Court of King's Bench of Alberta

Citation: Plotnikoff v Associated Engineering Alberta Ltd, 2024 ABKB 706

Date: 20241129
Docket: 2301 12977
Registry: Calgary

Between:

Christopher Plotnikoff

Plaintiff/Respondent

- and -

Associated Engineering Alberta Ltd.

Defendant/Appellant

Reasons for Decision
of the
Honourable Justice C.B. Thompson

Appeal from the Decision by
The Honourable Justice D.B. Higa
Dated the 12th day of September 2023
(2023 ABCJ 200, Docket: P2290101633)

I. Introduction

[1] The Appellant, Associated Engineering Alberta Ltd. (the "**Company**"), appealed the decision of Justice D.B. Higa (the "**Trial Judge**") dated September 12, 2023 (the "**Trial Decision**"), which granted judgment in favor of the Respondent, Christopher Plotnikoff ("**Mr. Plotnikoff**") in his wrongful dismissal action.

[2] The Company employed Mr. Plotnikoff, on May 21, 2012, and terminated his employment without cause on April 28, 2022. Mr. Plotnikoff was an employee of the Company for almost 10 years. The Company provided him payment in lieu of reasonable notice in the amount of $7,163.37, which was equivalent to six weeks' pay determined pursuant to sections 56 and 57 of the ***Employment Standards Code***, RSA 2000, c E-9 (the "***Code***"). Mr. Plotnikoff

commenced a wrongful dismissal claim against the Company, for failing to provide him reasonable notice pursuant to common law and the implied terms of his employment agreement, which he executed on May 21, 2012 (the "**Agreement**").

[3] The Trial Judge determined that the clause in the Agreement in respect of termination without cause ("**Clause 4(c)**") did not extinguish Mr. Plotnikoff's common law right to reasonable notice. The Trial Judge then determined that Mr. Plotnikoff was entitled to 10-months reasonable notice at common law, and that Mr. Plotnikoff's failure to seek other employment to mitigate his claimed losses did not reduce the reasonable notice period awarded or the quantum of his damages.

[4] The primary issue in this Appeal is whether the Trial Judge erred in the interpretation of the Agreement as not extinguishing Mr. Plotnikoff's common law right to reasonable notice or payment in lieu thereof. In the alternative, the Company challenged the Trial Judge's assessment of the reasonable notice period, and his decision not to reduce the quantum of damages to account for Mr. Plotnikoff's failure to mitigate his claimed losses.

[5] For the reasons set out below, I dismiss the Company's Appeal and uphold the Trial Decision.

II. Background

[6] The key facts pertinent to the disposition of this Appeal are uncontroverted and largely contained in the parties' Agreed Statement of Facts entered in evidence at the Trial. Some of the facts are set out in the Trial Decision and are referred throughout these Reasons as necessary.

[7] A summary of the key facts is that Mr. Plotnikoff attended Lethbridge College and completed a two-year program to become a civil engineering technologist. He was employed by the Company as a Civil Engineering CAD Technologist for nine years and eleven months. The Company was his sole employer since attending Lethbridge College. His work consisted of preparing drawings and designs for municipal infrastructure projects. He did not perform engineering type duties and had no managerial or supervisory duties.

[8] Mr. Plotnikoff was 33 years old at the time of his termination without cause on April 28, 2022. He was working on an approved reduced hours schedule since February 26, 2022, and he wished to continue working on a reduced hours schedule at the time of his termination.

[9] Clause 4(c) of the Agreement provided:

> **Termination without Cause**: The Company may terminate employment without cause upon providing the Employee with notice as may be mandated by the Employment Standards legislation or such additional notice as the Company, in its sole discretion, may provide or, at our option, pay in lieu of such notice.

III. Grounds of Appeal and Issues determined

[10] The Company submitted that the Trial Judge erred:

(a) in the interpretation and application of the terms of the Agreement governing Mr. Plotnikoff's entitlements upon termination of his employment by the Company;

(b) in the determination of a reasonable notice period for quantifying Mr. Plotnikoff's entitlements upon termination of his employment by the Company;

(c) in the determination that Mr. Plotnikoff's entitlements should not be reduced by Mr. Plotnikoff's failure to make reasonable efforts to mitigate his claimed losses by seeking new employment; and

(d) in rendering an unreasonable decision based on the facts and the law.

[11] The first ground is the Company's primary ground of appeal. The Company argued the second and third grounds in the alternative.

IV. Standard of Review

[12] The Parties disagreed on the applicable law on the standard of review for the issues in this Appeal, and the applicable standards of review.

[13] The Company agreed that interpretation of a written contract may involve mixed questions of fact and law. However, relying on ***Gudzinski Estate v Allianz Global Risks US Insurance Co***, 2011 ABQB 283, the Company argued that when there are no contested facts or inferences involved in the interpretation of a contract, it is a question of law reviewable on a standard of correctness.

[14] Mr. Plotnikoff argued that contractual interpretation and damages for wrongful dismissal are questions of mixed fact and law reviewable on a standard of palpable and overriding error.

A. Standard of Review in Civil Appeals from the Court of Justice to the Court of King's Bench

[15] The approach to standard of review of decisions of the Court of Justice by the Court of King's Bench is settled. To determine the standard of review applied by a civil appellate court, regardless of which court the decision originates, reviewing courts are required to determine whether the question appealed from is a question of law, fact, or mixed fact and law: ***Sattva Capital Corp v Creston Moly Corp***, 2014 SCC 53 at para 42; ***McCallum v Edmonton Frame and Suspension (2000) Ltd***, 2016 ABQB 271 at paras 48-50; ***Palmer v Van Keulen***, 2005 ABQB 239 at paras 11-12.

[16] The standard of review on a pure question of law is correctness. The standard of review for questions of facts and factual inferences is palpable and overriding error. The standard of review on a question of mixed fact and law, which engages the application of a legal standard to a set of facts, is palpable and overriding error, unless it is clear that the trial judge made some extricable error in principle with respect to the characterization of the standard or its application, in which case the error may amount to an error of law, subject to a standard of correctness: ***McCallum***, at paras 49-50 citing ***Housen v Nikolaisen***, 2002 SCC 33 at paras 25-36 and ***Koopmans v Joseph***, 2014 ABQB 395 at para. 10.

[17] In ***RH v Alberta (Director of Child and Family Services)***, 2024 ABKB 628 at paras 29-32 and 37, I discussed the current law on the errors of law that can arise from questions of mixed fact and law. Questions of mixed fact and law with readily extricable error in principle are reviewable on the standard of correctness. They include incorrect statement of the legal standard, mischaracterization of the proper legal test, application of an incorrect standard, a failure to consider a required element of a legal test, making a finding of fact for which there is no

evidence, the legal effect of findings of fact or of undisputed facts, an assessment of the evidence based on a wrong legal principle, a failure to consider all of the evidence in relation to the ultimate issue, or incorporating an identified myth: ***RH***, at para 37 citing ***Housen***, at paras 27, 33-37 and ***R v Hodgson***, 2024 SCC 25 at paras 34-35 and 86. See also ***Sattva***, paras 53-55.

