IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *McLeod v. Lifelabs BC LP,*
2015 BCSC 1857

Date: 20151014
Docket: S150008
Registry: Vancouver

Between:

Barbara McLeod

Plaintiff

And

Lifelabs BC LP and Lifelabs BC Inc.

Defendant

Before: The Honourable Madam Justice Duncan

Reasons for Judgment

Counsel for the Plaintiff:	A. Barker
Counsel for the Defendant:	G. Heywood B. Hollis
Place and Dates of Trial:	Vancouver, B.C. June 29-30, 2015 July 2, 2015
Place and Date of Judgment:	Vancouver, B.C. October 14, 2015

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[1] The plaintiff, Barbara McLeod, was employed by the defendant, Lifelabs BC LP and Lifelabs BC Inc., for 25 ½ years when she was terminated without cause from her position as process improvement manager.

[2] There are three issues for determination:

1. The notice period to which the plaintiff is entitled;

2. Whether the plaintiff's efforts to mitigate her damages were reasonable; and

3. The amount of damages to which the plaintiff is entitled.

The Plaintiff's Background

[3] The plaintiff is 50 years of age. After high school graduation she trained as a medical lab technician. She started work in that field in 1986 at Moose Jaw Hospital. The following year she moved to British Columbia to work as a medical lab technician at Cowichan District Hospital. On June 26, 1989, the plaintiff began working for Medical Arts as a hematology medical technician. Medical Arts eventually became part of Lifelabs, the defendant. It was not contested by the defendant that the plaintiff was continuously employed by the defendant or its predecessors from June 26, 1989.

[4] In 1990, the plaintiff became supervisor of hematology. Six years later she became operations manager for half of Vancouver Island, half of the Lower Mainland and all the couriers in the lab system. In 1998, she became operations manager for Vancouver Island, which had 250 staff, and was responsible for capital acquisitions and equipment requirements. The plaintiff took a leadership role in labour relations, representing management at the Labour Relations Board during a certification process.

[5] In 2005, the plaintiff earned a designation in Lean Six Sigma, a system focussed on eliminating or reducing waste, duplication or variation in work processes. In 2008, she became operations manager of client services, overseeing

five supervisors and about 250 employees. The plaintiff was responsible for ensuring that quality, safety and all aspects that make for a good work environment flowed through the supervisor group. The plaintiff continued to participate in labour relations matters, representing management in the negotiation process through four out of five collective agreements.

[6] In 2009, the plaintiff obtained her Master's Certificate in Project Management.

[7] In 2012, the plaintiff moved to senior manager of line services excellence. She had no direct reports but was tasked with looking for best practices and continuous improvement through working with managers. That position had a national focus and she worked with two counterparts in Ontario to implement national initiatives. The plaintiff worked on implementing the patient appointment and wait time system to give patients a better experience through providing online booking and giving front end staff a more predictable workload.

[8] The plaintiff spent most of her time in British Columbia, but travelled to Ontario as required on national projects. She was involved in work flow reviews in various patient centres in the province. She was project manager for Oceanside Integrated Health Centre which required relocating a centre in Parksville to another location to integrate services. The plaintiff dealt with the media on behalf of the defendant in the context of a privacy breach.

[9] The plaintiff's last position with the defendant was as process improvement manager. She provided a support function for other managers. She was senior to them in her experience with the defendant although the senior designation was removed from her title with this position. The plaintiff had no one reporting to her directly as she did formerly. She said she loved her work and was happy to continue as process improvement manager until she was 60 or 65.

[10] In 2005, when the plaintiff was facing change and losing her direct reports she applied for, and was offered, a position with Vancouver Island Health but chose to stay with the defendant. She also applied for two jobs in September 2014. The

plaintiff did not want to leave her job but was curious about opportunities outside her current employment. This was prompted by unexplained changes to her traditional work portfolio as well as the fact she did not undergo an annual performance evaluation.

[11] One of the jobs the plaintiff applied for in the fall of 2014 was program manager at Broadmead Care Facility and the other was manager for Cowichan District Hospital. At the time of trial she had only heard back from one of the two potential employers. She did not know the salary for the Broadmead job but that did not preclude her from applying. The plaintiff found the two jobs postings on the websites for the respective organizations.

