CITATION: Paquette v. TeraGo Networks Inc., 2015 ONSC 4189
COURT FILE NO.: CV-15-519137
DATE: 20150629

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:		
TREVOR PAQUETTE	Plaintiff	*Andrew Monkhouse* for the Plaintiff
– and –		
TERAGO NETWORKS INC.	Defendant	*Kimberley D. Pepper* for the Defendant
		HEARD: June 10, 2015

PERELL, J.

REASONS FOR DECISION

A. INTRODUCTION

[1] The Plaintiff Trevor Paquette was dismissed without cause by the Defendant TeraGo Networks Inc. ("TeraGo"). Mr. Paquette brings a summary judgment motion in his wrongful dismissal action.

[2] The parties agree that the case is appropriate for a summary judgment. See: *Beatty v. Best Theratronics Ltd.*, 2014 ONSC 3376, aff'd 2015 ONCA 247; *Di Tomaso v. Crown Metal Packaging Canada LP*, 2010 ONSC 5761; *Camaganacan v. St. Joseph's Printing Ltd.*, [2010] O.J. No. 3953 (S.C.J.); *Adjemian v. Brock Crompton North America*, [2008] O.J. No. 2238 (S.C.J.).

[3] There are three issues to resolve: (1) What is the reasonable notice period for salary and benefits? (2) Is Mr. Paquette entitled to a bonus notwithstanding that he was not "actively employed" by TeraGo on the date of the bonus payout? and, (3) Given that Mr. Paquette has yet to find new employment, how should the mitigation principle be addressed?

[4] For the reasons that follow, I fix the notice period at 17 months. I award Mr. Paquette damages of **$163,267.90**, broken down as follows: (a) $157,051.33 for salary ($10,416.67 x 17 - $20,032.06); (b) $6,216.57 ($410.21 x 17 - $757.00) for benefits; and (c) $0 for bonuses. The mitigation principle shall be dealt with by employing the "Trust and Accounting Approach," described below.

B. FACTUAL BACKGROUND

[5] Mr. Paquette was employed by TeraGo in Calgary, Alberta from July 14, 2000 until November 25, 2014 (14 years and 4 months), when he was dismissed without cause. He was 49 years old on the date of his dismissal. Since his dismissal, the economy in Alberta has been poor because of the sharp decline in world oil prices.

[6] TeraGo is a federally incorporated and regulated corporation that provides data and voice communication services, including data centre and hosting services. In July 2000, TeraGo hired Mr. Paquette. He was one of the first five employees. He was hired as a Lead Systems Architect.

[7] Before his employment with TeraGo, Mr. Paquette was employed as: (a) a Senior Unix Analyst where he was responsible for 30-40 Unix systems that were being used by Alberta Energy Corporation; (b) a Systems Programmer for Alberta Energy Corporation; and (d) a Senior Systems Software Analyst, which involved overseeing the computer systems for Alberta Energy Corporation.

[8] After seven years at TeraGo, in May 2007, Mr. Paquette was promoted to Director of Information Technology. He reported to the company's vice-presidents and senior executives. He was responsible for the supervision of other employees including a Lead Systems Architect.

[9] On June 9, 2014, after TeraGo introduced "cloud" storage of data, Mr. Paquette was made the Director, Billing and Operations Support. Although there was no increase in salary, he had a range of new responsibilities that included coordinating with external stakeholders and overseeing TeraGo's movement into a new and technically complex area of business. He supervised three external full time IT contractors, trained and mentored TeraGo's employees, supervised the intake of data into TeraGo's systems, provided technical support for these systems, and assisted in preparing requests for proposals from external vendors. He reported to Ryan Lausman, the Chief Operating Officer.

[10] I find as a fact that Mr. Paquette was upper-middle management with specialized skills in computer technology and project management. Throughout his employment with TeraGo, Mr. Paquette had never been warned, disciplined, or told that his performance was in any way deficient. Mr. Paquette occupied important positions and performed his duties faithfully.

[11] Mr. Paquette received a base annual salary of $125,000 ($10,416.67 per month). His T4 employment income for the years 2011-2014 was: (a) 2011: $150,755.86; (b) 2012: $157,309.48; (c) 2013: $199,699.41 (including one-time taxable stock); and (d) 2014: $133,185.15.

