CITATION: Rodgers v. CEVA, 2014 ONSC 6583
COURT FILE NO.: C-1016-12
DATE: 2014-11-19

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
Bruce Rodgers	)	
Plaintiff	)	David E. Wires and Samantha Wu, for the Plaintiff
– and –	)	
CEVA Freight Canada Corp	)	Neal B. Sommer, for the Defendant
Defendant	)	
	)	**HEARD:** September 30 and October 1, 2014

G. E. TAYLOR

Introduction

[1] This is an action for damages for wrongful termination of employment. The defendant acknowledges that it terminated the plaintiff's employment without adequate notice or pay in lieu of notice. The only witness was Bruce Rodgers. The evidence at trial also included a Request to Admit.

Facts

[2] The plaintiff is 57 years of age having been born August 23, 1957. He is married with three adult children. He has a high school education and has been engaged throughout his entire working life in the trucking, freight forwarding and logistics industry.

[3] The plaintiff accepted an offer of employment with the defendant on September 6, 2009 to become its Country Manager, Canada at an annual salary of $276,000 with a $40,000 signing bonus paid within the first week of employment. The employment agreement also included

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other benefits. On June 28, 2012, the plaintiff's employment with the defendant was terminated. At the time of termination, the defendant paid the plaintiff two weeks salary in lieu of notice totaling $11,115.44, severance pay in the amount of $5307.72 and outstanding vacation pay of $20,324.92. Benefit coverage was terminated as of July 12, 2012.

[4] As of 2009, the plaintiff was the president of Sameday Worldwide, a company that handled transportation of goods larger in size than would be shipped by a courier and smaller than truckload quantities. He was earning an annual salary of $189,000 plus a bonus. In 2009 his bonus was $126,000. The plaintiff had been employed by Sameday or one of its affiliated companies since 1998.

[5] The plaintiff did not approach the defendant seeking employment but rather was recruited to become the defendant's Country Manager of its Canadian operations. The plaintiff knew Marcel Braithwaite, an employee of the defendant, as a result of prior business dealings. Sometime before September, 2009, Braithwaite approached the plaintiff and asked if he would be interested in employment with the defendant. Braithwaite said the defendant was looking for someone to lead the separation of the defendant's Canadian operation from that of its operations in the United States. The plaintiff indicated he would be interested in such a position.

[6] The plaintiff attended a total of seven interviews with the defendant. He was flown to Houston, Texas on two occasions and his final interview was with the Chief Executive Officer of the defendant's global parent company. The defendant presented the plaintiff with an offer of employment which he did not accept. The plaintiff could not remember the salary offered initially. Within a week the defendant presented a second offer of employment to the plaintiff which he accepted. The original offer of employment did not contain the signing bonus of $40,000. No evidence was presented with respect to the salary or any other terms or conditions of the first offer of employment although the plaintiff testified that he thought the salary in the first offer was less than the salary in the offer that he accepted.

[7] In addition to the salary and signing bonus, the offer of employment contained the following terms:

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a) a car allowance of $1000 per month:

b) an RRSP contribution of 5% of base salary which amounted to $13,800;

c) a bonus of up to 50% of salary;

d) three weeks paid vacation;

e) benefits including life insurance, accidental death and dismemberment insurance, health/medical insurance, extended health insurance and dental benefits.

[8] The offer of employment also contained a term entitled "Equity Plan" which stated:

> You will be expected to purchase shares in CEVA Investments, LTD at an investment of 37.5% of salary $64,500 EUR at the time of offer, with options granted at the rate of 0.25 options per share.

The cost of the shares purchased by the plaintiff in the Equity Plan, converted into Canadian dollars, was $102,330.85.

[9] The defendant also provided the plaintiff with a cell phone and membership at a golf club which included a food and beverage allowance. The plaintiff values the cell phone benefit at $350 per month or $4200 per year, the golf club membership at $426.67 a month or $5120 annually and the food and beverage allowance at $100 per month or $1200 annually.

[10] With respect to termination, the employment agreement stated:

> Your employment may also be terminated by our providing you notice, pay in lieu of notice, or a combination of both, at our option, based on your length of service and applicable legal requirements.

