IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Ostrow v. Abacus Management Corporation Mergers and Acquisitions,* 2014 BCSC 938

Date: 20140529
Docket: S128942
Registry: Vancouver

Between:

Adam Ostrow

Plaintiff

And:

Abacus Management Corporation Mergers & Acquisitions

Defendant

Before: The Honourable Madam Justice Watchuk

Reasons for Judgment

Counsel for the Plaintiff:	Kelly Slade-Kerr
Counsel for the Defendant:	Carman J. Overholt, Q.C.
Place and Dates of Trial:	Vancouver, B.C. June 12-14, 2013 September 23-25 2013 November 12, 2013
Place and Date of Judgment:	Vancouver, B.C. May 29, 2014

I. INTRODUCTION

[1] The issue in this case is the quantum of damages arising from wrongful dismissal. The plaintiff, Adam Ostrow, was employed as a specialist in United States ("US") taxation by the defendant, Abacus Management Corporations Merger and Acquisitions ("Abacus") for nine months from March 1, 2011 until December 1, 2011.

[2] Liability is not in issue. Counsel for Abacus also advised the court that the counterclaim is not proceeding.

[3] After examining the factors relevant in this case, I have found that Mr. Ostrow is entitled to damages in lieu of notice in the amount of six months' pay which include benefits, Canada Pension Plan contributions, and bonus.

II. FACTS

[4] The facts in this matter are substantially agreed upon by counsel. Where differences arise or where conclusions are to be drawn from the facts not in issue, they will be dealt with below in the discussion of the legal issues.

[5] Mr. Ostrow was born in October 1971 and is currently 42 years old. He has a Master's Degree in International Economics and Finance from Brandeis University International Business School in Massachusetts, and a Master of Business Taxation from the Carlson School of Management in Minnesota. He also completed the General Course and Legal Studies Program at the London School of Economics. He has nineteen years' experience in the international tax industry and has been a senior tax manager since 2002.

[6] Abacus is a private equity company with approximately $5.5 billion in holdings. It is in the merger and acquisition transaction business, buying and restructuring corporations through inter-corporate structures and transactions designed to realize added value and tax driven advantages. It develops and improves proprietary tax-structured products and business models for internal use

and for sale to enhance value and reduce taxable exposure for corporations and shareholders.

[7] In his employment with Abacus, Mr. Ostrow specialized in international and US tax. He was a Senior Manager in the Structured Financial Solutions group which provided tax advice for high-level financial transactions, often multimillion or billion dollar transactions. His work involved sophisticated and complicated analysis of the tax code and regulations, and an exercise of judgment to create innovative legal structures and transactions that would realize tax savings for the seller or vendor of a company. Mr. Ostrow's role was to conceive of the ideas and then lead and manage the deals in consultation with external consultants.

[8] Mr. Ostrow earned an annual salary of $135,000 plus a bonus in the range of 15% of income. He also participated in Abacus' extended health, dental, AD&D, life and disability insurance plans.

[9] Prior to his employment with Abacus Mr. Ostrow worked in various roles in international tax with international accounting firms, a large international law firm, and in private industry. Most of his career was spent in the United States. He moved to Canada in June 2006 when he was recruited from Baker Tilly to accept a Senior Manager, International Tax & Advisory Services position at KPMG in Vancouver, B.C. In January 2008, he was recruited by PWC in Vancouver to take a position as a Senior Manager, International Tax Services, US Corporate Tax Group where he worked for one year.

[10] In June 2008, six months after he started employment with PWC, Mr. Ostrow was the victim of a violent crime. He developed post-traumatic stress disorder (PTSD) and an adjustment disorder with major depression. His performance suffered and his employment with PWC ended in January 2009. He obtained employment at a smaller accounting firm but in May 2009, after five months, he left that position and started a disability leave. He was recovering from his illness when he began the search for new employment in the spring of 2010.

[11] In September 2010 Mr. Ostrow was hired by C2 Global Solutions Inc. ("C2"), which was owned and managed by Jas Hayre. At C2 Mr. Ostrow provided consulting services to Abacus. By October 2010, approximately 80% of C2's work was being done for Abacus and Mr. Ostrow worked from an office in Abacus' premises.

[12] In February 2011, Mr. Hayre advised Mr. Ostrow that Abacus wanted to formally employ him rather than have his consulting services provided through C2. The opportunity was presented to Mr. Ostrow as a choice.

[13] The employment with Abacus would provide an increase in salary from $100,000 to $135,000, provide a contractual right to bonus, and offer a full suite of benefits. Mr. Ostrow did not have benefits with C2.

[14] Mr. Ostrow received a copy of the draft employment contract (the "contract") from Abacus in about February 2011. He had concerns about the contract because it allowed Abacus to terminate by providing the minimum notice under the *Employment Standards Act*, R.S.B.C. 1996, c. 113. He did not think this gave him enough assurance of job security, which was an issue which arose for him because of his employment history. It also had a six-month restrictive covenant, or non-competition clause, which would restrict him from working for other employers.

[15] Negotiation of the contract lasted approximately three weeks. Mr. Ostrow first dealt with Greg Tedesco, the Chief Financial Officer. Mr. Tedesco asked Luana Fong, Human Resource Manager of Abacus, to assist to conclude the contract.

[16] In his negotiations with Abacus, Mr. Ostrow advised both Ms. Fong and Mr. Hayre of his concerns about the contract. Mr. Hayre told Mr. Ostrow that Abacus was a respectable employer and that most employees had been there for a long time. He told Mr. Ostrow that he would ensure he was taken care of. Ms. Fong advised Mr. Ostrow that Abacus rarely terminated people, and if they did, they were treated fairly. In the course of these negotiations and discussions, Abacus agreed to revise the termination provision to remove the right of the employer to terminate by

providing only the notice required by the *Employment Standards Act*. The negotiations and amendment of the contract provided Mr. Ostrow with the assurance he needed regarding job security.

[17] The contract was finalized and Mr. Ostrow commenced formal employment with Abacus on March 1, 2011. The contract stated that he would be provided with "reasonable notice according to the law or pay in lieu of notice in accordance with the law...".

[18] Mr. Ostrow was given further assurances of job security from his supervisor, Mr. Hayre, after the contract was signed. In the summer of 2011, Mr. Ostrow was approached by the Grosvenor Group about a potential opportunity as a Director of Tax. He thought things were going well at Abacus and approached Mr. Hayre for reassurance. Mr. Hayre told him that Abacus was growing by leaps and bounds with many irons in the fire. He told Mr. Ostrow that the company had big plans for his role and they wanted him on the ground ready to go when the big deals came in. Mr. Hayre confirmed in his evidence that he gave Mr. Ostrow these assurances of job security and that the purpose of the conversation was to give Mr. Ostrow a sense of security.

[19] Mr. Ostrow testified that after this conversation, he felt that Abacus appreciated him. He decided not to follow up with the Grosvenor Group.

[20] In October 2011, Mr. Ostrow was told by Mr. Hayre that he should start looking for new work. Jean-Marc Bougie, the new CEO of Abacus, had decided to change directions and focus on Canadian transactions. Mr. Ostrow believed there was work available for him and that the decision was a mistake. He thought that Abacus would change its mind. Mr. Hayre held out hope that the decision would be reversed. Mr. Ostrow started to explore other job opportunities. Mr. Hayre also hoped to make a business case for keeping Mr. Ostrow.

[21] Mr. Ostrow continued to work. He was surprised when he attended a meeting on December 1, 2011 and was terminated effective immediately. Mr. Hayre

confirmed that Mr. Ostrow was visibly upset. At that time he was given a termination letter which reminded him of the non-competition clause in his employment agreement.

