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(Winnipeg Centre)
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COURT OF KING'S BENCH OF MANITOBA

B E T W E E N:

SLAV KOZAR,	)	Joseph A. Pollock
	)	Avery A. E. Sharpe
plaintiff,	)	for the plaintiff
	)	
- and -	)	
	)	Lynda K. Troup
THE CANADIAN NATIONAL RAILWAY COMPANY,	)	for the defendant
	)	
defendant.	)	
	)	Judgment Delivered:
	)	January 23, 2024

REMPEL J.

BACKGROUND

[1] Slav Kozar (the "Plaintiff") sues The Canadian National Railway Company ("CN"), for wrongful dismissal from his employment in 2021 after more than 30 years of service. At the time of the termination of his employment, the Plaintiff was 61 years of age and had an unblemished service record.

[2] The Plaintiff seeks the equivalent of 24 months' pay in lieu of notice, as well as aggravated damages.

[3] Prior to trial, I permitted the Plaintiff to bring a motion for summary judgment as to liability and damages. At the motion, CN argued that summary

judgment as to the breach of contract question was inappropriate in the circumstances given that assessments of credibility lay at the heart of this dispute. CN maintains that the decision to terminate the employment of the Plaintiff without notice or pay in lieu of notice was justified in all of the circumstances.

DEEP ISSUE

[4] The parties disagree fundamentally not only about whether a summary judgment process is a reasonable way to fairly dispose of this case, but also what role a judge should play in resolving both conflicting testimonial accounts and litigious disputes more broadly.

[5] This case is unusual insofar as CN is unable to provide evidence from one of its current or former employees that confirms why the ultimate decision to terminate the Plaintiff's employment without notice was made and why he was not entitled to some lesser form of discipline. None of the employees responsible for the decision to terminate the employment of the Plaintiff have a recollection of the events leading up to the decision or why they arrived at the decision they made. CN is also unable to disclose any records from the Plaintiff's employment file that show how or why the decision was made.

[6] The termination letter received by the Plaintiff from CN was authored by a CN employee who admitted that he was following orders from a more senior manager when he issued the letter and he disagreed with the decision to dismiss the Plaintiff without notice.

[7] Given these unique facts, the Plaintiff argues that CN cannot meet the onus placed on an employer in a wrongful dismissal action of proving just cause for termination of employment without notice or pay in lieu of notice. CN counters that it had a right to terminate the Plaintiff's employment due to credible allegations that he failed to meet the standard set for management employees at CN in responding appropriately to complaints of sexual harassment and the zero-tolerance standard established by CN with respect to conduct that undermined its safe workplace policies.

[8] No evidence was led by CN at the summary judgment motion from the CN employee who made the allegations against the Plaintiff that led to the termination of his employment. No other eyewitnesses to the misconduct, as alleged, offered affidavit evidence in opposition to the summary judgment motion brought by the Plaintiff. CN argues that notwithstanding this lack of evidence, it intends to call all relevant witnesses at the trial and only after weighing all of the competing evidence surrounding the alleged misconduct of the Plaintiff, will I be in a position to rule as to whether the ultimate decision to terminate the employment of the Plaintiff without notice or pay in lieu of notice was justified.

DECISION

[9] I am satisfied that a summary judgment process is appropriate in these circumstances and that the Plaintiff is entitled to damages for wrongful dismissal. The evidence presented by CN in opposition to the motion for summary judgment does not persuade me that CN had just cause to terminate the Plaintiff's

employment without notice based on the knowledge it acquired prior to termination or facts discovered afterwards. My reasons follow.

FACTS

[10] The Plaintiff commenced his employment with CN in 1987 and remained employed with CN until his termination notice was issued by CN on April 5, 2021. At the time, the Plaintiff was 61 years of age and working in a management position as a "Senior Material Supervisor". Throughout his 34 years of employment with CN, the Plaintiff was never charged with misconduct or disciplined for unsatisfactory performance.

[11] On January 11, 2021, a female employee of CN (the "Complainant") had some kind of interaction in the workplace with a male co-worker (the "Incident"). The Complainant and the male co-worker who was the subject of the complaint both reported directly to the Plaintiff. The Plaintiff's affidavit evidence indicated that he was not involved in the Incident and that he did not see the interactions that became the subject matter of the complaint.

[12] Several days later the Plaintiff received a telephone call from Bobby Joe Koop ("Mr. Koop") who was a senior manager with CN at the time. Mr. Koop advised the Plaintiff that the Complainant had filed some kind of complaint against the male co-worker but he could not provide further particulars, including whether the complaint arose from the Incident.

[13] Mr. Koop did not offer any guidance to the Plaintiff as to how to manage the dynamics of the workplace given the fact that the Complainant and the male

co-worker were still on the job and part of the same team he was supervising. Further, Mr. Koop made a point of telling the Plaintiff that:

- There was nothing more he could say to the Plaintiff about the Incident because the complaint was confidential;
- It was now up to the human resources department at CN to resolve the issue; and
- No action was required by the Plaintiff in relation to the Incident.

[14] The Plaintiff was unsatisfied by this response from Mr. Koop because he had concerns about the Complainant and the male co-worker continuing to work together under his supervision when he did not know exactly what had transpired between them. On his own initiative, the Plaintiff called the Complainant into his office to discuss what the nature of her complaint was and before she left his office, he had the male co-worker briefly join them.

[15] The Complainant then left the Plaintiff's office while the Plaintiff continued to discuss matters with the male co-worker. The evidence of the Plaintiff was that the upshot of his discussions with both the Complainant and the male co-worker was that the Incident was not serious enough to merit further consideration or that it would interfere with their ability to work together in the same workplace.

[16] On January 26, 2021, the Complainant submitted a written complaint to Mr. Koop detailing "… *sexual, physical assault and harassment* …" against her by the male co-worker in the workplace and how the Plaintiff responded to this conduct. Most of the written complaint details sexual misconduct by the male

co-worker, but also includes allegations of certain specific misconduct against the Plaintiff as follows:

- On January 5, 2021, the Plaintiff challenged the Complainant for calling in sick and responded to a rude sexual comment by the male co-worker in the presence of the Complainant with the words "… *with age comes experience*";
- On January 11, 2021, the Plaintiff saw the aftermath of the Incident in which the Complainant alleged she was screaming in the office of the male co-worker while she was being "… *physically assaulted and kidnapped* …" and when she left the office she heard the Plaintiff ask "… *what is going on*". The Complainant indicated her response to the Plaintiff was that the male co-worker touched her forcefully and left "*stores*". It is likely she meant to write "*sores*"; and
- On January 18, 2021, when she was called into the Plaintiff's office, the Plaintiff threatened to terminate the Complainant's employment at CN and if she continued with her sexual misconduct complaint against the male co-worker she would in a professional sense be "… *digging [her] own grave*".

[17] In keeping with CN policy, an independent third-party investigator was appointed to investigate the written complaint against the Plaintiff. On March 26, 2021, the investigator released two separate reports, one that was five pages, and a second that was 29 pages (collectively, the "Reports"). The Reports

list 11 allegations against the Plaintiff relating to his lack of disapproval when inappropriate comments or actions were made in the workplace, and the Plaintiff himself making inappropriate comments. The Reports concluded that five of the allegations were partially substantiated, five were substantiated and one was unsubstantiated. The Reports did not recommend to CN that the employment of the Plaintiff should be terminated.