[11] As Country Manager, the plaintiff was responsible for the defendant's business operations in Canada which included over 500 employees and revenues in excess of $140 million annually. In 2010, the plaintiff received a bonus of $13,690 and in 2011 his bonus was $16,744.

[12] With respect to the required purchase of shares in CEVA Investments, the plaintiff was told by the CEO of the global parent of the defendant that it was a requirement for all senior managers to have an investment in the company. He said he wanted his senior managers to have "skin in the game". Accordingly, the plaintiff borrowed $102,000 in order to make the required

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investment. The plaintiff testified that he and his financial advisors thought it was a good investment.

[13] As part of the purchase of shares in CEVA Investments the plaintiff was required to sign a Shareholders Agreement, a Subscription Agreement and a Non Qualified Stock Option Agreement. The Shareholders Agreement contained a clause restricting disposition of shares without consent of the company. Included in Attachment C to the Non Qualified Stock Option Agreement was a clause providing as follows:

> Protective Covenants. Optionee agrees that the following covenants are reasonable and necessary protective covenants for the protection of the business interests described in Paragraph 1 above:
>
> (d) Definitions. "Competing Business" means any business involving freight logistics, freight forwarding, or any related activities that involve the same type of services sold by the Company or its affiliates, or any business so similar in nature that it would displace business opportunities or customers of the Company or its affiliates. "Covered Customer" means those customers entities and/or persons who did business with the Company or its affiliates and that Optionee either (i) received Confidential Information about, or (ii) had contact with within the last thirty-six (36) month period that Optionee was employed with Company or its affiliates. "Restricted Area" means (i) a one hundred and fifty (150) mile radius of any station of the Company or its affiliates that Optionee worked out of, provided services to, or provided supervision over, and (ii) any location, storefront, address or place of business where a Covered Customer is present and available for solicitation. Optionee may not circumvent the purpose of any restriction by engaging in business in the Restricted Area through remote means it like a telephone, correspondence, or computerized communication.
>
> (g) Restriction on Interfering with Customer Relationships. Optionee agrees that during the Restricted Period [12 months following termination of employment], Optionee will not, directly or indirectly, except in connection with Optionee's employment with the Company or its affiliates, service, call on, solicit, or take away, or attempted to call on, solicit, or take away any of the Covered Customers in the Restricted Area.

The plaintiff would fit within the definition of "Optionee" and the defendant would be included as an affiliate for the purpose of the above clauses.

[14] Immediately following the termination of his employment, the plaintiff commenced a job search for alternate employment. The defendant admits that the plaintiff's efforts to secure

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another position were reasonable and appropriate. The plaintiff remained unemployed until May 6, 2013 at which time he commenced employment with Vandegrift Canada as Country Manager – Canada. In this position the plaintiff receives a salary of $150,000 annually and a Christmas bonus of $12,500 paid in December each year. The plaintiff is also entitled to receive an incentive bonus of 1.5% of the gross profit of Canadian operations in excess of $2.5 million. The plaintiff's financial compensation from Vandegrift is capped at $250,000 annually. To date, the plaintiff has not received payment of any incentive bonus. The plaintiff receives health benefits and a vacation allowance commensurate with that which he received while employed with the defendant. During the period of unemployment the plaintiff financed his living expenses by way of his savings, his investments and utilizing a line of credit.

[15] The plaintiff testified that there are only six employers in Canada who are engaged in a business similar to that of the defendant. He also testified that for at least the period between the termination of his employment with the defendant and the commencement of his new job with Vandegrift, the freight forwarding and logistics business was sluggish.

[16] The defendant provided no assistance to the plaintiff in his search for alternate employment. The defendant did not provide the plaintiff with a letter of reference. However, the plaintiff did not seek any assistance from the defendant in his effort to secure employment nor did he request a letter of reference.

[17] The plaintiff testified that he did not think that the restrictive covenant contained in the Non Qualified Stock Option Agreement had any impact on his search for employment. He thought the Non Qualified Stock Option Agreement and the other agreements that he signed with respect to his purchase of shares in CEVA Investments were strictly related to that investment. It is not suggested that the defendant attempted in any way to enforce the restrictive covenants in the Non Qualified Stock Option Agreement.

