IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Thompson v. Revolution Resource Recovery Inc.,* 2025 BCSC 8

Date: 20250103
Docket: S207111
Registry: Vancouver

Between:

Margaret Christine Thompson

Plaintiff

And

Revolution Resource Recovery Inc.

Defendant

Before: The Honourable Justice Tucker

Reasons for Judgment

Counsel for the Plaintiff:	A. Wensel S. Fatima, A/S
Counsel for Defendant:	L. Robertson
Place and Date of Trial/Hearing:	Vancouver, B.C. March 5-7, 2024
Place and Date of Judgment:	Vancouver, B.C. January 3, 2025

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I. Introduction

[1] The plaintiff, Margaret Thompson, was employed at Revolution Resource Recovery Inc. ("Revolution") for a period of three years and four months in the position of Major/Key Accounts Manager ("Key Accounts Manager"). On September 27, 2019, Revolution terminated her employment without cause. This trial arises out of that termination.

[2] Ms. Thompson claims that she is entitled to a reasonable notice period of eight months, damages for breach of contract for failure to pay bonuses during employment, and $50,000 in punitive damages.

[3] Revolution says Ms. Thompson accepted and deposited a severance cheque in circumstances that released Revolution from all of claims. In the alternative, Revolution submits that a three to four-month notice period is appropriate. Revolution disputes Ms. Thompson's assertion that her salary for purposes of pay in lieu should include an amount for commission.

II. Background Facts

A. Hiring

[4] Ms. Thompson was hired to work as Key Accounts Manager. Her employment with Revolution began on June 1, 2016.

[5] On May 17, 2016, Ms. Thompson executed a set of "New Employee Set-Up Documents". In an agreed statement of facts, the parties agree those documents established the following terms of employment:

a) a base salary of $4,000 per month and a monthly car allowance of $700 (or a company vehicle in lieu);

b) a $500 bonus for signing eight new accounts in a calendar month, an additional $500 bonus if 14 new accounts were signed in the calendar month, and a further $100 bonus for every new account signed over 14 (to a maximum of 30);

c) a $250 bonus for re-signing 16 accounts in a calendar month, an additional $250 bonus if 20 accounts were re-signed, and a further bonus of $500 if 25 accounts were re-signed;

d) to receive commissions, she had to be an “active and current employee” at the time payment was due. An employee that was terminated, laid off, resigned, on leave or on disability at the time a commission payment became due was not eligible;

e) in the case of discrepancies or disputes with regard to commissions, management discretion would apply.

[6] On or about June 16, 2016, Ms. Thompson executed a “Confidentiality, Non-Solicitation and Non-Competition Agreement” (“Restrictive Agreement”).

[7] Ms. Thompson was part of the sales department. She was the sole Key Account Manager. Throughout her employment, she reported directly to Mark O’Hara, the Director of Sales. The other members of the department included two retention account managers (who dealt with cancelled accounts), several new business sales representatives (who sought out or “hunted” new clients for Revolution), sales coordinators (administrative assistants), and customer service agents (who dealt with day-to-day service issues).

[8] She attended weekly management meetings along with Mr. O’Hara and other managers in the sales department. Ms. Thompson's position involved managing accounts, not managing other employees. She had no authority to hire, fire or discipline any employees, although she was sometimes invited to provide input.

[9] Ms. Thompson’s job responsibilities and duties remained the same throughout her employment at Revolution. Her primary job function was maintaining Revolution’s existing clients and seeking to expand the service portfolios of those existing clients. Her work as the Key Accounts Manager work did not focus on seeking out and bringing in new clients. She testified that her work breakdown was about 75% retention of contracts and 25% new business, but that her new business

included making contracts for new sites for existing clients (e.g., where an existing client in the restaurant business opens a new restaurant at a new site). She testified that she also leveraged her relationships with existing clients to identify and obtain new clients (e.g., by asking for referrals).

[10] At some point, the word “Senior” was tacked onto her job title. It is undisputed that there was no corresponding change in duties, responsibility or remuneration. Mr. O’Hara did agree, however, that it was something Revolution did do to recognize employees who were working more independently.

B. Earnings

[11] Ms. Thompson’s base salary remained constant throughout her employment. Ms. Thompson was never paid any bonuses during her time at Revolution but she did earn significant commission.

[12] The agreed statement of facts sets out the plaintiff’s total compensation for each calendar year during her employment with Revolution. Ms. Thompson’s T4 total compensation was as follows:

a) 2016 (June-December): $57,890.74;

b) 2017 (full year): $103,477.19;

c) 2018 (full year): $142,964.49; and

d) 2019 (January-September): $114,337.84.

[13] The agreed statement of facts also contains a chart setting out Ms. Thompson’s commission earnings. The chart shows the amount of commission earned for each individual month worked. The amounts vary significantly from month to month. The chart also set out a monthly average of her commissions earnings in respect of each calendar year of employment.

[14] During her employment at Revolution, Ms. Thompson was ordinarily paid by direct deposit.

C. 2019 Events & Termination

[15] In May 2019, Revolution began looking to focus the Key Accounts Manager position more on new business development. When this was raised with her, Ms. Thompson said that she had not been hired as a new business sales representative and did not want to move into that role.

[16] On May 14, 2019, Mr. O'Hara sent Ms. Thompson a memo saying that new sales were lacking and that absent a strong effort on her part by the end of the second quarter, Key Accounts would need to be restructured in a way that would increase new business development.

[17] In early 2019, Ms. Thompson's mother began to suffer from a rapidly progressing dementia. In late July 2019, Ms. Thompson informed Mr. O'Hara that she would need to miss some days of work to move her mother into a care facility. As it happens, her mother's deterioration progressed so quickly that her needs outpaced the level of care at the facility that had been arranged for her. The end result was a period of time during which the level of care assistance required by her mother considerably outstripped what was provided by the facility. Her mother was allowed to stay at the facility while awaiting a new placement, but Ms. Thompson was required to arrange to cover the additional hours of care required.

[18] On July 22, 24, 26, 29, 31 and August 1, 2019, Ms. Thompson sent Mr. O'Hara a series of emails describing crisis issues she was facing in finding bridging care while her mother was waiting on a spot in a higher-level care facility. She indicated that she was staying overnight herself to provide care hours and was arranging temporary private care workers to come in to cover hours, including Ms. Thompson's own work hours. On July 31, 2019, she emailed Mr. O'Hara to advise that the temporary care worker arranged had failed to show up as scheduled at 7:30 a.m. that morning and she would not be in. On August 1, 2019, she emailed advising that the new nursing service she had hired was short-staffed and she was attempting to hire a different nursing service.

[19] On August 1, 2019, Mr. O'Hara sent Ms. Thompson an email acknowledging her recent family issues, but stating that she needed to focus on new business development and to start meeting sales quotas. Ms. Thompson continued to take the position that she had not been hired to do sales representative work. She describes there having being ongoing tension at the office. Ms. Thompson testified that in early September, Revolution ceased directing all existing customer account matters to her and that her commissions went down accordingly.

[20] Mr. O'Hara and Ms. Thompson had an in-person meeting scheduled for September 27, 2019. Ms. Thompson was aware it was to discuss her work, and prepared a review of the work she had done while at Revolution for use in the discussion. Mr. O'Hara testified that he had intended to terminate Ms. Thompson at the meeting.

[21] On the morning of September 27, 2019, Ms. Thompson cancelled the meeting due to her being ill. Ms. Thompson testified that she called back later in the day to advise that she was feeling better and could come in, but that Mr. O'Hara responded that she should check her email.

