IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Ly v. British Columbia (Interior Health Authority),* 2017 BCSC 42

Date: 20170111
Docket: S156771
Registry: Vancouver

Between:

Phuc Ly

Plaintiff

And:

Interior Health Authority

Defendant

Corrected Judgment: The text of the judgment was corrected on the front page on March 27, 2017

Before: The Honourable Madam Justice Morellato

Reasons for Judgment

Counsel for the Plaintiff:	Fred Wynne S. Low
Counsel for the Defendant:	Cameron R. Wardell
Place and Dates of Trial/Hearing:	Vancouver, B.C. July 11-14, 2016 July 22, 2016
Place and Date of Judgment:	Vancouver, B.C. January 11, 2017

I. INTRODUCTION

[1] This is an action by the plaintiff, Phuc Ly, for wrongful dismissal. Mr. Ly was hired by the defendant, Interior Health Authority ("IHA") on September 30, 2014. He commenced work on November 6, 2014 as a manager and was terminated on January 8, 2015 without notice.

[2] For the reasons articulated below, I have concluded that Mr. Ly's employment contract included a probationary term of employment which, in light of the specific facts of this case, is valid and enforceable. I also find that IHA did not meet its legal obligation to carry out a good faith assessment of Mr. Ly's suitability for continued employment. Accordingly, Mr. Ly is entitled to an award of damages based on reasonable notice of termination. I also find that Mr. Ly is entitled to additional damages relating to various expenses incurred during the course of employment.

II. BACKGROUND FACTS

[3] In mid-2014, the plaintiff applied and interviewed for the position of Manager of Quality and Patient Safety and Client Experience ("Manager"). The position of Manager involved the management of a team of six consultants and an administrative assistant ("QI Team") in the Quality Improvement Department of IHA's western operations ("Department"). The Department provides "quality" support to a variety of IHA's other departments. Members of the QI Team include Registered Nurses, most of whom have Master's degrees.

[4] The Department falls within the purview of IHA's Quality, Risk and Accreditation Department which has Ms. Linda Comazzetto as its Corporate Director. Mr. Ly reported to Ms. Comazzetto, who has a larger portfolio including several departments.

[5] Mr. Ly was offered the position of Manager through a number of emails from IHA on September 30, 2014. The first email was received at 8:35 a.m. and was sent by Ms. McDonald, an external recruitment HR service partner for IHA. The email welcomed and congratulated Mr. Ly. It also attached approximately 80 pages of documents for his review. This email referred to an attached offer of employment

letter but no such letter was in fact attached. What was attached to this email were several documents including IHA's 2008 Terms and Conditions of Employment and its 2014 Terms and Conditions of Employment. Both the 2008 and the 2014 Terms and Conditions of Employment documents referred to the existence of a probationary period.

[6] The 8:35 a.m. email read in part:

> Please find attached your Offer Letter of Employment, Interior Health Policies and Procedures, Terms & Conditions and General Information. Once you have carefully read and understood all the mentioned documents, please sign the Offer Letter to acknowledge that you have understood and agreed to all the attached Policies and current new Terms & Conditions.

[7] IHA produced a second email from Ms. McDonald which was apparently sent on September 30, 2014 at 8:43 a.m. to Mr. Ly. The cover email stated:

> Good morning. Please disregard my previous email as the Offer Letter did not save correctly. Attached is the correct email and attachments you should use.
>
> My apologies for any inconvenience.
>
> [Emphasis added.]

[8] This 8:43 a.m. email did not include an offer letter of employment. It did, however, include a document entitled "Standards of Conduct for Interior Health Employees", another document entitled "Workplace Environment", which addressed management responsibilities and personnel rights, and a payroll direct deposit information form.

[9] The 8:43 a.m. email did not contain IHA's 2008 or 2014 Terms and Conditions of Employment. Mr. Ly testified in direct and in cross-examination that he did not receive this second email at 8:43 a.m. but he did read it later that morning, as it was embedded in an email that he received from IHA at 9:33 a.m.

[10] At 8:44 a.m. the record shows that Ms. Comazzetto sent an email to Mr. Ly which stated: "It looks like they sent your offer letter to your hotmail account".

[11] The record does not disclose an email that enclosed an offer sent to Mr. Ly's Hotmail account. However, it appears Mr. Ly received the first offer of employment letter at some time before 9:17 a.m. Mr. Ly sent an email to Ms. Comazzetto at 9:17 a.m. which stated:

> Everything in the offer looks good, but I was wondering if it would be possible to do one amendment to the agreement? Upon further investigation it has been pointed out that the graduate studies programs I am looking to enroll in has September annual cycle start date, therefore I cannot complete my enrollment in the required programs till Sep 2015. Based on the identified start date, it looks like I'll require 3 years to complete any graduate studies. If you can have the offer reflect that my graduate studies are to be completed within 3 years of the start date, it would be much appreciated.

[12] Mr. Ly testified that following receipt of the email containing his offer of employment letter, he initiated discussions with Ms. Comazzetto regarding the modification of the term in his offer letter relating to the time period within which he was to complete further educational requirements.

[13] Ms. McDonald sent Mr. Ly another email with attachments at 9:33 a.m. This email contained an offer letter of employment which referred to the condition of employment requiring Mr. Ly to complete his further education requirements within two years. At this juncture, the offer letter did not reflect the verbal agreement between Mr. Ly and Ms. Comazzetto that he would be provided with an additional year to complete his studies.

[14] Embedded in this 9:33 a.m. email, as part of the email chain, was the second email of 8:43 a.m. Mr. Ly testified that when he received the 9:33 a.m. email, he also read Ms. McDonald's prior email of 8:43 a.m. and understood that he was to "disregard the email" that Ms. McDonald first sent him at 8:45 a.m. He did so.

[15] As a result of the instruction to "disregard" the 8:43 a.m. email, Mr. Ly did not read the 2008 or the 2014 Terms and Conditions of Employment documents, which were part of the large number of documents attached to the 8:43 a.m. email. He testified that, at that juncture, he was waiting for further instructions and further clarity regarding what he was to review. I accept Mr. Ly's testimony in this regard.

[16] Following the discussion between Mr. Ly and Ms. Comazzetto regarding the extension of the time within which Mr. Ly was to complete his additional educational requirements, the offer letter was revised as requested by Mr. Ly.

[17] At 1:18 p.m., Mr. Ly received a revised offer letter ("Offer of Employment Letter") which he signed and returned to IHA. Various portions of this letter read as follows:

> Offer of Employment
>
> On behalf of the Interior Health Authority, I would like to formally offer you permanent full time employment as Manager, Quality & Patient Safety and Client Experience located in Kamloops commencing November 6, 2014. I am pleased to welcome you into this organization, which strives for excellence in delivering client-focused health care.
>
> The salary for your new position is $98,000 per annum (Range 9, Step 12); this is based on a 37.5 hour work week. Employees are required to serve an initial probationary period of six (6) months for new positions. You are entitled to benefits as outlined in the attached Terms and Conditions of Employment for Interior Health. Your benefits entitlement will be as outlined for Excluded staff. Please note the Terms & Conditions of Employment and the Health and Welfare Benefits for executive and non-contract staff will change effective January 1, 2015. A copy of the updated terms & conditions is attached to this email as well.
>
> ….
>
> Interior Health is committed to ensuring each new employee receives an orientation which will help them transition into our complex organization. Please find attached the instructions to complete your mandatory Regional Orientation. If possible, complete prior to your first day of work at Interior Health.
>
> Attached with your emailed offer letter are policies that describe Interior Health's requirements regarding Confidentiality, Data Access, Standards of Conduct, Workplace Environment and Substance Use Disorder. By signing this Offer Letter you are acknowledging you have read, understood and agree to abide by these policies.
>
> If you have any questions regarding your new position, please contact Linda Comazzetto. Please sign this letter acknowledging receipt of same and confirming your acceptance of this position, and return it to maria.lopezmacdonald@interiorhealth.ca at your earliest convenience. By signing this letter you are confirming you have read, understood and agreed to the attached Terms and Conditions of Employment.
>
> [Emphasis added.]

[18] The email Mr. Ly received at 1:18 p.m. did not attach the 2008 or the 2014 Terms and Conditions of Employment of IHA. The email simply contained a single page document entitled "Interior Health" with the subtitle "General Orientation".

III. ISSUES

[19] The issues to be decided are:

1. What are the terms of the Employment Contract and is it valid?
   - A. Does the Employment Contract contain a probationary period of employment?
   - B. Did the Employment Contract incorporate the 2008 and the 2014 Terms and Conditions of Employment?
   - C. What, if any, provisions of the *Employment Standards Act*, R.S.B.C. 1996, c. 113 [*ESA*] apply to the Employment Contract?
   - D. Does the probationary term in the Employment Contract breach the *ESA*?
2. Was Mr. Ly wrongfully dismissed? That is, did IHA satisfy its obligations to carry out a good faith assessment of Mr. Ly's suitability for continued employment?
3. What, if any, damages are owing to Mr. Ly for wrongful dismissal?
   - A. What, if any, damages are owing to Mr. Ly for the termination of his employment without notice?
   - B. What, if any, contractual damages are owing to Mr. Ly, other than damages for the termination of his employment without notice?
   - C. Is Mr. Ly entitled to special damages relating to his moving expenses incurred after his dismissal?

