
CANADA / JUDGMENT

Munoz v. Sierra Systems Group Inc.

2015 BCSC 269

COURT

Supreme Court of British Columbia

DECIDED

24 February 2015

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2015 BCSC 269 Munoz v. Sierra Systems Group Inc.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Munoz v. Sierra Systems Group Inc.,

2015 BCSC 269

Date: 20150224

Docket: S142658

Registry: Vancouver

Between:

Ruben Cuesta Munoz

Plaintiff

And

Sierra Systems Group Inc.

Defendant

Before: The Honourable Madam Justice Bruce

Reasons for Judgment

Counsel for the Plaintiff:

Catherine J. Keri

Counsel for the Defendant:

Robert Sider

Katy E. Allen

Place and Date of Trial/Hearing:

Vancouver, B.C.

January 7-8 and 26, 2015

Place and Date of Judgment:

Vancouver, B.C.

February 24, 2015

INTRODUCTION

- [1] This is an application for summary judgment pursuant to R. 9-6 of the Supreme Court Civil Rules. Although the notice of claim sought damages for negligent misrepresentation and breach of contract, as well as aggravated, punitive and special damages, the plaintiff only seeks damages for wrongful dismissal, non-payment of wages, costs and interest in this application. The defendant has abandoned any claim that the plaintiff's dismissal was for cause.
- [2] The dispute between the parties centres on the terms of the employment contract, the length of the appropriate notice period and whether the plaintiff was entitled to be paid during the notice period. The defendant does not dispute that the plaintiff was entitled to reasonable notice of termination; however, the defendant argues that in the unique circumstances of this case the plaintiff was not entitled to any wages during the notice period. If the Court finds that a longer notice period was warranted in the circumstances, the defendant argues a limited damage award may be justified, but in any event, the plaintiff failed to mitigate his loss.
- [3] Both parties agree that this case is suitable for summary judgment because the material facts are not in dispute or are readily ascertainable from the documentary evidence filed in this application. Based on the factors articulated in *Inspiration Management Ltd. v. McDermid St. Lawrence Ltd.* (1989), 36 B.C.L.R. (2d) 202 (C.A.) at 214, I find this case is appropriate for summary judgment.
- [4] The plaintiff sought to amend the notice of claim during the summary trial proceedings primarily to add a claim that certain disputed terms of the employment contract were void because they were contrary to the Employment Standards Act, R.S.B.C. 1996, c. 113. While I have found the Act useful in the interpretation of ambiguous terms in the contract of employment, I have otherwise dismissed the claim that the contract terms are void by operation of the Act. The other amendments sought by the plaintiff are more in the nature of evidence to support the claim for wrongful dismissal and not necessary to plead. As a consequence, I do not find it necessary to address the amendments sought by the plaintiff.

MATERIAL FACTS

- [5] The defendant is a large and well-established company that provides information technology ("IT"), management and consulting services to clients across Canada. The defendant contracts with clients to provide a variety of IT-related services by placing consultants with the clients, either onsite or remotely from its offices. The plaintiff was employed as a consultant and his title was Senior Systems Administrator.
- [6] The plaintiff was born in Mexico and immigrated to Canada in 1999. His first language is Spanish and he also speaks English as a second language. The plaintiff earned a Bachelor Degree in Information Technology in Mexico and worked for over 22 years in the field of IT for companies based in Mexico, the United States, Canada, Argentina and Chile.
- [7] In September 2008, the plaintiff began working for Canadian Direct Insurance ("CDI") as a Senior Technical Analyst. His salary by June 2010 was \$71,166.42. By January 2011, the plaintiff had been promoted to the position of IT Operations Manager in charge of a budget of over \$1,000,000 per year. The plaintiff's annual salary was \$75,000. His work was primarily the design, development and implementation of IT hardware and software programs, the provision of IT technical support, and the recruitment and coaching of IT professionals.
- [8] In January 2011, the plaintiff was contacted by Alison Oxton who was employed by the defendant as a recruiter. Ms. Oxton had placed the plaintiff with CDI in 2008 and thus she was familiar with his background and expertise and the plaintiff knew and trusted her as a professional recruiter. Ms. Oxton advised the plaintiff that the defendant was looking for a senior systems or network administrator and asked if he would be interested in the position. In reply to this communication by email, the plaintiff wrote to Ms. Oxton on January 13, 2011 as follows:

Sure I am interested to look at any new Managerial/Senior job opportunities even more coming from you. Please provide me with the details about it, I am sure that you would need an updated resume, so I will e-mail it to you next week.

Things at Canadian Direct Insurance are good, however my career there won't have the improvement that I am looking for, due to the lack of promotions or new positions, also they haven't fulfilled the money promised 3 years ago. Nevertheless I should thank CDI for the huge experience and opportunity that I got from them.

- [9] Upon receipt of the plaintiff's email, Ms. Oxton wrote back describing the job the defendant sought to fill. In regard to the position's responsibilities, Ms. Oxton wrote:

The role is senior but not managerial as we are a consultancy so it depends on the project as to whether you are leading a team. There is progression to Principal and Director but we hire into the consultant level. Here is the job description - essentially it will be approximately 30% project work, 30% Operations, 30% trouble tickets - but with your Spanish, there would likely be more project work as one of our key clients has offices down in Mexico and South America.

- [10] After the plaintiff expressed some interest in the position, Ms. Oxton arranged interviews with Ernie Miller, who was the defendant's Director, Technical Services. There were multiple interviews in January and February 2011. During the interview process, the defendant's representatives advised the plaintiff that they had a long-term and stable agreement with Goldcorp Inc. ("Goldcorp") for the provision of IT consulting services. Their contract was renewed to December 2014. Goldcorp required a highly specialized IT consultant who spoke Spanish. The plaintiff was also advised that his Latin business experience and Spanish language skills would be a key asset for Goldcorp's work. While the defendant disputes that the plaintiff was hired to work exclusively for Goldcorp, he had no other clients from the date of hire to the date of termination.
- [11] The plaintiff deposed that during the interview process, the defendant's representatives, and in particular Mr. Miller and Mr. Dworschak, Technical Director, assured him that the Senior Systems Administrator position was long term, secure and would pay more than he earned at CDI. Mr. Miller deposed that he does not recall making these specific promises, but admits that the job offered to the plaintiff was permanent and featured a higher salary than his CDI position. It is not disputed that during the interview process there was no reference to the job being temporary, that the defendant had financial or budget issues or that it would have to downsize at some point in time. The plaintiff was not advised that there would be down periods during which he would not be paid. The plaintiff deposed that he would not have accepted a temporary job or one in which he could be left without pay for extended periods.
- [12] The facts contained in paragraphs 19, 20 and 21 of the plaintiff's first affidavit sworn December 11, 2014, are not disputed except for the claim that the job with the defendant relied on the plaintiff's business skills and that the job accepted by the plaintiff was "specialized":
19. The position of Senior Systems Administrator on the SI Solution Line for the Company was a specialized position. It required my Latin business knowledge and experience. Working in foreign Spanish speaking countries was one of the key reasons that I was recruited according to Allison Oxton and the managers I interviewed with during the lengthy interview process with the senior executives of the Company. I was assured that the Company would provide me with innovative and challenging assignments to support my career growth. I was very excited about this opportunity.
20. Although the role of Senior Systems Administrator was not a management position it was made clear to me that it was a high level and strategic position where I would be dealing with senior executives and executive teams of the Company and Goldcorp. This was clear because I met with the senior executives during the interviews, I was told my skills were specialized and rare and thus, I believed this would be invaluable for my career advancement opportunities.

