
CANADA / JUDGMENT

Bailey v. Service Corporation International (Canada) ULC

2018 BCSC 235

COURT

Supreme Court of British Columbia

DECIDED

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2018 BCSC 235 Bailey v. Service Corporation International (Canada) ULC

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Bailey v. Service Corporation International (Canada) ULC,

2018 BCSC 235

Date: 20180219

Docket: S147272

Registry: Vancouver

Between:

Donald Bailey

Plaintiff

And

Service Corporation International (Canada) ULC

Defendant

Before: The Honourable Madam Justice S. Griffin

Reasons for Judgment

Counsel for the Plaintiff:

H.C. Ritchie Clark, QC

Counsel for the Defendant:

Robert A. Sider

James Boyle

Place and Dates of Trial:

Vancouver, B.C.

October 23-27,

November 28-30,

December 1, 2017

Place and Date of Judgment:

Vancouver, B.C.

February 19, 2018

Introduction

- [1] For 17 years, the plaintiff, Mr. Bailey, worked as a salesman for the defendant company ("SCI") which sells funeral-related products and services to bereaved families and to persons planning for death in the future. SCI operates the Forest Lawn and Ocean View Cemeteries and Funeral Homes in the Greater Vancouver area.
- [2] Mr. Bailey experienced health problems in the summer of 2013. He obtained a note from his doctor that he was unable to work, and took time off work beginning on September 11, 2013.
- [3] Mr. Bailey was not paid a salary during the time off work. Instead, he made a claim for short-term disability benefits from: first, the SCI employee benefits-provider, Manufacturers Life Insurance Company or "Manulife"; and then at its suggestion to WorkSafeBC; and then at its suggestion back to Manulife. The processing of these claims took time but were ultimately denied as excluded from the scope of coverage. The employer, SCI, received notice of this.
- [4] Mr. Bailey was still in the course of pursuing appeals of the denial of his claim for short-term disability insurance with the benefits-provider, Manulife, when based on a decision of a manager at SCI, Mr. Brian Boyle, SCI terminated his employment without notice on November 28, 2013. This termination of employment was treated as retroactive to the last day he had worked, September 10, 2013.
- [5] Mr. Bailey was 60 years' old when he was dismissed from his employment.
- [6] Mr. Bailey discovered the termination when his wife made a claim for some medical-related benefits to Manulife and was informed that they were no longer covered because Mr. Bailey was no longer an employee.

- [7] Mr. Bailey seeks damages for dismissal without notice and without cause. He claims that there was an implied term of his employment contract that he would receive reasonable notice of termination in the event of dismissal without cause. He also claims that the method of his termination was reprehensible and so he seeks damages in addition to the ordinary damages that can be awarded in lieu of notice for dismissal.
- [8] SCI maintains that the dismissal was with cause, alleging that by taking the time he did off work, Mr. Bailey had abandoned his employment. It says that no damages are payable. In the alternative, if SCI had no cause for dismissal, SCI advances the further argument that any damages are limited to the measurement of what he would have earned during an eight-week notice period by virtue of the express terms of Mr. Bailey's employment contract. Further, if common law damages are payable, SCI says that Mr. Bailey failed to mitigate his damages.

Issues

- [9] The issues raised by the parties are as follows:
1. Did SCI have cause for Mr. Bailey's dismissal? If it did, all of the other questions do not need to be answered.
 2. If SCI did not have cause for Mr. Bailey's dismissal, did SCI breach an express or implied term of Mr. Bailey's employment contract by dismissing him without notice? If so, what is the measure of damages for such a breach of contract? This involves such questions as:
 - a. Was there an express contractual limit on notice? This requires analysis of several contract issues:
 - (1) Which of several written employment contracts applies?
 - (2) Does the contractual provision displace the implied common law term that an employee will be given reasonable notice before dismissal?
 - b. If there was no cause for dismissal, what general damages ought to be awarded for dismissal without notice?
 - c. Is Mr. Bailey entitled to aggravated or punitive damages due to the manner of his dismissal, if it was without cause?

Did SCI Have Cause for Mr. Bailey's Dismissal?

- [10] The allegations of cause for dismissal are found in paras. 9-12 of SCI's Response to Civil Claim ("RTCC"):
8. In or about September 2013, the Plaintiff alleged that he was unable to work due to illness. The Plaintiff applied for coverage under the Defendant's short-term disability program. The Plaintiff's application was denied as being without any medical proof of illness.

9. Subsequently, the Defendant repeatedly requested that the Plaintiff return to work. The Plaintiff either refused, or in the alternative neglected, to return to the employment of the Defendant.
10. Since on or about September 20, 2013, the Plaintiff was absent without leave from the Defendant's employ. While absent without leave from the Defendant's employ, the Plaintiff worked, and continues to work, as a real estate agent.
11. As a result of the Plaintiff's absence without leave and refusal or neglect to return to work as requested by the Defendant, the Defendant has just cause to terminate the Plaintiff's employment. In the alternative, the act of refusing to return to employment constituted a resignation or abandonment by the Plaintiff of his employment and a repudiation of the Contract which was accepted by the Defendant and [sic] terminated the Contract.
12. As a result of the actions of the Plaintiff, the Plaintiff's employment with the Defendant terminated on or about November 28, 2013.

Absence With or Without Leave

[11] I will address the first allegation in para. 10 of the RTCC: that since September 20, 2013 Mr. Bailey was "absent without leave" from SCI's employ.

[12] The allegation that Mr. Bailey was "absent without leave" does not stand up on any analysis of the facts.

[13] It is necessary to review the evidence in a bit more detail to address this allegation.

[14] On June 23, 2013, Mr. Bailey obtained a note from a doctor at a medical clinic where he sometimes attended stating:

This is to confirm that Mr. Bailey has a medical problem and I have advised him to be off work for the next two weeks, with an expected return to work July 10, 2013.

[15] On September 11, 2013 Mr. Bailey obtained a "Medical Absentee Certificate" from a doctor at the same clinic stating:

This is to certify that Donald Bailey has been under medical care from Sept 11 to Sep 11 and is able to return to work on Mar 1, 2014.

[16] The same date is when Mr. Bailey stopped attending at his workplace, that is, on September 11, 2013. Mr. Bailey let SCI know about this medical issue by calling a manager at SCI, Mr. Brent Forsyth, on September 11, 2013.

[17] Mr. Bailey forwarded the doctor's note to Mr. Forsyth by email on September 12, 2013.

[18] Mr. Forsyth sent Mr. Bailey an email message the same day stating:

This is in response to your phone call to me earlier today. It has come to my attention that in order for you to qualify for medical leave you must be evaluated by a company approved doctor. We will be contacting you in the near future to schedule the appointment.

- [19] There was no such thing as a "company approved doctor" and SCI never contacted Mr. Bailey to schedule such an appointment.
- [20] Mr. Bailey made a telephone call to Dan Cruz who worked as a benefits administrator for SCI, and asked him about the appointment with a company approved doctor. Mr. Cruz told him there was no such thing.
- [21] On September 16, 2013, Mr. Cruz sent to Mr. Bailey forms for applying for short-term disability benefits with Manulife. Mr. Bailey completed the forms and sent them back to Mr. Cruz.
- [22] On the same day, September 16, 2013, Mr. Brian Boyle, another manager at SCI and Mr. Bailey's supervisor, sent to Mr. Bailey by email a "request for leave" document and a copy of the "R.O.E. request". Mr. Boyle's email asked Mr. Bailey to sign the "request for leave" document and return it to him.
- [23] The R.O.E. request referred to an internal SCI form for its payroll department to issue a "record of employment" for purposes of initiating government employment insurance, or EI, benefits. I find that by sending this to Mr. Bailey, Mr. Boyle was communicating that SCI knew and accepted that he was taking unpaid time off work but was expecting to return.
- [24] Mr. Boyle filled out the R.O.E. request form as follows:
1. he confirmed that Mr. Bailey's last day for which he was paid was September 10, 2013;
 2. in answer to the question "is associate expected to return to work" he circled "yes" instead of "no";
 3. in answer to the question "is there an expected return date" he filled out that the return date was expected to be March 1, 2014, consistent with the doctor's note that Mr. Bailey had provided;
 4. for the "reason for needing R.O.E.", he circled "leave of absence";
 5. he signed it and dated it September 16, 2013; and he obtained the signature of a market manager on the same date.
- [25] Also attached to Mr. Boyle's September 16, 2013 email was an SCI internal form titled "Request for Leave - Canada". Mr. Boyle filled this out, checking off that Mr. Bailey's type of leave was "short term disability". On this form he wrote that the beginning date was September 11, 2013 and the end date was "T.B.D.". Mr. Boyle signed in the box for "Manager's Signature" and dated the form September 16, 2013. No other approval signature line was shown on the form. There was a signature line for "associate signature" under a section headed "acknowledgement of reinstatement policy". One possible interpretation of the form

would be that the employee was only required to sign to acknowledge the conditions that would apply upon return to work from a leave of absence.

[26] Mr. Bailey took exception to the way the R.O.E. request was filled out by Mr. Boyle. He sent an email to Mr. Cruz on September 16, 2013 suggesting that it was wrong for Mr. Boyle to have circled "leave of absence" as the reason for needing a R.O.E., instead of circling the choice "illness". Mr. Bailey also told Mr. Cruz in the same email:

[Mr. Boyle] also sent me a leave of absence form which he wants me to sign and return. This is wrong so I will not sign it.

[27] It appears to me that Mr. Bailey thought that Mr. Boyle was trying to characterize his leave as some kind of non-medical leave of absence, not a leave due to illness, and that it would therefore be incorrect to sign the form he had been sent by Mr. Boyle.

