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

B E T W E E N:

BRADLEY BROWN,	)	Brett A. Steidl
	)	for the plaintiff
plaintiff,	)	
	)	
- and -	)	
	)	
GENERAL ELECTRIC CANADA OPERATING AS GE TRANSPORTATION AND THE SAID GE TRANSPORTATION,	)	Dianne E. Jozefacki
	)	Rayaz M. Khan
	)	for the defendants
	)	
defendants.	)	
	)	Judgment Delivered:
	)	June 26, 2024

BOCK J.

INTRODUCTION

[1] This action concerns Bradley Brown's claim for wrongful dismissal against General Electric Canada. The claim arises out of General Electric Canada's sale of one of its divisions, GE Transportation, to another company, Wabtec Corporation ("Wabtec"). Mr. Brown was employed by GE Transportation at the time of the sale.

[2] GE Transportation was not an incorporated entity. Wabtec acquired the assets which comprised GE Transportation from General Electric Canada. Nevertheless, in these reasons I will refer to the defendant as "GE Transportation", as the parties did at trial, unless it is necessary to distinguish it from its former owner, General Electric Canada.

[3] Wabtec was eager to retain Mr. Brown's services when it acquired GE Transportation. Although it offered him the same position on terms substantially similar to those which had governed his employment at GE Transportation. Mr. Brown declined the offer, leaving him unemployed.

[4] Mr. Brown alleges that in the circumstances he was dismissed by GE Transportation without reasonable notice or pay in lieu. In reply, GE Transportation submits Mr. Brown elected to resign his employment or, alternatively, failed to act reasonably in mitigation of his damages when he declined Wabtec's offer of continued employment. This puts in issue the proper characterization of the termination of Mr. Brown's employment: was he dismissed, or did he resign? And, if he was dismissed, did he act reasonably to mitigate his damages?

[5] Mr. Brown also alleges he is entitled to be paid a pro-rated bonus of $133,000 under a "Retention Bonus Agreement". Under the terms of that agreement he is entitled to a pro-rated bonus if his employment was terminated "involuntarily". This gives rise to the same issue with respect to the proper characterization of the termination of his employment: was he dismissed, or did he resign?

[6] Finally, Mr. Brown submits that under the terms of GE Transportation's variable incentive compensation plan, known as the "VIC" plan, he is entitled to payment of a

$60,000 performance bonus for 2018. In response, GE Transportation contends Mr. Brown's entitlement to payment of the VIC bonus was conditional on his acceptance of Wabtec's employment offer. His refusal of that offer disentitles him to the VIC bonus.

[7] For the reasons that follow, I find Mr. Brown was dismissed by GE Transportation without reasonable notice or pay in lieu, but that he failed to act reasonably in mitigation of his damages by declining Wabtec's offer of employment. Despite that, because his employment was terminated "involuntarily", he is entitled to payment of the $133,000 bonus under his Retention Bonus Agreement. He is not, however, entitled to payment of the $60,000 VIC bonus.

FACTS GIVING RISE TO THIS DISPUTE

[8] Mr. Brown is a talented electrical engineer who, early in his career, developed special expertise in the field of railway controls. In 1992 he founded Iders Inc. ("Iders"), an electronic design and manufacturing company for the rail industry. Iders was located in Oakbank, Manitoba. One of its largest clients was GE Transportation.

[9] In 2016 GE Transportation acquired Iders from Mr. Brown by a stock purchase agreement. As a result of that acquisition, on November 29, 2016 Mr. Brown entered into three agreements with GE Transportation: an "Employment Agreement" as GE Transportation's senior business manager in Oakbank, the Retention Bonus Agreement mentioned earlier, and a "Restrictive Covenant Agreement". His status as an employee of GE Transportation also entitled him to participate in the VIC plan.

[10] General Electric Canada and Wabtec began discussing a potential sale of GE Transportation in May 2018. Mr. Brown soon became aware of these discussions.

Eventually, as the prospect of a sale to Wabtec became more likely, GE Transportation held information sessions for its employees. At these sessions employees were informed that, as part of the sale transaction, Wabtec would offer each of them continued employment on substantially the same terms and conditions which had governed their employment with GE Transportation.