[18] In November, 2012 plaintiff contacted the defendant inquiring about his investment in CEVA Investments. The response was:

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> The investment remains in the care of the company. There is not currently a process that would enable you to exit the plan by selling your CEVA Investments Limited stock.

The response made no mention of CEVA Investments being in a precarious financial situation.

[19] The plaintiff received an unsigned letter addressed to "Dear Shareholder" dated April 5, 2013. That letter purportedly was sent at the direction of the board of directors of CIL Limited, formerly known as CEVA Investments Limited, and advised that the shareholding in CEVA was without value and that it was unlikely that there would be any recovery for shareholders. The defendant admits that the plaintiff's shares in CEVA Investments are now worthless.

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Position of the Plaintiff

[20] The plaintiff submits that he was induced by the defendant to leave the secure and long-term employment with his previous employer. The defendant then terminated his employment without cause and virtually without notice or pay in lieu of notice after slightly less than three years' service. The plaintiff says he was terminated at an economically depressed time in the freight forwarding and logistics business. The plaintiff submits that there was and is a limited market for jobs similar to his position with the defendant and for that reason he has had to accept a lesser position with his current employer.

[21] The plaintiff submits that the period of reasonable notice for termination of his employment with the defendant was between 18 and 24 months. Therefore his damages for wrongful dismissal ought to be calculated on the basis of his loss of salary and benefits for between 18 and 24 months less what he has earned as a result of his mitigation efforts.

Position of the Defendant

[22] The defendant acknowledges that the plaintiff is entitled to damages arising out of the termination of his employment with the defendant. However, the defendant says that the most important factor in determining the appropriate period of notice to which the plaintiff was entitled was his length of service, which was very short. The defendant relies on the wording of the employment letter which specifically provides for notice of termination or pay in lieu of

notice to be based on "length of service" as a distinct factor from "applicable legal requirements". The defendant does not agree that plaintiff was induced to leave his previous employment.

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[23] Counsel for the defendant did not suggest a period or range of notice to which he says the plaintiff ought to be entitled. But it is clear from the submissions made that the defendants position is for the plaintiff to be found to be entitled to a period of notice far less than 18 months. The defendant called no evidence.

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Analysis

[24] In determining what is a reasonable period of notice to be provided to an employee upon termination of employment, the starting point is the decision of McRuer C.J.H.C. in *Bardal v. Globe & Mail Ltd.*, [1960] O.J. No. 149 where the Chief Justice stated at paragraph 21:

> 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.

[25] The *Bardal* factors were adopted by the Supreme Court of Canada in *Machtinger v. HOJ Industries Ltd.*, [1992] 1 S.C.R. 986 at paragraph 22. In *Wallace v. United Grain Growers Ltd.*, [1997] 3 S.C.R. 701, at paragraph 82, the Supreme Court of Canada held that the *Bardal* factors are not exhaustive. The court in *Wallace* went on to state at paragraph 83 that one such factor is whether the dismissed employee had been induced to leave previous secure employment.

[26] In *Honda Canada Inc. v. Keays*, [2008] 2 S.C.R. 362, Bastarache J. writing for the majority of the Supreme Court of Canada stated at paragraph 32 that no one *Bardal* factor should be given disproportionate weight. Bastarache J. went on to say at paragraph 56:

> We must therefore begin by asking what was contemplated by the parties at the time of the formation of the contract, or, as stated in para. 44 of *Fidler*: "[W]hat did the contract promise?"

[27] I will first address the defendant's submission that length of service is to be accorded priority in determining the appropriate period of notice because the employment letter says that the plaintiff's employment can be terminated upon notice or pay in lieu of notice "based on your length of service and applicable legal requirements". As I understand the defendant's

submission, I should interpret this to mean that special emphasis is to be given to length of service. I do not interpret the letter of employment that way. In my view, the employment letter, advises the plaintiff that his employment can be terminated based on notice determined in accordance with all applicable legal principles. If it was intended that length of service was to be accorded more weight than any other factor to be considered in determining the appropriate notice period, I find it to be incumbent upon the defendant to make that clear to the plaintiff. There is no such evidence.

