KING'S BENCH FOR SASKATCHEWAN

Citation: **2024 SKKB 85**

Date: **2024 05 10**
File No.: QBG-SA-00890-2021
Judicial Centre: Saskatoon

BETWEEN:

RANDI MacDONALD

PLAINTIFF

- and -

SASKATOON MINOR BASKETBALL ASSOCIATION

DEFENDANT

Counsel:

Steven J.R. Seiferling	for the plaintiff
Trent N. Adamus and Joel G. Seaman	for the defendant

JUDGMENT
May 10, 2024

R.S. SMITH J.

[1] On March 9, 2021, the plaintiff, Randi MacDonald [Randi] was advised by the Vice-President of Saskatoon Minor Basketball Association [SMBA], that the negative effects of COVID-19 restrictions forced SMBA's hand to engage in a reorganization. Her term as Executive Director of SMBA would be at an end. After some discussion, it was agreed that Randi would work as Executive Director for the SMBA to May 31, 2021.

[2] Shortly thereafter, Randi contacted counsel who advised the SMBA that Randi was entitled to reasonable notice in the face of her termination as Executive

Director, said notice being 24 months. The reply of SMBA was that Randi was not an employee but rather an independent contractor. Suffice it to say, that set the table for litigation.

Background

[3] Randi advances the position in her claim that she began working as an Administrative Assistant/Executive Assistant for SMBA in 1998. SMBA replies that its records are not in pristine condition, but to the best of its knowledge, her tenure as Administrative Assistant/Executive Assistant would have begun in late 2004/early 2005.

[4] Exhibit A to the affidavit of Greg Jockims (the current President of SMBA) is a letter dated May 25, 2004 where Randi applies for the position of Administrative Assistant. Also attached is her resume which is prepared sometime after 2003. Neither the covering letter or the resume makes any reference to employment prior to 2004 with SMBA. In short, I accept the position of SMBA and conclude Randi's tenure with SMBA commenced sometime in late 2004 or early 2005.

[5] During her tenure with SMBA, Randi held four job titles, Administrative Assistant, Executive Assistant, Programs and Communications Coordinator and Executive Director. In the affidavit of Greg Jockims, sworn September 8, 2023, at paragraph 20, it outlines, in part:

> 20. At all material times, Randi and the SMBA would enter into fixed term contracts for one year. Contract terms were largely negotiated by email with parties eventually agreeing to terms in each year Randi provided services to the SMBA. In most years, contracts were not executed by the parties.
> …

[6] The only difficulty I have with Mr. Jockims' averment is that it is not correct to say "the contract terms were largely negotiated". The contract prepared by

SMBA was essentially a diktat communicated by SMBA to Randi. Presumably she had a right to object to the terms, but she did not.

[7] Both parties concede that at one point one contract was, in fact, signed. However, no copy of that made it to the court file. But, more or less, every year a contract was sent by SMBA to Randi and remained unsigned. Notwithstanding that the contract was unsigned, it is clear that the parties operated on the basis that the contract sent by SMBA governed the relations between them.

[8] The first contract was entitled Contractual Agreement – Administrative Assistant. The germane provisions were:

> 1. **Responsibilities of Administrative Assistant:** The Administrative Assistant shall devote his/her full ability and attention to the business of Saskatoon Minor Basketball on a regular, "best efforts," and professional basis and at all times such efforts shall be under the direction of the Executive Director. Responsibilities of the Administrative Assistant include:
>
> - Administrative and clerical duties related to the operations, programs and activities of the regular season, spring league, etc.
> - Organize and administer Century Classic Inter-provincial Tournament
> - Recommend new administrative procedures for consideration
> - Promote positive public relations (with community coordinators, media, BSI, etc) as required.
>
> 2. **Non Competition:** During the term of this Agreement, the Executive Director shall not, directly or indirectly, engage in any business, commercial or professional activity which the Executive Director of SMBA deems to interfere with the business of SMBA, or with the performance of duties by the Administrative Assistant hereunder.
>
> …
>
> 4. **Period of Contract:** SMBA contracts with the

> Administrative Assistant on an annual basis, effective September 1, 2006 to August 31, 2008. The contract shall be renewed within 30 days prior to July 31 of each year.
>
> …
>
> 9. **Termination of Contract:** The Board of Directors may terminate the Administrative Assistant's contract at any time, with or without cause.
>
> a. **Termination without Cause by SMBA:** If the Administrative Assistant's contract is terminated without cause by SMBA prior to the expiration of this Agreement, the Administrative Assistant shall be paid a one week's average earnings severance payment in lieu of any other compensation otherwise payable under this Agreement.

[9] The next contract reflects a change of title and an expansion of duties. It is styled Contractual Agreement – Executive Assistant. The germane provisions are:

> 1. **Responsibilities of Executive Assistant:** The Executive Assistant shall devote his/her full ability and attention to the business of Saskatoon Minor Basketball on a regular, "best efforts," and professional basis and at all times such efforts shall be under the direction of the Executive Director. Responsibilities of the Administrative Assistant include:
>
> - Collect payments from dunkaroos, winter league, spring league and summer camp, from all sources and including late fees
> - Record and reconcile payments and make deposits
> - Reconcile all payments with the website, ensure right information is given and contact those that need more info on the registration page.
> - Field phone calls and email regarding all programing, dunkaroos, winter league, spring league and summer camp
> - Attend the City Wide Registration and help with registrations in communities.
> - Ensure all payments have gone through and been received via PayPal.
> - Record all deposits in our Google account for our records and do all deposits two to four times a month depending on the amount of payments

- Issue refunds all refunds
- Deposit all fees
- Take all financials to Forbes including bills and month end files
- Monitor our PayPal and bank account
- Reconcile each payment, record each payment and deposit each payment.
- Attend and take minutes at each meeting and email those minutes out to the executive
- Attend and record minutes at the Annual meeting
- Contact players/coaches about missing info on the website
- Web site updates, each week, with all pertinent information (to be figured out at some point)

[10] The Non-Competition was unchanged from the previous contract as well as the provisions dealing with Termination of Contract. The period of the contract read:

> 4. **Period of Contract:** September 1, 2012 to August 31, 2013. The contract shall be renewed within 30 days prior to July 31, 2012 [*sic*].