[11] Although Mr. Brown did not attend any of the information sessions, he was aware of the growing likelihood that Wabtec would acquire GE Transportation. On February 1, 2019, Mr. Brown sent an email to Todd Goodermuth, GE Transportation's product director, asking how the sale might affect him (Exhibit 7). Attached to his email were copies of his Employment Agreement, Retention Bonus Agreement and Restrictive Covenant Agreement. Mr. Brown's email to Mr. Goodermuth closed with this query:

> It appears that I will be involuntarily terminated at the time of the Wabtec transition. Can you tell me what position GE is planning on taking with respect to these agreements?
>
> Please let me know.

[12] At trial, Mr. Brown elaborated on the concerns that had led him to write to Mr. Goodermuth. He was especially worried that by accepting Wabtec's offer he would "voluntarily leave" his employment with GE Transportation, which would disentitle him to payment of any portion of the bonus otherwise payable to him by GE Transportation under the terms of the Retention Bonus Agreement. Although there is no reference to it in this email, Mr. Brown testified he was also worried that GE Transportation could treat his employment by Wabtec as a violation by him of certain non-competition provisions in the Restrictive Covenant Agreement.

[13] Mr. Goodermuth replied to Mr. Brown's email within the hour, writing that while he did not think the Wabtec transaction would trigger Mr. Brown's "involuntary termination", he would refer his question to "someone who is better able to answer your concern". To that end, Mr. Goodermuth referred Mr. Brown's email to three more senior members of GE Transportation's executive team: Mr. Brown's immediate superior, Bill Fleming (senior director of software engineering), Garret Fitzgerald (vice-president and general manager), and Kevin Fox (senior manager of corporate business development).

[14] Mr. Brown eventually received a response to his February 1, 2019 email, but not before formal, written employment offers from Wabtec were delivered to all of GE Transportation's Oakbank employees on Friday, February 8. Because Mr. Brown was out of the office on February 8, he did not see his offer (the "Offer Letter", Exhibit 12) until the following Monday, February 11. The Offer Letter, signed by Scott Wahlstrom, Wabtec's executive vice-president of human resources, contemplated Mr. Brown's continued employment at Wabtec on substantially the same terms and conditions as had applied at GE Transportation, as follows:

> We are excited to have you join our company and to welcome you to the Wabtec team. The following is a summary of the terms and conditions of your continuing employment with Wabtec. To the extent not specifically addressed in this letter, your present terms and conditions of employment at GE will be substantially similar at Wabtec. Your offer is contingent upon the successful closing of the transaction.

[15] As I will discuss further in these reasons, Mr. Brown was not satisfied with the contents of the Offer Letter or the various assurances he later received in reply to his

email of February 1, 2019. Matters finally came to a head on the afternoon of Friday, February 22, when Mr. Brown, after three telephone calls earlier that day between him and various representatives of GE Transportation, sent an email declining Wabtec's offer of employment (Exhibit 24). GE Transportation treated this email as Mr. Brown's decision to resign his employment effective February 23, 2019.

[16] Wabtec's acquisition of GE Transportation formally closed the following Monday, February 25, 2019. On that day Mr. Fleming, who had accepted employment with Wabtec, distributed an email in which he announced Mr. Brown's decision "not to join us at Wabtec" (Exhibit 29). In that same email Mr. Fleming also paid warm tribute to Mr. Brown's success as the founder of Iders and his important contributions to GE Transportation.

[17] In the two years after Mr. Brown's departure from GE Transportation he spent time exploring different business opportunities and working. During that time he earned a total of $62,500.

THE PARTIES' POSITIONS

[18] Mr. Brown submits GE Transportation dismissed him without reasonable notice or pay in lieu, and he is therefore entitled to damages.

[19] In reply, GE Transportation alleges Mr. Brown effectively resigned by refusing Wabtec's offer of continued employment. Alternatively, GE Transportation contends that even if Mr. Brown was summarily dismissed, he failed to act reasonably in mitigation of his damages by not accepting Wabtec's offer. Had he done so, he would have avoided all of the damages he now claims.

[20] Mr. Brown has two responses to GE Transportation's arguments on mitigation. First, he submits his rejection of Wabtec's employment offer was reasonable. Second, and in any event, he contends GE Transportation cannot rely on his refusal of Wabtec's offer for reasons of timing. Mr. Brown argues his obligation to mitigate only arose after the termination of his employment with GE Transportation on February 23, 2019. That being so, his rejection of Wabtec's offer on February 22 cannot be taken into account for purposes of mitigation, because it was made before the termination of his employment. And since Wabtec never revived its offer to him after the termination of his employment on February 23, GE Transportation has no basis on which to complain that he failed to act reasonably by not going to work for Wabtec.