The Plaintiff's Remuneration

[12] At termination the plaintiff earned an annual salary of $108,357.79 and the defendant matched 6% of her salary through RRSP contributions. The defendant also paid the plaintiff's Medical Services Plan premiums of $72 per month and provided her with extended health and dental coverage.

[13] In addition to her salary and benefits, the plaintiff received an annual bonus or short-term incentive plan (STIP) from the defendant from 2000 until her dismissal. In 2014, the bonus was $11,251.29. She regarded it as a consistent and significant portion of her remuneration.

The Termination

[14] The plaintiff met with Michelle Hings and Tina Jansen in Victoria on November 12, 2014. She assumed they were coming to discuss some data she had compiled or meet with an employee the plaintiff had been dealing with on a discipline issue. Ms. Hings informed the plaintiff she was going to be laid off and her last day would be December 31, 2014. The plaintiff was offered the option to stay at work if she wished. She did not want to leave things in the hands of someone else so she decided to keep working.

[15] While the plaintiff entertained suspicions about her employment situation through 2014 due to changes that had taken place, she was still devastated. She took pride in working for the defendant and had been with the company more than half her life. The plaintiff said the defendant had been very good to her and had helped her to develop into a manager. She understood the decision to let her go was a business decision.

[16] The plaintiff was in a car accident on November 24. She sustained whiplash which prevented her from working full time. After the accident she worked not less than 5.5 hours per day, a change from her formerly long hours.

The Plaintiff's Job Search

[17] When the defendant terminated the plaintiff it offered her coaching sessions with Right Management, an outsourcing company that assists people who have been displaced or dismissed in obtaining skills to make them more marketable, assist them with resumes and cover letters and provide them with other resources to find a new job. The plaintiff began working with Right Management around November 24. She completed an online skills assessment and obtained resume coaching in January 2015 to bring her resume up to industry standards.

[18] The plaintiff attended an online career expo hosted by Right Management, and used the company's website to check for job postings. She learned to look for new opportunities through various online methods such as LinkedIn, craigslist, Kijiji and Monster as well as on individual websites for BC Transit, BC Ferries and others. The plaintiff looked for senior management positions in health care, but looked outside that industry when the skill set in a posting matched what she had to offer. She did not see a lot of positions on Vancouver Island advertised through Right Management's website.

[19] The plaintiff prefers to stay in Victoria or at least on Vancouver Island. Her son is in Victoria, her sister is in Duncan and she has an aunt in Campbell River as well as many cousins. The plaintiff knows she may need to reach out further geographically if her job search on Vancouver Island is unsuccessful.

[20] The plaintiff kept a log of jobs she has applied for. She looked more intensively for work as of April 1 because it is the start of the government's new fiscal year and she felt senior positions waiting for funding are more likely to be posted then. As well, prior to April 1 she was still dealing with the after effects of the car accident and it was painful to spend a lot of time on the computer.

[21] In addition to applying for jobs online, the plaintiff spoke to several people from her former employment, including three doctors and a manager along with someone who works for the Vancouver Island Health Authority. She sent her resume to two executive recruiting firms at the suggestion of a former co-worker.

[22] In terms of following up on the applications she made, the plaintiff followed the instructions on posting websites to the effect that only successful candidates would be notified. She felt that was consistent with the advice she had received from Right Management.

[23] The plaintiff is not optimistic about her prospects but is hopeful something will come up. She feels that once someone is over 50 it is difficult to find work, particularly to break in to senior management at another organization.

[24] Counsel for the plaintiff asked her to comment on a report prepared by Bruce Gillespie, the defence mitigation expert. Mr. Gillespie identified a number of potential employment opportunities that he thought might be suitable for the plaintiff's skill set to support his opinion that she should have been able to find work within about three months of termination.

[25] The plaintiff articulated a number of reasons she did not pursue the positions identified in Mr. Gillespie's report, which he found through data mining software. Some of them involved technical testing positions and she had not been on the testing bench for nearly 18 years so was not qualified to either test or supervise testing. In addition, none was a senior management position and all involved substantially lower salaries than what she had been earning. Some of the jobs were in Vancouver. Some required either a Bachelor of Science or a Master's degree, and

she did not have either. There were several postings requiring computer expertise in informatics, which the plaintiff does not have.

