

COPY

IN THE SUPREME COURT OF BRITISH COLUMBIA

Date: 20080125
Docket: S068175
Registry: Vancouver

Between:

Robert Lewis

Plaintiff

And:

Lehigh Northwest Cement Limited

Defendant

Before: The Honourable Mr. Justice Silverman

Oral Reasons for Judgment

January 25, 2008

Counsel for Plaintiff:

S. Forestell

Counsel for Defendant:

M. Weiler

Place of Trial/Hearing:

Vancouver, B.C.

[1] **THE COURT:** This is an action for damages for breach of contract. The contract was a contract of employment between the plaintiff, an employee, and the defendant, his employer. The relevant terms of the contract are partially implied and partially contained in numerous documents.

[2] The employer has terminated the plaintiff's employment. The alleged breach is wrongful dismissal. The parties are agreed that the dismissal was without cause. The parties are agreed that an implied term of the contract between them is that the plaintiff was entitled to receive reasonable notice on termination.

[3] The plaintiff argues that his dismissal was wrongful because he did not receive reasonable notice, as a result of which the plaintiff seeks damages for breach of contract in an amount equal to the reasonable notice which the plaintiff claims he was entitled to, and he seeks what are referred to as **Wallace** damages in the form of increased notice for, according to the plaintiff, the harsh and high-handed manner in which he was terminated.

[4] The pleadings, that is, the statement of claim, also included claims for aggravated and punitive damages. Those claims have been abandoned.

[5] The defendant argues that the plaintiff has received reasonable notice, or at least an offer which would be reasonable notice, and that the plaintiff had a duty to mitigate by taking appropriate steps to find other employment, and he failed in that duty to mitigate thereby reducing the amount of damages to which he would otherwise be entitled. The defendant argues that the manner in which he was

terminated was perfectly appropriate, professional, and courteous, and no **Wallace** damages should be awarded.

[6] The matter is before me in the form of a summary trial under Rule 18A with evidence by way of affidavit. Both parties desire a resolution by this procedure because of the prohibitive cost of proceeding to a traditional trial. There are disputes of fact to be resolved, and the parties submit that the affidavit material is sufficient to enable me to resolve those disputes.

[7] The defendant raises some credibility issues concerning the plaintiff stemming from allegations by the defendant of bad faith on the part of the plaintiff, late disclosure of documents, and even non-disclosure. Nevertheless, despite those complaints, the defendant reluctantly agrees that this matter can be resolved by way of affidavit and Rule 18A.

[8] I have considered all of the submissions and the affidavit evidence, and I am satisfied that I am able to resolve all of those issues and determine this matter pursuant to Rule 18A.

[9] By way of chronology, the plaintiff was hired by the defendant in 1980. The defendant is, in very general terms, in the cement manufacturing business. The plaintiff held various positions over the years he worked for the defendant, ultimately, managerial in nature. When originally hired, he was a senior computer engineer. Ultimately he had the title of manager, process computer systems for the employer's plant in Delta, British Columbia. He also worked in latter years for a different plant in California owned not by the defendant but by a sister company of the defendant, part

of what is referred to as the Lehigh Family. He received a special allowance for the work in California and his pay continued to be paid by the defendant company.

[10] His duties and responsibilities in latter years included designing, overseeing, and implementing cement plant control system projects, their budgets, staffing the department, overseeing the work of several employees and consultants, as well as other duties.

[11] In May of 2004, he went on medical leave. He received disability benefits from the insurance company with whom those arrangements were in place. In November of 2004, while the plaintiff was still on medical leave, the defendant advised him in writing that his involvement working at the California plant of the sister company had ceased some months earlier, in March of 2004.

[12] On August 8, 2006, the plaintiff was advised by the disability insurer that they were satisfied he was no longer disabled and that his disability benefits would be terminated as of September 8 and that he was, in their view, fit and able to return to work.

[13] Immediately the plaintiff contacted several defendant representatives indicating his desire to return to work and asking that steps be put in place to find him an appropriate position.

[14] On August 17, 2006, the plaintiff requested from the appropriate representative of the defendant information about his pension. That information was

provided. He also sought in that same time period information from an independent source relating to the liquidating of certain assets which he owned.