[21] Mr. Brown also claims he is entitled to a pro-rata payment of his retention bonus under the terms of the Retention Bonus Agreement because the termination of his employment with GE Transportation was "involuntary". GE Transportation denies this on the basis that Mr. Brown resigned his employment voluntarily.

[22] Finally, Mr. Brown contends under the terms of the VIC plan he is entitled to payment of the 2018 VIC bonus, whether or not his employment was terminated involuntarily. GE Transportation disputes this on the grounds that payment of the bonus was conditional on Mr. Brown's acceptance of Wabtec's employment offer, which he refused.

[23] The parties have agreed on the quantum of damages in the event of liability, and on the assumption that Mr. Brown fulfilled his duty to mitigate. Further details are set forth below.

DISCUSSION AND DISPOSITION

[24] As I noted at the outset of these reasons, I have come to these conclusions:

(a) Mr. Brown's employment was constructively terminated without reasonable notice or pay in lieu thereof as a result of General Electric Canada's sale of GE Transportation to Wabtec;

(b) Mr. Brown failed to act reasonably in mitigation of his damages by declining Wabtec's offer of employment;

(c) because his employment was terminated involuntarily, Mr. Brown is entitled to a pro-rated bonus under his Retention Bonus Agreement; and

(d) because Mr. Brown refused Wabtec's employment offer he is not entitled to payment of the 2018 VIC bonus.

My explanation for each of these conclusions is set forth below.

(a) Mr. Brown's employment was constructively terminated

[25] I find Mr. Brown's employment with General Electric Canada was constructively terminated when it sold GE Transportation to Wabtec. It is clear from the evidence that as a result of that sale, General Electric Canada no longer wanted or needed Mr. Brown's services. While he was offered continued employment with Wabtec, a separate and distinct legal entity, that did not constitute an offer of continued employment by General Electric Canada. Insofar as his employment there is concerned, it ended with the sale of GE Transportation to Wabtec.

[26] Mr. Brown's circumstances in this regard are the same as the plaintiff's in ***Buchanan v. Canada Valve Inc. et al.***, 1987 CanLII 4433 (ON SC), 59 O.R. (2d) 681 (Ont. H.C.), pp. 2-3, and they lead to the same legal result:

> I can say shortly that the effect of the sale of the assets of Canada Valve effectively terminated the employment of the plaintiff: see Addison v. M. Loeb, Ltd. (1986), 53 O.R. (2d) 602 at p. 603, 25 D.L.R. (4th) 151 at p. 152, 11 C.C.E.L. 100 at p. 102. He was given neither notice, nor compensation in lieu thereof. He obviously was a highly valued employee. Therefore I find that he is entitled to succeed if he can prove damages.

[27] The result in ***Buchanan*** is based on the principle that a contract for personal services cannot be assigned without the consent of the parties. In ***Addison v. M. Loeb, Ltd.***, 1986 CanLII 2474 (ON CA), 53 O.R. (2d) 602 (Ont. C.A.), the Ontario Court of Appeal expressed that principle in the context of the sale of a business in these terms, at p. 3:

> At common law, since a contract of personal services cannot be assigned to a new employer without the consent of the parties, the sale of a business, if it results in the change of the legal identity of the employer, constitutes a constructive termination of the employment.

This same principle has been acknowledged and applied in Manitoba (***Bodnarus v. Buchok***, 2000 MBCA 53, para. 9).

[28] GE Transportation's efforts to recast the termination of Mr. Brown's employment as a voluntary decision to resign are unpersuasive. I accept, as GE Transportation has argued, that Mr. Brown was unhappy with how things had unfolded after GE Transportation's acquisition of Iders in 2016. Indeed, Mr. Brown said as much in the February 1, 2019 email referred to earlier, when he told Mr. Goodermuth that "lots of

things have not gone according to the plans that were set out in December of 2016" (Exhibit 7). I also accept that Mr. Brown's reasons for rejecting Wabtec's employment offer were unreasonable. But while the unreasonableness of those reasons is relevant to GE Transportation's position on mitigation (a point to which I will return), it is not relevant when it comes to characterizing the termination of his employment as either voluntary or involuntary. By operation of law, Mr. Brown's employment was constructively terminated by the sale of GE Transportation to Wabtec. From Mr. Brown's perspective, in other words, the termination of his employment with GE Transportation was involuntary.