[26] On cross-examination, the plaintiff agreed she only applied for three jobs in the first four months after termination. She viewed the opportunities available to her at that time as limited. The plaintiff agreed the number of job applications she made increased just before examination for discovery on May 22. She attributed this to more government opportunities in the new fiscal year.

[27] Counsel for the defendant pointed out to the plaintiff one job the defence expert found and noted in his report. It was for a clinical researcher with the BC Cancer Agency, a job the plaintiff admittedly missed in her job search. The plaintiff agreed if she had been aware of the job she would have applied for it. Further, she acknowledged she had the expert report before the examination for discovery. While the posting stated a preference for a Master's degree, the plaintiff agreed she had the skills listed in the job description. There was another job in Comox identified in the expert report which the plaintiff knew of by the time of examination for discovery but could not explain why she did not apply.

[28] The plaintiff was extensively cross-examined on her networking efforts after termination. She could not network with people who worked for the defendant until her termination was announced at the end of December. After that time she met with three doctors and several other people, but not with any potential employers or former employees of the defendant now working with the Vancouver Island Health Authority. She agreed Right Management told her networking was important but did not recall being told to arrange up to three meetings per week on an ongoing basis as part of her job search.

[29] The plaintiff agreed that with her management training and project management certificate she could look outside the health area to management generally, but she was mostly focussed on jobs in health care. She acknowledged that by not considering a move to the Lower Mainland she was reducing her opportunities but wants to remain on Vancouver Island if possible for family reasons.

[30] Counsel for the defendant suggested to the plaintiff that she ignored the advice of Right Management to follow up on applications. The plaintiff did not feel it was helpful at the senior manager level to call potential employers and sound needy but ultimately agreed it would have been useful to contact people listed as contacts for jobs.

[31] Defence counsel took the plaintiff through a variety of postings in the expert report and asked her why she had not applied for them. Her explanations were similar to those given on direct examination: she felt she did not have the industry experience or education the posting listed. The plaintiff did agree that she applied to be a senior project manager to lead and manage large ministry IT projects without a computer background. She also applied to be the director of fleet management in response to a posting that listed an academic requirement she did not have. She said they listed it as ideal and not required.

The Bonus Program a.k.a. STIP

[32] The plaintiff agreed the terms for STIP potentially changed every year and she had to sign off on the details for the coming year. She was also aware that between 2009 and 2014 some of the terms changed and this was noted in the document she was provided with. She agreed the terms and conditions of STIP were contractual and one of the requirements was that she be employed at the time of payout.

[33] The fiscal year end for STIP is October 31. The plaintiff understood if she was terminated, the STIP would be pro-rated and to be eligible for STIP she had to be an employee for three months of the fiscal year. She was terminated on December 31, 2014 so did not work three months of the 2015 fiscal year. She did not pay much attention to STIP each year and never took the opportunity to seek out more information about it.

The Defence Mitigation Expert

[34] Bruce Gillespie gave expert opinion evidence on job searches, employment availability and related issues. His report was focussed on the plaintiff's efforts at mitigation. In Mr. Gillespie's opinion, the plaintiff had many employment opportunities available to her within her area of specialty or where her skills were easily transferable. He found there were many opportunities available to her for several months and likely for months to come, based on his analysis of employment trends and job postings.

[35] Mr. Gillespie thought the plaintiff had excellent breadth in job scope and strong credentials, based on her experience in both technical managerial and project roles than most "in her category." In his opinion, based on his observation of job searchers he has observed or worked with during significantly worse market conditions over the past 30 years, a moderately well-managed job search yielded employment offers in a three to five month period, though there is a period of adjustment immediately after termination which should be factored in to that analysis.

[36] Mr. Gillespie testified Right Management "would have" emphasized the importance of setting up frequent networking meetings and face to face meetings with qualified referral sources. I put that comment in quotation marks because nobody from Right Management testified about the company's dealings with the plaintiff and the plaintiff did not agree on cross-examination that she was advised by Right Management to network as extensively as Mr. Gillespie recommended.