21. Mr. Robert Dworschak Technical Director of the Company, Consultants Stan Kolbin, Rod Zadaeh and Chris Haight all assured me during the interview process that I should leave CDI as I would have a successful long term employment with greater opportunity for advancement and to enhance my career with the Company.
- [13] On February 23, 2011, the defendant offered a full-time salaried position to the plaintiff as a consultant in the SI Solution Line. He was to report to Mr. Grogan, SI Solution Manager. The start date was March 21, 2011. Although the plaintiff was to be based in Vancouver, his assignments could involve out of town travel and travel outside of Canada. The base salary offered was \$82,500; benefits included an employer-sponsored RRSP with matching contributions by the employer up to 3% of the base salary, three weeks' vacation, medical and dental plan, extended health plan, short-term and long-term disability insurance. Premiums for long-term disability insurance were to be paid by the employee while the defendant paid for all other benefits.
- [14] As a condition of his employment, the plaintiff was expected to sign a confidentiality and non-competition agreement that had a six-month term following dismissal. The agreement prohibited the plaintiff from disrupting, damaging or interfering with the defendant's clients, agents, vendors, distributors and other third parties. The agreement also prevented the plaintiff from soliciting the defendant's employees. Lastly, for a period of six months after termination, the plaintiff was prohibited from providing consulting services or products to "any former, existing or prospective clients or business associates of Sierra Systems, with whom [he] had contact, as a result of [his] employment/engagement with Sierra Systems or to whom [he had] been proposed by Sierra Systems" during the last six months of his employment with the defendant.
- [15] The employment offer also contained the following clause regarding changes to the contract:

The terms of this employment offer may change from time to time, including policies and procedures contained in our Human Resources Policy Manual.

- [16] The plaintiff accepted the offer of employment on February 25, 2011 and signed the letter of offer and the non-competition agreement. He left CDI and began working for the defendant on March 21, 2011.
- [17] When the plaintiff commenced this new job, he regularly worked 40 hours per week under the supervision of Mr. Miller. Goldcorp was his only client and the travel required was extensive. There is no dispute that at least 50% of the plaintiff's time was spent travelling abroad to service Goldcorp's business requirements; however, the defendant did not record or track the plaintiff's business travel and the plaintiff deposed that the travel was far more extensive. The plaintiff deposed that he virtually never went to the Vancouver office of the defendant to work. His time was spent at Goldcorp offices in Canada and abroad.

- [18] The plaintiff provided Goldcorp with bilingual IT technical support and expertise primarily to Spanish speaking clients. His role was to provide expertise to clients in server engineering and to implement, monitor and trouble shoot IT infrastructure for clients. He had no managerial duties and did not supervise other employees. He took part in confidential communications and discussions as a consultant employee, not as a manager or an executive.
- [19] In March 2011, the defendant introduced a new compensation plan for consultant employees. The plans were explained to employees at webinars, which were oral presentations about the plans aided by printed information on the internet, and the policies were contained on the defendant's internal internet website. There were essentially four plans.
- [20] The "Hourly" plan involved the employee receiving a fixed amount for each hour the defendant billed out to a client and any time not billed was unpaid unless it was a statutory holiday or a payment equal to earned vacation time as a percentage of base salary. The employee assumed 100% of the risk that he will not be working billable hours and in such case the employee received no pay. The reward for the risk was that the employee could earn more than he could with a salary plan alone. The plan referred to the periods of non-placement as "bench" time and encouraged employees to view these periods as time to "recharge".
- [21] The "Base Plus 1" plan contemplated a specific base salary paid to an employee each pay period plus the employee received an additional amount per hour for each hour actually billed to a client. The employee received 65% of their salary as a guaranteed payment and the balance was paid as a dollar amount per hour billed. The employee accrued vacation and received paid statutory holidays and during bench time the employee was expected to work on internal projects, proposals, sales calls, or other value-added activities as directed by management.
- [22] The "Base Plus 2" plan involved a base salary paid to the employee that represented 95% of their salary and the remaining 5% was paid as an hourly rate for each hour billed to a client. Because the employee was accepting less risk in the event of bench time, the hourly rate was lower than for Base Plus 1 plan members. The employee accrued paid vacation time and received paid statutory holidays. When the employee was on bench time he was required to work on internal projects, proposals, sales calls, or other value-added activities as directed by management.
- [23] The "Salary" plan involved the employee making no change to his compensation plan. He retained 100% of his salary without opportunities to earn greater compensation but with no salary reduction during bench time. He was also required to work on internal projects, proposals, sales calls, or other value-added activities as directed by management.

- [24] The plan policies indicated that regardless of the compensation plan chosen by an employee, they "will have access to Sierra's health, dental and other insured benefits". Life insurance, short-term and long-term disability and AD& D were to be set using the employee's base salary plus estimated billable, vacation and statutory holiday hours. Employer RRSP contributions were to be based on "actual earnings" each pay period. "Actual earnings" was defined as base salary plus compensation paid for the hourly component. Sick pay was to be paid based on the salary component only. As a consequence, Hourly plan employees did not receive sick pay.
- [25] While it was up to the employee to choose a compensation plan at the outset, switching to a different plan was subject to conditions. First, an employee was required to spend six months on a plan before being eligible for a transfer to a different plan. Second, an employee who wished to switch to a lower risk plan had to request a transfer that was subject to approval by management. Third, an employee who wished to switch to a higher risk compensation plan after six months could only do so if his cumulative "utilization" for the prior six months was 80% or higher and the switch was approved by management.
- [26] Hourly rate employees could switch to Base Plus 1 at any time, but once approved the employee had to remain on the new plan for a minimum of six months. Approval of any change in compensation was discretionary and dependent upon economic factors.
- [27] The plaintiff deposed that during the webinars he was advised by Ms. Waywood-Cox, who was a Resource Manager employed by the defendant, that there was no risk of bench time for him because the Goldcorp work was steady and long term at least until December 2014. She also assured him that if he was "benched" it would only be for a couple of weeks and could be treated like a vacation. The compensation plan had been used in the United States and was not yet tested in Canada; however, the defendant had no experience with employees being benched for extended periods. Ms. Waywood-Cox deposed that she did not attend the webinars and thus could not have made these representations to the plaintiff.
- [28] The plaintiff deposed that before choosing a compensation plan he confirmed with Mr. Miller, Ms. Waywood-Cox and Ms. Collins the status of the Goldcorp contract and they confirmed that the defendant's relationship with Goldcorp was stable and long term. As a consequence of these assurances, the plaintiff believed there would be no actual risk of income loss if he chose the higher compensation plans.
- [29] Effective May 26, 2011, the plaintiff elected to be placed on the Base Plus 2 compensation plan. Effective November 16, 2011, the plaintiff elected and was granted approval to move to the Base Plus 1 compensation plan. On April 1, 2012, the plaintiff was given a raise by an increase in his base salary under Base Plus 2 and an increase in his hourly rate to bring his potential annual earnings up to a total of \$99,026. His base salary (65%) was increased to \$64,331.

- [30] On May 15, 2012, the plaintiff requested to be placed on the hourly compensation plan. The hourly rate proposed was \$60.15 per billable hour. The plaintiff also agreed that on the Hourly plan in lieu of vacation time, an additional payment equal to the earned vacation time as a percentage of base pay less deductions would be paid to him. The plaintiff also acknowledged that he had "read the Consultant Compensation Plan Policy Manual [and] fully understand the plan options, and agree to the policy."
- [31] On April 1, 2013, the plaintiff was advised that his hourly rate was to be increased to \$62.18 per billable hour with a maximum earning potential of \$119,386. This raise was due to the plaintiff's hard work and dedication and performance results.
- [32] Between January and June 2013, the plaintiff was working in excess of 100 hours per week for Goldcorp and the travel required to complete projects was extensive. He was not able to take time off for vacation. However, on June 17, 2013, Mr. Miller notified the plaintiff by email that the work for Goldcorp had to stop immediately:

Hi everyone. You may have heard that Goldcorp have requested Rod & Ruben stop working on their projects. At this time, it is unknown as to how long this will be, but it is due to internal Goldcorp issues, not due to the work they (or we) are doing. We hope that these internal issues will be dealt with shortly, but in the meantime, we are looking for other projects for both of them just in case it is longer than hopefully expected.

