IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Steinebach v. Clean Energy Compression Corp.,* 2015 BCSC 460

Date: 20150325
Docket: S161995
Registry: New Westminster

Between:

Steve Steinebach

Plaintiff

And

Clean Energy Compression Corp. dba IMW Industries

Defendant

Before: The Honourable Mr. Justice Cohen

Reasons for Judgment

Counsel for the Plaintiff:	T.R. Thomas
Counsel for the Defendant:	M.J. Schalke
Place and Date of Hearing:	New Westminster, B.C. January 20, 2015
Place and Date of Judgment:	New Westminster, B.C. March 25, 2015

[1] The plaintiff brings this application for a summary trial to dispose of his claim that arises from his alleged wrongful dismissal by the defendant.

I. Background

1. The Plaintiff

[2] The plaintiff, now 49 years of age, started working for the defendant on October 17, 1994. His employment of 19.5 years was terminated without cause on May 2, 2014.

[3] The defendant is a supplier of compressed natural gas ("CNG") equipment for vehicle fuelling and industrial applications, including use for buses, heavy-duty trucks and corporate vehicle fleets.

[4] During his tenure with the defendant, the plaintiff held a variety of positions including: service technician; purchasing manager; sales and marketing director of CNG products division; director of CNG sales and marketing for North/East Asia and Canada; commercial projects manager; sales and business development manager for North America; and from March 12, 2013, to the date of his termination, Vice President Business Development Canada (pursuant to the "March 2013 employment contract").

[5] The plaintiff notes that in his role as Vice President Business Development Canada he was primarily responsible for the direction of the business development unit in Canada, and that the principle elements of his role were to direct the business unit, manage all business activities, achieve sales goals, and collaborate with the executive team to develop strategic business plans.

[6] According to the plaintiff, the compensation structure in the March 2013 employment contract was significantly different than the compensation structure it replaced from October 2006, in that his base salary was increased; commissions were calculated at a much higher range of percentages against his own sales; and there was the addition of a bonus incentive, so that if the annual sales forecast was achieved a bonus would be paid.

[7] In his affidavit sworn August 19, 2014, at para. 36, the plaintiff deposed, in part, as follows:

> On February 5, 2014, IMW offered me the newly-created position of Senior Regional Sales Manager; however, I was not satisfied with this employment offer for three primary reasons. First, the compensation structure did not adequately compensate me for my economic contribution to IMW and represented a very significant reduction in the potential for commissions earnings compared to my existing contract of March 2013. Second, the new offer imposed a severance-limited clause in the event that my employment was terminated. Third, the new offer imposed a non-competition clause that was not in my previous contract. Other reasons for my dissatisfaction with the offer were the elimination of my Vice President title, which would have a detrimental effect on my ability to access senior level corporate decision makers, and my effective demotion in the organizational structure by the addition of a new layer of supervision above me.

[8] On March 3, 2014, the plaintiff advised the defendant that he was not satisfied with the February 5, 2014 employment offer, and that he was not able to accept it. Ms. Crystal Holek ("Holek"), the defendant's human resources manager, then told the plaintiff to immediately relinquish his company computer and telephone and leave the premises. According to the plaintiff, he was placed on a "paid leave of absence". The plaintiff later received a formal letter of termination dated May 2, 2014.

[9] At the time of his dismissal the plaintiff was earning an annual base salary of $72,100 ($6,008.33 per month), sales commissions, a cost of living allowance, bonus, vacation pay, and a comprehensive benefits program. He fully expected that his 2014 income would exceed his 2013 income, due to substantially higher sales prospects for his territory going into 2014. He claims that had he remained employed with the defendant and achieved his sales forecast, he would have earned approximately $251,847 in 2014, including salary, commissions, bonus, vacation pay and benefits.

[10] The plaintiff also claims that following his termination he immediately began seeking employment in a senior level role in a CNG related company that allowed him to remain close to his home and family in Chilliwack, but that despite his efforts he was not able to secure a new position that met his criteria. He submits that

having regard to his age and the factors set out in *Bardal v. Globe & Mail Ltd.* (1960), 24 D.L.R. (2d) 140 (Ont. H.C.), a period of 18-22 months of reasonable notice is appropriate. He claims $6,008.33 per month ($72,100 annual) of base salary over the period of reasonable notice; loss of opportunity to earn commissions of $10,000 per month; a bonus of $2,899.17 per month ($34,790 annual); dental and medical benefits, being MSP payments of $138.50 per month; out of pocket expenses totaling $436.60; and RRSP contributions of $567.23 per month.

2. The Defendant

[11] In September 2012, the defendant hired Mr. Hoang Phu "Brian" Nguyen ("Nguyen"), whose job it was to make the defendant more efficient. By the end of 2012, Nguyen had held the position of Senior Vice-President of Global Operations, reporting to the President, and in December of 2013 he became the President.

[12] Nguyen introduced a number of changes, including one to the plaintiff's position. He changed the plaintiff's title from Sales and Business Development Manager to Vice President Business Development Canada. According to the defendant, this change was made because Nguyen thought that decision-makers at customers and potential customers were more likely to respond to an email, voice message, or business card from a salesperson with such a title.

[13] In changing the plaintiff's title, Nguyen also changed the plaintiff's compensation package, which was done, according to the defendant, in order to give the plaintiff a modest pay increase after several years without an increase, and because Nguyen felt a new commission plan would provide a better incentive to the plaintiff to "take a more proactive approach to sales".

[14] The defendant takes the position that notwithstanding the new compensation package the plaintiff's sales territory, as well as his job duties and position, remained the same, namely, to sell the defendant's products and services in Canada. The defendant's position is that the plaintiff had no authority to make hiring or firing decisions; did not have a secretary or administrative assistant; and, was not an officer of the defendant, nor a member of its management team.

[15] In June 2013, Nguyen hired Mr. Dave Orton ("Orton") as Vice President, Global Business Development and Product Branding. Orton made a determination that having salespersons with the title of Vice-President Business Development was potentially confusing because, in the defendant's view, they were salespersons of the defendant's products and not employees with any executive responsibilities. Orton also made a determination that the commission plan for the plaintiff was overly complicated and did not provide proper incentive.

[16] The defendant takes the position that the modified commission plan for the plaintiff did not constitute a significant reduction in his potential commission earnings compared to the commission plan set out in the March 2013 employment contract.

[17] The defendant claims that the February 5, 2014 employment offer to the plaintiff did not make any change to his job duties, although it did entail a change in his job title to Senior Regional Sales Manager Canada. The defendant also takes the position that the title change was not a demotion in that the plaintiff's position would remain the same after his acceptance of the offer, namely, a salesperson to whom no one reported and who was not part of the management team.

[18] Orton was made aware by Holek, that the plaintiff had concerns about the offer. Orton spoke with the plaintiff by telephone on February 28, 2014, and told him, *inter alia*, that he had until March 3, 2014 to accept the offer and that if he did not the defendant would terminate his employment, with a severance package to be negotiated between the parties.

[19] After the plaintiff decided not to accept the defendant's February 5th offer and Holek informed him that he was required to relinquish his company computer and telephone and leave the defendant's premises immediately, the defendant continued the plaintiff's base salary and health benefits from March 3, to May 2, 2014, while the parties attempted to negotiate a severance package. No agreement was reached and on May 2nd the defendant sent the plaintiff a termination letter that read, as follows:

Your employment with Clean Energy Compression Corp. dba IMW Industries ("Company") is terminated effective immediately ("Termination Date"), in accordance with the following terms:

The Company will pay to you:

- Your final base wages to the Termination Date;
- Any accrued vacation amounts, up to the Termination Date, which we currently calculate as $4337.38;
- Any accrued commission amounts, up to the Termination Date, which we currently calculate as $105,129.99;
- An amount of $11,092.32 which is equivalent to eight (8) weeks' wages per the B.C. *Employment Standards Act.* The Company takes the position that you have had much more than eight (8) weeks' working notice of termination so, while the Company is not required to pay you anything under section 63 of the Act, the Company is making such a payment out of its own volition, to assist you in your transition, and on a without prejudice basis to the Company's position that you are not entitled to any additional compensation, under common law or statute; and

The above items will be subject to statutory deductions/withholdings. A cheque to cover the above items is enclosed along with your Record of Employment.