[29] Even if I were to take the approach urged by GE Transportation, I would arrive at the same conclusion. An employee's resignation must be "clear and unequivocal" (***Kieran v. Ingram Micro Inc.***, 2004 CanLII 4852 (ON CA), 189 O.A.C. 58 (C.A.), para. 27). The test for making such a determination involves both a subjective and objective element, as observed by Brongers, J. in ***Khangura v. Lumberwest Building Supplies Inc.***, 2023 BCSC 1053, para. 85:

> [85] As noted in *Beggs* [*Beggs v. Westport Ltd.*, 2011 BCCA 76] at para. 36, the test for assessing whether an employee has resigned is both subjective and objective. The question is whether the employee intended to resign and whether the employee's words and acts, objectively viewed, support a finding that the employee resigned. …

[30] Mr. Brown announced his intentions in his February 22, 2019 email to Mr. Fleming (Exhibit 24): "I do wish to record, as a statement of fact, that I am not terminating my employment with GE. I am not accepting an offer of employment with Wabtec as it has been presented to me". Whether Mr. Brown's words are viewed subjectively or objectively, there can be no doubt about his intentions – he was clearly and

unequivocally not resigning his position from GE Transportation, and just as clearly and unequivocally not accepting employment from Wabtec.

[31] To conclude this section of my reasons, I find Mr. Brown's employment was constructively terminated without reasonable notice or pay in lieu thereof as a result of the sale of GE Transportation to Wabtec.

(b) Mr. Brown failed to act reasonably in mitigation of his damages

[32] There is no dispute between the parties regarding Mr. Brown's duty to make reasonable efforts to secure comparable employment and thereby mitigate his losses.

[33] Where the parties differ, however, is whether Mr. Brown failed in his duty to mitigate by not accepting Wabtec's offer of continued employment. GE Transportation argues, and I accept, that Mr. Brown acted unreasonably when he declined Wabtec's offer of the same position, duties, responsibilities, seniority, salary and benefits. The employment offered by Wabtec was not only comparable, but practically identical, to his employment with GE Transportation.

[34] I turn now to explain why Mr. Brown's decision to refuse Wabtec's offer was unreasonable.

[35] Mr. Brown's primary concern was that by accepting employment with Wabtec he would forfeit his right to receive payment under the Retention Bonus Agreement. Clause 1 of the Retention Bonus Agreement provided that Mr. Brown was entitled to payment of a $300,000 bonus subject to the condition that he remain "actively employed" by GE Transportation for a period of 60 months from the closing date of the acquisition of Iders, which was December 8, 2016. Clause 6 addressed Mr. Brown's entitlement to

a pro rata portion of the bonus in the event of the termination of his employment before the expiry of the 60 months. It provided in relevant part (Exhibit 2):

> Without restricting the forgoing, if you voluntarily leave your employment with GE Transportation (including retirement) before any Effective Time for a payout date or if your employment is terminated for cause (including violation of Company policies), you will not be entitled to any remaining payments or portion of the retention bonus and there will be no pro-rata payment … If your employment involuntarily terminates for any reason other than for cause (for example, because of death or disability), you or your estate will be paid a prorated portion of the bonus through your last day of employment.

[36] By accepting employment with Wabtec, Mr. Brown reasoned, he would both cease to be "actively employed" by, and would "voluntarily leave" his employment with, GE Transportation, thereby disentitling himself to payment of any portion of the retention bonus.

[37] Additionally, Mr. Brown regarded the Retention Bonus Agreement and the Restrictive Covenant Agreement to be two parts of a single agreement, and this figured in his analysis of his situation, too. He concluded that it was not possible to secure his rights under the Retention Bonus Agreement with Wabtec by means of an assignment from GE Transportation to Wabtec, because Clause 7 of the Restrictive Covenant Agreement (which, on his view of the matter, applied equally to the Retention Bonus Agreement) limits assignment by GE Transportation to an "affiliated legal entity", which Wabtec was not.