[12] Mr. Paquette participated in TeraGo's health and dental plans, for which TeraGo paid monthly premiums of $410.21.

[13] While he was actively employed, Mr. Paquette received bonuses under TeraGo's Bonus Program. Under the Bonus Program, employees "**actively employed by TeraGo on the date of the bonus payout**" are eligible for a bonus based on their salary. An employee would receive a bonus if: (a) the employee met his or her personal objectives, determined by the manager and approved by a vice president; and (b) TeraGo's performance met the corporate objectives set by TeraGo's Compensation Committee.

[14] Mr. Paquette received: (a) a $27,814.50 bonus in 2011; (b) a $31,832.78 bonus in 2012; (c) a $27,932.69 bonus in 2013; and (d) a $7,841.41 bonus paid in February, 2014 (for the 2013 fiscal year).

[15] In 2014, TeraGo changed its Bonus Program to pay bonuses in February of a given year for performance in the prior year. Before this change, bonuses were paid semi-annually, with one payment in August and the second in February of the following year.

[16] On November 25, 2014, Mr. Paquette was informed that his employment with TeraGo had been terminated, effective that day. A termination letter offered him 30 weeks of his base salary (approximately 7 months), with no consideration of bonus, in lieu of notice. It also informed him that his employment benefits would be extended until January 21, 2015.

[17] The termination letter did not provide for payment of bonus during the notice period because TeraGo took the position that it was not payable because Mr. Paquette would not be an active employee on the February 2015 payment date specified in the Bonus Program. Had Mr. Paquette been employed in February 2015, he would have been eligible to receive a bonus based on both his and TeraGo's performance.

[18] Mr. Paquette rejected the severance offer.

[19] TeraGo proceeded to pay Mr. Paquette $20,032.06 representing eight weeks' salary in satisfaction of his termination notice and severance pay entitlements under the *Canada Labour Code*. TeraGo also continued his health and dental benefit coverage until January 21, 2015 (value $757.00).

[20] At the time of the summary judgment motion, Mr. Paquette remained unemployed. After updating his resume and creating job search profiles on five different online job search engines, and without any assistance from TeraGo, he has searched for comparable replacement employment, so far without success. He testified that he applied for approximately 96 positions between December 15, 2014 and May 20, 2015.

C. LEGAL BACKGROUND

1. The Calculation of Damages for Wrongful Dismissal

[21] An employee who is dismissed without reasonable advance notice of termination is entitled to damages for breach of contract based on the employment income the employee would have earned during the reasonable notice period, less any amounts received in mitigation of the loss: *Sylvester v. British Columbia*, [1997] 2 S.C.R. 315.

[22] The purpose of requiring reasonable notice is to give the dismissed employee an opportunity to find other employment: *McKay v. Camco, Inc.*, [1986] O.J. No. 2329 (C.A.) at para. 40; *Morrison v. Abernathy School Board* (1875-76), 3 S.C. (4th) 945 at p. 950.

[23] There is no catalogue as to what is reasonable notice in particular classes of cases, and the reasonableness of notice must be determined by reference to the facts of each particular case: *Bardal v. Globe & Mail*, [1990] O.J. No. 149 (H.C.J.).

[24] In determining the length of notice, the court should consider, among other possible factors: (1) the character of employment; (2) the length of service; (3) the age of the employee; and (4) the availability of similar employment having regard to the experience, training, and qualifications of the employee: *Machinter v. HOJ Industries Ltd.*, [1992] 1 S.C.R. 986; *Cronk v. Canadian General Insurance Co.* (1995), 25 O.R. (3d) 505 (C.A.); *Bardal v. Globe & Mail*, *supra*. The factors are not exhaustive, and what is a reasonable notice period will depend on the

circumstances of the particular case: *Honda Canada Inc. v. Keays*, [2008] 2 S.C.R. 362; *Wallace v. United Grain Growers Ltd.*, [1997] 3 S.C.R. 701 at para. 83; *Minott v. O'Shanter Development Co.* (1999), 42 O.R. (3d) 321 (C.A.) at para. 66; *Duynstee v. Sobeys Inc.*, 2013 ONSC 2050 at para. 17.