B. Standard of Review for Contractual Interpretation

[18] In ***Gudzinski Estate***, Browne J. held that interpretation of an insurance contract is a question of law reviewable on a standard of correctness, and fact findings or inferences to determine the essential terms of a contract warrant deference absent palpable and overriding error. Therefore, where there are no fact findings or inferences necessary or the facts are not contentious, the question is purely a question of the correct interpretation of the phrase and the standard of review is correctness: ***Gudzinski Estate***, at para 17 citing ***Pivotal Capital Advisory Group Ltd v NorAmera BioEnergy Corp***., 2010 ABCA 199 at para. 18 (involving a financial advisory services agreement) and ***Jager v Liberty Mutual Fire Insurance Co***, 2001 ABCA 163 at para 14 (involving a standard automobile insurance policy).

[19] ***Holm v AGAT Laboratories Ltd***., 2018 ABCA 23 involved the interpretation of an employment contract. At paras 15-16, the Alberta Court of Appeal, relying on ***Sattva*** and ***Housen***, accepted that contractual interpretation is a question of mixed fact and law, and unless there is an extricable question of law, it is reviewed for palpable and overriding error. However, the Court of Appeal specifically noted that ***Holm*** did not involve the interpretation of a standard form contract and factual matrix specific to the particular parties within the meaning of ***Ledcor Construction Ltd v Northbridge Indemnity Insurance Co***, 2016 SCC 37 at para 46.

[20] ***Rice v Shell Global Solutions Canada Inc***, 2021 ABCA 408 leave to appeal refused 2022 CanLII 58768 (SCC) also involved the interpretation of an employment agreement. At para 18, the Alberta Court of Appeal affirmed the ***Sattva*** principle. The Court confirmed that contractual interpretation involves issues of mixed fact and law. Unless it is clear that a trial judge erred in connection with an extricable question of law, the determination of whether the facts satisfied the relevant legal test is reviewable on the standard of palpable and overriding error.

[21] ***Bryant v. Parkland School Division***, 2022 ABCA 220 involved the interpretation of an employment contract, but the chambers judge characterized the employment contract as a standard form contract. At para 10, the Alberta Court of Appeal stated that while the interpretation of standard form contracts is reviewed for correctness (citing ***Ledcor*** at para 46), where the contract is not properly characterized as standard form the interpretation is a question of mixed fact and law reviewable for palpable and overriding error (citing ***Holm*** at para 15).

[22] In ***Sattva***, at paras 53-55 the Supreme Court of Canada, in establishing the modern principles of contractual interpretation, stated that "courts should be cautious in identifying extricable questions of law in disputes over contractual interpretation ... as it is often difficult to extricate the legal questions from the factual."

[23] In ***Earthco Soil Mixtures Inc. v Pine Valley Enterprises Inc*., 2024 SCC 20**, Martin J., writing for the majority, reiterated the ***Sattva*** modern principles of contractual interpretation and the applicable standard of review.

[24] This Appeal does not involve the interpretation of a standard form contract. Therefore, the ***Sattva*** standard of review in modern contractual interpretation, as applied by the Alberta

Court of Appeal in ***Rice*** and ***Holm***, applies to the Trial Judge's interpretation of the Agreement in this case.

[25] The principles set out in this section are applied under each ground of appeal discussed below.

V. Analysis

A. Issue 1: Did the Trial Judge err in interpreting the Agreement as not extinguishing Mr. Plotnikoff's common law right to reasonable notice?

[26] I start with the applicable standard of review. I find that the Company's submissions in respect of the first ground is about "how" the Trial Judge interpreted the termination provision of the Agreement. The Company did not identify any extricable questions of law that justifies the standard of review of correctness. For example, the Company did not argue that the Trial Judge applied an incorrect principle, failed to consider a required element of a legal test, or similar errors discussed above.

[27] Accordingly, ground one of the appeal remains a question of mixed fact and law reviewable on a deferential standard of palpable and overriding error.

1. Applicable Law

[28] In this section, I set out the law applicable to employment contracts relevant to the issue in dispute.

[29] This case appears to be the first reported decision, at least in Alberta, that addresses employer discretion in an employment termination clause and the effect of that discretion on an employee's right to common law reasonable notice implied in employment contracts and preserved in the employment statute.

[30] Section 3(1) of the *Code* provides as follows:

> 3(1) Nothing in this Act affects
>
> (a) any civil remedy of an employee or an employer;
>
> (b) an agreement, a right at common law or a custom that
>
> (i) provides to an employee earnings, leaves of the types described in Divisions 7 to 7.6 or other benefits that are at least equal to those under this Act, or
>
> (ii) imposes on an employer an obligation or duty greater than that under this Act. [emphasis added]

[31] In Canada, there are specific principles that apply to interpretation of employment contracts: ***Holm*** at paras 40-41; ***Bryant*** at paras 12, 27-28.

[32] Courts recognize the power imbalance and inequality of bargaining power inherent in the employment relationship and the limited opportunity of employees to negotiate contractual terms. Moreover, courts have repeatedly recognized the significance of work (and the manner in which employment can be terminated) to an individual's life and well-being: ***Bryant*** at para 12 citing ***Globex Foreign Exchange Corp v Kelcher***, 2011 ABCA 240 at paras 6-7; ***Reference Re Public Service Employee Relations Act (Alta)***, [1987] 1 SCR 313 at p 368; ***Machtinger v HOJ***

Industries Ltd,[1992] 1 SCR 986 at para 30; ***Wallace v United Grain Growers Ltd***, [1997] 3 S.C.R. 701 (S.C.C.) at paras 91, 93-95.

[33] Interpretive principles have evolved to protect employees and one such principle is that "in employment law, uncertainty ought to be resolved in favour of the employee". "[F]aced with a termination clause that could reasonably be interpreted in more than one way, courts should prefer the interpretation that gives the greater benefit to the employee": ***Bryant***, at para 13 citing ***Holm*** at para 34; ***Wood v Fred Deeley Imports Ltd***, 2017 ONCA 158 at para 28; ***Miller v Convergys CMG Canada Limited Partnership***, 2014 BCCA 311 at para 15; ***Singh v Qualified Metal Fabricators Ltd***. (2016), 33 CCEL (4th) 308 at para 15.

[34] Another long-standing principle is that employment contracts are presumed to contain an implied term requiring an employer to provide reasonable common law notice of dismissal: ***Bryant*** at para 14 citing ***Machtinger***, at 998; ***Globex*** at para 9; ***Howard v Benson Group Inc (The Benson Group Inc)***, 2016 ONCA 256 at para 20.

[35] Therefore, while it is open to an employer to include language in the contract rebutting that presumption, the contract language must be "clear and unambiguous" to be effective. Courts have also stated that the contract must contain language that is "clear and unequivocal", or that meets a "high level of clarity", to extinguish the common law right to reasonable notice": ***Bryant***, at para 14 citing ***Howard***, at para 20; ***Holm*** at para 21; ***Matthews v Ocean Nutrition Canada Ltd***, 2020 SCC 26 at para 61.