[15] On September 6, 2006, the plaintiff spoke with an appropriate defendant representative. The plaintiff made notes of that meeting, indicating that he was aware of three different options, and I conclude that he was considering three different options at that time:

1. Returning to work.
2. The possibility of termination.
3. A further medical leave.

[16] At the same time, he asked for an update on job availability. The defendant advised that it needed a few more weeks. The defendant agreed as a matter of courtesy to pay, in the meantime, to the plaintiff the amount of the disability benefits he had previously been receiving. There was some original confusion as to what that agreement was. I find that it was a matter of goodwill on the part of the defendant company to cause it to agree to pay three weeks of long-term disability payments.

[17] In early September of 2006, the defendant made a decision to terminate the plaintiff but did not advise him at that time or at the interview of September 6. Rather, it was on September 22, 2006, when the appropriate defendant representative advised the plaintiff that he was being terminated. That meeting was at a Starbucks. He was told he was terminated. He was provided with a letter of termination which counsel agree is not a "without prejudice" document. That letter

offered him a number of weeks of salary as a result of being terminated, as well as assistance in a job search. It also unilaterally picked an earlier date, that of September 8, 2006, as the commencement of the termination date. The actual number of weeks offered are not relevant here and may become relevant on an issue of costs. What is relevant is that the plaintiff did not accept that offer.

[18] On October 2, 2006, the defendant paid the plaintiff eight weeks of severance pay required under the *Employment Standards Act*, R.S.B.C. 1996, c. 113 and indicated that that was in addition to the number of weeks that had been offered in its letter of September 22. The defendant also paid at that time the three weeks of long-term disability benefits that I have referred to, indicating they were for the period from September 8 through September 30.

[19] On December 19, 2006, this action was commenced. In the latter half of December 2006, the plaintiff commenced his job search. On December 20, he provided or prepared the first of four résumés, each containing some conflicting information when compared to the previous ones. In 2007, he sent out various unsolicited letters to various prospective employers.

[20] In May of 2007, the plaintiff's wife told him that she would not relocate if he obtained employment in a far away location.

[21] There is an entry in the plaintiff's personal notes of August 9, 2007 that is somewhat ambiguous, but in the view of the defendant suggests that an offer with a major employer had been made and turned down by the plaintiff because he did not want to relocate. The other possible interpretation of the ambiguous note is that

there was simply a discussion on that topic and not an actual job offer. The defendant makes a strong submission about that, and I will refer to that in greater detail a little later in my judgment.

[22] I turn to the question of reasonable notice. There are two aspects of this to be determined. One is the number of months of notice to which he was entitled. The second is from what date should that notice run.

[23] On a review of the case law, and I have been provided with numerous cases from both counsel, I have considered that, among others, the following factors are the most important to be considered here:

1. That the plaintiff was at the time he was terminated, which really means at the time he went on sick leave for these purposes, in a management position as previously noted with great responsibility.
2. His work is in a specialized sector of a specialized field.
3. He put in 24 years of service with respect to the company before he took his medical leave, 26 years if the medical leave period is considered.

[24] I consider his age, which is in his late 50s, almost 60. There is a suggestion, and I accept it, that he has ongoing medical problems which, while they will not prevent him from working, may make him less desirable to prospective employers. I consider that he was a hardworking and valuable member of the defendant company until the time he went on medical leave, and his work benefited the company in a significant way.

[25] The parties are agreed that the upper limit in wrongful dismissal cases for reasonable notice would be 24 months. The numerous cases provided to me by the plaintiff with facts which vary in different degrees of similarity when considered with the facts at bar suggest the 18 to 24 months range. The defendant cases also provide me with varying degrees of similarity for consideration. Those cases suggest an appropriate period of time as 15 to 18 months.

[26] I am satisfied, after considering those cases and all the important considerations that I have already referred to, that an appropriate amount of notice in this case is 22 months, and I determine that for the reasons that I have already indicated.

[27] That does not automatically translate into a damage award of 22 months times monthly salary because the amount of damages to which he is entitled may vary from that 22 months depending on:

1. The success or lack of success of the argument relating to mitigation which I will refer to.
2. Determining what the amount of his monthly salary actually was, which is an issue in dispute.
3. Whether or not there are any other benefits as a result of which he suffered further loss beyond the salary and for which he perhaps should be compensated.

[28] He was entitled to receive the reasonable notice from the date of termination. The parties do not agree on what that date is. The plaintiff says it is September 22, 2006, the date he was notified of his termination at the meeting at Starbucks and the date of the letter which told him he was terminated. The defendant argues the date

of termination was September 8, which was the date the decision was made, although the plaintiff was not told until September 22. The defendant argues that it legitimately and appropriately backdated that date so that the plaintiff would have some status to receive the disability payments I have previously referred to which he ultimately did receive for a period of time, in the defendant's view, starting on September 8.