[25] The determination of a reasonable notice period is a principled art and not a mathematical science. In *Minott v. O'Shanter Development Co., supra,* Justice Laskin wrote at para. 62:

> Determining the period of reasonable notice is an art not a science. In each case trial judges must weigh and balance a catalogue of relevant factors. No two cases are identical; and ordinarily, there is no "right" figure for reasonable notice. Instead, most cases yield a range of reasonableness.

[26] In *Cronk v. Canadian General Insurance Company, supra*, Associate Chief Justice Morden stated at para. 85:

> The governing rule is that a dismissed employee, in the position of Ms. Cronk, is entitled to reasonable notice or payment in lieu of it. The legal precept of reasonable notice, which is the essence of this rule, is a standard and not, itself, a rule. Unlike a rule, it does not specify any detailed definite state of facts which, if present, will inevitably entail a particular legal consequence. Rather, its application enables a court to take all of the circumstances of the case into account. It allows for individualization of application and, obviously, involves the exercise of judgment.

[27] Economic factors such as a downturn in the economy or in a particular industry or sector of the economy that indicate that an employee may have difficulty finding another position may justify a longer notice period: *Bullen v. Proctor & Redfern Ltd.*, [1996] O.J. No. 340 (Gen. Div.) at paras. 24-29; *Thomson v. Bechtel Canada*, [1983] O.J. No. 2397 (H.C.J.); *Corbin v. Standard Life Assurance*, [1995] N.B.J. No. 461 (C.A.); *Leduc v. Canadian Erectors Ltd.*, [1966] O.J. No. 897 (Gen. Div.) at para. 34-36.

[28] The approach to determining a reasonable notice period is flexible, and each case will turn on its own particular facts. The weight to be given each factor will vary according to the circumstances of each case, and the judge in a wrongful dismissal case is required to exercise judgment in determining what factors are of particular importance. In determining the reasonable notice period, the court should not apply as a starting point any rule of thumb attribution so many weeks or months of notice per year of service, because such an approach privileges length of service above all relevant factors in determining notice, and each case must be considered having regard to its particular facts: *Minott v. O'Shanter Development Co., supra*; *Beatty v. Best Theratronics Ltd.*, 2015 ONCA 247; *Love v. Acuity Investment Management Inc.*, 2011 ONCA 130; *Cowper v. Atomic Energy of Canada Ltd.*, [1999] O.J. No. 2021 (S.C.J.); *Dey v. Valley Forest Products* (1995), 162 N.B.R. (2d) 207 (C.A.) at p. 215.

[29] The character of employment factor tends to justify a longer notice period for senior management employees or highly skilled and specialized employees and a shorter period for lower rank or unspecialized employees: *Cronk v. Canadian General Insurance Co., supra*; *Bullen v. Proctor & Redfern Ltd., supra,* at paras. 7-10; *Teitelbaum v. Global Travel Computer Holdings Ltd.* (1999), 41 C.C.E.L. (2d) 275 (Ont. S.C.J.); *Bernier v. Nygard International Partnership,* 2013 ONSC 4578 at para. 57; *Tull v. Norske Skog Canada Ltd*., 2004 BCSC 1098.

[30] Generally speaking, the longer the duration of employment, the longer the reasonable notice period: *Bullen v. Proctor & Redfern Ltd., supra,* at para. 21.

[31] Generally speaking, a longer notice period will be justified for older long-term employees, who may be at a competitive disadvantage in securing new employment because of their age. In *McKinney v. University of Guelph*, [1990] 3 S.C.R. 229 at para. 92, Justice La Forest stated:

> Barring specific skills, it is generally known that persons over 45 have more difficulty finding work than others. They do not have the flexibility of the young, a disadvantage often accentuated by the fact that the latter are frequently more recently trained in the more modern skills. Their difficulty is also influenced by the fact that many in that age range are paid more and will generally serve a shorter period of employment than the young, a factor that is affected not only by the desire of many older people to retire but by retirement policies both in the private and public sectors.