[22] When Ms. Thompson called in sick, Mr. O'Hara sent Ms. Thompson a September 27, 2019 memorandum ("Termination Notice"). The Termination Notice advised her that she was permanently laid off, effective immediately, as her position had been declared redundant. It instructed her to return all company property that day. It also stated:

> You will receive all wages and commission to this date along with four weeks severance. By accepting this payment, you acknowledge that you have no claims against Revolution Resource Recovery Inc., its related companies, officers, and management relation to your employment relationship.

D. Communications regarding Notice Entitlement

[23] Revolution provided Ms. Thompson with a cheque for $7,782.92 ("Cheque").

[24] On September 30, 2019, Ms. Thompson wrote to Mr. O'Hara ("September 30 Letter"). She stated that the common law entitled her to more severance than

Revolution had offered and that she did not accept Revolution's severance offer. She noted that the employment standards legislation obliges an employer to pay everything owing to the employee within 48 hours of the last day worked. She asked to be paid by direct deposit and for a written breakdown of the total paid.

[25] In the September 30 Letter, Ms. Thompson also asserted that Revolution owed her unpaid bonuses and included a chart entitled "Sale/Retention Activity Summary" ("Chart"). Among other things, the Chart set out her calculation of the number of contracts signed and resigned by her in each year of employment. Ms. Thompson testified that she originally put the Chart information together for the September 27, 2019 meeting with Mr. O'Hara, and that she had the information as she had a practice of collecting her own "stats" every month in the same way she had been required to do for her previous job.

[26] Revolution did not send a response to the September 30 Letter.

[27] On October 2, 2019, Ms. Thompson wrote Mr. O'Hara again ("October 2 Letter"). She advised that she had refused to sign for a package Revolution had couriered to her home. She again asked to be paid by direct deposit. She also asked Revolution to explain how it had calculated her average weekly pay for purposes of its severance offer. She reiterated that she would not release Revolution from her claims.

[28] Ms. Thompson never received the information she requested and never received any payment by direct deposit. Mr. O'Hara emailed advising her that she could pick up her personal possessions at the office reception. Ms. Thompson attended the office in person to collect her personal items. She refused to sign anything at of collection and told Mr. O'Hara that she did not intend to sign anything.

[29] On October 7, 2019, Revolution sent Ms. Thompson a letter referencing the Restrictive Agreement ("Cease and Desist Letter"). In it, Revolution alleged Ms. Thompson had breached the Restrictive Agreement and the common law by failing to return all confidential company information in her possession. It also stated

that Ms. Thompson had “misused” improperly retained confidential information to negotiate with Revolution, in apparent reference to the Chart. The letter demanded an immediate return and threatened legal action in the event any related loss of revenue.

[30] On or about October 7, 2019, Ms. Thompson was offered a position as an account manager for Waste Connections Canada (“Waste Connections”) at a base salary of $45,000. The position dealt with regular accounts as opposed to key or major customer accounts. She was advised during the offer meeting that if she met her work targets, she could expect to earn about $80-85,000 a year in total. Ms. Thompson declined the offer. She testified that she declined it both because the earning potential was too low and because she was concerned about the terms of the Restrictive Agreement. She agreed that she was also still spending considerable time and energy addressing her mother’s health issues situation at this point in time.

[31] On or about October 17, 2019, Ms. Thompson deposited the Cheque.

[32] On October 24, 2019, Ms. Thompson received an email from a head hunter advising her that an opportunity had come up in the waste management industry. She asked him to forward her the information. On October 28, 2019, he provided the information indicating that it was a sales representative role with Waste Connection. She testified that the job description indicated the position was primarily a new business “hunter” role. Ms. Thompson emailed a response saying that she had been in direct contact with Waste Connection herself regarding an account manager position and that she was not interested in a “predominantly Hunter” position.

[33] At some point around mid-October, Ms. Thompson had a discussion with a former client. She told him that she was concerned about taking any waste industry-related work because of the Restrictive Agreement and Cease and Desist Letter. The former client told her that he was considering opening a new nutrient recovery facility if he was able to capitalize on an anticipated bankruptcy sale in relation to an existing facility. The idea for the nutrient recovery facility business was to take

usable organic waste and recover it for use in livestock food. She told the former client she would be interested in working for him if he did.

[34] The bankruptcy proceeded and the former client did buy the facility and proceed with his new business plan. He offered Ms. Thompson a position. On March 15, 2020, Ms. Thompson started as Director of Operations with that company, ReFeed Canada Farms/FTF Enterprises Ltd. ("ReFeed"), earning a base salary of $72,000 a year.

[35] On July 3, 2020, Ms. Thompson filed her notice of civil claim.

III. Issues

[36] The issues to be addressed here are as follows:

a) Did cashing the Cheque release Revolution from all claims?

b) What period constitutes reasonable notice in the circumstances?

c) Whether Ms. Thompson failed to mitigate her damages?

d) Should Ms. Thompson's commission income be accounted for in calculating pay in lieu of notice?

e) Did Ms. Thompson earn unpaid bonuses?

f) Is Ms. Thompson entitled to punitive damages?

IV. Cashing the Cheque

[37] Revolution argues that Ms. Thompson was knowledgeable and competent, well aware she could obtain comparable employment, and in depositing the Cheque was choosing to accept Revolution's offer and release it from claims. Revolution says that even if Ms. Thompson initially said she did not intend to accept the Cheque, she subsequently did and deposited it without saying any further to Revolution. The defendant provided no legal authority in support of their position.

[38] Ms. Thompson says she clearly told Revolution that she would not accept the $7,782.92 in settlement of her claims and that she believed she was entitled to more at common law before cashing the Cheque.

[39] Ms. Thompson relies on *IBI Group v. LeFevre & Company Property Agents Ltd.*, 2004 BCSC 298 [*IBI Group*]. In *IBI Group*, the Court said:

> [18] Section 43 of the *Law and Equity Act* provides:
>
> Part performance of an obligation either before or after a breach of it, when expressly accepted by the creditor in satisfaction or rendered under an agreement for that purpose, though without any new consideration, must be held to extinguish the obligation.
>
> [19] In *Day v. McLea*, [(1889), 22 Q.B. 610 (C.A.),] the defendant sent to the plaintiff a cheque for less than the amount claimed by the plaintiff with a form of receipt indicating that the sum was accepted in full satisfaction of the claim. The plaintiffs kept the cheque but refused to accept it in satisfaction, and sent a receipt on account. It was contended that the keeping of the cheque so sent was, as a matter of law, an accord and satisfaction of the claim, and that the plaintiffs were bound either to take it in full satisfaction or to return it. Bowen J. held at p. 613 that the question whether there is an accord and satisfaction must be one of fact:
>
> > If a person sends a sum of money on the terms that it is to be taken, if at all, in satisfaction of a larger claim; and if the money is kept, it is a question of fact as to the terms upon which it is so kept. Accord and satisfaction imply an agreement to take the money in satisfaction of the claim in respect to which it is sent. If accord is a question of agreement, there must be either two minds agreeing or one of the two persons acting in such a way as to induce the other to think that the money is taken in satisfaction of the claim, and to cause him to act upon that view. In either case it is a question of fact.
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> [20] Addressing the *Law and Equity Act* s. 43, (which then in 1995 was s.40), the BC Court of Appeal in *Allen v. Bergen*, [(1995), 1995 CanLII 852 (BC CA), 8 B.C.L.R. (3d) 127], at ¶ 17 reiterated the two methods of determining when part performance will extinguish an obligation:
>
> > [t]he two methods are, first, that part performance may be "expressly accepted by the creditor in satisfaction", and, second, that part performance may be "rendered in pursuance of an agreement for that purpose"...
>
> [21] To summarize, where a creditor cashes, certifies, deposits or otherwise negotiates with a cheque delivered on condition of full settlement, accepting receipt may be evidence of accord and satisfaction, but not conclusive evidence and no presumption of the kind should be drawn. The creditor is at liberty to cash and keep the funds and disregard the condition as long as he or she does not agree otherwise or communicate express acceptance of the condition.