[18] The Reports found the Complainant to be a credible witness and the Plaintiff to be incredible on several points. The key findings of the investigator that are contained in the Reports are that the Complainant was credible in saying, among other things, that the Plaintiff:

a) Witnessed male employees making misogynistic and sexist remarks or gestures to the Complainant and he did not intervene to stop them or express disapproval to the male employees who made them;

b) Heard the Complainant call for help during the Incident and did not intervene; and

c) Threatened to have the Complainant fired when she complained about the Incident.

[19] On April 5, 2021, Mr. Koop issued a letter to the Plaintiff terminating his employment with CN. In the termination letter, Mr. Koop copied and pasted specific findings from the Reports and reported them as facts. Mr. Koop used this information to justify CN's termination of the Plaintiff due to a breach of his duty of good faith to CN that were demonstrated by his failure to follow CN safe work policies that prohibit harassment and promote "*violence prevention*".

[20] On October 16, 2023, Mr. Koop was examined under King's Bench Rule 39.03 that allows for the examination of a witness prior to trial. Prior to this examination Mr. Koop agreed to be interviewed by the Plaintiff's lawyer who then drafted an affidavit for Mr. Koop to swear in support of the motion for summary judgement. Mr. Koop got cold feet about swearing the affidavit out of fear of possible repercussions against his spouse, who had a business relationship with CN, if he voluntarily gave evidence in support of the Plaintiff's position. Accordingly, the Plaintiff's lawyer was forced to serve Mr. Koop with a subpoena to give evidence under oath.

[21] During his examination under oath, Mr. Koop made minor changes to the content of his draft affidavit, which included changes to certain dates and an added caveat that he did not personally witness the events that are alleged to have taken place in the complaint, and that he was not a part of the investigation by CN into the complaint. Other than those specific caveats, Mr. Koop fully adopted the contents of the draft affidavit that was marked as an exhibit at his examination.

[22] The evidence of Mr. Koop under examination was that:

a) CN typically practiced progressive discipline with employees that included warnings and reprimands before the most extreme measure of termination was taken;

b) The Plaintiff had never been reprimanded in any way while he was an employee of CN, either as a member of the union or management;

c) The Plaintiff was not offered warnings or reprimands in this case;

d) In his experience the Plaintiff always acted professionally in his duties and was a dedicated employee;

e) He saw the Complainant crying after the Incident but he did not tell the Plaintiff about this because he did not believe that the issue was sufficiently important to merit discussion with the Plaintiff;

f) He would not have terminated the Plaintiff on the facts known to him, had the decision been his to make;

g) It was his personal belief that CN's decision was not fair to the Plaintiff; and

h) The department headed by the Plaintiff was a workplace where many employees frequently used foul language and vulgar remarks were common.

[23] Mr. Koop made a point in retracting a comment he made to counsel for the Plaintiff that the Plaintiff was turned into a scapegoat for the "male culture" in his department, because he did not know all of the information that became part of the investigation into the Plaintiff's conduct.

THE LAW – WRONGFUL DISMISSAL

Contextual Analysis

[24] Under the common law, employers can be held liable in damages for failing to give reasonable notice of termination of a contract of employment or payment in lieu of notice. In cases where sufficiently serious or egregious misconduct can be proven, the contract of employment can be terminated without notice.

Terminations of employment without notice that are based on just cause require a contextual analysis to determine if the most extreme penalty available to an employer is proportional to the severity of the misconduct. "*An effective balance must be struck between the severity of an employee's misconduct and the sanction imposed*" (***McKinley v. BC Tel***, 2001 SCC 38 (CanLII), [2001] 2 S.C.R. 161, at para. 53).

[25] ***McKinley*** also teaches that no single act of impropriety or dishonesty by an employee can necessarily lead to termination for cause without notice, unless the facts when examined in context demonstrate that "*… the impugned behaviour was sufficiently egregious to violate or undermine the obligations and faith inherent to the employment relationship*" (at para. 55).

[26] ***McKinley*** recognizes that it is "… *particularly difficult to enumerate …*" the tipping point of when just cause is reached in any given circumstance because it will depend on "… *the nature of the employment and the status of the employee …*" (at para. 33). The contextual analysis required to meet the just cause threshold established by the ***McKinley*** decision includes a sliding scale based on the seniority of the employee. "*Misconduct must be more serious in order to justify the termination of a more senior, longer-service employee who has made contributions to the company*" (at para. 33).

[27] In ***Klassen v. Rosenort Cooperative Limited***, 2020 MBQB 116 (CanLII), Suche J. distilled the following principles from the ***McKinley*** decision, at para. 49:

> [49] The law regarding dismissal for cause is well settled and most recently described by the Supreme Court of Canada in ***McKinley v. BC Tel***. Whether an employer is justified in dismissing an employee – be it for a single incident of wrongdoing or as a result of the course of conduct – is a question of fact to be determined from all the circumstances. The employee's misconduct must objectively be so serious to have caused irreparable damage to the employment relationship. That is, it must have breached an essential condition of employment, expressed or implied, interfered with the employer's business in a material way or revealed the employee to have a dishonest or untrustworthy character. Both the circumstances surrounding the misconduct and the degree of wrongdoing must be examined. This includes the nature of the misconduct and the potential consequences, the status and duties of the employee and the nature of the employer's activity.

Heads of Damage for Wrongful Dismissal

[28] ***Wallace v. United Grain Growers Ltd.***, 1997 CanLII 332 (SCC), [1997] 3 S.C.R. 701, confirms that a contract of employment has an implied term or obligation requiring an employer to give reasonable notice of an intention to terminate the employment relationship in the absence of just cause. A breach of this implied term can also constitute an independent cause of action that can support a claim for aggravated damages that are commonly referred to as "***Wallace*** damages". The expected and common feelings of upset and distress that inevitably follow the termination of employment are not considered actionable and do not qualify as ***Wallace*** damages:

[29] ***Wallace*** states at para. 73 that:

> 73 … An employment contract is not one in which peace of mind is the very matter contracted for (see e.g. *Jarvis v. Swans Tours Ltd.*, [1973] 1 Q.B. 233 (C.A.)) and so, absent an independently actionable wrong, the foreseeability of mental distress or the fact that the parties contemplated its occurrence is of no consequence …

[30] ***Fidler v. Sun Life Assurance Co. of Canada***, 2006 SCC 30 (CanLII), [2006] 2 S.C.R. 3, teaches that "*true*" aggravated damage claims arise out of aggravating circumstances and "*… rest on a separate cause of action – usually in tort – like defamation, oppression or fraud"* (at para. 52). The Supreme Court of Canada goes on to confirm in that paragraph that true aggravated damages are not awarded under the foreseeability test established in ***Hadley v. Baxendale***, (1854), 9 Ex. 341, 156 E.R. 145, because they arise from a separate cause of action and not the contractual breach itself.