[22] At the time of his termination Mr. Ostrow had been working with Abacus for five months as a consultant with C2, and nine months under a formal employment contract with Abacus. He was provided with one weeks' pay in lieu of notice, equivalent to the minimum notice specified by the *Employment Standards Act*. He did not receive a bonus for the five-month period from July 2011 to December 2011.

[23] Mr. Ostrow had a difficult time with the termination. The symptoms of his illness flared up including difficulty sleeping, nightmares, and tremors. He was also dealing with personal issues related to the financing of his property, moving to a new home, and delays with processing of his EI.

[24] Mr. Ostrow became employed sixteen months after the termination. His new position pays 30% less than his position at Abacus. While unemployed, he did volunteer work and short-term work through the Gemology Association.

III. ISSUES

[25] As there is no dispute regarding liability, the issue is the quantum of damages for Mr. Ostrow's wrongful dismissal. The determination of this issue, in accordance with the submissions of counsel, involves the resolution of four questions:

1. The credibility of the plaintiff;
2. The length of the period of reasonable notice;
3. Mitigation; and,
4. The calculation of damages for the period of notice including bonus, benefits, and Canada Pension Plan contributions.

[26] I will deal with these issues in turn below.

IV. DISCUSSION

A. Credibility

1. Law

[27] The law regarding the assessment of credibility was well summarized by Dillon J. in *Bradshaw v. Stenner*, 2010 BCSC 1398:

> [186] Credibility involves an assessment of the trustworthiness of a witness' testimony based upon the veracity or sincerity of a witness and the accuracy of the evidence that the witness provides (*Raymond v. Bosanquet (Township)* (1919), 59 S.C.R. 452, 50 D.L.R. 560 (S.C.C.)). The art of assessment involves examination of various factors such as the ability and opportunity to observe events, the firmness of his memory, the ability to resist the influence of interest to modify his recollection, whether the witness' evidence harmonizes with independent evidence that has been accepted, whether the witness changes his testimony during direct and cross-examination, whether the witness' testimony seems unreasonable, impossible, or unlikely, whether a witness has a motive to lie, and the demeanour of a witness generally (*Wallace v. Davis* (1926), 31 O.W.N. 202 (Ont. H.C.); *Farnya v. Chorny*, [1952] 2 D.L.R. 354 (B.C.C.A.) [*Farnya*]; *R. v. S.(R.D.),* [1997] 3 S.C.R. 484 at para. 128 (S.C.C.)). Ultimately, the validity of the evidence depends on whether the evidence is consistent with the probabilities affecting the case as a whole and shown to be in existence at the time (*Farnya* at para. 356).

2. Discussion

[28] Abacus submits that the plaintiff is not a credible witness, and where his evidence contradicts the evidence provided by the witnesses for Abacus, the court should prefer the latter.

[29] Counsel for Abacus pointed to two specific aspects of Mr. Ostrow's testimony that demonstrate his attempt to mislead the court. First was Mr. Ostrow's claim under direct examination that, when he was terminated on December 1st, he had to urgently sell his home which he could no longer afford. In cross-examination Mr. Ostrow admitted that he had listed his home for sale around July 22, 2011, and had sold it by November 1st of the same year, a month before being dismissed. Abacus submits that this demonstrates an attempt by Mr. Ostrow to exaggerate the stress he was under at the time of his dismissal.

[30] The second aspect of Mr. Ostrow's testimony that Abacus submits impeaches his credibility involved falsifications on Mr. Ostrow's resume. On cross-examination

Mr. Ostrow admitted that he had intentionally misrepresented some aspects of his resume on several occasions. He said that he did this in an attempt to cover gaps in his employment record due to medical leave.

[31] I am not persuaded by Abacus' submissions on this issue. Rather than being a witness who was trying to mislead the court, I found Mr. Ostrow to be a witness who wanted to tell the court everything in great detail, often expanding his answers at length. He appeared to be intent on omitting no detail from his evidence.

[32] Mr. Ostrow's testimony about the timing of the sale of his house must be assessed in context. Mr. Ostrow was describing the financial stress he was under in general, and as a result of his litigation with PWC. He may have overstated the situation at points, but at no time did he appear to be attempting to hide anything. On the contrary, as with the resume, when confronted with a more accurate reflection of the circumstances, Mr. Ostrow was quick to adopt the accurate depiction, and had a genuine desire to be honest with the court.

[33] With regard to the inaccuracies on his resume, the issue arises primarily due to Mr. Ostrow's statement on one resume that his work with Abacus began in May 2010 rather than with C2 in September 2010. He testified that Mr. Hayre told him that he could use the earlier date, and in cross-examination he explained sincerely that the reason was to minimise the gaps in his employment. Mr. Hayre stated in cross-examination that it was possible he had permitted Mr. Ostrow to change the dates on the resume. There were also two other occasions on which Mr. Ostrow used inaccurate dates in listing the duration of previous employment for a similar reason.

[34] In these particular circumstances I find that Mr. Ostrow's evidence, viewed in its totality with the explanations, is internally consistent and consistent with the other evidence presented. It is also consistent with his good character and intensity, particularly in the circumstances in which he found himself at the relevant times. The inconsistencies do not affect the evidence regarding the issues to be resolved.

Where the evidence of Mr. Ostrow is to be weighed in determining those issues, I find him to be a reliable and credible witness.

B. Reasonable Notice

1. General Principles

[35] The general principles governing the assessment of reasonable notice are well established. The purpose of reasonable notice is to provide the employee with a fair opportunity to obtain similar or comparable re-employment (*Bishop v. Carleton Co-Operative Ltd.*, [1996] N.B.J. No. 171 (C.A.), at para. 10).

[36] In *Bardal v. Globe and Mail Ltd.* (1960), 24 D.L.R. (2d) 140 (Ont. H.C.) [*Bardal*], at p. 145, the factors to be considered when determining reasonable notice were described in the following oft-cited paragraph:

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

This passage was quoted with approval by the Supreme Court of Canada in *Machtinger v. HOJ Industries*, [1992] 1 S.C.R. 986, at pp. 998-999.

[37] The British Columbia Court of Appeal adopted the *Bardal* approach in *Ansari v. British Columbia Hydro and Power Authority* (1986), 2 B.C.L.R. (2d) 33 [*Ansari*], which is the leading case in this province. In *Ansari*, Chief Justice McEachern stated at p. 43:

> At the end of the day the question really comes down to what is objectively reasonable in the variable circumstances of each case, but I repeat that the most important factors are the responsibility of the employment function, age, length of service and the availability of equivalent alternative employment, but not necessarily in that order.
>
> In restating this general rule I am not overlooking the importance of the experience, training and qualifications of the employee but I think these qualities are significant mainly in considering the importance of the employment function and in the context of alternative employment.

[38] The *Bardal* factors are not exhaustive, and no single factor is determinative (*Wallace v. United Grain Growers Ltd. (c.o.b. Public Press)*, [1997] 3 S.C.R. 701 at para. 82 [*Wallace*]). When assessing these factors the court must not apply a formulaic approach, but must assess the relevant factors on a case by case basis, looking at recent precedents from the court to determine an appropriate range (*Kerfoot v. Weyerhaeuser Co.*, 2013 BCCA 330 at para. 47 [*Kerfoot*]; and *Wallace* at para. 82). In *Honda Canada Inc. v. Keays*, 2008 SCC 39, the Supreme Court of Canada has made clear that, like all damages for breach of contract, in damages for wrongful dismissal the court must look at the reasonable expectation of the parties at the time the contract was made (paras. 55-56).