[36] Courts have repeatedly asserted that there is no magic formula to limit termination notice, or payment in lieu, to the minimums in employment standards legislation. However, the terms of such enforceable employment contract need to "satisfy a court that presumptions in favour of the employee, mandated by previously decided jurisprudence, have been rebutted": ***Holm***, at para. 42. At its essence, an enforceable employment contract must contain clear and unequivocal language to extinguish or limit an employee's common law rights. Where an employment contract does not meet this threshold, an employee remains free to pursue common law remedies: ***Holm***, at para 35.

[37] In the dissenting reasons in ***Bryant***, at para 28, Slatter J.A. stated that the

> "rule has since been restated in subsequent cases such as ***Ocean Nutrition*** at paras. 55, 64 to be:
>
> > … do the terms of the employment contract ... unambiguously take away or limit that common law right? The question is not whether these terms are ambiguous but whether the wording ... unambiguously limits or removes the employee's common law rights ..."
>
> The proper approach is not to examine the clause to see if it is ambiguous. The analysis starts with the assumption that the employee is entitled to common law reasonable notice, and the contract must be examined to see whether it unambiguously limits that right.

[38] The starting point, as the majority concurred, is that there is a presumption of an implied term requiring the employer to provide reasonable common law notice on dismissal. Only where the employment contract unambiguously limits or removes that right will the presumption be rebutted, and the implied term ousted: ***Bryant***, at para 15.

[39] Employment standards statutes only set minimum termination notice periods required by law. They do not set maximum periods. Thus, contracts that depend on this wording are generally not sufficiently clear to exclude notice longer than the statutory minimum: ***Cunningham v Hillview Homes Ltd***, 2015 ABQB 304 at paras 81, 83, 85-86; ***Smith v Hostess Frito-Lay Co***, 1994 ABCA 238 at paras 11, 15-23; ***Turner v Uniglobe Custom Travel Ltd***, 2005 ABQB 513 at paras 47 and 55; ***Bryant***, at para 25 per Slatter J.A.; ***Holm***, at para. 29.

[40] I now turn to the parties' submissions.

2. Application of the Law to the Facts

[41] As discussed below, the Company argued that the Trial Judge committed several errors in interpreting the Agreement.

[42] Mr. Plotnikoff submitted that the Trial Judge applied the correct law and determined that unless a term of contract rendered section 3 of the *Code* inapplicable, the employee will be entitled to common law reasonable notice or severance pay in lieu.

a. The test for enforcing an employment contractual clause for termination without cause

[43] I start with the Company's submissions relating to the legal principle that governs interpretation of the Agreement. The Company relied on the test set out in ***Nutting v Franklin Templeton Investments Corp***, 2016 ABQB 669.

[44] In my view, the test for enforcing an employment contractual notice clause upon termination without cause, particularly in the context of Alberta's employment legislation, is as set out by the Alberta Court of Appeal in ***Holm*** and ***Bryant***.

[45] The Company argued that common law reasonable notice (or payment in lieu) can be excluded in an employment contract by an express provision of a different entitlement, which will be valid provided the contractual provision meets the minimum entitlements in the employment standards legislation. In my view, this is not the correct test.

[46] In ***Nutting***, at paras 13 and 21, Master Wacowich relied on an excerpt from the majority reasons in ***Machtinger*** and stated that, "[i]n order to oust the presumed (or implied) term of reasonable notice upon notice of termination without cause, the agreement must expressly or implied specify "some other period of notice"". [emphasis added]

[47] ***Machtinger*** confirmed that contractual notice periods shorter than statutory minimums are unenforceable: ***Bryant***, at para 23. It then determined whether the common law reasonable notice or the statutory minimums applied in that case where the contract was found to be null and void. The material statements in ***Machtinger*** are as follows:

> The history of the common law principle that a contract for employment for an indefinite period is terminable only if reasonable notice is given is a long and interesting one, going back at least to 1562 and the Statute of Artificers, 5 Eliz. 1, c. 4. … In Canada, it has been established since at least 1936 that employment contracts for an indefinite period require the employer, absent express contractual language to the contrary, to give reasonable notice of an intention to terminate the contract if the dismissal is without cause: *Carter v. Bell & Sons (Canada) Ltd.*, 1936 CanLII 75 (ON CA), [1936] O.R. 290 (C.A.).

> The parties devoted considerable attention in argument before us to the law governing the implication of contractual terms, and specifically to the relevance of the intention of the parties to the implication of a term of reasonable notice of termination in employment contracts. The relationship between intention and the implication of contractual terms is complex, and I am of the opinion that this appeal can and should be resolved on narrower grounds. For the purposes of this appeal, I would characterize the common law principle of termination only on reasonable notice as a presumption, rebuttable if the contract of employment clearly specifies some other period of notice, whether expressly or impliedly. [per Iacobucci, J. at pp 997-998]
>
> ...
>
> But what is at issue is not the intention of the parties, but the legal obligation of the employer, implied in law as a necessary incident of this class of contract. That duty can be displaced only by an express contrary agreement: [citations omitted] [per McLachlin J. in concurring reasons at p 1012]
>
> [emphasis added]

[48] In my view, the principle of general application is that, in Canada employment contracts for an indefinite period require the employer, *absent express contractual language to the contrary*, to give reasonable notice of an intention to terminate the contract if the dismissal is without cause. Thus, the employer's legal obligation to give reasonable notice of termination can be displaced only by an express contrary agreement.

[49] The above view is supported by the Alberta Court of Appeal's interpretation of ***Machtinger*** and the test for enforcement in the context of Alberta's employment legislation set out in ***Holm*** and ***Bryant***. The test in ***Holm*** and ***Bryant*** is binding in Alberta. With great respect, the test set out at para 21 of ***Nutting*** is not consistent with binding Alberta case law.

[50] As stated in ***Bryant***, the proper approach is to start the interpretation analysis with the presumption that the employee is entitled to common law reasonable notice, and then examine the employment contract to see whether it unambiguously removed or limited the employee's right. The correct test to determine whether the employment contract unambiguously removed or limited the employee's right, is that the language in the employment contract must be "clear and unambiguous", "clear and unequivocal", or meets a "high level of clarity" to extinguish the common law right to reasonable notice.

[51] This test is consistent with the long-standing principle, generally applied in Canada and recognized in ***Machtinger***, that absent express contractual language to the contrary, employment contracts for an indefinite period require the employer to give reasonable notice of an intention to terminate the contract if the dismissal is without cause.

[52] I find that the Trial Judge adopted the correct approach and applied the correct test in ***Holm*** and ***Bryant***.

b. Interpretation of the Court of Appeal's statement at para 17 of *Bryant*

[53] The Company argued that Clause 4(c) of the Agreement should be interpreted to have extinguished Mr. Plotnikoff's right to common law reasonable notice, based on a statement at para 17 of ***Bryant***, which the Company characterized as *obiter* or binding guiding principle.