[28] The employees of SCI had received numerous documents about their conditions of employment over the years. The process of applying for leave was not clearly spelled out. As well, in September 2013, Mr. Bailey was having very extreme symptoms of stress. I find that Mr. Bailey could easily have been confused about the process and the forms he was sent by Mr. Boyle.

[29] Neither Mr. Cruz, Mr. Boyle, nor anyone else at SCI told Mr. Bailey that he was misinterpreting the forms and needed to sign the "request for leave" form even if his leave was due to illness.

[30] The employee handbook in existence at the time, according to Mr. Cruz, contained a policy regarding leaves of absence. This handbook stated that if an employee had a question about a leave policy or wanted to initiate a leave of absence, the employee should contact the Human Resources representative or the Benefits Department. Since Mr. Cruz worked in the Benefits Department, it seems entirely appropriate that Mr. Bailey was directing his email to Mr. Cruz, and not to Mr. Boyle.

[31] Also, the company form described as "Request for Leave - Canada" read as though leave had been approved by Mr. Boyle signing the form.

[32] Mr. Bailey's concern in his email that it should be made clear that the reason for his leave was illness appears to have been valid, as Mr. Cruz agreed with him that a new R.O.E. should be produced attributing the leave as due to illness. Mr. Cruz instructed a co-employee to amend the R.O.E. and resend it to Mr. Bailey. This was done by an SCI employee who issued a R.O.E. form on September 24, 2013 stating that reason for the request was "illness or injury". This was a government form which warned on its face that it is an offence to make false entries, and which required the SCI employee to certify statements on the form as true.

- [33] There is a reason Mr. Cruz did not insist on Mr. Bailey signing the "request for leave" form. Mr. Cruz testified that because Mr. Bailey's reason for leave was illness, it was Mr. Cruz's understanding of company policy that there was no need for Mr. Bailey to fill out a new "request for leave".
- [34] Thus, as of sometime in September 2016, all SCI communications to Mr. Bailey suggested to him that the company knew that he was taking unpaid leave because of illness and would be applying for EI benefits on that basis; that a manager, Mr. Boyle, had signed off on an R.O.E. request form as well as a request for leave form; and that the company had his certification from his doctor that he was expected to be off until March 1, 2014. No one from SCI informed Mr. Bailey that he needed to do anything else.
- [35] Mr. Bailey also had gained the impression that Mr. Cruz, the benefits administrator, was planning to help him facilitate his request for short-term disability benefits to Manulife and had sent to him forms in this regard.
- [36] There was no written policy which required Mr. Bailey to do anything more than what he had done, to take an approved leave due to illness. Mr. Cruz as much as admitted this in his cross-examination at trial.
- [37] But even if I am wrong and the SCI employee handbook or other policies required Mr. Bailey to take some other step within SCI, in the circumstances it was incumbent on Mr. Cruz, as benefits administrator, to tell him this. This is implicit in the employee handbook which pointed employees to the Benefits Department to deal with leave requests and questions.
- [38] There was no reason for Mr. Bailey to suspect that he needed to do anything more and that if he failed to do so SCI might think that he had resigned or abandoned his job.
- [39] This situation never changed in terms of Mr. Bailey's communications with SCI, until SCI terminated his employment. In other words, no one on the part of SCI ever said to Mr. Bailey that he needed to take some other steps to obtain approval for leave or that his leave was going to expire or be treated as abandonment of his position.
- [40] SCI's allegation that Mr. Bailey was "absent without leave" fails. I find that the steps taken by SCI in processing the leave and R.O.E. forms amounted to approval of Mr. Bailey's leave. I find that Mr. Bailey was on approved leave at the time his employment was terminated by SCI.

Illness

- [41] An undercurrent of the defendant's pleading and evidence at trial suggests that SCI considered Mr. Bailey's illness to only be "alleged". To the extent it is necessary to find that he was truly ill, I note that there was undisputed evidence that: Mr. Bailey experienced symptoms of illness starting in the spring of 2013; in the summer of 2013 he obtained a note from his medical doctor confirming he was ill; his health issues continued such that by September 2013 he obtained a note from his doctor that he was not expected to be able to

return to work until March 2014; and Mr. Bailey took steps with SCI's assistance to apply for coverage for short-term benefits due to illness.

- [42] No medical expert evidence was called at trial but this evidence was not needed because both parties at the time accepted the fact that Mr. Bailey was ill.
- [43] Mr. Bailey's honest state of mind was that he was ill and his physician informed him that he was ill. Mr. Bailey was experiencing sensations of vibrating, jaw-shaking, loss of concentration, foggy-headedness, panic, difficulty sleeping, irritability and a short temper.
- [44] There was no evidence that Mr. Bailey attempted to make up an illness or "act sick" to pursue some other agenda or advantage.
- [45] SCI personnel accepted that Mr. Bailey was ill, at least initially, and never told him differently. This was clear from the fact that personnel in the Benefits Department of SCI issued the R.O.E. to Mr. Bailey, noting that he was away due to illness, so that he could collect EI.
- [46] However, the suspicion that Mr. Bailey was responsible for his own ill health seems to have been held by Mr. Boyle.
- [47] Mr. Bailey had been diagnosed with prostate cancer in 2011 and had decided against conventional treatment, opting instead for some unconventional alternative remedies which at times made him unable to attend at the office because of urgent need to use a toilet. Mr. Boyle appeared to view Mr. Bailey with skepticism arising out of this history.
- [48] At some point during Mr. Bailey's leave in 2013, Mr. Boyle learned that Mr. Bailey reported to WorkSafeBC that his stress problems were at least in part related to interactions with Mr. Boyle. Mr. Boyle took great exception to this and wrote a draft email to Deanna Lajcik in the Human Resources Department of SCI responding to the claim. Mr. Boyle did not send the email and SCI only produced a copy of it mid-trial. However, the draft email by Mr. Boyle reveals his state of mind at the time.
- [49] In the draft email Mr. Boyle asserted that there were likely two reasons for Mr. Bailey's stress, both of which in his view were Mr. Bailey's own fault. One reason was that Mr. Bailey was studying for his real estate licence, and trying to perform two jobs at once; the other reason was that Mr. Bailey was not following his doctor's orders in respect of being monitored for prostate cancer, and that this was causing Mr. Bailey additional stress.
- [50] At a minimum, this draft email is an admission that Mr. Bailey's supervisor at SCI, Mr. Boyle, did believe that Mr. Bailey was suffering a health problem related to stress. There was no suggestion in the draft email that Mr. Boyle or others at SCI did not believe that Mr. Bailey was ill.

- [51] It is fair to say that the medical notes that Mr. Bailey provided to his employer at the time he took medical leave were very brief. Perhaps the employer assumed he would provide more information to the benefits' providers. But importantly, at no time did SCI or Mr. Boyle ask Mr. Bailey to provide further details or evidence regarding his illness.
- [52] I find that Mr. Bailey was indeed ill at the time he took leave which continued during the period of his remaining employment until he was fired. His symptoms of illness appeared to be stress-related.

Denial of Benefits

- [53] Connected with the statement in the RTCC that Mr. Bailey simply "alleged" that he was ill, the defendant also pleads that Mr. Bailey's application for short-term disability benefits was denied "as being without any medical proof of illness" (at para. 8).
- [54] SCI has also called no witness from Manulife or WorkSafeBC to prove that Mr. Bailey's application for short-term disability benefits due to illness was denied "as being without any medical proof of illness".
- [55] Correspondence from Manulife and WorkSafeBC to Mr. Bailey, and to SCI, responding to Mr. Bailey's claim for benefits, was introduced at trial. This correspondence does not support a conclusion that the claim for benefits was denied because there was no medical proof of illness.
- [56] Rather, the communications from Manulife to SCI indicate that Manulife considered that Mr. Bailey's claims arose out of the course of Mr. Bailey's employment and as such they were not covered for short-term disability benefits. Manulife recommended that he apply to recover benefits from WorkSafeBC. Manulife's representative also told Mr. Cruz that they would need additional medical information to support a claim, but did not explain why, probably for privacy reasons.
- [57] There is no evidence that Mr. Cruz told Mr. Boyle (who made the decision to terminate Mr. Bailey's employment) that Mr. Bailey was not really sick. There is no evidence that anyone at Manulife suggested to SCI that Mr. Bailey was pretending to be sick or not really suffering from symptoms.
- [58] Mr. Cruz, the SCI employee dealing with benefits and who received the correspondence from the insurers, summarized the Manulife initial decision to turn down the claim for benefits in an email message to Mr. Boyle on October 2, 2013, as follows:

Be advised that Don Dailey's [sic] Short Term Disability claim for work absence since September 11, 2013 has been declined by Manulife.

After a review of the evidence submitted it would appear that his claim for the illness or injury arises out of or in the course of employment which is not compensable under our STD policy. It is my understanding that Don has filed for a claim with WorkSafe BC. You may be required to submit and file a Form 7-Employer's Report of Injury to WorkSafe BC.

Manulife have advised Donald Bailey of their decision and the appeal process by phone and in writing.

- [59] Following that first denial of a claim for benefits, Mr. Bailey took Manulife's advice and made a claim to WorkSafeBC. In that claim he stated that his medical condition had been "created by years of working in a stressful environment", and in this regard, he mentioned "years of what I believe being picked on and abused by a management team" of two people, one of whom was Mr. Boyle. He outlined various work incidents where he felt mistreated and which left him shaking and vibrating, depressed and coming home in tears.
- [60] As I have mentioned, when Mr. Boyle learned of the substance of Mr. Bailey's claim, that his stress was due in part to years of abuse by Mr. Boyle, he took great exception to this claim, going so far as to write a draft email attributing Mr. Bailey's stress to other things, as referred to above.
- [61] In any event, WorkSafeBC turned down Mr. Bailey's claim for benefits by letter to SCI dated November 4, 2013. In this correspondence the insurer took the view that disability coverage did not extend to claims that arose out of the ordinary course of Mr. Bailey's work, because his stress symptoms on his own reports were due to his work environment.
- [62] I conclude that SCI has failed to prove its allegation that Mr. Bailey's benefits claims were denied "as being without any medical proof of illness".