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[28] One of the significant points of disagreement between the parties is whether the plaintiff was induced to leave his secure employment with Sameday to take up the position with the defendant. The plaintiff's evidence is that he was approached by Marcel Braithwaite on behalf of the defendant who asked if he would be interested in leading the initiative to separate the defendant's Canadian operations from its US operations. The plaintiff testified that he was interested in the proposal. The uncontradicted evidence of the plaintiff is that after seven interviews he was presented with an offer of employment which he rejected. Within a week the defendant presented the plaintiff with another offer of employment which was more financially favourable. I accept the plaintiff's evidence that the second offer contained the signing bonus of $40,000 and that the salary was greater than in the first offer by an unknown amount. The plaintiff did not testify to the effect that he was in any way reluctant to terminate his employment with Sameday. He did not testify that he raised any concern about job security as a result of leaving a position that he had held for many years in order to accept the new position with the defendant.

[29] In *Wallace*, the plaintiff specifically raised the issue of a guarantee of job security if he were to accept a position with the new employer. The Supreme Court of Canada held that this was a factor which justified an award of damages at the high end of the scale. At paragraph 85, Iacobucci J. writing for the majority stated:

> In my opinion, such inducements are properly included among the considerations which tend to lengthen the amount of notice required. I concur with the comments of Christie et al., supra, and recognize that there is a need to safeguard the employee's reliance and expectation interests in inducement situations. I note, however, that not all inducements will carry equal weight when determining the

> appropriate period of notice. The significance of the inducement in question will vary with the circumstances of the particular case and its effect, if any, on the notice period is a matter best left to the discretion of the trial judge.

[30] In *Egan v. Alcatel Canada Inc.*, [2004] O.J. No. 2974, an employee with 20 years' experience and earning the $85,000 annually was approached, on behalf of the defendant, by two former coworkers and was encouraged to apply for a position with the defendant. When first approached, the plaintiff had no particular interest in changing jobs but she was open to consider other opportunities. She accepted a position with the defendant at a starting salary of $125,000 per annum plus a $5000 signing bonus. The plaintiff was hired as a Director, Product Marketing, in the Marketing and Business Development Department of the defendant. Less than two years later the plaintiff's employment was terminated because of a recession in the high-tech industry. In awarding damages to the 42-year-old plaintiff based on a nine-month period of notice, the trial judge took into consideration that she had been encouraged to leave her previous employment. The Court of Appeal declined to interfere with the trial judge's determination of the period of reasonable notice.

[31] *Jackson v. Makeup Lab Inc.*, [1989] O.J. No. 1465 was a case where the plaintiff was approached on a "cold call" by an employment agency, was intrigued by the call and agreed to an interview. After a period of months and three separate interviews he was hired by the defendant, at a salary of $45,000 per annum, as plant manager, a position very much equivalent to that which he held at his previous employment. This was held to be an inducement to leave his former employment which together with the other *Bardal* factors was found to justify a notice period of eight months.

[32] In *Davidson v. Allelix Inc.*, [1991] O.J. No. 2230 a 53-year-old microbiologist was approached by the defendant to supervise the construction of a plant in Canada to manufacture inoculants for use in the agricultural industry. The plaintiff was found to have been induced to move to Canada by generous provisions that were offered by the defendant.

[33] With respect to the issue of inducement, I have come to the conclusion that there was some measure of inducement by the defendant which resulted in the plaintiff leaving his employment with Sameday. The only evidence is that the plaintiff was approached by the

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defendant to become its Canadian manager. The financial package including, signing bonus and benefits was attractive to the plaintiff and was part of the encouragement on the part of the defendant to have him accept the position which he was offered. When the plaintiff declined the defendant's initial offer, an improved offer was promptly presented. While I am of the view that there was some degree of inducement by the defendant to encourage the plaintiff to leave his secure employment, the inducement did not achieve the level of that in *Wallace* where the plaintiff was given a specific assurance of long-term job security.

[34] The plaintiff was the most senior person in the defendant's Canadian operation. He was responsible for more than 500 employees and the Canadian operation generated sales in excess of $140 million annually. It follows, in my view, that both parties would understand the difficulty that would be encountered by the plaintiff in securing a similar position if his employment were to be terminated.