[54] In rejecting the chambers judge's conclusion in ***Bryant*** that "the employer had given itself the discretion to decide the amount of notice owing to an employee", the Court of Appeal stated that, "[t]hat seems a questionable conclusion. If that was intended the employer could have written the contract to clearly say so." [emphasis added]

[55] The Company argued that it did exactly that in Clause 4(c) of the Agreement in this Appeal. I disagree. I also disagree with the Company's characterization of the Court of Appeal's statement as *obiter*, or a guiding principle that is binding on lower courts.

[56] I find that the Court of Appeal in ***Bryant*** did not determine any wording that would be effective to establish that "the employer had given itself the discretion to decide the amount of notice owing to an employee" to the exclusion of the employee's common law rights. The Court of Appeal did not decide what wording an employer can use "to clearly say so".

[57] The wording in Clause 4(c) was not before the Court of Appeal in ***Bryant***. Courts are cautioned against hypotheticals in contractual interpretation, an "inherently fact specific" exercise: ***Rice***, at para 44; ***Sattva***, at paras. 54-55.

[58] I find nothing in ***Bryant*** that supports the Company's interpretation and characterization of the Court of Appeal's statement at para 17 of ***Bryant***.

c. The Trial Judge's reliance on cases considering different contractual wording not similar to Clause 4(c)

[59] The Company argued that the Trial Judge erred by adopting the reasoning in ***Bryant*** as dispositive with respect to the words in Clause 4(c) of the Agreement. It argued that by overlooking the key difference in the wording of in Clause 4(c), the Trial Judge treated it as comparable to the wording of the contractual provisions in ***Bryant***, ***Holm***, and ***Kosowan v Concept Electric Ltd.***, 2007 ABCA 85.

[60] The Company cited examples in the jurisprudence where courts construed employment contract termination provisions to have adequately limited notice to statutory minimums and precluded common law reasonable notice. It relied on ***Nutting***, ***Clarke v Insight Components (Canada) Inc.***, 2008 ONCA 837, ***Farah v EODC Inc***., 2017 ONSC 3948, ***Inayat v Vancouver Career College (Burnaby) Inc. (Eminata Group)***, 2017 ABPC 124 and ***Lawton v Syndicated Services Inc.***, 2022 ABPC 3.

[61] I find that the Trial Judge was alive to the facts of the case before him and the difference between the wording of the Agreement in this case and the wording of the employment contract provisions in the jurisprudence he considered.

[62] At para 12 of the Trial Decision, the Trial Judge stated, "[p]aragraphs 16 and 17 of **Bryant** could almost be repeated in relation to the facts of this action and the wording of clause 4(c) of the Agreement." [emphasis added]

[63] While para 12, at first glance, appears to support the Company's contention, the Trial Judge's reasoning did not stop there. Paras 13 to 18 set out the Trial Judge's analysis of Clause 4(c), including the key phrases "*with notice as may be mandated by the Employment Standards legislation*" and "*or such additional notice as the Company, in its sole discretion, may provide...*". The Trial Judge set out his objective interpretation of the Agreement and explained his reasons for rejecting the Company's interpretation of these key phrases and the wording of the Agreement.

[64] At paras 19 to 29 of the Trial Decision, the Trial Judge analyzed ***Kosowan*** and ***Holm*** and set out the theme he found that connected the wording of the contracts in those cases and Clause 4(c) of the Agreement in this case. The Trial Judge concluded that the reasoning in ***Bryant***, ***Kosowan*** and ***Holm*** support the conclusion that it is not clear and unambiguous that Clause 4(c) extinguished or limited Mr. Plotnikoff's common law right to reasonable notice. I agree.

[65] At paras 30 to 33 of the Trial Decision, the Trial Judge distinguished ***Nutting***, ***Inayat***, and ***Lawton***. He noted that the wording in ***Nutting*** was "clear and unequivocal that notice or pay in lieu is restricted to the applicable employment standards legislation and that no claim in common law is permitted." I agree.

[66] The termination clause at para 5 of ***Nutting*** included the following wording:

> The provision of such notice or pay in lieu of notice, benefits and severance pay constitutes full and final satisfaction of all rights or entitlements which you may have arising from or related to the termination of your employment (including notice, pay in lieu of notice, severance pay, etc.), whether pursuant to contract, common law, statute or otherwise.

I agree with Master Wacowich, at para 38, that the agreement in ***Nutting*** contained a valid clause on notice of termination which met the legal test for enforceability, in that, it "expressly evidenced the parties' intention that the prescribed notice would oust any other notice requirement that may have otherwise been implied."

[67] The Trial Judge distinguished ***Inayat*** and noted that ***Lawton*** did not mention ***Bryant, Kosowan*** or ***Holm*** and was not binding. I also agree.

[68] In this Appeal, the Company also relied on ***Clarke v Insight Components (Canada) Inc.***, 2008 ONCA 837 and ***Farah v EODC Inc***., 2017 ONSC 3948. However, the Company acknowledged that the wording of the contracts in these cases it relied upon are not identical to the wording in Clause 4(c) of the Agreement. In my view, these cases are distinguishable from the Appeal before me.

[69] In ***Clarke***, the key parts of the contract provided as follows:

> "Termination of Employment — ... Your employment may be terminated without cause for any reason upon the provision of reasonable notice equal to the requirements of the applicable employment or labour standards legislation. By signing below, you agree that upon the receipt of your entitlements in accordance with this legislation, no further amounts will be due and payable to you whether under statute or common law. [emphasis added]

[70] The Ontario Court of Appeal held that the clause was clear and to "resolve any possible doubt, the concluding words of the clause exclude any further amounts "whether under statute or

common law"": ***Clarke***, at para. 5. I agree. The wording in ***Clarke*** has a similar level of clarity, in expressly excluding common law, as the wording in ***Nutting***. No such excluding or limiting wording exists in Clause 4(c) of the Agreement in this Appeal.

[71] In ***Farah***, the Applicant signed five consecutive employment contracts during his six and half years working for that employer. The key parts of the latest contract wording provided as follows:

> the Employer may terminate the Employee without just cause simply upon providing him/her with the entitlements prescribed in the *Employment Standards Act*, 2000 ("the Act") or any amendments thereto. The Employee hereby acknowledges that he/she has had the opportunity to review the relevant portions of the Act and/or to consult with legal counsel about their impact on his/her current entitlements upon termination of his/her employment. [emphasis added]

[72] That court found the above wording to be clear and unambiguous. The contractual history between the parties was a factor, as argued by the employer. I also note that the wording in ***Farah*** did not expressly include any additional notice by the employer, as in ***Bryant*** and in Clause 4(c) of the Agreement in this Appeal. Therefore, the court in ***Farah*** did not consider the meaning or effect of any expressed additional notice by the employer.