(a) Character of Employment

[39] With regard to the character of employment, the traditional approach has been for the court to grant more notice to employees with more responsibility, usually in the form of supervisory or managerial responsibility. In *Ansari,* McEachern C.J.S.C. criticized the practice of distinguishing between employees who have supervisory duty and those who do not. He stated that this distinction has little application to professional employees who are employed due to their professional skill. It is the advanced training and specialized skills used in the position which are important (at p. 39).

[40] The recognition of the importance of skills and training is linked to the primary purpose of notice, which is to provide an opportunity to find alternative and comparable employment. That job search may be difficult for an employee in certain circumstances even without prior supervisory responsibilities. Rather than focus on supervisory duties, courts have occasionally looked at the salary of the plaintiff as indicating the level of responsibility or seniority of a job: see for example, *Kerfoot* at para. 48; and *Philips v. Jakin Engineering & Construction Ltd.*, 2012 BCSC 2066 at para. 71).

(b) Short-Term Employees

[41] With regard to length of service, it has generally been accepted by the courts in this province that short term employees are entitled to a proportionately longer period of notice (*Saalfeld v. Absolute Software Corp.,* 2009 BCCA 18 at para. 15 [*Saalfeld*]; *Bavaro* at para. 19; and *Taner v. Great Canadian Gaming Corp.,* 2008 BCSC 129 at para. 40 [*Taner*]).

[42] *Saalfeld*, concerned an appeal by an employer where the trial judge had awarded five months' notice to an employee who had been employed for eight months. At para. 15 the Court of Appeal summarized the current law relating to a short-term employee:

> While B.C. precedents are consistent that proportionately longer notice periods are appropriate for employees dismissed in the first three years of their employment, I see little support for the proposition that five to six months is the norm in short service cases for employees in their thirties or early forties whose function is significant for their employer, but not one of senior management. I further see no support for a floor of six months as the trial judge appears to have understood the respondent's counsel to have suggested to her. That proposition was not put to us. Absent inducement, evidence of a specialized or otherwise difficult employment market, bad faith conduct or some other reason for extending the notice period, the B.C. precedents suggest a range of two to three months for a nine-month employee in the shoes of the respondent when adjusted for age, length of service and job responsibility: *Zeidel v. Metro-Goldwyn Mayer Studio Inc*., 2004 BCSC 1415; *Duprey v. Seanix Technology (Canada) Inc.*, 2002 BCSC 1335; 20 C.C.E.L. (3d) 136; *Woolard v. Unum Life Insurance Co. of Canada*, 2002 BCSC 1178, 4 B.C.L.R. (4th) 333; *Mitchell v. Paxton Forest Products Inc*., 2001 BCSC 1802, aff'd 2002 BCCA 532, 174 B.C.A.C. 205; *Kussman v. AT & T Capital Canada*, Inc., 2000 BCSC 268, 49 C.C.E.L. (2d) 124.

[43] Although the Court of Appeal found that the five-month award was on the high end of an acceptable range, it held that it was not unreasonable in the circumstances and dismissed this ground of appeal.

(c) Discussion

[44] The contract between Mr. Ostrow and Abacus expressly adopts the principle of reasonable notice as the basis for the assessment of damages.

[45] At the time of Mr. Ostrow's termination, he was 40 years old and held the position of Senior Manager with Abacus' Structured Financial Solution Group, specializing in US taxation and working on multimillion-dollar transactions. The contract described his position as "senior, fiduciary, specialized and unique".

[46] Mr. Ostrow did not have any supervisory responsibilities, but provided tax advice to structure high-level financial transactions. He has two Masters Degrees specific to this role, one in International Economics and Finance and the other in Business Taxation, as well as nineteen years' experience in the international tax industry. Mr. Ostrow is a highly educated and specialized professional. His remuneration reflected this, as he earned an annual salary with Abacus of $135,000, plus a bonus in the range of 15% and extended benefits.

[47] With regard to length of employment, I do not find that Mr. Ostrow's employment with C2 can be considered a part of his employment with Abacus for the purposes of determining the length of service. Mr. Ostrow went through a formal and extensive contract negotiation with Abacus, and he does not challenge the validity of that contract. Those negotiations are consistent with the beginning of a new job with a new company which commenced March 1, 2011. I therefore find that Mr. Ostrow's length of service with Abacus was nine months.

[48] With regard to the factors listed above, Abacus submits that this is the type of case which was referred to by the Court of Appeal in *Saalfeld* at para. 15 (quoted above), which would normally attract a range of two to three months reasonable notice. Abacus further submits that Mr. Ostrow was not overly specialized. They argue that Mr. Ostrow performed a variety of duties and roles with Abacus, and in the end was able to get a very different position with an accounting firm through his mitigation efforts. He also had the ability to teach which he never pursued.

[49] Abacus relies on *Balogun v. Deloitte & Touche, LLP*, 2011 BCSC 1314 *[Balogun]*, as the most recent and similar case. In *Balogun*, the plaintiff was a 49 year old Certified Public Accountant in the US, but had not obtained the equivalent Canadian designation. The plaintiff moved from Toronto to Prince George to take

the position of tax manager, where he worked for the defendant for seven-and-a-half months. The court found that there was no evidence of aggravating factors, such as a depressed economic situation, and awarded the plaintiff two months' notice.

[50] I agree with Abacus' submission that *Saalfeld* provides the best starting point for cases such as the one at bar. However, the court stated that two to three months was appropriate for an employee of nine months absent "inducement, evidence of specialized or otherwise difficult employment market, bad faith conduct or some other reason for extending the notice period" (at para. 15).

[51] Unlike the plaintiff in *Balogun*, Mr. Ostrow held a more senior position and was hired to perform a much more specialized role for which his advanced education and experience had explicitly prepared him. I am not persuaded by Abacus' submission that Mr. Ostrow's position was not specialized, as that specialization was claimed by Abacus to be the basis for his termination: Abacus was moving in a different direction, taking fewer US tax clients, and there was no longer the need for Mr. Ostrow's specialized skill set.

[52] The level of responsibility carried by Mr. Ostrow is evidenced by his significant remuneration ($135,000 per year, in contrast to $64,000 per year for the plaintiff in *Balogun*), which is of more relevance for a specialized professional than whether or not he had a supervisory role. There is no claim that Mr. Ostrow was not competent at what he did. He was hired at Abacus because he was good at his job which he had demonstrated through his work for Abacus while an employee at C2 and when employed by Abacus.

[53] There is no claim that Abacus was facing financial difficulties at the time of Mr. Ostrow's termination. Rather, Mr. Ostrow was told by Mr. Hayre that the company was growing, and Abacus admitted that they did as well in late 2011 and early 2012 as they had been doing when Mr. Ostrow was hired.

[54] The availability of comparable employment is closely related to the character of the plaintiff's employment. The plaintiff submits that, though there is little direct

evidence of the availability of similar employment, the Court may make inferences regarding the lack of similar employment from the length of time it took Mr. Ostrow to find alternative work. The plaintiff relies on similar inferences in *Bavaro* and *Saalfeld*. The plaintiff also points to the testimony of Mr. Hayre where he stated that there were few similar businesses to Abacus. Most such specialized work is done by the "Big 4" accounting firms and, of those, the plaintiff had already worked for two and the other two were not in a position to hire him.

[55] On the evidence I cannot find that there was an unavailability of employment at the relevant time such that an increase in the notice period is justified. However, the specialized nature of Mr. Ostrow's employment and the length of time it took him to find alternative work, even at a reduced wage and benefits, allow me to infer that available similar employment was scarce (*Saalfeld* at para. 16). I note that Mr. Ostrow was not unwilling to work during this period, as is evident by his volunteer activity.