[38] I disagree with Mr. Brown's analysis. There is no basis for Mr. Brown's treatment of the Retention Bonus Agreement and the Restrictive Covenant Agreement as one agreement. Nothing in either agreement justifies such an interpretation. Nor is there

anything in the Retention Bonus Agreement to justify incorporating into it the limits on assignment contained in Clause 7 of the Restrictive Covenant Agreement. Finally, nothing in the Retention Bonus Agreement itself limits the parties' rights of assignment to another party.

[39] In sum, nothing prevented Mr. Brown, GE Transportation and Wabtec from entering into a binding agreement whereby Wabtec would assume responsibility for GE Transportation's obligations to Mr. Brown under the Retention Bonus Agreement. In my view, the Offer Letter was intended to achieve exactly that result.

[40] I am also satisfied Wabtec and GE Transportation made reasonable efforts to give Mr. Brown the assurances he sought with respect to his rights under the Retention Bonus Agreement. I will briefly review those efforts.

[41] To begin, the terms of Wabtec's Offer Letter, reasonably construed, ought to have allayed Mr. Brown's concerns. The Offer Letter provided, "To the extent not specifically addressed in this letter, your present terms and conditions of employment at GE will be substantially similar at Wabtec" (Exhibit 12). It is common ground between the parties that the Retention Bonus Agreement formed part of the "present terms and conditions of [Mr. Brown's] employment at GE". A plain reading of the Offer Letter leads me to conclude, and should have led Mr. Brown to conclude, that because the Retention Bonus Agreement was not "specifically addressed" in the letter, it would continue in force, and be enforceable against Wabtec.

[42] Next, on February 12, 2019, Mr. Fox met with Mr. Brown to reassure him that Wabtec was legally obligated under the terms of its agreement with GE Transportation

to assume all of its liabilities, including its liabilities to Mr. Brown under the Retention Bonus Agreement. He told Mr. Brown Wabtec would honour that agreement.

[43] Then, on February 14, 2019, Mr. Fitzgerald followed up with an email, to which he added an image of his handwritten signature to demonstrate his "clear commitment" to Mr. Brown. Mr. Fitzgerald's email contained this acknowledgement of Wabtec's obligations to Mr. Brown under the Retention Bonus Agreement going forward (referred to here as the "retention agreement", Exhibit 18):

> I want to assure you that Wabtec will honor the terms in your retention agreement with GE Transportation. Per the signed transaction agreements between GE and Wabtec, your retention agreement is included in the asset sale from GE Transportation to Wabtec. This means that Wabtec is legally obligated to assume certain assets and liabilities (like your retention agreement) related to GE Transportation as part of the merger expected to close on February 25th. I hope this can provide you with some reassurance.

[44] In the days that followed, Mr. Brown continued to express concerns about his legal position if he accepted employment at Wabtec. In a final effort to allay those concerns, on February 22, 2019 GE Transportation expressed its willingness to amend the Offer Letter so that it included explicit reference not only to the retention bonus payable under the Retention Bonus Agreement, but also to his eligibility for a VIC bonus under GE Transportation's VIC plan, which until then had not been identified by Mr. Brown as a concern. (A copy of the VIC plan was marked as Exhibit 4.)

[45] None of this satisfied Mr. Brown who, upon further consideration, told Mr. Fleming, "After having consulted with counsel and deliberated on it, I have decided that there is no point in Wabtec generating an offer letter updated as we discussed a few hours ago" (Exhibit 24).

[46] The evidence convinces me that Wabtec and GE Transportation were ready and willing to give Mr. Brown the assurances he sought before accepting employment at Wabtec, including the preservation of his rights under the Retention Bonus Agreement and his continued eligibility for payment under the VIC plan – assurances which I find were unnecessary in the first place, given the contents of the Offer Letter as originally drafted. Despite that, Mr. Brown declined Wabtec's offer. In my opinion, he was unreasonable in doing so.

[47] I turn next to Mr. Brown's concerns about his Restrictive Covenant Agreement with GE Transportation. Mr. Brown testified he was concerned that by accepting employment with Wabtec, he might be violating the covenant not to compete against GE Transportation in the Restrictive Covenant Agreement. This would in turn expose him to the risk of a lawsuit by GE Transportation to enforce the terms of that covenant.

[48] Although Mr. Brown testified he raised these concerns about the Restrictive Covenant Agreement with representatives of GE Transportation and Wabtec in February 2019, I think he is mistaken in his recollection, for two reasons.