[73] The Company also submitted that the limits placed on common law reasonable notice were achieved either by (i) indicating that statutory entitlements represented the ceiling to any claim, or (ii) by stipulating that any additional notice beyond statutory amounts would be available to the employee only if the employer decided to give more "in its sole discretion". Based on this theory, the Company concluded that Clause 4(c) restricted Mr. Plotnikoff's legal entitlements to those "mandated" in employment standards legislation, and that any additional notice or severance that might be provided by the Company was in its "sole discretion" to offer.

[74] I disagree with Company's analysis. In my view, the cases the Company relied on do not support the Company's theory. The outcome of those cases largely depended on the wording of their contracts, the provisions of their applicable legislation, and the specific facts and circumstances of the parties, among other things.

[75] Further, mere reference by an employer to employment standard legislation in a termination notice clause generally does not meet the test. As set out above, it is settled that employment standards statutes only set minimum termination periods required by law. Courts have severally held that contracts that depend on that wording are generally not sufficiently clear to exclude notice longer than the statutory minimum: ***Bryant***, at para 25. Compliance by the employer with the minimum statutory standards does not operate to circumscribe the employee's common law rights. Compliance with the employment legislation is not in and of itself a defence to a common law action for wrongful dismissal: ***Turner***, at para 47 citing ***Martellacci v CFC/INX Ltd.***, 1997 CanLII 12327 (ON SC) at paras 21 and 25.

[76] This Court has held that the period of notice an employee is entitled to receive pursuant to the Alberta *Code* reflects their minimum entitlement, and given the provision of s 3 of the *Code*, an employee's right to pursue a civil remedy for wrongful dismissal is preserved: ***Cunningham***, at paras 81 and 86.

[77] The Alberta Court of Appeal also held in ***Smith*** that section 57 of the *Code* provides the minimum periods of notice of termination to be given by an employer, which can be extended by

common law, and do not in any way affect an employee's right to have the issue of reasonableness of a notice period determined by common law. The Court of Appeal concluded that the statutory minimums are simply that — minimums, and that an employee may still sue for wrongful dismissal and have the question of reasonable notice determined by the common law. The Court held that section 9 (now section 3) of the *Code* clearly states that nothing in the Alberta *Code* prevents an employee from pursuing a civil remedy and that section preserves the employee's right to commence a civil action to determine whether the common law notice period will be greater than that set by s. 57 of the *Code*: ***Smith***, at paras 15-16 and 20-23.

[78] The issue in this Appeal is not whether I would interpret the Agreement and Clause 4(c) in exactly the same manner as the Trial Judge. The issue is whether the Trial Judge erred in interpreting the wording of the Agreement as not clearly extinguishing or limiting Mr. Plotnikoff's common law right to reasonable notice, but instead recognized that a period of notice extending beyond the statutory minimum is a realistic possibility.

[79] I find that the Trial Judge did not err in answering the key question before him as to whether the termination provisions in Clause 4(c) of the Agreement meet the "clear and unambiguous", "clear and unequivocal" or "high level of clarity" test required to extinguish Mr. Plotnikoff's common law right to reasonable notice.

[80] In my view, Clause 4(c) of the Agreement does not contain clear limiting or exclusionary wording that meet the "clear and unambiguous", "clear and unequivocal" or "high level of clarity" test required to limit, oust or extinguish Mr. Plotnikoff's common law right implied in the Agreement and preserved under section 3(1) of the *Code*. The Agreement does not reference at all, let alone exclude, the remedies and rights preserved under section 3 of the *Code*.

[81] On its face, Clause 4(c) provided that the Company will provide Mr. Plotnikoff with (i) notice as may be mandated by the Employment Standards legislation or (ii) such additional notice as the Company, in its sole discretion, may provide.

[82] I agree with the Trial Judge that the words "mandated by the Employment Standards legislation" in the first part of Clause 4(c) simply establishes Mr. Plotnikoff's minimum period of notice and compliance with statutory requirements under the *Code*.

[83] I find that this wording in Clause 4(c) does not reference section 3 of the *Code* and does not contain any language to limit or extinguish Mr. Plotkinkoff's common law rights. Therefore, that wording leaves open the ability of Mr. Plotnikoff to pursue his common law entitlements preserved under section 3 of the *Code*. As set out in ***Smith***, ***Turner***, and ***Cunningham***, minimum notice periods do not in any way affect an employee's right to have the issue of reasonableness of the notice determined by common-law, and compliance by the employer with the minimum statutory standards does not operate to circumscribe the employee's common law rights.

[84] I also agree with the Trial Judge that the wording "or such additional notice" in the second part of Clause 4(c) recognizes that a period of notice extending beyond the *Code*'s minimum requirements is a realistic possibility.

[85] However, the Trial Judge determined, at para 18 of the Trial Decision, that the wording "in its sole discretion" is not of consequence. He reasoned that the ultimate decision to set and increase Mr. Plotnikoff's notice, will be that of the employer, whether or not it is expressly stated.

[86] While I respectfully disagree with the Trial Judge that the words "in its sole discretion" is of no consequence, my interpretation of that wording in the context of the Agreement as a whole does not change the ultimate conclusion that Clause 4(c) contemplated the possibility of additional notice to the employee beyond the statutory minimum. I agree with Mr. Plotnikoff that the word "discretion" by itself does not extinguish common law rights.

[87] Given the legal principle that the minimum notice period in the *Code*, referenced in the first part of Clause 4(c), does not affect Mr. Plotnikoff's right to have the reasonableness of the notice determined by common-law, in my view, another objective and reasonable interpretation of the phrase in the second part "or such additional notice as the Company, in its sole discretion, may provide" is that the Company reserved for itself the choice to make an offer to Mr. Plotnikoff in respect of his common law reasonable notice.

[88] Even if I apply the statement at para 21 of ***Nutting***, as the Company argued, that in order to oust the common law reasonable notice the agreement must expressly or implied specify "some other period of notice", I find that the wording in in Clause 4(c) does not meet the requirement in the ***Nutting*** statement.

[89] With respect to the first part of Clause 4(c) "notice as may be mandated by the Employment Standards legislation", Iacobucci J. held that the minimum notice periods set out in the Act do not operate to displace the presumption at common law of reasonable notice; and the common law presumption of reasonable notice is a "benefit", which, if the period of notice required by the common law is greater than that required by the Act, will prevail over the notice period set out in the Act: ***Machtinger***, at p 999-1000.

[90] With respect to the second part of Clause 4(c) "or such additional notice as the Company, in its sole discretion, may provide", I find that the wording does not specify some other period of notice as required in the ***Nutting*** statement. In my view, it is silent as to the term of notice. It is open for the court to imply a term of notice. According to McLachlin J., the law says that where the contract is silent as to the term of notice upon dismissal, the court will imply a term of notice: ***Machtinger***, at p 1007.