[20] Each of these issues is addressed below.

IV. ANALYSIS

1. What are the terms of the Employment Contract and is it valid?

A. Does the Employment Contract contain a probationary period of employment?

[21] It is well-established law that, in the absence of just cause, there is a presumption in all contracts of employment that reasonable notice will be required in order to lawfully terminate the contract: *Machtinger v. HOJ Industries Ltd.*, [1992] S.C.J. No. 41 (S.C.C.). In *Machtinger* at para. 20, the Supreme Court of Canada characterized the common law principle of termination on reasonable notice as "a presumption, rebuttable if the contract clearly specifies some other period of notice". As addressed in greater detail below, an express probationary clause in an employment contract may rebut the presumption of reasonable notice, provided no statutory entitlement is contravened. The existence of a probationary period is a question of fact in each case.

[22] The facts in this case establish that on September 30, 2014, Mr. Ly reviewed and signed a letter from IHA comprising an offer of employment ("Employment Contract"). The Employment Contract made express reference to the existence of a six-month probationary period.

[23] Counsel for the plaintiff submits that the bare reference to probation in Mr. Ly's Offer of Employment Letter is not sufficient to create a valid contractual probationary period. He relies on *Easton v. Wilmslow Properties Corp.*, [2001] O.J. No. 447 (Ont. Sup. Ct.), arguing that the simple use of the word "probation" is ambiguous and it is not sufficient to meet the employer's obligation to expressly create a probationary term. Counsel further submits that for a valid probationary term to exist, the employer must clearly indicate what will happen if the relationship ends before the probation terminates. More specifically, counsel argues that "the contract must spell out that probation is meant to be a period where the employee must demonstrate that she is suitable for regular employment as a permanent

employee and that she is to go through a period of assessment to determine whether she is suitable for the job".

[24] The reasoning in *Easton* is distinguishable and does not assist Mr. Ly in light of the facts of the instant case. The issue before the court in *Easton* concerned how the term "probation" was to apply. The court concluded, at para. 16, in support of the plaintiff's position, that it was her salary level that was subject to probation in the sense that her salary would increase from $32,000 to $45,000 during a 90-day period if she could demonstrate her abilities to handle all the books of the defendant employer, including those relating to real estate holdings. More specifically, the defined probationary period in *Easton* included a phrase under the heading "Post Probationary Period" that stated "[f]ailure to completely and satisfactorily fulfill the prescribed duties will result in re-negotiation of the salary structure". In this context, the court found that the phrase "Probationary Period", without further explanation, did not make the plaintiff a probationary employee *per se*. Instead, this phrase simply meant that the employee's salary level was subject to probation and that if she could demonstrate her abilities to the defendant, her salary would increase.

[25] Unlike *Easton*, the offer letter signed by Mr. Ly does not include language which suggests or provides for a contrary meaning to a probationary term of employment beyond the usual interpretation of "probation" in the employment law context.

[26] The term "probation" is well understood in business and industry as one where an employee is being assessed by the employer to ascertain the suitability of the employee as a permanent employee: see *Ritchie v. Intercontinental Packers Ltd.* (1982), 2 C.C.E.L. 147 (S.K. Q.B.); citing *Mitchell v. R.* (1979), 23 O.R. (2d) 65 (H.C.) at paras. 13-14. In this context, an express reference to the term "probation" in a contract or letter of employment is sufficient.

[27] In *Nagribianko v. Select Wind Merchants Ltd.*, 2016 ONSC 490, the contract in question, like the contract at issue in this case, made a bare but express reference to a probationary period of six months. The court found the term was enforceable, reasoning as follows:

> [40] A reasonable person in the same circumstances as the Respondent/Plaintiff would have understood the term "probation" to mean a period of tentative employment during which Select would determine whether the Respondent/Plaintiff would be a suitable employee and would decide whether or not to make him a regular/non probationary employee.

[28] The probationary period in this case is expressly set out in the offer letter to Mr. Ly as follows: "Employees are required to serve an initial probationary period of six (6) months for new positions". In cross-examination, Mr. Ly acknowledged that as an experienced manager, he was familiar with the term "probation" as a period of assessment in which an employee's suitability and performance is assessed.

[29] Mr. Ly testified that he dismissed the reference to the term in his offer letter because he did not think the term of probation applied to him. However, the offer letter was addressed specifically to Mr. Ly, he reviewed the letter and he signed it.

[30] Further, it is instructive that when Mr. Ly reviewed the original offer letter, he requested a change be made to it in regard to the condition that he was to complete his educational requirements within a certain time frame; the change he requested was in fact made. If he believed the reference to a probationary period in his offer letter did not apply to him, he could have easily questioned the need for its inclusion, or requested its omission. He did not. Having reviewed and signed the offer letter, he cannot now take issue with the applicability of a probationary period expressly contained within it.

B. Did the Employment Contract incorporate the 2008 and the 2014 Terms and Conditions of Employment?

[31] Counsel for Mr. Ly argues that the term of probation in this case is invalid as it offends ss. 63(1) of the *ESA* which provides that after three consecutive months of employment, an employee is entitled to one week's wages for compensation for length of service. He also asserts that any agreement to waive any *ESA* requirement is invalid pursuant to s. 4 of the *ESA* which provides:

> 4. The requirements of this Act and the regulations are minimum requirements and any agreement to waive any of those requirements … has no effect.

[32] In support of this argument, Counsel refers to clause 6 of IHA's 2008 Terms and Conditions of Employment which provides:

> Employees are required to serve an initial probationary period of not less than three (3) months but not more than six months.
>
> An Employee terminated within the probationary period is not entitled to notice or payment in lieu of notice.

[33] IHA later instituted its 2014 Terms and Conditions of Employment, which state as follows:

> For the first six (6) calendar months of continuous employment, new regular, temporary, or casual employees shall be on probation, during which their suitability for continued employment will be assessed.
>
> The six (6) month probationary period can be extended for an additional three (3) months, at the discretion of Interior Health.

[34] Section 5 of the 2014 Terms and Conditions of Employment contains the following clause:

> 5. Interior Health must not give notice of termination or termination severance in the following circumstances:
>
> […]
>
> (b) The probationary employee is not able to meet the job requirements and has not completed six (6) months of consecutive employment.

[35] The various emails sent to Mr. Ly from IHA during the formation of the Employment Contract, particularly during the morning of September 30, 2014, were confusing at best. While copies of the 2008 and the 2014 Terms and Conditions of Employment were attached with numerous other documents to the first email that Mr. Ly received at 8:35 a.m., Mr. Ly was asked to disregard that email. Furthermore, those documents were not attached to any subsequent emails leading up to the final offer attached to the 1:18 p.m. email. In addition, the 8:43 a.m. email, which asked Mr. Ly to disregard the 8:35 a.m. email, stated: "attached is the correct email and attachments you should use" but it did not include the 2008 or the 2014 Terms and Conditions of Employment.

[36] Mr. Ly understood he was to disregard the 8:35 a.m. email and he testified that he was not aware of (and therefore could not agree to) the 2008 or the 2014 Terms and Conditions of Employment either at the time he signed the offer letter on September 30, 2014 or prior to his dismissal. I accept his testimony in this regard.

[37] Evidence was tendered to the effect that the 2008 Terms and Conditions of Employment were intended to apply at the time Mr. Ly was hired, and the 2014 Terms and Conditions of Employment were intended to apply at the time of Mr. Ly's termination. Nonetheless, I find that neither the 2008 nor the 2014 Terms and Conditions of Employment were actually incorporated into Mr. Ly's Employment Contract.

C. What, if any, provisions of the ESA apply to the Employment Contract?

[38] Counsel for IHA argues, quite apart from the question of whether the 2008 or the 2014 Terms and Conditions of Employment apply in this case, that this case represents an opportunity for the court to clarify an undeveloped legal issue with respect to the nature of employment "probation". He asserts:

> The important question before the Court is whether employers can have probationary periods longer than three months. In the Defendant's submission, they can, but we concede that the law is not clear on the framework for that analysis.

[39] There appears to be a need for greater clarity in this area of the law. Two fundamental principles are engaged relating, first, to the rebuttable presumption of reasonable notice and, second, to the implied right of employers to terminate an employee without reasonable notice during the probationary period. In my view, the implied right to terminate without reasonable notice is necessarily informed and shaped by the legislative provisions of the *ESA* and their applicability to the facts of this case.