Your benefit coverages will cease as at thirty (30) days from the date of this letter. All disability and life coverage will cease effective immediately, as they cannot be continued post-employment. You may be eligible to convert some group insurance coverages to an individual policy without a medical examination within thirty (30) days of group coverage ceasing. If you are interested, contact the insurer directly.

We remind you that, notwithstanding the termination of your employment, certain obligations under your employment and other contract with the Company, and under law and equity, continue to apply post-termination. These obligations include, but may not be limited to, obligations of confidentiality and obligations relating to intellectual property to which you may have contributed while employed by the Company.

Effective immediately, you are asked to cease all business interactions and communications with/or on behalf of the Company. Please refrain from unplanned or non-scheduled visits with the Company. All interactions, requests for information, or other inquiries must be done through Brian Nguyen or Randy Seanks.

Please return all Company property that you have in your possession, including any confidential Company documents, ID Cards and other items you may have. Please note that any personal belongings will be delivered to your address.

On a without prejudice basis to the Company's position that you are not entitled to any additional compensation, we remind you that you are under a duty to mitigate by looking for, and accepting, other employment.

We wish you all the best in future endeavours.

[20] The defendant submits that the plaintiff had working notice of termination effective March 3, 2014, and that the May 2nd termination letter also put the plaintiff on notice that he had a duty to mitigate. The defendant paid final wages to the plaintiff on May 2nd.

[21] The defendant's position is that any notice period ought not to exceed ten months, and that it ought to take into account that the plaintiff had working notice from March 3rd until May 2nd; that he was paid eight weeks of base wages; that at the time of his termination his annual base salary was $72,100; that the plaintiff should not receive commissions, bonus or benefits during the notice period as he was not actively employed at the time that payment otherwise comes due (March 3rd); and that in the alternative, the best way to calculate the plaintiff's lost commissions, bonus and benefits for any notice period is by taking a monthly average of commissions, bonus and benefits that were actually paid to the plaintiff in 2011, 2012 and 2013. The defendant also takes the position that the amount of $78,206.76 paid to the plaintiff on May 2nd as part of his final wages (commissions that had not accrued because the goods had not shipped at the time) should be deducted from any compensation the plaintiff is awarded.

II. The Notice Period

1. Reasonable Notice

[22] A key conflict in the positions of the parties on reasonable notice is the characterization of the role played by the plaintiff with the defendant under the March 2013 employment contract.

[23] The March 2013 employment contract is in the form of a letter to the plaintiff which states, *inter alia*, that, "As a result of reorganization within the Sales Department, we are pleased to offer you the position of Vice President of Business Development, Canada. In conjunction with the role comes a new compensation structure, outlined below and effective 2013/03/04. We feel that your skills, abilities

and experience will enable you to find great success within the new structure." The letter attaches a job description which states, *inter alia*:

> "The VP Business Development is responsible for the direction of the business development unit, and holds direct responsibility for acquisition of new clients and the establishment of productive and profitable relationships with external organizations. … Key elements of employment include the assessment of operational issues regarding competitiveness, the ability to stay current in trends and innovations that impact our business interests, and the thorough review of research, feasibility studies and business plans for the improvement, development and customization of products and services. …".

[24] The defendant submits that the job description suffers from "business jargon", giving the example of referring to a janitorial position as a custodial engineer, and that to the extent that the job description sets out something other than a sales position, it is inaccurate.

[25] The plaintiff's position is that he was responsible for all aspects of business development and sales for the territory of Canada, as well as some projects and customers in the United States which were duties that, in most cases, went well beyond that of just selling. The plaintiff also noted that the job description included a number of management level duties and responsibilities that accurately reflected many of his actual duties with the defendant.

[26] The defendant referred to the plaintiff's examination-for-discovery where the plaintiff said that in respect of the Canadian market he was a salesperson and that he provided guidance, mentoring, support, processes and tools to the rest of the sales team. He also said that while generally his compensation increased with the March 2013 employment contract, his core duties were generally the same, "although dramatically different from … the previous contract in 2006 both in level of language of responsibility as well as ownership of certain things like cost containment, budgeting, all that kind of stuff which hadn't been spelled out like that, and of course the level of qualifications, as I mentioned, had risen a fair bit." He did agree that his on-the-ground day-to-day duties were relatively the same after the March 2013 employment contract as they were before.

[27] The defendant submits that the plaintiff was one of many salespersons in the employ of the defendant and that the skills possessed by him could be used to sell many types of industrial machinery, and he is not limited to selling the defendant's products and services. The defendant insists that the only thing the plaintiff was responsible for was making sales and executing approved marketing initiatives in his territory and that any notice period ought not to exceed ten months given all the circumstances of the plaintiff's employment, citing *Shinn v. TBC Teletheatre B.C*. *et al.*, 2001 BCCA 83; *Husband v. Labatt Brewing Company Ltd*., [1998] B.C.J. No. 3193 (S.C.); *Bergmann v. CPT Canada Power Technology Ltd.* (1997), 31 C.C.E.L. (2d) 97 (Alta. Q.B.); *Pritchard v. The Stuffed Animal House Ltd*., 2010 BCSC 213; *Graham v. Galaxie Signs Ltd*., 2010 BCSC 609, aff'd 2013 BCCA 266; and, *Sharp Electronics of Canada Ltd. v. Nelson*, 2003 ABCA 57.

[28] The defendant also submits, citing *Starks v. Corner Brook Garage Ltd*. (2002), 220 Nfld. & P.E.I.R. 332 (S.C.T.D.); and, *Allen v. Ainsworth Lumber Co*. *Ltd.*, 2013 BCCA 271, that the plaintiff had working notice from March 3, 2014 until May 2, 2014, at which point he was terminated, and that if, for example, the notice period awarded to him was ten months, notice has already been given for two months, with the remaining eight months requiring compensation in lieu. In the alternative, the defendant submits that the plaintiff's employment was terminated on March 3rd when he was told to leave the office of the defendant, and any remuneration in respect of the period from March 3rd to May 2nd ought to be characterized as pay in lieu of notice and credited against any damages awarded to the plaintiff.

[29] The general principles used to determine an appropriate length of notice were recently summarized *in Ostrow v. Abacus Management Corporation Mergers and Acquisitions*, 2014 BCSC 938:

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

> [36] In *Bardal v. Globe & Mail Ltd*. (1960), 24 D.L.R. (2d) 140 (Ont. H.C.) [*Bardal*], at p. 145, the factors to be considered when determining reasonable notice were described in the following oft-cited paragraph:
>
> > There can be no catalogue laid down as to what is reasonable notice in particular classes of cases. The reasonableness of the notice must be decided with reference to each particular case, having regard to the character of the employment, the length of service of the servant, the age of the servant and the availability of similar employment, having regard to the experience, training and qualifications of the servant.
>
> This passage was quoted with approval by the Supreme Court of Canada in *Machtinger v. HOJ Industries*, [1992] 1 S.C.R. 986, at pp. 998-999.
>
> [37] The British Columbia Court of Appeal adopted the *Bardal* approach in *Ansari v. British Columbia Hydro and Power Authority* (1986), 2 B.C.L.R. (2d) 33 [*Ansari*], which is the leading case in this province. In *Ansari*, Chief Justice McEachern stated at p. 43:
>
> > At the end of the day the question really comes down to what is objectively reasonable in the variable circumstances of each case, but I repeat that the most important factors are the responsibility of the employment function, age, length of service and the availability of equivalent alternative employment, but not necessarily in that order.
> >
> > In restating this general rule I am not overlooking the importance of the experience, training and qualifications of the employee but I think these qualities are significant mainly in considering the importance of the employment function and in the context of alternative employment.
>
> [38] The *Bardal* factors are not exhaustive, and no single factor is determinative (*Wallace v. United Grain Growers Ltd*. *(c.o.b. Public Press),* [1997] 3 S.C.R. 701 at para. 82 [*Wallace*]). When assessing these factors the court must not apply a formulaic approach, but must assess the relevant factors on a case by case basis, looking at recent precedents from the court to determine an appropriate range (*Kerfoot v. Weyerhaeuser Co*., 2013 BCCA 330 at para. 47 [*Kerfoot*]; and *Wallace* at para. 82). In *Honda Canada Inc*. *v. Keays*, 2008 SCC 39, the Supreme Court of Canada has made clear that, like all damages for breach of contract, in damages for wrongful dismissal the court must look at the reasonable expectation of the parties at the time the contract was made (paras. 55-56).