- [33] Ms. Waywood-Cox deposed that Goldcorp asked to have the plaintiff removed from its projects due to inappropriately billed hours; Goldcorp remained a client. At the time of his removal from Goldcorp's work, Ms. Waywood-Cox was hopeful that Goldcorp could be convinced to take the plaintiff back. She might have shared with the plaintiff her hopes that this could be done, but after two weeks it was apparent that Goldcorp did not wish the plaintiff to work on its projects any longer. It is apparent that Ms. Waywood-Cox did not believe that Goldcorp's allegations had any merit because on June 13, 2013, she sent an email to the plaintiff indicating that the defendant was working diligently to find other work for him and that, as a consequence, he should keep her apprised of his whereabouts. She also told the plaintiff to regard the bench time as a vacation and to relax.
- [34] Because Goldcorp was the only client that the plaintiff worked for, he was now on the "bench" and earning no income on the Hourly plan. Either he asked to be switched to the Base Plus 1 plan or it was suggested to him by Ms. Waywood-Cox because of the situation. The change was approved and Ms. Waywood-Cox moved the plaintiff to Base Plus 1 effective June 16, 2013.

- [35] Subsequent to the change to Base Plus 1, Ms. Waywood-Cox informed the plaintiff that on this compensation plan he would be required to report for work at the Vancouver office. While the plaintiff deposed that he was told that he may have to do menial office work, Ms. Waywood-Cox deposed that she did not instruct the plaintiff regarding the duties he would be expected to perform. Her email to the plaintiff dated June 18, 2013 explained the following requirements because of the change to the Base Plus 1 compensation plan:

As you are now on the bench and being paid to be on the bench, you will need to come to the office. If you want to sit at your old desk that is fine, you can do that or you can book one of the hotel desks, just look up on the SKN "how to book a desk in Vancouver."

Regarding vacation, if you were on hourly and you wanted to take time off while you were in a down period, you could do that as there is nothing being paid to you. Now that you are on Base + 1, you do not have any paid vacation entitlements so any time off you want to take will need to be Leave without Pay.

- [36] On June 19, 2013, the plaintiff asked to go back onto the Hourly plan and this request was approved. The change of mind appears to be related to three factors. First, the plaintiff was under the impression that once off the Hourly plan he would have to wait a year before being eligible to return to this plan. It is disputed that anyone from management told the plaintiff that he would have to wait longer than the six months stipulated in the compensation plan policy manual. Second, another employee who worked on Goldcorp projects advised the plaintiff that "Management 'believes' you will be doing billable work for GC within a few weeks." Third, while on Base Plus 1, the plaintiff would be required to do work in the office that was not necessarily within his job description and he could not take any vacation time.
- [37] The plaintiff was not paid any wages from June 17, 2013 until October 24, 2013, when he was given notice of termination effective December 5, 2013. Between June 19, 2013 and December 5, 2013, the plaintiff did not request a transfer to another compensation plan.
- [38] The plaintiff believed that as he was still an employee of the defendant he would have to make himself available for any work that came up. While he spent time on vacation during the summer of 2013, the plaintiff remained in contact with the defendant should work become available. The defendant does not deny that it attempted to find other projects for the plaintiff until December 5, 2013 but was not successful. While Ms. Waywood-Cox deposed that she cannot recall giving the plaintiff an opinion about whether he could seek alternate employment elsewhere while on the "bench", the plaintiff deposed that during telephone conversations with Ms. Waywood-Cox she advised him that he remained an employee and must be ready to work immediately if they called him. The plaintiff was being maintained on the defendant's medical and dental plans during the "bench" period. As a result of the plaintiff's continuing status as an employee, he did not look for alternate employment before October 24, 2013.

- [39] On October 24, 2013, the defendant gave the plaintiff notice of termination effective December 5, 2013. The notice indicated that he was being given "worked notice". While on worked notice he was required to be employed on a full-time basis and expected to perform duties as assigned by Ms. Waywood-Cox. He was also reminded of the obligations contained in the non-competition agreement. Apart from benefits, the plaintiff received no severance pay. The plaintiff was instructed by Ms. Waywood-Cox that the defendant would continue to look for work for him during the notice period and, as a consequence, he must be available for work. While on this "worked notice" the plaintiff was not entitled to receive any salary because no work was made available to him by the defendant. His benefits were continued until December 2013; however, there was no employer contribution to the plaintiff's RRSP because he did not earn any income. The plaintiff received no income during the worked notice and no income from and after June 17, 2013.
- [40] Instead of seeking employment after his termination, the plaintiff decided to build up a business he had started in 2003 called Ideas in Evolution. The cost of marketing and building this business has so far been greater than the profits earned. Ideas in Evolution carries on business in Canada and Mexico; it offers services and products in the IT field. The plaintiff loaned the company \$42,000 in 2012/2013 and this is recorded as a shareholder loan repayable starting in 2016.
- [41] While he waited for the defendant to find work for him, the plaintiff made an alliance with a Mexican carrier for the sale of IT products in Mexico. The shareholder loan was used to hire and train workers in Mexico to put in effect a marketing plan. In addition, a client in Toronto demanded more services from the company in 2014, which doubled its income but did not cover the shareholder loan and other business expenses. The plaintiff deposed that pursuing this business was a prudent course of action because it would eventually be profitable and there was no risk of another termination.
- [42] Mr. Miller deposed that there are many Vancouver employers who are seeking workers in the IT field wherein the plaintiff has the required training. Attached to his affidavit is an online search conducted on December 23, 2014, which outlines several job openings that Mr. Miller deposed were available to the plaintiff.

ARGUMENT

- [43] The plaintiff argues that during the recruitment process, the defendant made false or negligent representations about the job that induced him to leave CDI. He relied on these representations to his detriment and the defendant owed him a duty of care. The plaintiff argues these misrepresentations warrant an increase in the notice period, but he abandoned the separate claim for damages for negligent misrepresentation.
- [44] The plaintiff argues that he is entitled to be paid during the period June 17 to October 24, 2013, and the failure to do so is a breach of the employment contract. The plaintiff argues that payment must be based on his hourly rate of \$62.18. The plaintiff maintains that the

changes to his employment contract that were unilaterally introduced by the defendant under the compensation plans are void and unenforceable because they are contrary to the Employment Standards Act, were drafted ambiguously, and were misrepresented to the plaintiff.

- [45] The plaintiff argues that a period of 12 months' notice with pay is reasonable notice in the circumstances. The plaintiff was lured away from a secure job; the plaintiff worked for the defendant in a specialized, high level position where his Spanish language skills were imperative; the plaintiff is highly skilled but is older and would have greater difficulty finding comparable employment; a non-competition agreement restricted his employment opportunities, and the defendant precluded the plaintiff from starting a job search for several months due to representations that he was still employed and thus must be available for work if it arose.
- [46] The plaintiff argues he took reasonable steps to mitigate his loss by expanding his side business and by continuing to market and build this business. The plaintiff maintains the defendant has produced no evidence that comparable employment was available in 2013 when he was terminated and no evidence that the plaintiff was qualified for any of the jobs referred to in the online search conducted in December 2014.
- [47] In support of his argument, the plaintiff relies upon a number of authorities: *Churchill v. Stockgroup Media Inc.*, 2008 BCSC 578 at para. 47, which held that an employer cannot make unilateral fundamental changes to the employment contract without fresh consideration; *Cook v. Royal Trust* (1990), 31 C.C.E.L. 6 (B.C.S.C.), which held that fundamental changes to the contract amount to a constructive dismissal; *Hill v. Johnson Controls L.P.*, 2006 BCSC 826 at para. 49 [Hill], which stands for the proposition that the employer's conduct can increase the notice period, including manufacturing a cause for dismissal and luring the employee from a steady job; *Machtinger v. HOJ Industries Ltd.*, [1992] 1 S.C.R. 986 [Machtinger]; and *Hooge v. Gillwood Remanufacturing Inc.*, 2014 BCSC 11 at paras. 37-38 [Hooge], which held that there is no statutory right of layoff and that an indefinite layoff is a termination.
- [48] In regard to the length of notice required, the plaintiff relies upon: *Gillies v. Goldman Sachs Canada Inc.*, 2001 BCCA 683; *Hill* at paras. 47-48; *Pollock v. Cotter*, 2005 BCSC 1799; *Ostrow v. Abacus Management Corporation Mergers and Acquisitions*, 2014 BCSC 938; *Robertson v. Weavexx Corp.* (1997), 30 B.C.L.R. (3d) 381 (C.A.); *Saalfeld v. Absolute Software Corporation*, 2009 BCCA 18 [Saalfeld]; *Graceffo v. Alitalia* (1994), 8 C.C.E.L. (2d) 35 (Man. Q.B.) [Graceffo]; *Beglaw v. Archmetal Industries Corp.*, 2004 BCSC 1369; *Tatla v. Western Fibres Ltd.*, 2004 BCSC 1770; and *Mackie v. West Coast Engineering Group Ltd.*, 2009 BCSC 1775.
- [49] In support of his argument on mitigation, the plaintiff relies upon *Bradley v. Brains II, Inc.*, 2000 BCSC 1629 [Bradley]; and *Suri v. North American Tea & Coffee Inc.*, 2007 BCSC 534.
- [50] The defendant argues that it did not breach the plaintiff's contract of employment by failing to pay him between June 17, 2013 and October 24, 2013, the termination notice date, because he did not perform work to earn wages during this period. The defendant argues that the