[37] Mr. Gillespie also recommended face to face contact with key recruiters, a consistent review of opportunities via the internet and responding to job advertisements and postings "with the objective of setting up face to face meetings." He opined the plaintiff needed to move away from sporadic low value activities, such as virtual job fairs and random searching of the websites of major employers, to those that would engage others in a face to face setting. Essentially, Mr. Gillespie

said most jobs are in the “hidden market” and are only available to people who network and go outside traditional job search methodologies.

[38] On cross-examination, Mr. Gillespie explained that he used a data mining program to search for the jobs he included in the report both in the table and the appendix to the report. It is a subscription-based service so it is not available free of charge to job seekers. He acknowledged that on close examination, some of the positions he listed were duplicates, either because they were copied twice by accident or because the data mining program used two sources to get one posting. As an example, data mining could locate a job through an employment website as well as directly through the organization’s website. Mr. Gillespie did not agree that this affected his report, as he probably underestimated the number of jobs available in any event.

[39] Mr. Gillespie testified there were two fluctuations in job availability, one at Christmas and one in the summer period. The provincial government has been under a hiring freeze for a number of years. He did not agree there could be a correlation between the fiscal year and postings and he did not agree there were any postings in the provincial government which were available to internal applicants only, although internal candidates might have a better level of viewing jobs than external candidates. He did not see the plaintiff’s age as a negative. He is familiar with studies done in the area which conclude there is no significant impact on employment until the age of 60. Those studies were not in evidence before me.

[40] Many of the postings Mr. Gillespie listed in his report were for non-supervisory positions. He included reference to them because in his view, the job you want is not always there and you may have to take something at lower pay and a lower classification level. Mr. Gillespie agreed he included a job in his report that paid $14.90 per hour, substantially less than the plaintiff earned. He justified its inclusion to substantiate his conclusion that there are jobs in the plaintiff’s sector but ultimately he agreed it was one job he could have filtered out. His intent was to look at activity in a sector rather than compensation.

Michelle Hings

[41] Ms. Hings is the director of client services for the defendant. The defendant is a national company and the largest provider of diagnostic testing services in British Columbia. It is the fourth largest provider of those services in the world. The corporate structure includes 50 to 60 directors in Canada, 9 or 10 senior vice presidents and then the CEO.

[42] Ms. Hings has known the plaintiff for over a decade in various roles. Latterly the plaintiff was one of Ms. Hings' direct reports as the process improvement manager. Managers are below the director level.

[43] The plaintiff did not have direct reports of her own as process improvement manager, although in past roles she has had people reporting to her. She provided assistance for other managers in various capacities and worked with Human Resources. The plaintiff was terminated because the defendant bought BC Biomedical Laboratories and integrated the two companies. Many of the plaintiff's functions were to be moved to other departments.

[44] Ms. Hings testified the defendant does not have senior managers. Directors are on the senior leadership team and managers are the next level down. She acknowledged agreeing at examination for discovery that the plaintiff was like a senior manager and senior to the other managers in the organizational structure. She explained the plaintiff was a senior manager until 2012 and then became a process improvement manager. Ms. Hings thought it was a title change rather than a demotion.

[45] Ms. Hings agreed the annual bonus document did not specify a person might be ineligible for a bonus if he or she was terminated. The board has sole discretion over the bonus plan in terms of how much people will get and how it is administered. The current plan is more or less the same as the 2014 plan, with a few changes. All managers would get different bonuses based on the personal performance portion of the annual bonus document.

Reliability and Credibility

[46] Counsel for the defendant urged me to find the plaintiff's credibility was suspect. He cited a number of examples, such as the plaintiff's surprise at being terminated when she had detected changes in her responsibilities and had actually looked for other jobs while still in the defendant's employ. Counsel also pointed out the inconsistency in the plaintiff's account of which employment websites she accessed along with other similar considerations.

[47] Overall I found the plaintiff gave her evidence in a credible and forthright manner. While there were discrepancies in her account of which employment websites she had accessed and a pronounced spike in her job search around the time of examination for discovery, I conclude that she gave an honest and reliable account of her work history, her termination and the resulting job search.

[48] As to the defendant's witnesses, while I found Ms. Hings was credible, she was caught in an inconsistency concerning whether the plaintiff was a senior manager or simply a manager. It was clear from the plaintiff's employment history that at one point she had been called a senior manager. That title was removed during reorganization. Ms. Hings tried to downplay the significance of the senior manager designation but she was clearly uncomfortable when confronted with the inconsistency in her evidence from examination for discovery on this point.