[11] The next contract covered the period September 1, 2013 to August 31, 2014. It was identical to the previous contract.

[12] For the year 2014 to August 2015, Randi was promoted to a new position. The contract signed was entitled Contractual Agreement – Programs and Communications Coordinator. The germane provisions were:

> 1. **Responsibilities of Programs and Communications Coordinator:** The Programs and Communications Coordinator shall devote his/her full ability and attention to the business of SMBA on a regular, "best efforts," and professional basis and at all times such efforts shall be under the direction of the Board of Directors. Responsibilities of the Programs and Communications Coordinator include:
>
> - Maintain positive working relationships with internal and external stakeholders.
> - Participate in Board planning process and carry out actionable items and goals as a result of business planning.

- Act as liaison between customers and Board, along with community associations through registration as well as regular SMBA programs.
- Responsible for collection, payment, and reconciliation of all SMBA programs and expenses.
- Accountable for operating within budgeted estimates from the Board.
- Carry out regular website updates.
- Maintain accurate minutes and records of SMBA meetings, including the Annual General Meeting, and distribute minutes to all Board members on a regular basis.

2. **Non Competition:** During the term of this Agreement, the Programs and Communications Coordinator shall not, directly or indirectly, engage in any business, commercial or professional activity which the **Board of Directors** of SMBA deems to interfere with the business of SMBA, or with the performance of duties by the Programs and Communications Coordinator hereunder. [Emphasis in bold indicates change from previous clause.]

[13] The termination of the contract was in all material terms the same as the previous contract. The term ran from September 1, 2014 to August 31, 2015.

[14] The contract for the period, September 1, 2015 to August 31, 2016 was the same as the year before other than the addition of the word "If" in the clause dealing with the period of contract. That clause reads:

4. **Period of Contract:** September 1, 2015 to August 31, 2016. **If** the contract is up for renewal at the end of the contract period, it shall be renewed within 30 days prior to July 31, 2016.

[15] The contract for the period, September 1, 2016 to August 31, 2017 was the same as the previous year, including the addition of the word "If".

[16] Commencing September 1, 2017, Randi received a promotion to Executive Director. The contract read Contractual Agreement – Executive Director.

The germane terms are:

1. **Responsibilities of Executive Director:** The Executive Director shall devote his/her full ability and attention to the business of SMBA on a regular, "best efforts," and professional basis and at all times such efforts shall be under the direction of the Board of Directors. Responsibilities of the Executive Director include:
   - Maintain positive working relationships with internal and external stakeholders.
   - Participate in Board planning process and carry out actionable items and goals as a result of business planning.
   - Act as liaison between customers and Board, along with community associations through registration as well as regular SMBA programs.
   - Responsible for collection, payment, and reconciliation of all SMBA programs and expenses.
   - Accountable for operating within budgeted estimates from the Board.
   - Carry out regular website updates.
   - Maintain accurate minutes and records of SMBA meetings, including the Annual General Meeting, and distribute minutes to all Board members on a regular basis.
   - All other matters and duties directed by the Board of Directors not stated in the above responsibilities.
2. **Non Competition:** During the term of this Agreement, the Executive Director shall not, directly or indirectly, engage in any business, commercial or professional activity which the Board of Directors of SMBA deems to interfere with the business of SMBA, or with the performance of duties by the Executive Director hereunder.
3. **Nondisclosure of Confidential Information:** The Executive Director agrees that he/she will not, at any time during or after the termination of his/her services under this Agreement, use for his/her own benefits, either directly or indirectly, or disclose or communicate in any manner to any individual, corporation, or other entity, other than SMBA, any confidential information acquired by him/her during his/her services, regarding any actual or intended business activity, service, plan or strategy of SMBA.
4. **Period of Contract:** September 1, 2017 to August 31, 2018. If the contract is up for renewal at the end of the contract

> period, it shall be renewed within 30 days prior to July 31, 2018.

[17] There was a change in the clause dealing with termination, namely, Randi was to receive a lump sum of one-and-a-half months' payment in the event of termination without cause. The provision provided:

> 7. **Termination of Contract:** The Board of Directors may terminate the Executive Director's contract at any time, with or without cause. If the Executive Director's contract is terminated without cause by SMBA prior to the expiration of this Agreement, the Executive Director shall be given notice of termination or paid one-and-a-half month's lump sum severance payment ($5,550) in lieu of any other compensation otherwise payable under this Agreement.

[18] The contract for the period commencing January 1, 2019 reflects a change in the formatting of the agreement. It looks as if it may have been taken to a law office. The germane portions are:

> **1. APPOINTMENT**
>
> 1.1 The parties hereby agree the Executive Director, during the term of this Agreement, shall be contracted to act as the Executive Director of the SMBA with such duties, responsibilities and authority as may from time to time be assigned to her with the express or implied authorization and approval of the SMBA, including the duties, responsibilities and authority provided for in this Agreement.
>
> 1.2 It is agreed that the Executive Director shall report directly to the SMBA though [*sic*] its President and the SMBA's Board of Directors (the "Board").
>
> …
>
> **3. OBLIGATIONS OF THE EXECUTIVE DIRECTOR**
>
> 3.1 The Executive Director agrees to advise and assist the SMBA, the Board, and the Board's sub-committees with respect to any and all matters affecting the general

administration of the SMBA to ensure optimum utilization of its personnel, finances and resources.

3.2 The Executive Director agrees that at all times during the term of this Agreement, she shall adhere to all the rules and regulations respecting conduct which may be established by the SMBA and, without limiting the generality of the foregoing, the Executive Director agrees not to engage in any employment, business, or professional undertaking without the prior approval of the SMBA. For further clarity, the Executive Director agrees, during the term of this Agreement, to not directly or indirectly engage in any business, commercial, or professional activity which the Board deems to interfere with the business of the SMBA or with the Executive Director's obligations under this Agreement.

