SUPREME COURT OF NOVA SCOTIA
Citation: *Oakley v. Bounty Print Limited*, 2024 NSSC 224

Date: 20240809
Docket: 512744
Registry: Halifax

Between:

Michael Oakley

Plaintiff

v.

Bounty Print Limited, a Nova Scotia Limited Company &
Taylor Printing Group Inc., a New Brunswick Corporation,
collectively carrying on business as Rocket.Ink

Defendants

LIBRARY HEADING

Judge: The Honourable Chief Justice Deborah K. Smith

Heard: June 5, 6, 7, 10 and 17, 2024, in Halifax, Nova Scotia

Subject: Wrongful dismissal during the pandemic. Failure to mitigate.

Summary: The Plaintiff, who had worked for the Defendants, or their predecessors, for 41 years was one of a number of individuals who lost their job as a result of the pandemic. He was 67-years old at the time. Shortly after his employment ended he was offered a similar job by a third party earning a wage that was 81% of his previous salary. A few weeks after that he was offered his original job back. He turned down both opportunities.

Approximately five months after he lost his job, he attempted to access his pension. He was unable to do so as the Defendants had failed to issue a Statement of Termination. The Deputy

Superintendent of Pensions got involved and the matter was eventually resolved.

Issues: (1) What was the appropriate notice period in the circumstances?

(2) Did the Plaintiff fail to mitigate his damages?

(3) Did the Defendants breach their statutory and common law fiduciary duties to the Plaintiff as administrator of his pension?

(4) Is the Plaintiff entitled to aggravated and/or punitive damages?

Result: The appropriate notice period was 24 months (two years). The Plaintiff did not satisfy the court that there were exceptional circumstances that warranted a notice period in excess of 24 months.

The Plaintiff failed to mitigate his damages when he turned down both the third party offer and the offer to return to his original employment. Accordingly, his damages are limited to $3,302.76.

The facts of the case did not support an award of aggravated or punitive damages.

The Defendants breached their statutory and common law fiduciary duties as administrator of the Plaintiff's pension plan. The Plaintiff is entitled to be renumerated for the legal fees that he incurred in pursuing the matter with the Deputy Superintendent of Pensions. These fees are awarded as consequential damages.

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DECISION

Judge:	The Honourable Chief Justice Deborah K. Smith
Heard:	June 5, 6, 7, 10 and 17, 2024, in Halifax, Nova Scotia
Written Decision:	August 9, 2024
Counsel:	Sean Kelly and William Wojcik, for the Plaintiff Blair Mitchell, for the Defendants

By the Court:

[1] In March 2020, the world was struck by the COVID-19 pandemic. It was a life-altering event. Countless individuals died. Public health restrictions had a devastating impact on many businesses and employees lost their jobs. The Plaintiff in this action, Michael Oakley, was one of the unfortunate individuals who lost his job. After 41 years of working for the Defendants or their predecessors in the printing industry, Mr. Oakley and five fellow employees were terminated from their employment due to the financial consequences of the pandemic.

[2] A few months later, the Plaintiff was offered his job back. He declined to return. One of the major issues in this case is whether the Plaintiff failed to mitigate his damages by failing to return to his former employment or by failing to accept employment with an alternate employer that had similar work available at a lower wage.

Background facts as found by the Court

[3] Bounty Print Limited ("Bounty") was purchased by its present owners in December 2019. The owners of Bounty also own Taylor Printing Group Inc. ("Taylor"), a New Brunswick corporation. Both companies operated under the business name "Rocket". Bounty and Taylor acknowledge that they were common employers of the Plaintiff.

[4] In March 2020, a few months after Bounty was purchased, the global pandemic hit. The effects of the pandemic on the business were immediate and significant. Within the first 30 days of the crisis, Bounty's orders were down by 70 to 80 percent.

[5] The company pivoted in an attempt to keep its employees working. It immediately applied for a government workshare program and started manufacturing personal protective equipment. Through these efforts, Bounty managed to keep all its employees working. However, by the fall of 2021, it became evident that "layoffs" would be necessary for the business to survive. I use the term "layoff" gingerly, as the word has become something of a lightning rod in this very unfortunate litigation.

[6] The workshare program ended in September 2021. While it was possible to reapply for this program, there had to be a cooling off period before a second application could be submitted. Bounty was running out of cash. Its bank had put it into special accounts. That fall, the shareholders of the company met and concluded that they needed to lay off six of their employees. They considered the skill set of each employee and decided which ones would be laid off. The decision to lay off employees was finalized in December 2021 but was not executed until January 2022, so as to not ruin the employees' holidays.

[7] Michael Oakley was one of the six individuals selected to be laid off. In January 2022, he was working as a bindery specialist earning $22.22 per hour. His formal education is limited (grade nine) but he was a well-regarded and respected employee.

[8] In early January 2022, Joanne Williams (the Human Resources Manager for both Defendants) contacted Nicole Heelan, a lawyer who practiced employment law, to obtain legal advice in relation to the proposed layoffs. In an email to Ms. Heelan dated January 4, 2022, Ms. Williams stated:

> ……..
>
> Because of loss of work due to Covid, we are needing to lay off 6 people effective January 17. What is our responsibility around that? 5 of the 6 are 10+ year employees. The other is 1 year. There is no immediate sense of bringing them back.
>
> ……..

[9] Ms. Heelan replied asking for additional information. In a further email sent on the same date, Ms. Williams stated:

> ……..
>
> All employees are in NS. They are all still working and have not been told anything at this point regarding layoff. Our business took a big hit with Covid in general and is not recovering as hoped – no doubt due to ongoing Covid (Omicron). We were part of the federal work sharing program but that ended in September. We are reapplying currently but even with that, we don't have enough work for everyone even at reduced hours.

[10] Ms. Heelan advised that in Nova Scotia, an indefinite layoff constitutes a termination without cause. In an email sent to Ms. Williams on January 5, 2022, Ms. Heelan wrote:

> ……

> Given that your business is terminating the employment of these six individuals for economic reasons the termination will be on a 'without cause' basis citing loss of business/economic hardship as the reason. Given that it is still 'without cause', however, you will be on the hook for, at least, the statutory notice periods. For your employee with one year of service they will be owed one week notice or pay in lieu. The employees with over ten years of service are each owed eight weeks' notice or pay in lieu.
>
> We are happy to prepare these letters of termination on your instruction. You may want to consider enhancing the notice period so that you can ask them to sign a release.
>
> ……..

[11] Ms. Williams advised Ms. Heelan that the Defendants would not be paying over and above the statutory notice periods. She indicated that they understood the risk of this approach.

[12] Ms. Williams also asked whether the eight weeks' pay in lieu of notice could be made over four bi-weekly pay periods. She noted that it would help the Defendants financially while saving the employees "a large hit on tax". Ms. Heelan advised that "[p]aying out the 8 weeks in the normal course is fine".

[13] At Ms. Williams' request, Ms. Heelan drafted a sample termination letter. For the most part, the Defendants used the template provided by Ms. Heelan in dismissing the six employees.

[14] The template prepared by Ms. Heelan provided very little information as to the reason the employees were losing their jobs. The only reference to the pandemic appeared in the first paragraph of the letter, which read:

> Further to today's meeting, this letter confirms that your employment with Rocket (the "Company") is terminated, effective immediately, due to the ongoing impact of the COVID-19 pandemic on our business.

[15] There was no reference in the letter to the possibility of bringing the employees back to work once the company's economic situation improved.

[16] When Mr. Oakley arrived at work on January 14, 2022, he was called into a meeting with three of the shareholders of Bounty/Taylor (Scott Williams, Mike Hamilton and Aubrey Graham). He was advised by Mr. Graham that revenue was not coming back because of the pandemic and there were no signs that it was going to come back, so they had to let him go. Mr. Oakley was handed his termination

letter in an envelope and was thanked by Mr. Williams and Mr. Hamilton. Nothing was said about the situation being temporary or about bringing the Plaintiff back if the company's financial situation improved.

[17] Mr. Oakley was understandably shocked and upset. He went to work that day as he had for over four decades and left shortly thereafter, unemployed.

[18] After this meeting, Mr. Oakley contacted Mr. Grant Machum, a friend of his who happened to be a labour lawyer at Stewart McKelvey. On January 21, 2022, Mr. Machum sent a demand letter to Scott Williams expressing shock over the amount of compensation being provided to Mr. Oakley, a loyal employee of more than 41 years. He also suggested that the manner in which the statutory notice of eight weeks was being paid was in violation of the Nova Scotia *Labour Standards Code*, R.S.N.S. 1989, c. 246. Mr. Machum indicated that Mr. Oakley was prepared to accept the following:

- A lump sum payment of 24 months (inclusive of the months payable under the Code) to be treated as a retiring allowance or as otherwise directed;

- A contribution to Mr. Oakley's pension program (Great West Life) for a period of 24 months;

- Group benefit continuation for a period of 24 months. It was said that Mr. Oakley would make the employee contributions;

- A $2,000.00 contribution towards legal fees.

[19] Mr. Machum indicated that if he did not hear from Mr. Williams by January 26, 2022, he would be contacting the Department of Labour to report the alleged breach of the *Code* and would be issuing legal action.

[20] Shortly thereafter, Bounty retained new counsel (Mr. Mitchell). On February 2, 2022, Mr. Mitchell wrote to Mr. Machum. He advised that Taylor Printing Group Inc. operated the location where Mr. Oakley was employed and was his actual employer. He went on to state:

……..

> Mike Oakley's contribution to the workplace was, and continues to be, highly regarded by our client. Taylor sincerely hopes that it will be in a position to recall him.
>
> From the time of the onset of the pandemic, through 2020 and most of 2021, by adroitly exercising access to government programs, and exercising its own entrepreneurship to redirect the resources of the company into the manufacture of personal protective equipment, Taylor was able to sustain the employment of all of its employees. The company also ensured that employees were kept fully aware of market circumstances and its efforts to address them.
>
> However, as Mr. Oakley undoubtedly knows, subsequent surges of the pandemic have drastically reduced our client's markets. Closed or restricted schools, universities and community sports associations – a major market of our client – have effectively eliminated sports and extracurricular activities, at the same time as conventional business markets have gone much more quiet. Traditional sources of pre-pandemic work have largely evaporated. It is unknown when, how and in many respects, if, those sources of work will be recovered.
>
> Our client can assure you that the January 14, 2020 discharge of your client was not wanted by Taylor, that the discharge decision was reached entirely in good faith, that it was carried out only after extensive efforts to maintain the employment of employees were made and only with the continuing hope that people can be recalled to work.
>
> ……..

[21] Mr. Mitchell suggested that the matter was caught by s. 72(3)(d) of the *Labour Standards Code*, which meant that statutory notice payments were not required. He went on to assure Mr. Machum, however, that the Defendants were committed to continuing Mr. Oakley's statutory payments for the full eight weeks and were also committed to the "recall" of Mr. Oakley should the business return to balance.

[22] Mr. Mitchell's letter of February 2, 2022, did little to assuage Mr. Machum's views. He responded to Mr. Mitchell's correspondence by 10:56 a.m. the same day. Mr. Machum once again suggested that the Defendants were in violation of the *Labour Standards Code* by not paying the eight weeks of statutory notice within five working days following the end of the pay period. He suggested to Mr. Mitchell that there was also a statutory obligation to pay vacation pay on top of the eight weeks of statutory notice. He stated, "[w]e will be relying on this failure to support a claim of punitive damages." Mr. Machum disagreed that s. 72(3)(d) of the *Code* applied, but noted that even if it did, that provision would not relieve Mr. Mitchell's clients of their common law duty to provide reasonable notice. In relation to the suggestion that Mr. Oakley may be recalled, Mr. Machum noted that Mr. Oakley was not laid off, but was terminated and not provided with proper notice. This appears to be the

beginning of a dispute between counsel and the parties about whether Mr. Oakley was laid off or terminated. Mr. Machum gave Mr. Mitchell until the following afternoon to advise whether he had instructions to accept service of documents.