plaintiff agreed to be paid an hourly rate for each hour billed to a client and take the risk that he would not be able to bill any hours in return for a higher potential income than he could earn based on a salary. The defendant argues that it is a fundamental principle of employment law that an employee performs work in exchange for remuneration: *Hydro-Québec v. Syndicat des employé-e-s de techniques professionnelles et de bureau d'Hydro-Québec*, section locale 2000 (SCFP-FTQ), 2008 SCC 43. Because the plaintiff did not bill any hours he is not entitled to be paid wages.

- [51] The defendant argues that the plaintiff was given reasonable notice of six weeks commencing October 24, 2013. Although this was working notice, and the plaintiff was not paid wages during this period, the defendant maintains it was not in breach of the employment contract because the plaintiff was not billing any hours to a client during this period. The defendant says its only obligation was to look for work for the plaintiff and it carried out this responsibility. The only remuneration the plaintiff was entitled to was his benefits and he received these. The defendant says that benefits alone were what the employee would have earned had the contract been performed during the notice period: *Whiting v. First Data Canada Merchant Solutions ULC*, 2011 BCCA 84 at para. 16.
- [52] Relying on *Bardal v. Globe & Mail Ltd.* (1960), 24 D.L.R. (2d) 140 (Ont. H.C.J.) [*Bardal*]; and *Ansari v. British Columbia Hydro and Power Authority* (1986), 2 B.C.L.R. (2d) 33 (S.C.), aff'd 55 B.C.L.R. (2d) xxxiii (C.A.) [*Ansari*], the defendant argues that six weeks' notice was reasonable because the plaintiff was a non-managerial employee whose IT skills were extremely transferrable in today's business market; and there are no factors that would increase the notice required: *Dorrington v. Kobelt Development Inc.*, 2005 BCPC 78; *Chong v. Nuance Global Traders (Canada) Inc.*, 2002 BCSC 503; and *Novak v. Fintech Services Ltd.*, 2001 ABQB 1077.
- [53] The defendant argues that inducement is not a factor because it did not act dishonestly towards the plaintiff in the recruitment process; he wanted to change jobs and the previous job held by the plaintiff was short term: see, *Firatli v. Kohler Ltd.*, [2008] O.J. No. 2763 (S.C.J.). The defendant also argues that the non-competition clause is also not a factor because the only client that could not be solicited for six months was Goldcorp. The fact the plaintiff operated his own company providing IT services indicates he properly understood the agreement's restrictions on his ability to compete.
- [54] The defendant argues that even if a longer notice period is mandated, no damages are payable because the plaintiff was not entitled to wages unless he billed hours to a client. In the alternative, the defendant argues that any damages owing should be calculated on the contingency that the plaintiff may have been placed with a client after the effective date of termination. The defendant argues this contingency should be small because it could not find a client for the plaintiff between June and December 2013. In the further alternative, the defendant argues that the compensation under Base Plus 1 and a small contingency for additional billable hours is reasonable compensation in the event that notice of termination was not reasonable.

- [55] The defendant argues that the plaintiff has failed to properly mitigate his loss. The plaintiff did not seek alternate employment. While the onus of proof rests with the defendant, it argues that the plaintiff's own evidence of a failure to take proper steps to mitigate may satisfy this onus: *Red Deer College v. Michaels*, [1976] 2 S.C.R. 324. The defendant says the plaintiff failed to take all steps a reasonable person would have taken to reduce his loss because he never attempted to find work: *Smith v. Aker Kvaerner Canada Inc. and Kvaerner Power Inc.*, 2005 BCSC 117 [Smith]; *Forshaw v. Aluminex Extrusions Ltd.* (1989), 39 B.C.L.R. (2d) 140 (C.A.); and *Leawood v. Thunderbird Home Centres* (3 April 1981) Vancouver C941213 (B.C.S.C.).
- [56] While the defendant acknowledges that starting a business can be proper mitigation, it argues the plaintiff's first duty was to conduct a job search, particularly where there is evidence that the plaintiff's skill set was in demand: *MacDonald v. Valley Credits Ltd.*, [1988] B.C.J. No. 3219 (S.C.); *Huszar v. Antech Antenna Technologies Ltd.*, [1988] O.J. No. 2145 (H.C.J.); *Wenarchuk v. Comstock Canada* (1997), 32 C.C.E.L. (2d) 313 (Sask. Q.B.); and *Montanaro v. Budd's Hamilton Ltd.*, [2005] O.J. No. 4199 (S.C.J.). The defendant argues that focusing on a business without looking for a job, given that the company provides negligible income, was not reasonable.
- [57] In the alternative, if the plaintiff was constructively dismissed on June 17, 2013, the defendant says he failed to mitigate by not reverting to the Base 1 compensation plan.
- [58] The defendant argues that the failure to mitigate should reduce the notice period by 100% because the plaintiff failed to take any reasonable steps to mitigate his loss: *Nicholls v. Columbia Taping Tools Ltd.*, 2013 BCSC 2201; *Maddocks v. British Columbia Hazardous Waste Management Corp.* (1995), 8 C.C.E.L. (2d) 262 (B.C.S.C.); and *Jalan v. Inst. of Indigenous Government*, 2005 BCSC 590.
- [59] The defendant argues that the claim for negligent misrepresentation fails because there was only vague evidence as to the nature of the representations and nothing that was told to the plaintiff during the interview process was untrue. Further, the defendant argues that the plaintiff was looking for another job and thus did not rely on the representations as a reason for taking a job with Sierra. Lastly, the defendant argues there are no damages for negligent misrepresentation because the job paid more than the plaintiff was earning at CDI: *Khan v. Vernon Jubilee Hospital and Interior Health Authority*, 2008 BCSC 1637.

DECISION

[60] The issues in dispute are as follows:

1. What were the terms of the employment contract?
2. Did the defendant violate the terms of the employment contract by failing to pay wages to the plaintiff during the period he was off work between June 17, 2013 and the date of the termination notice on October 24, 2013?

3. Did the defendant provide reasonable notice of termination to the plaintiff?
4. What compensation, if any, is owing to the plaintiff?
5. Did the plaintiff fail to mitigate his loss?