[56] It is also no argument that the plaintiff is capable of doing different work, such as teaching, as the issue is his ability to find comparable replacement employment which in this case is specialized employment. However, it is also the true that the court should not equate the time required to secure new employment with the proper notice period (*Bavaro* at para. 7).

[57] Based on the character of his employment and the availability of similar employment, I find that Mr. Ostrow is entitled to a greater notice period than the benchmark provided in *Saalfeld* and *Balogun* for a nine-month employee. I will examine the additional factors affecting Mr. Ostrow's claim before determining the required period of notice.

2. Additional Factors

[58] Counsel for Mr. Ostrow argued that the following additional factors are relevant to determining the appropriate notice period in the case at bar: the employer's inducement of the employee away from a stable job; the impact of the non-compete clause in the employment contract on the plaintiff's ability to find

alternative work; assurances of job security given to the plaintiff by the employer; and, the plaintiff's particularly vulnerable position due to his PTSD, adjustment disorder with major depression. There is no allegation of bad faith on the part of the employer.

[59] I will outline the law and the impact of each of these factors on the length of the notice period.

(a) Inducement

[60] In the recent decision of *Nicholls v. Columbia Taping Tools Ltd.*, 2013 BCSC 2201 *[Nicholls]*, I summarized the law relating to inducement by an employer as follows:

> [224] Inducement to leave secure employment may be a factor that is considered when determining a dismissed employee's notice period.
>
> [225] The starting point with regard to the law on inducement is the Supreme Court of Canada's decision in *Wallace v. United Grain Growers Ltd*., [1997] 3 SCR 701. In paras. 83-85 the court stated:
>
> (a) that inducements are another factor which may be added to the Bardal factors;
>
> (b) that not all inducements will carry the same weight;
>
> (c) that the relevance of inducements is the expectation interests of the terminated employee on the basis of representations of job security and compensation;
>
> (d) the period of reasonable notice may be lengthened if the Court finds that an employer has induced an employee to leave previous secure employment; and
>
> (e) the significance of any inducement will depend on the circumstances of the case, and its effect on the notice period is a matter for the discretion of the trial judge.
>
> [226] In *Zeidel v. Metro-Goldwyn-Mayer Studios Inc. d.b.a. MGM Home Entertainment Canada*, 2004 BCSC 1415 (*Zeidel*), the court found no inducement where an employee was not reluctant to leave her current employer.
>
> [227] Where there is equal interest by both the employer and employee in forming the new employment relationship, courts have found that the employee was not "induced." (*Wright v. Feliz Enterprises Ltd.*, 2003 BCSC 267).

[61] In *Nicholls*, the defendant employer had approached the plaintiff regarding a job at the time the plaintiff had a secure job with another company. However, the plaintiff and defendant had known each other for some time and the plaintiff had been having difficulties with his previous employer, which he had shared with the defendant. As the plaintiff had been more than ready to leave his previous employer, inducement was not a factor in that case.

[62] In *Taner* the plaintiff had been working in the United States at a stable job. She had begun to look for alternative work as well as an opportunity in a different location. The court found that, although the plaintiff had been interested in switching jobs, it was clear that she would not have done so if the alternative job was not a permanent and long-lasting one with a comparable salary (para. 38). At para. 40, Justice Bracken stated:

> While the plaintiff was a short term employee when her employment was terminated, it seems to me that when an individual leaves secure employment to take up an offer of employment some distance away, if that employment is terminated a short time later, the court should recognize that a longer period of notice or compensation in lieu of notice is appropriate.

[63] Counsel for Mr. Ostrow submits that he left secure employment with C2 to take a position with Abacus. However, inducement was not strongly argued, and there is the contradictory argument put forward by the plaintiff that his employment with Abacus be considered a continuation of his employment at C2.

[64] Mr. Ostrow's employment with C2 was short-term. He had worked there for approximately five months before he was offered employment with Abacus, and by that time 80% of C2's work was for Abacus. He chose the job with Abacus when staying at C2 was an available option since Mr. Hayre, the owner of C2, was not joining Abacus.

[65] I find that Mr. Ostrow's employment with Abacus was of equal interest to both parties, and that inducement is not a factor to be considered in this case.

(b) Assurances of Job Security

[66] The court may consider assurances of job security given by the employer to the employee as a factor in assessing the length of the notice period. This factor is closely related to inducement, and is referred to in the third *Wallace* factor cited in the *Nicholls* quote above. That is, where the reasonable expectation interests of the employee have been affected by the assurances of job security, the court may lengthen the notice period required: see *Singh v. British Columbia Hydro & Power Authority*, 2001 BCCA 695, at paras. 47, 48 & 52 [*Singh*].

[67] In *Singh,* the plaintiff had been employed for eighteen years with BC Hydro, becoming a mailroom supervisor by the time of his dismissal. At some point during his employment, BC Hydro circulated a memorandum in order to create a "climate of job security in the workplace" (at para. 52). Mr. Singh also suffered from depression, and was on medical leave for just over a year shortly before he was dismissed. Mr. Singh was given a compensation package equivalent to 20.5 months of notice. The trial judge dismissed his claim that he had not been given reasonable notice. The Court of Appeal allowed Mr. Singh's appeal in part, awarding him 27 months' notice, finding that the employer's assurance of job security and the vulnerability of Mr. Singh due to illness were factors that entitled him to a lengthier notice period than normal.

[68] I find that assurances of job security made by Abacus to Mr. Ostrow are a relevant and important factor in this case. Mr. Ostrow's reasonable expectations were clearly affected by assurances of job security made by the employer at the time the contract was entered into.

[69] The extended negotiation of the employment contract in February 2011 evidences job security being one of Mr. Ostrow's primary considerations. The main issue was a clause that allowed Abacus to terminate Mr. Ostrow with the minimum notice under the *Employment Standards Act* and which would have offered no job security. When Mr. Ostrow expressed his concerns about this issue to both Ms. Fong and Mr. Hayre, both reassured Mr. Ostrow that employment with Abacus

was almost always long term. These assurances along with Abacus' agreement to amend the contract to provide for notice under the common law were important in Mr. Ostrow's decision to take the job.

[70] During his employment Mr. Ostrow received further assurances of job security. After Mr. Ostrow was approached by another company about a potential position, he sought assurances by Abacus that he was meeting expectations and his job was secure. Mr. Hayre confirmed in discovery that he told Mr. Ostrow that the company was growing rapidly, that he was part of this growth, and that the purpose of these conversations was to give Mr. Ostrow assurances of job security.

[71] I find that Mr. Ostrow had a reasonable expectation of job security as a result of the assurances given by Abacus, both at the initial contract negotiation stage as well as during his term of employment. As a result, Mr. Ostrow is entitled to an increase in the amount of notice.

(c) Vulnerability of the Employee

[72] As can be seen from the discussion of *Singh* above, the vulnerability of a particular employee can also be a factor taken into account when assessing the length of the notice period. As stated in *Ansari*, the primary consideration in awarding damages for wrongful dismissal is the ability of the employee to find alternative and comparable employment. It has subsequently been recognized that the health issues of an employee may reasonably affect that ability by making them less desirable to prospective employers: see *Lewis v. Lehigh Northwest Cement Ltd*., 2008 BCSC 542 at para. 24 (appeal allowed on the issue of costs but reasonable notice award upheld, at 2009 BCCA 424) *[Lewis]*.