[23] The following day, Mr. Mitchell wrote to Mr. Machum noting that Stewart McKelvey was involved in the acquisition of various corporations, including Taylor, in December 2019, and, as a result, had been privy to detailed and highly confidential information relating to the company. He suggested that the confidential information was directly material to Mr. Oakley's claim and objected to Stewart McKelvey's continued representation of Mr. Oakley. He asked that the firm immediately withdraw from representing the Plaintiff.

[24] On February 17, 2022, Mr. Oakley filed a Notice of Action and Statement of Claim against Bounty Print Limited in the Supreme Court of Nova Scotia. He continued to use Stewart McKelvey as counsel.

[25] On March 9, 2022, Aubrey Graham (of Bounty/Taylor) emailed the Plaintiff, advising him that a company by the name of ADR in Dartmouth, Nova Scotia, was looking for an experienced bindery person. He offered to provide ADR with Mr. Oakley's name and contact information or, alternatively, to give Mr. Oakley ADR's telephone number and email address. Mr. Oakley was familiar with the Vice-President of Operations at ADR, Clinton Foss, and arranged an interview with him in the first half of March 2022.

[26] ADR was looking for a bindery person with years of experience. Mr. Foss showed the Plaintiff around ADR's plant. Shortly thereafter, he offered the Plaintiff a full-time job paying $18.00 per hour. Mr. Oakley would need to be trained on a piece of equipment known as a stitcher but, in general, the work was the same type of work that the Plaintiff had been doing with the Defendants. If the Plaintiff's training was successful, Mr. Oakley would have been given an increase in pay. It is not clear from the evidence that the possibility of a pay increase was conveyed to the Plaintiff. Mr. Oakley replied that he would need to be paid $24.00 per hour due to the fact that ADR was further from his home and he would have to pay a bridge toll to get back and forth from work. Twenty-four dollars per hour was $1.78 more per hour than the Plaintiff had earned with the Defendants. Mr. Foss advised Mr. Oakley that ADR could not meet that salary expectation due to the training involved for him to run the stitcher. ADR eventually hired someone else for the position.

[27] A Defence was filed by Bounty on March 16, 2022. Bounty pleaded that the Plaintiff had been laid off [rather than terminated] in January 2022, due to the ongoing impact of the pandemic.

[28] Shortly thereafter, in or around March 18, 2022, Mr. Oakley received a letter from Scott Williams indicating that they were able to recall him to his previous position as a bindery operator, effective May 2, 2022. The Plaintiff was advised that he would return on the same terms and conditions of employment that he enjoyed at the time of his "layoff". Mr. Oakley was asked to confirm by March 25, 2022, whether he would be returning.

[29] On March 21, 2022, Mr. Mitchell wrote to counsel for Mr. Oakley noting that Mr. Oakley had been "recalled" and was to return to work on April 1 [*sic*], 2022.

[30] On March 21, 2022, Mr. Machum emailed Mr. Mitchell asserting that Mr. Oakley had been terminated, not laid off. Mr. Machum indicated that in order to assess the offer to return to work, he required confirmation of the following:

- The proposed return to work date was May 2, 2022;
- Would Mr. Oakley be paid any lost wages and benefits since his termination on January 14, 2022?
- Confirmation that after commencement of employment Rocket would not make any unilateral changes to the conditions of employment;
- Some information [to] provide comfort to Mr. Oakley that there is sufficient work for him to perform;
- Confirmation that Mr. Mitchell's client will immediately discontinue its motion in relation to representation of Mr. Oakley by Stewart McKelvey;
- Confirmation that Rocket will pay legal fees incurred to date by Mr. Oakley.

[31] Mr. Machum indicated that once he received this information, he would obtain instructions.

[32] Mr. Mitchell replied that his client would not be paying Mr. Oakley's lost wages or benefits or for legal fees that he had incurred. He reiterated his position that Mr. Oakley had been laid off from his job, not terminated. Mr. Mitchell assured Mr. Machum that his client would continue to employ Mr. Oakley in good faith. A "gratuitous" contribution to Mr. Oakley's pension of $1,000.00 was also offered if Mr. Oakley returned to work.

[33] On March 25, 2022, Mr. Machum wrote to Mr. Mitchell advising that Mr. Oakley would not be returning to work. Mr. Machum accused Mr. Mitchell's client of various forms of bad faith conduct, including, *inter alia*, mischaracterizing Mr. Oakley's termination as a layoff, not providing him with reasonable notice and not complying with the *Labour Standards Code*. He advised that since the Defendants were refusing to make Mr. Oakley "whole" for lost wages and legal expenses, the Plaintiff intended to proceed with litigation.

[34] On March 28, 2022, Mr. Mitchell wrote to Mr. Machum:

> …….
>
> You were individually and specifically advised of the lay-off basis of this matter more than two weeks before this application [*sic*] commenced. The history of our company's employment and efforts to keep balance during the Covid surges is well known to Mike. Mike and his co-workers experienced and saw those efforts and their extent directly. Mike has been in communication with various co-workers, including management since his layoff, and has persistently been welcomed with open arms, as he will continue to be, and should be.
>
> In January, Mike's employment, along with that of six other employees was interrupted. Mike and one other of those employees have since been recalled. At least one further such employee will be recalled in the very, very near future. If recovery in the market continues and sustains, our clients believe this trend will lead to yet more.
>
> Mike's skills and experience are central to our clients intended operations commencing May 2nd, 2022. Our client wishes to have the benefit of them and have him return.
>
> ……

[35] In early April 2022, Scott Williams wrote to Mr. Oakley directly, indicating that things had continued to pick up and they were able to bring Mr. Oakley back sooner [than the proposed start date of May 2, 2022] if he was able to return. Mr. Williams indicated, "In the meantime, we would love to have you back."

[36] Mr. Williams received no response from Mr. Oakley or his counsel.

[37] On April 25, 2022, Mr. Mitchell wrote once again to Mr. Machum. He indicated that his client valued Mr. Oakley's abilities and wished to see him return to work but that it would have to fill his position elsewhere if Mr. Oakley did not indicate that he was returning by Wednesday, April 27. In an effort to incentivise the Plaintiff's return to work, Mr. Michell's client offered Mr. Oakley a bonus of $2,000.00 on his return and a further $3,000.00 three months later, provided that he remained in continuous employment to that time. Mr. Mitchell made no suggestion that Mr. Oakley would be required to discontinue or dismiss his legal action as a condition of his return to work.

[38] Mr. Oakley declined to return to work.

[39] In early June 2022, Mr. Oakley started to try to access his pension. He was unable to do so, as the Defendants had failed to issue a Statement of Termination of Employment as required under s. 41 of the *Pension Benefits Act*, S.N.S. 2011, c. 41. Eventually, the Deputy Superintendent of Pensions became involved and indicated that she would be making an Order requiring Bounty to issue a Statement. Bounty promptly complied with the direction of the Deputy Superintendent and Mr. Oakley was eventually able to access his pension.

[40] Bounty's business was up and down after the six employees were let go. Scott Williams testified that the business was "bleeding cash". In February 2024, Bounty sold its assets to ADR. As part of the deal, ADR agreed to take on the vast majority of Bounty's employees.

[41] Mr. Oakley remained unemployed at the time of the hearing of this matter.

What is the appropriate notice period for Mr. Oakley?

[42] The law has long recognized the right of employers or employees to terminate an employment arrangement at any time, provided there are no express provisions in an employment contract to the contrary (see *Wallace v. United Grain Growers Ltd*, [1997] 3 S.C.R. 701, at ¶75). There is no evidence of such a contract in this case.

[43] In *Farber v. Royal Trust Co.*, [1997] 1 S.C.R. 846, Gonthier J. stated at p. 858:

> In the context of an indeterminate employment contract, one party can resiliate the contract unilaterally. The resiliation is considered a dismissal if it originates with

> the employer and a resignation if it originates with the employee. If an employer dismisses an employee without cause, the employer must give the employee reasonable notice that the contract is about to be terminated or compensation in lieu thereof …….
>
> [Citations omitted]

[44] In *Honda Canada Inc. v. Keays*, 2008 SCC 39, the court stated at ¶50:

> An action for wrongful dismissal is based on an implied obligation in the employment contract to give reasonable notice of an intention to terminate the relationship in the absence of just cause. Thus, if an employer fails to provide reasonable notice of termination, the employee can bring an action for breach of the implied term (*Wallace*, para. 115). The general rule, which stems from the British case of *Addis v. Gramophone Co.*, [1909] A.C. 488 (H.L.), is that damages allocated in such actions are confined to the loss suffered as a result of the employer's failure to give proper notice and that no damages are available to the employee for the actual loss of his or her job and/or pain and distress that may have been suffered as a consequence of being terminated. ……

[45] Damages for wrongful dismissal are meant to compensate the employee for lack of notice, not to penalize the employer. The notice period is meant to provide the employee with a sufficient opportunity to seek new employment and arrange their personal affairs (*Evans v. Teamsters Local Union No. 31*, 2008 SCC 20, at ¶28).

[46] All parties acknowledge that by law, Mr. Oakley's employment was terminated without cause on January 14, 2022, and that he was entitled to notice as a result. Mr. Kelly, on behalf of the Plaintiff, claims a notice period of between 28 and 30 months. Mr. Mitchell suggests that the appropriate notice period is between 22 and 24 months.

[47] There is no exact formula for calculating the appropriate notice period in a wrongful dismissal action. Arriving at a period of reasonable notice is an art, not a science (see *Minott v. O'Shanter Development Co.* (1999), 42 O.R. (3d) 321 (Ont. C.A.), at ¶62). The leading authority on the matter is *Bardal v. The Globe and Mail Ltd.*, (1960), 24 D.L.R. (2d) 140 (Ont. H.C.), where McRuer C.J.H.C. stated at p. 145:

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

> employment, having regard to the experience, training and qualifications of the servant.

[48] These factors are not exhaustive (see *Wallace v. United Grain Growers Ltd*, *supra*, at ¶82). In addition, no one factor should be given disproportionate weight (see *Honda Canada Inc. v. Keays*, *supra*, at ¶32).

[49] For many years courts have recognized that while there is no absolute upper limit or cap on what constitutes reasonable notice, generally only exceptional circumstances will support a notice period in excess of 24 months (see, for example, *Lowndes v. Summit Ford Sales Ltd.*, [2006] O.J. No. 13 (Ont. C.A.), at ¶11; *Dawe v. The Equitable Life Insurance Company of Canada*, 2019 ONCA 512, at ¶¶ 31-33 and *Currie v. Nylene Canada Inc.*, 2022 ONCA 209, at ¶12).

[50] Similarly, in *Lloyd's Register of North America, Inc. v. Silvester*, 2004 NSCA 17, the Nova Scotia Court of Appeal indicated that "[w]hile 24 months does not represent the absolute maximum notice period beyond which a court may not go, a period [of] notice above that 'high end' of the range must be justified on the facts" (see ¶28). See also the comments of Warner J. in *Welch v. Ricoh Canada Inc.*, 2017 NSSC 174, at ¶56. Counsel have not provided me with any Nova Scotia cases where a notice period in excess of 24 months has been awarded.