[30] The authorities relied upon by the plaintiff to support an award to him for a period of reasonable notice of 18-22 months include *Lemay v. Canada Post Corp*. (2003), 26 C.C.E.L. (3d) 241 (Ont. S.C.J.) (16 months); *Ahlberg v. O & K Orenstein & Koppel Inc.*, 2001 ABQB 856 (15 months); and, *Day v. JCB Excavators Limited*, 2011 ONSC 6848 (17 months).

[31] The plaintiff began his employment with the defendant in a junior role (technician), and worked his way up to progressively more senior roles, including manager and director, before being promoted to Vice President Business Development Canada.

[32] The plaintiff submits that each of his roles carried a high level of responsibility, demonstrated by the following activities:

- managed a large budget ($5 million);
- responsible for marketing and costing;
- responsible for a significant portion of revenue production;
- recruited and supervised distributors and sales representatives in foreign markets;
- led the rebranding of the defendant's sales/marketing tools;
- participated in weekly management meetings;
- contributed to corporate strategy development;
- advocated for government initiatives to support the CNG industry; and
- responsible for client acquisition and contract negotiation.

[33] The plaintiff submits that these activities demonstrate his high-level understanding of the defendant's products, market, customers, and business strategy. In each position as manager and director he was steadily increasing his knowledge and skill level in the CNG industry, which served him in his role as Vice President Business Development Canada.

[34] The plaintiff submits that, because his position as Vice President Business Development Canada made him responsible for developing new business, it had a direct impact on the defendant's profitability in Canada and, therefore, carried a high level of responsibility.

[35] He also notes that the March 2013 employment contract contains a job description that lists duties and responsibilities, including:

- assess operational issues in regard to competitiveness;
- carry out feasibility studies / business plans;
- collaborate with the executive team to develop short and long-term strategic plans, including the preparation of annual business plans;
- conduct sales forecasts;
- create strategies to ensure competitive edge;
- create marketing campaigns for new products and services including budgeting;
- create product segmentation strategies;
- develop and implement distribution strategies, reselling agreements, and other growth opportunities;
- develop and implement quarterly and/or annual sales plans, policies, and programs for territory sales staff and agents;
- develop execution strategies and tactics to support strategic plans at the divisional, regional, and international levels;
- execute strategic marketing plans;
- integrate and align sales strategies with available talent, processes, IT systems, and other areas to increase sales force capability and success;
- provide direction for the business development unit, ensuring appropriate training and guidance are provided; and
- provide input from sales for strategic planning purposes.

[36] He submits that this position also required a significant amount of industry experience and expertise, product knowledge, market knowledge, client knowledge, the ability to use this knowledge and expertise to develop business development

strategies, and the ability to utilize this knowledge and expertise to achieve the defendant's overall business strategy.

[37] As well, the March 2013 employment contract contained a job description with the following experience requirements:

- 10+ years of direct work experience in sales and/or business development;
- strong experience in all aspects of sales, including growth strategies, distribution channel management, account development, and business planning;
- proven ability to lead and direct sales forces;
- demonstrated knowledge of accounting and financial practices;
- experience creating and managing budgets for a large, distributed department;
- understanding of the industry and area of service;
- demonstrated knowledge of marketing and advertising theories and practices;
- experience creating incentives and compensation plans; and
- excellent grasp of brand building and articulation of value propositions.

[38] While the plaintiff submits that his role as Vice President Business Development Canada carried a high level of importance, he acknowledged that he did not have supervisory responsibilities. He notes that in *Ostrow*, the Court commented on the presumption that positions with supervisory or management functions command a longer notice period. The Court held that it is appropriate to focus on advanced training and specialized skill when the person is employed due to their professional skill:

> [39] With regard to the character of employment, the traditional approach has been for the court to grant more notice to employees with more responsibility, usually in the form of supervisory or managerial responsibility. In *Ansari*, McEachern C.J.S.C. criticized the practice of distinguishing between employees who have supervisory duty and those who do not. He stated that this distinction has little application to professional employees who are

> employed due to their professional skill. It is the advanced training and specialized skills used in the position which are important (at p. 39).
>
> [40] The recognition of the importance of skills and training is linked to the primary purpose of notice, which is to provide an opportunity to find alternative and comparable employment. That job search may be difficult for an employee in certain circumstances even without prior supervisory responsibilities. Rather than focus on supervisory duties, courts have occasionally looked at the salary of the plaintiff as indicating the level of responsibility or seniority of a job: see for example, *Kerfoot* at para. 48; and *Phillips v. Jakin Engineering & Construction Ltd.*, 2012 BCSC 2066 at para. 71).

[39] In *Ostrow,* the plaintiff's educational background and work experience demonstrated a greater degree of education and specialized knowledge than the plaintiff in the instant case:

> [46] Mr. Ostrow did not have any supervisory responsibilities, but provided tax advice to structure high-level financial transactions. He has two Masters Degrees specific to this role, one in International Economics and Finance and the other in Business Taxation, as well as nineteen years' experience in the international tax industry. Mr. Ostrow is a highly educated and specialized professional.

[40] However, I also note the plaintiff's submission that the Court in the case at bar should consider specialization in the CNG industry (which he developed over 19.5 years of working for the defendant), rather than his lack of supervisory functions, as a factor for increasing the notice period.

[41] Specialization was a factor to increasing the notice period in *Sciancamerli v. Comtech (Communication Technologies) Ltd.*, 2014 BCSC 2140. The defendant emphasized that the plaintiff's job was primarily a sales position, the plaintiff's sales skills were transferable to any industry, and these factors should militate against longer notice. However, the Court found that the plaintiff had developed a degree of specialization based on his specific knowledge in the industry, and this warranted a longer notice period than that of a general salesperson:

> [21] The parties dispute whether the plaintiff's job entailed specialized skills or not. Comtech's ad for the position sought people with college or university degrees in business, engineering, computer science or marketing, and at least five years' experience in "external sales". The defendant says those education qualifications are broad and general.

[22] Certainly the preference for business or marketing skills is general as it relates more to sales than any specific industry, but the inclusion of engineering and computer science is an indication that Comtech was seeking someone with specific knowledge. The fact that the plaintiff has a 20-year work history devoted almost exclusively to the telecommunications field no doubt made him an excellent candidate for the job. This was not an entry-level sales position which might require a candidate be defined more by sales skill than any particular knowledge base.

[23] The defendant emphasized the job was primarily a sales position and says that sales skills are transferable to any industry. I also note that there was a clear division in the company between the sales staff and the technical and operational team. Comtech say these factors militate against longer notice.

[24] I agree that the position was primarily a sales position but Comtech was looking for someone with specific knowledge in the industry. It is highly unlikely someone without any familiarity with the equipment, jargon and technical needs of telecommunications systems would be considered an attractive candidate for the job based on sales experience alone. The plaintiff was an ideal candidate because of his combination of sales and technical knowledge. *Hill v. Johnson Controls L.P.*, 2006 BCSC 826 [*Hill*] is very helpful on this point, at paras. 46 - 47:

> [46]...The defendant says that the plaintiff was a sales person and relies on a number of cases that suggest the notice period should be relatively short, equal to approximately two and a half to three weeks for each year of service. The leadings case in this line of authority is *Husband v. Labatt Brewing Co*., [1998] B.C.J. No. 3193 (S.C.). Brenner J. ... said at paragraph 17: Generally, in “salesman” and “sales manager” cases the court has consistently awarded notice in the range of 2.5 weeks per year of service even where the plaintiffs are in their 50s or 60s. The principles underlying this is the fact that the skills of sales employees are considered to be more readily transferable, thus enabling them to secure new employment with relative ease.
>
> However, the *Husband* case makes clear that this is not an absolute rule to be applied in all cases involving sales positions.
>
> > I accept the plaintiff's submissions that his job description of sales representative ought not to be conclusive and that the nature of his employment must be determined by examining the plaintiff's actual duties and responsibilities (paragraph 10).
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> [47] For example, in *Gillies v. Goldman Sachs Canada Inc*. (2001), 95 B.C.L.R. (3d) 260, 2001 BCCA 683 the Court of Appeal held that 13 months was the appropriate notice period for a securities salesperson who, on the basis of the *Husband* formula would have been entitled to less than four months. The court emphasized the specialized nature of the sales function and the limited alternative employment opportunities in that field.