[91] In my view, the wording in Clause 4(c) "in its sole discretion" does not meet the "clear and unambiguous", "clear and unequivocal" or "high level of clarity" binding test in ***Holm*** and ***Bryant*** required to limit or extinguish Mr. Plotkinkoff's common law rights in the Agreement and preserved under section 3 of the *Code*.

[92] From the foregoing analysis, I agree with the Trial Judge's conclusion that Clause 4(c), interpreted in the context of the Agreement as a whole, is insufficient to clearly and unequivocally limit or extinguish Mr. Plotnikoff's right to common law reasonable notice implied in the Agreement and preserved under section 3 of the *Code*.

[93] In employment law, uncertainty ought to be resolved in favour of the employee and the reading more favourable to the employee must prevail: ***Holm***, at para 34; ***Bryant***, at para 18; ***Rizzo & Rizzo Shoes Ltd. (Re)***, 1998 CanLII 837 (SCC), [1998] 1 SCR 27 at para 36.

d. The legal effect of Clause 4(c) from the employee's perspective

[94] The Company further argued that the Trial Judge's interpretation of Clause 4(c) at paras 13 and 18 of the Trial Decision failed to appreciate the clause's legal effect from Mr. Plotnikoff's perspective. It submitted that, from the vantage point of Mr. Plotnikoff, the language

of Clause 4(c) did set a clear upper limit to what he could assert as his legal entitlement to notice, therefore, it was the notice entitlement mandated by the *Code*.

[95] I disagree with the Company's alleged legal effect of the clause. I have addressed above the legal effect of contractual termination notice clauses that rely on minimum statutory standards. I find that the Trial Judge considered the perspectives of both parties, applied the correct law to the facts before him, and interpreted the Agreement objectively.

[96] Objectivity of assessment is a crucial means by which courts can ensure the legality of the contract at the same time courts enforce the terms of the contract consistently with what those terms mean, irrespective of the aspirations of parties seen in hindsight: ***Holm***, at para 17.

[97] I am satisfied that the Trial Judge did not make any error the Company alleged in respect of the legal effect of Mr. Plotnikoff's perspective.

3. Conclusion

[98] The Trial Judge concluded that the Agreement in this case, and particularly the without-cause termination provision in Clause 4(c), does not meet the enforceability threshold, and consequently, Mr. Plotnikoff remains free to pursue common law remedies. That conclusion does not engage an area of appellate review without deference, and I find no reviewable error in the Trial Judge's interpretation of the Agreement in this Appeal.

B. Issue 2: Did the Trial Judge err in his assessment of a reasonable notice period for quantifying Mr. Plotnikoff's award?

[99] The Company made an alternative argument that the Trial Judge's assessment and award of a reasonable notice period of 10-months was inordinately high and fell outside the reasonable range.

[100] Courts will not interfere with the decision of the Trial Judge as to the reasonable notice period unless the Trail Judge erred in principle by applying the wrong test or deciding on a reasonable notice period which was inordinately high or low (palpably wrong.): ***Hnatiuk v RW Gibson Consulting Services Ltd***, 2005 ABQB 78 at paras 6-7 and 17 citing ***Holmes v PCL Construction Management Inc***, 1994 ABCA 358 at para 9; ***Sharp Electronics of Canada Ltd v Nelson***, 2003 ABCA 57 at para 5.

[101] Given that the Company's second ground of appeal focuses on the range of the notice period the Trial Judge awarded to Mr. Plotnikoff, the standard of review is palpable and overriding error.

1. Applicable Law

[102] The guiding principles and non-exhaustive list of factors articulated and generally accepted for determining what constitutes a reasonable notice period was set out in ***Bardal v Globe & Mail (The)***,1960 CanLII 294 (ON SC), 24 D.L.R. (2d) 140 at p 145 (confirmed in ***Machtinger*** and ***Wallace***) as follows:

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

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

[103] No two cases are identical, and there is no set formula to be applied: ***Nelson v Champion Feed Services Inc***, 2010 ABQB 409 at para 86. While case law is useful as a general guideline, the exercise of selecting the appropriate notice period is unique to every case and each case must be decided on its own facts: ***Motta v Davis Wire Industries Ltd***, 2019 ABQB 899 at para 156.

[104] Once the various factors to be considered have been applied to the facts of the particular case, the conclusion of length of notice is a matter of judgment on which there will be different opinions. There is no formula derived from precedent, leading to a certain result since the facts from case to case will be almost infinitely variable: ***Christianson v North Hill News Inc***, 1993 ABCA 232 at para 9 citing ***Bagby v. Gustavson International Drilling Co. Ltd***., 1980 ABCA 227 at para 20.

[105] The ***Bardal*** factors, more fleshed out in ***Nelson*** at para 87, are as follows:

(a) The nature of the employment - the more senior the position, the longer it is likely to take to find a replacement position. There are fewer senior management jobs around.

(b) The length of service - the longer an employee has worked for one employer, the more difficult it may be to find an alternate job. Either because the employee has narrowed his or her skills by working for one employer for a long time, or the employee has been paid more than the job is worth because of long service.

(c) The age of the employee - the older the employee is, the less likely he or she is to find a suitable position, or the longer it is likely to take. Older employees are sometimes perceived as less worthwhile to invest in.

(d) The availability of suitable similar employment having regard to the employee's experience, training and qualifications together with surrounding economic circumstances - what is the realistic prospect of this employee getting a similar replacement job? What is the job market like? In good economic times, jobs may be plentiful and the employee may have little difficulty finding a good replacement job; in poorer times, there may be few jobs around.

2. Application of the Law to the Facts

[106] The Company provided a quantum assessment database chart using the search criteria of non-managerial, technical skilled employee, between 30 and 39 years of age, with six to ten years' tenure of employment. The chart shows four awards with the smallest being three months, the largest being nine months, and the median being 8.5 months.

[107] Mr. Plotnikoff provided a table of eight cases it presented at the Trial. The length of employment fell between 8.5 and 13 years. The smallest award was 7.5 months and the largest was 14 months. There were two 10-months awards and two 12-months awards.

[108] The Trial Judge, at paras 34 to 41, considered the law and the applied the ***Bardal*** factors to the facts before him. The Trial Judge specifically considered of significance Mr. Plotnikoff's almost ten-year period of employment and that the Company was his sole employer since attending Lethbridge College. Also of significance for the Trial Judge was the restricted nature of Mr. Plotnikoff's employment duties, categorized as a "singular experience for a singular employer." The Company did not dispute any of these facts.

[109] I find that the Trial Judge applied the correct law to the facts before him. I am satisfied that the 10-months award of reasonable notice was within a range of awards in comparable circumstances. Most importantly, I am satisfied that the 10-months award of reasonable notice was supported by the undisputed facts before the Trial Judge. I see no palpable or overriding error warranting appellant intervention for this ground of appeal.

3. Conclusion

[110] I am satisfied that the Trial Judge made no error in awarding 10-months reasonable notice to Mr. Plotnikoff.

C. Issue 3: Did the Trial Judge err in the determination that Mr. Plotnikoff's award should not be reduced by his failure to mitigate his claimed losses?