[51] The Plaintiff has referred the court to *Slater v. Halifax Herald Limited*, 2021 NSSC 210; *Lynch v. Avaya Canada Corporation*, 2023 ONCA 696; *Re Richard* (N.B. Adjudicator, February 15, 2024); *McLean v. Dynacast Ltd.*, 2019 ONSC 7146; *Currie v. Nylene Canada Inc.*, *supra*; and *Hussain v. Suzuki Canada Ltd.*, [2011] O.J. No. 6355 (Ont. Sup. Ct. J.), in support of his claim for a 28 to 30 month notice period. I have considered all of these authorities in my deliberations.

[52] The Defendants have not provided the court with any authorities in support of their suggestion that the appropriate notice period is 22 to 24 months.

[53] I turn now to the *Bardal* factors.

Character of the employment

[54] Mr. Oakley was a bindery specialist when his employment was terminated in January 2022. His job involved using various pieces of printing equipment to cut, score and print on paper products. He did not have any managerial or supervisory duties when employed by the Defendants or their predecessors.

Length of service

[55] Mr. Oakley began working for the Defendants' predecessors in February 1980. He would have been 25 years of age at the time. He was a 41-year employee at the time his employment ended.

Age

[56] Mr. Oakley was 67 years old when he lost his job.

Availability of similar employment, having regard to the experience, training and qualifications of the Plaintiff

[57] Mr. Oakley started working in the printing industry in the mid-1970s. He worked in that industry throughout his life, using various forms of printing equipment. He was certified as a pressman shortly after commencing his employment. He appears to have been a versatile employee. In his testimony, he identified himself as a "jack of all trades".

[58] The Plaintiff's formal education is extremely limited (grade nine). I accept Mr. Oakley's evidence that most employers these days are looking for at least a grade 12 education or a GED. He has neither.

[59] The Plaintiff testified that when he was handed his termination letter, he thought that his printing days were over. He stated that most businesses now use digital printing. He does not have experience with digital printing. In addition, his computer skills are very limited.

[60] In addition to the *Bardal* factors, I have determined that when considering an appropriate notice period, I should take into account the fact that Mr. Oakley was terminated during a global pandemic. In other words, he lost his job at a time when the global economy, and many businesses, were negatively affected by the COVID pandemic (see *Milwid v. IBM Canada Ltd.*, 2023 ONCA 702).

Analysis re: the appropriate notice period

[61] Mr. Oakley was an experienced and well-respected bindery specialist at the time of his termination. He had spent virtually his entire career in this field working for the same employer.

[62] I accept the Plaintiff's evidence that most businesses now use digital printing, an area in which he has no expertise. Therefore, he would be searching for new employment in a field where the demand for his services would be very limited. He would be making that search as a 67-year-old. I doubt that many employers would be interested in hiring a 67-year-old. While older employees bring years of experience and may be seen, by some, as dependable and reliable, by today's standards, they may face health challenges that younger employees do not usually have. They may also be seen as set in their ways and not adaptable to change (see *Slater v. Halifax Herald Limited, supra*, at ¶17). Mr. Oakley's job prospects, in my view, would be very limited.

[63] When determining the appropriate notice period, I must consider the circumstances that existed at the time of termination and not the amount of time that it took the employee to find another job (see *Holland v. Hostopia.com Inc.*, 2015 ONCA 762, at ¶61). However, in analysing the *Bardal* factors, including the availability of similar employment, I am satisfied that I can consider the fact that in 2022 there was at least some demand for an individual with Mr. Oakley's skills and experience, notwithstanding his age. I say this because he was offered similar employment by ADR within two months of losing his job and, shortly thereafter, he was offered his job back with the Defendants.

[64] Although Mr. Oakley was a 67-year-old skilled worker in a dying trade, both ADR and the Defendants clearly preferred to hire someone with his skills and years of experience than to find and train someone new. The fact that he was offered these positions establishes that at the time of termination, there was at least some market for his skills and experience, despite his age. That is the only use that I make of this information in my reasonable notice analysis.

[65] Taking all of the *Bardal* factors into account, as well as the fact that Mr. Oakley was terminated during a global pandemic, I am satisfied that he was entitled to a significant notice period. I have concluded that the appropriate notice period is 24 months (two years).

[66] When it comes to the issue of appropriate notice, I see many similarities between this case and *Slater v. Halifax Herald Limited, supra*. *Slater* involved a 61-year-old gentleman who had worked as a Distribution Coordinator/Manager for a local newspaper for 39 years. His employment was terminated in 2020, shortly after the pandemic began. His loss of employment was based on economic factors brought on by the pandemic and a general decline in the newspaper business. After

considering the *Bardal* factors, Justice Campbell determined that the plaintiff was entitled to a reasonable notice period of 24 months.

[67] I appreciate that Mr. Slater was six years younger than Mr. Oakley and had worked for his employer for 39 years, compared to Mr. Oakley's 41 years. Nevertheless, both individuals were in their 60s and had worked for the same employer for approximately four decades at the time their employment was terminated due to the pandemic. Accordingly, I find *Slater* to be a useful comparator.

[68] The *Slater* decision was decided prior to the Ontario Court of Appeal decisions in *Currie v. Nylene Canada Inc.*, *supra*, and *Lynch v. Avaya Canada Corporation*, *supra*. In *Currie*, the court upheld a 26-month notice period given Ms. Currie's "unique situation" (¶9). In *Lynch*, the court upheld an award of 30 months. In my view, both *Currie* and *Lynch* are distinguishable.

[69] In *Currie*, *supra*, the Ontario Court of Appeal upheld the trial judge's conclusion that Ms. Currie's age, limited education and "very specialized" and "not easily transferable" skills made her termination equivalent to a "forced retirement" (see ¶11). In this case, I am satisfied that while Mr. Oakley's job prospects at the time he was terminated were very limited, there were still jobs available to him in the field in which he was trained.

[70] In *Lynch*, *supra*, the plaintiff was a 63-year-old engineer who worked for the same employer for 38.5 years. He specialized in the design of software to control unique hardware manufactured by his employer. The Ontario Court of Appeal noted that Mr. Lynch's job was unique and specialized and that his skills were tailored to, and limited by, his very specific workplace experience with the Defendant employer.

[71] While Mr. Oakley has specialized skills in the printing industry, they are not limited to the Defendants' business. His skills are transferable to another printing company or business.

[72] The Plaintiff has not satisfied me that there are exceptional circumstances in this case that warrant a notice period in excess of 24 months.

Has the Plaintiff failed to mitigate his damages?

[73] A dismissed employee has a duty to make reasonable efforts to mitigate their damages. This can involve looking for new employment or returning to work for the same employer that dismissed them.

[74] The burden is on the Defendants to establish that the Plaintiff has failed to mitigate his damages. The burden is not a light one (see *Red Deer College v. Michaels*, [1976] 2 S.C.R. 324).

[75] One of the leading cases on the issue is *Forshaw v. Aluminex Extrusions Ltd.* (1989), 39 B.C.L.R. (2d) 140 (B.C.C.A.), where the court stated at p. 144:

> The duty to "act reasonably", in seeking and accepting alternate employment, cannot be a duty to take such steps as will reduce the claim against the defaulting former employer, but must be a duty to take such steps as a reasonable person in the dismissed employee's position would take *in his own interests* – to maintain his income and his position in his industry, trade or profession. The question whether or not the employee has acted reasonably must be judged in relation to his own position, and not in relation to that of the employer who has wrongfully dismissed him.
>
> [Emphasis in original]

[76] The obligation of the terminated employee is to seek comparable employment which is typically employment that is comparable in status, hours and renumeration to the position held at the time of dismissal (see *Carter v. 1657593 Ontario Inc.*, 2015 ONCA 823, at ¶6).

[77] The question of whether an employee has mitigated their damages is dependent upon the facts of each case.

[78] Before analyzing this issue, I will deal with a preliminary matter that was raised by counsel for Mr. Oakley for the first time on the last day of trial. He submitted that there may not have been a duty on his client to mitigate his damages in light of his age. He relied on the trial court decision in *Potter v. New Brunswick (Legal Aid Services Commission)*, 2011 NBQB 296, affirmed 2013 NBCA 27, reversed on other grounds, 2015 SCC 10, where the court stated at ¶71:

> ….. Given his age (66 in March, 2010) and circumstances, the small likelihood he would find any employment let alone a job analogous to the ED's position and what I find to have been the intention of the parties, I find that there was no duty on Mr. Potter to mitigate his damages.

[79] I was also referred to Stacey R. Ball, *Canadian Employment Law* (Thomson Reuters: Online, 2024) at §12:36, where the author states in footnote 2:

> ….. The Supreme Court of Canada [in *Potter*] implicitly accepted the trial judge's approach by affirming the provisional damage award and citing the age and small likelihood of finding similar employment in the trial judgment …..

[80] The court in that case was clearly satisfied, given the circumstances, including Mr. Potter's age, that it was highly unlikely that he would find any form of similar employment. Those are not the circumstances here. Mr. Oakley was 67 years old at the time of his termination, but he had been offered a new job by ADR and, as well, had been offered his previous job back within two months of losing his employment. Despite Mr. Oakley's age, he enjoyed his work and had planned to continue working. In my view, he had a duty to mitigate his damages.

[81] Mr. Oakley was offered two jobs after he was terminated. The first was offered to him by an outside employer in mid-March 2022, approximately eight weeks after his employment with the Defendants ended. The second offer was made in or around March 18, 2022, when he was offered his former job back starting work on May 2, 2022. I will deal with each of these job offers separately.

ADR job offer

[82] I have found that in mid-March 2022, Mr. Oakley was offered a full-time job working in the bindery department of ADR. ADR is a printing company located in Burnside, Nova Scotia. During summation, counsel for Mr. Oakley acknowledged that Burnside is within the same municipality as the Plaintiff's former employment. ADR was looking for an employee to run a die cutter and stitcher. A stitcher is used to make magazines and books. Mr. Oakley had experience using a die cutter but would have had to be trained on how to operate the stitcher.

[83] The Plaintiff was offered a salary of $18.00 per hour for this work. I am unable to conclude, from the evidence that was presented, that he was told that his salary would increase after a probationary period.

[84] Was the employment offered by ADR comparable in status, hours and renumeration to Mr. Oakley's position with the Defendants?

[85] The Plaintiff argues that the position at ADR was not comparable to his previous employment because the salary was lower. He refers to *Forshaw v. Aluminex Extrusions Ltd., supra*, where the court held that a former employer "cannot have any right to expect that the former employee will accept lower paying alternate employment with doubtful prospects, and then sue for the difference" (see

p.144). In that case, a month after the plaintiff was terminated by the defendant employer, he received a job proposal from the principal of a company that was planning to set up a new division in competition with the defendant. The company wanted the plaintiff to establish and manage the new division. The court noted that since the proposed business was to be started almost from scratch, and there would have been a start-up period before sales could be made, the plaintiff's initial level of renumeration would have been at least 40 percent below that which he earned in his previous job (see p.141). In addition, the plaintiff reasonably believed that the proposed business was unlikely to succeed. The court concluded that the plaintiff had not failed to mitigate his damages in those circumstances.

[86] In *Slater v. Halifax Herald Limited*, *supra*, the plaintiff had been offered two new jobs by his previous employer. The plaintiff had been a Distribution Coordinator/District Manager for a local newspaper. He supervised others in that job. Approximately a year after firing Mr. Slater, his former employer offered him jobs as a clerk and a security guard. The clerk's job involved an 11 percent decrease in salary. The security guard position represented a salary reduction of close to 19 percent. Campbell J. felt that both jobs represented a substantial reduction in pay. In addition, and not surprisingly, he did not feel that an employee with 39 years of seniority should be required to go from having management responsibilities to taking a clerical position or a job as a security guard. The court concluded that the extent of the reduction of pay and status, together with Mr. Slater's long service, made it unreasonable to expect him to accept either of these positions. The court in that case clearly saw the defendant's job offers as an attempt to limit the damages it might be ordered to pay at trial (see ¶46).