2. Aggravated and Punitive Damages

[32] As a general rule, additional damages are not awarded to compensate the employee for the disappointment, embarrassment, or other psychological effects flowing from the loss of employment: *Fidler v. Sun Life Assurance Co. of Canada,* [2006] 2 S.C.R. 3; *Peso Silver Mines Ltd. (N.P.L.) v. Cropper,* [1966] S.C.R. 673 at p. 684; *Addis v. Gramophone Co.*, [1909] A.C. 488 (H.L.).

[33] If an employee can prove bad faith conduct by the employer in the manner of the dismissal that caused mental distress that was in the contemplation of the parties, then the employee may be entitled to aggravated or punitive damages. These damages are calculated according to the same principles and in the same way as in cases dealing with moral damages and not by extending the reasonable notice period. Damages resulting from the manner of dismissal are available, if during the course of the dismissal, the employer's conduct is unfair or is in bad faith by being, for example, untruthful, misleading, or unduly insensitive such as attacking an employee's reputation, misrepresenting the reasons for the dismissal or depriving the employee of an accruing right. See: *Honda v. Keays, Canada*, *supra*; *Wallace v. United Grain Growers Ltd.*, *supra.*

[34] In the case at bar, Mr. Paquette abandoned his claim for aggravated or punitive damages.

3. Benefits, Bonuses, Incentive Plans, and Stock Options

[35] As part of an employment contract, in addition to salary, an employee may enjoy benefits such as: health care insurance; dental insurance; long term disability insurance; group life insurance; employer contribution to employee R.R.S.P.; employer contribution to the C.P.P.; stock options, bonus, etc.

[36] An employee who is wrongfully dismissed is entitled to recover the value of all losses arising from the failure to have been given reasonable notice of the termination of his or her employment: *Koor v. Metropolitan Trust Co. of Canada*, [1993] O.J. No. 1476 (Gen. Div.); *Earl v. Northern Purification Services (Eastern) Ltd.,* [1980] O.J. No. 160 (H.C.J.); *Davidson v. Allelix Inc.* (1991), 7 O.R. (3d) 581 (C.A.); *Locke v. Avco Financial Services Can. Ltd.* (1987), 85 N.B.R. (2d) 93 (Q.B.); *Leduc v. Canadian Erectors Ltd*., *supra,* at paras. 41-51.

[37] The damage award should place the plaintiff in the same financial position he or she would have been at the end of the reasonable notice period had he or she actually been given the

appropriate notice of pending termination, and, thus, the employee is entitled to the salary, benefit, and bonuses he or she would have received during the period of reasonable notice: *Bernier v. Nygard International Partnership*, *supra*, at para. 45; *Weibe v. Central Transport Refrigeration (Man.) Ltd.* (1993), 84 Man. R. (2d) 273 at p. 277.

[38] In *McKay v. Camco, Inc.*, *supra*, at p. 10, Justice Blair discussed the nature of damages for wrongful dismissal:

> The employee is entitled to damages measured by the salary and other benefits to which he would have been entitled during the notice period but subject to his duty to mitigate. Earnings from alternative employment during the notice period or such earnings as the employee might reasonably have been expected to earn had he diligently sought alternative employment must be deducted from the damages payable to the employee.

[39] A wrongfully dismissed employee is entitled to be compensated for the value of the employment-related benefits that the employee had available when employed or the cost of replacement coverage for the reasonable notice period: *Davidson v. Allelix Inc.*, *supra*; *Ludchen v. Stelcrete Industries*, 2013 ONSC 7495; *Zaman v. Canac Kitchens Ltd. (Kohler Ltd.)*, [2009] O.J. No. 872 (S.C.J.) at para. 19.

[40] Whether a bonus or the benefits of a stock option or incentive plan is payable during the reasonable notice period will depend upon the language of the plan, if any, and upon whether the bonus had become an integral part of the employee's annual salary. If the bonus or benefit formed part of the employee's compensation, then absent contractual terms to the contrary, the employee is entitled to the bonus or benefit: *Gryba v. Moneta Porcupine Mines Mintes Ltd.*, [2000] O.J. No. 4775 (C.A.); *Kieran v. Ingram Micro Inc.*, [2004] O.J. No. 3118 at para. 56 (C.A.); *Brock v. Matthews Group Ltd.*, [1991] O.J. No. 83 (C.A.); *Bagby v. Gustavson International Drilling Co. Ltd.*, [1980] A.J. No. 743 (C.A.); *Bernier v. Nygard International Partnership*, *supra* at paras. 45-46.