> [48] ...This is not a case where it can simply be assumed that a salesman experienced in selling one product or service can easily obtain another job selling the same thing or a job selling something else. In fact, the plaintiff has still not been able to find a job that makes use of his knowledge and experience.
>
> [25] Overall, I find that the plaintiff does have a degree of specialization that justifies an increase in the notice period.

[42] The defendant submits that it is important to consider that the plaintiff was not part of the executive team, did not manage anyone, had no one reporting to him, and did not have the authority to make hiring decisions. Orton deposed that the plaintiff was not responsible for "creating, assisting or dictating the [d]efendant's executive-level market strategies" for Canada, rather he would have forecasts, budgets, strategies and plans pertaining to just him as any salesperson would. In addition, the defendant submits that the plaintiff "did not have any particular academic training that was germane to his duties with the defendant."

[43] In the instant case, as noted above, the March 2013 employment contract included a job description which contained numerous requirements.

[44] The plaintiff submits, and I agree, that while he held a sales position, his position required a degree of specialized skill and knowledge that would not be required if the position was merely to sell the defendant's products. Similar to *Sciancamerli*, he had "familiarity with the equipment, jargon and technical needs" of the CNG systems to warrant a degree of specialized skill and I am satisfied that this justifies a longer notice period for the plaintiff.

[45] Although the defendant referred to a performance review of the plaintiff that rated him as being a 3 on a scale of 5, the plaintiff was not dismissed for poor performance, and in my view it is reasonable to infer that his length of loyal service to the defendant and historical acceptable performance, along with his extensive experience in the industry formed a large part of the defendant's decision to offer him the position of Vice President Business Development Canada.

[46] In my opinion, based upon the whole of the evidence, and the authorities, I find that the plaintiff should be awarded 16 months' notice. When I consider the plaintiff's age at the time of his termination, the length of his employment with the defendant, the degree of his specialization, and the fact that for much of his employment with the defendant he held senior-level positions that carried job duties with a high degree of responsibility and importance, and as submitted by the plaintiff, his contribution to the profitability, reputation and growth of the defendant, 16 months seems to me to be an entirely appropriate award.

[47] I also think it would not only be unfair, but completely contrary to the weight of the evidence to accept the defendant's characterization of the plaintiff to the effect that his duties with the defendant did not go beyond that of "simply selling". I do not accept the "business jargon" argument used by the defendant to attempt to undermine the plaintiff's seniority, depth of experience, and extensive role within the defendant's business organization. The defendant is a sophisticated commercial party and it is obvious from the detail of the March 2013 employment contract that the defendant carefully evaluated the plaintiff's qualifications for the position of Vice President Business Development Canada; considered his past performance, role, and responsibilities; and fully intended that he carry out all of his duties in accordance with those listed in the March 2013 employment contract.

2. Working Notice

[48] I agree with the plaintiff that no working notice was provided to him.

[49] The defendant takes the position that the plaintiff had working notice from March 3, 2014 until May 2, 2014. In *Ostrow*, the court addressed the issue of what constitutes notice:

> [89] In the recent decision of *Kerfoot*, the Court of Appeal again discussed the issue of when notice of termination is deemed to be given. *Kerfoot* involved an appeal by the employer, Weyerhaeuser, from the decision of the trial judge to award two employees one month of notice for each year of service, awards of 18.4 and 15.75 months' notice. On this point the court allowed the appeal, commented on the use of a formulaic approach, and changed the notice periods to 15 months for each employee, based on the fact that the employee with less years of service had a job with greater responsibility.

> [90] Weyerhaeuser had informed the employees that it intended to transfer its operation to another corporation, Domtar Inc., which they expected to take place within six months, though no firm date was given. Approximately six-and-a-half months later Weyerhaeuser announced that the transaction had been completed and the employees were informed that they were terminated, but re-employed by Domtar Inc., effective immediately. At trial and during the appeal, the employer argued that notice of termination was given when the employees were told that their jobs would be terminated at the completion of the transaction. The court upheld the trial judge's finding that the certainty required for notice was not present, and stated:
>
> > 27 This ground of appeal engages the legal characteristics of notice. Notice is a binary concept; either there is notice or there is not. In other words, communication that is almost notice is not notice at all.
> > …
> > 31 Although *Gibb* admits of a rare case in which notice is given even though the date of termination is not defined in the initial communication, it demonstrates that, at a minimum, clear communication of impending termination is required, and it is a case in which certainty of the date of termination was soon defined by communications between the parties.
> > …
> > 34 I see nothing in the cases referred to by the parties that detracts from the proposition that in order for a communication to constitute notice of termination, at the least, it must spell out clearly that the employment <u>will</u> end.
>
> [91] Mr. Ostrow was terminated on December 1, 2011. Abacus does not challenge this, but submits that the court can take into account prior notice of termination when assessing the notice period, citing *Hewitt v. Craig Brothers Ltd*., 2005 SKQB 392, and *Holmes v. Irving Shipbuilding Inc*., 2001 NBQB 142. Abacus also submits a policy argument, arguing that forewarning employees of pending termination is a practice which should be encouraged by reducing the notice period.
>
> [92] However, this law is clear. The jurisprudence in this province regarding when notice is deemed to be given is as stated in *Kerfoot*. Notice is a binary concept; an employee is either given notice of termination or they are not; and that notice must not be ambiguous. The reasonable notice period begins on the date unambiguous notice is given.

[50] The defendant submits that in the case of *Allen,* at para. 27, the Court of Appeal established that termination could be implied from the conduct of the employer:

> The test is objective: was notice of termination specifically and unequivocally communicated to the employee in such a manner that a reasonable person would clearly understand the employment contract was at an end? Dismissal is a matter of substance over form. Termination of employment may arise

> from express notice, or be implied from conduct of the employer that amounts to repudiation of its essential obligations in the employment relationship.

[51] On February 28, 2014, Orton advised the plaintiff that if he refused to accept the February 5, 2014 employment offer, the defendant would terminate his employment. On March 1, 2014, the plaintiff emailed Nguyen, Orton and Holek to address the new employment offer and suggest a compromise. According to the plaintiff on March 3, 2014, Holek directed him to immediately relinquish his company computer and phone, and leave the premises on a paid leave of absence.

[52] I agree with the plaintiff's submission that the directive from Holek did not constitute proper notice. As he points out, her directive was ambiguous; there was no formal written notice; there was no certainty that a termination did in fact occur; no specific date of termination was provided; and, I accept the plaintiff's evidence that he was placed on a paid leave of absence. I find that the defendant failed to meet the unambiguous requirement set out in *Ostrow,* and that the date of termination was May 2, 2014, the date that the defendant provided the plaintiff with the formal letter of termination.

III. Mitigation

[53] I turn next to the parties' arguments on mitigation.

[54] The plaintiff acknowledges that a dismissed employee has a duty to mitigate his loss by seeking reasonably comparable employment.

[55] In *Forshaw v. Aluminex Extrusions Ltd*. (1989), 39 B.C.L.R. (2d) 140 at 144 (C.A.), the Court summarized the duty to mitigate as follows:

> 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.