[87] Reference is also made to *Dalton v. Cobi Foods Inc.*, [1995] N.S.J. No. 118 (S.C.) where Carver J. noted, in *obiter*, that if a dismissed employee had been offered a position by his former employer that paid 20 percent less, he would have been obliged to take it due to the limited availability of similar employment (see ¶¶9 and 23).

[88] In my view, neither *Forshaw*, *supra*, nor *Slater*, *supra*, stand for the proposition that an employee will never be required to mitigate damages by accepting a position with a lower salary. As noted by Campbell J. in *Slater*, the consideration of whether alternate employment offered is reasonable requires a case-specific analysis.

[89] Mr. Oakley enjoyed working. Despite his age, he intended to continue working. Work gave him a sense of purpose. He was the main source of income for his family. His wife testified that, in her view, Mr. Oakley "would have worked until he could no longer."

[90] Mr. Oakley was an experienced bindery specialist in an industry that was changing. Those changes reduced the demand for services from individuals with Mr. Oakley's talents.

[91] Approximately two months after losing his job, Mr. Oakley was presented with a new opportunity from a new employer. The pay that he was offered was 81 percent of his previous salary (a 19 percent reduction). In addition, he would have had to travel a few extra miles to work and, if he elected to take the bridge, would have incurred a bridge toll to get to and from his new employment.

[92] While Mr. Oakley had not previously used a stitcher, he testified that he had used a variety of equipment when employed by the Defendants. As indicated, he viewed himself as a "jack of all trades." The job with ADR was in the bindery department. Mr. Oakley worked in the bindery department when employed by the Defendants.

[93] This new job was a full-time position offering the Plaintiff 40 hours of work per week. That is the same number of hours that he worked when employed by the Defendants.

[94] While not exactly the same, I find that the job with ADR was comparable in status, hours and remuneration to the work that Mr. Oakley did with the Defendants. I also find that a reasonable person in Mr. Oakley's position would have accepted this new employment in his own interests.

[95] As indicated, Mr. Oakley testified that when he lost his job, he thought his printing days were over. Demand for traditional printing was declining. In addition, the pandemic had significantly affected the printing industry. Despite this, he was offered a full-time job in the bindery department of another company. I conclude that the Plaintiff failed to mitigate his damages when he turned down this job.

[96] In coming to this conclusion, I have taken into account the fact that in March 2022, Mr. Oakley was aware that the Defendants hoped to bring him back to work. If the Plaintiff had testified that he turned down the ADR position because he was hoping to return to work with the Defendants, I would have had to consider whether

that was reasonable in the circumstances. However, Mr. Oakley did not give any such evidence. His reasons for declining the ADR job related to salary and increased expenses in getting to work.

Offers to return to work with the Defendants

[97] As indicated previously, in or around March 18, 2022, Mr. Oakley was advised by the Defendants that they were able to "recall" him back to work. He was asked to return to work on May 2, 2022. He declined to do so.

[98] The question of whether an employee should have returned to work for a previous employer to mitigate his damages requires a nuanced analysis. The leading case is *Evans v. Teamsters Local Union No. 31*, *supra,* where the Supreme Court stated at ¶¶30-31:

> ……. Where the employer offers the employee a chance to mitigate damages by returning to work for him or her, the central issue is whether a reasonable person would accept such an opportunity. In 1989, the Ontario Court of Appeal held that a reasonable person should be expected to do so "[w]here the salary offered is the same, where the working conditions are not substantially different or the work demeaning, and where the personal relationships involved are not acrimonious" (*Mifsud v. MacMillan Bathurst Inc.* (1989), 70 O.R. (2d) 701, at p. 710). In *Cox*, the British Columbia Court of Appeal held that other relevant factors include the history and nature of the employment, whether or not the employee has commenced litigation, and whether the offer of re-employment was made while the employee was still working for the employer or only after he or she had already left (paras. 12-18). In my view, the foregoing elements all underline the importance of a multi-factored and contextual analysis. The critical element is that an employee "not [be] obliged to mitigate by working in an atmosphere of hostility, embarrassment or humiliation" (*Farquhar*, at p. 94), and it is that factor which must be at the forefront of the inquiry into what is reasonable. Thus, although an objective standard must be used to evaluate whether a reasonable person in the employee's position would have accepted the employer's offer (*Reibl v. Hughes*, [1980] 2 S.C.R. 880), it is extremely important that the non-tangible elements of the situation – including work atmosphere, stigma and loss of dignity, as well as nature and conditions of employment, the tangible elements – be included in the evaluation.
>
> I note that the nature of this inquiry increases the likelihood that individuals who are dismissed as a result of a change to their position (motivated, for example, by legitimate business needs rather than by concerns about performance) will be required to mitigate by returning to the same employer more often than those employees who are terminated for some other reason. This is not, however, because these individuals have been constructively dismissed rather than wrongfully

> dismissed, but rather because the circumstances surrounding the termination of their contract may be far less personal than when dismissal relates more directly to the individuals themselves……..

[99] The matter was put succinctly in *Halifax Herald Limited v. Clarke*, 2019 NSCA 31, where Beveridge J.A. stated at ¶102:

> The critical focus of the mitigation analysis is that an employee should not be obligated to mitigate by working in 'an atmosphere of hostility, embarrassment or humiliation'. But where the atmosphere is not tainted, an employee is generally required to work in the changed position in order to mitigate damages (see: *Evans* at paras. 30-31).

[100] In this case, there was no changed position. The Plaintiff was offered his former job back on the same terms and conditions that existed when he had been terminated a few months prior, due to the effects of the pandemic.

[101] When analysing this issue, it is important to consider matters as they existed in March and April 2022. This is the time period when the offers to return to work were made. Events that took place later (in relation to the Plaintiff's pension) would not have been known to Mr. Oakley at the time that these job offers were made.

[102] At trial, Mr. Oakley testified that he would have returned to work with the Defendants if all of his "demands" had been met, although he would not have trusted them. While this is relevant to my analysis (by providing evidence in support of the suggestion that a continued working relationship was possible) it is not determinative of the matter (see *Evans*, *supra*, at ¶36).

[103] I am satisfied from the evidence presented that Mr. Oakley and the Defendants had a positive working relationship. The Plaintiff was clearly and understandably affected by the sudden loss of his job and his trust in the Defendants changed after he was let go. However, the evidence fully satisfies that me that he was never shown any hostility, humiliation or animosity by the Defendants or any of their principals. Quite the contrary. Following his termination, it was made clear that the Plaintiff's contribution to the workplace was, and continued to be, highly regarded by the Defendants. It was explained to Mr. Oakley that he, along with a number of other employees, had to be let go due to the effects of the pandemic. The Defendants had not wanted to discharge Mr. Oakley. The decision was reached only after extensive efforts by the Defendants to keep the business going during the pandemic. The Defendants even took the unusual step of disclosing financial statements to the

Plaintiff and his counsel in the spring of 2022 to back up their suggestion that their financial situation caused the loss of the Plaintiff's job.

[104] Mr. Oakley was advised (albeit a few weeks after his termination) that there was hope that the dismissed employees could be called back to work. In April 2022, Mr. Williams wrote to the Plaintiff indicating that the Defendants would love to have him back.

[105] Mr. Oakley viewed all of this with a great deal of skepticism. He was offended that the Defence filed by Bounty Print Limited (the only Defendant at the time) in March 2022 suggested that he had been laid off rather than terminated (I will say more about this later). He viewed the job offers made by the Defendants as nothing more than an attempt to get him to back down from his litigation.

[106] Counsel for Mr. Oakley has referred the court to *Ensign v. Price's Alarm Systems (2009) Ltd.*, 2017 BCSC 2137, where the employer's offers of re-employment were found to be disingenuous. The plaintiff in that case had been offered several jobs by his previous employer which were found to be radically different than the work that he had traditionally performed. The plaintiff argued that these job offers were designed to avoid paying him the severance pay that he was entitled to. The court in that case was clearly not satisfied that the job offers were legitimate.

[107] Even if a defendant's offer to re-employ is motivated by a desire to avoid the payment of damages, that does not necessarily make the offer unreasonable (see *Hooge v. Gillwood Remanufacturing Inc.*, 2014 BCSC 11, at ¶89 and *Besse v. Dr. A.S. Machner Inc.*, 2009 BCSC 1316.) Nevertheless, in this case, I am fully satisfied that the Defendants were not offering re-employment to the Plaintiff to avoid paying damages. I find that they sincerely wanted Mr. Oakley to return to his job. In coming to this conclusion, I have considered the fact that the Plaintiff was not offered working notice by the Defendants in March 2022. Rather, he was offered his job back on the same terms and conditions that he had previously enjoyed. I am satisfied from the evidence presented that if Mr. Oakley had returned to work, he would still be working today, albeit for ADR, the company that bought Bounty's assets earlier this year.

[108] Further, the evidence fully satisfies me that from the time the decision was made to lay off employees due to the pandemic, the Defendants' goal was to bring them back to work.

[109] The Defendants in this action took the highly unusual step of releasing to the Plaintiff and the court their solicitor/client communications with Ms. Heelan to prove that their goal was not to permanently terminate the employees who were let go, but to lay them off and bring them back to work when their business improved. They terminated them because Ms. Heelan, quite properly in my view, advised them that an indefinite layoff constitutes a termination without cause (see David Harris, *Wrongful Dismissal* (Thomson Reuters: Online, 2024) at § 4:32).

[110] During the proceeding, there was reference to the Defendants attempting to retroactively characterize Mr. Oakley's termination as a layoff (see, for example: ¶5 of the Plaintiff's pre-trial brief) or the Defendants' "disingenuous" recall to work (Exhibit #1, Tab B13, at p. 3). Respectfully, I do not accept these characterizations. I find that the Defendants' attempts to have the Plaintiff return to work were genuine and sincere. They were not disingenuous as was found in *Ensign*, *supra*.

[111] During summation, counsel for Mr. Oakley suggested that courts seem to insist that at a minimum, an employer must pay any outstanding wages owing to an employee before a duty to mitigate by returning to work for that employer arises. He relied on *Ensign*, *supra*, as well as *Fredrickson v. Newtech Dental Laboratory Inc.*, 2015 BCCA 357, in support of this proposition.

[112] In *Ensign*, *supra*, the court found the employer's disingenuous offers of employment to be radically different from the plaintiff's original work. They also noted that *no* offer had been made to pay the plaintiff's lost wages.

[113] In *Fredrickson*, *supra*, the court noted that the employer's offer to pay lost salary would not have made the plaintiff whole. However, as is clear from that decision, the court was concerned about a number of issues in the relationship between the employee and the employer, including the fact that the employer had surreptitiously recorded two conversations with the employee and had openly discussed the plaintiff's situation with another employee. In addition, the plaintiff in that case would be returning to work in a very small office of only five employees. Working in such a small office with the erosion of trust between the parties, in the court's view, made the working relationship untenable. [1]

[1] *Fredrickson*, *supra*, is an interesting decision. On two occasions, Saunders J.A., writing for the court, suggested that the duty to accept re-employment is one that would arise infrequently (see ¶ 21 and 33). That suggestion was specifically rejected by the Yukon Court of Appeal in *Evans v. Teamsters Local Union No. 31*, 2006 YKCA 0014, where the court stated at ¶52: "Nor do I find support for the proposition that it will only be the 'rare' case where a terminated employee is not obliged to return to his former employer in order to mitigate his damages. Where the facts of the case, viewed objectively, warrant it, mitigation requires just that." Saunders J.A. served on the panel and concurred in the Court of Appeal decision in *Evans*. While this issue was not dealt with directly by the Supreme Court of Canada, the Court of Appeal decision in that case was upheld. In my view, there is no reason to indicate how often an employee will be found to have been obliged to return to work for their original employer. If the facts of the case support the conclusion that a reasonable person would have returned to work, there is an obligation to do so.