A. The Terms of the Employment Contract

- [61] The plaintiff signed an employment contract at the commencement of his employment and those terms of employment were altered regarding the method of calculating and paying wages when the plaintiff agreed to participate in the new compensation policy implemented by the defendant in May 2011. The plaintiff first elected to receive 95% base salary and 5% of his wages based on actual hours billed to a client on April 27, 2011. Commencing November 16, 2011, the plaintiff signed an agreement to be bound by the Base Plus 1 compensation policy, which consisted of 65% base salary and 35% based on billable hours. As of May 15, 2012, the plaintiff agreed to the Hourly plan, which offered no base salary but an hourly rate for billed hours to a client that was capable of generating an annual salary of \$118,000 for the plaintiff.
- [62] Prior to the plaintiff signing these amendments to his contract, the plaintiff had obtained information about the compensation plans during webinars prepared and presented by the defendant. It is clear from the written terms of the compensation policy that the employee, by accepting a lower base salary, was assuming the risk of a lower overall salary if he did not bill any or few hours to a client. On the other hand, the incentive for the employee was a potential increase in his salary. The employee was also given a choice of compensation plans that included remaining on salary only. The plaintiff was aware of this choice when he signed the agreement to be bound by the compensation policies in April and again in November 2011 and May 2012. Further, the policies clearly informed the employee that there may be times when he would not be able to bill hours to a client and when this occurred he would be "benched" and only entitled to the base salary or no salary if on the Hourly plan. I do not find the terms of this policy were ambiguous. While the policy did not define the maximum period during which an employee could be "benched" before he could be regarded as terminated, and in this sense may be regarded as ambiguous, there was no doubt about what would happen regarding the plaintiff's remuneration while on the "bench." When "benched", an employee would not be working and not be paid if on the Hourly plan. Lastly, at least with respect to the Hourly plan, the plaintiff agreed that he had read and understood the compensation policy and agreed to its terms by signing the election.
- [63] The plaintiff argues that the defendant treated the movement up the ladder on the compensation policies from Base Plus to Hourly as a reward for good service. By characterizing the movement to the Hourly plan as a reward, the plaintiff argues that the defendant camouflaged the true nature of the risk of financial loss associated with the compensation policies. I am unable to accept this argument. The letters relied upon by the plaintiff in support of this argument do not refer to the compensation policies as a reward

for commendable service. These communications from the defendant were to notify the plaintiff of an increase in his hourly rate, which would have applied regardless of which compensation plan he was on, including the straight salary plan. I found nothing in the defendant's communications with the plaintiff directly or indirectly recast or altered the impact of the clear terms of its compensation policies.

- [64] The plaintiff also argues that he was a vulnerable employee and that the compensation policies were unconscionable. There is no evidence to support this argument. The plaintiff is well educated and had many years of experience in the IT field in Canada and internationally. While his first language is Spanish, there is no evidence that his knowledge of the English language was less than adequate for his high level work in the IT field. All of his written communications with the defendant indicate that the plaintiff had no difficulty understanding and using the English language. I do not find the terms of the compensation policies to be unconscionable or the circumstances surrounding the plaintiff's agreement to these terms of employment.
- [65] The plaintiff argues that the changes made to his employment contract were made without consideration and amounted to a unilateral fundamental alteration of his terms of employment. I disagree. This was not a unilateral change to the employment contract however fundamental the compensation term of the agreement. In this case, the plaintiff agreed to the changes in his terms of employment and enjoyed an increase in his income as a consequence. There is no doubt that the plaintiff appreciated the risks and incentives offered by the policy.
- [66] Moreover, the plaintiff's employment contract contemplated that changes would be made to its terms over time, including changes that arose from policies implemented by the defendant. Further, the fresh consideration for the new compensation terms was the opportunity to make additional income beyond the plaintiff's initial salary through a commission based upon billable hours charged to a client. While there was a risk that the plaintiff would not earn more than the base salary, which was lower than his initial salary, the plaintiff in fact earned far more than this salary over the two years prior to his termination. At no time did the plaintiff object to this increase in his income or to how his wages were determined based on the compensation policy.
- [67] Finally, the plaintiff argues that the terms of the compensation plans were unlawful because they effectively permitted the defendant to pay an employee below the minimum wage dictated by the Employment Standards Act. This argument can only apply to the Hourly plan because the Base Plus 1 and Base Plus 2 plans paid more than minimum wage, even if there were no billable hours earned by the plaintiff. The Hourly plan contemplated and resulted in no monies paid to the plaintiff apart from the cost of the employer-paid benefits and vacation pay for statutory holidays if he did not bill any client hours. However, the plaintiff was not required to perform any work for the defendant for periods he was not earning an hourly rate. The Employment Standards Act does not require an employer to pay the minimum wage rate to an employee who does not work any hours. Accordingly, I do not

accept that a contract that contemplates periods of time in which the employee does not work and is not paid is rendered unlawful by the terms of the Employment Standards Act.

- [68] In summary, I find the terms of the plaintiff's employment contract included the various compensation policies implemented and agreed to by the plaintiff from time to time and specifically each time he agreed to a different compensation method. Further, none of the terms of the contract were illegal and unenforceable. Lastly, the changes to the contract were not imposed unilaterally and without consideration.

B. Failure to Pay Wages from June 17, 2013 to October 24, 2013

- [69] In my view, whether the plaintiff is entitled to be paid wages during this period prior to the notice of termination depends upon whether he can be regarded as terminated effective June 17, 2013. The plaintiff agreed that he would not be paid unless he billed client hours and it is not disputed that between June 17, 2013 and October 24, 2013, the plaintiff did not generate any billable hours. The agreement contemplated periods when an employee would not be working (bench time) and would only receive employer-sponsored benefits during this period. These periods must be regarded as a layoff. The question is whether the agreement can be interpreted such that after a certain period of time on the "bench" an employee would be considered terminated and entitled to reasonable notice.
- [70] The "bench" period is not defined in terms of its length and is in this sense ambiguous and should be construed against the defendant, who drafted the policy, pursuant to the contra proferentem rule: Hill at para. 27. Neither party addressed their minds to the length of a bench period nor when an employee would be regarded as terminated. The defendant had no experience with the compensation policies and had no information about the average length of a bench period for an employee. Obviously for IT consultants, the bench periods would depend on the amount of client project work available to them at any particular time. Depending on the skills of the consultant, bench time could vary considerably. The plaintiff did not consider this question because he felt his work with Goldcorp was secure; however, he had no real opportunity to negotiate the terms of the compensation policy in any event. The defendant gave the employees a choice about which policy to accept, but not in regard to the terms of the policy.
- [71] In these circumstances, I find that the layoff provisions of the Employment Standards Act qualify the right of the defendant to "bench" or lay off an employee. It is not a question of enforcing statutory rights in a civil action or implying terms which are absent in an employment contract as occurred in *Macaraeg v. E Care Contact Centers Ltd.*, 2008 BCCA 182. Instead, the definition of layoff found in the Act is used to interpret an ambiguous term of the employment contract dealing with the right to lay off an employee as occurred in *Collins v. Jim Pattison Industries Ltd.* (1995), 7 B.C.L.R. (3d) 13 (S.C.) at para. 23.

- [72] The Employment Standards Act, s. 1(1) defines a "temporary layoff" as a period of up to 13 weeks of layoff out of a consecutive period of 20 weeks and s. 62 defines a "week of layoff" as "a week in which an employee earns less than 50% of the employee's weekly wages, at the regular wage, averaged over the previous 8 weeks." Anything beyond a temporary layoff is a deemed termination: s. 1(1). For the purpose of determining the termination date under the notice provision, s. 63(5) of the Act says that "the employment of an employee who is laid off for more than a temporary layoff is deemed to have been terminated at the beginning of the layoff."
- [73] The plaintiff's last day worked was June 17, 2013, and he received no wages for the ensuing 13 weeks ending on September 13, 2013. Interpreting the contract in a manner consistent with the Employment Standards Act, the plaintiff is deemed to have been terminated on June 17, 2013.
- [74] The defendant argues that the plaintiff could have elected to return to Base Plus 1 or 2 during this period and thus it cannot be regarded as a layoff. However, an election to return to Base Plus 1 or 2 would amount to a fundamental alteration in the terms of the plaintiff's contract as of the date of termination. The plaintiff would receive remuneration that was less than what he was earning under the Hourly plan and would be required to perform other types of duties for the defendant that were not necessarily within his job description. While on the bench under the Hourly plan the plaintiff was not required to perform any work. Unless the plaintiff agreed to this fundamental alteration of his terms of employment, the terms of the other compensation policies would not form part of his employment contract. Moreover, once termination notice was given, the defendant could not alter the terms and conditions of employment without the consent of the plaintiff: s. 67(2) of the Employment Standards Act.
- [75] Thus while I find the plaintiff was not entitled to wages from and after June 17, 2013, under the terms of his employment contract, he was entitled to reasonable notice of termination effective June 17, 2013. The defendant did not give him notice until October 24, 2013, almost 19 weeks later. Payment during the notice period is addressed below; however, the defendant's failure to give proper notice of termination also has a bearing on the plaintiff's obligation to mitigate his loss.