[41] If the bonus or benefit formed part of the employee's compensation and the bonus, incentive, or benefit plan is ambiguous about whether the employee is entitled to the bonus or benefit during the reasonable notice period, then the employee will be entitled to the bonus or benefit if the benefit would have been paid during the reasonable notice period: *Kieran v. Ingram Micro Inc.*, *supra*, at paras. 56-61 explaining *Schumacher v. Toronto Dominion Bank*, [1999] O.J. No. 1772 (S.C.J.), aff'd [1999] O.J. No. 1772 (C.A.).

[42] An employee is entitled to his or her statutory vacation pay upon the termination of his or her employment but not damages for vacation pay on top of an award of full salary for the notice period because that would provide a double indemnity: *Cronk v. Canadian General Insurance Company, supra; Scott v. Lillooet School District No. 29* (1991), 60 B.C.L.R. (2d) 273 (B.C.CA.) at pp. 276-80.

4. Mitigation

[43] Wrongful dismissal is a breach of contract claim, and the normal principles of damages assessment apply to the determination of the quantum of damages, including the principle that a plaintiff cannot recover for avoidable loss; i.e., the mitigation principle. See: *Zaman v. Canac Kitchens Ltd., a division of Kohler Ltd.*, *supra*; *British Westinghouse Electric & Mfg. Co. Ltd. v. Underground Electric R. Co. of London, Ltd.*, [1912] A.C 673 (H.L.); *Karas v. Rowlett*, [1944] S.C.R. 1; *Apeco of Canada Ltd. v. Windmill Place*, [1978] 2 S.C.R. 385. The so-called duty of a

plaintiff to mitigate is somewhat mislabeled as a duty because the duty is a matter of self-interest and is not a duty owed to others. The policy idea behind the so-called duty to mitigate is that a plaintiff should not recover for losses that he or she could have avoided.

[44] It is a corollary to the mitigation principle that an innocent party must take into account the benefits received from actually mitigating his or her loss: *Cockburn v. Trusts and Guarantee Co.* (1917), 37 D.L.R. 701 (S.C.C.).

[45] The onus is on the defendant to establish a failure to mitigate: *Michaels v. Red Deer College I,* [1976] 2 S.C.R. 324; *Dobson v. Winton & Robbins Ltd.*, [1959] S.C.R. 755. More particularly, the onus is on the employer to prove that the employee would likely have found a comparable position reasonably adapted to his or her abilities and that the employee failed to take reasonable steps to find that comparable position: *Di Tomaso v. Crown Metal Packaging Canada LP, supra* at paras. 36-37; *Palmer v. Clemco Industries Inc.*, 2010 BCSC 230; *Link v. Venture Steel Inc.*, 2010 ONCA 144 at para. 73; H.A. Levitt, *The Law of Dismissal in Canada*, (3rd ed. loose-leaf) (Aurora,: Canada Law Book, 2003) at p. 10-3; England, Wood, Christie, *Employment Law in Canada*, (4th ed., loose-leaf), (Markham: LexisNexis Canada Inc., 2005) at p. 16-89.

[46] In assessing the innocent party's efforts at mitigation, the courts are tolerant, and the innocent party need only be reasonable, not perfect: *Banco de Portugal v. Waterlow & Sons Ltd*., [1932] A.C. 452 (H.L.); *Leduc v. Canadian Erectors Ltd.*, *supra* at paras. 52-60.

[47] In a wrongful dismissal action, the court may grant judgment before the expiration of the reasonable notice period but the employee will be subject to the so-called duty to mitigate for the duration of the reasonable notice period: *Cronk v. Canadian General Insurance Co., supra; Bullen v. Proctor & Redfern Ltd., supra* at para. 38; *Markoulakis v. SNC-Lavalin Inc.*, (2015) ONSC 1081.