[49] I found Mr. Gillespie's expert report at first blush supported the defence contention that there were dozens of jobs available for which the plaintiff was qualified. After cross-examination, however, it is clear Mr. Gillespie did not take care to ensure that duplicate postings or jobs which were clearly unsuitable for the plaintiff, either due to the low wage or to her lack of qualifications, were culled from the report. I do not find the report was calculated to make it look like there were more jobs for the plaintiff's qualifications than was actually the case, but the duplication and lack of care reduce the weight I might otherwise put on Mr. Gillespie's opinion and his evidence at trial.

Notice Period

[50] In the absence of contractual terms concerning termination, an employee is entitled to reasonable notice or pay in lieu of notice if she is dismissed without cause. The amount of notice is case specific. There are four main factors to consider in arriving at an appropriate notice period: the character of the employment, the length of service, the employee's age and the availability of similar employment, having regard to the employee's experience, training and qualifications: *Bardal v. Globe & Mail Ltd.* (1960), 24 D.L.R. (2d) 140.

[51] The plaintiff is 50. She believes her age will be a factor in securing employment commensurate with her position with the defendant. This belief has support in the jurisprudence, notwithstanding Mr. Gillespie's optimism that it is not difficult to find work until one attains the age of 60.

[52] The plaintiff has worked for 25.5 years for the defendant. While she lost the title of senior manager as a result of reorganization several years before termination, the plaintiff was senior in her years of experience and service to the other managers in the organizational chart. The fact that she had no direct reports at the time of termination matters not, as her role was to support the other managers, not front line supervisors as in the past.

[53] The plaintiff seeks notice in the range of 20 to 24 months, citing a number of cases involving individuals of roughly the same age and duration of employment:

- *Fraser v. Kelowna (City)*, 1993 CarswellBC 1192 (BCSC) - a 59-year-old manager with 23 years of service and a 60-year-old assistant manager with 22 years of service were awarded 24 months' notice, based on their many years of service and level responsibility.

- *Bell v. Itzak Walton Killam Hospital for Children*, 1986 CarswellNS 114 (NSSC) - a 54-year-old director of a hospital pharmacy with 26 years of service was awarded a notice period of 24 months.

- *Halliday v. Hanover Kitchens (Canada) Inc.*, 1997 CarswellOnt 4642 (OSCJ) - a 55-year-old national sales manager with 28 years of service was awarded a notice period of 24 months.

- *Miller v. ICO Canada Inc.*, 2005 CarswellAlta 397 (ABCQB) - a 51-year-old special project supervisor with 30 years of experience was awarded a notice period of 22 months based on the "considerable responsibility and authority" that went with his position.

- *Trudeau-Linley v. Plummer Memorial Public Hospital*, 1993 CarswellOnt 867 (OntCJ) - the 46-year-old plaintiff was awarded a 22-month notice period. She was dismissed after 20.5 years, had broad knowledge of hospital operations and there were limited options for employment in a similar capacity as Quality Assurance Co-ordinator.

- *Bastow v. Woodward Stores Ltd.*, 1992 CarswellBC 887 (BCSC) - a 57-year-old assistant store operations manager who had 23 years of service was awarded a 20 month notice period. She had a highly responsible job with doubtful prospects for finding similar alternative employment.

[54] The defendant does not dispute the plaintiff's long and valuable service, but maintains a notice period of 20 to 24 months is reserved for individuals in higher managerial roles than the one the plaintiff held. The defendant suggests 15 to 18 months is an appropriate notice period, less the eight weeks' notice the plaintiff received at the end of her employment by way of working notice. The defendant has cited a number of authorities, of which the following provide some assistance in this case:

- *Lacouvee v. McGavin Foods Ltd.*, [1993] B.C.J. No. 467 - the plaintiff was 54 years old at termination with 30 years of service. He had significant supervisory responsibilities. The court awarded a notice period of 18 months.

- *Polak v. Surrey Memorial Hospital Society*, [1996] B.C.J. No. 131 - the 51-year-old plaintiff had 22 years of service when her employment was terminated. She was an accounts receivable manager. The court found the appropriate amount of notice to be 17 months;

- *Lewis v. Lehigh Northwest Cement Ltd.*, 2008 BCSC 542 - the plaintiff was nearly 60, had been employed for nearly 26 years and was the Manager, Process Computer Systems which involved substantial duties and responsibilities at a cement plant beyond what the plaintiff in the case before me had in her portfolio. He was awarded a notice period of 22 months.