[73] In *Moody v. Telus Communications Inc.*, 2003 BCSC 471 [*Moody*], Justice Cullen (as he then was) awarded a notice period of 24 months to the plaintiff for wrongful dismissal. The plaintiff was 51 years old and had been employed by the defendant for 27 years. The plaintiff held a mid-management position, and at the time of his dismissal was recovering from cancer treatments. His supervisors were aware of his treatments, although he only missed seven days of work. After

discussing the case law, including *Singh*, Cullen J. stated the following with regard to the vulnerability of an employee and reasonable notice:

> [32] It seems to me that the common theme which runs through those cases relied on by the plaintiff as establishing the reasonableness of a notice period of 24 months or more where the *Bardal* factors of character of employment, age, length of service, and availability of similar employment otherwise augur in favour of the rough upper limit, encompasses circumstances where the employee is put in a particularly vulnerable position by the termination. That vulnerability may be established where an employee has gone from a role of great responsibility and recompense to none and will be hard-pressed to find comparable employment because of the inherent scarcity of such positions, or where an employee has gone from a lesser position to none and because of circumstances affecting him or her uniquely is put at a disadvantage beyond the norm in seeking comparable employment.
>
> [33] While it appears from *Ansari*, *supra*, that economic considerations such as reduced business activities or opportunities are not factors influencing the length of notice, other factors limiting an employee's ability to right himself or herself after termination such as age, illness, damage to reputation, over-specialization, inducements to forego other job possibilities at more opportune times, and the absence of comparable opportunities outside of the terminating employer's business are appropriate considerations in lengthening the notice period.

[74] Mr. Ostrow's counsel submits that the return of the symptoms of his medical condition as a result of the stress of losing his job, combined with his pre-existing financial stress, made it difficult for Mr. Ostrow to "right himself" after termination. Counsel submits that this combined with the fact that his illness had caused a gap in his employment record and he had now had a short-term position with Abacus, created unique barriers to re-employment for Mr. Ostrow.

[75] Abacus submits, first, that they cannot be held responsible for the gap in employment that existed prior to Mr. Ostrow being employed with Abacus. Second, Abacus argues that the plaintiff has not submitted any medical evidence. To the contrary, Mr. Ostrow told Abacus that he had no medical restrictions to employment during contract negotiations, and based on his conduct at work, Abacus had no basis on which to believe differently. As well, counsel for Abacus submits, Mr. Ostrow's position is different from that in both *Singh* and *Moody*, where the

plaintiffs had been terminated shortly after returning from medical leave, and it was undisputed that the employer knew about the employee's recovery.

[76] I agree with Abacus' submissions on this point. Although the gap in Mr. Ostrow's employment record may have made it more difficult to find subsequent employment, this cannot be put at the feet of the employer in this case as it occurred before he was employed by Abacus.

[77] There is no medical evidence with regard to Mr. Ostrow's vulnerability from a particular medical condition at the time of his termination. Although Mr. Hayre was aware of the injuries suffered by Mr. Ostrow, Mr. Ostrow testified that his symptoms were mostly under control during his employment with Abacus. Mr. Ostrow rarely showed signs of suffering from a medical condition.

[78] I do not doubt that Mr. Ostrow was under great stress due to his financial situation which is similar to most people who lose their jobs and are put under increased financial stress. I will, however, consider the return of Mr. Ostrow's symptoms, after his termination, from his attack under the issue of mitigation below.

(d) Non-Competition Clause

[79] There is a surprising lack of jurisprudence on the relationship between a non-competition clause in the employment contract and the length of the reasonable notice period. However, this issue has been dealt with at least once by the British Columbia Court of Appeal, in *Watson v. Moore Corporation Ltd*., [1996] B.C.J. No. 525 (C.A.) [*Watson*], and in some Ontario cases: see *Murrell v. Burns International Security Services Ltd*., [1994] O.J. No. 1019, aff'd on this point in *Murrell v. Burns International Security Services Ltd*., [1997] O.J. No. 4456 (C.A.); *Budd v. Bath Creations Inc.*, [1998] O.J. No. 5468, and *Khan v. Fibre Glass-Evercoat Co.*, [2000] O.J. No. 1877 [*Khan*]. Despite the lack of cases on this point, there is consistency among them: a non-competition clause in the employment contract is a factor which may increase the length of the reasonable notice period.

[80] In *Watson*, the plaintiff had worked for the defendant for 25 years, working for the last thirteen years as a sales or account executive. After thirteen years of employment, the plaintiff signed a contract that contained an onerous non-competition clause, effective on termination, and a clause permitting termination with the minimum amount of notice allowed under the *Employment Standards Act*, plus one week for every two years of completed service. The plaintiff was later summarily dismissed and offered twenty weeks' pay in lieu of notice. At trial the main issue was whether the contract signed during service was valid, as the only consideration for the modification had been continued employment. The trial judge ruled that this constituted consideration and dismissed the action. The plaintiff appealed.

[81] The majority of the Court of Appeal overturned the trial judge's decision, finding that continued employment did not constitute consideration for the modification of an employment contract. This is the point on which this case is primarily cited. However, after finding that the modified contract was not valid, McEachern C.J.B.C., writing for the majority, went on to determine the length of notice, and specifically considered the non-competition clause. Despite the contract, and thus the non-competition clause, being void, the fact that the plaintiff had been led to believe that she was bound by that clause was an important factor in the assessment of the length of notice (at para. 47). As a result, the court awarded the plaintiff eighteen months' notice.

[82] In *Khan*, the plaintiff sold his company, Advant-Edge Inc., to the defendant and, along with the compensation for the sale, was given a job as an International Sales Manager with the defendant. This employment was terminated without cause after five-and-a-half months of employment. The plaintiff was given one month of actual notice as well as three months compensation. The plaintiff brought an action for wrongful dismissal arguing that his length of service should include his self-employed with Advant-Edge and the notice should take into account the five-year non-competition clause in his contract. Justice Lederman, for the Ontario Superior Court of Justice, allowed the action, stating:

> 28 I find that the plaintiff is entitled to reasonable notice as if he had continued in the employ of Advant-Edge, Inc. That being so he should be considered a two-year employee. A reasonable period, without more, in the circumstances, having regard to the factors in *Bardal v. The Globe & Mail Ltd.* [1960] O.W.N. 253, would be four months, as given by the defendant. However, when the plaintiff was terminated, the defendant insisted that he abide by the five year non-competition agreement which would seriously impede the availability of similar employment and would make it more difficult, in fact, for him to find such employment. In these circumstances it is appropriate to extend the period of notice: see *Budd v. Bath Creations Inc.* [1998] O.J. No. 5468 (Gen. Div.). I would add five months to the period of notice on that account.
>
> [Emphasis added]

[83] Abacus did not seek to enforce the restrictive covenant, and they were unaware of any previous situation where they had taken legal action against an employee with regard to the violation of such a covenant. Counsel for Abacus submits that the plaintiff could not have believed that he was restricted by the clause, and if he did, such a belief was unreasonable. They also submit that all the cases relied on by the plaintiff on this issue involved an employer who attempted to enforce the clause.

[84] I do not agree with defendant's submission on this point. The analysis in *Watson* does not consider whether the employer enforced the non-competition clause. Rather, in *Watson* it was found that the non-competition clause was an important factor in assessing the length of the notice period despite the fact that the clause could not be enforced because the contract was void. It was the fact that the plaintiff was *led to believe* that they were bound by the clause that made it relevant.