[29] While I impute no ulterior motive whatsoever to the defendant in backdating the termination date, I am satisfied that that is not a fair or correct way for this to be viewed. The plaintiff is entitled to know when he is terminated at the time he is terminated, and the defendant is not entitled to unilaterally change that date.

[30] I conclude that the termination date of the plaintiff was September 22 when he was terminated, and the 22 months will be calculated from that point.

[31] What damages should he receive? Damages are not based on the amount that the plaintiff would have been paid if he had not been dismissed but, rather, on actual losses suffered during the period of notice. The plaintiff must prove the loss suffered in each category in which he says he has suffered a loss in order to recover damages in that category.

[32] In each category, the onus is on the plaintiff to prove on a balance of probabilities the amount of the loss in the categories that the plaintiff has raised — loss of salary, bonus, MSP premiums, EI and CPP premiums, and pension.

[33] I turn to the question of salary. The calculation of damages in this category of damages is to be based on the plaintiff's annual salary at the date of termination. Since he had been on medical leave, the annual salary of the plaintiff in the year in which he commenced that leave is the relevant salary upon which to base the calculation. The parties disagree on what that salary was at that time. The difference appears because in that year and for sometime more than one year before he went on medical leave he was working at the plant in California receiving above what would traditionally be referred to as his salary, an additional \$10,000 per year which has been referred to and was referred to at the time as a special allowance. The plaintiff says that \$10,000 must be considered as part of the salary and claims that that \$10,000 combined with the traditional salary makes a total of \$126,680 per year and that that is the figure from which calculations for his loss should be made.

[34] The defendant says that that \$10,000 was not part of his salary and should not be considered part of his salary, that it was a special allowance exclusively for the work being performed in California and was never intended by the defendant and was never expected by the plaintiff to be payable to him once the California job was no longer the place where he was attending and working.

[35] When that is reduced, and with whatever minor adjustments go with it, the defendant argues that the amount of salary for the calculations in this case is \$116,150 per year.

[36] The plaintiff argues that the \$126,000 figure is the appropriate one and argues as follows in that regard:

1. In his last year of work, and for sometime more than a year, the plaintiff directed almost all of his efforts to the California plant.
2. He was paid \$126,680 for the last two years of his work before he went on medical leave.
3. The disability benefit payments which he received while on medical leave were based on an annual income of \$126,680.
4. The paperwork which was provided to the disability insurer and completed by the appropriate representative from the defendant listed the plaintiff's monthly benefits as 1/12th of the \$126,000 figure.
5. The disability insurer wrote a letter to the plaintiff noting the \$126,000 figure. A copy of that letter was sent to Human Resources personnel at the defendant company. The defendant did not correct or write to the disability insurer correcting what it now says was in fact an error. That letter says that his basic monthly salary was 1/12th of \$126,000.
6. A defendant representative wrote the plaintiff on August 17, 2006, in response to the plaintiff's request about pension information. That letter states that the annual "pensionable earnings" of the plaintiff is \$126,680 for the years 2004 and 2005 and prorated to arrive at the same amount for the year 2006. Those are periods of time when he was on medical disability.
7. In the statement of claim, while the salary is claimed as being \$116,150, there is also a claim in the same paragraph of the statement of claim for the \$10,000 as "compensation for services provided in the United States of America."
8. While the California plant was indeed owned by someone different than the defendant company, it was a sister company and the plaintiff continued to be paid his income, including the \$10,000, from the defendant company.

[37] The burden of proving the amount of loss in this category, as in all others, is on the plaintiff. The plaintiff has, in my view, not met that burden. I am satisfied that

the amount of salary was not \$126,680 but was, rather, \$116,150. The additional amount was a special allowance payable only so long as the plaintiff was working in California, and that particular job was unavailable to the plaintiff when he returned to work. It was, in fact, unavailable to him, and he knew it, by no later than November of 2004, at which time he was advised that that job was no longer available, and he was so advised in writing.