> [22] The courts have mainly observed two important considerations in respect of express acceptance. The first is that the onus is on the payor to prove that the payee has expressly accepted the part payment as full payment. The standard of proof for this purpose is the balance of probabilities, although most of the cases above-mentioned also describe the onus of proving acceptance as "a heavy and substantial one". [Citations omitted.]
>
> [23] The second consideration is that a condition of acceptance attached to the part payment, however clear and however extensive it may be, is not determinative. What governs is the intention of the recipient and whether it is "expressly" communicated. The weight of authority requires evidence of "express acceptance" beyond mere receipt of payment. Further, a creditor owes no duty per se to inform the debtor of his intention not to accept a part payment on condition. Silence is not generally, without more, tantamount to express acceptance. [Emphasis added.]

See also, *Chrysler Canada Ltd.v. Shury*, [1988] B.C.J. No. 587, [1988] B.C.W.L.D. 1752 (B.C.S.C.) at paras. 33–35; and *Woodlot Services Ltd. v. Flemming* (1977), 24 N.B.R. (2d) 225, 83 D.L.R. (3d) 201 (N.B.C.A.) at paras. 10–11.

[40] Revolution has not established any express acceptance by Ms. Thompson. Rather, the evidence establishes the contrary – Ms. Thompson expressly advised Revolution that she did not accept its offer and considered herself legally entitled to more notice. Ms. Thompson's cashing of the Cheque did not release Revolution from her present claims.

A. Reasonable Notice Period

[41] Ms. Thompson submits that reasonable notice of termination would be a period of eight months. Revolution says the range of three to four months is appropriate.

[42] Both parties accept that absent an enforceable contractual provision to the contrary, an employer must give an employee reasonable notice of termination: *Ansari v. B.C. Hydro & Power Auth.* (1986), 2 B.C.L.R. (2d) 33 at para. 11, 1986 CanLII 1023 (S.C.) [*Ansari*]. The purpose of reasonable notice is to provide the employee with a fair opportunity to obtain similar or comparable re-employment: *Ostrow v. Abacus Management Corporation Mergers and Acquisitions*, 2014 BCSC 938 at para. 35.

[43] In *Ansari* at para. 15, the British Columbia Court of Appeal endorsed the approach taken in *Bardal v. Globe & Mail Ltd.* (1960), 24 D.L.R. (2d) 140 at 145, 1960 CanLII 294 (O.N.S.C.) [*Bardal*]. *Bardal* established a non-exhaustive list factors for consideration. The listed factors include:

a) the character of the employment;

b) the length of service of the employee;

c) the age of the employee; and

d) the availability of similar employment.

[44] Both parties referred the court to cases as guidance on the application of the *Bardal* factors. While every set of facts is unique, precedents can establish a range of outcomes to assist the Court: *Wilson v. Pomerleau Inc.*, 2021 BCSC 388 at para. 37.

B. Character of Employment

[45] Prior to 2006, Ms. Thompson had sales and then sales manager experience in the area of industrial chemicals. In 2006, she began working for Waste Management Co. (now Waste Connections) as a territorial sales manager. After a very brief return to the industrial chemical industry, she returned to the waste management industry, working with Progressive Waste and then, as of June 2016, as the Key Account Manager for Revolution.

[46] The nature of Ms. Thompson’s position has been generally outlined above. Ms. Thompson described her primary role as maintaining and fostering relationships with existing clients, representing Revolution at trade shows and events, and engaging with senior management to establish client pricing. She explained that accounts are characterized as “key” based on considerations including sales volume, complexity (i.e., the number of services), multiple sites and/or multi-locations. Her work required her to learn existing clients' needs, priorities and challenges and use her familiarity with Revolutions various service options,

packages and schedules to offer them adjusted or expanded service packages that addressed those needs and priorities. To the extent she sought out new clients, this was significantly done through leveraging existing client relationships.

[47] The parties disagree as to whether Ms. Thompson's job entailed specialized skills or knowledge. Revolution says the Key Account Manager position was a sales position and that general sales skills are highly transferrable, citing *Nicholls v. Columbia Taping Tools Ltd.*, 2013 BCSC 2201 at para. 261 [*Nicholls*]. In *Nicholls*, the court concluded that the former employee worked in a general sales position with highly transferrable skills and would, accordingly, find it less challenging to find alternative employment.

[48] Ms. Thompson asserts that the waste management industry is a specialized industry, requiring specific knowledge and understanding of various different services, citing *Sciancamerli v. Comtech (Communication Technologies) Ltd.*, 2014 BCSC 2140 [*Sciancamerli*]. In *Sciancamerli*, the plaintiff worked in a sales position in the telecommunications industry. The court accepted that his work involved a degree of area specialization that justified an increase in the notice period. The court noted both the telecommunications background of the employee and the fact that the job posting for his position indicated that the employer had looked for specific knowledge when filling the position (paras. 23–25).

[49] The following discussion in *Hill v. Johnson Controls L.P.*, 2006 BCSC 826 [*Hill*], accurately reflects the parties' disagreement and positions in this case:

> [46] I now turn to the question of the proper notice that was required. The defendant says that the plaintiff was a sales person and relies on a number of cases that suggest the notice period should be relatively short, equal to approximately two and a half to three weeks for each year of service. The leadings case in this line of authority is *Husband v. Labatt Brewing Co.*, [1998] B.C.J. No. 3193 (S.C.). Brenner J. (as he then was) said at ¶ 17:
>
> > Generally, in "salesman" and "sales manager" cases the court has consistently awarded notice in the range of 2.5 weeks per year of service even where the plaintiffs are in their 50s or 60s. The principles underlying this is the fact that the skills of sales employees are considered to be more readily transferable, thus enabling them to secure new employment with relative ease.

> However, the *Husband* case makes clear that this is not an absolute rule to be applied in all cases involving sales positions.
>
> > I accept the plaintiff's submissions that his job description of sales representative ought not to be conclusive and that the nature of his employment must be determined by examining the plaintiff's actual duties and responsibilities (¶ 10).
>
> [47] For example, in *Gillies v. Goldman Sachs Canada Inc.* (2001), 95 B.C.L.R. (3d) 260, 2001 BCCA 683, the Court of Appeal held that 13 months was the appropriate notice period for a securities salesperson who, on the basis of the Husband formula would have been entitled to less than four months. The court emphasized the specialized nature of the sales function and the limited alternative employment opportunities in that field.
>
> [48] Similarly, I am satisfied that the plaintiff's sales position in this case was a highly specialized one that made use of his professional knowledge and training in a market with a very small number of potential clients. This is not a case where it can simply be assumed that a salesman experienced in selling one product or service can easily obtain another job selling the same thing or a job selling something else. In fact, the plaintiff has still not been able to find a job that makes use of his knowledge and experience.

[50] There is no evidence as to whether Revolution specifically sought waste management industry experience when it filled the Key Accounts Manager position, but it is notable that she did, in fact, have extensive experience. Further, her testimony describing her work satisfies me that Ms. Thompson had and relied on an in-depth understanding of the variety of services available, the nature of them, and how they could be bundled and scheduled to suit different types of clients in performing her work.

[51] This court quite recently confirmed that although general sales skills may be transferrable, a specialized field of knowledge may make a longer notice period is appropriate: *Moore v. Instow Enterprises Ltd.*, 2021 BCSC 930 at para. 26.