Real Estate Agent Allegation

- [63] SCI also alleges at para. 10 of the RTCC that Mr. Bailey was "absent without leave" from September 20, 2013, and that while doing so he worked as a real estate agent.
- [64] I have already dealt with the allegation that he was absent without leave, which I find to be untrue. I will now deal with the latter allegation.
- [65] Mr. Bailey's evidence, which I accept, was that in the time period leading up to the summer of 2013, he made it known within SCI that he wanted to study real estate and obtain his real estate licence. He was never told by anyone at SCI that this was not permitted. He never said to anyone at SCI that he wanted to sell real estate full-time.

- [66] Mr. Bailey's uncontradicted evidence at trial was that he had no intention of leaving his job at SCI to become a real estate agent. Mr. Bailey's evidence was that his plan was to become licensed almost as a hobby and his only immediate plan was to act for a relative who was selling a home. He had no plans to allow this work to conflict with or detract from his job at SCI. He never put in hours as a real estate agent or realtor that could be considered close to full-time or as conflicting with his job at SCI.
- [67] There were some references in medical documents or in his benefits claims to suggest that Mr. Bailey may have told others that he was planning to make a career change. However, Mr. Bailey denied that this was an immediate plan and the authors of these documents were not called as witnesses. It is not uncommon for hearsay evidence to be incorrect and I accept Mr. Bailey's evidence in this regard.
- [68] Mr. Bailey's evidence was credible: he was paid well at SCI and had built up a strong network as a salesman in the funeral industry. He had children he wanted to support through university or college. Giving up his well-paid job to pursue a highly competitive sales career in another field where he had no network and no experience would have been too risky for him as the major breadwinner of his family.
- [69] I find it possible that Mr. Bailey wanted to investigate whether a career in real estate might one day be an option for him, and had expressed this to others, but that he had not made the decision to actually seriously pursue such a career. I find it likely that his sentiments were misinterpreted in some of the documents written by others.
- [70] Mr. Boyle testified in examination-in-chief that he did not give Mr. Bailey "approval" to work in real estate, and if he had known he was working in real estate he would "no longer be working" at SCI because SCI expected a full-time commitment and that an employee not hold "another full-time position" anywhere. He also seemed to try to advance evidence that he had decided to fire Mr. Bailey because Mr. Bailey was working in real estate.
- [71] I found Mr. Boyle's evidence-in-chief on this subject internally inconsistent and disingenuous. There was no evidence that Mr. Bailey was working "full-time" as a real estate agent. Mr. Boyle also made no inquiries in this regard.
- [72] Mr. Boyle said he knew that Mr. Bailey was studying to take the real estate exam, because in his view this was happening on company time and was "disruptive". There is no evidence that, knowing this, Mr. Boyle told Mr. Bailey that he could not become a real estate agent and still continue to hold down a job at SCI.
- [73] It is true that in early September 2013, Mr. Boyle reprimanded Mr. Bailey for studying at work and using the office computers to study, but that is it. Mr. Bailey was upset and surprised by this reprimand, and stated to Mr. Boyle that a co-worker, Mr. Boyle's son, wasted a great deal more time at work.

- [74] Mr. Boyle also testified that he did some checking and found out on September 11, 2013 that Mr. Bailey had obtained his real estate licence and was "working" for someone else in real estate.
- [75] As the evidence made clear at trial, in order to secure his real estate licence, Mr. Bailey had to be affiliated with a real estate firm. This does not mean he had any obligations to be working long hours or in conflict with his duties at SCI. He was an independent contractor.
- [76] The owner of the real estate firm in question, Mr. Bill Binnie, testified at trial. He explained that it is quite common for real estate agents to work part-time. When Mr. Bailey became licensed and joined his agency, Mr. Binnie understood that Mr. Bailey worked full-time already, at a funeral home, and would only be working part-time in real estate.
- [77] Despite knowing as of around September 11, 2013 that Mr. Bailey had obtained his real estate licence and was affiliated with a real estate agency, Mr. Boyle did not terminate Mr. Bailey's employment but stood by while Mr. Bailey made claims for disability insurance from his work at SCI. Mr. Boyle tried to explain this by stating that he assumed that Mr. Bailey had probably made a decision to leave.
- [78] Mr. Boyle's evidence is inconsistent with his own actions, including a R.O.E. request form that Mr. Boyle filled out in relation to Mr. Bailey on September 16, 2013, stating that the employee was expected to return on March 1, 2014.
- [79] Overall I found Mr. Boyle to not be a credible witness.
- [80] The fact is that Mr. Bailey was not working full-time in real estate and his obtaining of a real estate licence was not abandonment of his work at SCI nor was it cause for his dismissal.

The True Reason for Dismissal

- [81] What seems most likely to have happened, on a review of all the evidence, is that Mr. Boyle looked for an excuse to terminate Mr. Bailey's employment.
- [82] Mr. Boyle had learned that Mr. Bailey had been critical of his management style, attributing this in part to Mr. Bailey's stress symptoms. Mr. Boyle felt that Mr. Bailey was readying himself for another career, as a real estate agent. Mr. Boyle seemed to have some resentment towards Mr. Bailey.
- [83] I find that Mr. Boyle decided to treat the denial of Mr. Bailey's claim for short-term disability benefits as equivalent to a determination that he never should have been on leave in the first place, and thus as justification to fire him. This conclusion arises inescapably from the evidence of Mr. Boyle and Mr. Cruz, and the conduct of SCI in the way the company dismissed Mr. Bailey.

- [84] In his evidence-in-chief, Mr. Cruz testified that once Manulife advised SCI that it was going to deny benefits, which was in a letter dated November 14, 2013, this triggered SCI terminating the employee from the payroll system.
- [85] Yet, as Mr. Cruz admitted in cross-examination, there was nothing in the written policies given to employees of SCI notifying them that Manulife would be adjudicating whether or not they were entitled to a leave of absence for illness.
- [86] Certainly Mr. Bailey was never told that his request for leave was not in fact approved and was only in some kind of purgatory to be determined later, and would be considered invalid retroactively if he did not qualify for insurance benefits. To the contrary, Mr. Bailey was led to believe by SCI's actions that his leave for illness was approved and the only issue was whether Manulife would top up his EI benefits by approving a short-term disability claim.
- [87] It was Mr. Boyle who made the decision to equate the insurer's denial of disability benefits to a decision terminating the employee's employment, and that is what he did, on November 28, 2013. He decided to fire Mr. Bailey, without telling him that his employment was terminated, while Mr. Bailey was away from work on a stress-related illness.
- [88] Just before Mr. Boyle fired Mr. Bailey he had an email discussion with Deanna Lajcik in SCI's Human Resources Department. This discussion identifies that Mr. Boyle was looking for an excuse to terminate Mr. Bailey's employment, and despite not talking to Mr. Bailey, wanted to treat him as though he had abandoned his job. The exchange of emails on November 27, 2013 is as follows, shown chronologically starting with the first email:

November 27, 2013

From Brian Boyle to Deanna Lajcik:

Can you give me some direction as to what is my next step and when with Don Bailey.

From Deanna Lajcik to Brian Boyle:

Is he still off? What is the status regarding his leave?

From Brian Boyle to Deanna Lajcik:

He applied for long term leave to Manulife which was rejected. He applied to WorksafeBC and his claim was rejected, so he [is] effectively away from work, but as he is still in our system he [sic] medical etc. is still covered. He has made no attempt to contact us re: his return to work, and as such his actions could be classified job abandonment. Or am I wrong? Either way should he not be back at work if all his claims have been rejected?

From Deanna Lajcik to Brian Boyle:

He is still claiming to be "ill" and we cannot terminate without inviting a human rights complaint. The fact that he is on unpaid leave however, would normally result in the cancellation of his benefits. How long has he been off? I don't think it's even a year so any action at this point would be premature. It costs nothing to leave him on our system so long as he is not receiving benefits.

From Brian Boyle to Deanna Lajcik:

We had suspicions he was working a real estate [sic] before he left. There were probably weeks where he wrote no business but was paid the minimum wage. In addition, if he had already accepted a position with his real estate firm prior to submitting his false claims for long term, is that a case for fraud?

From Deanna Lajcik to Brian Boyle:

It could be. But was he paid anything? If his LTD application failed, was he also denied STD? The issue really would be sick leave for which he was paid, but a good lawyer would argue that he was ill due to stress at the Forest Lawn environment, but did not preclude him from working elsewhere to maintain some form of income and also his "mental health".

From Deanna Lajcik to Brian Boyle:

If we notify him of the abandonment of his position that should suffice - alternatively, just terminate him in the system, he won't be getting benefits or anything else. Let sleeping dogs lie. If he makes any effort to return to work, advise him then he has abandoned his position and was effectively terminated.

[89] This leads to another unproven allegation of cause: that SCI "repeatedly requested" that Mr. Bailey return to work and he refused or neglected to do so (at paras. 9 and 11, RTCC).

Request to Return to Work

[90] The fact is that no one at SCI ever asked Mr. Bailey to return to work. The defendant's allegations, in paras. 9 and 11 of the RTCC, that Mr. Bailey was repeatedly asked to return to work and that he refused or neglected to do so, are false.