[38] I have relied upon the following in coming to my conclusion:

1. The statement of claim notes the claim for the \$10,000 as separate from the salary of \$116,150.
2. The \$10,000 which is noted in the statement of claim is specifically noted as being for "compensation for services provided in the United States of America".
3. The plaintiff's second résumé, when looking for work, listed his salary at \$116,000 plus bonus, and there is a figure of \$5,000 to \$10,000 in square brackets following that, per annum. His first résumé was silent on the question of salary. His third résumé changed the \$116,000 figure to \$126,000 plus bonus.
4. The plaintiff indicated in an affidavit that in looking for his new job, his salary expectations were "\$110,000 plus".
5. The affidavit evidence of the defendant representatives indicates that the plaintiff's salary was indeed the \$116,000 figure.
6. The examination for discovery of the plaintiff suggests that he understood his salary to be \$116,000 plus a special allowance for working in the United States rather than describing it as \$126,000 including an allowance for working in the United States.
7. The \$10,000 was for the California project only and the plaintiff knew that. The defendant does not own the California plant, although it is clear that it was a sister company.
8. The California job was no longer available at the latest by November of 2004 when the defendant told the plaintiff that that job had come to an end some months earlier.

9. I conclude that if the plaintiff had not been terminated, he would have been working at some job for the defendant which was not in California and he would not have been receiving the special allowance as a result.
10. The August 17, 2006 letter with respect to the pension does indeed refer to "pensionable earnings," however it also refers to "regular earnings plus the special allowance in connection with your assignment in California." I have omitted a few irrelevant phrases from the middle of that quotation. Further, the pension plan by its own terms fixes the amount for pension-determining purposes at the 2004 figure because that is the time when he went on medical leave.

[39] In sum, I conclude the amount of salary from which his loss to determine damages is to be calculated in this case is \$116,150 per annum.

[40] There are deductions to be made from that before the amount of the judgment is determined. The defendant has paid the plaintiff eight weeks of severance pay as required under the ***Employment Standards Act***. The defendant is certainly entitled to credit for those weeks of payment towards the 22 months of notice required.

[41] Since the plaintiff was not terminated until September 22, that payment, despite the fact that the defendant may have characterized it as otherwise, must be calculated as commencing at the time of termination, that is, September 22. The significance of that date is not that it affects the dollar amount of the credit that the defendant gets (the defendant gets eight weeks' credit from that whatever date is chosen as the starting date); rather, the significance is because it has an effect upon whether or not the defendant will also get credit to be deducted from the damages for the three weeks of disability payments made. Those three weeks of disability

payments to the plaintiff were intended to cover the period commencing September 8. The defendant argues that it should get credit for that as well and that that amount should be subtracted from the amount of damages in lieu of reasonable notice.

[42] I disagree with that. Termination was September 22. The eight weeks payable under the *Employment Standards Act* must begin at that time. On September 8, he was still an employee. The defendant had gratuitously and, as I have indicated, as a matter of goodwill, which will raise its head later in this argument, indicated it would pay the disability payments and it did do so. Those payments are deemed to have commenced on September 8, the date that the defendant chose for their commencement. From September 8 to September 22, the plaintiff had no other income from the defendant. He is entitled to keep that portion of the three-week long-term disability payments attributable to that time period, and the defendant gets no credit for that period of time, which would be subtracted from the reasonable notice.

[43] However, from September 22 on, the plaintiff is receiving his damages in lieu of notice, and consequently, the portion of the disability payments attributable to the period from September 22 on is something which the plaintiff is not entitled to receive as double recovery, since he is already being paid for the lack of notice. The defendant is entitled to be repaid the amount of the disability payments attributable to the post-September 22 period, and that repayment can be paid by way of set-off. There is simply no good reason for the plaintiff to double recover during that time

period and no good reason why the defendant should have to overpay for that time period.

[44] The plaintiff also claims that he suffered loss in the form of not receiving bonuses which he would have otherwise received. The evidence indicates that he received a bonus in the year 2000 of \$13,000; 2001 of \$10,000; 2002 of \$15,000. The plaintiff says that I should award an amount of \$15,000. I disagree. The evidence indicates that he did not receive bonuses for the years 2003 or 2004. The bonus was not something that the plaintiff was automatically entitled to. It had to be earned in accordance with predetermined standards relating to his work and the success of his work. It is something which in my view is not recoverable in lieu of notice, and consequently, the claim for any loss arising out of the bonus is dismissed.

[45] With respect to MSP premiums and the defendant's contribution to EI and CPP premiums, it came up during argument and unfortunately, if it got resolved, I missed it. It was suggested that these may have already been paid by the defendant. If they have, then of course this portion of the judgment will be satisfied. The defendant is required to pay those during the notice period, and if they have already been paid, then they need not be paid again.