3.3 Additional responsibilities, duties, and obligations of the Executive Director under this Agreement include but are not limited to: [A long list of tasks follows].

4. TERMINATION

…

4.3 The SMBA may terminate the Executive Director's contract pursuant to this Agreement at its sole discretion for any reason without cause, upon providing to the Executive Director one and one-half (1.5 or 1 and 1/2) months' notice or upon payment of an equivalent amount for one and one-half months' of the monthly payments made to the Executive Director under clause 2.1 of this Agreement.

For further clarity, the above termination pay in lieu of notice will be calculated on the basis of the Executive Director's annual compensation payable under clause 2.1 of this Agreement as of the date of notice of termination. Reimbursement, mileage, and other forms of additional compensation will not be considered part of the Executive Director's annual compensation.

…

[19] The provision dealing with term read as follows:

> 7. **TERM**
>
> 7.1 Subject to clause 4, this Agreement shall be in effect from January 1, 2019 to December 31, 2019.

[20] When the Board of Directors of the SMBA met with Randi in March 2021 and advised her that her position of Executive Director was being eliminated, she was presented with two options. Firstly, she could accept a short-term position for three months or apply for the new restructured position. The restructured position nearly doubled her previous Executive Director's responsibility and included a considerable bookkeeping element. Randi had no bookkeeping skills and, as a result, that option was unavailable.

[21] The next day Randi sought some clarification from the Board of Directors. It would appear that overnight someone on the Board of Directors read the employment contract and she was then advised that she would be paid, if she wished, a period of six weeks' severance pay but no more. Randi then opted to work for a three-month term, ending May 31, 2021.

[22] SMBA prepared this last agreement and emailed it to Randi. Like the other ones, it was not signed. To the best of the parties' belief, the one contract that was signed was during Randi's tenure as Programs and Communications Coordinator.

[23] At all material times, Randi worked from her home and dictated how she did her job.

[24] In June 2021, Randi contacted her current counsel, Steven Seiferling, who wrote a demand letter to SMBA. In its reply, SMBA offered another alternative to Randi. The relevant portions of the letter, dated June 18, 2021, reads:

> The SMBA, being a non-profit organization, will not consider paying the amount demanded in your June 9, 2021 letter. However, in an effort to resolve matters, on a WITH prejudice

> basis, the SMBA is offering to extend Ms. MacDonald's most recent contract for a 9-month period commencing July 1, 2021 and expiring on April 1, 2022.
>
> This offer is conditional upon Ms. MacDonald signing a full and final release from the SMBA in relation to any and all claims Ms. MacDonald has against the SMBA and will specifically acknowledge that Ms. MacDonald is not entitled to any further severance or other payment from the SMBA (other than payments contemplated to be made in the 9 month contract).

[25] In essence, the SMBA offered Randi a paid working notice of nine months. The offer was not accepted.

[26] At paragraph 86 of his brief, Randi's counsel outlined what he seeks on her behalf, namely:

> **VI RELIEF REQUESTED**
>
> 86. The Plaintiff hereby requests that summary judgment be granted in her favour.
>
> 87. The Plaintiff further requests this Honourable Court award her a 24-month notice period which, based on the Plaintiff's earnings, amounts to a total of $96,960.00, plus interest.
>
> 88. On account of the Defendant's breach of their duty of good faith and fair dealing, the Plaintiff requests a further award of $50,000.00 in moral and aggravated damages.
>
> 89. Finally, the Plaintiff requests an award for solicitor-client costs, enhanced costs, or any award for costs which this Honourable Court deems appropriate.

[27] SMBA takes the position that Randi was not an employee but rather an independent contractor. More to the point, an independent contractor whose contract for services had expired. Thus, there is no reasonable notice period for which they are liable.

[28] Similarly, SMBA takes the position that Randi's claim for $50,000 in moral or aggravated damages is not grounded in law or fact. It asks that Randi's claim

be dismissed.

Summary Judgment

[29] Randi asks that the Court deal with her claim on the basis of a summary judgment. SMBA resists.

[30] Rules 7-5(1) and (2) of *The King's Bench Rules* govern applications for granting summary judgment. Those Rules provide:

> **Disposition of application**
> **7-5**(1) The Court may grant summary judgment if:
>
> (a) the Court is satisfied that there is no genuine issue requiring a trial with respect to a claim or defence; or
>
> (b) the parties agree to have all or part of the claim determined by summary judgment and the Court is satisfied that it is appropriate to grant summary judgment.
>
> (2) In determining pursuant to clause (1)(a) whether there is a genuine issue requiring a trial, the Court:
>
> (a) shall consider the evidence submitted by the parties; and
>
> (b) may exercise any of the following powers for the purpose, unless it is in the interest of justice for those powers to be exercised only at a trial:
>
> (i) weighing the evidence;
>
> (ii) evaluating the credibility of a deponent;
>
> (iii) drawing any reasonable inference from the evidence.
>
> …

[31] In *Tchozewski v Lamontagne*, 2014 SKQB 71 at para 30, [2014] 7 WWR 397, Barrington-Foote J. (as he then was), summarized the process for applying

summary judgment rules:

> [30] The central question posed on a Rule 7-2 application, accordingly, is whether summary judgment will achieve what Karakatsanis J. calls (at para. 28) the "principal goal", and Popescul C.J.Q.B calls "the overarching consideration" (at para. 49, *Pervez* [2013 SKQB 377, [2013] 12 WWR 794]): that is, a fair process that results in a just adjudication of the dispute before the court. The answer to this question calls for an analysis of the affidavit and other evidence presented and the issues raised by the application, in the context of the litigation as a whole. In *Hyrniak* [2014 SCC 7, [2014] 1 SCR 87] Karakatsanis J. breaks that analysis down into discrete steps and key principles — a "roadmap" — based on the various elements of the summary judgment rules. In brief, the key elements of that roadmap, in the context of a Rule 72 application, are as follows:
>
> 1. The court must first decide if there appears to be a genuine issue requiring a trial within the meaning of Rule 7-5(1)(a)), based solely on the evidence before the court, and without using the powers provided by Rule 7-5(2)(b) to weigh the evidence, evaluate credibility and draw inferences. (*Hryniak*, para. 66)
>
> 2. There will be no genuine issue requiring a trial if the judge is able to reach a fair and just determination on the merits based on the affidavit and other evidence. That will be so if the summary judgment process:
>
> (a) allows the judge to make the necessary findings of fact;
>
> (b) allows the judge to apply the law to the facts; and
>
> (c) is a proportionate, more expeditious and less expensive means to achieve a just result than going to trial. (*Hryniak*, para. 49)
>
> …

[32] I am confident that the material before me allows me to meet the three goals, as articulated above, and, therefore, I conclude a summary judgment analysis is

appropriate.

Independent Contractor?

[33] Randi invoiced SMBA every month for her services, a procedure consistent with an independent contractor. She claimed GST and to the best of SMBA's knowledge, filed income tax as an independent contractor.

[34] Randi advises she provided invoices to the SMBA every month as that is what the original Executive Director, Mr. Ian Mirtle, told her what to do every month, and that is how she would get paid. I accept the fact that Randi would not have gone through an independent analysis, concluding that she was in business acting as an independent contractor *vis-à-vis* the SMBA.

[35] More to the point, the protocol as between Randi and SMBA is not determinative of the issue. Randi's counsel addresses it, starting at paragraph 41 of his brief:

> 41. In the *Connor Homes* case [2013 FCA 85, 358 DLR (4th) 363], the employer had appealed a tax court ruling that three of their workers were employees. The workers had signed contracts drafted by the appellant company which, unlike in this case, clearly stated throughout that the workers were independent contractors. The workers had also reported their income as independent contractors and had submitted monthly invoices for their services.
>
> 42. Mainville JA upheld the original ruling that the workers were employees, citing that the appropriate analysis, in accordance with *Wiebe Door* [[1986] 3 FC 553] and *Sagaz* [2001 SCC 59, [2001] 2 SCR 983], demonstrated that the contractual intent did not reflect the reality of the relationship; despite the workers reporting their income as independent contractors and submitting invoices, the objective reality of their relationship to the principal was as employees:
>
> > … the concerned individuals were not providing their

> services to the appellants as their own business on their own account. Rather, as a result of the significant degree of control the appellants exerted over the three individuals in the execution of their tasks, the limits on their ability to profit, and the absence of any significant financial risks or investments, in essence, these individuals were acting as employees of the appellants.
>
> 43. As has been thoroughly discussed, the Defendant exercised significant control over Ms. MacDonald, she had no ability to profit, and had no significant financial risks nor investments in the relationship: a *fortiori*, she was an employee.

[36] Mr. Seiferling also notes respecting this issue, commencing at paragraph 22 of his brief:

> 22. The court in *McKee* [2009 ONCA 916, 315 DLR (4th) 129] also quoted the Supreme Court of Canada in *Sagaz* on the broad discretion of the trier of fact when characterizing a work relationship: "there is no one conclusive test which can be universally applied", and "what must always occur is a search for the total relationship of the parties." Pursuant to this search for the relationship, the Ontario Court of Appeal noted:
>
> > [39] In *Belton* [(2004), 72 OR (3d) 81], Juriansz J.A., writing on behalf of the court, upheld the use of the following five principles, modelled on the *Sagaz* factors, at paras. 11, 15:
> >
> > > 1. Whether or not the agent was limited exclusively to the service of the principal;
> > >
> > > 2. Whether or not the agent is subject to the control of the principal, not only as to the product sold, but also as to when, where and how it is sold;
> > >
> > > 3. Whether or not the agent has an investment or interest in what are characterized as the "tools" relating to his service;
> > >
> > > 4. Whether or not the agent has undertaken any risk in the business sense or, alternatively, has any expectation of profit associated with the delivery of his service as distinct from a fixed commission;

> 5. Whether or not the activity of the agent is part of the business organization of the principal for which he works. In other words, whose business is it?

23. In *1392644 Ontario Inc. (Connor Homes) v Canada (National Revenue*), the Federal Court of Appeal adopted the elaboration on the *Sagaz* test as raised in *Royal Winnipeg Ballet v. Minister of National Revenue* [2006 FCA 87, [2007] 1 FCR 35]. The Court declared a two-step process: first seek the subjective intent of the parties to the relationship by determining if there was a mutual understanding about its legal nature. In looking for possible mutual understanding, courts should look at either the written contract or the actual behaviour of each party. Second, the courts must determine whether an objective reality supports the subjective intent of the parties.

24. Despite the elaboration of the Federal Court of Appeal, the guidance of the Supreme Court of Canada in *Sagaz* remains the ultimate question:

> The central question is whether the person who has been engaged to perform the services is performing them as a person in business on [their] own account.

25. On the undisputed facts, the Plaintiff was clearly an employee and not performing services as a person in business on her own account.

Then starting at paragraph 28, Mr. Seiferling posits:

> ***The Plaintiff was limited exclusively to the service of the Defendant***
>
> 28. Notably, the Defendant unilaterally drafted each of the contracts offered to the Plaintiff. The consistent wording among each of their contracts clearly and thoroughly restrained the Plaintiff from pursuing economic activity outside of her service to the Defendant. Through their non-compete clauses, SMBA granted itself absolute discretion to limit and control the Plaintiff's exercise of her right to engage in any other business or employment. The specific language of her original contract stated that the Plaintiff, "shall not, directly or indirectly, engage in any business,

commercial or professional activity which the Executive Director of SMBA deems to interfere with the business of SMBA, or with the performance of duties by the Administrative Assistant hereunder. The Defendant also extended its control over the Plaintiff to even her performance of "related duties," which were not limited to any pre-determined time commitment or hours of work.