[85] Upon his termination, Abacus gave Mr. Ostrow a formal letter which reminded him of the non-competition clause in the contract. He was also verbally reminded of that clause by Ms. Fong. It was reasonable at that point for Mr. Ostrow to believe that he was bound by the clause, regardless of whether Abacus had enforced such agreements in the past or would do so in Mr. Ostrow's case. That Mr. Hayre kindly assisted Mr. Ostrow in his attempt to find other employment somewhat lessens the impact of this clause and whether Mr. Ostrow believed that it would be enforced, but it does not negate the effect.

[86] I therefore find that the existence of the non-competition clause in Mr. Ostrow's contract increases the period of reasonable notice.

(e) When Notice of Termination is Given

[87] In *Kalaman v. Singer Valve Co.* (1997), 38 B.C.L.R. (3d) 331 at para. 38, the Court of Appeal summarized the law regarding when notice of termination is given, and when the notice period begins:

> [38] Counsel agree that, to be valid and effective, a notice of termination must be clearly communicated to the employee. A notice must be specific and unequivocal such that a reasonable person will be led to the clear understanding that his or her employment is at an end as of some date certain in the future. Whether a purported notice is specific and unequivocal is a matter to be determined on an objective basis in all the circumstances of each case. Counsel cited *Gibb v. Novacorp International Consulting Inc.* (1990), 48 B.C.L.R. (2d) 28 at 34 (C.A.) and *Yeager v. R.J. Hastings Agencies Ltd*. (1984), [1985] 1 W.W.R. 218 at 228-29 (B.C.S.C.) as authority for that legal proposition.

[88] In *Gibb*, cited in the above quote, Justice Wood, stated at 34:

> I do not think that in order to be specific and unequivocal, the notice given must necessarily use the words "you are hereby dismissed effective ..." or some such equivalent. If the words used are such as would lead a reasonable person to the clear understanding that his employment is at an end as of some date certain in the future, it may well be that specific, unequivocal notice has been clearly communicated. It must in every case depend on all of the circumstances in evidence.
>
> Here, any reasonable person reading the letter of 2 September, 1986 would be driven irresistibly to the conclusion that his employment with Canocean was shortly to end. The fact that no effective date of termination is to be found in the letter is a circumstance that might support an inference that the requirement of specific notice had not been met, but again it would depend on all of the circumstances. If no date were given, and much time passed, it might well lead a court to conclude that no proper notice was given. But here there was continuing correspondence between the parties, and nine days later a letter was sent to the appellant enclosing a release for him to sign. In that release a termination date of 5 November was specifically spelled out.

[89] In the recent decision of *Kerfoot*, the Court of Appeal again discussed the issue of when notice of termination is deemed to be given. *Kerfoot* involved an appeal by the employer, Weyerhaeuser, from the decision of the trial judge to award two employees one month of notice for each year of service, awards of 18.4 and

15.75 months' notice. On this point the court allowed the appeal, commented on the use of a formulaic approach, and changed the notice periods to 15 months for each employee, based on the fact that the employee with less years of service had a job with greater responsibility.

[90] Weyerhaeuser had informed the employees that it intended to transfer its operation to another corporation, Domtar Inc., which they expected to take place within six months, though no firm date was given. Approximately six-and-a-half months later Weyerhaeuser announced that the transaction had been completed and the employees were informed that they were terminated, but re-employed by Domtar Inc., effective immediately. At trial and during the appeal, the employer argued that notice of termination was given when the employees were told that their jobs would be terminated at the completion of the transaction. The court upheld the trial judge's finding that the certainty required for notice was not present, and stated:

> 27 This ground of appeal engages the legal characteristics of notice. Notice is a binary concept; either there is notice or there is not. In other words, communication that is almost notice is not notice at all.
>
> …
>
> 31 Although *Gibb* admits of a rare case in which notice is given even though the date of termination is not defined in the initial communication, it demonstrates that, at a minimum, clear communication of impending termination is required, and it is a case in which certainty of the date of termination was soon defined by communications between the parties.
>
> …
>
> 34 I see nothing in the cases referred to by the parties that detracts from the proposition that in order for a communication to constitute notice of termination, at the least, it must spell out clearly that the employment will end.
>
> [Underlining in the original]

[91] Mr. Ostrow was terminated on December 1, 2011. Abacus does not challenge this, but submits that the court can take into account prior notice of termination when assessing the notice period, citing *Hewitt v. Craig Brothers Ltd.*, 2005 SKQB 392, and *Holmes v. Irving Shipbuilding Inc.*, 2001 NBQB 142. Abacus also submits a policy argument, arguing that forewarning employees of pending termination is a practice which should be encouraged by reducing the notice period.

[92] However, this law is clear. The jurisprudence in this province regarding when notice is deemed to be given is as stated in *Kerfoot*. Notice is a binary concept; an employee is either given notice of termination or they are not; and that notice must not be ambiguous. The reasonable notice period begins on the date unambiguous notice is given.

[93] I am not persuaded by the defendant's submissions. There was no unambiguous notice given before December 1, 2011. I find that the "forewarning" that the plaintiff should look for other employment is not a factor which can decrease the length of the notice period in this case.

3. Conclusion Regarding Length of Notice

[94] Abacus submits that, following *Saalfeld* and *Balogun*, the appropriate length of the notice period in this case is two to three months.

[95] The plaintiff submits that, given all the circumstances of this case, the appropriate notice period is between eight and ten months. In support they provide seventeen cases as authority. Of these cases, only eight involve a plaintiff with similar length of service. The cases include *Saalfeld* (the trial decision), *Taner* (discussed above with regard to short-term employees), and *Paradis v. Skyreach Equipment Ltd.*, 2002 BCSC 32 *[Paradis]*.

[96] *Taner* involved a 36 year old Vice President of Marketing who was only employed for six months, but gave up stable and secure employment to relocate from Memphis to Vancouver. She was awarded ten months' notice. In *Paradis*, the plaintiff was a 43 year old branch manager earning $72,000 per year. He was employed for eight months, and the judge found that there was an expectation that the plaintiff would be employed for a long time, and awarded him six months' notice.

[97] Both *Taner* and *Paradis* were decided before the Court of Appeal decision in *Saalfeld*. In the case of a nine-month employee with no other relevant circumstances which would increase notice, *Saalfeld* suggests that the starting point is two to three months.

[98] In this case I must consider the additional relevant issues of specialization, assurances of job security, and the non-competition clause. In taking all factors into account, I find that an appropriate notice period for Mr. Ostrow is six months.

C. Mitigation

1. Law

[99] As with any claim for damages based on breach of contract, the plaintiff in a wrongful dismissal case has a duty to mitigate their damages. The onus is on the defendant to demonstrate that the plaintiff did not mitigate. This onus is "by no means a light one", as this involves the party who breached the contract demanding positive action from the wronged party (*Michaels v. Red Deer College*, [1976] 2 S.C.R. 324 at 332).