[46] With respect to the pension, the plaintiff submits that he has suffered a loss of pension benefits. The plaintiff argues that he is entitled to recover, as damages, an amount equal to the difference between the value of his pension had he worked to

the end of the reasonable notice period and the value of the pension determined at the date of dismissal.

[47] Following his termination, the plaintiff was given a number of options with respect to his accumulated pension. One of those options would have been to have kept the funds in the company plan and begun to receive benefits on a regular, presumably monthly, basis. He sought and received independent financial advice before making his choice. In early November of 2006, he chose to receive lump sum payments immediately rather than keeping the funds in the company plan. He indicated that he chose this for several reasons, including:

1. He considered that if he left the principal in the company fund, it would pay a lower rate of interest than he anticipated receiving if he took the funds out and invested them privately.
2. He considered that the company pension plan did not have advantageous survivor benefits which he desired.

[48] The plaintiff, as a result of that decision, received a gross amount of slightly less than \$600,000, out of which he was required to pay approximately \$70,000 in income taxes. He invested what remained with professional financial advisors for a number of months. Initially, his investments did indeed earn a greater return than they would have if the funds had been left in the company plan. More recently, his investments have apparently been earning a lesser return than the company plan. The plaintiff now claims that had he left the funds in the company account, it would have been worth a significantly greater amount at the end of the period of reasonable notice than it was worth when he was terminated and when he took it

out. His entitlement, he argues, is to the calculated amount at the end of the notice period.

[49] The plaintiff relies upon *Peet v. Babcock & Wilcox Industries Ltd.* (2001), 197 D.L.R. (4th) 633 (Ont. CA.) [*Peet*] where that principle supporting the plaintiff's argument was followed. However, there is, in my view, a significant difference between that case and the one at bar. In *Peet*, the plaintiff chose to leave the money in the company plan and to receive monthly benefits. The judgment decided that the amount of those monthly benefits must be the amount that they would have been if the plaintiff had worked to the end of the reasonable notice period. In my view, that distinction is an important one.

[50] In *Peet*, the employer continued to have the benefit of the principal sum and the plaintiff had not made the choice and therefore had no ability to invest the funds privately for a greater return; in the case at bar, exactly the opposite is the case. If the plaintiff were correct in his argument here, what would happen, I must ask myself, if the plaintiff's investments had resulted in a greater return than if it had remained in the company plan? Would he be required to refund the balance to the defendant, that is, the balance of the greater return?

[51] What about any interest or dividends the plaintiff might have made on his investments? Would the defendant be entitled to reduce the amount of any judgment by the amount of such returns? What if the value of the plaintiff's investments, now that he has already taken out the funds, increases next year and the year after that? Will he be required to return some portion to the defendant?

What about the value of the survivor benefits which the plaintiff believes are greater as a result of the choice he made? Does he get to retain that value and still have his lump sum increased to what it would have been at the end of the notice period? What about the loss to the defendant in not having the principal to invest in the meantime?

[52] For all of those reasons, I conclude that the plaintiff has not established a loss for which he is entitled to be compensated by the defendant. This aspect of the plaintiff's claim is dismissed.

[53] The defendant argues that the amount of damages must be reduced because of what the defendant says is the plaintiff's failure to mitigate. In ***Evans v. Teamsters Local Union No. 31***, 2006 YKCA 0014, 231 B.C.A.C. 19 at para. 53, the Court quotes this from ***Smith v. Aker Kvaerner Canada Inc.***, 2005 BCSC 117 at para. 31:

In seeking and accepting alternative employment, the plaintiff has a duty to act reasonably and to take such steps as a reasonable person in the plaintiff's position would take in his own interest to maintain his income and his position in his industry, trade or profession. The duty involves a constant and assiduous application for alternative employment, an exploration of what is available through all means.

[emphasis added by C.A.]

[54] There is no question that the plaintiff has a duty to mitigate. The defendant is not responsible for any loss occasioned by the plaintiff's failure to fulfil that duty. A plaintiff must act reasonably in looking for new employment. Determination of this is an objective test. It is not sufficient that the plaintiff believes he has taken

reasonable steps. The plaintiff must attempt in good faith to look for alternate similar employment in order to avoid loss.