[40] As noted above, the common law provides that any agreement which purports to rebut the presumption of reasonable notice must be clear and unequivocal. In *Machtinger,* the Supreme Court of Canada specifically reasons:

> …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 impliedly or implicitly.
>
> [Emphasis added.]

[41] In *Jadot v. Concert Industries Ltd.*, [1997] B.C.J. No. 2403 (C.A.), our Court of Appeal reasons:

> [29] After a careful review of the authorities, the trial judge concluded, correctly in my view, that an employer, during a probationary period "has the implied contractual right to dismiss a probationary employee without notice and without giving reasons provided the employer acts in good faith in the assessment of a probationary employee's suitability for the permanent position".
>
> [Emphasis added.]

[42] The reasoning in *Jadot* supports the conclusion that, while Mr. Ly did not expressly agree to specific terms and conditions of employment which negated reasonable notice, there is, nonetheless, an implied contractual right to dismiss him without notice during his probationary period, providing IHA acted in good faith in its assessment of his suitability for his position. As such, on the authority of *Jadot,* the presumption of reasonable notice set out in *Machtinger* may be effectively rebutted in cases where the parties agree to a probationary period of employment. That is, the contractual right to dismiss an employee without reasonable notice during a probationary period (as affirmed in *Jadot*) "impliedly or implicitly" rebuts the presumption that an employee, in this case Mr. Ly, is entitled to reasonable notice.

[43] While the reasoning in *Jadot* provides that the contractual right of no reasonable notice during the probationary term is implied by operation of our common law, the analysis does not necessarily end at this juncture. That is because the common law relating to probationary periods is subject to legislative modification. More specifically, the common law will not impute or imply a term into an employment contract that is inconsistent with legislative requirements or entitlements such as those found in the *ESA*: see *Chrysler Canada Ltd. v. Canada (Competition Tribunal)*, [1992] 2 S.C.R. 394 at 404.

[44] IHA readily accepts the proposition that a contractual term, in a contract of indefinite duration, that proscribes the without cause termination of an employee on less notice than required by the *ESA* is necessarily null and void. It concedes that the law on this point is well-established. IHA argues, however, that no statutory entitlement has been abrogated in this case. In this regard, counsel relies on the exemption to the minimum notice periods in the *ESA* of "just cause" found in ss. 63(3)(c), arguing that the words "just cause" in that subsection incorporate or subsume the standard of "suitability" typically applied to probationary employees. As such, employees who are assessed in good faith to be unsuitable fall within the ss. 63(3) exemption.

[45] Counsel for IHA refers to the Supreme Court of Canada's decision in *McKinley v. BC Tel*, 2001 SCC 38, arguing that the analysis of "just cause" has expanded to include a contextual analysis of all of the circumstances surrounding the dismissal. He submits that the existence of a period of "probation" is a contextual factor to be considered in this interpretation of the *ESA*, and one that lowers the applicable standard of just cause to unsuitability. Counsel further submits:

> Put another way: while the contemporary standard of "just cause" rests a relatively weighty burden on employers seeking to justify the dismissal of a regular employee without further obligation, that burden lowers to the level of "unsuitability" in the context of a probationary employee given the tentative or uncertain nature of that period, as established by the common law.

[46] The difficulty with this argument is its clear incompatibility with foundational principles that distinguish "just cause" and "suitability" in the context of probationary terms of employment. Suitability is the standard upon which probationary employees are assessed, while just cause is the standard our courts have established for non-probationary or "regular" employees: *Pathak v. Royal Bank of Canada*, [1996] B.C.W.L.D. 891(C.A.); *Jadot*. These are distinct legal standards.

[47] Moreover, it is a well-established principle of statutory interpretation that words ought not be "read-in" or inserted into statutory provisions: *Vandokkumberg v. H. Meyer Construction Ltd.*, 2006 BCCA 423 at para. 12; Ruth Sullivan, *Sullivan on*

the Construction of Statutes, 6th ed. (Markham, Ontario: LexisNexis Canada Inc., 2014) at § 12.14 to 12.15. Counsel for IHA expressly urged the court to effectively "read-in" the word "suitability" as an exception within ss. 63(3)(c) of the *ESA*. However, statutory language must not be judicially supplemented in this manner. It is not a permissible approach to insert statutory language where none exists: *Gulkison v. Vancouver Police Board*, 2015 BCCA 361 at para. 24. Had the legislature intended to include "suitability" as an exception to the application of the minimum notice periods in the *ESA*, it could have done so through the clear and plain language of ss. 63(3). It did not.

[48] Counsel for IHA also argues that a probationary term can be considered as a form of fixed-term contract, at least for the purposes of ss. 65(1)(b) of the *ESA*. That subsection exempts employers from the statutory minimums found in ss. 63(1) in cases of contracts of a "definite" or fixed term. Counsel submits that viewing a probationary period in this manner allows employers to assess and dismiss employees for unsuitability during probationary periods longer than three months without offending the *ESA*.

[49] I do not find this argument persuasive. Agreeing upon a period of probation does not establish a fixed term contract: see *Survival Systems v. Johnston* (1997), 164 N.S.R. (2d) 127 at para. 7 (S.C.). For a fixed-term contract to be established, the contract must contain "unequivocal and explicit language", and "any ambiguities" will be interpreted "against the employer's interests": see *Ceccol v. Ontario Gymnastic Federation* (2001), 55 O.R. (3d) 614 at para. 27 (Ont. C.A.). Further, the facts in this case do not support the conclusion that Mr. Ly's six-month probationary period constituted a fixed term or "definite term" contract.

[50] Absent any express language to the contrary, a probationary term of employment is best understood as part of a contract of employment where: a) the employee is held to the requirement that for a specific period of time that employee must demonstrate certain suitability requirements set by the employer; and b) the employee may be dismissed without reasonable notice (subject to statutory minimums) if he or she does not meet the suitability requirements. If the employee

meets the suitability requirements then, after that period of probationary assessment, the employee's contract continues as a contract of employment wherein the requirements of just cause and reasonable notice apply.

[51] In light of the facts of this case and the applicable law, I conclude that IHA is not exempted from the application of ss. 63(1) of the *ESA* in regard to Mr. Ly's employment. Given the applicability of the *ESA*, the question then arises as to whether Mr. Ly's probationary term of employment is invalid in light of the statutory minimums found in ss. 63(1).

D. Does the probationary term in the Employment Contract breach the ESA?

[52] I have concluded that Mr. Ly's employment comprised an express probationary term of six months duration coupled with the implied term as set out in *Jadot*: the employer's contractual right to dismiss a probationary employee without notice and without giving reasons provided the employer acts in good faith in the assessment of a probationary employee's suitability for the permanent position. However, the common law may be modified by statute and will not imply a term that is contrary to any legislated requirement or entitlement. Accordingly, the statutory entitlement found in ss. 63(1) of the *ESA* cannot be circumvented or breached by Mr. Ly's terms of probation. In my view, however, no such breach occurred in the instant case.

[53] The statutory minimum found in ss. 63(1) of the *ESA* has not been circumvented or breached by Mr. Ly's terms of probation simply because, as addressed above, there can be no implied contractual right of the employer to circumvent ss. 63(1) during Mr. Ly's probationary period. The result is that a probationary employee is entitled to the benefits under ss. 63(1) of the *ESA* during the probationary period. In addition, the existence of the probationary period continues such that suitability also continues to be the standard until the probationary period is completed. In this case then, Mr. Ly was subject to a probationary period, along with the attendant standard of suitability, throughout the course of his short tenure with IHA.

[54] Both counsel made reference to the reasoning of the Court of Appeal in *Shore v. Ladner Downs*, [1998] B.C.J. No. 1045 (C.A.). Counsel for Mr. Ly argues that Mr. Ly's probationary term of employment is unenforceable as a result. In *Shore*, our Court of Appeal concludes that if a provision in an employment contract provides for termination upon less notice than the minimum standards set out in the *ESA* then that provision is void and unenforceable *ab initio*: see also *Waddell v. Cintas Corp,* 2001 BCCA 717; *Krieser v. Active Chemical Ltd.*, 2005 BCSC 1370; and *Miller v. Convergys CMG Canada Limited Partnership*, 2014 BCCA 311. Of significance, the issue in *Shore* was whether a specific and express termination clause, that could *potentially* provide for a lesser entitlement than that available under the *ESA*, was void *ab initio*. The employment contract specifically provided that after the six-month probation period concluded, the employee's notice was fixed at 30 days. After nine months, the plaintiff was dismissed with damages in lieu of four weeks' notice. The damages payment exceeded the minimum statutory requirement under the *ESA* for the plaintiff's actual period of employment and, further, the statutory minimum would not have been exceeded until the plaintiff had been employed for at least five years. Even so, the Court concluded that because the employment contract failed to comply with the statutory minimums, the notice provision was void from the beginning and the plaintiff could only be dismissed without cause if he was given reasonable notice.