[114] Both the *Ensign* and the *Fredrickson* decisions are very different than the case before me.

[115] I do not accept the suggestion that an employee must be "made whole" in relation to lost salary before a duty to mitigate by returning to work for the employer arises. However, I am satisfied that the issue of past lost wages can be taken into account when performing the contextual analysis mandated by *Evans*, *supra*.

[116] As indicated previously, the Plaintiff's employment was terminated on January 14, 2022. He was paid eight weeks' salary after his termination. The records indicate that these statutory benefits covered his income loss until March 13, 2022.

[117] In addition, the Defendants paid their share of Mr. Oakley's pension contributions until January 21, 2022 and continued his health benefits coverage until March 11, 2022.

[118] At the conclusion of the trial, counsel agreed that if the court found that Mr. Oakley was entitled to damages in lieu of notice, his salary loss was $3,851.47 per month, the Defendants' contributions to his pension plan were $192.57 per month and their contributions to Mr. Oakley's health benefits were $214.76 per month.

[119] Mr. Oakley's re-employment was scheduled to commence on May 2, 2022.[2] He would have lost seven weeks of additional income between mid-March and early May 2022. I calculate that loss at $6,226.36.[3] In addition, the evidence satisfies me that the Plaintiff would have lost the value of the Defendants' pension contributions for approximately fourteen weeks during the period January 21 to May 2, 2022. That would represent a loss of $622.58.[4] Further, he would have lost the Defendants' contributions to his health benefits for approximately seven weeks during the period March 11 to May 2, 2022. This represents a loss of $347.20.[5] Finally, counsel have agreed that Mr. Oakley was owed $426.62 for vacation pay on his eight weeks of statutory benefits.

[2] In an undated letter written to Mr. Oakley by Mr. Williams in early April 2022 the suggestion was made that things had picked up and Mr. Oakley could return to work sooner if he was able to. I was not given evidence confirming the specific date.
[3] There are 4.33 weeks in a month. $3,851.47 divided by 4.33 = $889.48 per week. $889.48 x 7 weeks = $6,226.36.
[4] $192.57 per month divided by 4.33 weeks in a month = $44.47 per week. $44.47 x 14 weeks = $622.58.
[5] Health benefits of $214.76 per month divided by 4.33 weeks in a month = $49.60 per week. $49.60 x 7 weeks = $347.20.

[120] Using a return-to-work date of May 2, 2022, the Plaintiff's past loss of income, vacation pay and benefits totalled $7,622.76.[6]

[121] Originally, when the Defendants attempted to have the Plaintiff return to work, they did not offer anything for his past losses. Shortly thereafter, Mr. Oakley was offered a "gratuitous" contribution to his pension of $1,000.00, a bonus of $2,000.00 upon his return to work and a further $3,000.00 on the three–month anniversary of his return to work, provided he remained in the Defendants' continuous employment to that time. In other words, the Plaintiff's losses would have been reduced to $1,622.76.[7] That is not a small amount for an individual earning $46,217.64 per year.[8]

[122] If Mr. Oakley felt that it was worth pursuing, he could have proceeded with this action, or, if he determined that it was appropriate, he could have discontinued this action and proceeded in the Small Claims Court for relief (see *Beairsto v. Roper Aluminum Products Inc.* (1994), 132 N.S.R. (2d) 321 (S.C.), for the jurisdiction of the Small Claims Court to deal with wrongful dismissal actions). That, of course, would have left him in the position of working for the Defendants while suing them.

[123] There is no doubt that working for an employer while taking an action against them can be awkward. Counsel for the Plaintiff has referred to *Cox v. Robertson*, 1999 BCCA 640, where the court stated at ¶16:

> …… As Mr. Justice Donald mentioned in argument, it is almost amusing, and highly artificial, to say that these two persons should be expected to work closely and professionally together on the same mouths in the morning and then attend examinations for discovery in the afternoon and then continue to work harmoniously again the next day, all while preparing for a summary trial.

[124] It is useful to also review ¶17 of the same decision, where the court stated:

> As the authorities suggest, a reasonable person might rightly think that in some cases, an employee should accept temporary employment in mitigation of damages. In such cases, the parties did not usually have to interact closely with each other. In this case, however, with the plaintiff and defendant always working side by side, the employment relationship could not have been closer. In my view, no reasonable person would conclude that a dental assistant in these circumstances should be

[6] $6,226.36 (lost income) + $622.58 (lost pension contributions) + $347.20 (lost health benefits) + $426.62 (lost vacation pay on the statutory notice) = $7,622.76.
[7] Losses of $7,622.76 - $1,000.00 for the "gratuitous" pension contribution, a bonus of $2,000.00 and a further $3,000.00 = $1,622.76.
[8] I appreciate that the loss could have been further reduced if the Plaintiff had accepted the new position with ADR.

> expected to co-operate harmoniously with a dentist who had been unfair to her and to litigate with him at the same time.

[125] Clearly, the court in that case was concerned about the close proximity in which the parties would have to work while the litigation was ongoing. I do not have that concern in this case. None of the three individuals who were involved in terminating Mr. Oakley's employment worked directly with him.

[126] The fact that litigation exists between the parties does not automatically negate the duty to mitigate by returning to work for the employer. If that were the case, every wrongfully dismissed employee could avoid their duty to mitigate by simply commencing an action. As noted by the Supreme Court of Canada in *Evans*, *supra*, at ¶46:

> With regard to the fact that Mr. Evans had started legal proceedings, I would note that this course of action can have an effect on the relationship between the parties and that this should be taken into account in each case, but that starting an action does not by itself relieve the employee from the duty to mitigate his or her damages. Again, I reiterate that it is the entirety of the situation that must be evaluated in every case…...

[127] The fact that there may have been ongoing litigation between Mr. Oakley and the Defendants is but one of the factors that I must take into account when considering Mr. Oakley's duty to mitigate.

[128] There is no doubt that there would be some awkwardness and difficulty in continuing to work for an employer that you have sued. The reality, however, is that in today's day and age, many employees bring legal proceedings against their employers while continuing to work. For example, unionized employees file grievances against their employers while maintaining their jobs. Employees bring class actions against their employers while continuing to work (see for example: *Fulawka v. Bank of Nova Scotia*, 2012 ONCA 443). Further, employees file complaints against their employers under human rights legislation and are protected, by law, from retaliation (see for example: s. 14.1 of the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6). See also *Garner v. Bank of Nova Scotia*, 2015 NSSC 122, on the question of whether an employee suing his employer amounted to a repudiation of the employment contract and made continued employment untenable.

[129] It must be recognized that there will be times when employees and employers work together in difficult situations. For example, employees who are going to be terminated but are provided with working notice are, absent bad faith or other

extenuating circumstances, expected to continue to work for their employer (see *Evans*, *supra*, at ¶29). When considering the issue of mitigation, the court's role is to analyse the tangible and non-tangible elements of the situation and determine, objectively, whether a reasonable person in Mr. Oakley's position would have accepted the Defendants' offer to return to work.

[130] While I accept that there would have been some awkwardness with Mr. Oakley working for the Defendants while suing them, I am not satisfied that the situation would have been so unworkable as to relieve Mr. Oakley of his duty to mitigate.

[131] What about the relationship between the parties?

[132] Any employee who has been dismissed, particularly an employee with over 40 years of service, is going to be understandably upset about their termination. It would be shocking to come into work, after decades of service, and be told that your employment is over. That shock will inevitably affect the relationship between the employee and employer. However, the reason for the termination must be considered (see *Evans*, *supra*, at ¶31). In this case, as devastating as the situation must have been for Mr. Oakley, he knew that he, and five other employees, had lost their jobs due to the economic situation brought on as a result of the pandemic. He was one of a number of individuals facing the same difficult situation.

[133] At trial, Mr. Oakley testified that he lost his trust in the Defendants when they characterized his termination as a layoff. For reasons that I do not understand, this distinction seems to have taken on undue importance between counsel. I have difficulty understanding this, as it was irrelevant whether the Defendants took the position that Mr. Oakley was dismissed or indefinitely laid off. Either way, at law, his employment was terminated, and he was entitled to notice. Nevertheless, the Plaintiff testified that he had lost his trust in the Defendants.

[134] Trust is an important element in the relationship between an employer and an employee. However, a duty to mitigate by returning to work cannot be negated by simply saying the employee has lost trust in the employer. It seems to me that in almost every case where an employee is terminated, that employee will lose trust in the employer. The matter must be viewed objectively, taking all relevant factors into account.

[135] I return to Mr. Oakley's testimony that if his "demands" had been met, he would have returned to work for the Defendants, although he would not have trusted

them. While this is not determinative of the matter, it shows that the relationship between the parties was not irretrievably broken.

[136] While each case must be decided on its own facts, it is useful to review some of the facts in *Evans*. In that case, Mr. Evans was employed for over 23 years in the respondent union's Whitehorse office. During a December 2002 election campaign, Mr. Evans supported the incumbent president, who was defeated. Prior to taking office on January 1, 2003, the incoming president, Mr. Hennessy, asked legal counsel, Mr. McGrady, for an opinion regarding the termination of six employees, including Mr. Evans. Mr. McGrady suggested that a court would find that Mr. Evans was an "indefinite term employee" and that the union's severance pay plan was "not a substitute for the Local's obligation to provide working notice or pay in lieu of notice" (¶3). Mr. McGrady provided wording for a letter to be sent to the employees.

[137] Mr. Evans was provided with a "leaked" copy of Mr. McGrady's opinion letter on January 2, 2003. Also on January 2, Mr. Evans received a termination letter from Mr. Hennessy which was almost entirely in the form suggested by counsel but did not include any reference to working notice (¶4). Later that day, Mr. Hennessy telephoned Mr. Evans to "commence discussions" (¶5).

[138] Mr. Evans retained counsel. In correspondence between his counsel and Mr. McGrady, the union denied that the letter of January 2, 2023, was intended as a termination without notice (¶7). The union eventually requested that Mr. Evans "return" to his employment to serve out the remainder of his 24-month notice period. It added that if Mr. Evans did not return by June 1, 2003, it would treat that refusal as just cause, and formally terminate him without notice. It would also amend its Statement of Defence to plead that Mr. Evans had failed to mitigate his damages by refusing to return to work (¶8).

[139] Counsel for Mr. Evans advised that his client was prepared to return to work provided the union immediately rescinded and withdrew its termination letter of January 2, 2003. Mr. McGrady replied that the union was not prepared to withdraw its notice of termination (¶11). Counsel for Mr. Evans then declared that his client had never "received 24 months notice of the termination of his employment", and therefore "he cannot rationally be expected to respond positively to your client's directive to return to work" (¶11).

[140] Mr. Evans cited numerous reasons why he believed that the working relationship between he and his employer had been poisoned by the circumstances that led to his termination. He was terminated without cause and his termination

was planned and deliberate. He felt like he had been "treated like a dog" by Mr. Hennessy during the telephone conversation on the day he was fired. There was no mention of working notice or pay in lieu of notice during the phone call with Mr. Hennessy. Mr. Evans further testified that he felt ostracized and that he was being treated differently than other employees who were terminated on the same day. In addition, he had already commenced litigation against the employer (¶40).