29. Consequently, even when she held a lower-placed position within the organization, Ms. MacDonald was limited to serving the Defendant at their absolute discretion. She was expected not to engage in any adjacent work with anyone else, or on her own, including the plethora of undefined and unscheduled duties the Defendant had assigned.

30. In practice, the Defendant required the Plaintiff's services year-round during regular weekly working hours, and to even be available to work on evenings and weekends. The schedule the Plaintiff actually kept confirms an employee-employer relationship with the Defendant.

31. When the Defendant offered the Plaintiff the Executive Director role she held at the time of her termination, they expanded their contractual non-compete provision to further impair her ability to pursue any other professional endeavours:

> 3.2 The Executive Director agrees that at all times during the term of this Agreement, she shall adhere to all the rules and regulations respecting conduct which may be established by the SMBA and, without limiting the generality of the foregoing, the Executive Director agrees not to engage in any employment, business, or professional undertaking without the prior approval of the SMBA. For further clarity, the Executive Director agrees, during the term of this Agreement, to not directly or indirectly engage in any business, commercial, or professional activity which the Board deems to interfere with the business of the SMBA or with the Executive Director's obligations under this Agreement.
>
> [emphasis added]

32. The absolute discretionary control the Defendant retained in their new contract over the Plaintiff's commercial activities, and the approval requirement they added, directly

> contradicts their assertion of the Plaintiff's independence in this relationship. She did not control her relationship with the organization but was subordinate and vulnerable to its control. Under the terms of the Plaintiff's contract with the Defendant, she could not independently seek out and perform any service for another employer, or for her own business interests, without the Defendant's approval. The Plaintiff, in fact, devoted all her time and attention to the Defendant's organization and only worked for them.
>
> ***The Defendant controlled both the required work and the manner of the Plaintiff's performance.***
>
> 33. As detailed under section 3 of the employment contract, titled "Obligations of the Executive Director", the Defendant listed three pages of detailed responsibilities, duties, and obligations that are assigned, without limitation, to the scope of her position, including additional duties that the Board may assign. Both the scope of her contractual duties and the Defendant's power to assign new ones at-will strongly indicate a traditional managerial form of employment fitting to the title of her role. Any freedom the Plaintiff possessed in the manner of her performance was typical of the managerial character of her position as Executive Director. Especially paired with the exclusivity required by the contract, the Defendant exerted considerable control over the manner of the Plaintiff's performance.

[37] For a trial judge, in reviewing such a relationship, it is necessary to consider the entire relationship, from above the forest. With all respect to SMBA, it reaches too far in trying to characterize the numerous unsigned contracts as a reflection of the fact that Randi was an independent contractor. It is interesting to note that none of the contracts use the term "independent contractor".

[38] I endorse and adopt the analysis of Randi's counsel as detailed above. I determine there is no reasonable conclusion other than for the entirety of the 16 or 17-year relationship, Randi was an employee of the SMBA. Moreover, even if I am incorrect in concluding that Randi is an employee, then I would posit that if she is not an employee she is a dependent contractor and thus entitled to reasonable notice for

termination. This status was reviewed in *McKee v Reid's Heritage Homes Ltd.,* 2009 ONCA 916, 315 DLR (4th) 129.

[39] In that case, the Ontario Court of Appeal noted, commencing at para. 24:

> [24] In 1936, this court recognized the existence of an "intermediate" position "where the relationship of master and servant does not exist but where an agreement to terminate the arrangement upon reasonable notice may be implied": *Carter v. Bell & Sons (Canada) Ltd.*, [1936] O.R. 290, at p. 297. *Carter* emphasized the permanency of the working relationship between the parties as a determinant in delineating this intermediate category: see *Carter* at pp. 297-98.
>
> [25] A number of courts in several Canadian jurisdictions have since found such intermediate workers in a number of reasonable notice cases, particularly where the worker is economically dependent on the defendant, generally due to complete exclusivity or a high-level of exclusivity in their work: see, e.g., *Marbry Distributors Ltd. v. Avrecan International Inc.* (1999), 171 D.L.R. (4th) 436 (B.C.C.A.), at paras. 35-38, 46; *JKC Enterprises Ltd. v. Woolworth Canada Inc.* (1986), 2001 ABQB 791), 300 A.R. 1 (Q.B.); *Erb v. Expert Delivery Ltd.* (1995), 167 N.B.R. (2d) 113 (Q.B.), at paras. 6-14.
>
> [26] This court impliedly recognized the existence of an intermediate category for work relationships involving a distributorship agreement in *Paper Sales Corporation Ltd. v. Miller Bros. Co. (1962) Ltd.* (1975), 7 O.R. (2d) 460. There, the court upheld, orally, Stark J.'s decision below, which held that a non-employment relationship whereby the plaintiff was "the exclusive distributor of the defendant's products in [two provinces]" was "closer to a contract of employment than to a commission agency" and thereby required reasonable notice for termination: *Paper Sales* at pp. 463-64.
>
> [27] *Mancino v. Nelson Aggregate Co.*, [1994] O.J. No. 1559 (C.J. (Gen. Div.)), at paras. 9-13, applied the reasoning in *Paper Sales* to self-employed truckers, requiring reasonable notice where the work relationship was permanent and exclusive in nature, such that the plaintiff was in a "position of economic dependence". *Mancino* thereby exemplifies the applicability, in Ontario, of the intermediate category analysis beyond merely sales or distributorship relationships.