[52] Further, I am satisfied that Ms. Thompson was not, in her Key Account Manager work, employing what are classically considered "general sales skills". As I read the cases provided, the term "general sales skills" is being used as shorthand description of an aptitude and package of interpersonal and communication skills that can be fairly regarded as amounting to a generic "ability to sell". That generic ability to sell is fungible in the sense that one might expect someone who was able to sell cars at a dealership could readily adapt to sell dishwashers at an applicance

retailer. This is consistent with the nature of Justice N. Smith's comments at para. 48 of *Hill*.

[53] Ms. Thompson's Key Account Manager sales work did not employ general sales skills in that particular sense, but rather was primarily knowledge-based in an industry-specific manner. That is, "account management work" – at least as Ms. Thompson was performing it in her position at Revolution – is not the same work and skill set employed by, for example, Revolution's new business sales representatives, in performing their work.

[54] I do not accept Revolution's position that Ms. Thompson is entitled to short notice on the basis that general sales skills are highly and broadly transferrable.

C. Length of Service

[55] The cases tend to recognize periods of reasonable notice that are proportionate to the length of service, with exceptions for employees who were employed for short or very long periods: *Spalti v. MDA Systems Ltd.*, 2018 BCSC 2296 at para. 16 [*Spalti*].

[56] In British Columbia, employees dismissed within their first three years of employment are awarded proportionately longer notice periods given their short period of service: *Saalfeld v. Absolute Software Corporation*, 2009 BCCA 18 at para. 15.

[57] Ms. Thompson had three years and four months service at the time of her termination. I consider Ms. Thompson's length of service to be a factor somewhat favouring a longer notice period, as she was just barely past the three-year mark.

D. Age

[58] Ms. Thompson was 56 years old at the time of termination. Ms. Thompson argues that she is entitled to longer reasonable notice as she is an older employee: *Conway v. Griff Building Supplies Ltd.*, 2020 BCSC 1899 at paras. 86-87.

[59] In *Sciancamerli*, Justice Sharma made the following comments about the effect of a plaintiff's age being 57 at the time of termination:

> [29] There is case law that supports the plaintiff's position that employees in their 50s and 60s will face more difficulty finding employment because of their age even if it cannot be demonstrated that the industry is dominated by younger workers: *Pollack v. Cotter*, 2005 BCSC 1799 at 27-28.
>
> [30] In *Matusiak v. IBM Ltd.*, 2012 BCSC 1784, the court was urged to view the impact of age from a "modern perspective" and no longer assume that age will be a detrimental factor on a person's job search. In that case, the defendant pointed out that mandatory retirement has largely been eliminated and that, among other things, justifies a re-examination of how age is factored into determining the length of proper notice. Justice Silverman acknowledged a modern approach was appropriate but also noted that at the end of the day, the court makes an evidentiary based enquiry on a case-by-case basis. In that light, the traditional judicial approach that views age as a detrimental factor should not be completely discarded.
>
> [31] Reading the cases together, I consider that the individual circumstances and evidence regarding the impact of age in each case is more important that following any particular rule.

[60] I endorse Sharma J.'s comments.

[61] Ms. Thompson was 56 years old at the time of her termination. She presented in court as a very capable individual. There is no evidence before me about age and employment in respect of the waste management industry or senior account management work in particular. I accept, however, that all other things being equal, there is a real possibility that some employers would favour an employee with more potential years of future service over Ms. Thompson.

[62] Overall, I find that Ms. Thompson's age favours, to a small degree, a longer notice period.

E. Availability of Employment

[63] In terms of the availability of employment, courts may infer that similar employment is scarce where an employee's position is specialized in nature and where the employee required a significant amount of time to find alternative work: *Ostrow v. Abacus Management Corporation Mergers and Acquisitions*, 2014 BCSC 938 at paras. 54–55.

[64] Ms. Thompson argues that I should consider the existence and impact of the Restrictive Agreement and find a longer reasonable notice period on the basis that Ms. Thompson's ability to take alternative employment was restricted. Ms. Thompson testified that one of the reasons she rejected the Waste Connections account manager offer was the Restrictive Agreement and her impression, from the Cease and Desist Letter, that Revolution would be aggressive in enforcing the restrictions.

[65] Non-compete and non-solicitation agreements can potentially have a deleterious effect of an employee's ability to find alternative work: *Munoz v. Sierra Systems Group Inc.*, 2015 BCSC 269 at paras. 91-92. The Restrictive Agreement contains both non-compete and non-solicitation clauses.

[66] The non-compete clause in the Restrictive Agreement is extremely broad, both in terms of territory and application. Ms. Thompson is not allowed to:

> … carry on or be engaged in any activity … that is competitive with the Business, directly or indirectly, and in any manner including, without limitation as an employee …

[67] Ms. Thompson identified some significant differences between ReFeed and Revolution as businesses and testified that she did not consider them to be competitors when deciding to take the ReFeed position. Mr. O'Hara, however, testified that in his view ReFeed is a competitor on the basis that both companies receive and dispose of unwanted organic material.

[68] As it is not alleged that taking employment with ReFeed was a breach of the Restrictive Agreement, there is no need to make a conclusive finding as to whether ReFeed and Revolution are competitors for purposes of the Restrictive Agreement. I note, however, that there is substantial merit to the position that they are not. Further, Mr. O'Hara's testimony indicates that he endorses the broadest possible reading of the scope of the restriction.

[69] Ms. Thompson testified that she was very concerned about the possibility of being accused of a breach of the Restrictive Agreement given the aggressive tone of

the Cease and Desist Letter. She did not want to have to defend herself against an allegation of breach. Given the breadth of the non-compete clause and the tone of the Cease and Desist Letter, I find that it was reasonable for Ms. Thompson to be hesitant to take any work that might give Revolution a basis for making a claim against her. (Mr. O'Hara's view of the scope of restriction at trial only buttresses this further.) I find that the impact of the Restrictive Agreement did significantly impact her ability to look for alternative employment.

[70] I do not accept Revolution's argument that Ms. Thompson ought to have sought out work in the waste management industry and then approached Revolution to see if Revolution would give its blessing to her taking the proposed employment. Nothing in the manner of Ms. Thompson's termination, the communications that followed her termination, or the tone of Cease and Desist Letter, made it reasonable to suppose that Revolution would assist her in any way.

F. Assessment of Reasonable Notice

[71] Cases may be compared on the basis of months of notice awarded per year of service, although the comparison is no more than a signpost and there is no arithmetical formula: *Spalti* at paras. 24–34. Ms. Thompson seeks a notice period of eight months.

[72] She asks the Court to consider the following as comparators:

a) *Corey v. Kruger Products LP*, 2018 BCSC 1510: the 58-year-old plaintiff, a Maintenance Supervisor with two years and seven months service, was awarded eight months. Mr. Corey had specialized professional qualifications and was employed as a management employee, supervising highly paid and specialized unionized employees.

b) *Equitable Life Insurance Co. of Canada v. Donnelly*, [1993] O.J. No. 171,1993 CarswellOnt 3093: the 58-year-old plaintiff, a Sales Manager with two years and three months service, was awarded six months. Mr. Donnelly was an

insurance underwriter and, at the time of his termination, was responsible for the London, Ontario branch.

c) *Meyer v. Danka Business Systems Ltd.*, 2001 BCSC 428: the 55-year-old plaintiff was employed as a senior salesperson for about four years. He was awarded 10 months. The considerations informing the 10-month period are not detailed in the reasons, but the employer proposed six months and the plaintiff sought 14 months, which suggests there were undisputed factors that significantly favoured a longer notice period.

d) *Nassar v. Oracle Global Services*, 2022 ONSC 5401 [*Nassar*]: the plaintiff, a 44-year-old salesperson with three years of service, was awarded five months. The Court specifically commented that Mr. Nassar's sales skills were very transferrable (para. 35).

e) *Mitchell v. Paxton Forest Products L.P.*, 2001 BCSC 1802: the plaintiff, a sales manager who was 53 years old at the time of trial and had 23 months of service, was awarded nine months.

f) *Munoz v Sierra Systems Group Inc.*, 2016 BCCA 140: the plaintiff, a 43-year-old IT consultant with two and a half years of service, was awarded eight months (reduced from 10 months awarded at trial). In arriving at eight months, the Court of Appeal accepted there had been an element of inducement (para. 36) and that the plaintiff's work (bilingual business consulting and development of software systems) was "highly specialized".

