CITATION: Pohl v. Hudson's Bay Company, 2022 ONSC 5230
COURT FILE NO.: CV-20-650903
DATE: 20220915

ONTARIO SUPERIOR COURT OF JUSTICE

RE: Darren Pohl, Plaintiff

-and-

Hudson's Bay Company, Defendant

BEFORE: Robert Centa J.

COUNSEL: Robert G. Tanner, for the plaintiff

Edward J. O'Dwyer and Fatimah Khan, for the defendant

HEARD: August 25, 2022

ENDORSEMENT

[1] In 1992, a 25-year-old Darren Pohl started work at the Hudson's Bay Company. Over the next 28 years, he worked his way up within HBC. From 2012 to 2020, Mr. Pohl worked as the Sales Manager of eight departments in HBC's Eglinton Square store. Approximately 30 sales associates reported to him. On September 15, 2020, HBC terminated Mr. Pohl's employment without cause. HBC did not assert that Mr. Pohl had committed any misconduct but, nevertheless, it directed Mr. Pohl's supervisor to immediately walk him out the front door.

[2] Mr. Pohl sued HBC for wrongful dismissal. HBC moved for summary judgment and Mr. Pohl brought a cross-motion for summary judgment. For the reasons that follow, I find that:

a. There are no genuine issues requiring a trial and summary judgment is appropriate on all issues.

b. HBC wrongfully terminated Mr. Pohl's employment and the appropriate notice period for the termination is 24 months, less the amounts already paid to him;

c. HBC did not prove that Mr. Pohl failed to mitigate his damages;

d. Mr. Pohl is also entitled to damages equal to the cost to him of replacing an equivalent basket of benefits and the employer's contribution to his pension for 24 months, less the period of time for which he received post-termination benefits;

e. HBC breached Mr. Pohl's employment contract by temporarily reducing his wages by 25% but Mr. Pohl ultimately acquiesced to this temporary change in his salary.

f. Mr. Pohl is entitled to an award of moral damages in the amount of $45,000.

g. Mr. Pohl is entitled to an award of $10,000 in punitive damages because HBC violated the *Employment Standards Act, 2000*, S.O. 2000, c. 41 ("*ESA*") by failing to pay out Mr. Pohl's wages in a lump sum within seven days of termination and HBC failed to provide him with a timely or accurate record of employment.

No genuine issue requiring a trial

[3] In this case, each party brought a motion for summary judgment. They agree that there is no issue requiring a trial and each asks the court to grant summary judgment in their favour. The court shall grant summary judgment if the parties agree to have all of the claim determined by summary judgment and the court is satisfied that it is appropriate to grant summary judgment: rule 20.04(2)(b), *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194.

[4] On a motion for summary judgment, the court assumes that the parties have each advanced their best case and that the record contains all the evidence that would be led at trial. Each party is obliged to put their best foot forward. They are not permitted to sit back and suggest that they would call additional evidence at trial: *Prism Resources Inc. v. Detour Gold Corporation*, 2022 ONCA 326, 30 B.L.R. (6th) 1, at para. 4; *Ntakos Estate v. Ntakos*, 2022 ONCA 301, 75 E.T.R. (4th) 167, at para. 38; *Salvatore v. Tommasini*, 2021 ONCA 691, at para. 17; *Miaskowski v. Persaud*, 2015 ONSC 1654, 51 R.P.R. (5th) 234, at para. 62, rev'd on other grounds, 2015 ONCA 758, 342 O.A.C. 167.

[5] Summary judgment is an important tool for enhancing access to justice where it provides a fair process that results in a just adjudication of disputes: *Hryniak v. Mauldin*, 2014 SCC 7, [2014] 1 S.C.R. 87, at paras. 4-7. Used properly, it can achieve proportionate, timely, and cost-effective adjudication.

[6] Wrongful dismissal cases are well suited for disposition by summary judgment: *English v. Manulife Financial Corporation*, 2019 ONCA 612, at para. 30; *Arnone v. Best Theratronics Ltd.*, 2015 ONA 63, at para. 12.

[7] I am satisfied that there are no genuine issues requiring a trial. I am able to make the necessary findings of fact, to apply the law to the facts, and to reach a fair and just result.

HBC wrongfully terminated Mr. Pohl's employment and he is entitled to a 24-month notice period

[8] Mr. Pohl did not have a written contract of employment with HBC at the time the company terminated his employment. At common law, Mr. Pohl is entitled to reasonable notice of termination or pay in lieu. The purpose of requiring an employer to give reasonable notice of termination is to provide the employee with reasonable time to seek alternative

employment: *Prinzo v. Baycrest Centre for Geriatric* Care, (2002), 60 O.R. (3d) 474 (C.A.), at para. 28.