[91] The very fact that SCI, a sophisticated company, would through its current employees advance such patently false allegations in a court document says something about the credibility of its employees. I find that it indicates awareness on the part of SCI's employees involved in the termination of Mr. Bailey's employment that the allegation of "job abandonment" was without merit and they therefore needed to buttress this allegation with the false assertion that Mr. Bailey had repeatedly been asked to return to work.

[92] Mr. Boyle sought to finesse these false allegations a few ways in his evidence. One way was to suggest he had contacted Mr. Bailey. Another way was to suggest that it was Mr. Bailey's responsibility to contact him, once his claim for benefits had been denied. A third way was to refer to Mr. Bailey having commenced work as a real estate agent. Mr. Boyle's evidence in this regard was evasive, inexact, and incredible.

[93] Mr. Boyle was asked on examination for discovery who it was that repeatedly requested Mr. Bailey to return to work after September 2013, as pleaded by SCI in the RTCC. He could not answer and so this was left as an outstanding request. It was later answered by legal counsel on behalf of SCI as follows:

Mr. Boyle contacted or attempted to contact Mr. Boyle [sic, meaning Mr. Bailey] to arrange for him to come in after he had left work and before he learned that he had taken a job as a real estate agent.

[94] In his evidence-in-chief, Mr. Boyle tried to create the impression that he tried to contact Mr. Bailey and just could not recall if he left him a message or not. However, he framed this evidence as wanting to call Mr. Bailey to give him a disciplinary letter; that he "tried calling him and never got any feedback response from him"; and that he did not try to contact him again. He also put it as "I tried calling him but didn't get through". Asked in-chief, why he did not try again, he said it was because he assumed Mr. Bailey was working another job, in real estate.

[95] Another answer to an outstanding request on Mr. Boyle's examination for discovery was revealing. This request was following up on the chain of emails on November 27, 2013, following which Mr. Boyle made the decision to terminate Mr. Bailey's employment. Counsel for the plaintiff asked if Deanna Lajcik made the decision not to communicate to Mr. Bailey that his benefits and employment had been terminated, and to advise why this decision was made. The response from legal counsel on behalf of SCI stated:

Ms. Lajcik was under the understanding at the time that Brian Boyle had contacted Mr. Bailey and told him that he had to come back to work or he would be terminated. Ms. Lajcik has no involvement in the continuation or termination of Mr. Bailey's benefits.

[Emphasis added.]

[96] Mr. Boyle had to admit in cross-examination at trial that he did not contact Mr. Bailey and ask him to return to work when he was on leave.

[97] Mr. Boyle had no explanation as to why SCI asserted in this case that Ms. Lajcik thought that Mr. Boyle had contacted Mr. Bailey. Mr. Boyle said he did not tell her this. This suggests that either Ms. Lajcik was asked about the email chain and was not telling the truth about her thoughts or Mr. Boyle was not telling the truth. Ms. Lajcik did not testify at trial but sat in the courtroom through the trial as SCI's representative.

[98] Regardless, and more importantly, SCI stuck by this false story that Mr. Bailey was repeatedly asked to come back to work as part of its defence.

[99] Clearly seeking to advance an alternative to buttress SCI's position, Mr. Boyle testified in-chief that he felt the onus was on Mr. Bailey to contact him to return to work after his claims to benefits were denied.

[100] As part of his direct testimony, Mr. Boyle was asked this question and gave this answer:

Q And what did you do when you understood that he had been denied benefits from WCB and Manulife?

A Well, my understanding was that after he had been denied his benefits he should have contacted me and returned to work, and failure to do that meant that he had abandoned his position. I also felt in inappropriate [sic] that he was still seeking benefits while he was now a real estate agent. And so I contacted HR to get some direction on what needed to be done.

[101] Clearly this position is advanced to support the inference that Mr. Bailey's failure to contact SCI when Manulife turned down his claim to benefits constituted abandonment of his position. This was not pleaded. Factually there is no basis for this assertion.

[102] When Mr. Bailey's employment was terminated, he was still in the midst of making his final appeal within the Manulife claims process. As far as he knew, nothing more was needed from him: SCI knew he was away on leave because of illness. Mr. Bailey's health was not suddenly better because his first appeal process regarding his claim for benefits to top up his EI was denied.

[103] Further, there was nothing in any SCI manual or employee handbook that gave notice to Mr. Bailey that he had an obligation to contact SCI or to return to work as soon as his claim for benefits was denied.

[104] Mr. Boyle went on to testify as follows as to the decision he made regarding Mr. Bailey, following the November 27, 2013 exchange of emails between him and Deanna Lajcik:

My position was that because he hadn't contacted me, and understanding that he didn't have an approved lead -- an approved leave, that we should process the paperwork for absence without leave and kick him out of the system as an employee.

[105] Mr. Boyle admitted he did not contact Mr. Bailey to tell him that he had been "kicked out of the system", the SCI euphemism for being fired.

[106] The defendant SCI submitted in closing submissions that the notion that Mr. Bailey abandoned his employment was based on the following description in one of the SCI handbooks for employees:

If an associate leaves work without notice or fails to report to work and does not return or communicate with their supervisor for at least three (3) consecutive workdays or three (3) consecutive calendar days (whichever is shorter), the absence is considered an involuntary separation for job abandonment and the termination will be considered for cause. "Workdays" is defined as days in which you are customarily scheduled to work, including weekends, if applicable.

[107] I do not find that the above employee handbook excerpt assists SCI. Mr. Bailey did not leave work without notice or fail to report to work. He left work with notice that he had medical reasons for being unable to work and that his physician did not expect him to be able to return until March 1, 2014. He was not told he needed to report to work. There was no request by anyone at SCI for Mr. Bailey to return to work.

[108] Further, Mr. Boyle's evidence was that he did not consider the definition of abandonment in the handbook when he decided to terminate Mr. Bailey's employment.

[109] The defendant further submits as follows:

Abandonment of employment is akin to repudiation of the employment agreement. The test for abandonment is whether, viewing the circumstances objectively, a reasonable person would have understood from the employee's words and actions that he or she had abandoned the contract of employment.

Pereira v. The Business Depot Ltd., 2011 BCCA 361 at para. 47

[110] I find it obvious that no reasonable person would have understood from Mr. Bailey's words and actions that he had abandoned the contract of employment. Indeed, this is so obvious that it explains why SCI pleaded the false assertion that Mr. Bailey was repeatedly asked to return to work and refused to do so: in the absence of evidence of this demand and refusal, it would be clear to any reasonable person that Mr. Bailey had not abandoned his job.

Conclusion: No Cause

[111] In conclusion, I find that the defendant had no cause for dismissal of Mr. Bailey from his employment. When he was dismissed Mr. Bailey was on an approved leave of absence from his work due to illness and he had not abandoned his job.

Is There a Contractual Limit on Damages?

[112] Having determined that there was no cause for dismissing Mr. Bailey from his employment, the next issue is determining whether Mr. Bailey's employment contract had an express term governing dismissal without notice.

Various Employment Contracts and Documents

- [113] Mr. Bailey began working for SCI in 1996. Over the years of his employment, Mr. Bailey signed a number of employment contracts and was also given a number of employment-related documents such as handbooks or policies, some of which required him to sign a document acknowledging receipt of the same. There were over 15 such documents. Over time, some of the language regarding termination changed in these documents.
- [114] SCI is part of a corporate group of over 22,000 employees in the United States and Canada, with management decisions emanating from head office in Houston, Texas. Employment-related documents were generated in the Houston head office.
- [115] The plaintiff submits that the first employment contract he entered into with SCI is the governing contract. This contract was entered into in 1996 (the "1996 Contract"). He submits that there was no consideration for subsequent contracts or employment-related documents. Rather, subsequent contracts were simply notices of adjustment in method of calculation of commissions (compensation) and some adjustments to job duties and employer policies, all of which was anticipated in the initial employment contract.
- [116] In this regard, the 1996 Contract described the employee as a "Counselor", the local funeral and cemetery subsidiaries as "the Corporation", and provided, amongst other things, as follows:
1. Employment. Counselor is hereby employed by Corporation as an employee subject to the rules and regulations of Corporation and SCI and any and all amendments thereof, to find and develop prospects and to make sales for and on behalf of Corporation of cemetery interment rights, merchandise, and services as may be designated by Corporation from time to time .
 3. Duties of Counselor. Counselor acknowledges that he has read and is familiar with the rules and regulations [and various policies] and agrees to abide by and be governed by the provisions thereof and any and all amendments made thereto together with any and all directions or instructions of corporation as may be given from time to time .
 4. COMPENSATION. Counselor's compensation shall consist of commissions and bonuses earned by Counsellor on the sale of Corporation's property, merchandise or services .
 - (a) The commission and bonus schedules shall be established by Corporation from time to time. The existing schedule, a copy of which has been examined by Counselor, may be amended or superseded by Corporation by issuing revised schedules. Copies of all revised commission and bonus schedules will be provided to Counselor and Counselor agrees to accept such commissions and bonuses as full compensation. Commissions and bonuses shall be earned in accordance with the schedule in force at the time a sale is made .
- [117] It was not evident on the defendant's RTCC which employment contract the defendant relies upon. The defendant pleads the employment contract was as follows:

4. The Defendant employed the Plaintiff pursuant to a written contract (the "Contract").
5. The Plaintiff was entitled to receive the compensation, benefits and perquisites set out in the Contract and in accordance with such compensation schedules and bonus programs as were established by the Defendant from time to time.
6. It was an express term of the Contract that the Defendant could terminate the Plaintiff's employment for cause without any notice or payment in lieu of notice.
7. It was an express term of the Contract that the Defendant could terminate the Plaintiff's employment without cause by providing to the Plaintiff written notice, pay in lieu thereof, or any combination of pay in lieu and notice of the greater of 8 weeks (having regard to the Plaintiff's length of service) or the minimum amount required by the Employment Standards Act.