[73] Revolution submits that any notice awarded should be in the range of three to four months. It relies on the following cases:

a) *Cybulski v. Adecco Employment Services Limited*, 2011 NBQB 181: the plaintiff, a 53-year-old contracts manager with three years of service, was awarded three months.

b) *Phillips v. Hilinex Packaging Inc.*, 1994 CanII 1767 (BC SC): the plaintiff, a 40-year-old with four and a half years of service, was awarded three and a half months. The court commented that notwithstanding his job title, the plaintiff was a “travelling salesman”.

c) *Mitchell v. Lorell Furs Inc.*, 1991 CanLII 4411 (NS SC): the plaintiff, a 45-year-old sales representative with three years of service, was awarded four months.

d) *Chawrun v. Bell Mobility Inc.*, 2013 BCSC 102: the plaintiff, a 38-year-old “Account Executive” with 5.75 years of service, was awarded six months. The court noted that notwithstanding his job title, the plaintiff was essentially a sales position with no supervisory or managerial authority.

e) *Lynch v. Mac Carter Ltd.*, 1995 CanLII 4127 (NB KB): the plaintiff, a 46-year-old real estate appraiser with 3.25 years of service, was awarded four months.

f) *SummerfieId v. Staples Canada Inc.*, 2016 ONSC 3656 [*Summerfield*]: the plaintiff, a 39-year-old enterprise account manager with 4.83 years of service, was awarded six months. Her account manager position involved both new work and managing important existing client relationships.

g) *Walters v. Val D'Amour Fabrication Inc.*, 1999 CanLII 32677 (NB KB): the plaintiff, a 33-year-old welder and foreman with three years service, was awarded three months.

h) *Mathew v. Kinek Technologies*, 2008 NBQB 371: the plaintiff, a 55-year-old chartered accountant with two and a half years of service, was awarded two months. The court took account of the fact that he had also been formally warned to begin looking for work two months prior to actual notice of layoff.

i) *Ladd v. Cox Radio & T.V. Ltd.*, 2009 NBQB 192: the plaintiff was a 56-year-old with the job title “general manager for consumer electronics”, which

> position was described by the court as a "responsible sales management position". The court found that the appropriate notice to be one and a half months notice for each of his three and a half years of service (4.8 months). Mr. Ladd, however, had found a job within the notice period (para. 13).

[74] In my view, *Nassar*, *Mitchell* and *Summerfield* are the best comparators. That is subject to the qualification, however, that in *Mitchell*, Mr. Mitchell's duties, although broadly similar to Ms. Thompson's, all appear to involve a somewhat higher level of management responsibility (paras. 78-79). The notice period awarded in *Mitchell* should be discounted accordingly to make it a fair comparator.

[75] Turning to the specific facts here and taking account of the *Bardal* factors, I find that a notice period of six months is appropriate in the circumstances.

V. Mitigation

[76] In wrongful termination cases, the defendant bears the onus of proving that a dismissed employee has failed to mitigate their losses. The standard is high. A defendant must prove both that the plaintiff has failed to take reasonable steps to reduce their loss and that those reasonable steps would have been successful: *McLeod v. Lifelabs BC LP*, 2015 BCSC 1857 at para. 57.

[77] It was reasonable for Ms. Thompson to perceive the account manager job offer she received directly from Waste Connection and the sales representative position she learned of through the head hunter as covered by the non-compete clause. Further, as the Waste Connection account manager position involved some new business development and the head hunter position was new business sales, the non-solicitation clause in the Restrictive Agreement was also in play. As already set out, I reject Revolution's submission that Ms. Thompson ought to come to Revolution to see if it would nonetheless consent to her taking those positions.

[78] Further, the amount of remuneration offered for the position directly offered by Waste Connection was not comparable, even if the existence of an RRSP contribution program is considered.

[79] Ms. Thompson took steps to keep herself in contact with people in the waste management industry, through calls and lunches, to keep herself in touch and in mind for her when the non-compete clause expired. That was reasonable conduct in the circumstances.

[80] Ms. Thompson gave the following evidence with respect to the steps she took to mitigate her losses. She searched Indeed and other job sites for available job positions; she reached out and applied to three postings; and she contacted waste industry participants hoping to learn of options. Eventually, she learned of the possible existence of, and then successfully obtained, the position at ReFeed through a former client.

[81] Revolution points to the fact that Ms. Thompson admitted she was “choosy” about applying to positions because she did not want a position focussed on new sales business development work. Revolution submits that she was not entitled to be choosy in that respect, citing *Coutts v. Brian Jessel Autosports Inc.*, 2005 BCCA 224 at para. 25 [*Coutts*].

[82] The discussion of mitigation in *Coutts* is very helpful here. Mr. Coutts had been terminated as a sales representative at an automobile dealership.The reasons of the Court of Appeal include the following paragraphs:

> [22] ... The duty to mitigate is not a duty owed to an employer, rather it is a duty an employee owes to conduct himself or herself as a reasonable person. In most cases, this necessarily means that the employee must take reasonable steps to find alternative employment upon dismissal. The underlying basis for the existence of the duty of mitigation was discussed by Taylor J.A. in *Forshaw v. Aluminex Extrusions Ltd.* (1989), 1989 CanLII 234 (BC CA), 39 B.C.L.R. (2d) 140 (C.A.), at pp. 143-44 wherein he stated:
>
> > That "duty" – to take reasonable steps to obtain equivalent employment elsewhere and to accept such employment if available – is not an obligation owed by the dismissed employee to the former employer to act in the employer's interests. It would indeed be strange that such a duty would arise where an employer has breached his contractual obligation to his employee, having in mind that no duty to seek other employment lies on an employee who receives proper notice.
> >
> > 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. The 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 between what he makes in that work and what he would have made had he received the notice to which he was entitled.

…

[24] Garson J. made the following findings of fact in dismissing the defence of mitigation. She found that: Mr. Coutts was primarily interested in pursuing opportunities with a new Ferrari dealership; he was overly optimistic about his employment with Mr. Ross, the principal of the new dealership; he failed to diligently pursue other opportunities; and had he pursued alternative employment opportunities, "he probably would have found work by the end of August 2003". In light of these findings of fact, the judge erred in dismissing the mitigation defence advanced by the dealership. In her reasons she stated:

> [53] From all the evidence of both parties concerning Mr. Coutts' efforts to find replacement employment and evidence of the availability of potential employment in the high end automobile field, I conclude that Mr. Coutts was primarily interested in pursuing opportunities with a new Ferrari dealership and, on the possibly overly optimistic view that his employment with Mr. Ross was assured, he failed to diligently pursue other opportunities. I am satisfied that Mr. Coutts did not pursue alternative employment opportunities and that had he done so he would probably have found work by the end of August 2003. However, on the evidence before me, the defendant has not proven that the employment opportunities that were probably available would replace the income that Mr. Coutts has lost. …

[25] Thus, the judge concluded that Mr. Coutts did not have a duty to accept a position at less remuneration than he earned from his former employment. With respect, the judge was in error in making that finding. The duty of mitigation required Mr. Coutts to act reasonably and diligently, in his own interest, in pursuing alternative employment. Personal preferences and career objectives are a consideration in deciding whether an employee is entitled to turn down an alternative employment, but they are not decisive. The employee must still act reasonably. In my view, Mr. Coutts did not act reasonably in the circumstances. Refusing to follow through with employment opportunities in the employee's accustomed line of work, in this case with Weissach Motors and MCL Motors, is not reasonable. Critical to the judge's finding was that Mr. Coutts could have had alternative employment by the end of August 2003. In this case, the judge found that Mr. Coutts was primarily interested in a new Ferrari dealership that did not even come into existence until 2004. His hopes of securing employment with Ferrari were both unrealistic and unreasonable. [Emphasis added.]