[9] HBC submits that it did not wrongfully terminate Mr. Pohl's employment contract. HBC submits that it offered Mr. Pohl a voluntary separation package that would provide 40 weeks of pay in lieu of notice of termination. HBC's offer was inclusive of Mr. Pohl's statutory entitlements including notice of termination and severance pay. When Mr. Pohl did not accept that offer, HBC provided Mr. Pohl with his minimum entitlements under the *ESA*. HBC submits that the "supports offered by HBC to [Mr. Pohl] at termination met or exceeded his legal entitlements".

[10] In its factum, HBC submits that a reasonable notice period in this case is 14 to 18 months. I note that this is far in excess of the 40 weeks' pay in lieu of notice HBC offered to Mr. Pohl at the time it terminated his employment. In its factum, HBC submits that "the severance package offered by HBC to [Mr. Pohl] fell within the range of reasonable notice." It did not. HBC did not provide a single case that indicated that 40 weeks was the appropriate amount of pay in lieu of notice in these circumstances.

[11] Mr. Pohl submits that HBC did not provide him with a reasonable notice period. He submits that he is entitled to a 28-month notice period.

[12] In *Bardal v. Globe & Mail Ltd.*, (1960), 24 D.L.R. (2d) 140 (Ont. H.C.), McRuer C.J.H.C. held that there is no exhaustive list of factors to be considered and that the reasonableness of the notice period must be decided with reference to each particular case. The case set out the four factors that are the starting point for assessing the appropriate period of reasonable notice of termination:

a. length of employment;

b. character of employment;

c. age of the employee; and

d. availability of similar employment having regard to the experience, training and qualifications of the employee.

Length of employment

[13] Mr. Pohl worked at HBC for 28 years. I find that this length of service, particularly in 2022, makes him an employee of long tenure. An employee of long tenure is entitled to a longer period of notice when compared to an employee with a shorter period of employment. This principle lies at the heart of the calculation of termination and severance pay under the *ESA* and the reasonable notice period at common law. Employers, employees, and the courts all recognize length of service as an important factor in determining fair and appropriate compensation at the time of termination.

[14] An employee's length of service reflects, in part, that employee's commitment to working for a particular employer. That commitment can, in some cases, reflect the employee's subjective intentions about how they have organized their life. Mr. Pohl had spent his entire working life with HBC. This factor weighs in favour of a longer notice period: *Russell v. The Brick Warehouse LP*, 2021 ONSC 4822, at para. 35. Moreover, Mr. Pohl's affidavit confirmed that he expected and intended to remain with HBC for the rest of his working life.

[15] I recognize that no one *Bardal* factor should be given disproportionate weight: *Honda Canada Inc. v. Keays*, 2008 SCC 39, [2008] 2 S.C.R. 362 at para. 32. In the circumstances of this case, I think it is appropriate to give significant, but not disproportionate, weight to Mr. Pohl's length of employment with HBC.

Character of employment

[16] Mr. Pohl held the position of Sales Manager or Customer Experience Manager. I find this to be a senior supervisory position in the store. At the time HBC terminated his employment, 30 sales associates reported to Mr. Pohl. In addition, because the store operated seven days a week, the other Sales Manager would be absent two days each week. On those days, Mr. Pohl assumed responsibility for those sales associates as well. Mr. Pohl did report to Joyce Patten, the General Manager at the store, but Mr. Pohl had significant and wide-ranging responsibilities. HBC did not challenge Mr. Pohl's description of his duties, which included:

a. interviewing, hiring, training, and orienting new associates, in coordination with Human Resources;

b. creating weekly and monthly schedules for the associate team, ensuring every department had proper coverage and following payroll guidelines;

c. creating a daily schedule and zone chart for the store to optimize service and store recovery;

d. assigning daily and weekly tasks to associates and providing follow-up;

e. reviewing sales for store and departments daily and weekly to focus sales efforts in opportunity areas;

f. coaching associates on store focusses, service, customer engagement, and modelling proper techniques;

g. providing feedback to associates with encouragement, recognition, and correction (giving verbal and written warnings for issues such as attendance, lateness, and service);

h. responding to and resolving escalated customer concerns, including delivery and product concerns;

i. leading the store team on loyalty programs (opening credit accounts for customers, signing up customers for the rewards card, and obtaining email addresses from customers);

j. executing directions provided by the executive team through daily and weekly communication to the store through the daily task calendar and weekly marketing kit. This included reflowing footwear, furniture, and mattresses along with other departments and coordinating with the marketing manager;

k. reviewing the daily task calendar and executing direction from buyer and marketing teams, providing information to the various associate teams and, at times, all employees of the store regarding marketing, changes to programs or policy, and in-store events; and

l. executing product recall directions for health or other reasons before and after Covid, including removing cleaning supplies and sanitizers from the selling floor and ensuring they were labelled and had material safety data sheets affixed.