[56] While the duty to mitigate arises immediately following dismissal, the courts have recognized that a period of time is required for the employee to adjust to the loss. In *Stuart v. Navigata Communications Ltd*., 2007 BCSC 463, the Court stated:

> [43] While, theoretically, the duty to mitigate begins at the date of termination, courts have acknowledged that employees generally require a period of readjustment and regrouping before pursuing re-employment strategies. As noted in ***Ata v. Carter Pontiac Buick Ltd*.** (2002), 112 A.C.W.S. (3d) 1078, 2002 BCSC 531:
>
> > 46 ... I am not satisfied that it is reasonable to assume that the day after an employee has gone through the trauma of being fired that he or she must immediately seek alternate employment to avoid the criticism that they are not mitigating their damages. Rather, I am satisfied that it is appropriate for a reasonable period of adjustment and recovery to be available to an employee whose employment has been terminated.
>
> [44] However, an assessment of all the circumstances is required.

[57] In *Lewis v. Lehigh Northwest Cement Limited*, 2008 BCSC 542, var'd on other grounds 2009 BCCA 424, the plaintiff took no steps toward finding alternative employment for about three months following his dismissal. The Court found that the delay was not a failure to mitigate:

> [67] I am not satisfied that the date that he started his search was unreasonably delayed. These courts have recognized the appropriateness of delays in such situations, and I refer to ***Jackson v. SNC Lavalin Engineers & Constructors Inc.***, 2003 BCSC 394.

[58] The plaintiff submits that he began his job search in mid-June 2014, and that this was a reasonable amount of time for him to adjust to the loss of his job, which had formed a significant portion of his working life.

[59] He also submits that his criteria for a new position were reasonable. At the time of his dismissal, he had attained a senior title and was earning a high income. Therefore, he sought opportunities in senior level business development, sales management or communications within the gas or energy industry, compensation that reflected his experience and aptitudes, a position that allowed him to continue the trajectory of his career, and allowed him to remain close to his home and family in Chilliwack.

[60] The plaintiff submits that his mitigation efforts must be considered in the context that he had been employed for nearly 20 years, and had not prepared an employment application, or attended an interview for new employment since commencing his role with the defendant in 1994. However, I note that according to Nguyen's affidavit sworn October 2, 2014, on February 25, 2013, the plaintiff submitted an application to the defendant for the position of "Senior VP of Global Business Development & Branding", that included an up to date resume and cover letter.

[61] The plaintiff submits that his mitigation efforts included updating his resume and LinkedIn profile; researching potential employers; online research into interview skills and career management; reading employment articles from LinkedIn and Workopolis; and registering on various employment websites. He notes that these efforts resulted in only a handful of opportunities that were unsuitable due to being a poor match with his experience, qualifications, and desired location.

[62] The plaintiff notes that he also contacted individuals in the industry, but that only one of these contacts resulted in a brief consulting project.

[63] On June 10, 2014, the plaintiff met with Mr. Cam Kirkby, the branch manager of CIBC Wood Gundy, to investigate working as a financial investments advisor. In July 2014, he shadowed Mr. Kirkby at CIBC. Mr. Kirkby verbally confirmed to the plaintiff that a job opportunity would be available once the plaintiff completed the Canadian Securities Course (the "course"). The plaintiff registered for the course on July 30, 2014, and completed it on October 2, 2014. At the time of the trial he was enrolled in a course for licensing accreditation, with an anticipated completion date of January 29, 2015. On December 15, 2014, the plaintiff was offered the position of Sales Assistant at CIBC Wood Gundy. He commenced working in this position on January 2, 2015, with an annual salary of $28,100.

[64] The plaintiff relies on a number of cases to support his decision to seek a new career path. First, in *Christianson v. North Hill News Inc.* (1993), 106 D.L.R. (4th) 747 (Alta. C.A.), the plaintiff was dismissed without cause from her position with a

printing company after 17 years. The technology used in her job was very specific to her employer's line of work, and other companies had modernized their equipment. The plaintiff enrolled in six-month course in new technology. At p. 751, the Court found her decision to upgrade her skills was reasonable, and did not reduce her damages:

> It is common ground that the plaintiff had all her training on the job, and that she knew no other printing systems than the defendant's system. And there is evidence that most other printers had in the meantime gone on to more modern technology. The defence was unable to show us any evidence to the contrary. The plaintiff ultimately went to the Technical Institute as a full-time student for about six months, and learned the new technology successfully, and thereafter quite soon got a job. Whether that course of action is the best investment of time and money cannot be certain, but it seems to us that at the time it was a reasonable decision to make, and one no court should be quick to second guess. It necessarily took six months at least, and if courses did not start every month, it may have necessarily taken more than six months.

[65] In *Kinsey v. SPX Canada Inc*. (1994), 2 C.C.E.L. (2d) 86 (B.C.S.C.), the plaintiff was a manager of the defendant's sales territory west of Quebec (the defendant produced and sold automotive diagnostic equipment). The plaintiff had worked with the plaintiff for about seven years, and had been promoted twice. Upon dismissal, the plaintiff took himself out of the job market for six months to take a real estate course. The Court found that he had taken the steps necessary to seek employment and mitigate his damages, and his enrollment in the real estate course was reasonable and understandable:

> [23] The defendant submits that the plaintiff's decision to take himself out of the job market commencing January 1994, for six months in order to take a real estate course is a failure to mitigate and a deduction of one to two months should therefore be made from the notice period.
>
> [24] I am satisfied that the plaintiff has taken steps necessary to seek employment and mitigate the damages. In a period of tight economic restraint, employment is not easily found and I conclude that the plaintiff's enrollment in the real estate course is a reasonable and understandable action for him to take.

[66] In *Hart v. EM Plastic & Electric Products Ltd.*, 2008 BCSC 228, the plaintiff was employed as a customer service manager (the defendant was in the business of selling supplies and materials to the sign, display, screen printing, fabrication, digital

imaging, and glazing industries). The plaintiff decided to embark on a new career as a real estate agent despite several job offers in his own industry, including one that would have paid as much as the position from which he was fired. Although the Court found the plaintiff's decision to change careers unreasonable in the circumstances, the Court noted that a plaintiff may have mitigated his damages even where a new career takes time to establish and has associated retraining costs:

> [48] In assessing mitigation efforts, personal preferences are a factor to consider and no one is compelled "to pursue one life-time career": ***Battell*** at 20. Even where the new career takes time to establish and has costs associated with retraining, a dismissed employee may be held to have properly mitigated in the circumstances if the evidence as a whole establishes he or she acted reasonably. In each case it is a question of fact.

[67] In *Battell v. Canem Systems Ltd*. (1981), 31 B.C.L.R. 345 at 348-349 (S.C.), the Court found that the plaintiff's failure to accept a comparable job in the same field and his decision to go into business for himself was reasonable:

> By way of summary, there is a good chance the defendant could have got work as a line supervisor with another electrical company doing business in the Fraser Valley. The evidence indicates a position was open from about 1st September 1980 at a salary of approximately $30,000 per year with the same kinds of benefits. He did not take reasonable steps to seek out this opportunity. In the circumstances, does his conduct deny him any compensation? I think not.
>
> He left British Columbia Hydro in 1974 and went into business for himself. That was unsuccessful. Ultimately, he was forced to shut down and sell off his equipment in 1978. Deciding to leave the electrical trade, he applied for a real estate course. About the same time, the defendant was looking for a person with his qualifications. It contacted him and persuaded him to change his mind and come to work for it in the spring of 1978. Shortly thereafter he suffered a heart attack. He was in the hospital for three weeks and off work for about six weeks. When dismissed by the defendant on 15th June 1980, he made a few inquiries concerning positions in the electrical business but finally decided to go back to real estate. Through a home correspondence course, he received his licence in July 1981.
>
> A reasonable inference arising from these facts is the recognition by the plaintiff that he was no longer suited for work as a line supervisor. He left one job, went broke in another, and was fired from the third. On the last occasion, he experienced a heart attack. Given these facts, I don't believe it unreasonable for him to decide he should try some other kind of endeavour. Besides, if he got a job in an unrelated field immediately following his dismissal, the defendant would in law be entitled to say the money so earned

> must go in mitigation of his claim against it. No law compels a person to pursue only one life-time career.

[68] The plaintiff in the case at bar submits that his change of career was not unreasonable. He argues that his efforts to find a comparable job in the CNG, gas or energy sectors had not produced any viable opportunities. He had extensive experience in client relationship building and sales, and the opportunity with CIBC Wood Gundy would provide him with a high earning potential, allow him to remain close to Chilliwack, allow him to build a book of business and allow him to take ownership in whether he was to be successful. He submits that the business model offered by CIBC Wood Gundy was similar to his role as a real estate salesman prior to his employment with the defendant (he was employed as a real estate salesman from 1987-1994). He notes that his success would be determined by how hard he worked and his ability to generate business.