[83] The Court of Appeal in *Coutts* did not say that personal preferences and career objectives are irrelevant, but rather that an employee taking them into account in considering alternative employment must still act reasonably. In this case, I do not think Ms. Thompson took account of her personal preferences and career objectives into account in a way that was unreasonable.

[84] As already set out, her position as Key Account Manager at Revolution did not involve employing "general sales skills" in the classic sense. Her testimony indicates that she did not consider herself suited to performing general sales skills. This is consistent with her resistance to performing what she described as "sales representative" work at Revolution as part of her Key Account Manager work. In her search for alternative employment, she was looking for a position that was comparable to the one she had at Revolution and which involved the same type of work she had successfully performed in the past. Further, she was not being unreasonably optimistic about the possibility of her finding work of that was comparable to her Key Account Manager position.

[85] Nor was it unreasonable or unrealistic for her to be primarily interested in the ReFeed possibility once it surfaced. It presented a realistic opportunity for her to obtain a position that employed her actual skill set, made use of her waste industry management knowledge and yet (at least in Ms. Thompson's view) was not off-side the Restrictive Agreement's non-compete clause. It was not unreasonable for Ms. Thompson to focus on that potential job opportunity once she learned of it, especially given that the ReFeed opportunity both surfaced and actually crystallized during the currency of the non-compete clause.

[86] Nonetheless, I am satisfied that Ms. Thompson did fall somewhat in her mitigation efforts. Once again, *Coutts* provides a helpful statement of the relevant law:

> [23] In an action for wrongful dismissal, the onus is on the plaintiff to prove damages. However, where an employer seeks to reduce damages on the ground that the employee failed to mitigate his or her losses, then the onus is on the employer to prove on a balance of probabilities that the employee failed to mitigate by not acting reasonably. The question of onus of proof

> where the defence of mitigation has been advanced was discussed in *Red Deer College v. Michaels*, 1975 CanLII 15 (SCC), [1976] 2 S.C.R. 324. Laskin C.J.C. made the following comments at p. 331:
>
> > In the ordinary course of litigation respecting wrongful dismissal, a plaintiff, in offering proof of damages, would lead evidence respecting the loss he claims to have suffered by reason of the dismissal. He may have obtained other employment at a lesser or greater remuneration than before and this fact would have a bearing on his damages. He may not have obtained other employment, and the question whether he has stood idly or unreasonably by, or has tried without success to obtain other employment would be part of the case on damages. If it is the defendant's position that the plaintiff could reasonably have avoided some part of the loss claimed, it is for the defendant to carry the burden of that issue, subject to the defendant being content to allow the matter to be disposed of on the trial judge's assessment of the plaintiffs evidence on avoidable consequences. … [Emphasis added.]

[87] Ms. Thompson candidly testified that she was distracted by the situation with her mother for a period of time and was not doing all that she might have done otherwise. That said, there is no evidence before me about how likely it was that Ms. Thompson might have secured a comparable account manager outside of the waste management industry. However, I am satisfied on Ms. Thompson's own evidence that she was not sufficiently diligent in exploring the possibility. In the circumstances, I find it appropriate to deduct one month from what would otherwise be a six-month notice period.

VI. Commissions and the Notice Period

[88] The parties dispute whether commissions should be included in the reasonable notice period and, if so, how to calculate the amount of commission.

[89] Revolution argues that commissions should not be included in the notice period as a result of the following term of employment ("Commission Clause"):

> The recipient of any commissions, bonuses, or other means of compensation must be an active and current employee of Revolution Resource Recovery to receive the commission or bonus at the time the commission or bonus is due. Any employee that has been terminated, laid off, resigned, on leave, or disability at the time commission is due will not be eligible[.]

[90] Ms. Thompson argues that the Commission Clause has no impact on her common law entitlement to pay in lieu.

[91] In *Matthews v. Ocean Nutrition Canada Ltd.*, 2020 SCC 26, paras. 50-55 [*Matthews*], Justice Kasirer, writing for the Court, outlined the proper approach to bonus, commission and like income in the context of pay in lieu of working notice:

> [50] In *Paquette*, the employee participated in his employer's bonus plan, which stipulated that employees had to be "actively employed" on the date of the bonus payout. ... In Paquette, but for the employee's termination, the employee would have received the bonus within the reasonable notice period. The motion judge ... concluded that the employee was not entitled to the bonus because ... he was not "actively" employed and so did not qualify under the terms of the plan.
>
> [51] The employee's appeal was allowed. ...
>
> [52] The Court of Appeal in *Paquette* built upon the approach in *Taggart*, proposing that courts should take a two-step approach to these questions. First, courts should "consider the [employee's] common law rights" ... That is, courts should examine whether, but for the termination, the employee would have been entitled to the bonus during the reasonable notice period. Second, courts should "determine whether there is something in the bonus plan that would specifically remove the [employee's] common law entitlement" ... "The question", van Rensburg J.A. explained, "is not whether the contract or plan is ambiguous, but whether the wording of the plan unambiguously alters or removes the [employee's] common law rights" ...
>
> [53] ... As the court ... reiterated in *Paquette*, when employees sue for damages for constructive dismissal, they are claiming for damages as compensation for the income, benefits, and bonuses they would have received had the employer not breached the implied term to provide reasonable notice ... Proceeding directly to an examination of contractual terms divorces the question of damages from the underlying breach, which is an error in principle.
>
> [54] Moreover, the approach in *Paquette* respects the well-established understanding that the contract effectively "remains alive" for the purposes of assessing the employee's damages, in order to determine what compensation the employee would have been entitled to but for the dismissal...
>
> [55] Courts should accordingly ask two questions when determining whether the appropriate quantum of damages for breach of the implied term to provide reasonable notice includes bonus payments and certain other benefits. Would the employee have been entitled to the bonus or benefit as part of their compensation during the reasonable notice period? If so, do the terms of the employment contract or bonus plan unambiguously take away or limit that common law right?

[92] With respect to the first part of the *Matthews* test, Revolution argues that there is no guarantee that Ms. Thompson would have earned commissions had she worked during the reasonable notice period. I disagree. For the entire duration of her employment at Revolution, Ms. Thompson earned some commission every month. While the amounts fluctuated, I have no doubt that she would have continued to earn at least some commission during the notice period. Certainly, there is no evidence to suggest otherwise.