[35] The plaintiff was employed by the defendant for slightly less than three years. He was not a long-term employee. This factor would tend it to lessen the period of notice upon termination of employment.

[36] The plaintiff was approximately 52 years of age when he began working for the defendant. He was 55 years of age when his employment was terminated. His resume makes it clear that his entire working career was in the transportation and logistics industry. The plaintiff's evidence is unchallenged that there are only six companies in Canada who carry on a business similar to that of the defendant. Accordingly, it would be reasonable for the parties to have had in contemplation at the time of entering into the employment agreement that the plaintiff would encounter some difficulty in securing an equivalent position if his employment with the defendant was terminated. The plaintiff's unchallenged evidence is also that the trucking business was in a downturn in the summer and fall of 2012 and there were no opportunities available for someone with his qualifications. These factors would have the effect of increasing the appropriate period of notice.

[37] The defendant provided no assistance to the plaintiff with respect to his job search efforts. The defendant did not even offer a letter of reference. On the other hand, there is no

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suggestion that the defendant in any way interfered with the plaintiff's efforts to secure alternate employment. I accept that there was a restrictive covenant contained in the Non Qualified Stock Option Agreement, but based on the evidence, I find that neither party addressed the issue of the restrictive covenant after the termination of the plaintiff's employment. The plaintiff testified that he did not think that the restrictive covenant had any impact on his search for employment. There is no evidence of any prospective employer declining an offer of employment or even expressing any concern arising out of the existence of the restrictive covenant. The defendant did not seek to enforce the restrictive covenant.

[38] The final factor which in my view should be taken into consideration in determining the appropriate period of notice is that of the investment made by the plaintiff in CEVA Investments. The letter of employment made it clear that the plaintiff was required to purchase shares in CEVA Investments as a condition of employment. The uncontradicted evidence of the plaintiff is that the CEO of the global parent of the defendant told him it was a requirement for all senior managers to make an investment in the company because he wanted his senior managers to have "skin in the game". One of the documents given to the plaintiff was entitled "CEVA Investments Limited 2006 Long-Term Incentive Plan". The investment required of the plaintiff immediately upon commencement of employment was approximately the equivalent of 4.5 months of salary.

[39] Based on the required investment in CEVA Investments I find there was at least an implied representation that the plaintiff was about to embark upon a long-term employment relationship with the defendant. The plaintiff would reasonably conclude from the requirement that he invest the equivalent of 4.5 months of salary, which he had yet to receive, that he would not to be summarily dismissed early in his tenure and be provided only minimal notice or severance pay because of the lack of seniority. I find that the required investment in CEVA Investments was intended to create the impression in the mind of the plaintiff that by accepting employment with the defendant he would have a degree of job security beyond what would normally be anticipated.

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[40] Although each case must be decided based on its particular facts, the plaintiff presented a number of cases which are of assistance in determining the appropriate period of notice to which the plaintiff was entitled.

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[41] In *Hooker v. Audio Magnetics Corp. of Canada*, [1984] O.J. No. 2588, a plaintiff who was 55 years old when he was hired was terminated after approximately one year of employment. The plaintiff's position was that of an assistant to the Canadian General Manager. The plaintiff was found to be entitled to 14 months' notice.

[42] In *Cowper v. Atomic Energy of Canada Ltd.*, [1999] O.J. No. 2021, a 60-year-old senior manager with 35 years of employment was found to be entitled to a notice period of 27 months. The Court of Appeal at [2000] O.J. No. 1730 found that the notice period of 27 months was at the "extreme upper limit" but declined to interfere.

[43] In *Bernier v. Nygard International Partnership*, [2013] O.J. No. 3091, at 54-year-old manager with a salary of $190,000 annually and 13 years of service was awarded damages based on 18 months notice.