[69] The plaintiff submits that in order for the defendant to demonstrate that he failed to mitigate, it must meet the two-part test set out in *Szczypiorkowski v. Coast Capital Savings Credit Union*, 2011 BCSC 1376, where the Court held:

> [90] However, the defendant must prove that the terminated employee has failed to mitigate damages. This onus is "by no means a light one" (*Red Deer College v. Michaels* (1975), [1976] 2 S.C.R. 324 at 332, 57 D.L.R. (3d) 386 at 391). The defendant must establish, first, that it would have been reasonable for the plaintiff to do more in an attempt to find new employment and, second, that if the plaintiff had done more, he would have been successful in obtaining employment.

[70] The plaintiff asserts that on the first branch of the test, it was not reasonable for him to do more in an attempt to find new employment prior to his decision to change careers. He submits that, given this significant length of time spent employed with the defendant, he was entitled to approach his job search cautiously to ensure that the next step in his career would meet his criteria and provide a long-term opportunity.

[71] On the second branch of the test, the plaintiff contends that if he had done more, he would not have been successful in obtaining employment. Ms. Lynne Gretsinger, defence counsel’s Legal Administrative Assistant, filed an affidavit sworn

October 2, 2014, attaching copies of employment opportunities from different websites. The plaintiff claims that he reviewed these opportunities and found that they did not meet his criteria. He contends that the defendant has not produced evidence to establish that he could have found comparable employment by performing a more diligent job search.

[72] The plaintiff refers to the decision in *Day*, where the Ontario Supreme Court noted the importance of whether more effort could have yielded comparable employment. The plaintiff was dismissed after 14 years of employment. On the issue of mitigation, the Court said the following:

> [93] Mr. Day's evidence on the efforts he undertook was not ideal. I expected detailed records to be kept with a chronological listing of prospective employers approached, contacts made, jobs sought, and responses received. Nothing of the kind was introduced.
>
> [94] Instead, Mr. Day described efforts he made to obtain alternative employment. He indicated he searched for jobs through websites such as Workopolis, reading the Globe and Mail, telephone discussions with industry contacts he had developed and in person discussions during attendances at trade shows in Las Vegas, Nevada and various locations in Ontario.
>
> [95] In the spring of 2002, he attended a course on starting a small business. In March, 2002 he obtained a GST/HST registration number in the name of Clearview Farms, a proprietorship he established. Under that business name, Mr. Day planted and harvested trees from a property he acquired near Creemore, Ontario. Mr. Day also performed limited services at a small number of trade shows during 2002-2004.
>
> [96] Mr. Day testified he made one formal application for employment to Home Depot Barrie. It generated the only written communication involving a prospective employer which was introduced into evidence.
>
> [97] On March 13, 2003, Home Depot Barrie thanked Mr. Day for his interest and advised that there was nothing "compatible with your aspirations and accomplishments" available.
>
> [98] During cross-examination Mr. Day indicated he contacted New Holland upon learning Mr. Fulmer had left to join JCB. He says he learned the position had already been filled.
>
> [99] Mr. Day did not obtain employment with a third party until hired by Volvo in February, 2004.
>
> [100] In those circumstances it is unsurprising Mr. LeNoury submitted Mr. Day's efforts to mitigate his damages were inadequate. Clearview Farms did not generate any income from planting and harvesting trees during 2002 or 2003. Revenue generated from other sources was modest and insufficient to satisfy claimed expenses.

> [101] Mr. LeNoury was underwhelmed by Mr. Day's evidence of casual phone calls and occasional, time limited face to face discussions at the odd trade show.
>
> [102] I share those concerns. Another can be added to the list. Mr. Day received $6,725.41 toward professional outplacement counseling services in June, 2002. He made no use of that service.
>
> [103] I am of the view that JCB has proven Mr. Day's efforts to obtain comparable alternative employment were modest.
>
> [104] However, the issue is whether more effort would have yielded comparable employment.
>
> [105] Mr. Day obtained his grade 12 diploma in 1968. He attended Centennial College for one year in 1970. He obtained a heavy equipment mechanic's licence in 1974 while working at JCB. His entire working career was in the agricultural, heavy industrial and construction equipment industries.
>
> [106] I have already found that JCB eliminated staff due to poor financial results. JCB provided no evidence that demonstrated the problem was short-lived or excluded the Province of Ontario. I am satisfied the problems facing the industry in 2001 and the immediately following years were industry wide and extended to Canada. In short, no evidence has been provided which suggests to me that there was similar employment available even if Mr. Day had acted with greater diligence.
>
> [107] Given Mr. Day's experience and an industry wide malaise, Mr. Day's decision to maintain casual contact with persons in the industry is understandable. Furthermore, his decision to start a tree farm was a reasonable one even though an immediate source of revenue was not generated from that source. Mr. Day was able to maintain contacts within the heavy equipment industry which ultimately resulted in similar employment with Volvo.

[73] Thus, the plaintiff submits that in the instant case, the defendant has not met the two-part test set out in *Szczypiorkowski* and, therefore, has not demonstrated that he failed to mitigate his damages.

[74] On the other hand, the defendant submits that, above all, the plaintiff failed in his duty to mitigate and the action ought to be dismissed or, in the alternative, the defendant's liability ought to stop as of early August 2014, when the plaintiff unreasonably decided to take the securities course and ceased active job hunt efforts.

[75] The defendant notes that at his examination for discovery the plaintiff, stated that he spent from mid-June 2014 to the end of July 2014 looking for a senior role in CNG industry companies, at which point he decided he wanted to go into financial

management. He acknowledged that he did very little in May 2014, did not really get his resume fully updated until mid-June 2014, and that it was mid-June 2014 when he started looking for work in the gas or energy industry in earnest, but that by end of July 2014 he decided that he was pursuing a career in financial management. He said he only sent out one resume as part of his job search process.

[76] Further, the plaintiff said that in early August 2014 he commenced taking the course, full-time; that he had a job opportunity lined up with CIBC Wood Gundy, to commence in early October 2014; that since early August 2014 his efforts to look for employment opportunities have been "very passive" and that he has been "very single-minded about looking at what it will take … to get established in the financial management field" and the financial management field is what he is "focused on now". He also acknowledged that since commencing the course in early August 2014, which he expected to complete in early October 2014, he had been spending about three hours per day on the course studies and the remainder of the day devoted to home-schooling his child. He acknowledged that, "…I'm not working my contacts, so to speak, I'm not calling people and pushing buttons."

[77] The defendant submits that the plaintiff would have the Court believe that he made very diligent efforts to find work similar to that he had had with the defendant, prior to deciding to pursue a career in financial management. However, the defendant contends that there are many businesses within an hour's drive of Chilliwack, which employ salespersons in a role similar to that held by him at the defendant, and which provide him with a similar compensation structure.

[78] The defendant notes that on July 7, 2014, Orton provided the plaintiff with a reference letter in order to assist him to find other employment. No potential employer contacted Orton about a reference for the plaintiff. The defendant also submits that Ms. Gretsinger's affidavit attachments show many opportunities for jobs similar to the one the plaintiff held with the defendant. In particular, but not limited to:

- Vice-President – Sales – OEM Heavy Equipment;
- Sales Manager – Catalys Lubricants Ltd.; and

- Director of Sales – Heavy Equipment.

[79] The defendant submits that while the plaintiff argues he never applied for jobs on the various websites because they were all inappropriate, he also said that he never made a single inquiry to find out more about any of these jobs.

[80] The defendant also notes that in the plaintiff's discovery he said that he was part of an industry group called the Canadian Natural Gas Vehicle Alliance, a group with several corporate members from this province. The defendant submits that when one considers the health of the CNG industry in southern BC, and the plaintiff's connections in the industry, his efforts to find work seem completely unreasonable.