[93] The next question is whether the Commission Clause unambiguously removes or limits the plaintiff's common law rights with respect to pay in lieu. What is required to unambiguously achieve this is canvassed in *Matthews*:

> [64] The question is not whether these terms are ambiguous but whether the wording of the plan unambiguously limits or removes the employee's common law rights (*Paquette*, at para. 31, citing *Taggart*, at paras. 12 and 19-22). Importantly, given that the LTIP is a "unilateral contract", in the sense that the parties did not negotiate its terms, the principle of contractual interpretation that clauses excluding or limiting liability will be strictly construed "applies with particular force" (*Taggart*, at para. 18, citing *Hunter Engineering Co. v. Syncrude Canada Ltd.*, 1989 CanLII 129 (SCC), [1989] 1 S.C.R. 426, at p. 459). As this Court recognized in *Tercon Contractors Ltd. v. British Columbia (Transportation and Highways)*, 2010 SCC 4, [2010] 1 S.C.R. 69, at para. 73, albeit in the commercial context, and cited here to underscore just this point, sophisticated parties are able to draft clear and comprehensive exclusion clauses when they are minded to do so.
>
> [65] To this end, the provisions of the agreement must be absolutely clear and unambiguous. So, language requiring an employee to be "full-time" or "active", such as clause 2.03, will not suffice to remove an employee's common law right to damages. After all, had Mr. Matthews been given proper notice, he would have been "full-time" or "actively employed" throughout the reasonable notice period (*Paquette*, at para. 33, citing *Schumacher v. Toronto-Dominion Bank* (1997), 1997 CanLII 12329 (ON SC), 147 D.L.R. (4th) 128 (Ont. C.J. (Gen. Div.)), at p. 184; see also para. 47; *Lin*, at para. 89). Indeed, the trial judge and the majority of the Court of Appeal agreed that an "active employment" requirement is not sufficient to limit an employee's damages (trial reasons, at para. 398; C.A. reasons, at para. 66).
>
> [66] Similarly, where a clause purports to remove an employee's common law right to damages upon termination "with or without cause", such as clause 2.03, this language will not suffice. Here, Mr. Matthews suffered an unlawful termination since he was constructively dismissed without notice. As this Court held in *Bauer v. Bank of Montreal*, 1980 CanLII 12 (SCC), [1980] 2 S.C.R. 102, at p. 108, exclusion clauses "must clearly cover the exact circumstances which have arisen". So, in Mr. Matthews' case, the trial judge properly recognized that "[t]ermination without cause does not imply

> termination without notice" (para. 399; see also *Veer v. Dover Corp. (Canada) Ltd.* (1999), 1999 CanLII 3008 (ON CA), 120 O.A.C. 394, at para. 14; *Lin*, at para. 91). Yet, it bears repeating that, for the purpose of calculating wrongful dismissal damages, the employment contract is not treated as "terminated" until after the reasonable notice period expires. So, even if the clause had expressly referred to an unlawful termination, in my view, this too would not unambiguously alter the employee's common law entitlement.
>
> [Emphasis added.]

[94] I find that the Commission Clause does not unambiguously alter the plaintiff's common law entitlement. It states that a terminated employee is not eligible to receive a commission. However, as noted in *Matthews*, had Ms. Thompson been given proper working notice, she would have been actively working during the notice period and neither she nor her contract would have been terminated during the currency of that notice period.

[95] I find that Ms. Thompson is entitled to have the salary should would have received during her notice period calculated taking expected commission earnings into account.

[96] The next question is how to calculate the amount of commission that would have been payable to Ms. Thompson during the five-month period.

[97] In *Hawes v. Dell Canada Inc.*, 2021 BCSC 1149 at para. 27, Justice Iyer stated the following with respect to calculating the amount of commission an employee would have earned during a notice period:

> [27] It is clear from the authorities that, where an employee's earnings are variable, there is no set formula. The court must award what is fair in the circumstances to approximate what the employee would have earned during the notice period. Sometimes courts have used the average of the past five years of commission earnings: *Veach v. Diversey Inc.*, [1993] B.C.J. No. 2420. Where an employee's commission earnings have been on an increasing or declining trend in the years prior to dismissal, it may be preferable to use only the last year's earnings: *O'Reilly [v. Imax Corporation*, 2019 ONSC 342], at para 43. Where the past is not a reliable indicator, the court has made an estimate based on the whole evidentiary record: *TCF Ventures [Corp. v. The Cambie Malone's Corporation*, 2017 BCCA 129] at para 43.

[98] Ms. Thompson's earnings in 2018 and 2019 were about 40% higher than her earnings in 2016 and 2017. She testified that she when first started in the position the portfolio was a mess and that her commission performance significantly improved once she got it organized and once management "gave her the reins" to perform the job. I am satisfied that 2016 and 2017 earnings should not be taken into account. However, her average monthly commission was on a declining trend in the few months immediately prior to her termination. This appears to have reflected her ongoing family issues and related challenges. In my opinion, this trend would likely have continued further into 2019 had she not been terminated, as is evidenced by her testimony with respect to her mother.

[99] Taking the findings above into consideration, I conclude that the most appropriate approach here to is award Ms. Thompson compensation in respect of her five-notice period that reflects her average monthly over 2019. Under the agreement statement of facts, that average is $6,399.62 a month.

VII. Claim for Unpaid Bonuses

[100] The amount of bonus received by Ms. Thompson, as per her employment agreement, is a function of how many new accounts she signed and old accounts she re-signed per month. At trial, Ms. Thompson alleges that she is entitled to $3,700 in bonuses that she earned from May 1, 2018 until September 27, 2019. She claims that Revolution did not pay her these bonuses, which she earned by signing new contracts and re-signing (or renewing) existing contracts.

[101] Revolution argues that Ms. Thompson is not entitled to any amounts for bonuses earned during this period.

[102] The evidence establishes that Ms. Thompson's bonus terms were provided to her in writing at the outset of her employment and remained consistent throughout her employment. Ms. Thompson was provided, on a monthly basis, with a sales report for her review and was in a position, monthly, to compare her sales report with her paycheque information with respect to commissions and bonuses. On the plaintiff's own evidence, she only raised an issue about whether a bonus should

have been payable once, in mid-2017, and that Mr. O'Hara disagreed and advised that management had discretion as to how the policy applied. She did not raise it again.

[103] Mr. O'Hara testified that he disagrees with Ms. Thompson's rationale for her bonus claims, disagreeing with her assertions as to what does and does not count as a "signing" or "re-signing" (and even as to what amounts to a "contract") for purposes of the bonus policy. He also testified that, as he previously advised the plaintiff in mid-2017, the awarding of bonuses at Revolution has always involved an exercise of management discretion.

[104] Ms. Thompson has provided no evidence in support of her position that she is entitled to bonuses based on her articulated understanding of how numbers are to be calculated for purposes of the bonus policy. Further, her own evidence indicates that she did accede to Revolution's approach to calculation, and its position that it was entitled to discretion in application of the policy, throughout the period of her employment.

[105] Ms. Thompson's claim for bonus amounts payments is dismissed.

VIII. Claim for Punitive Damages

[106] The distinction between aggravated and punitive damages was recently summarized by the Court of Appeal in *Johnson v. British Columbia (Attorney General)*, 2022 BCCA 82:

> [83] … Aggravated damages are compensatory in nature, and their primary aim is to compensate the plaintiff while recognizing the egregious nature of the behaviour in response to which they are awarded: *Norberg v. Wynrib*, 1992 CanLII 65 (SCC), [1992] 2 S.C.R. 226 at 264; *Whiten v. Pilot Insurance Co.*, 2002 SCC 18 at para. 116. Secondarily, they may also serve to satisfy the objectives of retribution, deterrence and denunciation. Where they are insufficient to achieve those objectives, however, the court may turn to punitive damages: *Performance Industries Ltd. v. Sylvan Lake Golf & Tennis Club Ltd.*, 2002 SCC 19 at para. 87.
>
> [84] The purpose of punitive damages, as the name suggests, is to punish the defendant rather than to compensate the plaintiff: *Hill v. Church of Scientology of Toronto*, 1995 CanLII 59 (SCC), [1995] 2 S.C.R. 1130 at para. 196. The objectives of punitive damages are retribution, deterrence and

> denunciation. They may be awarded where there has been "highly reprehensible misconduct that departs to a marked degree from ordinary standards of decent behaviour" and are assessed "in an amount reasonably proportionate to such factors as the harm caused, the degree of the misconduct, the relative vulnerability of the plaintiff and any advantage or profit gained by the defendant": *Whiten* at paras. 74, 94.