[31] A second kind of damages for mental distress are described in ***Fidler*** as follows:

> 53 The second are mental distress damages which do arise out of the contractual breach itself. These are awarded under the principles of *Hadley v. Baxendale*, as discussed above. They exist independent of any aggravating circumstances and are based completely on the parties' expectations at the time of contract formation. With respect to this category of damages, the term "aggravated damages" becomes unnecessary and, indeed, a source of possible confusion.
>
> [Emphasis added]

[32] The facts in ***Fidler*** involved a claim for damages flowing from the refusal of an insurer to honour the terms of a long-term disability policy and not wrongful dismissal. The Supreme Court of Canada ruled at para. 56 as follows about the key object of a disability insurance contract:

> 56 Turning to the case before us, the first question is whether an object of this disability insurance contract was to secure a psychological benefit that brought the prospect of mental distress upon breach within the reasonable contemplation of the parties at the time the contract was made? In our view it was. The bargain was that in return for the payment of premiums, the insurer would pay the plaintiff benefits in the case of disability. This is

> not a mere commercial contract. It is rather a contract for benefits that are both tangible, such as payments, and intangible, such as knowledge of income security in the event of disability. …

[33] In ***Honda Canada Inc. v. Keays***, 2008 SCC 39, [2008] 2 S.C.R. 362 ("***Keays***"), the Supreme Court of Canada revisited its decision in ***Fidler*** and how it impacts ***Wallace*** damages, at para. 54:

> [54] This brings us to *Fidler*, where the Court, per McLachlin C.J. and Abella J., concluded that it was no longer necessary that there be an independent actionable wrong before damages for mental distress can be awarded for breach of contract, whether or not it is a "peace of mind" contract. It stated at para. 49:
>
> > We conclude that the "peace of mind" class of cases should not be viewed as an exception to the general rule of the non-availability of damages for mental distress in contract law, but rather as an application of the reasonable contemplation or foreseeability principle that applies generally to determine the availability of damages for breach of contract.
>
> This conclusion was based on the principle, articulated in *Hadley v. Baxendale* (1854), 9 Ex. 341, 156 E.R. 145, that damages are recoverable for a contractual breach if the damages are "such as may fairly and reasonably be considered either arising naturally . . . from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties" (p. 151). The court in *Hadley* explained the principle of reasonable expectation as follows:
>
> > Now, if the special circumstances under which the contract was actually made were communicated by the plaintiffs to the defendants, and thus known to both parties, the damages resulting from the breach of such a contract, which they would reasonably contemplate, would be the amount of injury which would ordinarily follow from a breach of contract under these special circumstances so known and communicated. But, on the other hand, if these special circumstances were wholly unknown to the party breaking the contract, he, at the most, could only be supposed to have had in his contemplation the amount of injury which would arise generally, and in the great multitude of cases not affected by any special circumstances, from such a breach of contract. [p. 151]

[34] At para. 55 of ***Keays*** the Supreme Court of Canada confirms that the rule in ***Hadley v. Baxendale*** "… *unites all forms of contractual damages under a single principle*". If the mental distress of a plaintiff upon a breach was in the

reasonable contemplation of the parties at the time the contract was formed, damages can flow whether the contract was intended to secure a psychological benefit or a material one.

[35] The necessary analysis of the intention of the parties to the contract is described in ***Keays*** at paras. 56-58 as follows:

> [56] We must therefore begin by asking what was contemplated by the parties at the time of the formation of the contract, or, as stated in para. 44 of *Fidler*: "[W]hat did the contract promise?" The contract of employment is, by its very terms, subject to cancellation on notice or subject to payment of damages in lieu of notice without regard to the ordinary psychological impact of that decision. At the time the contract was formed, there would not ordinarily be contemplation of psychological damage resulting from the dismissal since the dismissal is a clear legal possibility. The normal distress and hurt feelings resulting from dismissal are not compensable.
>
> [57] Damages resulting from the manner of dismissal must then be available only if they result from the circumstances described in *Wallace*, namely where the employer engages in conduct during the course of dismissal that is "unfair or is in bad faith by being, for example, untruthful, misleading or unduly insensitive" (para. 98).
>
> [58] The application of *Fidler* makes it unnecessary to pursue an extended analysis of the scope of any implied duty of good faith in an employment contract. *Fidler* provides that "as long as the promise in relation to state of mind is a part of the bargain in the reasonable contemplation of the contracting parties, mental distress damages arising from its breach are recoverable" (para. 48). In *Wallace*, the Court held employers "to an obligation of good faith and fair dealing in the manner of dismissal" (para. 95) and created the expectation that, in the course of dismissal, employers would be "candid, reasonable, honest and forthright with their employees" (para. 98). At least since that time, then, there has been expectation by both parties to the contract that employers will act in good faith in the manner of dismissal. Failure to do so can lead to foreseeable, compensable damages. As aforementioned, this Court recognized as much in *Fidler* itself, where we noted that the principle in *Hadley* "explains why an extended period of notice may have been awarded upon wrongful dismissal in employment law" (para. 54).

[36] ***Keays*** also concludes at para. 59 that:

> [59] … there is no reason to retain the distinction between "true aggravated damages" resulting from a separate cause of action and moral damages resulting from conduct in the manner of termination. Damages attributable to conduct in the manner of dismissal are always to be awarded under the *Hadley* principle. …

[37] In that paragraph the Supreme Court of Canada also explains that awarding an extended notice period is not a proper way to compensate a plaintiff for mental distress that was reasonably contemplated by the parties:

> [59] … Examples of conduct in dismissal resulting in compensable damages are attacking the employee's reputation by declarations made at the time of dismissal, misrepresentation regarding the reason for the decision, or dismissal meant to deprive the employee of a pension benefit or other right, permanent status for instance (see also the examples in *Wallace*, at paras. 99-100).

[38] ***Keays*** concludes at para. 60 that:

> [60] In light of the above discussion, the confusion between damages for conduct in dismissal and punitive damages is unsurprising, given that both have to do with conduct at the time of dismissal. It is important to emphasize here that the fundamental nature of damages for conduct in dismissal must be retained. This means that the award of damages for psychological injury in this context is still intended to be compensatory. The Court must avoid the pitfall of double-compensation or double-punishment that has been exemplified by this case.