[44] In *Love v. Acuity Investment Management Inc.*, [2011] O.J. No. 771, a 50-year-old senior vice president earning in excess of $600,000 annually was terminated after approximately 2 ½ years of employment. He was also a part owner of the company. The trial judge fixed to the period of reasonable notice at five months which was increased by the Court of Appeal to nine months. At paragraph 19, the court stated:

> While short service is undoubtedly a factor tending to reduce the appropriate length of notice, reference to case law in a search for length of service comparables must be done with great care. The risk is that while lengths of service can readily be compared with mathematical precision that is not so easily done with other relevant factors that go into the determination of notice in each case. Dissimilar cases may be treated as requiring similar notice periods just because the lengths of the service are similar. The risk is that length of service will take on a disproportionate weight.

[45] To summarize, the plaintiff's age, his position as the Canadian manager of the defendant's operations responsible for over 500 employees and sales in excess of $140 million annually, the limited number of similar positions in Canada and the requirement that the plaintiff make a significant investment with a company associated with the defendant as a condition of employment all point to a lengthy notice period. The recruitment of the plaintiff by the defendant when he was employed in a senior position of significant length of service is also a

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factor tending to increase the period of notice. Against those factors is the short period of time that the plaintiff was employed by the defendant. However, I have concluded that both parties to the employment contract contemplated, at the commencement of the employment relationship, that it would be a long one. Specifically, I do not believe that either party thought of the plaintiff's employment could be terminated after approximately three years of service upon payment of two weeks' salary in lieu of notice plus severance pay in the approximate amount of $5000.

[46] In my view, an appropriate period of notice is 14 months.

Damages

[47] The plaintiff was dismissed by the defendant on June 28, 2012. He began his new employment with the Vandergrift on May 6, 2013. For the purpose of the calculation of damages, I propose to round the period during which the plaintiff was unemployed to 10 months. Accordingly there will be a period of four months during which the defendant will be entitled to credit for the salary and benefits earned by the plaintiff through his employment with the Vandergrift.

[48] Counsel for the plaintiff prepared spreadsheets setting out the plaintiff's salary and the value of the plaintiff's benefits provided by the defendant pursuant to the employment agreement. The spreadsheets set out the various amounts on a monthly basis. The defendant did not take exception to the calculations regarding the value of benefits. I therefore calculate the monthly remuneration of the plaintiff as follows:

Salary	$23,000
Car allowance	$1000
RRSP contribution	$2145
Benefits	$2300
Cell phone	$350
Golf membership	$426
Golf food and beverage	$100

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Average annual bonus	$1268
Total monthly remuneration	$30,589

Extended over 14 months the plaintiff would have been entitled to receive in compensation from the defendant the sum of $428,246.

[49] The defendant is entitled to a reduction in the total compensation which the plaintiff would have received during the period of notice for the amounts actually received by the plaintiff as pay in lieu of notice, severance pay, benefits provided by the defendant and the salary and benefits received by the plaintiff through his employment at Vandegrift. Those amounts are:

Pay in lieu of notice	$11,115
Severance pay	$5307
Benefits to July 12, 2012	$1073
Salary from Vandegrift (four months)	$50,000
Bonus from Vandegrift (four months)	$4166
Benefits from Vandegrift	$10,600
Total	$82,261

The plaintiff testified that his benefits with Vandegrift are comparable to the benefits provided by the defendant, with the exception of the membership at the golf club. I have therefore used the same figures for the value of benefits, including the cell phone but not including the golf club membership and food and beverage allowance at the golf club, at both employers.

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[50] I therefore calculate the plaintiff's damages to be the difference between his anticipated remuneration from the defendant for the period of notice less amounts actually received from the defendant and by way of mitigation. This amount is $345,985.

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Conclusion

[51] For these reasons, the plaintiff is entitled to judgment against the defendant for $345,985.

[52] If counsel are unable to agree on the appropriate disposition as to costs they may make written submissions. The written submissions on behalf of the plaintiff are to be delivered to my office within 14 days of the release of these Reasons, not to exceed three pages in length exclusive of a Bill of Costs and Costs Outline. Responding submissions are to be delivered to my office within 28 days of the release of this these Reasons, not to exceed three pages in length.

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G.E. Taylor, J.

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SUPERIOR COURT OF JUSTICE

BETWEEN:

Bruce Rodgers

Plaintiff

– and –

CEVA Freight Canada Corp

Defendant

REASONS FOR JUDGMENT

G. E. Taylor, J.

Released: November 19, 2014