[81] The defendant set out a number of authorities on the issue of mitigation: *Bates v. John Bishop Jewellers Ltd.*, 2009 BCSC 158, aff'd 2009 BCCA 615; *Reynolds v. First City Trust Co.* (1989), 27 C.C.E.L. 194 (B.C.S.C.); *Deputat v. Edmonton School District No. 7*, 2008 ABCA 13 at paras. 26-32; *Mukuka v. Fort Optical Ltd.*, [1994] B.C.J. No. 1445 (S.C.); *Akins v. St. Charles Academy Inc.,* 2001 MBQB 23; *Plotogea v. Heartland Appliances Inc.* (2007), 60 C.C.E.L. (3d) 216 at paras. 62-64, 73 (Ont. S.C.J.); *Coutts v. Brian Jessel Autosports Inc.*, 2005 BCCA 224 at para. 25; *Cimpan v. Kolumbia Inn Daycare Society (K.I.D.S.)*, 2006 BCSC 1828 at paras. 102-108; *Blais v. Harvey Burrows and Son Ltd*. (1995), 16 C.C.E.L. (2d) 47 at para. 15 (Ont. C.J.); *MacKinnon v. Acadia University*, 2009 NSSC 269; *Araki v. Balco Industries Ltd.*, [1987] B.C.J. No. 2601 (Co. Ct.).

[82] I am persuaded, on the whole of the evidence and the authorities, that the plaintiff has failed to adequately mitigate his damages. I am of the view that the plaintiff's criteria were too narrow, that it would have been reasonable for him to make greater efforts to find new employment, and that if he had done more he would likely have achieved greater success in finding employment in the industry that he had spent the major part of his working life. In my further view, the plaintiff failed to pursue available opportunities that fell within his skill and experience, conducted too

limited a job search, and placed a greater emphasis on his personal preferences and career objectives than was reasonable in all of the circumstances.

[83] Although I do not agree with the defendant that the plaintiff's claim should be dismissed for his failure to mitigate, I do find that the plaintiff's notice period of 16 months should be reduced by 3 months for his failure to adequately mitigate.

IV. Damages

[84] Finally, I turn to the issue of the plaintiff's damages based on a notice period of 13 months.

[85] The plaintiff claims that his damages should include his base salary, commissions, bonus, and benefits consisting of RRSP, MSP, and out-of pocket expenses.

1. Commissions and Bonus

[86] The plaintiff calculated his claim for lost commissions in the amount of $10,000 per month, using the formula structured by the defendant in the March 2013 employment contract, which provides:

> Commissions will be calculated as a percentage of the operating budget accrued for each line item sold. The percentage is determined on a linear scale based on the incremental gross margin (IGM) over the agreed minimum factory prices for each line item, and shall be calculated by rounding down to one decimal place.
>
> > i. For line items where the IGM is 0.0 to 5.0% the commission rate shall be scaled from 0.0 to 25.0% of the operating budget calculated for that specific line item.
> >
> > ii. For line items where the IGM is 5.1 to 10.0% (or more) the commission rate shall be scaled from 25.2 to 35% (or more) of the operating budget calculated for that specific line item.

Appendix 1 of the March 2013 employment contract contains calculations for examples of scale of budget contribution and sales commission amounts.

[87] The March 2013 employment contract also contains a bonus incentive which provides, that if the annual sales forecast was achieved, a bonus would be paid to the plaintiff calculated as 10% of any surplus budget amount (remaining budget after

deduction of the plaintiff's salary, commissions and expenses). Using this formula, the plaintiff estimates that his lost bonus for 2014 would be $34,790, or $2,899.17 per month.

[88] First, regarding the plaintiff's claim for the loss of opportunity to earn commissions during the notice period, he relies on the decision in *Stuart v. Navigata Communications Ltd.,* 2007 BCSC 463, where at para. 30 the Court held:

> [30] If the mode of remuneration of an employee such as Ms. Stuart includes commissions, the award of damages should include such commissions as the employee would likely have received during the notice period (the burden being on the plaintiff to show that there was some reasonable probability of receiving commissions during the notice period)…

[89] The Court then went on to explain the concept of the loss of opportunity to earn commissions, stating that even when a termination clause contained the phrase: "only commission for business, which has been verified up to the final day worked, will be paid", the plaintiff was entitled to compensation for the loss of opportunity:

> [34] With respect to the termination clause, Navigata says that as a result of it, Ms. Stuart cannot claim commissions. In my view the clause does not prevent Ms. Stuart from claiming the loss of opportunity to earn commissions. The contractual clause addresses the method of dealing with commissions earned (in part or in full), but not paid. This is a separate and distinct issue from damages for loss of opportunity to earn commissions. While the former pertains to commissions for work at least partially undertaken by Ms. Stuart, the latter is a measure of the commissions she would likely have earned, had her employment not been terminated.
>
> [35] If a contractual clause could effectively deprive an employee of recovery for loss of opportunity to earn commissions, this could lead to the untenable result that an employee, paid entirely on a commissioned basis, might not recover any damages for lost earnings upon being wrongfully terminated. The purpose of notice is to give the wrongfully terminated employee an amount which approximates what he or she would have earned, had the employment contract not been wrongfully terminated. In the case of a commissioned employee, that amount must account for the former employee's loss of opportunity to earn commission.
>
> [36] Therefore, in the present case, the appropriate way to assess the amount of compensation is to use Ms. Stuart's expected base salary over the notice period plus an amount to account for her lost opportunity to earn commissions over that same period…

[90] The plaintiff submits that in assessing damages for lost commissions during the notice period the courts will examine a variety of factors, including the employee's past commission earnings over a representative period, the employer's actual or anticipated sales revenues, and whether the business conditions during the relevant period were responsible for unusually high or low commission earnings: *Krieser v. Active Chemicals Ltd.*, 2005 BCSC 1370 at paras. 78-80.

[91] The plaintiff also submits that the calculation for damages for loss of opportunity to earn commissions should be based solely on the commission structure contained in the March 2013 employment contract. The agreement provides a commission structure that was significantly different from his previous commission structure, such that, for 2013 he earned substantially more commission than in previous years. He notes that the pre-March 2013 employment contract commission structure does not provide an accurate reflection of the commissions that he reasonably expected to earn during the reasonable notice period.

[92] Second, regarding the bonus, the plaintiff submits that an award of damages for wrongful dismissal will include compensation for lost bonus monies the employee would have been entitled to receive during the notice period had the contract been performed, citing *Noble v. Principal Consultants Ltd. (Trustee of)*, 2000 ABCA 133:

> [41] Applying the basic principles of law set out earlier, Noble is entitled to compensation for lost bonus monies that were part of his income and therefore, upon his unlawful dismissal, became damages to which he was entitled based on the premise that he would have received them had the contract been performed. The probability is that, during the notice period, had the contract been performed, the incentive compensation would have been earned. In the absence of evidence to the contrary, it is an implied term of the employment contract that an employer will carry on its business in its normal course. In this case, the parties have agreed on the quantum of damages for the bonus component of Noble's salary for the notice period …

[93] The plaintiff notes that in order to receive compensation for the loss of a bonus, the employee must establish that "past history establishes that [the bonus had] become an integral part of the plaintiff's wage structure", and that there is a basis on which to calculate the amount of any such bonus: *Szczypiorkowski*, at

para. 72. The Court in *Szczypiorkowski,* at para. 71, considered four factors in determining whether the bonus was an "integral" part of the plaintiff's compensation:

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

[94] In the trial decision of *Allen* (2011 BCSC 1707), Holmes J. found that the plaintiff was entitled to compensation for lost bonus. The plaintiff had received a bonus for several years, but had also received no bonus two years before his dismissal. The defendant argued that the bonus was discretionary and performance-based, and as the plaintiff had been dismissed for poor performance, it would not make sense to award him a performance-based bonus. Holmes J. held:

> [40] The difficulty with Ainsworth's submissions is that with the without-cause termination of Mr. Allen's employment, Mr. Allen's entitlement to a bonus was no longer discretionary, performance-based, or based on actual employment with Ainsworth: it was a component of the 15 months' "pay in lieu" due to him under the employment agreement.
>
> [41] The MIP bonus plan is expressly mentioned in the May 2008 employment agreement:
>
> > You will be eligible for our annual management incentive bonus plan. The plan currently provides for a target bonus of 30% of your base salary, subject to achieving specific performance objectives.
>
> [42] As is obvious both from the agreement and from the amounts of Mr. Allen's bonuses in relation to his annual salary, the bonus was an important part of Mr. Allen's compensation package. "Pay in lieu" of bonus was therefore due when Ainsworth terminated his employment. The only real question is the amount, since bonuses varied year to year.