[39] The reputational and emotional harm to an employee accused of the kind of misconduct that justifies dismissal without notice can be devastating and result in claims based on a breach of duty of good faith or the duty of honest performance of a contract. In ***Matthews v. Ocean Nutrition Canada Ltd.***, 2020 SCC 26 (CanLII), the employer alleged just cause for dismissal without notice due to dishonest behaviour over a protracted period of time. The manner of

dismissal was the subject of comment by the Supreme Court for two reasons, the first of which is set out in paras. 39 to 40:

> [39] The first pertains to the proper method of analyzing claims for wrongful dismissal, like that of Mr. Matthews, where the employee alleges a failure to provide reasonable notice as well as bad faith. So long as damages are appropriately made out and causation established, a breach of a duty of good faith could certainly give rise to distinct damages based on the principles in *Hadley*, approved in this setting in *Keays* (at paras. 55-56), including damages for mental distress. Punitive damages could also be available in certain circumstances. To this end, ensuring litigants take care that their pleadings are properly made out, and ensuring courts are following a methodologically coherent approach to constructive dismissal cases is certainly of value as it can affect the ultimate damage amount to be awarded to an employee plaintiff.
>
> [40] It is apparent too from the pleadings here that there is a measure of uncertainty as to the impact of *Bhasin*, not just in Mr. Matthews' case but on employment law more generally. At a minimum, I believe this is an occasion to re-affirm two important principles stated in *Potter*. First, given the various submissions in this case, I would recall that the duty of honest performance — which Cromwell J. explained in *Bhasin* applies to all contracts, and means simply that parties "must not lie [to] or otherwise knowingly mislead" their counterparty "about matters directly linked to the performance of the contract" — is applicable to employment contracts (*Bhasin*, at para. 33, see also para. 73; *Potter*, at para. 99). Second, given the four-year period of alleged dishonesty leading up to Mr. Matthews' dismissal, I would also reiterate that when an employee alleges a breach of the duty to exercise good faith in the manner of dismissal — a phrase introduced by this Court in *Wallace*, and reinforced in *Keays* — this means courts are able to examine a period of conduct that is not confined to the exact moment of termination itself. All this reflects, in my view, settled law.

[40] At para. 41 of ***Matthews***, the Supreme Court of Canada confirms the second reason for comment was a reaffirmation that findings of dishonesty or bad faith by an employer in a wrongful dismissal action should not result in a "*bump-up*" of the reasonable notice period, because it constitutes a separate head of damages distinct from the lack of notice.

Onus

Just Cause

[41] If a dismissed employee establishes a fundamental breach of the employment contract, such as termination without notice or pay in lieu thereof, the onus shifts to the employer to prove on the balance of probabilities that there was just cause for the termination of the contract of employment (***Irvine v. Gauthier (Jim) Chevrolet Oldsmobile Cadillac Ltd.***, 2013 MBCA 93 (CanLII), at paras. 55-56).

Mitigation

[42] The onus as to failure to mitigate damages by a dismissed employee is set out in ***Grant v. Electra Sign Ltd.***, 2018 MBCA 5 (CanLII) ("***Grant***"), at para. 45:

> [45] The legal principles regarding the onus of proof in relation to the mitigation of damages are set out by Howard A Levitt, *The Law of Dismissal in Canada*, 3rd ed (Toronto: Thomson Reuters, 2017) (loose-leaf updated April 2017) ch 10 at 10-3 to 10-4 (at para 10:20.10):
>
> The onus is on the employer to prove the following:
>
> - failure to mitigate on the employee's part; and
> - that the employee would have likely found another comparable position if one had been searched for.
>
> [footnotes omitted]
>
> (See *Red Deer College v Michaels*, 1975 CanLII 15 (SCC), [1976] 2 SCR 324 at 331-32, 346; *Evans v Teamsters Local Union No 31*, 2008 SCC 20 at paras 30, 99-100; and *Southcott Estates Inc v Toronto Catholic District School Board*, 2012 SCC 51 at para 24.)

[43] The question as to what constitutes a "*reasonable*" effort to find comparable employment is of course a fact-driven exercise and is explored in G.H.L. Fridman, *The Law of Contracts*, 5th ed. (Toronto: Carswell, 2006), at pp. 781-782. The

Fridman text cites case law confirming that a terminated employee who refuses or declines an offer of employment on the same terms as their previous employment can be found to be acting unreasonably in their duty to mitigate and states at p. 782:

> … The important point here is that the alternative employment was of the same kind, with the same status and salary, as the employment from which the plaintiff was wrongfully dismissed. In the *Yetton* case, however, the plaintiff was dismissed from his position as managing director of a company, in circumstances which justified his action for wrongful dismissal. It was held that he had not failed to perform his duty to mitigate, by seeking alternative employment, when he refused to accept an alternative position with the same salary, but involving a lower status, and when he sought employment which was at a level at least comparable to his previous salary. Hence, his claim for damages for wrongful dismissal based on his loss of salary for the uncompleted period of his contract to service was successful. The same principles, with the same result, were applied by the Supreme Court of Canada in *Michaels v. Red Deer College*, which was concerned with the wrongful termination of the contract of service of a college instructor.

Procedural Fairness

[44] The Manitoba Court of Appeal in ***Middelkoop v. Canada Safeway Limited***, 2000 MBCA 62 (CanLII), 148 Man. R. (2d) 30, confirms that an employer terminating a contract of employment does not owe a duty of procedural fairness to an employee (at para. 25), unless there is an express term in the contract of employment to that effect (at para. 30). The absence of a duty of procedural fairness as set out in ***Middelkoop*** means that there is no duty on an employer to conduct an investigation after an employee is suspended or provide an opportunity to an employee to offer an innocent or benign explanation for the offending conduct prior to termination.

[45] In **Middelkoop**, the Court of Appeal not only held "… *that an employer is not bound to act fairly in dismissing an employee* …" but can also "… *justify a summary dismissal by reliance on grounds different from those given, even if they were not known at the time of the dismissal*" (at para. 29).

[46] The Manitoba Court of Appeal revisited its decision in ***Middelkoop*** in ***McCallum v. Saputo***, 2021 MBCA 62 (CanLII), where it confirmed that absent a contractual or statutory obligation to the contrary "… *the law in Manitoba continues to be that employers are under no inherent obligation to comply with the standards of natural justice or with any duty of procedural fairness when dismissing an employee* …" (para 28). In the same paragraph, the Court of Appeal confirms the absence of a duty of procedural fairness also relieves an employer form conducting an investigation prior to termination.

[47] ***McCallum*** also includes a cautionary note about the risk an employer takes in failing to adequately investigate allegations it later relies on to establish just cause in its defence of a claim for wrongful dismissal. The risk, of course, is that a judge may find after weighing all of the evidence, that the allegations relied on by the employer do not rise to the level of misconduct required to justify termination without notice (paras. 22–26).

[48] The full extent of the risk facing an employer is highlighted in ***McCallum*** at para. 27 as follows:

> [27] As I have mentioned, where just cause is not proven, inadequate investigations have, in some instances, resulted in punitive damage awards against employers for the manner of dismissal (see *Francis*; *Perewernycky v National - Oilwell Canada Ltd*, 2007 ABQB 170 at paras 60-61, 71; and *Elgert v Home Hardware Stores Limited*, 2011 ABCA 112 at paras 88-89).

THE LAW - SUMMARY JUDGMENT

[49] King's Bench Rules 20.01-20.03 set out the general principles governing motions for summary judgment. The legal test for summary judgment under the King's Bench Rules is set out in ***Dakota Ojibway Child and Family Services et. al. v. MBH***, 2019 MBCA 91 (CanLII), which provides at paras. 107-111 that the moving party bears the persuasive burden of proof at all times to establish that the process it is proposing allows for a fair and just adjudication on the merits and that there is no genuine issue requiring a trial.

[50] This persuasive burden of proof rests on the party moving for summary judgment at all times and the applicable standard of proof is on the balance of probabilities.