[48] Where judgment is granted before the expiration of the reasonable notice period, courts have employed three approaches to the duty to mitigate during the balance of the notice period; namely:

- The Contingency Approach – The employee's damages are discounted by a contingency for re-employment during the balance of the notice period. See *Russo v. Kerr,* 2010 ONSC 6053; *Smith v. Pacific National Exhibition* (1991), 34 C.C.E.L. 64 (B.C.S.C.).

- The Trust and Accounting Approach – The employee is granted judgment but a trust in favour of the employer is impressed on the judgment funds for the balance of the notice period requiring the employee to account for any mitigatory earnings. See: *Thomson v. Bechel Canadian Ltd.* (1983), 3 C.C.E.L. 16 (Ont. H.C.J.) at para. 23; *Bullen v. Proctor & Redfern Ltd., supra; Correa v. Dow Jones Markets Canada Inc.* (1997), 35 O.R. (3d) 126 (Gen. Div.); *Adjemian v. Brock Crompton North America, supra*; *Di Tomaso v. Crown Metal Packaging Canada LP, supra.* In *Correa*, the Court awarded a lump sum payment for the maximum notice period, which included damages for the unexpired period of reasonable notice and the plaintiff was ordered to account to the defendant for any earnings during the notice period.

- The Partial Summary Judgment Approach – The employee is granted a partial summary judgment and the parties return to court during and or at the end of the

notice period for further payments subject to the duty to mitigate. See *Markoulakis v. SNC-Lavalin Inc., supra*.

[49] The employee is entitled to claim as damages the expenses of mitigation provided that the expenses were reasonably foreseeable as damages: *Leduc v. Canadian Erectors Ltd., supra* at para. 52.

D. POSITION OF THE PARTIES

1. Mr. Paquette's Position

[50] Mr. Paquette submits that his position at TeraGo was very specialized and given his age and the current poor economic climate in Alberta, his ability to find a new job has been adversely impacted. He argues that given his age, he is at a competitive disadvantage to younger persons with more recent training in a highly technical and fast-changing area of employment. He submits that as a highly-skilled manager in a senior position, responsible for supervising, mentoring and training other employees, as well as providing ongoing technical support for complex computer systems, in a specialized industry the appropriate notice period is between 17 to 20 months.

[51] As comparable cases determining reasonable notice, Mr. Paquette relied on: *Tull v. Norske Skog Canada Ltd., supra*; *Bernier v. Nygard International Partnership, supra*; *Lacroix v. Esso Resources Can. Ltd.*, [1988] A.J. No. 249 (Q.B.); *Mitchell v. Lorell Furs Inc.*, [1991] N.S.J. No. 205 (T.D.); *Day v. JCB Excavators*, 2011 ONSC 6848; *Dey v. Valley Forest Products Ltd., supra*.

[52] Mr. Paquette submits that he should be entitled to the value of his employment benefits ($410.21 per month) for the notice period and to bonus payments for the fiscal year 2014 for which he had worked 11 of the 12 months at the time of his dismissal. He also claims the bonus for the 2015 year as falling within the reasonable notice period.

[53] Relying on *Schumacher v. Toronto Dominion Bank, supra,* Mr. Paquette submits that he was an employee entitled to a regular bonus and but for his wrongful dismissal he would have been "actively employed" by TeraGo on the date of the bonus payment for 2014 and if the notice period were fixed at between 17 to 20 months, he would have qualified for the 2015 bonus as well, .

[54] If the notice period is fixed at less than 17 months, Mr. Paquette submits that he should be entitled to a pro-rated bonus for the 2015 year. He submits that he ought not to be deprived of a payment that he would have enjoyed but for TeraGo's wrongful dismissal. He submits that these bonus payments should be calculated based on the average of his annual bonus payments; i.e. $29,193.32.

[55] Mr. Paquette submits that TeraGo has failed to establish that he has not made reasonable efforts to mitigate his damages and, therefore, there should be no deduction made from the damages award.

[56] Mr. Paquette submits that the Trust and Accounting Approach used in *Correa v. Dow Jones Markets Canada Inc., supra* is the appropriate approach for resolving the issue of mitigation during the reasonable notice period.