C. Period of Reasonable Notice

- [76] On October 24, 2013, the defendant gave notice of termination, effective December 5, 2013. This is approximately six weeks' notice. As outlined above, there was also the period between June 17, 2013 and October 24, 2013 when the plaintiff was terminated without notice.
- [77] Where the employment contract has no defined termination date, there is an implied obligation on the employer to give reasonable notice of termination: *Machtinger* at 997. The defendant does not dispute the existence of such an obligation in the circumstances of this

case. The contractual obligation placed on the employer is to give reasonable notice and to retain the employee during the notice period. If the employer fails to give reasonable notice, the employee is entitled to the damages that flow from this breach of contract: *Graceffo* at para. 13:

As noted by McIntyre J. in *Vorvis v. Insurance Corporation of British Columbia* (1989), 94 N.R. 321, at 331, 58 D.L.R. (4th) 193, at 199-200 (S.C.C.):

The law has long been settled that in assessing damages for wrongful dismissal the principal consideration is the notice given for the dismissal. A contract of employment does not in law have an indefinite existence. It may be terminated by either employer or employee and no wrong in law is done by the termination itself. An employee who is dismissed is entitled to the notice agreed upon in the employment contract or, where no notice period is specified in the contract, to reasonable notice. He is entitled in the alternative in the absence of due notice to payment of remuneration for the notice period.

[78] The factors to be considered when determining reasonable notice in the particular circumstances of a case, were summarized by McRuer C.J.O. in *Bardal* at 145:

There can be no catalogue laid down as to what is reasonable notice in particular classes of cases. The reasonableness of the notice must be decided with reference to each particular case, having regard to the character of the employment, the length of service of the servant, the age of the servant and the availability of similar employment, having regard to the experience, training and qualifications of the servant.

[79] In *Ansari* at 37, McEachern C.J.S.C. (as he then was) concluded that the *Bardal* factors were the most important and other considerations that have "crept into the assessment" in subsequent authorities were not of great significance. However, in more recent judgments of this Court, other factors such as inducements have been given weight in the analysis of reasonable notice: *Hill* at para. 49. Inducement was expressly found to be a relevant factor in *Wallace v. United Grain Growers Ltd.*, [1997] 3 S.C.R. 701 at paras. 83-85 [*Wallace*]. In *Wallace*, the Supreme Court of Canada concluded that the *Bardal* factors are not exhaustive and a proper analysis of reasonable notice could include other relevant considerations. As *Iacobucci J.* says at paras. 82-85:

82 Canadian courts have added several additional factors to the *Bardal* list. The application of these factors to the assessment of a dismissed employee's notice period will depend upon the particular circumstances of the case.

83 One such factor that has often been considered is whether the dismissed employee had been induced to leave previous secure employment: see e.g. *Jackson v. Makeup Lab Inc.* (1989), 27 C.C.E.L. 317 (Ont. H.C.); *Murphy v. Rolland Inc.* (1991), 39 C.C.E.L. 86 (Ont. Ct. (Gen. Div.)); *Craig v. Interland Window Mfg. Ltd.* (1993), 47 C.C.E.L. 57 (B.C.S.C.). According to one authority, many courts have sought to compensate the reliance and expectation interests of terminated employees by increasing the period of reasonable notice where the employer has induced the

employee to "quit a secure, well-paying job . . . on the strength of promises of career advancement and greater responsibility, security and compensation with the new organization" (I. Christie et al., *supra*, at p. 623).

84 Several cases have specifically examined the presence of a promise of job security: see e.g. *Makhija v. Lakefield Research* (1983), 14 C.C.E.L. 131 (Ont. H.C.), affirmed by the Ontario Court of Appeal (1986), 14 C.C.E.L. xxxi; *Mutch v. Norman Wade Co.* (1987), 17 B.C.L.R. (2d) 185 (S.C.). In particular, I note that the British Columbia Court of Appeal recently adopted this approach in *Robertson v. Weavexx Corp.* (1997), 25 C.C.E.L. (2d) 264. The facts of this case were very similar to those currently before this Court. Writing for the court, Goldie J.A. stated at pp. 271-72:

Also part of the inducement to the respondent in making the move he did was, no doubt, the discussions as to long term employment. . . . As I have concluded, those discussions lacked contractual force in terms of the respondent's assertion of a fixed term contract but nevertheless, they were and are, in my opinion, significant on the issue of reasonable notice.

85 In my opinion, such inducements are properly included among the considerations which tend to lengthen the amount of notice required. I concur with the comments of Christie et al., *supra*, and recognize that there is a need to safeguard the employee's reliance and expectation interests in inducement situations. I note, however, that not all inducements will carry equal weight when determining the appropriate period of notice. The significance of the inducement in question will vary with the circumstances of the particular case and its effect, if any, on the notice period is a matter best left to the discretion of the trial judge.

[80] A majority of the Supreme Court of Canada reaffirmed the validity of the Bardal factors in *Honda Canada Inc. v. Keays*, 2008 SCC 39 at paras. 28-31 [Honda Canada]; however, Bastarache J., writing for the majority, underlined the necessity of determining the applicability of these factors based on the specific facts rather than relying on generalizations. Importantly, the actual duties of the employee rather than his place in the management hierarchy are determinative. In addition, Bastarache J. held that no single Bardal factor should be given disproportionate weight: at para. 32.

[81] In this case, the plaintiff was employed for a period of two years and seven months. This must be regarded as a relatively short term of employment; however, the notice period is not generally restricted to a proportionate formula. Shorter term employees are generally awarded a disproportionately longer notice period: Saalfeld at para. 15. In addition, I find that the defendant offered the plaintiff inducements during the recruitment process that contribute to a lengthier notice period.

[82] Job security was a key consideration for the plaintiff during the recruitment process. While the plaintiff was hired as an IT specialist, he was targeted for recruitment because of his Spanish language skills. The defendant was particularly in need of a consultant for Goldcorp, which required someone who could converse with its staff in Spanish. Much of the discussion between Mr. Miller and the plaintiff during the interview process centred upon the stability of the defendant's contractual arrangement with Goldcorp. The plaintiff

was assured that the contract with Goldcorp was secure until at least December 2014. The plaintiff's evidence that he would not have left CDI without these assurances of job security is not contradicted.