[51] If the moving party meets this burden, the responding party bears an onus to show why the evidentiary record, the facts or the law preclude a fair disposition of the matter by way of a summary judgment process. In the alternative, the responding party can meet its burden by showing it cannot properly raise its defence in a summary judgment process.

[52] In ***295 Garry Street Inc. v. Mittal et. al.***, 2023 MBCA 35 (CanLII), the Manitoba Court of Appeal offers a neat summary of the first principles applicable to summary judgment, at paras. 53-56:

> Summary Judgment
>
> [53] In *Hryniak v Mauldin*, 2014 SCC 7, Karakatsanis J described when summary judgment is appropriate (at para 49):
>
> > There will be no genuine issue requiring a trial when the judge is able to reach a fair and just determination on the merits on a motion for

> summary judgment. This will be the case when the process (1) allows the judge to make the necessary findings of fact, (2) allows the judge to apply the law to the facts, and (3) is a proportionate, more expeditious and less expensive means to achieve a just result.
>
> [54] These principles are incorporated into r 20 of the MB, *Court of King's Bench Rules*, MR 553/88 (the *Rules*), which governs summary judgment (see *Dakota Ojibway Child and Family Services et al v MBH*, 2019 MBCA 91 at para 85; and *Bibeau et al v Chartier et al*, 2022 MBCA 2 at para 53).
>
> [55] Rule 20.03(1) states:
>
> **Granting summary judgment**
>
> **20.03(1)** The judge must grant summary judgment if he or she is satisfied that there is no genuine issue requiring a trial with respect to a claim or defence.
>
> [56] Under the summary judgment rule (see r 20.03(2) of the *Rules*), a judge is entitled to make findings of credibility. However, care must be taken in assessing competing expert opinion evidence in the context of summary judgment (see *Business Development Bank of Canada v Cohen*, 2021 MBCA 41).

POSITION OF CN

[53] CN relies heavily on the Reports, which it says support its position that it had just cause to terminate the Plaintiff. Further, CN takes the position that I cannot weigh the evidence in support of its position on affidavit evidence alone and a formal trial is essential to assess the credibility of Mr. Kozar and the witnesses CN intends to call at the trial, including the Complainant.

[54] According to CN, the fact that these credibility issues remain unresolved makes a summary judgment process inappropriate. CN argues that the contents of the Reports put the issue of credibility of the Plaintiff and the Complainant squarely before me and the existence of these conflicting testimonial accounts amount to a genuine issue for trial because they rise above the level of mere denials of the facts put forward by the Plaintiff.

[55] Citing ***Lenko v. The Government of Manitoba***, 2016 MBCA 52 (CanLII), CN says that a "*hard look*" at the evidence shows that it has raised genuine issues of credibility and they can only be resolved at trial and not on a motion for summary judgment. In short, CN maintains that summary judgment "*is not the time or the place*" to address the findings contained in the Reports and the credibility assessments of the investigator who authored them. Finally, CN maintains that it is "*not clear and obvious*" that the dismissal of the Plaintiff was wrongful and since that is the case, a traditional trial is imperative in these circumstances.

[56] Counsel for CN does not dispute that CN has been unable to refer her to any current or former employees of CN involved in the decision to dismiss the Plaintiff without notice who can recall that they relied on the Reports in making that decision. There is also no evidence on the motion before me that any of the CN management employees involved in the decision to terminate the employment contract of the Plaintiff actually read the Reports. There is also no dispute that the Plaintiff was never given an opportunity to respond to or challenge the Reports.

[57] CN responds to the absence of evidence from any current or former CN employees who are able to give evidence as to the how and why of the termination of the Plaintiff's employment with an affidavit from its current Human Resources Director Stephanie Hedley. Although Ms. Hedley was not involved in the decision to dismiss the Plaintiff without notice and she did not know about it until after-the-fact, she opines she would have made that decision had it been up to her based on her reading of the Reports.

ANALYSIS AND CONCLUSION AS TO LIABILITY

[58] Resolving conflicting testimonial accounts in the course of litigious disputes is one of the core functions judges are called upon to perform. The law as to summary judgment has evolved considerably in Manitoba since January 1, 2018 when the King's Bench Rules were changed in keeping with the decision of the Supreme Court of Canada in ***Hryniak v. Mauldin***, 2014 SCC 7 (CanLII), [2014] S.C.R. 87, that called for a "*culture shift*" in how disputes were litigated in Canada. "*This shift entails simplifying pre-trial procedures and moving the emphasis away from the conventional trial in favour of proportional procedures tailored to the needs of the particular case*" (at para. 2).

[59] ***Dakota Ojibway*** speaks to this culture shift in how the King's Bench Rules as to summary judgement were to be interpreted in light of ***Hryniak***, at para. 85:

> [85] The January 1, 2018 amendments to r 20 reflect the culture shift encouraged in *Hryniak*, that is, to change summary judgment from a process intended to "weed out" clearly unmeritorious claims to an alternative method of adjudication (at para 45). In particular, r 20.07(1) requires a judge to grant summary judgment if he or she is satisfied that there is "no genuine issue requiring a trial", whereas the former rule (then r 20.03(1)) required a judge to do so where there was "no genuine issue for trial".

[60] It seems to me that the position taken by CN is mired in the "old school" of thought governing summary judgment in Manitoba prior to the amendment of the King's Bench Rules in 2018.

[61] There is nothing in the post-***Dakota Ojibway*** case law that supports the contention advanced by CN that the evaluation of credibility can only take place in a traditional trial and the ***295 Garry Street*** decision that I have already quoted

from explicitly confirms this. The ***Lenko*** decision relied upon by CN no longer reflects the current state of the law on summary judgment.

[62] It is important to note that King's Bench Rule 20.03(2) empowers judges to evaluate credibility and weigh evidence in a summary judgment process:

Powers of judge	**Pouvoirs du juge**
20.03(2) When making a determination under subrule (1), the judge must consider the evidence submitted by the parties and he or she may exercise any of the following powers in order to determine if there is a genuine issue requiring a trial:	**20.03(2)** Pour prendre sa décision sous le régime du paragraphe (1), le juge prend en compte les éléments de preuve présentés par les parties et peut, sauf si l'intérêt de la justice commande que ces pouvoirs ne soient exercés qu'au procès, exercer les pouvoirs qui suivent pour décider si une véritable question litigieuse justifie la tenue d'un procès :
(a) weighing the evidence;	a) apprécier la preuve;
(b) evaluating the credibility of a deponent;	b) évaluer la crédibilité d'un déposant;
(c) drawing any reasonable inference from the evidence;	c) tirer des conclusions raisonnables de la preuve.
unless it is in the interests of justice for these powers to be exercised only at trial.	

[63] On the facts before me, I am left with no other conclusion than that CN took the most extreme option open to it (termination without notice) without being able to explain why this was proportional to the severity of the alleged misconduct. The Reports themselves do not recommend a sanction for what the Plaintiff apparently did.