[17] In my view, it is irrelevant whether Mr. Pohl's position is described as managerial or supervisory: *Russell*, at para. 34; *Di Tomaso v. Crown Metal Packaging Canada*, 2011 ONCA 469, 337 D.L.R. (4th) 679. It is clear that HBC entrusted Mr. Pohl with significant responsibilities and that he fulfilled an essential and integral role at HBC's Eglinton Square store.

Age of employee

[18] Third, HBC terminated Mr. Pohl when he was 53 years old. Mr. Pohl was towards the end of his working career, but it was not at an end: *Russell*, para. 34.

Availability of similar employment having regard to the experience, training and qualifications of the employee

[19] Mr. Pohl has significant experience as a store manager. Almost all of his experience and qualifications were obtained during his career at HBC. He graduated from Carleton University with a Bachelor of Arts in law and psychology. Mr. Pohl's resumé contains no work experience other than HBC, where he started in 1992 as a department head in men's accessories. He resumé does not list any professional or continuing education courses.

[20] I accept that Mr. Pohl did not perform a specialized role that does not exist in workplaces other than HBC. He also does not live in a remote region where similar employment is not available. These factors support a shorter notice period, rather than a longer one.

[21] HBC also submits that "there were an abundance of retail manager or assistant manager opportunities available" to Mr. Pohl at the time of his termination. HBC states that it identified 907 jobs for which the plaintiff would be qualified. In support of this submission, HBC relies on the evidence of an articling student at the law firm representing HBC. Her affidavit states:

> Based on Pohl's work experience at Hudson's Bay Company ("HBC") as Customer Experience Manager, Pohl would be qualified to perform managerial roles in various trades. These positions are widely available, including in the retail industry, as demonstrated by the job postings I have compiled with the assistance of counsel, delivered to Pohl, and included in this Affidavit.

[22] By relying on these job postings, HBC is asking me to accept that they are comparable jobs to which Mr. Pohl could have or should have applied. If they are not comparable positions, they are irrelevant to the reasonable notice period in this case. There is no evidence from an HBC employee on this point. HBC filed one affidavit from Catherine Durand, its HR Generalist, Eastern Canada. Ms. Durand does not offer any evidence on how the job postings were selected or how HBC determined that they were comparable to Mr. Pohl's job.

[23] HBC's only evidence on this point is found in the affidavit described above. That affidavit, however, provides no evidence regarding what instructions the deponent received, how she identified the job postings, what geographic limits she placed on her search, or what salary, benefit, or responsibility parameters she used. In short, there is no evidence before me regarding how these jobs were selected for inclusion, or why these jobs were considered comparable or reasonably appropriate in the circumstances. The affidavit does not make clear what, if any, qualifications the deponent had to identify jobs that were appropriate for Mr. Pohl's consideration.

[24] Mr. Pohl's evidence was that he reviewed each and every one of these jobs and that HBC's suggestion that it identified 907 appropriate jobs is overstated, unreliable, and misleading for the following reasons:

a. approximately half of the 907 postings identified by HBC are duplicates of prior postings. HBC made no attempt to reflect the duplicate job postings in its overall count of available positions. For example, one job posting as an assistant store manager at Coach is represented 19 times in HBC's total;

b. some of the job postings are duplicates, but are listed more than once under parent and subsidiary company names;

c. some of the job postings were located in Windsor, Dryden, Surrey (British Columbia), or "northern Canada," far away from Mr. Pohl's residence;

d. some of the positions paid only $15 per hour, which was significantly less than his former salary;

e. some of the positions involved sales of high-end women's fashions, applying cosmetics to customer's skin, or selling women's intimate apparel, for which Mr. Pohl did not appear qualified;

f. some of the jobs did not match Mr. Pohl's skills, for example a job posting for a barista at Starbucks.

[25] Having reviewed the job postings, Mr. Pohl concluded that the job postings that HBC sent to him were "not being prepared or sent with any regard to providing useful information directed to my particular circumstances, qualifications or experience, but appear to be unedited general lists of all retail sales postings of any kind."

[26] Mr. Pohl's evidence was that he searched the Canada Job Bank, Google, Workopolis, in addition to reviewing and the job postings HBC sent to him. In his affidavit dated July 26, 2022, Mr. Pohl swore that he had identified 136 jobs that were comparable to his former position and that he had applied to every single one of them. He provided a comprehensive spreadsheet detailing his efforts.