[55] Since I have decided that, as a matter of fact, IHA's 2008 and 2014 Terms and Conditions of Employment were never actually incorporated into Mr. Ly's Employment Contract, *Shore* does not apply in this case. *Shore* is distinguishable and inapplicable because there are no express terms in Mr. Ly's Employment Contract which potentially circumvent ss. 63(1) of the *ESA* and, further, as I concluded above, the common law will not import an implied term into a probationary term of employment that is contrary to the legislative requirements under the *ESA*.

[56] Given that I have concluded that neither the 2008 nor the 2014 Terms and Conditions of Employment were incorporated into Mr. Ly's Employment Contract, the validity of IHA's Terms and Conditions of Employment is best left for another day. This issue ought to be decided where such a decision is necessary to dispose of the

matter at hand: *Glassco v. Cumming*, [1978] 2 S.C.R. 605 (S.C.C.) at 611. Nonetheless, given the submissions of both counsel on this point, I would simply question, without deciding, the validity of employment policies that attempt to circumvent the application of statutory entitlements in the *ESA* during the course of probationary periods. *Shore* remains good law in British Columbia.

2. Was Mr. Ly wrongfully dismissed? That is, did IHA satisfy its obligations to carry out a good faith assessment of Mr. Ly's suitability for continued employment?

[57] As addressed above, the test for dismissal in the context of probationary employment is suitability. Just cause need not be established. An employer needs only to establish that it acted in good faith in its assessment of the probationary employee's suitability: *Jadot.*

[58] In determining whether an employer acted in good faith, courts have examined the process through which the employer determines whether the employee is suitable for permanent employment. While an employer is not required to give reasons for the dismissal of a probationary employee, that employer's conduct in assessing the employee is reviewed by the court in light of various factors such as: 1) whether the probationary employee was made aware of the basis for the employer's assessment of suitability before, or at the commencement of, employment; 2) whether the employer acted fairly and with reasonable diligence in assessing suitability; 3) whether the employee was given a reasonable opportunity to demonstrate his suitability for the position; and 4) whether the employer's decision was based on an honest, fair and reasonable assessment of the suitability of the employee, including not only job skills and performance but also character, judgment, compatibility, and reliability: See *Geller v. Sable Resources Ltd.*, 2012 BCSC 1861 at para. 33; *Ritchie*; *Jadot*; *Longshaw v. Monarch Beauty Supply Co.*, [1995] B.C.W.L.D. 2945 (S.C.); *Rocky Credit Union Ltd. v. Higginson* (1995), 27 Alta. L.R. (3d) 348 (C.A.); *Jacmain v. Attorney General (Can.) et al.,* [1978] 2 S.C.R. 15 (S.C.C.); *Gebhard v. Board of Education of the Wilkie School Division No. 59* (1986), 52 Sask. R. 272 (Q.B.).

[59] In considering the events leading to Mr. Ly's termination in light of the legal standard of suitability, I find that he was not given a fair opportunity to demonstrate his suitability for his position. Mr. Ly made genuine and concerted attempts to better understand the basis for his employer's assessment of his suitability but his efforts to do so were not responded to with clarity by his employer. I accept Mr. Ly's testimony that he tried to ascertain relatively early on in his probationary period the expectations and standards IHA would apply to him in assessing his suitability but he was not, in his words, "given a chance" in this regard. Absent such a fair opportunity to demonstrate his suitability, Mr. Ly is entitled to damages.

[60] Counsel for IHA argues that "Mr. Ly took no time to learn about his department, that he disregarded the directions of his superiors and that his insubordinate imposition of his 'vision' of how things were to be done almost resulted in his department losing at least two of its valuable members". Further, counsel argues that Mr. Ly was well aware of the expectations of his post.

[61] Counsel for Mr. Ly argues that no standards, expectations or assessment criteria were set out at the outset of his employment and that these were not communicated to him at any time. Mr. Ly's counsel further argues that IHA's failure to communicate the basis upon which Mr. Ly's suitability was to be assessed is fatal to its assertion that its assessment of Mr. Ly's suitability was made in good faith.

[62] Of particular concern to this Court, as discussed further below, is Mr. Ly's request on December 10, 2014, within five weeks of commencing his employment, for the opportunity to meet with Ms. Comazzetto for purposes of more fully and clearly comprehending the expectations and standards upon which he was being assessed, so as to better ensure he understood and was meeting those requisite standards. This email from Mr. Ly to Ms. Comazzetto stated:

> Hi Linda,
>
> Hope all is well with you. I just wanted to send a quick email requesting if it would be possible to set up some recurring 1-1 meetings with me to discuss details such as:
>
> - My progress
> - Areas I need to work on

- Establishing expectations
- Establishing responsibilities
- Communicating and establishing outcome measurements for myself as well as the team
- Decision authority

My goal when accepting this job was to ensure my teams success as well as my own. I would really appreciate any help and guidance you might be able to provide in getting me proficient in the role. I just want to ensure my efforts are aligned with not only the organizational goals but your vision and goals as well for the team. Let me know if you'd have the time to do this and I can try to get Colleen to set up and book the appointments. I uprooted my life because I truly felt I can contribute in a positive way to this program. I want to do anything I can to ensure that yourself and my team meet all expectations laid out.

Thanks,

[63] A meeting did not take place between Mr. Ly and Ms. Comazzetto to address the above items as requested by Mr. Ly. Yet, the evidence of both Mr. Ly and Ms. Comazzetto was that it would take a considerable period of time for Mr. Ly to get to know the staff members, to comprehend what they did and, further, that it would take Mr. Ly six months to a year to learn the intricacies of IHA's operations and to understand the organization. Mr. Ly was terminated after just two-and-a-half months of employment, well before the expiry of his probationary period of six months and also before his explicit requests for further information and clarity, as set out in the December 10th email, were addressed.

[64] I accept Mr. Ly's evidence that from the outset of his employment, he undertook to come to know his team and to learn about their respective responsibilities. In addition, the evidence of both Mr. Ly and IHA established that the team that Mr. Ly was hired to manage had worked closely together for a considerable period of time prior to his hiring, and that it was a tight knit group. There was a strong sense among the team itself, from the very onset of Mr. Ly's employment, that the various members of the team worked independently, that the team was functioning at a high level, and that little management intervention was necessary. This was not a simple or easy environment within which to learn about a complex organization and to undertake the responsibility of managing an established group within it.

[65] Further complicating Mr. Ly's orientation and his movement into the role of Manager, was the fact that one of the team members, who was the interim manager prior Mr. Ly's arrival, and who was very well liked and respected by the others in his team, had unsuccessfully competed with Mr. Ly for his job. The evidence established that Mr. Ly's job interview went very well, while the interim manager's interview did not.

[66] Mr. Ly is intelligent and articulate. The evidence before me established that Mr. Ly was attempting to learn about the complex operations of IHA and was seeking to responsibly manage a tightly knit team, while also respectfully requesting input from them. The evidence does not establish, as IHA argues, that Mr. Ly was insubordinate or disrespectful.

[67] IHA further argues that although Mr. Ly was instructed not to implement a management system referred to as "lean management," he attempted to do so. Specifically, counsel argues that Ms. Comazzetto advised Mr. Ly that "lean management" at IHA was under "a different portfolio than quality", and that Mr. Ly "was not to implement it given that it was a political 'hot potato'". IHA asserts that Mr. Ly was expressly told by Ms. Comazzetto that he was "to take things very slowly with the staff, to shadow them, learn what they did, and not to make any changes without speaking to her first". IHA argues that Mr. Ly effectively ignored these instructions.

[68] The evidence of IHA is unclear with regard to the question of how employees are to approach the "lean management" method. Dr. Etherington, Ms. Comazzetto's immediate supervisor, testified that he did not direct Ms. Comazzetto to not use "lean management". He testified that "lean" is an important concept and that lean tools are sometimes used in what is referred to as "quality improvement". Dr. Etherington further stated that there is a distinction between "lean projects" and "lean tools" and that at the time Mr. Ly was hired, the quality department did in fact use "lean tools" in everyday work. Further, while the quality department was developing a number of "lean tools", it was taking its direction on lean projects from the human resources department.

[69] Dr. Etherington also testified that Mr. Ly's experience in "lean management", from his previous employment with Vancouver Coastal Health, was an attribute. Indeed, Ms. Comazzetto admitted that Mr. Ly was selected in part because of his "lean" experience.

[70] The evidence does not establish that Mr. Ly implemented lean projects or that he utilized "lean" in defiance of, or in a manner inconsistent with, IHA policy and practice. IHA's reliance on this issue as a basis for Mr. Ly's lack of suitability was not borne out on the evidence before me.