[107] Aggravated damages were not pursued. In closing argument at trial, Ms. Thompson sought $50,000 in punitive damages for Revolution's conduct in the termination of her employment and in the period following her termination.

[108] The parties agree that punitive damages are exceptional. The object of punitive damages is not compensatory, but to deter future unfair conduct by punishing an employer. The conduct complained of must be an independent actionable wrong, a requirement that is satisfied where an employer fails to meet their implied obligation of good faith and fair dealing in the manner of dismissal: *Hrynkiw v. Central City Brewers & Distillers Ltd.*, 2020 BCSC 1640 [*Hrynkiw*].

[109] As the Court stated in *Hrynkiw* at para. 212, punitive damages should only be awarded where there is a heightened need to punish the wrongdoer because other remedies, including compensatory damages, are insufficient to serve the objectives of giving the defendant their just desert (retribution), deterring the defendant and others from similar misconduct in the future (deterrence), and marking the community's collective condemnation of what has happened (denunciation).

[110] In *Kelly v. Norsemont Mining Inc.*, 2013 BCSC 147 [*Kelly*], Justice Fenlon (then of this Court) stated as follows with respect to punitive damages:

> [114] The conduct complained of must be an actionable wrong. The actionable wrong does not need to be an independent tort: it can be found in a breach of a distinct and separate contractual provision, or in another duty such as a fiduciary obligation: *Whiten v. Pilot Insurance Co.*, 2002 SCC 18 at para. 82, [2002] 1 S.C.R. 595. The requirement of an actionable wrong may be satisfied where the employer fails to meet his or her implied obligations of good faith and fair dealing in the manner of dismissal: *Nishina v. Azuma Foods (Canada) Co.*, 2010 BCSC 502 at paras. 260-64.
>
> [115] Examples of conduct justifying punitive damages include the employer knowingly fabricating allegations of serious misconduct or incompetence against an employee to support dismissal; the employer utilizing "hardball" tactics to intimidate the employee into withdrawing or settling his or her

> wrongful dismissal suit; or the employer implementing the dismissal in a manner designed to disparage the employee's capabilities or honesty in the eyes of other employees or future employers: Geoffrey England et al, *Employment Law in Canada*, 4th ed., (Markham, Ontario: LexisNexis Canada Inc.), ch. 16 at 138-39.

[111] There are two prongs to Ms. Thompson's claim for punitive damages.

[112] The first relates to the Cease and Desist Letter. Counsel for Ms. Thompson characterized the sending of the Cease and Desist Letter as heavy-handed and entirely unwarranted.

[113] I accept Ms. Thompson's evidence that she was able to create the Chart set out in the September 30 Letter based on information she was entitled to have in her possession at the time. However, that fact was not readily apparent from the September 30 Letter. In my view, Revolution was not unreasonable in having and expressing concerns about the possible wrongful retention of confidential information in the Cease and Desist Letter. I agree that the tenor of the Cease and Desist Letter was aggressive, but sending it was neither high-handed nor reprehensible.

[114] The second prong focusses on Revolution's conduct in relation to the Cheque and its failure to provide final payment to Ms. Thompson in accordance with the provincial employment standards legislation.

[115] The agreed statement of facts includes the following paragraphs:

> 10. Pursuant to s. 63 of the *BC Employment Standards Act*, RSBC 1996 c. 113, the Plaintiff was entitled to three (3) weeks' notice of termination or pay in lieu thereof based on her 3 consecutive years of employment.
>
> 11. Pursuant to s. 18(1) and s. 1 (1) of the *BC Employment Standards Act*, RSBC 1996 c. 113, the Defendant was required to pay all wages, which included three (3) weeks' pay in lieu of notice, within 48 hours after the Defendant terminated the Plaintiff's employment.

[116] Ms. Thompson asserts that Revolution withheld her wages, including her three weeks' termination pay, at a time when she was financially and emotionally vulnerable, and that it acted in a manipulative and reprehensible manner in instead

providing her the Cheque subject to its unilaterally imposed condition that signing it would release Revolution from all claims.

[117] I find that punitive damages are warranted here.

[118] An employee who is terminated without notice will generally be immediately placed into a financially precarious position. Further, Revolution was aware – from Ms. Thompson's emails to Mr. O'Hara – that Ms. Thompson had been suffering a family crisis and that been incurring the unexpected expense of paying for private care providers to look after her mother. Revolution was also aware that Ms. Thompson's commission earnings had declined in the period immediately preceding her termination due to her time dealing with her mother's situation and as a result of Revolution's September decision to stop referring all existing client renewals to her.

[119] Knowing these things, Revolution provided her with the Cheque subject to the imposed condition that cashing it would release Revolution. When Ms. Thompson asked to simply be paid in accordance with the employment standards legislation instead, Revolution ignored that request. Even after Ms. Thompson expressly advised that she considered herself legally entitled to additional notice at common law and that she would not release Revolution from her claim to it, Revolution continued to insist on receiving a release as a condition of making any payment at all. While it refused, it continued to run internal checks to see if she had given in and cashed the Cheque yet. Revolution refused to even inform Ms. Thompson as to how it had calculated termination pay for purposes of the Cheque, depriving her of the ability to even make an informed assessment of her position. I find that Revolution did these things in an ongoing attempt to pressure Ms. Thompson into accepting whatever Revolution was prepared to provide, and into providing a release in exchange for it.

[120] As noted in *Kelly*, the requirement of an actionable wrong may be satisfied where the employer fails to meet its implied obligations of good faith and fair dealing in the manner of dismissal: *Nishina v. Azuma Foods (Canada) Co. Ltd.*, 2010 BCSC 502 at paras. 260-264. In this case, Revolution first staked out its position regarding

the cashing of the Cheque in its Termination Notice and then maintained it through communications exchanged regarding the notice she was owed. I am satisfied that it breached its obligation of good faith and fair dealing in the manner of dismissal thereby.

[121] I am satisfied that Revolution's conduct in this respect can fairly be labelled reprehensible. Employers should clearly be deterred from leveraging their own non-compliance with employment standards requirement to compel financially vulnerable employees to comprise their legal positions.

[122] The amount of punitive damages awarded must be proportionate to other damages granted and appropriate to meet the objectives of denunciation and deterrence. The case law relied upon by Ms. Thompson in seeking an award include: *Kelly; Fobert v. MCRCI Medicinal Cannabis Resource Center Inc.*, 2020 BCSC 2043; *Moffat v. Prospera Credit Union*, 2021 BCSC 2463; *Altman v. Steve's Music*, 2011 ONSC 1480.

[123] Having reviewed the cases provided, and having considered the facts before me, I find that the amount of $25,000 is appropriate in the circumstances.

IX. Disposition

[124] In summary, I make the following findings:

a) The reasonable notice period for termination of Ms. Thompson's employment at Revolution was six months.

b) Ms. Thompson was not as fully diligent in her search for alternative employment outside of the waste management industry as she should have been. Her otherwise six-month notice period is reduced by one month as a consequence, resulting in a five-month notice period.

c) Ms. Thompson is entitled to be paid in lieu for that five-month notice period for commission earnings at the rate of $6,399.62 per month.

d) Ms. Thompson's claim regarding unpaid bonuses is dismissed; and

e) Ms. Thompson is entitled to $25,000 in punitive damages.

[125] Ms. Thompson is also, as the successful party, entitled to her costs in the cause.

"Tucker J."