[27] I prefer the evidence of Mr. Pohl to that of HBC on these points. I reject as grossly inflated HBC's claim that it identified over 900 comparable and available jobs. HBC's count contains many duplicate entries and entries that are entirely inappropriate in these circumstances. Absent any explanation of how HBC selected the jobs sent to Mr. Pohl, I prefer Mr. Pohl's evidence regarding his careful consideration of the appropriateness of the opportunities.

[28] In addition, Mr. Pohl was terminated during the COVID pandemic. HBC filed evidence that the pandemic significantly harmed its business, which resulted it in it deciding to dismiss at the same time as Mr. Pohl "many other employees in the same or similar roles". There is no evidence before me that HBC was the only employer in this situation, which would have made it more difficult for Mr. Pohl to find a comparable job.

[29] Finally, the total number of jobs available is not the only relevant statistic. It also matters how many people are applying to these positions. Mr. Pohl's evidence that he has applied unsuccessfully for 136 positions puts the number of available positions in perspective. I find that this factor supports a longer period of notice. Economic factors such as a downturn in the economy that indicate that an employee may have difficulty finding another position may justify a longer notice period: *Yee v. Hudson's Bay Company*, 2021 ONSC 387, at para. 21; *Paquette v. TeraGo Networks Inc.*, 2015 ONSC 4189, at para. 27.

Range

[30] The plaintiff submits that a 28-month notice period is appropriate. The plaintiff cites the cases of *Keenan v. Canac Kitchens*, 2016 ONCA 79, *Cardenas v. Kohler Canada Co.*,2009 CanLII 17976 (ON SC); and *McLean v. Dynacast*, 2019 ONSC 71646.

[31] HBC submits that the reasonable notice period in this case is between 14 to 18 months and cited 13 cases in support of that submission. HBC relies on the 1995 decision of the Court of Appeal for Ontario in *Cronk v. Canadian General Insurance Company*, (1995), 25 O.R. (3d) 505. In *Cronk*, the Court of Appeal held that a 12-month notice period was appropriate

for a 55-year-old junior clerical employee. I do not find *Cronk* to be of significant assistance to me in this case.

[32] First, Mr. Pohl did not hold a junior, clerical position. HBC did not explain how the character of Ms. Cronk's employment was equivalent to Mr. Pohl's employment. Second, HBC's submission does not reflect subsequent appellate authority that explains and limits the reach of *Cronk*. For example, in *Minott v. O'Shanter* (1999), 168 D.L.R. (4th) 270 (Ont. C.A.), at para. 76, Laskin J.A. explained as follows:

> I do not regard this court's decision in *Cronk* as establishing an upper limit of 12 months notice for all non-managerial or non-supervisory employees. At most it deals with one occupational category, clerical employees. Moreover, the imposition of an arbitrary 12 months ceiling for all non-managerial employees detracts from the flexibility of the *Bardal* test and restricts the ability of courts to take account of all factors relevant to each case and of changing social and economic conditions.

[33] See also, *Di Tomaso v. Crown Metal Packaging Canada LP* 2011 ONCA 469, 337 D.L.R. (4th) 679, at paras. 13 to 17.

[34] Of the remaining 12 cases cited by HBC, only one case is from Ontario and that case is now 38 years old. *Farrugia v. Wabco-Standard Inc.*, [1984] O.J. No. 409 (H.C.), concerned a 57-year-old foreman with 23 years of service who was awarded a notice period of 12 months.

[35] I find the recent decision of Vella J. in *Russell v. The Brick Warehouse LP*, 2021 ONSC 4822 to be more helpful to me. In that case, Mr. Russell was a lifelong employee of the employer, with 36 years of service when the employer terminated him at age 57. Justice Vella awarded Mr. Russell 24 months notice after canvassing a number of Ontario decisions that considered the appropriate notice period for a long-term employee. At paragraph 38, she summarized the authorities as follows:

> I find that Russell's employment circumstances fall within the range of notice found by this court in the following cases: *Hussain v. Suzuki Canada Ltd*., [2011] O.J. 6355 (S.C.); *Ozorio v. Canadian Hearing Society*, 2016 ONSC 5440; *Lalani v. Canadian Standards Association*, 2015 ONSC 7634; *Kwasnycia v. Goldcorp Inc*., 1995 CanLII 7276; *Lowndes v. Summit Ford Sales Ltd*. 2006 CanLII 2013 (Ont. C.A.); *Maasland v. Toronto (City)*, 2015 ONSC 7598 (aff'd on other grounds, 2016 ONCA 551). In these cases the terminated employees were between 57 and 65 years old, and had 30 plus years of service with the employer at the time of dismissal. In each case, the reasonable notice period awarded was in the range of 24 – 26 months.