[64] Further, there is no evidence before me linking the decision to dismiss the Plaintiff to the Reports, other than the termination letter which cut and pasted excerpts from the Reports. CN cannot offer any evidence as to whether any of its former management employees involved in the decision to terminate the

employment of the Plaintiff actually read the Reports, never mind relied on them in making their decision.

[65] Crucially, Mr. Koop, who had the most detailed understanding of the facts surrounding the incident and had no authority to terminate the Plaintiff, testified he did not agree that CN's decision to take the most extreme measure possible was justified in all of the circumstances.

[66] Given these facts as a backdrop, CN cannot rely on the Reports to discharge its onus that there was just cause to terminate the employment of the Plaintiff. The Reports were not put into evidence by way of an affidavit from their author, but rather as an exhibit to the affidavit of Ms. Hedley, who was not involved in the decision to terminate the employment of the Plaintiff and had no knowledge of it until after-the-fact. As such, the Reports constitute hearsay evidence.

[67] Although King's Bench Rule 39.01(4) explicitly allows for hearsay evidence on any motion, including summary judgment, provided the source of the information and belief is disclosed, I am not prepared to attach any weight to them because the Plaintiff had no effective means to challenge the conclusions as to his alleged lack of credibility and the veracity of the Complainant.

[68] The problem that affidavits containing hearsay evidence pose in contentious matters is explained by Scurfield J. in ***Telecommunication Employees Association of Manitoba Inc. et al. v. Manitoba Telecom Services Inc. et al.***, 2005 MBQB 259 (CanLII), 206 Man. R. (2d) 39 ("***T.E.A.M.***"), this way, at para. 10:

> [10] However, admissibility should not be confused with weight. A party should not rely on hearsay evidence in respect of contentious matters unless it can concurrently demonstrate the necessity and reliability of doing so. The court should afford little or no weight to hearsay evidence that is justified by claims of expedience or by a transparent goal of avoiding cross-examination. Reliance on hearsay evidence should be particularly discouraged in the context of a summary judgment motion. Parties are urged to put their best evidence before the court in a direct fashion when they seek a summary judgment in their favour: ***Podkriznik v. Schwede***, 1990 CanLII 2617 (MB CA), [1990] M.J. No. 179 (QL), (1990), 64 Man.R. (2d) 199 (C.A.).

[69] Although expert evidence is not an issue before me, I note that Joyal J. (as he then was) relied in part on ***T.E.A.M.*** in confirming that expert evidence is not properly before the court on a summary judgment motion unless it is in the form of a sworn affidavit of the expert. (See ***Towers Ltd. v. Quinton's Cleaners Ltd.***, 2009 MBQB 72 (CanLII), at para. 72.)

[70] By failing to present evidence in opposition to the motion from the Complainant or any of the CN management employees responsible for the decision to terminate the employment of the Plaintiff, CN is in effect putting all of its evidentiary eggs in the basket of the hearsay evidence that the Reports provide. Given this reality, CN is not able to meet its onus under the ***McKinley*** test to prove that the impugned behaviour was sufficiently egregious to violate or undermine the obligations and faith inherent in the employment relationship. The contextual analysis required by ***McKinley*** cannot be completed in an evidentiary vacuum.

[71] It is not enough for CN to say that it will do better at the trial, where it will call all of the necessary evidence to satisfy its onus. CN had an obligation to put its best foot forward at the motion for summary judgment and has failed to do so. CN has not persuaded me that the hearsay allegations in the Reports rise to the

level of misconduct sufficient to justify their decision to dismiss a long-term employee with over 30 years' service who had an unblemished work record.

[72] CN cannot put in a better case at trial because it cannot identify any of its current or former employees involved in the decision to terminate the Plaintiff's employment without notice. Without this evidence I cannot engage in the process of weighing the evidence known to CN when the decision was made and what it learned thereafter that could have justified the termination of a long-standing employee with a sterling record who worked in a particular workplace that was fraught with a "culture" that ran counter to its official policies.

[73] The fact that CN may be able to prove at trial that the behaviour of the Plaintiff ran counter to its official policy is also not helpful in defeating the motion for summary judgment. I make this finding because official policies in any workplace can be more honoured in the breach than in the observance. The whole purpose of a contextual analysis prescribed by ***McKinley*** is to preclude what ***Dhatt v. Kal Tire Ltd.***, 2015 BCSC 1177 (CanLII), describes at para. 62, as:

> [62] …
>
> … the possibility that an employee will be unduly punished by the strict application of an unequivocal rule that equates all forms of dishonest behaviour with just cause for dismissal. …

[74] Sexual misconduct, even if proven, cannot necessarily support a just cause argument by an employer. This was one of the key findings in ***Café La Foret Ltd. v. Cho***, 2023 BCCA 354 (CanLII) ("***Cho***"), where the British Columbia Court of Appeal confirmed that proof of misconduct by an

employee that constituted sexual harassment could not support a just cause argument by an employer on all of the facts.

[75] ***Cho*** teaches that sexual harassment, like any other form of employee misconduct, must be examined in context with all of the facts to establish if it was sufficiently egregious to cause a fundamental breakdown in the employment relationship. Although every form of sexual harassment is serious, the Court of Appeal concluded that sexual harassment is like any other form of misconduct in an employment context insofar as it exists on a spectrum and the nature or degree of the sexual harassment in question must be considered based on the unique facts of the case.

[76] In ***Cho*** a male employee was terminated after touching the arm, shoulder and buttocks of a female employee in a sexual way and despite this finding, the male employee was awarded damages for wrongful dismissal, including aggravated damages, at paras. 43-44:

> [43] The judge blended this assessment by addressing both the severity of the harassment and the intentions of Mr. Cho at para. 143(a). Although it would have been preferable for the judge to address the two considerations independently, in my view this does not amount to a material error. I do not see that she erred in considering the intentions of Mr. Cho in assessing the severity of his misconduct as part of determining whether the employment relationship was salvageable.
>
> [44] Nor do I see that the judge erred in finding the sexual harassment to fall on the lower end of the spectrum. All sexual harassment is serious, and I agree with the appellant that unwanted physical contact can fall at the more serious end of the spectrum. As Justice Pearlman stated in *van Woerkens v. Marriott Hotels of Canada Ltd.*, 2009 BCSC 73:
>
> > [181] In assessing the nature and degree of sexual harassment on the particular facts of each case, courts have classified the gravity of the harassment on a continuum: [*Brazeau*] at para. 226; *Leach* [*v. Canadian Blood Services*, 2001 ABQB 54] at

> paras. 119, 120. At the serious end of the continuum are forms of harassment involving improper physical contact such as touching, forced kissing, or fondling, while less serious forms of harassment include sexual innuendo, offensive jokes and suggestive words or gestures. Harassment involving a physical component may constitute a form of sexual assault: *Leach* at para. 120.
>
> [Emphasis in the original]

[77] The law is clear that in order to succeed CN must provide evidence on how it assessed and responded in a proportional way to the sexual harassment complaints in this workplace. Without this evidence a contextual analysis as to whether the facts that CN relied on to justify the most extreme option open to it becomes impossible. The evidence of Mr. Koop speaks to the fact that the response of CN in these circumstances was more extreme than was typically the case for this particular workplace and that the response was not fair.