[71] A concern raised by IHA, as illustrative of Mr. Ly not "taking things slowly" or not acting in accordance with his instructions, revolved around an hours of work and attendance guidelines memorandum ("Guidelines") sent by Mr. Ly to his team. Mr. Ly had a team meeting on November 27, 2014 where he discussed a number of matters including the Guidelines. The next day, an email with the Guidelines was sent by Mr. Ly to his team and was copied to Ms. Comazzetto. The email stated:

> Hello everyone,
>
> Attached are the attendance and scheduling guidelines discussed during our last team meeting. Based on feedback from team members, some adjustments and clarifications have been made. These guidelines are always open for review so please feel free to provide additional feedback. Please take some time to review the document, and if there are any concerns please feel free to contact me.
>
> Thanks.
>
> [Emphasis added.]

[72] The attached Guidelines document stated:

> Hello everyone,
>
> To ensure clarity, I just wanted to review a few things as it pertained to our discussion on attendance the other day.
>
> General Attendance Guidelines for Quality Improvement and Patient Safety Team IH West:
>
> - Those who are full time are asked to follow a 37.5 hours a week work schedule. All full time staff will do their best to maintain a 37.5 hour a week work schedule.

- If you work additional hours on one of your work days, please find time during that week to adjust your schedule to ensure your work hours balance out to 37.5 hrs for that same week if possible. eg. Monday you had to come in earlier to attend a meeting and ended up working an additional hour that day. Try to find a day to either come in an hour later or leave an hour earlier sometime that week or as soon as possible and notify the manager of the change.

- Please start keeping track of the additional hours worked. (Additional hours also include travel time from work site to work site. Exclusions: from home to home worksite)

- Bank time should not exceed more than 7.5 hours.

- Permission to use banked time is based on Manager approval.

- Standard hours for full time staff members is Monday to Friday from (8AM to 9AM start) to (4PM to 5PM end times). Due to the unique requirements of the work we do, please adjust the days start and end time as needed.

- Requests for scheduling exceptions should be completed and presented to the manager in writing, one week prior to the exception occurrence.

- Any emergency or last minute exceptions will be reviewed on a case by case basis by the Manager.

- Prior manager approval is required if you need to work from home.

As stated I want to promote fairness, equality, and work life balance within all team operational functions. If there are any concerns with these standards/guidelines, I am definitely open to have the discussion for review.

Thanks everyone,

[Emphasis added.]

[73] Ms. Erickson, the former acting manager, responded to Mr. Ly's email as follows within a half hour of its receipt:

> Hi Van, here is my feedback. I would like to talk with you as my "bank" is very full right now (see notes in the feedback). I normally could adhere to these guidelines fairly well however, at this time am struggling to do that.
>
> Looking forward to that discussion, Cheers, Naomi.

[74] Ms. Erickson's feedback was cordial and collaborative in nature. Mr. Ly responded to Ms. Erickson's email promptly and in kind as follows:

> Hi Naomi,
>
> Hope this provides a bit of clarity. With this document being a guideline, it should not be viewed as a hard fast rule. I want people to try to attempt to stay within the parameters, but if not it's not viewed as the end of the world. Let me know if you have further questions.
>
> Cheers,
>
> Van

[75] Despite the respectful tone of the email which attached the Guidelines, some team members were upset. Two members went to Ms. Erickson, to express their upset. Ms. Erickson, in turn, met with Mr. Ly to discuss the matter.

[76] I found Ms. Erickson to be the most candid of the witnesses for IHA. She testified that after she met with Mr. Ly about the Guidelines, she better understood his approach and did not consider the Guidelines to be a problem. Ms. Erickson acknowledged that after this meeting with Mr. Ly, she did not discuss the results of this conversation with him with her other team members.

[77] A discussion also ensued between Ms. Comazzetto and Mr. Ly about the Guidelines soon after she read the email enclosing them. Ms. Comazzetto was upset Mr. Ly had sent the email to his team without first seeking her approval. As the meeting ended, she muttered words to Mr. Ly to the effect that she "didn't know how long he'd last".

[78] Mr. Ly held another meeting with his team on December 18, 2014. He discussed several matters including a chapter from a book entitled the "Speed of Trust". While he meant this discussion to be a positive message aimed at team building, the message was not well received by members of his team. Team members raised other issues of concern with Mr. Ly. For example, one issue pertained to a November 20, 2014 webinar that Mr. Ly attended with members of his team. At that webinar, Mr. Ly commented about how members of his team might consider the work and approach of another colleague in a different department;

Mr. Ly had met this colleague during his orientation and was impressed with her approach. At the December 18, 2014 meeting, one team member commented on how Mr. Ly's comment at the webinar upset her and how Mr. Ly clearly did not understand the nature of her work in making the comment.

[79] Another issue that was raised at the December 18, 2014 meeting concerned Mr. Ly's posting a "Continuous Improvement Board" outside of his office door at or around the end of November 2014. This was considered a "lean management" tool. Mr. Ly posted statements on the Continuous Improvement Board which were interpreted negatively by members of his team. He was asked on December 18 by members of his team to remove the Continuous Improvement Board. Mr. Ly did so.

[80] Following this December 18, 2014 meeting, Mr. Ly attempted once again to set up a meeting with Ms. Comazzetto. He wished to discuss his work and the status of matters, as set out in his December 10th email. He was seeking constructive direction and clarity regarding his position. While Ms. Comazzetto did agree to a meeting with Mr. Ly on January 8, 2015, she testified the decision to terminate Mr. Ly's employment was made before this meeting.

[81] When Mr. Ly attended the January 8, 2015 meeting he anticipated it would address his request for feedback as set out in his December 10th email, with regard to various performance expectations and criteria applicable to his position. Indeed, he brought a copy of a performance assessment document that he had previously used in 2014 to evaluate his team. While he did not think the document applied to him, he thought it might be useful for discussion purposes. In any event, he was seeking clarity and guidance on the responsibilities associated with his new job. Ms. Comazzetto testified the performance tracking document that Mr. Ly brought to the January 8th meeting applied to Mr. Ly but she admitted that Mr. Ly was never told that it did.

[82] Mr. Ly did not know the decision had already been made to terminate his employment until he attended the January 8, 2015 meeting at which his employment was in fact terminated. After Mr. Ly was terminated, the former acting manager was appointed to his position.

[83] Mr. Ly's request for further information was a necessary and responsible overture, particularly given that his employer had previously affirmed it would take some time to understand and master his position. In this regard, it is noteworthy that out of a total of 43 working days before his termination, Mr. Ly and Ms. Comazzetto worked together from their adjacent offices in Kamloops for 18 days, as both worked on 27 days in different locations.

[84] I have also considered the following evidence, notwithstanding that Mr. Ly's counsel objected to it on the basis that it is hearsay evidence:

(a) Ms. Comazzetto gave evidence about conversations she had with Mr. Hill and Mr. Chan (two IHA employees) as to their experiences with Mr. Ly on his orientation;

(b) Ms. Wootton and Ms. Erickson gave evidence about discussions among the QI Team of unhappiness with Mr. Ly's management, although on cross-examination Ms. Erickson acknowledged that her concerns about the Guidelines were resolved;

(c) Ms. Comazzetto gave evidence about concerns raised with her by Ms. Colleen Kennedy, Ms. Lori Seeley and Ms. Sandy Da Silva (other employees of IHA) with respect to Mr. Ly's conduct;

(d) Ms. Wootton gave evidence that she had spoken to others, including Ms. Erickson, about their concerns with Mr. Ly;

(e) Ms. Erickson and Ms. Wootton gave evidence about discussing the fact that they were unhappy and thinking of leaving the Department;

(f) Ms. Erickson gave evidence that she told Mr. Ly that people were unhappy and thinking of leaving the Department (including herself); and

(g) Ms. Wootton gave evidence that she told Ms. Comazzetto about the concerns people had, including that some were thinking of leaving the Department (including herself).

[85] Counsel for IHA submits, that some of the evidence at (a), (f) and (g) was substantiated. He further submits that the balance of this evidence is adduced for the non-hearsay purpose of showing that the defendant acted in good faith in terminating Mr. Ly. He relies on *Jadot* and, in particular, the following passage where the Court of Appeal reproduces the reasons Mr. Justice Sigurdson, at para. 30:

> Before terminating Ms. Jadot, Mr. Peter did not apprise her of the concerns, or the level of his concern, nor did he give her an opportunity to respond to the opinion that he was forming. In my view, in these circumstances, it was not bad faith not to give Ms. Jadot an opportunity to respond to general concerns about her lack of compatibility with the employer's organization. **I allowed the defendant to introduce hearsay evidence of the comments made to Mr. Peter and Mr. Edwards by employees and people outside Concert Industries as part of the assessment process. The hearsay statements were not introduced for the truth of their contents. That evidence, however, supports my conclusion that the defendant took reasonable steps and reached the opinion in good faith that the plaintiff was not compatible within the organization.**
>
> [Underlining of the Court of Appeal]
> [Bolding by Counsel for IHA]

[86] Counsel for IHA points out that the judgment of Mr. Justice Sigurdson was upheld on appeal, with the unanimous Court quoting the foregoing passage. I accept this argument and have considered the hearsay evidence enumerated above in this case on the same basis as in *Jadot,* as it relates to the issue of good faith. Having done so, and taking the evidence as a whole, along with the evidence of Mr. Ly, I remain of the view that IHA did not meet its obligation to carry out a good faith assessment of Mr. Ly's suitability. I find that Mr. Ly entered an environment that was challenging to manage, that he made a concerted effort to understand the expectations of his position, and when he expressly asked his employer for the opportunity to clarify the basis upon which his suitability was being assessed, IHA

did not act fairly or with reasonable diligence in providing that opportunity or in assessing his suitability.