[Emphasis added.]

[118] Out of the possible number of contracts that could apply in this case, in closing submissions, the defendant argued that an employment contract entered into in 2004 applies.

[119] It is necessary to review the various termination clauses in the various contract documents over time.

[120] The 1996 Contract provided as follows:

6. TERMINATION. Counselor's employment may be terminated by either party without cause, upon giving written notice to the other party as required under the Employment Standards Act of British Columbia, .

[121] When Mr. Bailey first commenced work with SCI in 1996, he was doing an area of sales known as "pre-need", meaning before there has been a death. This was considered training ground for the more lucrative and broader sales category of "at-need" which dealt with customers who had experienced the death of a loved one and would be purchasing services to address that death, but those customers were also leads for the same SCI salesmen to make additional "pre-need" sales.

[122] Later, in 1998, Mr. Bailey applied for and was approved by SCI to sell services in the broader "at-need" customer category. He continued to be an "at-need" salesperson until he was dismissed from employment in 2013. Sometimes the "at-need" salespeople were called "family service counselors".

[123] Mr. Boyle became Mr. Bailey's supervisor in 1998, once Mr. Bailey moved into the position of a salesperson covering both "at-need" sales, dealing with a deceased person, as well as pre-need sales, that is, advance funeral services. Mr. Boyle admitted that since Mr. Bailey began working for him in 1998, he had been performing much the same job since, right up to when his employment was terminated in 2013.

- [124] The defendant submits that the 1996 Contract was specifically covering Mr. Bailey's employment as a "pre-need" salesperson; and that Mr. Bailey entered into a new employment contract in 1998 when he became an "at-need" salesperson.
- [125] I find this assertion unproven on the evidence. The 1996 Contract does not contain any language distinguishing Mr. Bailey's type of sales services as "pre-need" only. SCI did not produce any parallel 1996 contract for "at-need" salespersons, and there is no evidence that a separate form of contract existed for this broader category of sales.
- [126] It is the case, however, that in 1998 Mr. Bailey was presented with and signed two successive employment contracts, one of which described the type of sales as pre-need, and the other of which described the type of employment as "Family Service Sales Counselor", understood to be at-need sales (the "1998 Contracts").
- [127] The evidence was that all of the SCI employees including Mr. Bailey were presented with employment documents from time to time, were told they needed to sign them, and did so. There were no negotiations about the terms.
- [128] The termination clauses in the 1998 Contracts were virtually identical. They stated that employment could be terminated without cause upon "prior written notice"; they did not provide that employment could be terminated without prior written notice upon payment of damages in lieu of notice.
- [129] The precise language in the 1998 Contracts was as follows:

TERMINATION

Employee may be discharged by Employer without prior notice to Employee for just cause, including failure on the part of Employee to comply with the terms and conditions of this Agreement; unsatisfactory work, including sales volume below levels acceptable to Employer; misconduct; or violation of any Employer's policies or procedures. In addition, Employee's employment may be terminated by Employer, without cause, upon prior written notice to Employee in accordance with the following Chart:

Length of Service

Notice or Severance

0 months to less than 3 months

0 weeks

3 months to less than 12 months

1 week

1 year to less than 3 years

2 weeks

3 years to less than 4 years

3 weeks

4 years to less than 5 years

4 weeks

5 years to less than 6 years

5 weeks

6 years to less than 7 years

6 weeks

7 years to less than 8 years

7 weeks

over 8 years

8 weeks

Employee may terminate his employment with Employer upon a minimum of five (5) days prior written notice to Employer or such longer period as may be required by employment standards legislation.

[130] The next occasion when employees were presented with employment documents to sign occurred in 2004. Over the months of May and June 2004 Mr. Bailey and other employees were presented with some documents which outlined a change in compensation for "Family Service Counselors". He and other employees were asked to and did sign a document acknowledging the receipt of the new compensation plan and an additional document acknowledging receipt of a "revised Sales Representative Employment Agreement Exhibit A and Exhibit B, distributed on June 1, 2004".

[131] In fact no such Exhibit A or B dated June 1, 2004 was produced by SCI in evidence at trial. However, SCI did produce a document dated June 23, 2004 entitled "British Columbia Sales Representative Employment Agreement", which was filled out in Mr. Bailey's name and signed by him on June 23, 2004 (the "2004 Contract").

[132] In this proceeding SCI relies on the 2004 Contract as governing the employment of Mr. Bailey. It provided for termination as follows:

16. TERMINATION

Employee may be discharged by Employer without prior notice to Employee for just cause, including failure on the part of Employee to comply with the terms and conditions of this Agreement; unsatisfactory work, including sales volume below levels acceptable to Employer; misconduct; or violation of any of Employer's policies or procedures. In addition, Employee's employment may be terminated by Employer, without cause, upon prior written notice to

Employee (or if permitted by applicable employment/labour standards legislation, pay in lieu thereof or any combination of pay in lieu and notice) in accordance with the greater of the notice/severance set out with the following Notice/Severance Chart (which chart accords with current employment/labour standards legislation in this province) and Employee's entitlement under the Employment Standards Act and/or such similar applicable legislation as may be in force at the time of termination.

Employee will not be entitled to any additional notice of termination, pay in lieu, severance or any other benefits whatsoever upon termination of employment under the common law or otherwise:

NOTICE/SEVERANCE CHART

Length of Service

Notice/Severance

0 months to less than 3 months

0 weeks

3 months to less than 12 months

1 week

1 year to less than 3 years

2 weeks

3 years to less than 4 years

3 weeks

4 years to less than 5 years

4 weeks

5 years to less than 6 years

5 weeks

6 years to less than 7 years

6 weeks

7 years to less than 8 years

7 weeks

Over 8 years

8 weeks

Employee may terminate his employment with Employer upon a minimum of five (5) days prior written notice to Employer or such longer period as may be required by employment/labour standards legislation.

[Emphasis added.]

- [133] The 2004 Contract stated that the Employer (SCI) "hereby employs Employee", Mr. Bailey, "as a Sales Representative upon the terms and conditions contained in this Agreement, and Employee hereby accepts such employment." It contained an "entire agreement" clause stating that it superseded and replaced all prior employment agreements.
- [134] At page 2 of the 2004 Contract it stated that it would be "of no force and effect until countersigned by the Managing Director of Employer". There was a space on the same page for the Managing Director to sign, but there was no signature in the space provided. There was another space for signature by the "Market Manager or Director" and the "Sales Manager", and these spaces were signed.
- [135] Unlike the earlier contracts, the 2004 Contract expressly contained language providing for payment in lieu of notice, on termination without cause. It also contained language expressly limiting the right to claim any additional notice or pay or benefits under common law or otherwise. This language was not only missing in the earlier contracts, it was also missing in the next contract, entered into in 2005. This explains why SCI seeks to rely on the 2004 Contract.
- [136] A new employment contract was presented to and signed by Mr. Bailey in 2005 (the "2005 Contract"). This included a change in the title of employees, referring to the new name of "Community Service Advisor" and or "Field Force Sales Counselor". It stated that the employee's employment "shall commence upon the execution of this Agreement" and be subject to the termination provisions.
- [137] The termination provisions in the 2005 Contract more closely mapped the 1998 Contracts, as it only provided for termination without cause upon prior written notice and did not provide for payment of damages in lieu of notice. Specifically, the 2005 Contract provided that employment could be terminated "without cause, upon prior written notice to Employee in accordance with the following Chart", setting out a chart identical to the one in the 1998 Contracts and the 2004 Contract.
- [138] The very last document that might be seen as trying to impose employment terms but which was not signed, and was given to the plaintiff in November 2012, was stated to be effective January 1, 2013. It was described as "Family Service Counselor - Sales Incentive Plan Document" ("2013 Sales Incentive Document"). The 2013 Sales Incentive Document stated that it was a plan "designed to reinforce the linkage between performance and financial rewards". It did not state that it was a new employment contract. Most of the content of the document related to commissions.

[139] The 2013 Sales Incentive Document also provided as follows:

Administrative Guidelines

Employment

Your employment with the Company is for no definite period of time. Either you or the Company may end the employment relationship at any time, by providing the minimum notice and/or pay in lieu of notice required by employment standards legislation applicable to the province in which you are employed. In the event the Company has just cause to terminate your employment, the Company may terminate your employment summarily, without notice or any pay in lieu. This indefinite employment relationship remains in effect and cannot be changed by the statements, policies, practices or communications of others. Agreements to the contrary are ineffective unless they are in writing and signed by the Company's President or an authorized Officer.

All participants must comply with the general employment practices and policies of the company.

[Emphasis added.]

Analysis of Which Contract Applies

[140] As a first step in the analysis, I have concluded that the 1996 Contract applies because there was no consideration for the subsequent contracts. In this regard, I accept the plaintiff's argument based on *Watson v. Moore Corporation Ltd.*, [1996] B.C.J. No. 525 (C.A.).

[141] In *Watson*, the Court of Appeal found that continued employment alone is not consideration for signing an employment contract, there must be something more. That something more can be forbearance from termination or another incentive.

[142] In the case at bar, each of the successive contracts were simply presented as something employees had to sign as a matter of their continued employment. This does not amount to forbearance. Forbearance requires some benefit to the employee beyond the threat "we will fire you if you don't sign": see *Krieser v. Active Chemicals Ltd.*, 2005 BCSC 1370 at paras. 29-32.