- *Hooge v. Gillwood Remanufacturing Inc.*, 2014 BCSC 11 - the 57-year-old plaintiff was terminated from his position as production manager after 36 years of service. He had a grade 12 education and spent his entire working life in a particular sector of the wood manufacturing industry, which limited his options for future employment. The notice period was 18 months.

- *George v. Cowichan Tribes,* 2015 BCSC 513 - the plaintiff was dismissed at age 55 after 33 years of service. She was in a supervisory position over six managers who in term had teams of social workers. She also had budget responsibilities. The court determined the notice period to be 20 months.

[55] Taking into account the plaintiff's age at termination, her years of service and the position she occupied at termination, I find a reasonable notice period to be 18 months. The plaintiff did not have as broad a scope of duties, including budget responsibilities, as other individuals of similar age who received longer notice periods.

The Plaintiff's Efforts at Mitigation

[56] The duty to mitigate is articulated in *Forshaw v. Aluminex Extrusions Ltd.* (1989), 39 B.C.L.R. (2d) 140 at para. 17:

> The duty to "act reasonably", in seeking and accepting alternate employment, cannot be a duty to take such steps as will reduce the claim against the

> defaulting former employer, but must be a duty to take such steps as a reasonable person in the dismissed employee's position would take *in his own interests* - to maintain his income and his position in his industry, trade or profession. The question whether or not the employee has acted reasonably must be judged in relation to his own position, and not in relation to that of the employer who has wrongfully dismissed him. The former employer cannot have any right to expect that the former employee will accept lower paying alternate employment with doubtful prospects, and then sue for the difference between what he makes in that work and what he would have made had he received the notice to which he was entitled.

[57] To satisfy the court that the plaintiff failed to mitigate, the defendant must show not only that the plaintiff failed to take steps to mitigate but also that had the plaintiff taken those steps he or she could likely have found equivalent employment: *Smith v. Aker Kvaerner Canada Inc.*, 2005 BCSC 117, at para. 32.

[58] The onus is not a light one and is not discharged simply by the defendant cross-examining the plaintiff on possible jobs, such as the ones unearthed by Mr. Gillespie using his data mining software. As I noted earlier in these reasons, many of the job postings in Mr. Gillespie's report were duplicates. Some offered hourly wages far below what the plaintiff earned at termination. Others were for jobs she was not currently qualified to do, such as a lab technician. As the plaintiff said, she has not been "on the bench" in a number of years and her experience and trained is geared more towards the managerial side of things at this point in her career.

[59] Mr. Gillespie's opinion about what an individual looking for a job should be doing was illuminating, and may well guide the plaintiff in her future endeavours, but it reflected what someone would do in a perfect world with a perfect job coach. It also reflected a level of intensity and a focus on "hidden jobs" that was not apparent in the training the plaintiff received from Right Management. Nobody from Right Management testified about what exactly the plaintiff was instructed to do in order to find work. The defendant relies on what Mr. Gillespie said Right Management "would have" told the plaintiff, based on his experience.

[60] The plaintiff took the training offered by the defendant through Right Management, participated in online work expos and followed other suggestions from her coach at Right Management. It took her some time to recover from her job loss and the car accident that occurred very shortly after her termination. The plaintiff was not obliged, at this early stage of her job search, to accept a low paying job outside her preferred area of Vancouver Island. While she has looked for work primarily in the health care field, she has also expanded her horizons to jobs where her management training and credentials would serve her well and perhaps make up for her lack of a graduate degree, which many of the postings referred to by Mr. Gillespie listed as a preferred qualification. In all the circumstances I am not persuaded the defendant has discharged the onus of showing the plaintiff failed to mitigate.

Damages

[61] Is the plaintiff entitled to the bonus?