[87] In conclusion, IHA did not meet the requisite standard of good faith in assessing Mr. Ly's suitability for his position. I find that Mr. Ly was simply not given a reasonable opportunity to demonstrate his suitability for his job as Manager.

3. What, if any, damages are owing to Mr. Ly for wrongful dismissal?

A. What, if any, damages are owing to Mr. Ly for the termination of his employment without notice?

[88] Within approximately three months of his termination by IHA, Mr. Ly found alternate employment. He was hired by the Winnipeg Regional Health Authority ("WRHA"). He commenced work on April 10, 2015, earning approximately $85,500 per annum, which was about $1,000 less per month than his salary with IHA. In addition, between the end of his employment with IHA and the commencement of his work with the WRHA, Mr. Ly earned $600 for work he did for a friend.

[89] Counsel for Mr. Ly submits that reasonable notice in this case falls within the range of five to six months, based on the following factors: 1) Mr. Ly was 38 years old at the time of his termination; 2) he had worked for IHA for just over two months; 3) while he was not induced to work for IHA, Mr. Ly had left secure employment with the prospect of promotion and moved from Vancouver to Kamloops to work; and 4) Mr. Ly had a specialized career in public service and health care quality management. Counsel also highlighted how there are limited opportunities in Mr. Ly's field of employment and that he was required to move to Winnipeg for re-employment. Counsel submits that these factors support an award at a higher range of damages in the five to six month range.

[90] Counsel for IHA argues that, in light of the probationary term of the Employment Contract, Mr. Ly is entitled to only two weeks of notice. Counsel further argues that notice periods for individuals in Mr. Ly's circumstances are habitually brief, whether or not a probationary term is considered.

[91] Having considered the length of Mr. Ly's employment, including the probationary term of his employment, along with his age, the character of his employment, the availability of his employment, and his experience, training and qualifications, I am of the view that a three-month notice period is reasonable in this case. In British Columbia, the logical measure for damages when a probationary employee is wrongfully dismissed is a measure of pay in lieu of reasonable notice: see Mr. Justice Randall Scott Echlin & Matthew L.O Certosimo, *Just Cause, The Law of Summary Dismissal in Canada*, (Toronto: Thomson Reuters Canada Limited, 2013) at 5-14; *Benson v. Co-op Atlantic*, [1987] N.J. No. 15 (Nfld. C.A.)*; Bardal v. The Globe & Mail Ltd.* (1960), 24 D.L.R. (2d) 140 (Ont. H.C.J.); *Geller*; and *Kirby v. Motor Coach Industries Ltd.* (1981), 10 Man. R. (2d) 36 (C.A.).

B. What, if any, contractual damages are owing to Mr. Ly, other than damages for the termination of his employment without notice?

[92] Mr. Ly claims damages for two additional breaches of contract by IHA:

(i) failure to pay his full relocation allowance entitlement for his relocation from Vancouver to Kamloops to assume his role with IHA; and

(ii) failure to reimburse travel expenses incurred in the course of employment.

[93] Mr. Ly claims his entitlement to these expenses based on the terms of the IHA's "Relocation Allowance Program" policy. He also references IHA's reimbursement policies including the Travel Expense Policy. It is undisputed that Mr. Ly agreed to these policies and relied upon them in incurring legitimate employment related expenses.

[94] A proper starting place for this analysis is the decision of the Supreme Court of Canada in *Fidler v. Sun Life Assurance Co. of Canada*, 2006 SCC 30. There the Court confirmed that the rule in *Hadley v. Baxendale* (1854), 9 Exch. 341, 156 E.R. 145 (Eng. Ex. Div.), is the guiding rule under which compensatory damages should

be assessed. From *Hadley,* it is a well-known legal principle that damages for breach of contract should, as far as money can do it, place the wronged party in the same position he or she would have been in had the contract been performed. Damages must be "such as may fairly and reasonably be considered either arising naturally ... from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties": *Hadley* at p. 151.

[95] In *Fidler* at para. 44, the Court laid out the proper approach to this principle as follows:

> … The court should ask "what did the contract promise?" and provide compensation for those promises. The aim of compensatory damages is to restore the wronged party to the position he or she would have been in had the contract not been broken. As the Privy Council stated in *Wertheim v. Chicoutimi Pulp Co.* (1910), [1911] A.C. 301 (Quebec P.C.), at p. 307: "the party complaining should, so far as it can be done by money, be placed in the same position as he would have been in if the contract had been performed". The measure of these damages is, of course, subject to remoteness principles…

[96] Courts have applied *Hadley* to wrongful dismissal cases for economic losses that were in the reasonable contemplation of the parties when the contract was formed: see *Jean v. Pêcheries Roger L. Ltée*, 2010 NBCA 10; and *Marchen v. Dams Ford Lincoln Sales Ltd.,* 2010 BCCA 29. Such an approach is applicable to Mr. Ly's claims for contractual damages, which are assessed below.

i. Is Mr. Ly entitled to reimbursement for further expenses pursuant to the terms of the Relocation Allowance Program?

[97] IHA has an express "Relocation Allowance Program". Within that program is an option for an advance payment. Mr. Ly testified that he read and printed the Relocation Allowance Program, and reviewed and signed the Advance Request on September 30, 2014, the same day he signed his Offer of Employment. Mr. Ly received $4,900 as a relocation advance.

[98] IHA's Relocation Allowance Program is found at Appendix A of this decision. The express purpose of the Relocation Allowance Program is to facilitate recruitment. The Policy stipulates that all receipts for the pre-authorized advance

must be submitted within 60 days of the employee's start date. The policy also stipulates that "All expenses must be claimed within a maximum of one year of the employee's start date".

[99] Under IHA's policy, Mr. Ly had the option of either paying for his relocation costs directly and then being reimbursed at a later date or, alternatively, choosing to receive an advance payment for his relocation expenses and providing receipts within a 60-day period. IHA argues that, in opting for an advance payment, Mr. Ly was required but failed to provide original receipts within 60 days. It claims the $4,900 advance payment be repaid to it.

[100] While IHA's policy required receipts to be provided within 60 days of commencing employment, the policy refers to "original receipts" in regard to two scenarios: 1) "original receipts are required within one year of the start date"; and 2) in relation to the option to "[p]ay your relocation costs directly and then submit all original receipts for reimbursement…". The policy language does not clearly provide, as counsel for IHA submits, that "original receipts" are required within 60 days for advance relocation payments. At best, the policy appears somewhat ambiguous in this regard and on cross-examination Ms. Comazzetto admitted that copies of receipts can be provided from time to time.

[101] The policy also expressly contemplates that exceptions to the one-year time limit may be made in unusual circumstances if supported in writing by the hiring manager and if authorized by the Corporate Director, Human Resources Services. Some discretion is clearly contemplated in regard to the one year period as well. Mr. Ly signed a form entitled "Relocation Allowance Program: Approval/Employee Acceptance Form" on September 30, 2014. That form is found, in part, at Appendix B of this decision. It requires an employee to affirm the intention to "remain in the employment of Interior Health Authority for a minimum of two years" and also contemplates repayment of the relocation advance in the event an employee leaves IHA within 24 calendar months of being hired.

[102] The policy does not expressly address whether the obligation to repay IHA is triggered in circumstances where an employee is dismissed during the probationary

period or otherwise. Ms. Comazzetto admitted she was not sure how the relocation allowance policy was to be applied in this regard and that she would need to ask the Human Resources Department if employees were required to pay back the advance if they were terminated. No one from IHA's Human Resources Department was called to testify in this regard although an internal email from a supervisor of accounts payable dated January 21, 2015 states: "because he [Mr. Ly] was terminated by Interior Health he will not be required to repay his relocation even though he did not work the required two years, unless he cannot provide receipts to back up the relocation advance". Counsel for Mr. Ly underscores that this correspondence confirms the 60-day time frame for providing receipts was not mandatory.