[111] The Company made another alternative argument that the Trial Judge failed to correctly apply the appropriate legal principles for assessing Mr. Plotnikoff's mitigation efforts. It argued that the Trial Judge overstated and mischaracterized the legal burden an employer bears when it asserts a failure to mitigate by a former employee. The Company also argued that the Trial Judge failed to consider the "more than adequate evidence to satisfy the applicable test."

[112] The determination of whether a terminated employee took reasonable steps in mitigation, including whether the failure to mitigate caused any part of the loss, is largely a question of fact. Absent an error in principle or a palpable and overriding error, a decision respecting mitigation is entitled to deference: ***Lake v La Presse***, 2022 ONCA 742 at para 13.

[113] Given the above allegations of the Company, this ground of appeal engages extricable errors in principle in a question of mixed fact and law. As I discussed in ***RH***, extricable errors in principle include an assessment of the evidence based on a wrong legal principle and a failure to consider all of the evidence in relation to the ultimate issue. Accordingly, ground three of the appeal is reviewable on a standard of correctness.

1. Applicable Law

[114] On termination without cause, an employee has a duty to mitigate his damages by taking all reasonable steps to obtain alternate employment. If failure to mitigate is alleged, the burden lies on the employer to show, on a balance of probabilities, that the employee failed in their duty to mitigate: ***Smith v Mistras Canada, Inc***, 2015 ABQB 673 at para 55 [***Mistras***] and ***Robinson v Team Cooperheat-MQS Canada Inc.***, 2008 ABQB 409 citing ***Red Deer College v Michaels***, 1975 CanLII 15 (SCC), [1976] 2 SCR 324.

[115] As the Supreme Court of Canada stated in ***Red Deer College***, if it is the employer's position that the employee could reasonably have avoided some part of the loss claimed, it is for the employer to carry the burden of that issue, *subject to the employer being content to allow the matter to be disposed of on the trial judge's assessment of the employee's evidence on avoidable consequences*. The burden of proof is upon the employer to show that the employee either found, or, by the exercise of proper industry in the search, could have procured other employment of an approximately similar kind reasonably adapted to their abilities, and that in absence of such proof the employee is entitled to recover the salary fixed by the contract. But the burden which lies on the employer of proving that the employee has failed in his duty of mitigation is by no

means a light one, for this is a case where a party already in breach of contract demands positive action from one who is often innocent of blame: ***Red Deer College***, at pp 331-332.

[116] In ***Evans v Teamsters Local Union No. 31***, 2008 SCC 20, [2008] 1 S.C.R. 661 at para 30, the Supreme Court of Canada further stated:

> This Court has held that the employer bears the onus of demonstrating both that an employee has failed to make reasonable efforts to find work and that work could have been found (*Red Deer College v. Michaels* [citations omitted]. [emphasis added]

[117] From ***Red Deer*** **College and** ***Evans***, the Supreme Court of Canada's original wording of the two-part onus or burden of proof on the employer in respect of the employee's mitigation, was that the employer must demonstrate that: (i) an employee has failed to make reasonable efforts to find work, and (ii) work could have been found of an approximately similar kind reasonably adapted to their abilities.

[118] However, the two-part onus has been expressed in subsequent case law as being that the employer must prove that: (i) the employee failed to take reasonable steps in the employee's particular circumstances to find reasonably alternate employment; and (ii) if the employee had taken those steps, the employee would have probably found employment: ***Robinson***, at para 122; ***Mistras***, at para 55; ***Magnan v Brandt Tractor Ltd***., 2008 ABCA, at para 30.

[119] In this Appeal, the Company relied on ***Robinson*** in support of its arguments. In ***Robinson***, Lee J. at para. 124 explained the employer's burden as follows:

> The Defendant has an onus to prove there was specific suitable employment available to Mr. Robinson had he looked. However the test is not whether there was a particular job open for Mr. Robinson, but whether the Plaintiff acted reasonably in seeking alternative employment, and whether had he attempted, it is probable he would have secured employment.

[120] Lee J. found that the employee's lack of effort *coupled with the employer's evidence demonstrating a vibrant labour market* was sufficient to meet the burden upon the employer.

[121] The Trial Judge relied on the test set out in ***Red Deer College*** as summarized in ***Lake***, at paras 11-12 and 32. In ***Lake***, at para 12, the Ontario Court of Appeal stated the employer's two-part onus as to prove that: (i) that the plaintiff failed to take reasonable steps to mitigate her damages; and (ii) that if she had done so she would have been expected to secure a comparable position reasonably adapted to her abilities.

[122] The Ontario Court of Appeal stated that the second part of the test on mitigation requires the court to be satisfied that, if reasonable steps had been taken, the terminated employee would likely have found a comparable position within the reasonable notice period. This is because the breach of the plaintiff's duty to mitigate will only be relevant if the breach is proved to be causative of the plaintiff's loss: ***Lake***, at para 32. The Court of Appeal accepted that in appropriate cases, an employer could meet the second branch of the mitigation test by means of a reasonable inference from proven facts: ***Lake***, at para 33.

[123] The reasonableness of an employee's decision not to mitigate will be assessed on an objective standard, within a multi-factored and contextual analysis. ***Evans***, at paras 30 and 33.

[124] In ***Christianson***, the Alberta Court of Appeal stated at para 11:

> Bearing in mind the fact that wrongful dismissal suits are suits for breach of contract, assessing their damages follows familiar principles. One of the most familiar is the defence that the plaintiff failed to mitigate his or her damages, and that was pleaded and argued here. The most important and undoubted qualification on that defence is this. The efforts of the plaintiff will not be nicely weighed, particularly with hindsight. All that the plaintiff need do is to make what at the time is an objectively reasonable decision; he or she need not make the best possible decision. In particular, the courts will not usually expect one faced with a breach of contract to take steps which are risky or unsavory. The onus of proof is on the defendant [citations omitted] and so any gap in the evidence accrues to the plaintiff's benefit. In wrongful dismissal cases, the courts have extended that qualification a little further: the plaintiff need not mitigate damages by taking a significant demotion, or by going back to the employer who fired him or her. All that is trite law. [emphasis added]

2. Application of the Law to the Facts

[125] The Company argued that it is not required to lead definitive evidence that if Mr. Plotnikoff had applied for one of the comparable jobs he found, he would have been assured of success in securing the new job. Therefore, had the Trial Judge adopted the correct legal test for assessing the evidence surrounding Mr. Plotnikoff's inadequate mitigation efforts, the Trial Judge would have concluded that there was a failure to mitigate that warranted a substantial reduction in the damages award.

[126] The Company submitted the Trial Judge also failed to consider Mr. Plotnikoff's own evidence, that there were in fact civil engineering technologist positions available during the months following his termination that he could have applied for but did not. It argued that this was more than adequate evidence to satisfy the applicable test for reducing Mr. Plotnikoff's quantum of damages for his failure to mitigate.