[100] In *Nardulli v. C-W Agencies Inc.,* 2012 BCSC 1686 [*Nardulli*], Justice Loo summarized the law regarding the duty to mitigate:

> [449] Accordingly, the onus is on an employer to prove that: (i) the employee failed to mitigate; and (ii) had the employee taken reasonable steps to mitigate, he would have likely obtained equivalent or alternate employment. The employer can meet the onus by providing evidence of the availability of actual alternative employment or evidence that, had the employee taken reasonable steps to mitigate, he would have been likely to obtain comparable alternative employment: *Carlysle-Smith v. Dennison Dodge Chrysler Ltd.* (1997), 33 C.C.E.L. (2d) 280 (B.C.S.C.) at paras. 37-38. However, the employer is not required to show that a "specific" job was available, in the sense that a specific company had offered the employee employment: *Stuart v. Navigata Communications Ltd.*, 2007 BCSC 463 at para. 50.
>
> [450] Where the employer meets the burden, the notice period may be reduced or eliminated altogether: *Cimpan v. Kolumbia Inn Daycare Society*, 2006 BCSC 1828 at para. 109; *Carlysle* at para. 40. But even if a court concludes that the employee failed to mitigate his damages, there can be no reduction in the award of damages where the employer has not proved that the employee would otherwise have found appropriate work: *Maguire v. Sutton* (1998), 34 C.C.E.L. (2d) 67 (B.C.S.C.) at paras. 76-77. In certain circumstances, courts may reasonably infer – without direct evidence that jobs were available – that the employee would have obtained employment sooner if he had made reasonable efforts: *Parks v. Vancouver International Airport Authority*, 2005 BCSC 1883 at para. 54.
>
> [451] While the duty to mitigate theoretically begins at the date of termination, courts have "acknowledged that employees generally require a

> period of readjustment and regrouping before pursuing re-employment strategies": *Stuart* at para. 43. A terminated employee may delay his search for work in circumstances where it is appropriate to do so (for example, to "recover from the stress of the dismissal": *Borsato v. Atwater Insurance Agency Ltd.*, 2008 BCSC 724 at para. 77). An assessment of all the circumstances is required.

[101] In the recent appeal of *Nardulli*, 2014 BCCA 31, the appeal was allowed with regard to profit sharing, but dismissed with regard to the finding of and award for wrongful dismissal. The overview of the law regarding mitigation of damages remains applicable.

[102] In *Lewis,* noted above in the discussion of vulnerable employees, an employee of 26 years was wrongfully dismissed after returning from two years of medical leave. The employer argued that Mr. Lewis had failed to fully mitigate as he was considering retirement and turned down a job. Justice Silverman disagreed. He found that the employer had not satisfied the burden on them to prove a lack of mitigation, and that it was appropriate in the employee's circumstances to consider retirement as an option.

> [64] I am not satisfied that he could have found appropriate employment if he had taken greater steps, partly because of his age which I recognize has expanded the ability of a person to find work as we move into more enlightened times, so not exclusively because of his age, but partly because of his age; partly because of his prior two years on medical disability which would have made him less attractive to potential employers; and partly because of his newer medical complaints about his arthritis.
>
> …
>
> [66] Given his age, the number of years of service, and his medical condition, I am not satisfied that the self-imposed restrictions that he placed on himself were unreasonable. I am not satisfied that his notes of August 9 point to anything other than an ambiguity which may or may not have been a job offer, and I am unable to resolve that one way or the other, so that it remains ambiguous in my mind. But I am certainly not satisfied that he had a real job offer which he could have accepted, but instead turned down.

2. Discussion

[103] Mr. Ostrow provided extensive evidence of his mitigation efforts and demonstrated that he had significant trouble finding similar employment. There are

few positions doing the level of work Mr. Ostrow was doing for Abacus and at the same relatively high compensation level.

[104] Mr. Ostrow gave evidence that there were several barriers to reemployment, including: a 15-month gap on his resume before his relatively short-term employment with Abacus; the lack of similar employment at his level; the non-competition provision in his contract; and the return of the symptoms of his illness, caused by the stress of the termination combined with personal events in his life, which interfered with his ability to look for new work following the termination.

[105] Abacus submits that Mr. Ostrow failed to take reasonable steps to mitigate his damages, particularly between October 2011 and May 2012. Abacus claims that these reasons for this failure on the part of Mr. Ostrow were described in testimony: that he relied too heavily on an opportunity at Deloittes; he went on vacation for two weeks in early 2012; he had to move into his new condo; he did not look for opportunities in the newspaper; and, he testified that he felt that if he had an offer of employment, he would be letting Abacus off the hook. Abacus also submits that the court should be cautious in accepting the testimony of Mr. Ostrow with regards to the many steps he took to mitigate, and that Mr. Ostrow did not make any applications in the first six months of unemployment.

[106] In reply, counsel for the plaintiff submits that Mr. Ostrow never stated that he did not want to mitigate because he wanted severance. Rather, a statement of this nature was only made in the context of a statement by Mr. Hayre, that if Mr. Hayre was successful in finding Mr. Ostrow alternative employment before he was given his formal notice of termination, then this would get Abacus off the hook for paying severance.

[107] The plaintiff further submits that an employee is generally allowed a period of time after termination to get things together. In this case, it took more time due to Mr. Ostrow's medical condition and other financial stress. Further, in this age, the fact of not using the newspaper is not indicative of not taking reasonable steps to search for a job.

[108] Finally, the plaintiff submits that the defendant must show both that the plaintiff has not taken reasonable steps, and, even if that is shown, they must also demonstrate that if the steps had been taken the plaintiff would likely have received a job. Counsel for the plaintiff submits that the defendant has offered nothing in the way of evidence demonstrating the second step.

[109] As I have found above that the date of termination is December 1, 2011, there was no need to mitigate before that time. Further, the plaintiff is generally allowed a period of time immediately after the termination in order to come to grips with the situation (*Nardulli* at para. 451).

[110] Given that Mr. Ostrow was terminated just before the holiday season, and given the return of the symptoms of his medical condition, as well as his belief that he was bound by a non-competition clause, I find that he is allowed more than the normal time to right himself. I find that, as in *Lewis*, it was reasonable for Mr. Ostrow to self-restrict his mitigation efforts as he did for the first four months following his dismissal in December 2011.

[111] Mr. Ostrow gave detailed evidence regarding his extensive job search from March 2012 to March 2013 when he was hired by his new employer. He utilised the internet, recruiters, headhunters, and networking through social media. He took a web course on job-search techniques. He produced numerous documents to substantiate his efforts. In the job search process, he applied for over 90 positions. His testimony in this regard evidenced his meticulous memory for dates and numbers. I accept his evidence that he continued to try after many rejections and many occasions of receiving no response from enquiries.

[112] Mitigation is concerned with locating comparable replacement employment. Abacus has not provided any evidence that, assuming Mr. Ostrow did not take reasonable steps to mitigate, which I do not find, that he would likely have found comparable replacement employment. Whether or not Mr. Ostrow could have switched careers and become a teacher is not relevant.

[113] I therefore find that Abacus has not met the burden on them to demonstrate that Mr. Ostrow failed to mitigate his damages.

D. Calculation of Damages

1. General Principles

[114] The law is well settled with regard to compensation to be given to an employee who has been wrongfully dismissed. In *Nygard Int. Ltd. v. Robinson* (1990), 46 B.C.L.R. (2d) 103 (C.A.) at 107, Justice Southin stated that, "compensation, that is to say, damages for the breach are what the innocent party would have received or earned depending on the nature of the contract had it been performed according to its terms" (Also see *Saalfeld* at paras. 20 and 36). The dismissed employee is "entitled to be treated, for remedial purposes, as if he were an employee throughout the notice period" (*Gillies v. Goldman Sachs Canada Inc.*, 2001 BCCA 683, at para. 20; and *Hawkes v. Levelton Holdings Ltd*., 2013 BCCA 306 at paras. 67-73 [*Hawkes*]).

[115] In calculating damages in a case of wrongful dismissal, the issue is what the employee would have been entitled to had they remained employed by the employer during the notice period. This will include any salary payable to the employee during this time. It will also include all benefits, including a bonus, to which the employee would have been entitled (*Martell v. Ewos Canada Ltd*., 2005 BCCA 554, at paras. 26 and 27 and *Hawkes* at paras. 72-73 and 76). The employer is also required to compensate an employee for the amount of money paid to replace lost benefits during the notice period: *Sorel v. Tomenson Saunders Whitehead Ltd.* (1987), 15 B.C.L.R. (2d) 38 (C.A.) [*Sorel*].