[49] First, there is no evidence that Mr. Brown ever raised this issue in any of the several emails and text messages he exchanged with his counterparts at GE Transportation and Wabtec during this time. Second, none of the other witnesses who testified at trial – Mr. Fleming, Brianna Demchuk (GE Transportation's human resource manager in Canada), Mr. Fitzgerald or Dea Palmer (employed in GE Transportation's human resource department in the United States) – had any recollection of Mr. Brown expressing any concerns about the Restrictive

Covenant Agreement in any of their discussions with him. All of them testified to the effect that Mr. Brown's concerns were aimed at the Retention Bonus Agreement. Ms. Palmer, in particular, was quite emphatic in her testimony that there was no discussion of the Restrictive Covenant Agreement during the parties' final discussions on February 22, 2019.

[50] As for the concerns Mr. Brown expressed about the Restrictive Covenant Agreement in his testimony at trial, I find them to be unreasonable.

[51] To begin, it is hard to imagine under what possible circumstances GE Transportation would have or could have taken the position, post-closing, that Mr. Brown's acceptance of Wabtec's offer of employment constituted an actionable breach of its Restrictive Covenant Agreement.

[52] Moreover, had this truly been a concern that needed to be addressed in order to assuage Mr. Brown nothing would have prevented the parties from negotiating an assignment of the Restrictive Covenant Agreement to Wabtec. On this point, I do not accept Mr. Brown's interpretation of Clause 7 of the Restrictive Covenant Agreement to mean that it could not be assigned by GE Transportation to Wabtec. While Clause 7 does limit assignment by GE Transportation to "an affiliated legal entity", Clause 8 goes on to provide the agreement can be waived or modified by subsequent agreement of the parties (Exhibit 2). The evidence leaves me with no doubt that the Restrictive Covenant Agreement could have been assigned by GE Transportation to Wabtec "by subsequent agreement", namely the Offer Letter, had the parties considered it necessary to do so.

[53] Finally, Mr. Brown argues that as a matter of law GE Transportation is not entitled to rely on his refusal of Wabtec's employment offer, because the offer was made before the termination of his employment on February 23, 2019 and was never revived thereafter. There is no merit to that argument.

[54] GE Transportation bears the onus of proving that Mr. Brown did not act reasonably to obtain other comparable employment (***Red Deer College v. Michaels***, 1975 CanLII 15 (SCC), [1976] 2 S.C.R. 324, p. 325). Mr. Brown, on the other hand, is required "to take the steps in mitigation that a reasonable person would take" (***Farquhar v. Butler Brothers Supplies Ltd.***, 1988 CanLII 185 (BC CA), 23 B.C.L.R. (2d) 89 (C.A.), p. 7).

[55] GE Transportation has satisfied its onus with the evidence of Wabtec's offer of continued employment with it on substantially similar terms. It is true that Wabtec did not make a fresh offer of employment to Mr. Brown after February 22, 2019. In their evidence, Mr. Fleming and Mr. Fitzgerald both explained there did not seem to be any point in offering Mr. Brown a job he had just turned down. This strikes me as a reasonable conclusion in the circumstances.

[56] However, I have no doubt that had Mr. Brown reconsidered and asked Wabtec on February 25, 2019, to employ him on the terms he had just rejected – steps that any reasonable person would have taken in mitigation, and which Mr. Brown therefore ought to have taken – Wabtec would have done so. There is ample evidence to support this conclusion, particularly Wabtec's concerted efforts to retain Mr. Brown's services and Mr. Fleming's praise for Mr. Brown, which I take to be sincere, when he announced

Mr. Brown's decision "not to join us at Wabtec" in his February 25, 2019 email (Exhibit 29).

[57] In my view, Mr. Brown places far too much emphasis on the precise timing of Wabtec's employment offer. While the timing of an offer of employment may be relevant in determining whether a plaintiff's decision to reject it was unreasonable in the circumstances, it is not determinative. It is simply one of a number of factors to be taken into account when assessing a dismissed employee's performance of their duty to mitigate (***Evans v. Teamsters Local Union No. 31***, 2008 SCC 20, [2008] 1 S.C.R. 661, p. 663; ***Hickey v. Christie & Walther Communications Limited***, 2020 ONSC 7214, para. 81).