[141] The trial judge found that the union had terminated Mr. Evans without cause and without reasonable notice on January 2, 2003, and then attempted to re-hire him for an additional term. This finding was not challenged on appeal. The trial judge held that although the union had not acted in bad faith, Mr. Evans had acted reasonably in refusing to return to work in his former position. The Yukon Court of Appeal reversed, concluding that Mr. Evans had filed to mitigate his damages by refusing to return to work for his former employer.

[142] In assessing whether Mr. Evans acted reasonably, the Supreme Court of Canada attributed little importance to the fact that the union had terminated him without notice, denied that it had intended to terminate him without notice, and then directed him to "return" to work. The majority wrote at ¶49:

> I agree with the Court of Appeal that on an objective test, a reasonable person would have viewed the union's May 23, 2003 letter as a *bona fide* employment opportunity. Although the request to return to work should have been drafted differently, Mr. Evans clearly understood that this was a unique position and that he had no work alternative if he were to remain in Whitehorse. The request fulfilled the 24 months' notice that Mr. Evans had offered on January 3, 2003. He had been paid full salary and benefits for 5 months and the duration of his employment with the union would be for an additional 19 months. The trial judge had found that during the January 2, 2003 telephone conversation, Mr. Hennessy was attempting to negotiate an alternative to the immediate cessation of employment. The union had then and there demonstrated that it wanted Mr. Evans to continue his work with the organization.

[143] After considering of all the relevant factors, including the lack of any evidence of acrimony between Mr. Evans and Mr. Hennessy and the evidence that Mr. Evans had been prepared to return to work if certain conditions were met, the Supreme Court of Canada concluded that, on an objective basis, Mr. Evan had failed to mitigate his damages by not returning to work for the employer who had terminated him.

[144] As in *Evans*, while the letter offering Mr. Oakley a return to work should have been drafted differently (the term "recall" should not have been used), Mr. Oakley clearly understood that he was being offered his job back. While I accept his evidence that he had lost trust in the Defendants, I am not satisfied that their relationship was so damaged that they could not have continued to work together. In my view, a reasonable person in Mr. Oakley's position would have returned to work for the Defendants on May 2, 2022. He failed in his duty to mitigate his damages. Accordingly, any award for damages in lieu of notice will end as of that date.

Mr. Oakley's Pension

[145] Mr. Oakley has advanced two claims in relation to his pension. First, he seeks to recover the legal fees that he incurred in obtaining access to his pension. In addition, he submits that the value of his pension was reduced while it was improperly withheld. He asks to be compensated for the reduction in value.

[146] All parties agree that the Defendants were the administrators of the Plaintiff's pension plan and that Mr. Oakley's pension is governed by the provisions of the Nova Scotia *Pension Benefits Act*, *supra*, (the "*Act*"). Mr. Oakley submits that, as plan administrators, the Defendants failed to administer his pension in accordance with its legal obligations under the *Act* and its fiduciary duties at common law.

[147] An administrator has a duty under the *Act* to ensure that the pension plan and pension fund are administered in accordance with the *Act* and its regulations (see s. 30(1)). Section 33 of the *Act* imposes a statutory duty of care on a pension plan administrator. In Ari Kaplan & Mitch Frazer, *Pension Law*, 3d ed. (Toronto: Irwin Law, 2021), the authors describe the nature of a pension plan administrator's statutory obligations at pp. 324-326:

> The broad range of an administrator's functions in connection with a pension plan and pension fund situates it in a sobering position with respect to its potential for regulatory action under the PBA and liability to plan beneficiaries including for damages in civil actions……
>
> …..
>
> **a) Statutory duty of care**
>
> Because the plan administrator is the ultimate authority accountable for the administration and investment of the pension plan and fund, the administrator owes its constituency a "special duty" of care as a fiduciary in connection with its statutory functions.

……

> While the distinction may be a fine one, the duties of care owed by an administrator under the PBA are "statutory obligations" that are enforceable by the [Superintendent] and are "independent of causes of action in tort, fiduciary or trust law." The relevance of the distinction between the extent of an administrator's so-called statutory and common law fiduciary duties goes more to the remedy and forum in which a person alleging a breach of the duty pursues that remedy, than it does to the qualitative content of the duty.
>
> [Citations omitted]

[148] With respect to the common law duty of care owed by a pension administrator, the authors state at p. 326:

> Independent of its statutory obligations, a pension plan administrator is a fiduciary at common law vis-à-vis the beneficiaries of the pension fund and, as such, can be liable for damages, restitution, or other equitable relief for a breach thereof. A person owes another a fiduciary duty at common law where there is evidence of a dependency relationship in which that person is reasonably reposed with trust and confidence by the other to act in their best interests. It is "virtually self evident" that a pension plan administrator meets these criteria in light of the administrator's statutory obligations and the fact that plan beneficiaries are always dependent on the administrator to manage the plan and protect the fund. In short, a pension plan administrator "owes a duty of care to members of the pension plan" and, correspondingly, employees can reasonably expect the administrator to act in their best interests.
>
> But regardless of the source of the duty, what is clear is that an administrator must comply with both the statutory and common law standards.
>
> [Citations omitted]

[149] See also *Indalex Ltd. (Re)*, 2011 ONCA 265, varied on other grounds at 2013 SCC 6, where the Ontario Court of Appeal stated at ¶117:

> It is clear that the administrator of a pension plan is subject to fiduciary obligations in respect of the plan members and beneficiaries…… These obligations arise both at common law and by virtue of s. 22 of the PBA.

[150] The authors of *Pension Law*, 3d ed., examine the duties owed by pension plan administrators in some detail. They write at p. 330:

> The duty of knowledge and skill extends not only to the investment of the pension plan, but to all aspects of pension plan administration, including communications

> with employees and beneficiaries, the interpretation of plan documentation, the calculation and payment of pension benefits, regulatory filings, and dealings with the [Superintendent].
>
> [Citations omitted]

[151] The authors further state at p. 341:

> The PBA prescribes a host of specific disclosure requirements for a plan administrator vis-à-vis employees and the regulator. In addition to these specific requirements, a plan administrator's general communications with employees and beneficiaries are subject to a fiduciary responsibility to disclose material information sufficient to permit that person to make a fully informed decision respecting their rights and entitlements. This is both a common law duty and part of the statutory duty of care imposed upon administrators in the PBA.
>
> [Citations omitted]

[152] As indicated previously, in early June 2022, Mr. Oakley started to try to access his employment pension, which was being held with Canada Life. In order to access his pension, the Plaintiff required a Statement of Termination of Employment. The Defendants had not issued this statement after the Plaintiff's employment had been terminated on January 14, 2022.

[153] Canada Life sought clarification from the Defendants about whether Mr. Oakley had been laid off or terminated. Joanne Williams advised Canada Life that Mr. Oakley had been laid off since January 2022 and had not been terminated. In a June 9, 2022, email to Canada Life, Ms. Williams stated that "[a]ny treatment of Mr. Oakley's status by Canada Life as that of a terminated employee will not be with the consent or acquiescence of Rocket." As a result of this position, Mr. Oakley was not able to access his pension at that time.

[154] No further inquiries were made about the pension until November 2, 2022. On that date, Mr. Machum wrote to the Deputy Superintendent of Pensions seeking an order requiring "Rocket" to comply with the *Pension Benefits Act* and its regulations and to compensate the Plaintiff for the difference in value of his pension from the start of the alleged breach of the *Act* until the pension was transferred.

[155] Correspondence passed between Mr. Machum, Mr. Mitchell and the Deputy Superintendent of Pensions over this pension issue. Mr. Mitchell suggested that Mr. Oakley's application to the Deputy Superintendent was an abuse of process as he had already commenced an action in the Supreme Court of Nova Scotia concerning, *inter alia*, the pension issue.

[156] On January 13, 2023, the Deputy Superintendent released a Notice of Proposed Order which would find Bounty in breach of s.41(1) of the *Pension Benefits Act* and s.76(1) of the *Pension Benefits Regulations*. The Order would require Bounty to provide or instruct Canada Life to provide a Statement of Termination of Employment to Mr. Oakley. The Deputy was not prepared to deal with Mr. Oakley's request for compensation. The same day, Ms. Williams complied with the Proposed Order. As result, the Plaintiff was eventually able to access his pension.

[157] Mr. Oakley submits that the Defendants had an obligation to issue the Statement when his employment was terminated in January 2022 and, as a result of their failure to do so, he needlessly incurred legal fees in pursuing the matter.

[158] Section 41(1) of the *Pension Benefits Act* requires the administrator of a pension plan to provide a written statement to a member of the plan when the member terminates employment or otherwise ceases to be a member of the plan. The statement must set out information in respect of the benefits, rights and obligations of the member under the plan.

[159] Section 46 of the *Act* indicates that an employee who is a member of a pension plan continues as a member of that plan as long as the employee's employment continues. Mr. Oakley ceased to be a member of the plan on January 14, 2022, when his employment was terminated. The Defendants were obliged to issue a Statement of Termination within 60 days of that date (see s. 76(1) of the *Pension Benefits Regulations*). They failed to do so. In my view, they breached their statutory and common law fiduciary duties to Mr. Oakley as a result of this failure.

[160] The Plaintiff has indicated that he is seeking costs on a solicitor and client basis for the legal fees that he incurred in obtaining the Proposed Order from the Deputy Superintendent of Pensions. Respectfully, I believe that he has mischaracterized this portion of his claim. He should be seeking the return of those fees as consequential damages arising from the Defendants' breach of fiduciary duty (see *Williamson v. Williams*, 1998 NSCA 195).

[161] Mr. Oakley is entitled to recover as consequential damages the reasonable legal fees that he incurred in pursuing the breaches of s. 41(1) of the *Pension Benefits Act* and s. 76(1) of the *Regulations* with the Deputy Superintendent of Pensions. Counsel for all parties agreed that if the Plaintiff was successful with this aspect of his claim, the court will be provided with particulars of the legal fees incurred. If

counsel are unable to agree on a reasonable figure for this head of damages, I will receive detailed copies of the accounts in question and will determine the matter.[9]

[162] In addition to his legal fees, Mr. Oakley is claiming the sum of $5,113.80, which he says, due to market fluctuations, is the difference in the value of his pension between December 31, 2021 ($54,178.70) and January 14, 2023 ($49,064.90). I assume that counsel for Mr. Oakley has chosen December 31, 2021, as the starting point because it is close in time to the date that the Plaintiff lost his job (January 14, 2022).

[163] The Defendants had 60 days from the date that Mr. Oakley's employment was terminated to issue a Statement of Termination (see s. 76(1) of the *Pension Benefits Regulations*). Mr. Oakley then had 90 days to direct the Defendants to transfer the pension (see s. 195(1) of the *Pension Benefits Regulations*). Finally, the Defendants then had 60 more days to comply with Mr. Oakley's request (see s. 195(2) of the *Pension Benefits Regulations*).

[164] Mr. Oakley was terminated on January 14, 2022. The Defendants had until mid-March of that year to issue the Statement of Termination. The Plaintiff then had until mid-June to direct the Defendants to transfer the pension. The Defendants then had until mid-August to effect the transfer.

[165] I have not been provided with evidence showing the value of Mr. Oakley's pension as of August 2022. The closest statement that I have is for June 30, 2022. The value of his pension on that date was $47,064.02. This figure is $2,000.88 lower than the value of the pension in January 2023. In other words, the value of Mr. Oakley's pension went up from June 2022 until January 14, 2023, when he was finally able to access his pension.

[166] Mr. Oakley has not satisfied me that he has suffered a loss in relation to the value of his pension as a result of the Defendants' delay in issuing the Statement pursuant to s. 41(1) of the *Pension Benefits Act*. Accordingly, this aspect of his claim is dismissed.