(a) CPP Contributions

[116] In *Shinn v. TBC Teletheatre B.C*., 2001 BCCA 83 [*Shinn*], the Court of Appeal found that an employee was entitled to compensation for the amount of the contribution to the Canada Pension Plan that the employer would have made during the notice period (at paras. 19-20 and 37-38). The court interpreted *Sorel* as standing for the proposition that, "damages will be awarded where the employee can

show that he or she has suffered a loss by virtue of the employer's failure to pay the benefits during the notice period" (at para. 37). However, the demonstration of that loss does not require an extensive actuarial study on the part of the plaintiff. Rather it is assumed that every loss of premiums paid will reduce the pension by some amount. This entitles the plaintiff to recover the amount of the contribution that would have been paid by the employer, unless the employer can establish that, "the loss is something less than the actual premium dollar shortfall during the period of reasonable notice" (stated by McEachern C.J.B.C. for the minority of the court in *Shinn* at para. 20, and concurred with by the majority at para. 37).

[117] Abacus submits that Mr. Ostrow is not entitled to damages for loss of benefits that he held prior to his employment with Abacus. However, after reviewing *Shinn*, Abacus concedes that Mr. Ostrow is entitled to his lost CPP contributions.

[118] In terms of benefits, the plaintiff submits that he is entitled to be compensated for what he has had to pay in order to replace benefits during the notice period.

[119] I find that Mr. Ostrow is entitled to compensation for lost CPP contributions as well as any benefits for which Abacus was paying while he was an employee, and which he would have continued to receive had he remained an employee during the notice period. This includes any benefits that Mr. Ostrow had before being an employee, but whose payments were taken over by Abacus once he became an employee. This also includes compensation for any amount Mr. Ostrow paid in the notice period in order to replace the benefits provided by Abacus.

[120] The above awards, based on six months of notice, are calculated as follows: $148.08 for life insurance coverage; $1,623 for extended health and dental benefits; $295.56 for long-term disability coverage; and, $2,306.70 for CPP contributions (4.95% of $46,600, which is the maximum contributory earnings in 2012, and which Mr. Ostrow would have exceeded during the notice period given his salary with Abacus). The total award for lost or replacement benefits is $4,373.34.

(b) Bonus

[121] In order to receive compensation for the loss of a bonus, the employee must establish that they would have been entitled, through contract or past conduct, to receive the bonus, as well as showing the basis on which to calculate the amount of any such bonus: *Szczypiorkowski v. Coast Capital Savings Credit Union*, 2011 BCSC 1376 at para. 72 and *Ellerbeck v. KVI Reconnect Ventures Inc*., 2013 BCSC 1253 at para. 60 [*Ellerbeck*].

[122] In *Gillies v. Goldman Sachs Canada Inc*., 2000 BCSC 355 (affirmed on appeal on this point, 2001 BCCA 683 at paras. 41-42), the court held that damages should be awarded for bonuses earned during the notice period if the employee demonstrates that the bonus was an integral part of the employee's compensation (at para. 62). The court then listed four factors, at para. 63, that are helpful in determining whether this is the case in a particular situation:

> 1) A bonus is received each year although in different amounts;
> 2) Bonuses are required to remain competitive with other employers;
> 3) Bonuses were historically awarded and whether the employer had never exercised his discretion against the employee; and
> 4) The bonus constituted a significant component of the employee's overall compensation.

[123] In *Allen v. Ainsworth Lumber Co*., 2011 BCSC 1707, aff'd on appeal at 2013 BCCA 271 [*Allen*], Justice Holmes found that the plaintiff was entitled to compensation for lost bonus. The plaintiff had received a bonus for several years, but had also received no bonus two years before his dismissal. The defendant argued that the bonus was discretionary and performance-based, and as the plaintiff had been dismissed for poor performance, it would not make sense to award him a performance-based bonus. Justice Holmes stated:

> [40] The difficulty with Ainsworth's submissions is that with the without-cause termination of Mr. Allen's employment, Mr. Allen's entitlement to a bonus was no longer discretionary, performance-based, or based on actual employment with Ainsworth: it was a component of the 15 months' "pay in lieu" due to him under the employment agreement.

> [41] The MIP bonus plan is expressly mentioned in the May 2008 employment agreement:
>
> > You will be eligible for our annual management incentive bonus plan. The plan currently provides for a target bonus of 30% of your base salary, subject to achieving specific performance objectives.
>
> [42] As is obvious both from the agreement and from the amounts of Mr. Allen's bonuses in relation to his annual salary, the bonus was an important part of Mr. Allen's compensation package. "Pay in lieu" of bonus was therefore due when Ainsworth terminated his employment. The only real question is the amount, since bonuses varied year to year.

[124] Abacus submits that the bonus was discretionary, not an integral part of Mr. Ostrow's employment, and as Mr. Ostrow only received one bonus there was no established track record on which Mr. Ostrow could expect to rely, citing *Ellerbeck*.

[125] Mr. Ostrow submits that the case at bar is distinguishable from cases such as *Ellerbeck*, as Mr. Ostrow's contract provided an express provision entitling him to a bonus, twice yearly, based on two objective criteria: personal performance and financial performance. He submits that he is entitled to bonus for both the second half of 2011 as well as the first half of 2012.

[126] Given that Mr. Ostrow's entitlement to bonus was an express term of a thoroughly negotiated contract, and constituted a significant sum, in the range of $20,000 per year, I find that it formed an integral part of his expected compensation. As stated in *Allen*, upon being wrongfully dismissed, entitlement to bonus became a non-discretionary part of pay in lieu of notice, as agreed to in his contract. The only question is the quantum of that bonus.

[127] The bonus that Mr. Ostrow is entitled to is a question of fact based on evidence of the two criteria mentioned above. Abacus admitted that its performance in the second half of 2011 and the first half of 2012 was as good as in the first half of 2011 when Mr. Ostrow received a bonus. As well, Abacus claimed to be "very pleased" with Mr. Ostrow's work in a letter of November 2011. Mr. Ostrow submits that he should be entitled to the same level of bonus he received for the first half of 2011, for the period from July to December 2011, and from January to June 2012. Both Mr. Hayre and Ms. Chan received a similar bonus for those periods.

[128] I find that Mr. Ostrow is entitled to the bonus that would have been paid to him by Abacus had he remained employed until June 1, 2012, six months after his termination. Given the evidence of his performance, the performance of Abacus as a whole, and the bonuses received by Mr. Hayre and Ms. Chan, Mr. Ostrow is entitled to the same amount of bonus as he received in the first half of 2011, taking into account the fact that that first bonus was prorated, for the second half of 2011 and for the first five months of 2012.

V. CONCLUSION

[129] I conclude that Mr. Ostrow is entitled to the following as a result of his wrongful dismissal from Abacus:

(a) Salary: $11,250 per month for six months, less one week ($2,596.15), which equals $64,903.85; and,

(b) Bonus: $9,750 for the period of July-December 2011, and $8,125 for the period of January-June 1, 2012, for a total of $17,875; and,

(c) Benefits and CPP Contributions: $4,373.34, based on the breakdown at paragraph 120 above.

The total award of damages for wrongful dismissal is $87,152.19. If counsel requires clarification of the calculations, they have leave to apply.

[130] The counterclaim is dismissed.

[131] With regard to costs, unless there are matters of which I am unaware, Mr. Ostrow is entitled to his costs. If a different cost result is sought, written submissions should be filed within 30 days of the date of these Reasons, with 21 days for reply.

"The Honourable Madam Justice Watchuk"