[143] There was no suggestion that the company had to restructure and therefore unless Mr. Bailey signed and accepted some new provisions of his employment, his employment would be terminated.

[144] It is true that the 1996 Contract incorporated the concept that the employee was agreeing to future changes in company rules and regulations, policies, and compensation schedules. However, the 1996 Contract was express about the areas of future change that were being agreed to, and did not include in this the subject matter of termination. The termination clause in the 1996 Contract said nothing about the employee agreeing to future changes in terms of termination. I consider that the 1996 Contract did not constitute an agreement to

future changes in material terms dealing with termination.

- [145] However, if I am wrong and there was consideration for subsequent and successive contracts, I would conclude that the 2004 Contract does not apply because the same logic that would enforce successive contracts would lead to the conclusion that the 2005 Contract replaced the 2004 Contract.
- [146] I reject the notion that the 2013 Sales Incentive Document was a contract that imposed terms of employment related to termination. There was insufficient evidence to indicate that there were circumstances where it was introduced to the plaintiff and then treated mutually by the parties as a new contract. The evidence was simply that it was available on the company's intranet.
- [147] I have not elaborated on these findings because as I will explain shortly, in the end all of the contracts lead to the same result: an enforceable limit of eight weeks' notice.

Does the Contract Have Express Provisions Governing Notice of Dismissal Without Cause?

- [148] The 1996 Contract contained express terms regarding notice of dismissal without cause: "Counselor's employment may be terminated by either party without cause, upon giving written notice to the other party as required under the Employment Standards Act of British Columbia".
- [149] The common law implies a term in employment contracts that an employee will not be fired without cause unless there is reasonable notice. However, the law is quite clear that such a term will be displaced by a contract clause which expressly deals with notice, unless for some reason the express contract clause is void.
- [150] Here, as a first step, it is clear that the 1996 Contract expressly displaces the common law presumption of reasonable notice, by a term of notice that is defined as "required under the Employment Standards Act of British Columbia". The question is whether this clause is void.

Parties' Positions on 1996 Contract

- [151] The plaintiff argues that the express contractual limit on notice is void and does not displace the implied common law term of reasonable notice for a number of reasons:
1. the defendant gave no notice;
 2. the clause provides less than the minimal protections under the ESA because it says nothing about payment of damages in lieu of notice and for these reasons the clause is ambiguous and unenforceable;
 3. the contract was fundamentally breached by the defendant and thus it is unenforceable.

- [152] The defendant submits that the 1996 Contract is clear and unambiguous and enforceable; that it displaces the common law presumption of reasonable notice, replacing it with a term of notice as required under the ESA. Any damages are thus measureable by that period of notice required by the ESA.

Analysis of 1996 Contract

- [153] Much of the plaintiff's argument is circular. The fact that no notice was given by the defendant when it dismissed the plaintiff from employment simply means that the defendant breached the 1996 Contract. What flows from a breach of contract is not a finding that the contract is void, but rather, what flows is a measure of damages for breach of contract.
- [154] This takes us to ordinary contract principles. The measure of damages for breach of contract is typically to put the injured party in the position he would have been in had the contract been performed: see G.H.L. Fridman, *The Law of Contract in Canada*, 4th ed. (Toronto: Carswell, 1999) at 787; see also the judgment of Southin JA in *Nygaard International Ltd. v. Robinson*, [1990] B.C.J. No. 1155 (C.A.) [Nygaard].
- [155] An employer is not prohibited from terminating the employment of an employee. We must consider what would have happened had SCI terminated Mr. Bailey's employment in accordance with the terms of the contract.
- [156] This leads us back to the original question: was it a term of contract that notice of dismissal be limited to that required by the ESA; or was this term unenforceable and therefore the implied common law term applied, requiring that reasonable notice of dismissal be given? Once the answer to this question is reached, the measure of damages will be equivalent to the benefits of employment (salary and other benefits) for the applicable period of notice.
- [157] The plaintiff also argues that there is ambiguity in the 1996 Contract in part because the clause says nothing about damages being payable as an alternative to notice. The plaintiff points out that the ESA provides in s. 63 that an employer is liable for wages for certain periods depending on length of service, if an employee is dismissed without cause; and this liability is only discharged absent payment if the employee is given written notice of termination.
- [158] On this argument, the plaintiff suggests that it is unclear what is meant in the 1996 Contract by the reference to the notice "required by" the ESA.
- [159] I am not persuaded that the clause is ambiguous in this regard.

- [160] There are many examples in the case law of employment contracts referencing the notice requirements of employment standards legislation in similar fashion, and these provisions being found enforceable. Many of these authorities were referenced in *Cook v. Hatch Ltd.*, 2017 ONSC 47. In *Cook*, the termination clause found to be enforceable provided for termination with notice in writing with a minimum of "the notice required by the applicable labour legislation".
- [161] One prong of the plaintiff's argument seemed to be that the clause was ambiguous because the termination clause in the 1996 Contract did not mention damages in lieu of notice.
- [162] This argument is built on faulty logic. While an employer can choose to state what damages will be payable in lieu of notice, failure to do so does not mean there is ambiguity in the notice provision. A similar clause in *Cook* only provided for notice and did not provide for payment in lieu of notice, but the clause was enforceable. This was also the case in *Clarke v. Insight Components (Canada) Inc.*, 2008 ONCA 837.
- [163] Here the clause in the 1996 Contract is clear: the notice that must be given is that required by the ESA. Reading the ESA it is obvious that notice is required if an employee is terminated and the employer has done so without paying the required damages.
- [164] It is not necessary for the 1996 Contract to spell out what damages will flow if the employer breaches the notice provisions of the contract. The measure of damages for breach of contract will be based on ordinary principles of contract law.
- [165] Viewed another way, the plaintiff's argument amounts to a suggestion that where an employment contract expressly provides for a notice period of termination, but no measure of damages for breach of that notice period, the court should imply that the parties intended damages to be equivalent to the period of reasonable notice that would have been implied at common law. For policy reasons this argument is not without some attraction in the area of employment law, given the importance of the employment relationship and the imbalance of power between employee and employer. But to date the courts have rejected such an approach.
- [166] In two leading cases, and not without some reservation, the appellate courts of British Columbia and Ontario were clear that if an employment contract specifies a period of notice that must be given for dismissal of an employee without cause, then the measure of damages for breach of that provision will be based on the express notice period: see *Nygard*, and *Wallace v. Toronto-Dominion Bank* (1983), 41 O.R. (2d) 161 (C.A.).
- [167] The contractual notice period governs the measurement of damages even where the notice provision was breached by dismissal without notice, and even where the contract itself does not specify the measure of damages in lieu of notice, as in *Nygard* and the earlier Ontario Court of Appeal case of *Jobber v. Addressograph Multigraph of Canada Ltd.*, [1980] O.J. No. 1598 (C.A.).

[168] To date, therefore, the common law relating to employment contracts has not developed an implied term of contract that "damages will be payable in lieu of notice", in absence of an express damages clause.

[169] As stated by Saunders J.A. in *Saalfeld v. Absolute Software Corporation*, 2009 BCCA 18:

[36] It is clear, on authority of this Court, the implied term in the employment contract is that "each party must give reasonable notice of termination to the other. The implied term is not a term to the effect that the employer may give pay in lieu of notice": *Dunlop v. BC Hydro & Power Authority* (1988), 32 B.C.L.R. (2d) 334 at 338, [1989] 2 W.W.R. 518 (C.A.), *Lambert J.A.* The corollary of this proposition is, as said by Southin J.A. in *Nygard Int. Ltd. v. Robinson* (1990), 46 B.C.L.R. (2d) 103 at 107 (C.A.):

That compensation, that is to say, damages for the breach are what the innocent party would have received or earned depending on the nature of the contract had it been performed according to its terms.

See also *Iacobucci v. WIC Radio Ltd.*, 1999 BCCA 753, 72 B.C.C.R. (3d) 234, and *Gillies v. Goldman Sachs.*, 2001 BCCA 683, 95 B.C.L.R. (3d) 260.

[170] Even if a court were to attempt to discern the parties' intentions at the time they entered the employment contract in order to imply a damages clause in the contract, one would expect the employer to argue that it would be logical to imply that they intended, in the event of a failure to give notice, that damages would be payable equivalent to the period of notice that was provided for in the contract.

[171] I come back to the remainder of the plaintiff's argument regarding the termination clause in the 1996 Contract being unenforceable. The plaintiff suggests that the case of *Machtinger v. HOJ Industries Ltd.*, [1992] 1 S.C.R. 986 [*Machtinger*] applies.

[172] The case of *Machtinger* in this context stands for the proposition that an employer may not contract out of provisions of the ESA, and that a contract term that attempts to do so will be found void.

[173] Here, the plaintiff criticizes the termination clause for not addressing certain subjects provided for in the ESA: liability for eight weeks' wages in lieu of notice, and a prohibition on terminating an employee who is on leave (ss. 63 and 67 in 1996).

[174] However, the termination clause does not contradict these provisions in the ESA, but rather states that notice must be as required under the ESA. This does not preclude paying wages in lieu of notice; nor does it provide for notice being given during an employee's leave in contravention of the ESA. I therefore do not find the termination clause in the 1996 Contract to be void.