Bad Faith - Aggravated and Punitive Damages

[9] Counsel must separate out the legal fees that were incurred in pursuing the pension issue with the Deputy Superintendent of Pensions. Any legal fees that were incurred in pursuing the pension issue in this action will be dealt with in costs at the end of this proceeding.

[167] The Plaintiff is seeking both aggravated and punitive damages.

Aggravated Damages

[168] Moral or aggravated damages are meant to compensate individuals for mental distress caused by an employer's bad faith conduct. In *Wallace v. United Grain Growers Ltd.*, *supra,* Iacobucci J., speaking for the majority, confirmed that damages for mental distress can be awarded as compensation for bad faith conduct by the employer in the manner of dismissal. In *Wallace*, *supra*, these damages resulted in an extension of the employee's notice period. In *Honda Canada Inc. v. Keays*, *supra*, the court reiterated that the normal distress and hurt feelings that result from a dismissal are not compensable. The contract of employment is, by its terms, subject to cancellation on notice or subject to the payment of damages in lieu of notice without regard to the ordinary psychological impact of that decision (see ¶56). However, damages (sometimes referred to as moral damages) are available if the employer engages in conduct during the course of dismissal that is unfair or in bad faith (see ¶57). The court concluded on this issue at ¶59:

> ….. 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).

[169] Counsel for Mr. Oakley has referred me to *Groves v. UTS Consultants Inc.*, 2019 ONSC 5605, where the court summarized the law with respect to the availability of aggravated damages at ¶¶113-114:

> Moral damages cannot be claimed to redress the "normal distress and hurt feelings" resulting from termination, which are non-compensable: *Keays*, at para. 56. To make out a claim for moral damages, the plaintiff must establish that the employer's conduct caused psychological injury to the plaintiff that goes beyond the "hurt feelings" intrinsic to a standard termination process. It is not necessary to provide medical evidence of psychological injury: *Lau v. Royal Bank of Canada*, 2017 BCCA 253, 415 D.L.R. (4th) 166 (B.C. C.A.), at para. 47 [*Lau*]. Nevertheless, some

> external evidence of mental distress is typically required to make out a successful claim: see *Lau*, paras. 45-47; *Morison v. Ergo-Industrial Seating Systems Inc.*, 2016 ONSC 6725, 272 A.C.W.S. (3d) 770 (Ont. S.C.J.); *Cottrill v. Utopia Day Spas and Salons Ltd.*, 2018 BCCA 383, 427 D.L.R. (4th) 39 (B.C. C.A.) (leave to appeal to SCC dismissed, 38448 (April 11 2019) [2019 CarswellBC 928 (SCC)]).
>
> The grounds for moral damages are assessed on a case-by-case basis: *Galea v. Wal-Mart Canada Corp.*, 2017 ONSC 245, 44 C.C.E.L. (4th) 251 (Ont. S.C.J.), at para. 232 [*Galea*]. Conduct that could qualify as a breach of good faith or fair dealing in the course of a dismissal includes conduct by an employer that is untruthful, misleading or unduly insensitive, or where the employer fails to be candid, reasonable, honest and forthright with the employee: *Galea*, at para. 232.

[170] When considering the issue of bad faith dismissal, the court is not confined to the exact moment of termination (see *Matthews v. Ocean Nutrition Canada Ltd.*, 2020 SCC 26, at ¶40).

[171] Mr. Oakley, and his spouse, both gave evidence about the effect that this entire situation had on him. Mr. Oakley has had a number of strokes since June 2023 and Ms. Oakley wonders whether there is a correlation between her husband's health problems and his loss of employment.

[172] The Plaintiff has raised a myriad of issues that he says constitute bad faith. This includes, *inter alia*, the "after-the-fact characterization of Mr. Oakley's termination as a lay off" as well as the last-minute abandonment of this "meritless defence." Reference is also made to the unjustifiable withholding of Mr. Oakley's pension, as well as the failure to pay out his statutory notice entitlements within five days of the next pay period following his termination. There is also an allegation of a "baseless" motion to have Stewart McKelvey removed as counsel of record and then discontinuance of the claim that there was a conflict. The Plaintiff further alleges that the Defendants refused to consent to reasonable amendments to his pleadings when he learned of the sale of Bounty's assets. As a result, Mr. Oakley was forced to bring a motion to amend and the trial dates were delayed. Numerous other allegations are made which I will deal with later in my decision.

[173] Before I review the specific allegations, I will deal with a suggestion by Plaintiff's counsel that the Defendants decided to take a "hard line" after they terminated the six employees in January 2022. Plaintiff's counsel argues that this is evidence of bad faith.

[174] Shortly after the employees were let go, Joanne Williams received a letter from Mr. Franc Colicchio, one of the six individuals who lost his job. Mr. Colicchio had been an employee for almost 16 years. He was seeking a reasonable severance package. Ms. Williams and Ms. Heelan discussed paying Mr. Colicchio an additional ten weeks of salary if he signed a release. Scott Williams then became involved. He expressed concern that offering ten weeks' additional severance would not actually end the matter and advised Ms. Heelan that the Defendants were leaning towards "taking a harder line for now."

[175] It appears that this hard line was also taken with Mr. Oakley. In March 2022, when the Defendants offered the Plaintiff his job back, Mr. Machum inquired as to whether Mr. Oakley would be paid his lost wages and benefits from the date of termination. Originally, the Defendants said they would not pay lost wages or benefits and would only make a $1,000.00 gratuitous contribution to his pension.

[176] I must consider the approach taken by the Defendants in relation to the Plaintiff's lost wages and benefits in the context that existed at the time. Mr. Mitchell had recently been retained. As occurred in *Slater*, *supra*, defence counsel appears to have raised questions as to whether the employment contracts between the Defendants and the six employees had been frustrated as a result of the pandemic and, if so, whether the employer was still required to provide reasonable notice. It is not surprising that the highly unique circumstance of the pandemic generated some uncertainty as to its impact, if any, on employers' obligations at common law.

[177] In addition, when Mr. Machum emailed Mr. Mitchell in response to the "recall" notice, he sought confirmation of a number of things which, in my view, were problematic. For example, he wanted information to provide comfort to Mr. Oakley that there was sufficient work for him to perform. Providing such assurance would be difficult, and likely imprudent, in the middle of a global pandemic.

[178] Mr. Machum also sought confirmation that Mr. Mitchell's client would immediately discontinue its motion in relation to Stewart McKelvey's representation of Mr. Oakley. For reasons I will discuss later, I am not satisfied that this was a reasonable request.

[179] Finally, Mr. Machum sought confirmation that "Rocket" would pay Mr. Oakley's legal fees incurred to date. In my view, this request was not reasonable or realistic. Rarely would a party to litigation agree to pay the opposing party's solicitor/client legal fees.

[180] It is against this background that the Defendants indicated, *inter alia*, that they would not be paying Mr. Oakley's lost wages or benefits. This position, which I agree could be viewed as hard-line, was softened very shortly thereafter. The next month, in addition to the earlier offer of a $1,000.00 gratuitous contribution to Mr. Oakley's pension, the Defendants offered Mr. Oakley a bonus of $2,000.00 if he came back to work and a further $3,000.00 on the three-month anniversary of his return to work, provided that he remained in continuous employment up to that time.

[181] Taking all of the circumstances into account, while not ideal, I am not satisfied that the Defendants' initial decision not to pay Mr. Oakley for his lost wages and benefits justifies a finding of bad faith or an award of aggravated damages.

[182] I turn now to the allegation of the "after-the-fact characterization of Mr. Oakley's termination as a layoff." This is one of the "nefarious tactics" the Defendants have been accused of employing against the Plaintiff.

[183] I think it is useful to provide some background to this issue.

[184] The Defendants' intention and desire, from the beginning, was not to terminate the six employees who lost their jobs. The Defendants' goal was to try to keep all of their employees working through the pandemic. By the fall of 2021, they concluded that they had to lay off six of their employees. This is evidenced by the very first email that Joanne Williams sent to Ms. Heelan on January 4, 2022, where Ms. Williams stated, "Because of loss of work due to Covid, we are needing to **lay off** 6 people effective January 17" (emphasis added).

[185] Ms. Heelan appears to have advised them that by operation of law, in the absence of a specific term in an employment contract which allows for such, an indefinite layoff would constitute a termination. Nevertheless, the Defendants' wish was to simply lay the employees off.

[186] On Ms. Heelan's advice, the Defendants provided each affected employee with a letter of termination. However, they continued to refer to the matter, internally and externally, as a layoff. An email that Ms. Williams sent to Canada Life on June 17, 2022, sums up the matter. Ms. Williams stated:

> ….. The province of Nova Scotia does not recognize the term layoff, so on the basis of shortage of work due to Covid, we needed to lay him off but use the proper term of termination. His record of employment states layoff and our intent all along was layoff with the hopes that we would be able to recall him along with others

> back to work when volumes increased. This has all been explained to Michael on various occasions……

[187] Mr. Oakley and his counsel could not have known about the Defendants' desire to lay off the employees (rather than dismiss them) in January 2022 when Mr. Oakley lost his job. However, they were made aware when they received Mr. Mitchell's letter of February 2, 2022, that the Defendants wished to "recall" Mr. Oakley if their business returned to balance. In addition, they eventually received the solicitor-client communications between the Defendants and Ms. Heelan which clearly showed a desire to lay off the employees rather than dismiss them.

[188] In my view, there was nothing malicious or dishonest about the Defendants' use of the term layoff. It reflected what they intended to do but, by operation of law, could not.

[189] What about the fact that the Defence filed by Bounty on March 16, 2022 and the Amended Defence filed by Bounty and Taylor on the first day of trial, contain an assertion that the Plaintiff was laid off – rather than terminated - on January 14, 2022, due to the ongoing impact of the Covid-19 pandemic, pursuant to the provisions of the Nova Scotia *Labour Standards Code*? Counsel for Mr. Oakley submits that this "meritless defence" is evidence of bad faith by the Defendants.

[190] During summation, Mr. Mitchell suggested that this portion of the pleading was intended to be a statement of fact, not a defence. The difficulty with this position is that, even if the Defendants did not intend for the statement to be construed as a defence, it is clearly not an accurate statement of fact. Mr. Oakley was not laid off. His employment was terminated, as is clear from the letter of termination that he received on January 14, 2022. In my view, this was a meritless defence. Does that make it bad faith?

[191] The courts regularly see meritless pleadings. For example, it is not uncommon in a motor vehicle claim for a plaintiff to allege that a defendant was under the influence of alcohol or drugs at the time of an accident. Rarely is this allegation borne out by the evidence.

[192] In *Fredrickson, supra*, throughout the litigation until closing submissions, the defendant took the position that it had not dismissed the plaintiff but had laid her off. Only in closing submissions did the defendant acknowledge that the plaintiff had been dismissed without cause or reasonable notice (see ¶12).

[193] In *Slater*, *supra*, the defendant took the position that the contract of employment between it and the plaintiff had been frustrated as a result of the pandemic. This defence was abandoned the day before the matter was scheduled to be heard (¶7).

[194] In the case before me, the Plaintiff himself, in his Second Amended Statement of Claim, pleaded that the sale of Bounty's assets earlier this year (2024) was a bad faith attempt by Bounty to dispose of its assets prior to trial. It was only on the last day of trial that Plaintiff's counsel advised that his client was no longer relying on this aspect of his claim.