[55] Having said that, the onus is not on the plaintiff to prove he has taken those steps; rather, the onus is on the defendant to prove that he has not. The onus is on the defendant to prove a failure to mitigate.

[56] In this case, the defendant argues that it has met that onus and points to the following arguments and evidence in support of that:

1. The defendant says the plaintiff did not exercise due diligence in looking for new work.
2. It bases its arguments on the affidavits of two senior defendant employees which are before me as opinion evidence by one of them at least who has great experience in the area; however, it is not before me as expert evidence and I have not considered it as such.
3. The affidavits of the plaintiff in which the defendant argues there are inconsistencies and weaknesses which should cause me concern.
4. The cross-examination of the plaintiff at examinations for discovery.

[57] The defendant says that a consideration of the totality of the evidence should lead me to the conclusion that the plaintiff was never seriously looking for work or intending to return to work; rather, he was intending to retire. This is clear, the defendant argues, by virtue of the fact that he was seeking pension information, that he was seeking information about the selling of unrelated shares, and his own notes in which he noted that these were, at a minimum, amongst his considerations.

[58] The plaintiff's efforts, the defendant argues, fall woefully short of fulfilling the duty to mitigate which is on him, and they fall short in these ways:

1. He waited until late December to begin his job search.
2. He used four different résumés with changes in them when compared with the previous ones, including changes in amount of salary and age.
3. He imposed self-restrictions on what work he would find acceptable and that he would be willing to accept, self-imposed restrictions which made it virtually impossible that he would find work. Those restrictions include:
 - (a) a geographical restriction on how far he would travel;
 - (b) that once his wife indicated she would not relocate, the geographical restriction made it clear that neither would he;
 - (c) a restriction on the type of work he would be willing to do;
 - (d) the methods and sources of his searches were not what they should have been. They were primarily restricted to the internet rather than using the great wealth of sources that are available for job searches;
 - (e) it is clear that he considered his age as a limitation, and he indicated that;
 - (f) he raised late in the day a medical issue, arthritis, which he indicated had a bearing on what jobs he could or could not take;
 - (g) he made minimal to no use of assistance available through various professional organizations which could have assisted him; and
 - (h) he refused or made minimal use of advice and help offered by the persons in the defendant company who have experience in assisting persons to look for new jobs.

[59] In addition, the defendant argues that the plaintiff actually turned down what was, the defendant says, a very good job offer with a large company doing the same kind of work, large in the sense that it is a company with international reach. The evidence for this that the defendant points to is found in one of the plaintiff's own handwritten notes of August 9, 2007, which, according to the interpretation the defendant says should be put on it, indicates that the plaintiff was offered a job and turned it down, and turned it down because he was not willing to relocate.

[60] The defendant argues that while the note itself may be ambiguous in terms of whether or not a job was actually offered, and the note clearly does not literally say that, the defendant argues that I must put that together with evidence of the plaintiff's behaviour which should cause me to draw a negative inference against him on this point and conclude that indeed it was a job offer.

[61] The behaviour that the defendant points to is the fact that this note was disclosed very late in the day. The information in the note was not disclosed at an earlier time, although there had been earlier affidavits, earlier notes provided, and earlier examinations for discovery, and he has not been forthright in this regard. I should draw the necessary inference and resolve that ambiguity by reading that note as suggesting that he was offered a good job and that he turned it down.

[62] In addition to that job, there was affidavit material concerning the question of whether or not the defendant itself might have and could have provided suitable work for the plaintiff, and the defendant's view is that there was simply no such work available.

[63] I have concluded, on the basis of this evidence, that the defendant has failed to discharge the onus on it to prove that the plaintiff did not fulfil his duty to mitigate. I accept that he considered retirement as a serious option from the beginning of the relevant time period. It would have been foolish not to. But that does not lead me to the conclusion that he had made a decision that he was going to retire and not make attempts to seriously look for work. I am satisfied that his efforts were genuine and sufficient and that despite that, he was unable and indeed unlikely to have found suitable employment in any event.

[64] I am not satisfied that he could have found appropriate employment if he had taken greater steps, partly because of his age which I recognize has expanded the ability of a person to find work as we move into more enlightened times, so not exclusively because of his age, but partly because of his age; partly because of his prior two years on medical disability which would have made him less attractive to potential employers; and partly because of his newer medical complaints about his arthritis.