> [28] Recently, this court again impliedly recognized the intermediate category where the case required the court to determine the status of a commissioned salesperson. In *Braiden v. La-Z-Boy Canada Ltd.* (2008), 2008 ONCA 464, 294 D.L.R. (4th) 172, at para. 24, Gillese J.A. noted the trial judge's suggestion that a "third category of relationship has emerged, between [the employer-employee and independent contractor relationship categories], in which reasonable notice of termination must also be given", while upholding his conclusion that the plaintiff, Braiden, was nevertheless an employee.
>
> [29] Finally, recognizing an intermediate category based on economic dependency accords with the statutorily provided category of "dependent contractor" in Ontario, which the *Labour Relations Act*, S.O. 1995, c. 1, Sch. A, s. 1(1), defines as:
>
> > [A] person, whether or not employed under a contract of employment, and whether or not furnishing tools, vehicles, equipment, machinery, material, or any other thing owned by the dependent contractor, who performs work or services for another person for compensation or reward on such terms and conditions that the dependent contractor is in a position of economic dependence upon, and under an obligation to perform duties for, that person more closely resembling the relationship of an employee than that of an independent contractor.
>
> [30] I conclude that an intermediate category exists, which consists, at least, of those non-employment work relationships that exhibit a certain minimum economic dependency, which may be demonstrated by complete or near-complete exclusivity. Workers in this category are known as "dependent contractors" and they are owed reasonable notice upon termination.

What is a reasonable period of notice?

[40] There is no question that a period of reasonable notice is required in this fact scenario. As always, the debate is in the details.

[41] Case law provides a plethora of results respecting reasonable notice for someone in Randi's situation. Both counsel did a thorough review and came to different

conclusions. Mr. Seiferling posits that 24 months' notice is the most appropriate.

[42] Counsel for SMBA submits that in all the circumstances nine months' reasonable notice is appropriate. Counsel for SMBA also argues that the three months, from March 1, 2021 to May 31, 2021, should be treated as working notice as it was agreed to after Randi had been advised the position was coming to an end, thus leaving an obligation of six months owing by SMBA.

[43] I recently had occasion to do some research respecting reasonable notice in the case of *Ketch v Meadow Lake Mechanical Pulp Ltd.*, 2023 SKKB 241. I determined a shift supervisor with 24 years' experience was entitled to reasonable notice. The fruit of my research is laid out at para. 78:

Case Name	Age	Years of Service	Position	Reasonable Notice (in Months)
Pohl v Hudson's Bay Company, 2022 ONSC 5598, 83 CCEL (4th) 87	53	28	Senior Supervisor	24
Keenan v Canac Kitchens Ltd., 2015 ONSC 1055, 2015 CLLC 210-025	63 & 61	25 & 32	Supervisor	26
Miller v ICO Canada Inc., 2005 ABQB 226, [2005] 9 WWR 386	47	30	Special Projects Supervisor	22
Sandy v Beausoleil First Nation (2003), 24 CCEL (3d) 304 (Ont Sup Ct)	46	30	Property Manager/Executive Assistant	24
Kuny v Owens-Corning Canada Inc., 1999 ABQB 540, 246 AR 168	60	Predecessor company for 13; current company for 20	Shift Supervisor	22

[44] There is no specific evidence as to Randi's age, but I conclude that she is somewhere between 45 and 49 years of age.

[45] Having reviewed the authorities proffered by both counsel and my own previous research, I conclude that reasonable notice in these circumstances is 22

months.

[46] I agree with counsel for SMBA that the period March 1, 2021 to May 31, 2021 should be treated as working notice even though neither Randi or the representatives of SMBA may have characterized it as such at the time it was agreed to. Therefore, SMBA is liable for 19 months' salary to Randi.

Applicability of Termination Clause

[47] As previously outlined, each of the contracts emailed by SMBA to Randi contained a termination clause originally suggesting she was entitled to one week for every year and later converted to a lump sum of six weeks' termination if she was terminated without cause.

[48] Randi's counsel makes the case that such a clause is invalid and unenforceable. Starting at paragraph 59 of his brief he argues:

> ***The termination clauses in the employment contracts were invalid and unenforceable, and the Plaintiff is owed common law reasonable notice***
>
> 59. It is trite law that every employee is presumed to enjoy reasonable notice of termination unless their employment contract clearly and unambiguously displaces or rebuts that presumption. Having addressed the purported annual period of her contracts and determined that the parties did not unambiguously contract for a series of terms but one of indefinite service, we must examine the termination clause of the Plaintiff's contract.
>
> 60. Where the termination clause of an employment agreement attempts to contract out of the statutory minimum notice entitlements, that clause is deemed invalid and unenforceable. In the result, the employee retains their underlying common law right to reasonable notice. The Supreme Court of Canada in *Machtinger v HOJ Industries Ltd.* explains these principles:
>
> … [Paragraphs 33-37 of *Machtinger* that were quoted in the

> plaintiff's brief have not been included in this judgment]
>
> **VI. Conclusion and Disposition:**
>
> **[37]** I would conclude that both the plain meaning of ss. 3, 4, and 6, and a consideration of the objects of the Act lead to the same result: where an employment contract fails to comply with the minimum notice periods set out in the Act, the employee can only be dismissed without cause if he or she is given reasonable notice of termination.
>
> [Emphasis added]

[49] Then commencing at paragraph 62, counsel notes:

> 62. Under the *Saskatchewan Employment Act* [SS 2013, c S-15.1], an employee of over 10 years' service is entitled to not less than eight (8) weeks' notice of termination. At the time of her termination in March of 2021, the Plaintiff had been continuously employed by the Defendant organization for 23 years. The Defendant's termination provision of only 1.5 months (approximately 6 weeks) clearly violated the minimum notice requirement under the Act with respect to the Plaintiff's tenure, and therefore the principle in *Machtinger* [[1992] 1 SCR 986] applies. The termination provision of the contract was invalid and unenforceable – the Plaintiff retained her presumed right to common law reasonable notice.
>
> 63. The termination provision must be struck in its entirety -- the court will not read down invalid clauses. In addition, the Defendant never even purported to rely on the contract language in this case, and therefore the contract language (even if it was valid, which is denied) is irrelevant.