[195] The reality is that many parties make allegations in their pleadings that end up being meritless at the end of the day. This was not an allegation that called Mr. Oakley's character or value as an employee into question. In this case, the suggestion that Mr. Oakley had been laid off was of little consequence. As I have indicated previously, whether he was laid off or his employment was terminated, he was entitled to proper notice. He had very experienced counsel representing him who would have been aware of that fact.

[196] While the advancing of a meritless defence may be taken into account when deciding costs (see *Civil Procedure Rule* 77.07(2)(e)), I am not persuaded that the Defendants' pleading, which indicated that the Plaintiff had been laid off, constitutes bad faith.

[197] That takes me to the issue of the unjustifiable withholding of Mr. Oakley's pension.

[198] It is clear from the evidence before me that despite the Defendants having provided a letter of termination to Mr. Oakley in January 2022, they characterized the matter in their minds as a layoff. That characterization carried over into how they dealt with his pension. They refused to recognize that Mr. Oakley had been terminated despite the obvious fact that he had been. Clearly, the Defendants were misguided in this regard. However, I do not accept that they were attempting to be dishonest, high-handed or malicious in how they dealt with Mr. Oakley or his pension. I have concluded that they breached their statutory and common law duties to the Plaintiff when they failed to provide him with a Statement of Termination of Employment. I am not satisfied, however, that they were acting in bad faith when they did so.

[199] The Plaintiff also alleges bad faith in connection with the Defendants' decision to pay him his statutory benefits over eight weeks instead of in one lump sum. The Plaintiff refers to s. 72(4) of the Nova Scotia *Labour Standards Code*, *supra*, which provides:

> **Termination of employment by employer**
>
> **72 (4)** Notwithstanding subsections (1), (2) and (3), but subject to Section 71, the employment of a person may be terminated forthwith where the employer gives to the person notice in writing to that effect and pays him an amount equal to all pay to which he would have been entitled for work that would have been performed by him at the regular rate in a normal, non-overtime work week for the period of notice prescribed under subsection (1) or (2), as the case may be.

[200] Unlike Ontario's *Employment Standards Act*, *2000*, S.O. 2000, c. 41, which makes it clear (at s. 61) that statutory benefits are to be paid in a lump sum, our legislation is vaguely worded. Assuming, without deciding, that there was an obligation on the Defendants to pay Mr. Oakley his statutory benefits in a lump sum, I am not at all satisfied that failing to do so constituted bad faith. The Defendants sought legal advice from Ms. Heelan on the matter and were advised that paying out the eight weeks' notice "in the normal course" was fine. They acted on that advice. There was no bad faith in doing so.

[201] The Plaintiff further alleges bad faith in relation to the Defendants raising the possibility of the firm of Stewart McKelvey being in a conflict of interest due to its representation of the vendors when Bounty was purchased in December 2019. The evidence indicates (and the Plaintiff alleges in his Second Amended Statement of Claim) that Bounty was bought by Taylor in December 2019. Mr. Williams testified that Stewart McKelvey acted for the vendor in that sale. The concern was that as a result of this representation, Stewart McKelvey held detailed confidential financial information relating to Bounty. Mr. Oakley submits that this was a baseless allegation designed to remove his counsel of choice.

[202] I do not accept this argument. It was, in my view, perfectly legitimate for the Defendants to raise this issue. Bounty was suggesting that due to its financial situation, it was forced to end the employment of a number of employees. As result of Stewart McKelvey representing the vendors of Bounty in 2019, they may well have had confidential financial information relating to the company. While Bounty elected not to pursue the matter, I find that it was not bad faith to raise the issue.

[203] Mr. Oakley further submits that the Defendants exhibited bad faith when they refused to agree to amendments to his pleadings earlier this year when Bounty advised that they were selling their assets. Some background is required to deal with this argument.

[204] Mr. Machum was retained very shortly after the Plaintiff lost his job and wrote to the Defendants on January 21, 2022. He referred to the fact that "Rocket" had terminated Mr. Oakley's employment. By letter dated February 2, 2022, Mr. Mitchell advised Mr. Machum that the Taylor Printing Group Inc. operated the location where Mr. Oakley was employed and was his actual employer. Mr. Machum responded that Mr. Oakley's pay statement and termination letter both referred to Rocket as the employer but that, in any event, he would proceed against both companies if necessary (Rocket is not a company; it is a business name).

[205] Within five weeks of losing his job, Mr. Oakley had commenced this action. He sued only Bounty Print Limited carrying on business as Rocket.Ink (Mr. Kelly was not counsel of record at the time).

[206] On July 8, 2022, by consent, Mr. Oakley filed an Amended Statement of Claim. The amendments dealt primarily with the pension issue and clarified that Mr. Oakley was seeking aggravated and punitive damages.

[207] On January 9, 2024, counsel for the Plaintiff received notice from Bounty that it had reached an agreement in principle to sell its assets to an arm's-length third party. Shortly thereafter, the Plaintiff proposed further amendments to his Notice of Action and Statement of Claim. As part of these amendments, Mr. Oakley sought to join Taylor to the action. The Defendants were not prepared to agree to some of the amendments, including the joinder of Taylor as a party. A contested motion was held before me on February 20, 2024. On February 29, 2024, I ruled that the Plaintiff's action against Taylor was statute-barred but I allowed Taylor to be joined in the action pursuant to s. 22(b) of the Nova Scotia *Limitation of Actions Act*, S.N.S. 214, c. 35. I see nothing wrong with the Defendants refusing to consent to these amendments in the face of an expired limitation period.

[208] Mr. Oakley also refers to the fact that the Defendants continued to communicate directly with him despite being advised, more than once, to communicate directly with his counsel.

[209] Counsel for the Defendants has referred to *Honda Canada Inc. v. Keays*, *supra*, where the Supreme Court of Canada stated at ¶77 that parties are always entitled to deal with one another directly.

[210] It appears from the evidence before me that there were occasions when both the Plaintiff and the Defendants dealt with one another directly notwithstanding the involvement of counsel. I am not satisfied that this constitutes bad faith.

[211] Further, the Plaintiff refers to the fact that the Defendants apparently refused to answer certain questions on discovery examination, which necessitated a Chambers motion to have the matter determined. The matter was dealt with by the court with costs being awarded to the Plaintiff. I am not satisfied that this is evidence of bad faith.

[212] Finally, the Plaintiff refers to various procedural matters that occurred during the course of the lawsuit, such as the Defendants instructing Mr. Mitchell not to accept service of documents when the motion was made to join Taylor to the action, attempting to join a third-party claim against Ms. Heelan after the parties had indicated that they were ready for trial, and missing or ignoring numerous deadlines throughout the course of the litigation. While these are all valid concerns, in my view, they do not constitute bad faith and are best dealt with when determining costs.

[213] I should indicate that while I have considered each of Mr. Oakley's claims of bad faith individually, I have also considered whether, collectively, they constitute bad faith. I am not satisfied that the Defendants exhibited bad faith conduct in the manner in which they dismissed Mr. Oakley.

Punitive Damages

[214] Finally, the Plaintiff has advanced a claim for punitive damages relying on the decision in *Kelly v. Norsemont Mining Inc.*, 2013 BCSC 147.

[215] In *Honda Canada Inc. v. Keays*, *supra,* the Supreme Court of Canada stated at ¶62:

> In *Vorvis*, McIntyre J., for the majority, held that punitive damages are recoverable provided the defendant's conduct said to give rise to the claim is itself "an actionable wrong". This position stood until 2002 when my colleague Binnie J., writing for the majority, dealt comprehensively with the issue of punitive damages in the context of the *Whiten* case. He specified that an "actionable wrong" within the *Vorvis* rule does not require an independent tort and that a breach of the

> contractual duty of good faith can qualify as an independent wrong. Binnie J. concluded, at para. 82, that "[a]n independent actionable wrong is required, but it can be found in breach of a distinct and separate contractual provision or other duty such as a fiduciary obligation." … punitive damages are restricted to advertent wrongful acts that are so malicious and outrageous that they are deserving of punishment on their own…..

[216] At ¶68 of the same decision, the court stated:

> ….. this Court has stated that punitive damages should "receive the most careful consideration and the discretion to award them should be most cautiously exercised" (*Vorvis*, at pp. 1104-5). Courts should only resort to punitive damages in exceptional cases (*Whiten*, at para. 69). The independent actionable wrong requirement is but one of many factors that merit careful consideration by the courts in allocating punitive damages. Another important thing to be considered is that conduct meriting punitive damages awards must be "harsh, vindictive, reprehensible and malicious", as well as "extreme in its nature and such that by any reasonable standard it is deserving of full condemnation and punishment" (*Vorvis*, at p. 1108)…..

[217] In my view, there is no basis in this case for an award of punitive damages.

Conclusion

[218] Michael Oakley was terminated from his employment on January 14, 2022, at the age of 67. He had worked for the Defendants or their predecessors for 41 years. He was entitled to a notice period of 24 months (two years).

[219] Mr. Oakley was offered a new job with ADR shortly after his employment ended and was also offered his previous job back by the Defendants. He failed to mitigate his damages when he declined to accept these offers.

[220] Mr. Oakley was paid statutory benefits from January 14 until March 13, 2022. He was offered the ADR job in or around the same time. I was not given a specific start date for the ADR position. They were in need of an employee at the time. I will use March 21, 2022, as the start date for the purpose of my calculations.

[221] Mr. Oakley is entitled to one week's salary ($889.48) for the period March 14 to 20, 2022.

[222] For the period March 21 to May 1, 2022 (six weeks) he is entitled to the difference between what he would have earned with the Defendants ($22.22 per hour) and what he would have earned with ADR ($18.00 per hour). Counsel have

agreed that Mr. Oakley was earning $889.48 per week when working for the Defendants. He would have earned $720.00 per week working for ADR ($18.00 per hour x 40 hours per week = $720.00). The difference is $169.48 per week. Over six weeks, the total is $1,016.88. Mr. Oakley is entitled to be paid this sum by the Defendants. He is not entitled to anything after May 2, 2022, in light of his failure to return to his employment with the Defendants and mitigate his damages.

[223] Mr. Oakley is also entitled to $622.58 for the loss of the Defendants' pension contributions during the period January 21 to May 2, 2022 and $347.20 for the loss of the Defendants' contributions to his health benefits during the period March 11 to May 2, 2022. He is also entitled to $426.62 for vacation pay on his eight weeks of statutory benefits.

[224] I award the Plaintiff damages in the total sum of $3,302.76.[10]

[225] Pre-judgment interest has been agreed to at a rate of 4% (simple interest). If the parties are unable to agree on the period for pre-judgment interest, I will decide the matter.

[226] Further, the Plaintiff is entitled to recover the reasonable legal fees that he incurred in pursuing with the Deputy Superintendent of Pensions the breaches of s. 41(1) of the *Pension Benefits Act* and s. 76(1) of the *Pension Benefits Regulations*.

[227] At trial, the Defendants acknowledged that they were common employers of the Plaintiff. Under the common employer doctrine, two or more corporate entities may be found to be jointly and severally liable to a wrongfully dismissed employee (see *Downtown Eatery (1993) Ltd. v. Ontario*, [2001] O.J. No. 1879 (Ont. C.A.) leave to appeal refused, [2001] S.C.C.A. No. 397). Bounty and Taylor are jointly and severally liable for the amounts owing to Mr. Oakley.

[228] There has been mixed success in this proceeding. If the parties are unable to agree on costs, I will receive written submissions by the Plaintiff on or before September 6, 2024 and by the Defendants on or before September 20, 2024. Reply submissions by the Plaintiff (if any) shall be provided to the Court on or before October 4, 2024.

Deborah K. Smith, Chief Justice

[10] $889.48 + $1,016.88 + $622.58 + $347.20 + $426.62 = $3,302.76.