[78] The facts of this case are similar to ***Dhatt***, where the employer also failed to offer evidence from the person who ultimately made the decision to terminate an employee without notice. The court concluded in ***Dhatt***, at para. 93, that this failure made it impossible to consider the alleged misconduct in the manner prescribed in ***McKinley***, including the past behaviour and work history of the employee and how official policies had been applied in the past:

> [93] There is no evidence that there was any consideration of the particular facts and circumstances, or a determination of whether the nature and seriousness of the alleged dishonest conduct undermined the employment relationship between the defendant and the plaintiff. …

[79] Although CN did not owe a duty of procedural fairness to the Plaintiff by conducting a thorough investigation by its management team or offering him any kind of due process before terminating his employment, they took a risk by doing

so which is identified in the ***McCallum*** decision. By failing to prove what facts it considered prior to termination, apart from the fact that an allegation of sexual harassment was raised, CN cannot discharge its onus under the ***McKinley*** test. In fact, CN cannot even prove that the persons responsible for the decision to terminate the employment of the Plaintiff even bothered to read the Reports.

[80] The evidentiary vacuum created by CN makes it impossible for me to weigh and measure the facts it relied on to justify a decision that represented the most drastic step open to it. I cannot in these circumstances decide if the response taken by CN was commensurate to the impugned conduct of the Plaintiff in all of the circumstances and this will not change if I should order that this matter proceed to trial.

[81] If this matter should proceed to trial, CN would in essence be asking me to step into the shoes of an employer in order to decide if I would have dismissed the Plaintiff without notice. That is not my role as the finder of fact in this matter.

[82] For all of these reasons I am satisfied that this is a case that can fairly be decided on a summary judgment basis. The summary judgment process in this case allows me to make the necessary findings of fact and apply the law to those facts in a manner that is proportionate, more expeditious and the least expensive means to achieve a just result. The Plaintiff has satisfied his onus as the moving party on a motion for summary judgment and CN has failed as the responding party to show why the evidentiary record, the facts or the law preclude a fair disposition of this matter by way of summary judgment.

[83] As a result of my decision, CN is liable in damages to the Plaintiff. I am satisfied that it is also just to proceed with findings as to damages in this case on a summary judgment basis, given that counsel for CN conceded it would be just to do so had liability for damages been admitted.

DAMAGES

Pay in Lieu of Notice.

[84] ***Bardal v. Globe & Mail Ltd.***, 1960 CanLII 294 (ON SC), 24 D.L.R. (2d) 140 (Ont. H.C.), confirms the principle that the measure of damages in cases of wrongful dismissal "… *must be considered in the light of the terms of employment and the character of the services to be rendered*" (at p. 143). ***Bardal*** also confirms, at pp. 143-144:

> The contractual obligation is to give reasonable notice and to continue the servant in his employment. If the servant is dismissed without reasonable notice he is entitled to the damages that flow from the failure to observe this contractual obligation, which damages the servant is bound in law to mitigate to the best of his ability.

[85] A reasonable period of notice or pay in lieu thereof defies mathematical precision. The factors driving the analysis of what constitutes reasonable notice are described in ***Bardal*** at p. 145 as follows:

> 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.

[86] In applying the key facts required for a ***Bardal*** analysis I would note, the Plaintiff:

a) Is 62-years of age and was employed by CN for 34 years at the time of his termination;

b) Never graduated from high school;

c) Had no trade certifications or credentials and received all of his training "*on the job*";

d) Was terminated by the only employer he had in his adult life; and

e) Achieved a managerial role at the time of his termination with a salary of over $100,000 inclusive of bonuses.

[87] The Plaintiff is seeking damages equal to 24 months' pay in lieu of notice and CN admitted that damages in the range of 21 to 24 months are appropriate in the circumstances, if I should find that they are liable to pay damages. I have no hesitation in finding that the notice period on these facts should be 24 months, which represents the highest end of the range for damages flowing from lack of notice.

[88] The affidavit of the Plaintiff confirms his employment income, inclusive of salary, bonuses, and benefits, was $101,306.69 in 2019, $93,888 in 2020 and $108,101 in 2021. The three-year average amounts to an annual income of the Plaintiff of $101,098.56. Therefore, the Plaintiff is entitled to a damage award of twice the annual average of his annual income, namely $202,197.12, subject to any reduction arising from his duty to mitigate his losses.

Mitigation

[89] The entitlement to damages by a successful plaintiff in any breach of a contract case, including wrongful dismissal, is subject to their duty to mitigate their

loss. The duty to mitigate imposed on a plaintiff in a wrongful dismissal action means that a defendant is entitled to a reduction in the award for pay in lieu of notice for the net amount of what the employee earned or could have reasonably earned in other employment of a similar nature. (See ***Red Deer College v. Michaels***, 1975 CanLII 15 (SCC), [1976] 2 S.C.R. 324, at p. 332.)

[90] The decision in ***Red Deer College*** confirms that the onus of any default in the duty to mitigate rests on the employer and that this burden of proof "… *is by no means a light one …* " (at p. 332). As I have already noted in these reasons, ***Grant*** teaches that the onus includes the obligation of an employer to prove that the employee would have likely found another comparable position if they had searched for one.

Mitigation – Application of Facts to the Law

[91] Although CN does not take serious issue to the period of notice as I have already noted, it does take issue with what it alleges is the Plaintiff's failure or refusal to mitigate his loss. In this case the CN points to two factors in support of its position. The first is that the Plaintiff accepted the option he was given by CN to elect an early retirement benefit effective the date of termination, rather than waiting until he turned 65. Secondly, CN also argues the Plaintiff failed to make a determined effort to find other employment. As a result of these choices, CN argues that the Plaintiff failed in his duty to mitigate his losses and he is not entitled to damages.

[92] It is fundamentally unfair for CN to argue that the Plaintiff made a "*decision to retire*" in these circumstances. Due to the unjust conduct of CN in terminating

his long-term employment without notice, the Plaintiff was faced with a difficult dilemma because he had no reasonable prospects of finding employment that would pay him substantially the same wages, benefits and bonus structure as he had enjoyed at CN.

[93] Given his age, education and experience I can take judicial notice of the fact that it would have been extremely unlikely for the Plaintiff to find a corporate management position that would remunerate him in an amount over $100,000 per year. It is unlikely in my view that the Plaintiff would have managed to find employment paying more than minimum wage ever again.

[94] Faced with a significant short-term and long-term reduction in his income, the Plaintiff had no real option other than to accept the early retirement benefit he was offered by CN at the time his employment was terminated. Declining the early retirement benefit would have left the Plaintiff with no way to manage his ongoing expenses without depleting whatever savings he may have had.

[95] Given the difficult choice foisted upon him by the unjust conduct of CN, I am satisfied the Plaintiff acted reasonably and should not be punished by a finding of fact that he refused to mitigate his loss. On cross-examination, the Plaintiff was clear in stating his position that he was forced to take the early retirement benefit due to the dire circumstances he was presented with.