[103] In response to Mr. Ly's claim, IHA specifically pleaded that Mr. Ly had failed to provide original receipts in support of both his relocation advance as well as his other expenses. As such, it argues that he failed to satisfy the requirements of his contract for purposes of reimbursement. Nonetheless, as noted above, IHA acknowledges that it did receive copies of the relocation expense receipts in the course of the document disclosure process in this litigation. It also received the original receipts on the morning of the first day of trial. Further, the authenticity of these receipts was not challenged by IHA.

[104] Counsel for IHA argues that while IHA "adopted a more flexible approach a year ago, it will insist on the terms of its contracts and policies with respect to Mr. Ly's claims relating to them," asserting that since "Mr. Ly did not abide by them, he has no other basis to claim reimbursement". IHA argues that if it is found liable to Mr. Ly for any damages, it is entitled to a $4,900 set off because Mr. Ly did not properly claim his relocation expenses.

[105] In response, counsel for Mr. Ly submits that once an employer has repudiated the employment contract, the employee is no longer obliged to fulfill its terms. He argues that since IHA decided to terminate Mr. Ly, it could not rely on the 60-day time constraint in its policy. Nevertheless, Mr. Ly chose to provide the receipts in question, both copies and originals, in an effort to justify his relocation

expenses during the course of the litigation which followed his termination. He demonstrated the merits of his business expenses even though IHA put an end to the Employment Contract.

[106] Counsel for Mr. Ly relies on the case of *Globex Foreign Exchange Corp. v. Kelcher*, 2011 ABCA 240. That case also involved a restrictive covenant which the court declined to enforce. In doing so, the court referred to a "second justification" for not enforcing such a covenant in the face of a wrongful termination. The court reasons:

> … A second justification (alluded to by Simon Brown L.J. in *Rock Refrigeration)* may be that enforcing a restrictive covenant in the face of wrongful termination *prima facie* negates the consideration (whether continued employment or something else) given by the employer to the employee when she accepted the restrictive covenant. Said another way, because the employment was prematurely and wrongfully terminated the employee will not "have received, during the period of his or her employment, an extra amount of remuneration for having conceded to be bound by the restraint in the contract": *Employment Law in Canada* at §11.48.

[107] Counsel for Mr. Ly further argues that IHA cannot escape its obligations under the contract by virtue of its own breach. I note in this regard that IHA chose to end the employment relation before the 60-day period elapsed. According to IHA's evidence and submissions, the decision to terminate Mr. Ly was made sometime in the third week of December 2014.

[108] I find that IHA's breach of the Employment Contract, by wrongfully dismissing Mr. Ly, in effect removes any obligation Mr. Ly may have under that contract since he has been deprived of substantially the benefit of his Employment Contract through his wrongful dismissal. As stated in *General Billposting Co. Ltd. v. Atkinson*, [1909] A.C. 118 (H.L.(E.)), an employer's wrongful termination of an employee evinces an "intention no longer to be bound by the contract". Put differently, having wrongfully dismissed Mr. Ly, IHA cannot now strictly rely on the 60-day timeline as a base for claiming the return of the $4,900. Mr. Ly was under no obligation after the date of IHA's breach to provide the receipts within the 60-day period.

[109] I have also considered that the authenticity of Mr. Ly's relocation costs were not disputed by IHA, that the receipts in question were provided to IHA through the

litigation process, and that the 60-day time frame includes a discretionary component. I am of the view that Mr. Ly ought not be required to return his advance payment of $4,900 to IHA. Indeed, this result seems to be in accord with IHA's internal memorandum from its own accounts payable department. Furthermore, the amounts claimed by Mr. Ly are those that would have been in the reasonable contemplation of the parties when they entered into the contract. Based on the approach in *Hadley* and *Filder*, Mr. Ly is entitled to receive these reimbursements as they put him, the wronged party, in the same position he would have been in had the contract been performed. Mr. Ly provided evidence of additional relocation expenses for the period between October 14, 2014 and November 1, 2014 totalling $260.02. He is entitled to be reimbursed for these expenses on the same basis.

ii. Is Mr. Ly entitled to reimbursement for travel expenses?

[110] During his tenure with IHA, Mr. Ly incurred travel expenses associated with his work responsibilities. Mr. Ly provided receipts supporting a claim in the amount of $264.21. IHA also disputes Mr. Ly's entitlement to reimbursement for these expenses.

[111] IHA submits that in order to be eligible for reimbursement, Mr. Ly was required to show entitlement pursuant to its expense reimbursement policy. Counsel argues that the Travel Expense Policy required Mr. Ly to submit "original receipts" in conjunction with other mechanisms for payment (e.g., a "Teer" form or through "iSite"). IHA further argues that Mr. Ly understood the need to make a claim for reimbursement within certain time frames, and that he knew that the defendant's year end occurred at the end of March. Because Mr. Ly did not submit copies of receipts until January 29, 2016, with copies of his list of documents in this litigation, and did not submit original receipts until the opening of trial, IHA takes the position that Mr. Ly is not entitled to damages for these expenses.

[112] IHA's Travel Expense Policy states at section 3.4(g) that: "Except as specifically noted, itemized original receipts or electronic copies of original receipts and additional supporting documentation, as outlined in the *Travel User Guide*, must

accompany all properly authorized expense claims in order to be reimbursed". Section 3.3(c)(3) of IHA's Travel User Guide states that eligible employees "are responsible to ensure that all claims are…supported by original receipts". However, section 2.2(b) of IHA's Travel User Guide contemplates that travel reimbursement may be made without a written receipt "if every effort is made to obtain a written receipt but one is not available" providing the employee provides a written statement attesting to certain facts. Notably, Mr. Ly did more than provide a written statement supporting these expenses. He actually provided the written receipts themselves and confirmed the validity of the expenses. Further, IHA did not lead any evidence claiming these expenses were excessive or not related to Mr. Ly's work responsibilities.

[113] IHA also denies Mr. Ly's entitlement to these expenses on the basis that the receipts ought to have been provided before the end of March 2015. Section 3.2(b) of IHA's Travel User Guide provides in part that: "In any case, every effort must be made to submit expenses in the fiscal year they were incurred". This language does not necessarily preclude or prohibit entitlement beyond the fiscal year end, although clearly this is a guideline that ought to be followed in the usual course. In any event, the facts before the Court do not reflect the usual course of events.

[114] As addressed above, Mr. Ly was not under an obligation to provide receipts after he was wrongfully dismissed, other than to support his position in this litigation, since IHA deprived him of substantially the benefit of his Employment Contract by wrongfully dismissing him: *General Billposting*. In addition, reimbursement to Mr. Ly of these expenses puts him, as the wronged party, in the same position he would have been in had the contract been performed: *Hadley*; *Filder*. Accordingly, I am of the view that Mr. Ly is entitled to the $264.21 he incurred while travelling as Manager.

[115] I wish to note, for clarity, that this court's review of IHA's expense policies and their application is limited to the unique facts of this case and is not intended to have any broader application.

C. Is Mr. Ly entitled to special damages relating to his moving expenses incurred after his dismissal?

[116] Mr. Ly also claims moving expenses incurred in mitigating his damages. His counsel relies on the following passage in *Porta v. Weyerhaeuser Ltd.*, 2001 BCSC 1480, where Cullen J. (as he then was) reasons:

> The basis for the plaintiff's claim lies in the principle that relocation expenses can be recovered from an employer where they flow from the plaintiff's duty to mitigate his loss. The reasoning is that because the employer gains the benefit of the plaintiff's successful mitigation, the employer must pay the costs of such mitigation.
>
> …
>
> With regard to the issue of mitigation of loss, in my view, the weight of authority favours the conclusion that where a plaintiff seeks to mitigate his loss by incurring moving and relocation expenses then those relocation expenses are recoverable.
>
> [Emphasis added]

[117] Counsel for Mr. Ly also relies on the reasons of the court in *MacWilliam v. Rudy's Petroleum Services Ltd.* (1990), 32 C.C.E.L. 310 (B.C.S.C.):

> 16 As regards to those expenses reasonably and properly incurred during the notice period, or, for that matter, outside it, by the plaintiff employee on carrying out his obligation to mitigate his damages arising from the breach of failure to give adequate notice or payment in lieu, I am of the opinion that those expenses are properly recoverable against and to the extent of the benefit resulting from the mitigation to the employer, who would otherwise, failing such mitigation, be called upon to pay the full amount in lieu of notice. The employer should not have the benefit of the amount mitigated free of such costs in mitigation at the expense of the employee. Conversely, an employee cannot expect to recover his expenses in seeking employment or for moving as mitigation, to the extent that the amount of such expense exceeds what is recoverable as special damages as payment in lieu of adequate notice, because no mitigation results to the extent of such excess and it is not attributable to the breach. The principle may be exemplified more clearly by a simple example. If an employee is entitled to special damages of $3,000, representing his former salary and benefits of $1,000 a month, in lieu of 3 months' notice, and obtains similar employment at the commencement of the second month paying $1,000 a month inclusive of benefits, the mitigation results in a $2,000 benefit to the employer. If the expenses in mitigation are $1,000, this amount should be paid to the employee, leaving, by deduction, a benefit of $1,000 to the employer; but if the mitigation expenses are $3,000, the payment and deduction should be limited to $2,000. The $1,000 excess is not properly recoverable as an

> expense in mitigation as no mitigation resulted. It would, in reality, constitute an additional expense to the employer for which he is not legally liable for damages as flowing from the breach to give reasonable notice or payment in lieu thereof. To put it differently, but more succinctly, costs of mitigating are recoverable only up to the amount mitigated.