- [83] While I do not conclude that the defendant misrepresented its arrangement with Goldcorp, it is apparent that the long-term nature of this client's relationship with the defendant was held out as an incentive for the plaintiff to leave his position at CDI. This was a very important incentive because the only client that the plaintiff serviced during his term of employment was Goldcorp. Although the defendant maintains that the plaintiff was not hired solely to work for Goldcorp, not only was this the only client the plaintiff worked for, but after June 17, 2013, the defendant was unable to secure any other client work suitable to the plaintiff's qualifications and experience.
- [84] The defendant argues that the plaintiff was not induced to leave CDI because he was dissatisfied with the salary and the opportunities for advancement in his position. While the plaintiff did not consider the job with CDI entirely satisfactory, there is no evidence that he was seeking alternate employment when he was contacted by a recruiter employed by the defendant. There is nothing to suggest that the plaintiff's employment with CDI was insecure or that he would have left this position without the prospect of the job security and higher salary offered by the defendant.
- [85] Turning to the character of the plaintiff's job, it is apparent that he had no managerial responsibilities. Nevertheless, the plaintiff occupied an important position within the defendant's organization. He worked on high level IT systems for an important client and was required to liaise with Goldcorp executives around the world. I also find that his job required very specialized skills within the IT field, which were acquired over many years of experience in Canada and elsewhere. Further, for almost three years, the defendant relied upon the plaintiff's ability to work within the IT field proficiently in the Spanish language. The fact that the defendant could not secure comparable alternate work for the plaintiff, notwithstanding a diligent search for almost seven months, clearly supports an inference that the plaintiff's specialized skills were not readily transferrable to other clients within the defendant's large scale operation. The plaintiff was also well paid for his services. In June 2013, the last date that he worked, his hourly rate was \$62.18 and his average annual earnings were approximately \$118,000.
- [86] Neither party produced cogent evidence of the availability of similar employment at the time of the termination. Mr. Miller's bare statement that there were many jobs available to the plaintiff at the time of his termination must be given no weight without any evidence of his qualifications to proffer such an opinion. Moreover, the job searches attached to his affidavit were posted many months after the plaintiff was terminated and there is no basis upon which to conclude that the plaintiff was qualified for any of these positions. The defendant argues the Court should take judicial notice of the fact that IT skills are easily transferrable; however, I find there must be evidence in support of such a proposition. On the other hand, the inability of the defendant to place the plaintiff with another client

between June 17, 2013 and December 5, 2013, is clearly some evidence that employment within the plaintiff's skills and expertise was very scarce at the time of termination.

- [87] The plaintiff's age at the time of his termination is a neutral factor in this case. At 43 years old he could not be regarded as nearing the end of his career and there is no evidence that the IT field is dominated by young people. While it is well known that the IT field is rapidly changing with the advancements in technology, there is no evidence that the plaintiff's employment precluded him from keeping up with the latest innovations.
- [88] The plaintiff argues that the defendant engaged in bad faith conduct and unfair dealing in the course of the dismissal. This misconduct, argues the plaintiff, justifies an increase in the reasonable notice period. In support of this proposition, the plaintiff relies upon Wallace. In that case, the Supreme Court of Canada imposed on employers, a duty of good faith and fair dealing in the manner of the dismissal and created an expectation that the employer would be "candid, reasonable, honest and forthright with their employees": at para. 98.
- [89] It is apparent that at the outset of this litigation the defendant alleged cause for dismissal in its response to civil claim. The misconduct alleged by the defendant had the potential to sully the plaintiff's reputation for honesty as it concerned an alleged misuse of corporate credit cards. The defendant maintained this allegation for cause until the discoveries were concluded at the end of October 2014. Further, the defendant asserted that the alleged misconduct was discovered after the plaintiff's dismissal, thereby giving him no real opportunity to defend his reputation. I also find the defendant's treatment of the plaintiff during the notice period exhibited unfair dealing. Although the plaintiff was advised to regard the notice period as "working notice" carrying with it an obligation to perform work as directed by the defendant, no work was offered to the plaintiff and he was not paid during the notice period. Moreover, the defendant argued at trial that the plaintiff was not entitled to remuneration during the notice period because he failed to elect a lower compensation package and perform the duties corresponding to this wage package. Clearly the actions of the defendant burdened the plaintiff with additional stress and financial strain and were clearly defamatory.
- [90] Unfortunately, a longer notice period based on the type of conduct discussed in Wallace is no longer appropriate as a means of compensating an employee who has been wrongfully dismissed. While an employee may be awarded damages for foreseeable mental distress, it is not appropriate to arbitrarily extend the notice period to, in effect, calculate those damages: Honda Canada at para. 59. The plaintiff has not claimed damages for mental distress and did not lead evidence to establish compensable harm under this heading.
- [91] The plaintiff also argues that the non-competition clause restricted the clients that he could contact for work in the six months following his termination. Normally, a non-competition clause has a deleterious impact on the ability of a dismissed employee to find alternate work; however, in this case the agreement signed by the plaintiff only restricted attempts to provide consulting services or products to clients that he worked for or had contact with

during his tenure with the defendant and clients that the defendant proposed that he work for. This clause applied to Goldcorp and relatively few other clients that had contracts with the defendant.

- [92] Nevertheless, the non-solicitation and interference clause of the agreement signed by the plaintiff was much broader and far more restrictive. Clauses 2.1 to 2.3 of the agreement provided that for a period of six months from the date of termination the plaintiff could not, "directly or indirectly, disrupt, damage, impair or interfere with Sierra Systems' business, including Sierra Systems' relationship with clients, agents, vendors, distributors, or other third parties." In my view, an attempt to secure work from any of the defendant's clients may constitute interference within the meaning of this clause if the plaintiff's actions resulted in a loss of work from the client or a negative change in the defendant's business relationship with a client. Thus for the first six months after the date of termination, it would have been reasonable for the plaintiff to have regarded clients of the defendant as off-limits in terms of a job search. As a consequence, I find that this agreement slightly increases the proper notice period because it restricted the job opportunities available to the plaintiff for six months.
- [93] I have reviewed the authorities cited by the parties with regard to reasonable notice. I found the authorities relied upon by the defendant are not comparable to the plaintiff's circumstances and impose a notice period that does not reflect the factors present in this case. The plaintiff's authorities are also distinguishable and reflect longer term employees and more exceptional circumstances apart from Hill. In that case, the dismissed employee was a professional engineer who worked for less than four years and had no managerial duties. While the notice period was slightly increased due to bad faith in the manner of the dismissal, many of the relevant factors in determining notice are comparable to the plaintiff's circumstances. Mr. Hill had specialized skills that restricted the number of potential clients available to him and these skills were not easily transferrable. Inducement to leave other employment, on the other hand, was not as significant in Hill as I have found it was in the plaintiff's circumstances. Mr. Hill was also older than the plaintiff. The Court in Hill awarded 12 months' notice.
- [94] Hill at para. 53, also relied on *Frederick v. International Fund Raising Consultants Ltd.*, [1991] B.C.J. No. 3420 (S.C.), where the court awarded a 44-year-old sales consultant ten months' notice after three years of employment and the court noted the existence of some special circumstances at the time of the dismissal. Eight months would have been the appropriate notice period without the special circumstances.

- [95] In my view, these two authorities present reasonably comparable circumstances to the case at hand. Taking into consideration the age of the plaintiff at the time of dismissal (43), the slightly shorter length of service than in Hill, the limitations I have found in the employment market available to the plaintiff, the restrictions contained in the non-competition agreement, and the existence of some inducement to leave his former employment, I find the plaintiff was entitled to ten months' notice.
- [96] It follows that the defendant failed to give the plaintiff reasonable notice of termination by the letter of October 24, 2013, which provided six weeks' notice. Accordingly, I find the defendant violated the implied term of the plaintiff's employment contract that required reasonable notice of termination.

