justified cause for dismissal supports his claim for damages for unjust enrichment, breach of fiduciary duty and civil fraud in the counterclaim. The trial judge found that the defendant had made unfounded allegations of financial fraud against the plaintiff and that the counterclaim had been devastating to him. The trial judge held that there was not just cause for dismissal or liability in unjust enrichment or civil fraud. The trial judge noted that on the seventh day of trial, the defendant dropped its claim from $1.7 million to $1. The trial judge found that the defendant did not intend to prove damages but was using the large counterclaim to intimidate the plaintiff. The trial judge also awarded aggravated damages. The trial decision, including the trial judge's findings in respect of the counterclaim, was upheld on appeal.

[356] Mr. Mittra submits that the facts in *Ruston* pale in comparison to RBC's mistreatment of Mr. Mittra in the termination and post-termination process.

[357] I disagree. The evidence from Ms. Assal, which I accept, shows that there was a mistaken overpayment to Mr. Mittra. In *Ruston*, in contrast, the counterclaim was shown to have been utterly unfounded and made to intimidate the plaintiff. I do not accept that late production of documents about communications between RBC and EY shows that RBC is acting in bad faith or that it does not come to court with clean hands. There is no evidence to support the assertion that the counterclaim was made in bad faith to intimidate or harass Mr. Mittra.

Did Mr. Mittra change his position in reliance on the overpayment by using the funds to support himself, such that it would be inequitable for him to repay the amount he mistakenly received?

[358] Mr. Mittra submits that he changed his position after receipt of the overpayment and used those funds to support himself as he had no employment income. Mr. Mittra submits that in such circumstances, it would be inequitable for him to be required to make restitution to RBC for the overpayment.

[359] In *Garland v. Consumers' Gas Co.*, 2004 SCC 25, the Supreme Court of Canada, at para. 63, addressed the change of position defence and held, citing *Storthoaks v. Mobil Oil Canada, Ltd.*, 1975 CanLII 156, that "the remedy of restitution will be denied where an innocent defendant demonstrates that it has materially changed its position as a result of an enrichment such that it would be inequitable to require the benefit to be returned".

[360] In *Storthoaks*, a municipality mistakenly received royalty payments and the payor sought reimbursement. The mistakenly received payments were used to pay everyday expenses. There was no evidence that the municipality undertook any special projects or made any special financial commitments because of receipt of the mistaken payments, or that the municipality altered its position because these moneys were received. The Supreme Court of Canada held, at p. 164, that the mere fact that money received by mistake was spent does not, by itself, lead to the conclusion that the mistaken payment need not be repaid. The Supreme Court of Canada held, at p. 165, that the municipality had not established that it had so altered its position as a result of the receipt of the payments that it would be inequitable to require it to repay.

[361] Mr. Mittra has not adduced evidence to establish that the amount paid by mistake was spent or how it was spent. He has not shown that he changed his position in such a way that he will suffer an injustice if called upon to repay or that the injustice of requiring him to do so outweighs the injustice of denying RBC restitution.

Did Mr. Mittra receive the payment based on valid consideration related to his employment?

[362] Mr. Mittra submits that RBC intended for him to have funds at the time based upon valid consideration related to his employment.

[363] I do not accept this submission. The payment was made by mistake and not for valid consideration related to Mr. Mittra's employment.

Should the counterclaim be dismissed because EY was in a conflict of interest?

[364] Mr. Mittra submits that in relation to EY, it failed to comply with its obligations to him in circumstances where it was in a conflict of interest. Mr. Mittra submits that RBC knew, or ought to have known, that it put EY in a conflict of interest. He submits that, as a consequence, RBC's counterclaim should be dismissed.

[365] Ms. Assal testified that RBC retained EY to provide tax return services to their employees, one of whom was Mr. Mittra and, in this capacity, EY provided professional tax preparation compliance services to Mr. Mittra. Ms. Assal testified that RBC was the client of EY, not Mr. Mittra. Mr. Mittra submits that he was a client of EY from 2016 to 2020.

[366] Mr. Mittra has not shown that any communications between RBC and EY affect the factual question of whether Mr. Mittra received a mistaken overpayment from RBC. I find that he did receive a mistaken overpayment. Mr. Mittra has not shown that RBC engaged in any communications with EY that show that it is not coming to court with clean hands or that should disentitle RBC to repayment of the mistaken overpayment made to Mr. Mittra.

[367] I conclude that RBC is entitled to judgment for its counterclaim in respect of the tax overpayment to Mr. Mittra in the amount of £98,363.98 GBP.

RBC's counterclaim in respect of the 2019 Canadian tax year

[368] RBC's counterclaim in respect of the 2019 Canadian tax year has been resolved. Of the $94,840.08 claimed, Mr. Mittra has agreed to pay $52,028.08 to RBC as a set-off against any damages owing to Mr. Mittra. RBC's counsel advised the Court that RBC was content to forego the remaining $42,812 due to the complexity of the underlying issues.

DISPOSITION

[369] For these reasons:

a. Mr. Mittra's claim for damages for wrongful dismissal is dismissed, with the exception of his claim in respect of unpaid deferred compensation that had vested in December 2018 in the amount of $244,431.64, which I allow.

b. RBC's counterclaim is allowed. Mr. Mittra is ordered to pay to RBC the amounts of £98,363.98 (in respect of the 2017-18 U.K. tax year) and $52,028.08 (in respect of the 2019 Canadian tax year).

[370] If the parties are unable to resolve costs, they may make written submissions in accordance with a timetable, and with reasonable page limits, to be agreed upon by counsel and approved by me. If there is disagreement, I may be spoken to.

CAVANAGH J.

Released: January 29, 2024

CITATION: Mittra v. Royal Bank of Canada et al, 2024 ONSC 636
COURT FILE NO.: CV-19-624677
DATE: 20240129

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

AIDAN MITTRA

Plaintiff (Defendant by Counterclaim)

– and –

ROYAL BANK OF CANADA and RBC INVESTOR SERVICES TRUST

Defendants (Plaintiffs by Counterclaim)

REASONS FOR JUDGMENT

CAVANAGH J.

Released: January 29, 2024