[96] The evidence also shows the Plaintiff made inquiries as to what he could do to secure comparable employment. Unsurprisingly, he discovered that the employment that might be available to him was beyond his work experience or required at least a high school diploma. Further, the Plaintiff was also forced to

cope with the trauma of his wife's unexpected death, and this reduced the energy he was able to devote to looking for work.

[97] As I have already noted, the onus of proving the Plaintiff's failure to mitigate his loss rests on CN and this burden is a high one. Under the test set out in the ***Grant*** decision CN must show more than a lack of sufficient effort on the part of the Plaintiff to mitigate his loss by finding any kind of employment, but rather that the Plaintiff would have likely found another comparable position with similar remuneration had he searched for one.

[98] CN argues that it can distinguish the ***Grant*** decision because the plaintiff in ***Grant*** did not choose to retire. I have already noted that it is unfair for CN to argue that the Plaintiff chose to retire in this circumstance. Further, ***Grant*** clearly places the onus on an employer to prove comparable employment was available to the plaintiff in the same or some other industry had the plaintiff made a diligent job search (***Grant***, at para. 46).

[99] As I have already stated, management positions for someone over age 60 without a high school diploma and no formal trade credentials that pay six-figure salaries are virtually unheard of in today's job market. CN cannot discharge its onus with a bald assertion that the Plaintiff could have found comparable employment without providing *any* evidence to substantiate its claim.

[100] The fact that the onus to prove a failure to mitigate is a high evidentiary bar for an employer to clear is highlighted in ***Lewis v. Lehigh Northwest Cement Limited***, 2008 BCSC 542 (CanLII), 166 ACWS (3d) 266. The facts in ***Lewis*** involved a plaintiff with 24 years of service with his employer in a senior

management position, who considered retirement as an option after termination and then ultimately cashed out his pension with his employer to invest the net proceeds in a private retirement fund. Silverman J. found at paras. 63-64:

> [63] I have concluded, on the basis of this evidence, that the defendant has failed to discharge the onus on it to prove that the plaintiff did not fulfil his duty to mitigate. I accept that he considered retirement as a serious option from the beginning of the relevant time period. It would have been foolish not to. But that does not lead me to the conclusion that he had made a decision that he was going to retire and not make attempts to seriously look for work. I am satisfied that his efforts were genuine and sufficient and that despite that, he was unable and indeed unlikely to have found suitable employment in any event.
>
> [64] I am not satisfied that he could have found appropriate employment if he had taken greater steps, partly because of his age which I recognize has expanded the ability of a person to find work as we move into more enlightened times, so not exclusively because of his age, but partly because of his age; partly because of his prior two years on medical disability which would have made him less attractive to potential employers; and partly because of his newer medical complaints about his arthritis.

[101] CN cannot successfully argue that it can satisfy its onus as to proof of a failure to mitigate by pointing to the decision of the Plaintiff to elect the early retirement benefit, he was offered. Further CN cannot argue that obtaining a damage award for wrongful dismissal should result in a set-off of pension benefits received by a plaintiff over the 24-months' notice period. The receipt of pension benefits does not violate the compensation principle in contract law which in general terms does not permit a Plaintiff to collect more in damages than the breach of contract caused.

[102] The fact that pension benefits form an exception to the general rule established by the compensation principle is set out in ***IBM Canada Limited v. Waterman***, 2013 SCC 70 (CanLII), [2013] 3 S.C.R. 985 ("***Waterman***").

Waterman involved an employee who sued for wrongful dismissal after 42 years of service with his employer when he was 65 years of age. The employee continued his claim against his former employer after exercising his right to collect full pension benefits under his former employer's defined benefit pension plan.

[103] ***Waterman***, at para. 4, teaches that the application of the compensation rule in cases of damages for breach of contract cannot be strictly and inflexibly applied circumstances where a plaintiff receives a pension benefit after termination:

> [4] In my view, employee pension payments, including payments from a defined benefit plan as in this case, are a type of benefit that should generally not reduce the damages otherwise payable for wrongful dismissal. Both the nature of the benefit and the intention of the parties support this conclusion. Pension benefits are a form of deferred compensation for the employee's service and constitute a type of retirement savings. They are not intended to be an indemnity for wage loss due to unemployment. The parties could not have intended that the employee's retirement savings would be used to subsidize his or her wrongful dismissal. There is no decision of this Court in which a non-indemnity benefit to which the plaintiff has contributed, such as the pension benefits in issue here, has ever been deducted from a damages award.

Aggravated Damages

[104] The Plaintiff seeks aggravated damages resulting from the "*unduly insensitive*" manner in which he was dismissed. No claim for punitive damages was advanced by the Plaintiff during oral arguments.

[105] In ***Klassen*** this court awarded ***Wallace*** damages based on findings of fact that that the employer acted with animosity towards the employee, if not contempt, in the manner of his dismissal that was not supported by any evidence. The employer in that case operated a Co-op in a small community in Manitoba and

mailed out a letter to all to its members announcing the termination of the plaintiff who was serving as the general manager of the Co-op at that time. The publicity generated by the manner of the dismissal in this small community where the plaintiff was well known, left him feeling embarrassed and humiliated in a manner that went beyond the normal upset and distress anyone would feel when their employment was terminated.

[106] The facts in ***Klassen*** also showed that the employer elected to terminate the employment contract based on allegations of misconduct despite the evidence available to it through a forensic audit that clearly pointed to an absence of any wrongdoing by the employee (at para. 97). It was found that in all of these circumstances the conduct of the employer in that case ran contrary to the employer's duty of good faith and fair dealing in its contractual obligations to the employee and resulted in an award of aggravated damages of $10,000.

[107] The Plaintiff in the case before me argues that CN was "*unduly insensitive*" in terminating his employment, as that term is used in describing ***Wallace*** damages, because it knew his wife had died about eight months prior to his termination and he was grieving this loss at the time. The evidence of the Plaintiff was that he was diagnosed with anxiety and depression after his wife's death and these symptoms were "*exacerbated and worsened following his termination*".

[108] I have no doubt that the death of his wife was a traumatic experience for the Plaintiff and it worsened the state of his mental health, but the test set out in ***Keays*** requires me to begin my analysis as to damages by asking if the mental distress described by the Plaintiff on termination was reasonably contemplated by

the parties at the time of the formation of the contract. I am not satisfied that this is the case.

[109] I am also not satisfied that the manner in which the Plaintiff was dismissed in this case was done in a manner bordering on contempt or malice as described in ***Klassen***. There was nothing in the manner of his dismissal that would lead me to conclude that CN was making an effort to publicly humiliate or embarrass the Plaintiff or somehow rub salt into his wounds. The upset and distress the Plaintiff experienced does not rise above the normal feelings of upset and distress that typically accompany the termination of employment.

[110] For these reasons I am dismissing the Plaintiff's claim for ***Wallace*** damages.

CONCLUSION

[111] The Plaintiff is entitled to an award for damages of $202,197.12 which represents the remuneration he would have received over the 24-months' notice period he was entitled to. The prescribed statutory interest rate will apply to these damages.

[112] If the parties cannot agree on costs they can book a one-hour appointment to speak to that issue, provided they file written briefs in advance.

[113] The trial dates set for later this year will be cancelled.

_____

J.