[50] I agree with Mr. Seiferling's position. The clause purporting to limit reasonable notice to six weeks is unenforceable.

Mitigation

[51] The leading authority on the duty to mitigate continues to be *Red Deer College v Michaels*, [1976] 2 SCR 324 (cited in *Porcupine Opportunities Program Inc.*

v Cooper, 2020 SKCA 33 at para 11). Chief Justice Laskin (as he then was) explains the concept of the duty to mitigate as well as the burden of proof at pages 330-331:

> … The primary rule in breach of contract cases, that a wronged plaintiff is entitled to be put in as good a position as he would have been in if there had been proper performance by the defendant, is subject to the qualification that the defendant cannot be called upon to pay for avoidable losses which would result in an increase in the quantum of damages payable to the plaintiff. The reference in the case law to a "duty" to mitigate should be understood in this sense.
>
> In short, a wronged plaintiff is entitled to recover damages for the losses he has suffered but the extent of those losses may depend on whether he has taken reasonable steps to avoid their unreasonable accumulation. In *Payzu, Ltd. v. Saunders* [[1919] 2 KB 581], at p. 589, Scrutton L.J. explained the matter in this way:
>
> > Whether it be more correct to say that a plaintiff must minimize his damages, or to say that he can recover no more than he would have suffered if he had acted reasonably, because any further damages do not reasonably follow from the defendant's breach, the result is the same.
>
> In the ordinary course of litigation respecting wrongful dismissal, a plaintiff, in offering proof of damages, would lead evidence respecting the loss he claims to have suffered by reason of the dismissal. He may have obtained other employment at a lesser or greater remuneration than before and this fact would have a bearing on his damages. He may not have obtained other employment, and the question whether he has stood idly or unreasonably by, or has tried without success to obtain other employment would be part of the case on damages. If it is the defendant's position that the plaintiff could reasonably have avoided some part of the loss claimed, it is for the defendant to carry the burden of that issue, subject to the defendant being content to allow the matter to be disposed of on the trial judge's assessment of the plaintiff's evidence on avoidable consequences. …

[52] As Randi's counsel correctly states in his brief, SMBA has the onus of demonstrating whether Randi has failed to mitigate.

[53] In its brief, the SMBA states that Randi failed to mitigate her losses. SMBA states that they invited Randi to apply for the restructured Director of Operations position that was posted publicly on April 26, 2021. SMBA takes the position that since she did not apply for that position, that constitutes a failure to mitigate.

[54] Moreover, SMBA states that they offered Randi a new contract for the same position she held for a limited nine-month period at the same rate of renumeration commencing July 1, 2021 and ending on April 1, 2022. Again, SMBA takes the position that since she rejected this offer, that constitutes a failure to mitigate.

[55] Randi's counsel responds to these comments starting at paragraph 38 of his reply brief:

> 38. The Defendant claims that the Plaintiff's failure to apply for their offer, open to all applicants and without guarantee, of the newly restructured Director of Operations position demonstrates that she failed to mitigate. The record of Mr. Jockim's questioning shows that both the organization and the president himself understood that the new Director of Operations position incorporated the duties of both the former Executive Director position that Ms. MacDonald had occupied as well as the Program Coordinator position. The new Director of Operations position held twice the duties, responsibility, and work of Ms. MacDonald's old position. It simply could not be characterized as similar work for similar pay. In addition, the Plaintiff was expected to take on a second role, without additional compensation, if she applied for the new role. The Plaintiff was not in a position to take on a second role, especially one she did not have training for.
>
> 39. The Defendant asserts that the Plaintiff took employment with the Living Skies Basketball League ("Living Skies") for the 2022-2023 season. The Defendant cites the affidavit of Brad Smith which in turn swears the evidence of her employment came from a conversation with the co-founder of Living Skies. The Defendant's evidence, though in the form of an affidavit, is nonetheless hearsay. If the Defendant wished to submit an affidavit from an authorized agent of Living Skies to attest to Ms. MacDonald's employment with their organization, they should have done so.
>
> 40. In the alternative, the Defendant could simply have asked for Ms. MacDonald's records on mitigation, rather than including a hearsay affidavit of Mr. Smith.
>
> 41. Finally, the Defendant asserts that the Plaintiff failed to accept a new offer of employment starting on July 1, 2021, and for a term lasting until April 1, 2022. The Plaintiff replies that this belated offer of employment, after she had been fired in a manner evincing bad faith, could not be accepted. The Plaintiff argues

> that the guidance of the Supreme Court of Canada in *Evans* [2008 SCC 20, [2008] 1 SCR 661] applies and she was not required to accept such an offer where she would be working in an atmosphere of hostility, embarrassment or humiliation.

[56] I agree with Mr. Seiferling's position. SMBA has not met the requisite burden of proof to establish inadequate mitigation. In fact, other than the offers SMBA made, there is no evidence respecting mitigation. Accordingly, there will be no adjustment to the reasonable notice of 19 months.

Did SMBA breach its duty of good faith and fair dealing?

[57] As previously noted, Randi seeks $50,000 in damages for SMBA's breach of duty of good faith and fair dealing. She rests her claim on the manner in which she was terminated.