[95] In *Szczypiorkowski*, at para. 59, the employer argued that its bonus guidelines required that "the employee must be in the employ of the credit union … in order to be eligible to participate," the employee must meet team targets set by the defendant, and also meet performance expectations in order for the employee to be eligible for a bonus. The Court disagreed, stating:

> [65] Turning to the defendant's first argument, I find this position without merit for the simple reason that had CCS not wrongfully dismissed the plaintiff,

> Mr. Szczypiorkowski would have been employed and entitled to his bonus. Based on Mr. Szczypiorkowski regularly receiving a bonus in the past, it is reasonable to assume he would have continued to receive a bonus if he had continued his employment with the defendant. In *Ferguson v. Kodak Canada Inc.*, [1992] B.C.J. No. 2545 (S.C.), when considering a similar argument with regard to the award of dividends to a wrongfully dismissed employee, the court stated:
>
> > In my view the clause was not designed to meet the situation of a wrongfully dismissed employee who was deprived of the opportunity to work. He is entitled to be compensated by an award of damages that puts him in the position he would have been in had reasonable notice been provided.....

[96] As mentioned earlier in these reasons, the defendant's main challenge to the plaintiff's position is that the best method to calculate his claim for lost commissions and bonus is by taking a monthly average of the amounts paid to him in 2011, 2012 and 2013.

[97] In support of its argument, the defendant points out that the commissions payable to the plaintiff under the March 2013 employment contract depends on many factors, including the number of sales made by him, the minimum factory process for a particular sale, incremental gross margin for a particular sale, and whether the sale actually completes; and that his entitlement to receive a bonus depends upon the annual sales forecast, him meeting the forecast, the amount of the sales operating budget, and the amount of the surplus sales operating budget.

[98] First, I agree with the plaintiff, and find that his claim to lost commissions and bonus should be calculated on the basis of the provisions contained in the March 2013 employment contract. Second, I reject the defendant's argument that the plaintiff's claim for lost commissions and bonus should be calculated by averaging the plaintiff's income for the years 2011-2013. In my opinion, the variables mentioned in support of the defendant's argument have, for all intents and purposes, already been taken into account by the plaintiff in the calculation of his loss, as shown by the evidence set out at paras. 31-35 of his affidavit, evidence that has not been contradicted by the defendant:

> 31. I fully expected my 2014 employment income to exceed my 2013 income due to substantially higher sales prospects for my territory going into 2014.

Prior to 2014, I had cultivated key clients and projects which were forecast to be recognized as sales in 2014, including multiple orders from three key clients: Irving Oil, Ferus LNG, and Certarus CNG.

32. On December 10, 2013, I provided IMW's Senior Vice President of Global Business Development and Marketing, Dave Orton, with my sales forecast for 2013. Based on my analysis of current and pending sales opportunities in my territory, I developed a weighted forecast of $17.66 million. Expected revenue was adjusted according to the probability of each opportunity to ensure the final numbers were as realistic as possible. For my 2014 forecast, 13.5% ($2.39 million) was weighed at 100% probability as we already had purchase orders or contracts signed by customers; 72.6% ($12.82 million) was weighted at 80% probability as these were mostly repeat customers or municipalities with approved budgets; and 13.9% ($2.45 million) was weighted at 50% probability. Opportunities with probabilities lower than 50% were not even included in the forecast. On receipt, Mr. Orton instructed me to substantially lower my forecast to $13 million as he did not want to exceed my 2013 forecast by more than 30% (2013 forecast was $10 million). I complied and adjusted the forecast to $13 million, which was compiled into his overall 2014 forecast.

33. On February 5, 2014, Mr. Orton released his overall 2014 forecast to the sales team. In this forecast, Mr. Orton further reduced some of the territory forecasts. At a sales meeting earlier that day, he gave the explanation that he preferred to "under-promise and over-deliver". He had reduced my forecast from $13 million to $12 million. His substantial reduction of my forecast from the initial $17.66 million to the final $12 million is the reason I fully expected to not only achieve but surpass the final 2014 forecast.

34. Had I remained employed and achieved the conservative $12 million sales forecast under the terms of the March 2013 contract, I would have earned approximately $251,847 in 2014 (including salary, commissions, bonus, and benefits). This assumes the same overall 4% IGM achieved in 2013. Achieving at least 4% IGM was realistic since IMW list prices started at 10% IGM and most negotiated customer prices fell in the range of 5% to 10% IGM. My overall 2013 IGM was only 4% because of approved price concessions made to one client, Certarus CNG, which were no longer in effect. My anticipated earnings estimate also assumes twice the sales expenses of 2013 ($60,000 for 2014 versus $30,000 from 2013). The reason for doubling the number is to assume a worst case scenario, such as significantly more travel and advertising costs, in order to provide a conservative estimate.

35. Given the careful analyses of current sales opportunities, existing orders, the advanced stage of negotiations on future contracts, favourable market conditions (low price and rising adoption rates of CNG) and the conservative nature of the 2014 forecast, my earnings expectations for 2014 were very realistic. The demand for CNG products was growing, my customer relationships were strong, and the risk of not meeting or surpassing the 2014 forecast was low. Further, had I exceeded the forecast and achieved, for example, $15 million in sales, I would have earned, with benefits, approximately $296,800, even with estimated sales expenses further increased to $75,000. With the March 2013 contract in place and my market

> development efforts in Canada achieving significant success, I was poised to begin achieving peak earnings in 2014. Attached and marked as Exhibit "H" are the 2014 sales forecasts prepared by Mr. Orton.

[99] Thus, I am satisfied that the plaintiff is entitled to lost commissions of $10,000 per month, and a lost bonus of $2,899.17 per month, during the notice period of 13 months.

[100] The defendant also submits that at the time of dismissal, the plaintiff was paid his final wages, including $78,206.76 in commissions, which the defendant states, had "not accrued because the goods had not shipped at the time". The defendant states that the $78,206.76 should be deducted from any compensation awarded to the plaintiff. However, I agree with the plaintiff's submission that the $78,206.76 payment was commissions that he had already earned for confirmed orders secured during his employment that are distinct from the loss of opportunity to earn commissions during the notice period.

2. Benefits

[101] Regarding benefits, the plaintiff submits he is entitled to an award of damages that will put him in the same position as if he had received proper notice. Damages are not limited to salary but include the amount of money paid to replace lost benefits during the notice period: *Sorel v. Tomenson Saunders Whitehead Ltd.* (1987), 15 B.C.L.R. (2d) 38 (C.A.).

[102] The plaintiff also submits that the amount of the benefits he would have received had he stayed employed by the defendant should be included in assessing damages in this case. The entitlements to which he has been deprived include dental benefits, medical benefits, and RRSP contributions from the defendant.

[103] As of August 2014, the plaintiff has been paying $138.50 per month in MSP premiums.

[104] With regard to his RRSP, the Court has held that if an employee's benefits include employer contributions to an RRSP plan, the employee's damages

entitlement includes the value of those contributions for the duration of the notice period: *Ellerbeck v. KVI Reconnect Ventures Inc.*, 2013 BCSC 1253 at paras. 50-51.

[105] The plaintiff participated in the defendant's RRSP since its inception in June 2002, and consistently received a 3% matching contribution of his total salary and commissions from the defendant.

V. Conclusion

[106] In summary, the plaintiff is entitled to the following damages:

- reasonable notice of 13 months;
- base salary of $6,008.33 per month;
- commissions of $10,000 per month;
- bonus of $2,899.17 per month;
- RRSP benefits of $567.23 per month;
- MSP benefits of $138.50 per month; and
- out-of-pocket expenses totaling $436.60.

"B.I. Cohen J."

The Honourable Mr. Justice B.I. Cohen