[127] The Company concluded that having regard to the evidence that Mr. Plotnikoff made no meaningful effort to start applying for work until more than six months after the termination of his employment, a six-month reduction in the awarded reasonable notice period is justified.

[128] Mr. Plotnikoff argued that there was no evidence at trial of available opportunities of comparable work that he failed to apply for, there was no evidence of the likelihood that he would have found comparable work sooner had he made more efforts, and there was no evidence of a vibrant market for him to seek work.

[129] He argued that the Company chose not to put any evidence forward at the Trial, and the relevant evidence at page 28 of the Trial Transcript was vague at best, as the Company chose not to cross examine him on that evidence.

[130] The Trial Judge set out the law and his analysis on mitigation at paras 42 to 53 of the Trial Decision. He found that Mr. Plotnikoff's mitigation activities were conducted in a rather leisurely manner, as the first position he applied for was almost six months after termination. He found that Mr. Plotnikoff applied for only seven positions, and while the positions he applied for were full time positions, Mr. Plotnikoff advised potential employers that he was seeking only part time employment.

[131] At paras 49-50 of the Trial Decision, the Trial Judge considered evidence of available comparable work and found as follows:

> Mr. Plotnikoff further testified that there were civil engineering technologist positions available, "a few here and there" and "one to two positions would arise one to two months after". There was no evidence submitted that Mr. Plotnikoff made any effort to obtain information regarding potential opportunities in his field of endeavour. He did not apply for any available opportunities. In the Court's view, Mr. Plotnikoff failed to take reasonable steps to mitigate his damages.

[132] Neither the Company nor Mr. Plotnikoff appealed this finding. The Trial Judge's finding on the first part of the two-part onus on the Company stands.

[133] With respect to the second part of the Company's onus, the Trial Judge stated at para 51 of the Trial Decision: "[a]s stated in **Lake**, the defendant must also demonstrate that had Mr. Plotnikoff taken reasonable steps to mitigate he "would likely have found a comparable position within the reasonable notice period"."

[134] The Trial Judge found that while Mr. Plotnikoff failed to take reasonable steps to mitigate his damages, there was no evidence that had Mr. Plotnikoff taken reasonable mitigation steps he would have found a comparable position within the notice period. The Trial Judge found that the only evidence received regarding engineering technologist employment opportunities came from Mr. Plotnikoff and his comment there were at times 1 to 2 positions available. He found that the Court received "no specific information regarding those opportunities and whether there actually were engineering technologist positions available" and the Court received "no evidence that there was comparable employment of any nature available to Mr. Plotnikoff." The Trial Judge concluded that the Company has failed to satisfy the second part of the test in ***Lake*** and ***Red Deer College***.

[135] I disagree with the Company that the Trial Judge required it to lead definitive evidence that if Mr. Plotnikoff had applied for one of the comparable jobs he found, he would have been "assured of success" in securing the new job. That was not the test applied by the Trial Judge and the Trial Judge did not require the evidence to come from only the Company. I find that the Trial Judge stated and applied the correct law as set out above.

[136] I also disagree with the Company that there was "more than adequate evidence" to satisfy its onus on the issue of mitigation. Even in ***Robinson***, which the Company relied upon, Lee J. stated that the test is "whether, had [the employee] attempted, *it is probable he would have secured employment*." Lee J. found in that case that, in addition to the employee's lack of effort, the employer's evidence demonstrating a vibrant labour market, was needed to meet the burden on the employer. I find that the Company was content to allow the matter to be disposed of on the Trial Judge's assessment of Mr. Plotnikoff's evidence on avoidable consequences: ***Red Deer College***, at p 331.

[137] Upon my review of the Trial Transcript with respect to the available evidence on this issue, I find that the Trial Judge's finding is supported by the record. The Trial Judge found that the evidence that met the first part of the test (that Mr. Plotnikoff failed to take reasonable steps to mitigate his damages) was insufficient to meet the second part of the test (that had Mr. Plotnikoff taken reasonable steps to mitigate he "would likely have found a comparable position within the reasonable notice period"). If translated into the words of Lee J in ***Robinson***, the Trial

Judge in this case found that the Plaintiff's lack of effort, by itself, was insufficient to meet the burden on the Defendant employer.

[138] For the employer to meet the onus on it in respect of the employee's mitigation of claimed losses, the Court requires evidence, which proves that, had the employee taken reasonable steps the employee would have probably found or secured employment. One example of such evidence is evidence demonstrating a vibrant labour market in comparable positions of employment reasonably adapted to the employee's abilities. However, the evidence required to satisfy the onus on the employer will vary, depending on the facts and circumstances of each case.

[139] In ***Christianson***, the Alberta Court of Appeal held that the onus of proof is on the employer and any gap in the evidence accrues to the employee's benefit.

[140] I am satisfied that the Trial Judge considered all the evidence, made reasonable findings of facts based on the evidence before him, and applied the correct legal test to the facts he found. I find no error of law that warrant appellate interference as the Company alleged.

3. Conclusion

[141] I find that the Trial Judge made no error in principle in determining that the Company failed to satisfy the second part of the onus on it, and accordingly, no reduction of Mr. Plotnikoff's 10-months period of reasonable notice was warranted. Further, I see no palpable or overriding error in the Trial Judge's findings and conclusions on this ground of Appeal.

VI. Disposition

[142] In light of my conclusions on grounds one to three of this Appeal, I dismiss the Company's ground four that the Trial Judge erred in rendering an unreasonable decision based on the facts and the law.

[143] Given the above analysis, I found no error of law or palpable and overriding error in the Trial Decision that warrants appellate intervention. In the result, the Company's Appeal is dismissed.

[144] Mr. Plotnikoff, in his written Brief, requested cost of the Appeal and post judgment interest calculated on the total Judgment amount ($50,723.66) from the Judgment date (Sept. 12, 2023) plus the costs of the Appeal on the prescribed rates under the *Judgment Interest Regulation*, Alta Reg 215/2011 until the full amount owing is satisfied.

[145] In the event the parties are unable to reach agreement on costs of this Appeal, and post judgment interest on the total Judgment amount and on the cost of this Appeal, the following process shall apply:

(a) no later than January 10, 2025, Mr. Plotnikoff shall file and serve on the Company a written submission, setting out his position on cost and post judgment interest including all supporting evidence and legal authorities, and submit filed copies to my office;

(b) no later than February 10, 2025, the Company shall file and serve on Mr. Plotnikoff a written submission, setting out its position on cost and post judgment interest including all supporting evidence and legal authorities, and submit filed copies to my office; and

(c) each party's written submission shall include factors set out in rule 10.33 and will be a maximum of 5 pages (excepting attachments such as legal authorities, draft proposed bill of costs or reasonable or proper costs summary).

Heard on the 8th day of March, 2024.
Dated at the City of Calgary, Alberta this 29th day of November, 2024.

C.B. Thompson
J.C.K.B.A.

Appearances:

Craig Neuman, KC
for the Defendant/Appellant

Dylan Snowdon
for the Plaintiff/Respondent