- [175] Likewise, for similar reasons as already expressed, the doctrine of fundamental breach does not assist the plaintiff. Simply put, the case law seems clear that what occurred due to a lack of notice of termination was a breach of the contract, leading to damages, but not leading to a vitiation of the entire contract.
- [176] I find that the express provision as to notice in the 1996 Contract, namely, "as required" by the ESA, is enforceable and displaces the common law presumption of reasonable notice.
- [177] The parties agree that the notice period under the ESA is eight weeks' notice given the plaintiff's length of service.
- [178] If I am in error as to the 1996 Contract being the governing contract, I have found that the 2005 Contract applies. For similar reasons, I also find that the 2005 Contract contained unambiguous express language as to the length of notice for dismissal without cause, and this express language displaces the common law presumption of reasonable notice.
- [179] Indeed, it appears that under all versions of the employment contract, for an employee with the plaintiff's length of service, the employer expressly limited the period of notice of dismissal without cause to eight weeks, either by express reference to eight weeks, or by reference to the ESA, which itself requires eight weeks.

What are the Plaintiff's Ordinary Damages?

- [180] Given my findings as above, the plaintiff is entitled to damages measured on the hypothetical situation that the contractual notice period had not been breached.
- [181] The 1996 Contract required that an employee being dismissed without cause be given notice "as required" by the ESA.
- [182] The ESA required that an employee of a length of service similar to Mr. Bailey could be given eight weeks' notice, or eight weeks' wages (s. 63).
- [183] Section 67(1) of the ESA also provides:
- 67 (1) A notice given to an employee under this Part has no effect if
- (a) the notice period coincides with a period during which the employee is on annual vacation, leave, temporary layoff, strike or lockout or is unavailable for work due to a strike or lockout or medical reasons, or
 - (b) the employment continues after the notice period ends.
- [184] The words "temporary layoff" were added to s. 67(1)(a) of the ESA in 2002, otherwise these provisions are the same as they were at the time of the 1996 Contract. The above provisions of the ESA identify that had the employment contract not been breached, the defendant could not have terminated Mr. Bailey's employment until eight weeks after his return from medical leave.

[185] The only evidence about when the medical leave was going to end suggests that Mr. Bailey was going to be able to return to work on March 1, 2014.

[186] I therefore find that Mr. Bailey's ordinary damages for breach of the employment contract should be measured by the value of all the benefits of his employment he would have received if his employment had not been terminated until eight weeks after March 1, 2014.

Loss of Salary and Commissions

[187] Even had the contract been performed by SCI and not breached, it is uncontested that Mr. Bailey was not entitled to be paid salary or commissions while on medical leave. However, he would be entitled to earn salary or commissions upon his return, for eight weeks after March 1, 2014.

[188] The earnings of Mr. Bailey were largely determined by sales, which of course were always somewhat fluctuating.

[189] However, assuming he was given notice of termination at a time when he returned to work, he would have every reason to devote as much effort as possible to achieving sales so that he could maximize his income during the eight week notice period.

[190] Mr. Bailey was suffering from health problems in 2013 for a period before he took leave and I find that his earnings that year would not be a fair measure of his earnings had the contract been fulfilled and had he been allowed to work for eight weeks after March 1, 2014. I find that a more reasonable measure of his earnings would be to average his earnings for the years 2010, 2011, and 2012.

[191] The plaintiff has calculated that his earnings averaged over those years work out to an annual average of \$151,403 (including wages, commissions, and taxable benefits). To work out the amount weekly, one would divide this figure by 52; then multiply by 8 to determine the total for eight weeks. This works out to a total of \$23,293 for eight weeks (rounded to the nearest dollar).

[192] I therefore conclude that the loss of earnings suffered by Mr. Bailey due to his dismissal without notice and without cause was \$23,293.

[193] In all of the circumstances, and given his age and employment history, Mr. Bailey would have been unlikely to have found suitable replacement employment in the eight week notice period. I find that he did not fail to mitigate during the notice period. Regardless, in *Cottrill v. Utopia Day Spas and Salons Ltd.*, 2017 BCSC 704 [Cottrill], the Court found at para. 123 that the common law duty of mitigation does not apply when the plaintiff is limited to the amount of severance under the ESA.

[194] There is some evidence that Mr. Bailey sold a property in January or February 2014 earning net commission of \$4,310.28. However, he was never precluded from working part-time as a real estate agent while employed at SCI. He explained that it was his uncle's house and he

had been promised the listing a year or so before. When his employment was terminated he was feeling so low he did not want to do it but his cousin helped him host a couple of open houses. In other words, the fact that he was able to earn a commission on that sale does not contradict the evidence as to Mr. Bailey's state of health at the time.

- [195] It is clear that supplementary income that could have been earned had employment continued ought not to be deducted from a claim for damages for wrongful dismissal: see *Pakozdi v. B & B Heavy Civil Construction Ltd.*, 2018 BCCA 23 at paras. 44-45. I find that Mr. Bailey would have been able to earn that real estate commission even while working at SCI, had his employment not been terminated. For this reason and the reasons enunciated in *Cottrill* as to why mitigation does not apply, it would be inappropriate to reduce his damages claim by this amount.

Loss of Medical Benefits

- [196] The evidence was that SCI terminated Mr. Bailey's employment on November 28, 2013 retroactively to September 10, 2013. This meant that his coverage for his and his dependants' medical expenses was also cut off as of September 10, 2013, with the exception of medical claims that had already been submitted and paid by November 28, 2013.
- [197] Mr. Bailey advances two claims for a loss of medical benefits: damages for medical expenses he or his family members incurred which would have been covered had he remained an employee during the period of notice; and a claim for his inability to find replacement medical coverage due to the retroactive nature of the termination. I find that the latter prong of his claim fails for lack of proof.
- [198] Mr. Bailey also had some difficulty proving the medical expenses he or his family incurred that would have been covered, and were not, had the employer not breached the contract by terminating him without notice. These would be for the period from September 11, 2013 until eight weeks after March 1, 2014, i.e. until April 26, 2014.
- [199] It is difficult to determine what medical insurance coverage Mr. Bailey would have had during his period of medical leave. As SCI points out, salary does not continue while the employee is on leave, and so too there is no automatic right to benefits when not working.
- [200] The SCI employee handbook provides that it is in SCI's discretion to continue an employee's benefits for three months after taking leave. Indeed, SCI initially did this for a while until Mr. Boyle decided to terminate Mr. Bailey's employment on November 28, 2013. I conclude that had Mr. Boyle not breached the contract and terminated Mr. Bailey's employment without notice, SCI would have continued to exercise its discretion to allow Mr. Bailey's benefits to continue for the first three months of his leave, i.e. until December 11, 2013.

[201] Mr. Bailey is entitled to recover damages in the amount of the expenses Mr. Bailey or family members incurred that would have been reimbursed if the extended medical coverage applying to SCI employees applied to him, during the period September 11, 2013 to December 11, 2013. I will ask the parties to try to resolve this calculation of damages between them, and if they are unable to do so, I would be inclined to refer the issue to the Registrar.

[202] I accept SCI's submission that Mr. Bailey would not be entitled to the benefit of his employer paying MSP premiums during the period of his leave.

Is the Plaintiff Entitled to Aggravated or Punitive Damages?

[203] The plaintiff alleges that the termination was a breach of the obligation of good faith implicit in the employment contract, and that the defendant's conduct was high-handed and reprehensible and caused him mental distress. The plaintiff seeks aggravated and punitive damages.

[204] Initially the defendant submitted that the plaintiff had not properly pleaded these claims but the defendant abandoned this argument after discussions between counsel.

Aggravated Damages

[205] The Court of Appeal recently discussed aggravated damages in the context of an employment case in *Lau v. Royal Bank of Canada*, 2017 BCCA 253 [Lau]. From Lau and the authorities it cites including the leading Supreme Court of Canada cases of *Wallace v. United Grain Growers Limited*, [1997] 3 S.C.R. 701, 152 D.L.R. (4th) 1 [Wallace], and *Honda Canada Inc. v. Keays*, 2008 SCC 39 [Honda], a number of principles emerge:

1. A person's work is a significant aspect of a person's life, key to self-worth.
2. Employers have an obligation of good faith and fair dealing in the manner of dismissal of an employee. This includes refraining from conduct that is untruthful, misleading or unduly insensitive (Wallace at paras. 95 and 98).
3. When the employment relationship ends, the employee is vulnerable and some upset can be expected. Normal upset that can be expected is not compensable. However, aggravated damages resulting from the manner of dismissal are available if they result from conduct that is unfair or in bad faith (Honda at paras. 56, 57).
4. Examples of facts which can give rise to aggravated damages include but are not limited to conduct that is untruthful, misleading or unduly insensitive. Other conduct in which aggravated damages may be awarded include maintaining wrongful allegations of dishonest conduct; misrepresenting the reason for the termination; and firing an employee who is on disability leave (Lau at para. 31).

5. Aggravated damages are compensatory based on foreseeable injury for breach of the duty of good faith and fairness. Because of this there must be some evidence that the manner of dismissal (as opposed to the mere fact of dismissal) is the cause of damaging effects on the dismissed employee, whether mental distress or intangible effects such as damage to reputation (Lau at paras. 54, 59-60, 62).
 6. Medical evidence is not necessary to award aggravated damages based on mental distress caused by the manner of dismissal but there must be some evidence that transcends ordinary upset or distress (Lau at para. 49). This can include evidence from the employee or from family members or friends.
- [206] It is easy to conclude that SCI's manner of termination of Mr. Bailey breached the employer's duty of good faith and fair dealing in a whole host of ways, including:
1. failing to take into account Mr. Bailey's long period of service to SCI, during which the company had given him various awards and prizes for good performance;
 2. firing him when he was known to be: sick; seeking medical care; likely to need or want to continue on the company's extended medical plan; and costing the company nothing in terms of salary;
 3. not giving Mr. Bailey a chance to respond to Mr. Boyle's unfair assumption that he had abandoned his employment;
 4. not telling him he was dismissed, leaving it for his wife to discover it accidentally through a denial of medical benefits (and without any notice that the medical benefits would be cut off retroactively);
 5. falsely alleging and maintaining throughout the course of this lawsuit that there was cause for dismissal. These allegations carried with them the taint of dishonesty on Mr. Bailey's part, by casting doubt on him being ill, suggesting he was working full-time as a real estate agent at the same time as seeking disability benefits, and suggesting that he had been repeatedly asked to return to work but had refused. Anyone reading the RTCC would think that if the pleaded facts were true, Mr. Bailey was not an honest man.
- [207] The difficult issue for the plaintiff is proving that the manner of his dismissal caused him some kind of negative effect. Here the conundrum facing the plaintiff is that there is some evidence that he became severely mentally stressed before termination and this in part was why he was on medical leave. Also, close to the same time as his employment was terminated he was experiencing successive denials of his benefits claims, from Manulife and from WorkSafeBC, which also upset him and added to his stress.