[58] Finally, and in any event, Mr. Brown's complaints with respect to the timing of Wabtec's employment offer are ill-founded, given the fact that notice of the offer and notice of the termination of his employment with GE Transportation were made more or less concurrently. To put it simply, on Friday, February 22, 2019, Mr. Brown was well aware that unless he accepted Wabtec's offer he would be out of work the following Monday.

[59] In short, Mr. Brown acted unreasonably when he refused Wabtec's employment offer and therefore failed in his duty to mitigate his damages.

(c) <u>Mr. Brown is entitled to a pro-rated bonus under his Retention Bonus Agreement</u>

[60] Despite Mr. Brown's failure to mitigate, I do find he is entitled to payment of a pro-rated bonus under the Retention Bonus Agreement. This follows from my finding that his dismissal was "involuntary". As I have already noted, Clause 6 of the Retention

Bonus Agreement explicitly provides that if Mr. Brown's "employment involuntarily terminates for any reason other than cause", he would "be paid a prorated portion of the bonus" through his last day of employment (Exhibit 2). Mr. Brown's employment was terminated for a reason other than cause, namely, General Electric Canada's sale of GE Transportation to Wabtec. Accordingly, he is entitled to payment of the pro-rated portion of the bonus through his last day of employment, February 23, 2019, which the parties have calculated to be $133,000.

[61] Mr. Brown is also entitled to pre-judgment interest payable at the statutory rate from the date the pro-rated portion of the bonus first became payable.

(d) Mr. Brown is not entitled to payment of the VIC bonus

[62] Mr. Brown submits he is entitled to payment of the VIC bonus for 2018. In support of that position he notes that all GE Transportation employees who transferred to Wabtec received their 2018 VIC bonus. He acknowledges the VIC plan provides that "in order to receive a payment under the Plan, the Plan participant must be employed and not under notice on the date the award is paid out", and he concedes that he was not employed on the date of the award payment. But, he says, the only reason for that state of affairs was his involuntary termination by GE Transportation. If not for that, he would have been employed as required in order to receive payment of the 2018 VIC bonus.

[63] Mr. Brown's argument fails on account of two matters. First, under the terms of the VIC plan GE Transportation had broad discretion to change, modify or withdraw the plan unilaterally, including in the event of a change in ownership of the business (Exhibit 4, p. 5). Second, as part of the sale of its business to Wabtec, GE Transportation

exercised its discretion and made payment of the 2018 VIC bonus to Mr. Brown conditional on acceptance of Wabtec's employment offer. Mr. Brown failed to meet that condition when he turned down the offer.

[64] Thus, Mr. Brown is not entitled to payment of the VIC bonus for 2018.

PROVISIONAL DAMAGES

[65] At the commencement of the trial, I was informed the parties had agreed that, assuming liability, Mr. Brown was entitled to 24 months' notice of the termination of his employment by GE Transportation. They also agreed that, assuming Mr. Brown was found to have fulfilled his duty to mitigate, his damages comprise the following amounts, including a deduction of $62,500 on account of amounts earned in mitigation during the notice period:

Pay in lieu of notice ($300,000 per annum for 24 months):	$600,000.00
VIC bonus ($60,000 for each of 2018, 2019 and 2020):	$180,000.00
Pro-rated payment under Retention Bonus Agreement:	$133,000.00
Retirement savings contributions ($17,856.28 per annum for 2019 and 2020):	$35,712.28
Other taxable benefits ($5,214.28 per annum for 2018 and 2019:	$10,428.56
Mitigation earnings:	($62,500.00)
Total:	$896,640.84.

CONCLUSION

[66] In summary, Mr. Brown's employment was constructively terminated by GE Transportation, resulting in his dismissal without reasonable notice or pay in lieu thereof. Mr. Brown failed to act reasonably in mitigation of his damages by not accepting

Wabtec's offer of continued employment. Had he done so, he would have avoided all of the damages he now claims, including the loss of the 2018 VIC bonus.

[67] Because Mr. Brown's employment was terminated involuntarily, under the terms of the Retention Bonus Agreement he is entitled to payment of a pro-rated bonus in the sum of $133,000 plus pre-judgment interest at the statutory rate.

[68] As the successful party in this litigation, Mr. Brown is entitled to costs. The parties may make further submissions on the subject of costs to me if they are unable to come to agreement on that issue.

_____ J.