[65] I am not satisfied that the changes in his résumés were anything other than honest corrections or what he believed to be honest corrections of previous errors in earlier drafts. I am not prepared to conclude that he has been less than forthright, and while there was indeed some late disclosure, I am not prepared to draw the adverse inference that the defendant asks me to draw.

[66] Given his age, the number of years of service, and his medical condition, I am not satisfied that the self-imposed restrictions that he placed on himself were

unreasonable. I am not satisfied that his notes of August 9 point to anything other than an ambiguity which may or may not have been a job offer, and I am unable to resolve that one way or the other, so that it remains ambiguous in my mind. But I am certainly not satisfied that he had a real job offer which he could have accepted, but instead turned down.

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

[68] Consequently, there will be no deduction to the amount of damages to be awarded for failure to mitigate. Since the 22 month period of reasonable notice commences from September 22, 2006, that means it will not end until sometime in the late spring/early summer of this year. There is no reason to think that he is going to be more successful finding a job between now and then than he has been in the past. Therefore, there will be no contingency reduction for the remainder of that period.

[69] The plaintiff also seeks ***Wallace*** damages in the amount of two to three months of additional pay because of what the plaintiff refers to as the unduly harsh manner and conduct which the defendant engaged in, and points to a number of items in the evidence to support that:

1. Not paying the benefits that it had agreed to pay, the long-term disability benefits, until sometime in October, although it

backdated them at that time to cover the period from September 8.

2. Leading the plaintiff to believe originally that he would be put back to work and then terminating him and backdating the date of termination.
3. The location of terminating him - a public place, a coffee shop where, arguably, members of the public might have heard.
4. Advising the plaintiff that the defendant had tried to find him a position with the company but none was available, which the plaintiff asserts was not accurate and the defendant knew it was not accurate, the plaintiff arguing that the defendant continues to use independent contractors to do work which the plaintiff could be hired to do.
5. Maintaining that it had no alternative but to terminate the plaintiff because there was no work for him anywhere in its business.
6. Arriving at the decision to terminate the plaintiff without talking to him about alternate positions or asking if he would be willing to work at the Delta plant.
7. Failing to provide the plaintiff with a positive letter of reference.

[70] The defendant has answers to each of those which I will not set out here except to note that those explanations satisfy me in each instance that the defendant was not acting in a high-handed and callous manner towards the plaintiff in any of those aspects. To the contrary, I am satisfied that at all times it behaved courteously and professionally in dealing with him, including offering him help which he was not willing to accept, and gratuitously paying disability benefits for three weeks. Consequently, I reject the plaintiff's claim for **Wallace** damages.

[71] A summary of my findings:

1. This is an appropriate case for a decision under Rule 18A.

2. The plaintiff was terminated as of the date he was told of his termination, that is, September 22, 2006.
3. He was entitled to reasonable notice in the amount of 22 months commencing from the termination date.
4. His damages will consist of his actual losses suffered during the notice period.
5. His actual losses consist of the following with certain deductions to be made, and those losses before the deductions are:
 - (a) 22 months of salary; and
 - (b) the amount of MSP premiums and employer contributions to EI and CPP premiums which have not yet been paid.
6. The amount of his salary for calculation purposes and for all purposes was \$116,150.
7. The following deductions need to be made, for which the defendant gets credit, in determining the amount of the judgment:
 - (a) the eight weeks already paid pursuant to the **Employment Standards Act**; and
 - (b) the amount equal to long-term disability payments which can be attributed to the period after September 22.
8. The defendant is not entitled to credit for the amount equal to disability payments which cover the period from September 8 to September 22.
9. The payment for the period of September 8 to September 22 was a gratuitous payment to the plaintiff which the defendant is not entitled to have repaid and which the plaintiff is not required to repay.
10. The plaintiff is not entitled to recover and suffered no loss with respect to:
 - (a) any bonus; and

- (b) any pension beyond what he has already received as his payout.
- 11. The plaintiff did not fail in his duty to mitigate. There will be no reduction as a result.
- 12. The claim for **Wallace** damages is dismissed.

[72] I will not do the actual calculations. I presume that counsel will be able to work that out based on my findings.

[73] The plaintiff is entitled to prejudgment interest from September 22, 2006, in accordance with the principle quoted and set out in ***Tull v. Norske Skog Canada Limited***, 2004 BCSC 1098, 34 C.C.E.L. (3d) 225.

[74] I have been asked not to deal with costs. If the parties are unable to agree, they can set the matter down and we can deal with it.



The Honourable Mr. Justice Silverman