[58] In her brief, she makes the case, starting at paragraph 78:

> ***The Defendant, in the manner of terminating the Plaintiff, breached their duty of good faith and fair dealing, and thus owes the Plaintiff aggravated damages.***
>
> 78. The Supreme Court of Canada in the decision of *Keays v Honda Canada Inc.* [2008 SCC 39, [2008] 2 SCR 362] fleshed out the law regarding aggravated damages in the employment context. There, the Court said:
>
> > **[55]** Thus, in cases where parties have contemplated at the time of the contract that a breach in certain circumstances would cause the plaintiff mental distress, the plaintiff is entitled to recover (*Fidler* [[2006] 2 SCR 3, 2006 SCC 30], at para. 42; *Vorvis* [[1989] 1 SCR 1085], at p. 1102). This principle was reaffirmed in para. 54 of *Fidler*, where the Court recognized that the *Hadley* rule [(1854), 9 Ex. 341, 156 ER 145] explains the extended notice period in *Wallace* [[1997] 3 SCR 701]:
> >
> > > It follows that there is only one rule by which compensatory damages for breach of contract

> should be assessed: the rule in *Hadley v. Baxendale* [(1854), 9 Ex. 341, 156 ER 145]. The *Hadley* test unites all forms of contractual damages under a single principle. It explains why damages may be awarded where an object of the contract is to secure a psychological benefit, just as they may be awarded where an object of the contract is to secure a material one. It also explains why an extended period of notice may have been awarded upon wrongful dismissal in employment law: see *Wallace v. United Grain Growers Ltd.*, [1997] 3 S.C.R. 701. In all cases, these results are based on what was in the reasonable contemplation of the parties at the time of contract formation. [Emphasis deleted.]
>
> … [Paragraphs 56-58 of *Keays* that were quoted in the plaintiff's brief have not been included in this judgment]
>
> **[59]** To be perfectly clear, I will conclude this analysis of our jurisprudence by saying that 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. Moreover, in cases where damages are awarded, no extension of the notice period is to be used to determine the proper amount to be paid. The amount is to be fixed according to the same principles and in the same way as in all other cases dealing with moral damages. Thus, if the employee can prove that the manner of dismissal caused mental distress that was in the contemplation of the parties, those damages will be awarded not through an arbitrary extension of the notice period, but through an award that reflects the actual damages. 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).

79. Here, the Defendant employer was neither candid nor

> forthright and wholly insensitive in the manner of the Plaintiff's termination. By bringing her onto a public call, including many unknown participants, and having her decide her own method of termination, without foreshadowing the nature of the call, the Defendant blindsided and humiliated the Plaintiff.
>
> 80. Ms. MacDonald was unduly pressured to choose her own exit from the organization after committing 23 years of faithful service to the Defendant. She was told that she could only apply, without guarantee, for the new position that replaced her existing one. The public and unexpected presentation of her termination options was unduly insensitive, humiliating and callous.
>
> 81. Moreover, by not presenting her legislated severance entitlement as an option in that high-pressure phone call, the Defendant attempted to coercively deprive her of her statutory notice right. Finally, the Defendant's belated offer of severance, and only upon the Plaintiff's inquiry after the termination phone call, demonstrated the Defendant's lack of candidness and forthright dealing in the manner of her termination.
>
> 82. The Defendant's lack of warning for a publicly announced termination, and lack of candour and forthrightness in the manner of the Plaintiff's termination, all make out a breach of the Defendant's duty to the Plaintiff of good faith and fair dealing under their contract.

[59] It is no surprise that counsel for SMBA has a different take on this topic. It is addressed starting at paragraph 113 of its brief:

> 113. SMBA states that Randi MacDonald bears the onus of proving on a balance of probabilities that SMBA breached its duty of good faith. SMBA states that it is not liable for "normal distress and hurt feelings resulting from dismissal", as those harms are not compensable.
>
> 114. SMBA states that bad faith damages are compensatory in nature and must reflex actual damage. Randi MacDonald has not provided evidence in respect of a loss she has suffered directly related to SMBA's conduct.
>
> 115. Randi MacDonald's evidence is that the "phone call

terminating her role was humiliating, and that [she] found it to be incredibly demeaning to be terminated from a position [she] had held diligently and with positive reviews for so many years without the SMBA even considering the appropriate level of pay-in-lieu of notice for a long term employee.

116. SMBA respectfully states that by her own explanation, Randi MacDonald's feelings of distress were attributable to the fact that her employment had been terminated – not in SMBA's manner of dismissal. The evidence before the Court cannot support a finding that Randi MacDonald suffered more than "normal distress" in the course of the termination of her employment.

117. In her brief of law, Randi MacDonald states that she was unduly pressured to choose her own exit from the organization. There is no evidence before the Court that supports a claim that she was unduly pressured. Randi MacDonald's evidence is that she was informed that the "Executive Director position [was being eliminated] through a restructuring process with no guarantee of future employment. Randi MacDonald deposes that she was "provided with two options" to take a short-term contract, apply for a different position, and later to be paid out the 1.5 months pay in lieu of notice provided for her in her contract.

118. SMBA states that this is not evidence of undue pressure but of SMBA being candid and forthright with Randi MacDonald in the termination of her employment. On Randi MacDonald's own evidence she was (i) advised that her contract was terminated, (ii) advised of the explanation for the termination, (iii) advised of other opportunities within the organization that she may be interested in taking.

119. Randi MacDonald's claim for damages for bad faith in termination does not succeed because there is no evidence before the Court that SMBA attacked Randi MacDonald's reputation, misrepresented its reasons for her dismissal, or that it was a collateral attack intended to deprive her of some benefit.

[60] Like many businesses, the SMBA suffered because of COVID-19. It is a

not-for-profit organization that is always concerned about money. It has no Human Resources Department or any employee that would routinely deal with personnel issues. It is not used to dealing with employee problems. I expect its Board of Directors is, for the most part, comprised of volunteers.

[61] There is no question that the termination of Randi's contract could have been handled with more clerical exactitude. However, there is absolutely no evidence, or even suggestion, that the SMBA evidenced or manifested any animus *vis-à-vis* Randi. The sad fact is that it had to bring a long-term relationship to an end. Respectfully, I see no grounds on which to award damages for breach of duty of good faith and fair dealing.

Conclusion

[62] Accordingly, I conclude that the SMBA is liable to Randi for reasonable notice of 19 months. I leave it to the parties to calculate what the exact amount is and direct them to send a judgment, consented to as to form, to me for approval and issuance. Randi is at liberty to register the judgment anywhere she wishes to, however, no enforcement proceeding is to take place with respect to the judgment for 60 days from the date thereof.

[63] I award Randi costs in the amount of $3,000, to be added to the judgment.

_____J.
R.S. SMITH