[118] The difficulty with Mr. Ly's claim in this regard is that IHA did not in fact receive a benefit from Mr. Ly's new position in Winnipeg. Since Mr. Ly is entitled to three months' notice, IHA received no benefit from his mitigation efforts. As such, the moving expenses associated with his move are not recoverable.

V. DISPOSITION

[119] Mr. Ly is entitled to the following:

(a) three months' pay in lieu of reasonable notice at the date of his termination on January 8, 2015;

(b) $269.02 for unpaid relocation expenses; and

(c) $264.21 for unpaid travel expenses.

[120] IHA is entitled to a set off of $600 representing income Mr. Ly received for work done between his termination date of January 8, 2015 and when he commenced his new employment on April 10, 2015.

[121] The parties are granted leave to provide written submission on costs should the need arise.

"MORELLATO, J."

Appendix A

Interior Health

RELOCATION ALLOWANCE PROGRAM
New Employee Information

Congratulations on your new position! This form has been designed to assist you in following all the necessary steps to ensure that you receive the relocation allowance funds that you have been offered.

- The **purpose** of the Relocation Allowance Program is to facilitate recruitment of persons to external vacancies. Where relocation of the employee, family and household is determined by Interior Health to be necessary or preferable, a relocation allowance may be provided. All expenses must be claimed within a maximum one year of the employee's start date. In addition, receipts for a pre-authorized advance must be submitted within 60 days of the employee's start date.

Exceptions to the one-year time limit may be made for unusual circumstances, as supported in writing by the Hiring Manager, and authorized by the Corporate Director, Human Resources Strategic Services.

- Should you have any **questions** about receiving your relocation allowance, please **contact your new manager**.

- **Important Note:** It is in your best interest to consult Canada Revenue Agency (CRA) Regulations concerning taxable versus non-taxable benefits associated with receiving relocation allowance. Please use this link to access CRA: http://www.cra-arc.gc.ca/menu-eng.html

The following **Checklist** will assist you in making your claim for reimbursement:

	✓
Read this entire document and **sign** the "Employee Acceptance" section of the enclosed "*Relocation Allowance Approval/Employee Acceptance Form*" (Page 3 of this document).	
Consider how you wish to be paid your Relocation Allowance. Your manager has the option of authorizing that you either: 1. Receive an advance payment of any amount up to 50% of the maximum approved Relocation Allowance (Paid once you have a Payroll record, on or within a few days of your start date); or, 2. Pay your relocation costs directly and then submit all original receipts for reimbursement, up to the maximum approved Relocation Allowance (see note above regarding expected timelines for submission of receipts).	
If you need an advance payment, speak to your new manager before or on your start date to discuss your wishes in this regard. Then, if your manager agrees to authorize the advance payment, sign and submit the attached '*Relocation Allowance Approval/Employee Acceptance*' form to your manager before or on your start date. Note: Advances are paid after you have begun employment and are paid through an Accounts Payable cheque sent via your hiring manager. Receipts must be submitted within 60 days (see above). **If you are relocating from outside of Canada,** you must obtain at least one quote from a Canadian moving company. **Note: Duplicate Rent** does not include interim living accommodations (which is covered above) or damage deposit and has a **maximum limit of 3 months.** The intent of duplicate rent is to address the circumstances of an employee facing lease (rent) obligations at the previous place of residency while incurring additional lease (rent) obligations at the new place of residency. Similarly, duplicate mortgage obligations would also be eligible where the employees place of residency is actively being marketed for sale, with the reasonable expectation of a sale consistent with market conditions.	
Before one year from your start date collect all original receipts*** and attach to the '*Relocation Allowance Receipt Submittal Form*" (Page 4 of this document). Complete the form fully and present it to your manager for review and approval. Other than receipts submitted in the first 60 days to support an advance, all receipts are to be held and submitted collectively immediately after the last expenditure, again using the '*Relocation Allowance Receipt Submittal Form.*" If you received an advance that exceeded your total allowance claimed – attach a cheque with your receipts or contact Accounts Payable to arrange repayment through Payroll deduction. If you still have eligible expenses to be reimbursed within the approved expense level (i.e. over and above advance received), submit your receipts as above. Payment will be made to you through Payroll. *** *If the requested reimbursement amount of an expense is less than the total original amount paid, a copy of the expense receipt may be submitted to allow you to retain the original receipt for income tax purposes.* ***	

Appendix B

Interior Health

RELOCATION ALLOWANCE PROGRAM: APPROVAL/EMPLOYEE ACCEPTANCE FORM

(To be initiated by External Recruitment Services upon direction from the Hiring Manager Please refer to detailed program instructions before signing this form)

STEP 1 — EXTERNAL RECRUITMENT APPROVAL

Employee Name: **Van Phuc Ly**

Moving from: **Vancouver, BC** Moving to *(Work Location)*: **Kamloops, BC**

Position: **Manager, Quality & Patient Safety and CE** Relocation Category: **Excluded Range 9**

Position Start Date: November 6, 2014

Relocation Allowance Amount *(up to)*: **$9,800.00 CDN**

The above named employee is eligible for reimbursement of relocation expenses in keeping with the Relocation Allowance Program of Interior Health Authority.

External Recruiter
Monika Astofeeroff
HR External Recruiter
Excluded/Non-Contract Employees

September 30, 2014

Print Name **Signature** **Date**

STEP 2 — EMPLOYEE ACCEPTANCE (TO BE COMPLETED BY EMPLOYEE)

UPON RECEIPT OF THIS RELOCATION ALLOWANCE, THE FOLLOWING IS UNDERSTOOD AND AGREED:

It is my intention to remain in the employ of the Interior Health Authority for a minimum of two years following the date of transfer / hire. Should I resign from service prior to completing 24 calendar months of full time (or equivalent) service, I agree to repay the amount of relocation allowance granted to me on the pro rata basis of: 1/24th of the total amount of relocation subsidy received for each full and final partial month, if any, that my employment falls short of 24 calendar months of full time (or equivalent) service. **Note:** Where the employee is at work beyond the 15th day of the final partial month, that final partial month will be considered to be a completed month of service for purposes of calculating the amount to be repaid.

IMPORTANT: I understand that if I leave Interior Health before 24 calendar months or if I receive an advance in excess of expenditures claimed within 1 year or up to the point I leave the organization, the Interior Health Authority is hereby authorized to recover any outstanding portion of the relocation subsidy. If I leave the organization, repayment will be through payroll deduction or other remuneration deduction without further notice. If I am required to repay a portion of my advance and remain in the organization, terms of repayment wil be negotiated with the applicable manager as either payroll deduction or repayment through cheque.

NOTHING CONTAINED HEREIN shall prejudice the right of the Interior Health Authority to recover any outstanding advance or portion thereof after termination of employment.

Note: Revenue Canada may deem this to be a taxable allowance and should be contacted directly for further information.

I, Phuc Van Ly (Print Name) understand and agree to these terms and conditions.

(Signature) Sept 30/2014 (Date)

STEP 3 — MANAGER APPROVAL (TO BE COMPLETED BY MANAGER)

Hiring Department Cost Centre No.: _____

Advance Payment Required?* Yes ✓ **NO** ____ **$** 4900.00 (no more than 50% of approved allowance)

Receipts for this advance must be submitted within 60 days of the employee's start date. In the event the advance is not supported by receipts within 60 days, the advance amount will be recovered through payroll over the 6 pay periods immediately following the completion of those 60 days.

Notes to Hiring Manager:

- * Individual must be an active employee on the payroll system before an Advance Payment will be issued.
- **Advance Payment:** send original of this form to **Accounts Payable** as soon as it is signed and approved. (Interoffice Mail: Accounts Payable, Kelowna Warehouse (Reich) Acland Road, Kelowna, BC)
- **No Advance Payment:** the hiring manager should hold the form and send original to Accounts Payable along with the *Relocation Allowance Receipt Submittal Form* which will be given to you by the employee once all receipts are collected.
- Send a signed copy of this document to the **Employee Services Centre** for Employee File, keep a copy for your records and give the employee a copy. (Interoffice Mail: HR, Employee Services, Kirschner Mtn., Kelowna, BC)

Hiring Manager

Print Name **Signature** **Date**