2. TeraGo's Position

[57] TeraGo submits that the range of reasonable notice in this case is between 10 and12 months. It submits that Mr. Paquette is not entitled to damages in respect of the TeraGo Bonus Program for the 2014 fiscal year, nor is he entitled to a pro-rated bonus over the period of reasonable notice.

[58] As comparable cases determining reasonable notice, TeraGo relied on: *Haviv v. Comdata Corp. (c.o.b. Comdata Transportation Services)*, [1995] O.J. No. 2101 (Gen. Div.); *Kopij v. Metro Toronto*, [1996] O.J. No. 2408 (S.C.J.) [rev'd on other grounds] [1998] O.J. No. 4719 (C.A.)]; *Palmer v. Clemco, supra*; *Ludchen v. Stelcrete Industries, supra* and *Chrumka v. Mirant Energy*, 2004 ABQB 398.

[59] TeraGo conceded that Mr. Paquette's efforts to mitigate between November 2014 and February 28, 2015 were adequate but after there was a failure to mitigate. TeraGo submitted that based on his varied and extensive work experience, Mr. Paquette was highly marketable and is not restricted to roles solely in the telecommunications or information technology sector.

[60] Relying on the approach used in *Russo v. Kerr, supra*, TeraGo submitted that if the court determined that the period of reasonable notice goes beyond the date of the summary judgment motion, it should grant partial summary judgment up to the date of the motion, and adjourn the balance of the motion to the end of the notice period at which time the remaining amounts that are owed can be determined.

[61] Alternatively, TeraGo submits that there should be a partial summary judgment up to the date of the motion with the balance of the monies owing for the notice period to be paid to Mr. Paquette's counsel in trust to be paid out in equal monthly instalments in arrears on the 15th day of the following month, subject to any income earned by Mr. Paquette during each month. If income is earned, the amount of the income is to be deducted from the amounts held in trust and returned to TeraGo.

E. DISCUSSION AND ANALYSIS

[62] Having reviewed the law described above and having considered in particular the cases relied on by Mr. Paquette and those relied on by TeraGo, in my opinion, having regard to all the circumstances including Mr. Paquette's age and skills, his various roles at TeraGo and the history of that relationship; the length of his employment, the availability of comparable or suitable employment, and the economic climate in Alberta, the appropriate reasonable notice period is 17 months.

[63] It follows that Mr. Paquette is entitled to **$163,267.90**, broken down as follows: (a) $157,051.33 for salary ($10,416.67 x 17 - $20,032.06) and (b) $6,216.57 ($410.21 x 17 - $757.00) for lost benefits.

[64] I conclude that Mr. Paquette is not entitled to any bonus payments. Although the Bonus Program at TeraGo was an integral part of Mr. Paquette's employment, there is no ambiguity in the contract terms of the Bonus Program. Mr. Paquette may be notionally an employee during the reasonable notice period; however, he will not be an "active employee" and, therefore, he does not qualify for a bonus.

[65] I find that Mr. Paquette has made reasonable efforts to mitigate to the date of the motion.

[66] As for Mr. Paquette's duty to mitigate during the balance of the reasonable notice period, I employ the Trust and Accounting Approach as follows.

[67] TeraGo shall forthwith pay Mr. Paquette damages of $163,267.90 less any taxes or funds it is statutorily obliged to hold back or remit.

[68] Mr. Paquette may utilize the funds as he sees fit, but he must account for any mitigatory earnings for the balance of the reasonable notice period. It is the mitigatory earnings not the damages award upon which there is a court imposed constructive trust in favour of TeraGo.

[69] I reject the Partial Summary Judgment Approach as cynical, patronizing, unfair, impractical, and expensive.

[70] Mr. Paquette has had no employment income since November 2014. He has made diligent, albeit unsuccessful, efforts to mitigate, and it is cynical to assume that with many years of future employment both possible and needed, that he will sit on his hands and wait out the reasonable notice period rather than getting on with his career. If he earns mitigatory income, he will have to simply account for it or be liable for breach of trust.

[71] Judgment accordingly.

[72] If the parties cannot agree about the matter of costs, they may make submissions in writing, beginning with Mr. Paquette's submissions within 20 days of the release of these Reasons for Decision followed by TeraGo's submissions within a further 20 days.

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Perell, J.

Released: June 29, 2015

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