[62] The plaintiff received an annual bonus, or STIP, from the defendant annually since 2000. The STIP contract stated:

> TERMINATION OF EMPLOYMENT
>
> In the case of termination of employment due to voluntary resignation up to and including the pay-out date in January 2015, all rights to the STIP award will be forfeited. In case of termination of employment due to retirement or involuntary termination, the STIP award will be prorated based on the actual number of full months worked during the 2014 fiscal year, provided the participant had completed at least three (3) full months of employment during the 2014 fiscal year. An employee who is terminated in the 2014 fiscal year will have no eligibility for a STIP award in any future fiscal year.

[63] Identical language appears in the 2015 STIP contract.

[64] The plaintiff's position is that she has received an annual bonus every year since 2000. The amount of the bonus was about 10% of her base salary. If she had continued her employment, she would have continued to earn bonuses. The plaintiff argues the bonus language does not specify that a without cause dismissal will terminate any entitlements to a bonus, even if it is a wrongful termination. The

termination date should be interpreted to mean the lawful termination date, whether decided by the parties or by litigation, throughout the agreement.

[65] To put it another way, the plaintiff says if the defendant intended that entitlement to STIP should end upon a wrongful termination, the language must be clear and unambiguous and leave no doubt that a wrongful termination extinguishes the right to a bonus. The plan is far from clear in this regard. The plaintiff submits in the absence of express language ousting the presumption that the plaintiff is entitled to whatever benefits she would have received during the proper notice period, she should receive her future STIP benefits.

[66] The defendant submits the contractual language is clear. The plaintiff was involuntarily terminated and would only receive a prorated STIP award based on the actual number of months worked, provided she worked at least three full months during the 2015 fiscal year. Since the plaintiff only worked two months of the 2015 fiscal year - November and December 2014 - she is not entitled to prorated STIP for 2015.

[67] I find the contract language the defendant relies on to disentitle the plaintiff from receiving STIP to be vague and inconsistent. While the drafters may well have intended to disentitle employees who are wrongfully terminated from collecting STIP during any notice period, whether a consensual one or one determined by a court, the wording of the clause is far from ambiguous. “Terminated” and “termination” are not defined terms and the qualifier “involuntary” is used inconsistently.

[68] In *Gillies v. Goldman Sachs Canada Inc.,* 2000 BCSC 355, Skipp J. determined a bonus was an integral part of the plaintiff’s compensation, based on four factors:

1. A bonus was received each year although in different amounts;

2. Bonuses were required to remain competitive with other employers;

3. Bonuses were historically awarded and the employer had never exercised his discretion against the employee;

4. The bonus constituted a significant component of the employee's overall compensation.

[69] A similar result prevailed in *Szczypiorkowski v. Coast Capital Savings Credit Union*, 2011 BCSC 1376 where Mr. Justice B.D. MacKenzie held that had the plaintiff not been wrongfully dismissed, he would have been employed and entitled to his bonus. The bonus was awarded on the basis of a five-year average for the duration of the notice period.

[70] On the evidence before me, the plaintiff had routinely received a bonus since 2000. The amount varied from year to year, but it was a significant portion of her compensation. While the defendant reserved the right to determine whether or not a bonus would be awarded, the plaintiff was never denied one and there was evidence the employer was continuing with the STIP plan for the next fiscal year. Finally, Ms. Hings did not necessarily agree the bonuses were awarded to keep the defendant competitive, but common sense dictates that a bonus in the range regularly awarded to the plaintiff would be an incentive to someone with her qualifications.

[71] I find the plaintiff is entitled to her bonus on a prorated scale to the end of the 18-month notice period. The amount will be based on an average of the last five years which counsel for the plaintiff has calculated to be $11,505.88 or $958.82.

Summary

[72] The plaintiff is entitled to the following damages based on an 18-month notice period:

$162,536.76	based on $9,029.82 per month base base salary
8,146.44	based on $452.58 per month for RRSP contributions

17,258.76	based on $958.82 per month as prorated bonus
1,296.00	based on $72.00 per month for MSP premiums
267.08	for out-of-pocket expenses incurred to replace MSP benefits

TOTAL: $189,505.04

[73] The award is reduced by $16,670.43 for the base salary paid for eight weeks and for the $4,640.68 lump sum paid for loss of benefits for a total of $168,193.93.

[74] Unless there are matters I am not aware of, the plaintiff is entitled to her costs of trial at Scale B.

"Duncan J."

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The Honourable Madam Justice Duncan