D. Compensation Payable to the Plaintiff as Damages for Breach of Contract

- [97] The plaintiff is entitled to damages for breach of contract based on a reasonable notice period of ten months. Absent reasonable notice, an employee is entitled to payment of remuneration during the notice period: Graceffo at para. 13, citing Vorvis v. Insurance Corporation of British Columbia (1989), 94 N.R. 321 (S.C.C.) at 331. While a general statement of the law is that an employee is entitled to be paid the wages and benefits he would have been entitled to had proper notice been given, this articulation of the test cannot be interpreted as denying an employee any damages where he is earning no income at the time of dismissal due to a lack of work available within the employer's operation. If this were the law, then no employee who was dismissed for lack of work would be entitled to any compensation for breach of contract. In my view, this interpretation of the law would lead to absurd consequences and should not be adopted.
- [98] In my view, damages for wrongful termination must be based upon the remuneration the plaintiff would have earned had work been available to him in the ordinary course of his employment. A similar principle was applied in Hooze. Where the work is dependent upon billable client hours and varied, as in this case, the average earnings of the employee during a reasonable period prior to the termination should be used to determine the compensation payable for breach of contract: Serrao v. National Bank Financial Inc., [2004] O.J. No. 2821 (S.C.J.) at para. 27. In this case, the plaintiff's income was based on an hourly rate as of May 2012. There were no periods of layoff or bench time until June 17, 2013, over a year later. Accordingly, I find it is reasonable to calculate damages for failure to give proper notice based on this one-year period prior to the plaintiff's last day of work.
- [99] The plaintiff is entitled to the wages and benefits he would have earned during the ten-month notice period between June 17, 2013 and April 17, 2014, based on the income and benefits he earned in the previous year between June 17, 2012 and June 17, 2013. The plaintiff's annual salary in the year as of April 2013 appears to be a maximum of \$119,386. However, there may be some discrepancy in the actual amount paid to the plaintiff during the year prior to June 17, 2013 and the maximum he could have earned. Accordingly, the plaintiff is entitled to damages equal to ten months' salary based upon the actual income he

earned between June 17, 2012 and June 17, 2013. In addition, the plaintiff is entitled to damages representing the value of the benefits included within the plaintiff's contract of employment and which he would have received if the defendant had provided him with reasonable notice of ten months' duration.

E. Did the Plaintiff Fail to Mitigate?

[100] The issue of mitigation is conveniently divided into three periods: (1) June 17, 2013 to October 24, 2013; (2) October 24, 2013 to December 5, 2013; and (3) December 5, 2013 to April 17, 2014.

[101] Turning to the first period between June 17, 2013 and October 24, 2013, I find the plaintiff had no duty to mitigate his loss at a time when he was unaware of his termination. The defendant assured the plaintiff that it was working with Goldcorp to reinstate his relationship with this client during the spring of 2013. Further, he was advised to consider the bench time a vacation period during which he could "recharge." There was no indication from the defendant that the period on the "bench" was going to be lengthy or that the defendant anticipated great difficulty getting the plaintiff reinstated with Goldcorp. When it became apparent that Goldcorp would not reinstate the plaintiff, the defendant reassured the plaintiff that it was working diligently to find him another project. He was told to make himself available for work and to remain in close contact with the defendant. Alternatively, if there was a duty to mitigate, the plaintiff acted reasonably in choosing to rely on the defendant's efforts to find him another project and treat what he reasonably believed would be a relatively short period of down time as a vacation.

[102] During the period between October 24, 2013 and December 5, 2013, the plaintiff was given notice of termination and during this period he had a duty to mitigate by taking reasonable steps to reduce his loss. As articulated by D.A. Smith J. (as she then was) in *Bradley* at para. 34:

[34] It is trite law that an employee has a duty to mitigate his losses upon termination of his employment. In *Forshaw v. Aluminex Extrusions Ltd.* (1989), 39 B.C.L.R. (2d) 140 (C.A.) at p. 144, Taylor J.A. stated:

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

- [103] During this period, the plaintiff did not look for alternate employment. Instead, he made efforts to increase the business prospects of a company that he incorporated in 2003 to provide IT services and products to clients in Canada and in Mexico. He loaned money to the company and increased its business through marketing efforts, but made few net profits during this period.
- [104] Notwithstanding the failure to seek alternate employment, I find the defendant has not proven on a balance of probabilities that the plaintiff failed to mitigate his loss during this period for several reasons. First, during this period the defendant continued to assure the plaintiff that it was searching for work suitable to his qualifications and expertise among its own client base. Thus there was an incentive to remain available for work within the defendant's operation. Second, the notice of termination expressly required the plaintiff to remain available for work that the defendant required of him. The notice stated, "While on worked notice you will continue to be employed on a full-time basis and will be expected to perform duties as assigned by Judy Waywood-Cox." Although the defendant did not give the plaintiff any work, he was still obligated to keep himself available for work. Third, while the defendant argues the plaintiff could have elected to return to the Base Plus 1 or 2 compensation plans, and thereby mitigate his loss, I am not satisfied that this option was available to the plaintiff. The letter of termination did not offer this option and none of the plaintiff's supervisors advised him of this choice. Although the plaintiff had elected to revert to Base Plus 1 for a short period prior to receiving notice of termination on October 24, 2013, his right to again select this method of compensation after he was terminated and placed on working notice was not clearly articulated in any of the compensation policy documents. Further, the election was always subject to approval by the defendant and there is no evidence the defendant would have approved the election after it had decided to terminate the plaintiff. Indeed, given the defendant's position that the plaintiff was not entitled to any wages during the notice period, it is highly unlikely it would have willingly offered him remuneration even at a reduced rate. Lastly, as set out above, the duty to mitigate does not require the employee to accept any work offered by the employer, particularly when it is paid at a significantly lower rate and consists of duties that are different from his regular responsibilities.
- [105] In my view, the plaintiff's decision to increase the business opportunities of his pre-existing company was a reasonable step to take during the notice period up to December 5, 2013. Given the conditions imposed by the notice of termination, in terms of his obligation to remain available to the defendant for work assignments and the continued efforts of the defendant to find him other work, the plaintiff's actions were not unreasonable. The fact that the company did not make substantial profits in this short period is not evidence that the choice was unreasonable. Further, the defendant has produced no evidence that there were suitable, comparable jobs available to the plaintiff during this period.

- [106] Lastly, can it be said that the plaintiff failed to mitigate his loss between December 5, 2013 and April 17, 2014, the end of the reasonable notice period? The plaintiff did not search for employment after the termination date and, instead, relied upon his company for income. The company continued to be unprofitable throughout the spring of 2014, notwithstanding efforts by the plaintiff to expand its clients through extensive marketing. In those circumstances, it would have been reasonable for the plaintiff to seek out other types of work as an employee after it became clear that his business was not profitable. At age 43, the plaintiff was not towards the end of his career, even in a highly competitive market. He had extensive experience in the IT field that he could have used to find employment. However, as discussed earlier, the plaintiff had a specialized position with the defendant that made extensive use of his Spanish language skills and the defendant's own search for alternate work for the plaintiff indicates that his skills were not highly in demand. While the defendant produced evidence of available jobs in the IT field, most of these jobs were posted well after April 2014 and there is no evidence from which I can infer that the plaintiff had the qualifications and experience for these jobs.
- [107] Thus while the plaintiff took few steps to mitigate his loss in the early spring of 2014, I find there is little evidence that a suitable and comparable job existed had he looked for employment. The onus of proof rests with the employer to show that the dismissed employee has failed to mitigate his loss. Where there is no evidence that the plaintiff would otherwise have found appropriate work, there can be no reduction in the award of damages: per Burnyeat J. in *Smith* at para. 36. The onus rests with the defendant to prove that the plaintiff failed to take steps to mitigate his loss and that those steps would likely have led to equivalent employment: *Smith* at paras. 32-33 and the authorities cited therein.
- [108] Accordingly, for these reasons I find the defendant has not satisfied the heavy onus of proof regarding a failure to mitigate.

SUMMARY

- [109] I find the defendant wrongfully dismissed the plaintiff by failing to give reasonable notice of termination. Reasonable notice in the circumstances was ten months. The plaintiff is entitled to damages equal to the ten months' salary based on the actual amounts paid to him between June 17, 2012 and June 17, 2013, plus the value of the employer-paid benefits that would have been paid during the notice period of ten months. The plaintiff is entitled to interest pursuant to the Court Order Interest Act, R.S.B.C. 1996, c. 79 and costs at Scale B.
- [110] If there is a dispute concerning costs, the calculation of the value of benefits, or the calculation of the plaintiff's income in the year prior to June 17, 2013, I remain seized with respect to those issues.

"Bruce J."

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