- [208] While I found Mr. Bailey to be a credible witness, and so too his wife, it is almost an impossible task for an already seriously mentally distressed employee in such a situation to unravel tangled threads of mental distress and be able to prove that one of those threads was caused by the manner of dismissal as opposed to pre-existing causes or the fact of dismissal.
- [209] Nevertheless, both Mr. Bailey and his wife testified that after he found out about his termination while on medical leave, he could not understand how his employer could have treated him so badly and with no explanation; he was hurt, shocked and upset. Whereas before he had anxiety, after this termination was discovered he also became extremely depressed in mood, to the point that he would not get out of bed or interact with his family, and this dark mood lasted for months until he reached a stage where he did not want to live any more. Certainly as a matter of common sense, since he was already in a fragile state it is foreseeable that the manner of termination would exacerbate his mental distress.
- [210] I therefore conclude that while Mr. Bailey had felt anxiety before his termination, and any termination would have exacerbated his mental distress, the manner of his termination exacerbated his mental distress beyond that which could be expected from ordinary termination.
- [211] I find that Mr. Bailey has proven a claim for aggravated damages. However, due to the difficulty in parsing out the causes of his mental distress, I am unable to award a significant sum for aggravated damages.
- [212] In *Ram v. The Michael Lacombe Group Inc.*, 2017 BCSC 212, Madam Justice Warren awarded \$25,000 in aggravated damages in a wrongful dismissal case where a plaintiff was fired from her employment at a Burger King franchise after the franchise owner concluded that she stole food from the store after one of her shifts, contrary to store policy. It was found at trial that the franchise's general manager had given permission to the plaintiff to take the food home with her, even though the plaintiff knew of the store policy prohibiting this act.
- [213] I have also considered the facts of *Cottrill* and the authorities reviewed in *Cottrill* dealing with aggravated damages.
- [214] Considering the circumstances of this case, I consider an appropriate award of aggravated damages to be \$25,000.

Punitive Damages

- [215] I turn now to consider punitive damages.
- [216] In *Honda*, the Supreme Court of Canada described the test for punitive damages at para. 68: this Court has stated that punitive damages should "receive the most careful consideration and the discretion to award them should be most cautiously exercised" (*Vorvis*, at pp. 1104-5). Courts should only resort to punitive damages in exceptional cases (*Whiten*, at para. 69). The

independent actionable wrong requirement is but one of many factors that merit careful consideration by the courts in allocating punitive damages. Another important thing to be considered is that conduct meriting punitive damages awards must be "harsh, vindictive, reprehensible and malicious", as well as "extreme in its nature and such that by any reasonable standard it is deserving of full condemnation and punishment" (Vorvis, at p. 1108).

- [217] I have little difficulty in concluding that the conduct of SCI was harsh and reprehensible. I find that Mr. Boyle's motives were also malicious and vindictive. Mr. Boyle was upset that Mr. Bailey had made a claim attributing some of his stress to Mr. Boyle's management style. Mr. Boyle was the person responsible for making the decision to terminate Mr. Bailey's employment. He was not honest about the reason for termination, persisting in trying to find cause for termination.
- [218] SCI knew it had a sick employee who was suffering mental distress, and rather than dealing sensitively with him, chose to treat him cruelly. He was 60 years' old and had given 17 years of his life to this company, working in the stressful environment of selling products and services to bereaved persons.
- [219] Punitive damages serve the important goals of retribution, deterrence and denunciation: *Vernon v. British Columbia (Liquor Distribution Branch)*, 2012 BCSC 133. As held in *Vernon*, it is important to avoid a situation of double punishment where aggravated damages are also awarded.
- [220] Here I find that the aggravated damages award will not meet the goals of retribution, deterrence and denunciation. The aggravated damages award is in part limited because of the pre-existing mental distress of the plaintiff. It would be perverse to consider that an employer's conduct in treating an already vulnerable employee so badly as happened here would result in a lesser penalty of damages than treating an emotionally strong employee the same way. I find that this is one of the exceptional cases where punitive damages are necessary and just.
- [221] The quantum of punitive damages is governed by the notion of proportionality. The principles were summarized by Fenlon J., as she then was, in *Kelly v. Norsemont Mining Inc.*, 2013 BCSC 147 [Kelly]:
- [130] The governing rule in determining the appropriate quantum of punitive damages is proportionality. The overall award, i.e. compensatory damages plus punitive damages plus any other punishment related to the same misconduct, should be rationally related to the objectives for which the punitive damages are awarded (retribution, deterrence and denunciation): *Whiten* at para. 74.
- [131] Proportionality in punitive damages has six dimensions, which were set out in *Whiten* at paras. 111-126 and reviewed by the Alberta Court of Appeal in *Elgert v. Home Hardware Stores Ltd.*, 2011 ABCA 112 at para. 82, 510 A.R. 1. The award of punitive damages must be:

- (i) Proportionate to the blameworthiness of the defendant's conduct -- the more reprehensible the conduct, the higher the rational limits of the potential award. Factors include outrageous conduct for a lengthy period of time without any rational justification, the defendant's awareness of the hardship it knew it was inflicting, whether the misconduct was planned and deliberate, the intent and motive of the defendant, whether the defendant concealed or attempted to cover up its misconduct, whether the defendant profited from its misconduct, and whether the interest violated by the misconduct was known to be deeply personal to the plaintiff.
- (ii) Proportionate to the degree of vulnerability of the plaintiff - the financial or other vulnerability of the plaintiff, and the consequent abuse of power by a defendant, is highly relevant where there is a power imbalance.
- (iii) Proportionate to the harm or potential harm directed specifically at the plaintiff.
- (iv) Proportionate to the need for deterrence -- a defendant's financial power may become relevant if the defendant chooses to argue financial hardship, or it is directly relevant to the defendant's misconduct, or other circumstances where it may rationally be concluded that a lesser award against a moneyed defendant would fail to achieve deterrence.
- (v) Proportionate, even after taking into account the other penalties, both civil and criminal, which have been or are likely to be inflicted on the defendant for the same misconduct -- compensatory damages also punish and may be all the "punishment" required.
- (vi) Proportionate to the advantage wrongfully gained by a defendant from the misconduct.

[Emphasis in original.]

- [222] In *Kelly* the Court awarded \$100,000 in punitive damages. The Court weighed the fact that the employer's malicious attitude continued from the time of termination through trial, in advancing the meritless grounds for dismissal which included allegations of civil fraud and incompetence.
- [223] In the present case, the defendant's meritless allegations of cause for dismissal, which carried with them the taint of dishonesty, also continued from the time of termination through trial. Particularly callous was the leveling of such allegations against an employee who had shown such long-term loyalty to the company, at a time when he was the most vulnerable.
- [224] SCI is part of a large corporate group with over 22,000 employees in its operations in the United States and Canada. It has chosen to impose quite ungenerous terms of dismissal on its employees. Because of its contract terms, SCI is in a position of being able to make a calculated choice to treat employees abusively when firing them, as employees will seldom be willing to risk the costs of litigation.

[225] In my view, there needs to be a meaningful award of punitive damages if it is to serve as a deterrent to SCI so that it does not choose to treat its employees so maliciously and callously as it did in this case. In order to effectively deter the defendant, I award punitive damages of \$110,000. This is a meaningful award but in my view it is proportionate.

[226] I note that the total damages that SCI will be required to pay, namely, general, aggravated and punitive damages, is still less than what it would have likely been required to pay in general damages if the common law regarding implied reasonable notice applied. But for the limitation of notice in the contract, it is likely that Mr. Bailey would have been entitled to reasonable notice or damages in lieu of notice equivalent to at least 18 to 24 months given his age, length of service and special area of sales. This in my view is confirmatory that the award of punitive damages is not excessive or disproportionate.

Conclusion

[227] I have found that Mr. Bailey was wrongfully dismissed, without cause, by the defendant SCI.

[228] I have found that SCI's employment contract limited the period of notice to eight weeks, and so Mr. Bailey's ordinary damages are likewise so limited.

[229] Mr. Bailey is entitled to damages of \$23,293 for loss of his earnings. I have also found that Mr. Bailey is entitled to aggravated damages of \$25,000 and punitive damages of \$110,000. The total of these awards is \$158,293.

[230] Mr. Bailey is also entitled to damages for the medical expenses he or his family members incurred during that time period for which he normally would have been able to be reimbursed under the company's benefit plan, during the period of September 11 to December 11, 2013. I will ask the parties to try to resolve this calculation of damages between them, and if they are unable to do so, they can seek to make further submissions before me as to the form of a referral to the Registrar.

[231] The usual order would be for costs to be awarded to the plaintiff. However, if there are circumstances of which I am not aware which bear on the issue of costs for which the parties wish to make submissions, within 45 days of this judgment they may seek a further hearing date through Supreme Court Scheduling.

"The Honourable Madam Justice S. Griffin"

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