[36] Considering the four *Bardal* factors discussed above and recalling that the reasonableness of the notice period must be decided with reference to each particular case, I find that Mr. Pohl is entitled to a reasonable notice period of 24 months.

[37] I do not find that there are exceptional circumstances present to justify a period of notice in excess of 24 months: *Dawe v. The Equitable Life Insurance Company of Canada*, 2019 ONCA 512, 435 DLR (4th) 573, at paras. 31-36. I have given Mr. Pohl's age, length of service, and difficulty finding a job in this economy full weight in determining the appropriate notice period. They do not, however, qualify as exceptional circumstances justifying a longer notice period.

Mitigation

[38] HBC submits that Mr. Pohl did not take reasonable steps to mitigate his damages and that, as a result, his notice period should be reduced by a period of six to ten months. Mr. Pohl submits that he made good faith efforts to mitigate and that there should be no deduction for failure to mitigate. I agree with Mr. Pohl.

[39] A claim for wrongful dismissal is a breach of contract claim that is subject to normal principles used to assess damages for breach of contract. The principle of mitigation means that plaintiffs are not permitted to recover damages for losses that they could have avoided: *Michaels v. Red Deer College,* [1976] 2 S.C.R. 324. The onus is on the defendant to establish that the plaintiff failed to mitigate. This is a heavy onus. The employer must prove that the employee would likely have found a comparable position reasonably fit for the employee. As Brown J. (as he then was) put it in *Yiu v. Canac Kitchens Ltd., a division of Kohler Ltd*., [2009] O.J. No. 871 (S.C.J.):

> The onus an employer bears to demonstrate that the employee failed to mitigate is "by no means a light one...where a party already in breach of contract demands positive action from one who is often innocent of blame." Accordingly, an employer must establish that the employee failed to attempt to take reasonable steps and that had his job search been active, he would have been expected to have secured not just a position, but a comparable position reasonably adapted to his abilities: *Link v. Venture Steel Inc*., [2008] O.J. No. 4849, 2008 CanLII 63189 (ON S.C.), paras. 45 and 46. An employer must show that the plaintiff's conduct was unreasonable, not in one respect, but in all respects: *Furuheim v. Bechtel Canada Ltd*. (1990), 30 C.C.E.L. 146 (Ont. C.A.), para. 3.

[40] HBC points to several pieces of evidence in support of its submission that Mr. Pohl's notice period should be reduced by a period of six to ten months for failing to mitigate. I will consider each in turn.

HBC's offer of alternative employment

[41] HBC submits that when it terminated Mr. Pohl, it offered him "continued employment" as an associate lead and, therefore, Mr. Pohl "completely failed to mitigate his losses by refusing to accept HBC's offer." HBC submits that Mr. Pohl is, therefore, entitled to no damages beyond the *ESA* minimums. I do not accept this submission.

[42] At the time HBC terminated his employment, Mr. Pohl held a full-time position that paid him $61,254 plus pension contribution and other benefits. HBC's offer to him included the following terms:

a. He would be required to "voluntarily relinquish" his current job and transition to the associate lead position. At law, this would be a resignation, which would eliminate his entitlement to common law damages for the termination of his employment based on 28 years of service;

b. He would be paid $18.00 per hour;

c. His hours of work would vary from 28 to 40, but HBC would not guarantee any minimum number of hours in any week. Nevertheless, he would have to maintain "open availability, including evenings and weekends;" and

d. HBC could terminate his employment at any time without cause by paying him only *ESA* minimums.

[43] Assuming Mr. Pohl could work 40 hours a week for 48 weeks per year, he would earn $34,560, which would be a significant reduction in income compared to his former salary. However, HBC made no contractual promise to Mr. Pohl about his hours. HBC might choose to schedule Mr. Pohl to work 40, 28, 10, or zero hours each week. Despite this, HBC characterizes the position as having "substantially the same duties and working conditions." I disagree.

[44] In addition, HBC included a sweeping reservation of rights clause in its offer. It purported to allow HBC to make essentially any change to Mr. Pohl's employment contract, at any time, for any reason, without such a change constituting a constructive dismissal:

> Due to changing business needs, the Company may modify or cancel your benefits, change policy or plan documents, your manner or structure of remuneration, your job title and/or reporting structure, working conditions (including hours of work, shifts or work location within a reasonable geographic proximity) and duties and responsibilities from time to time, without providing any prior notice. You agree that any such changes shall not constitute constructive dismissal or trigger any entitlement to notice of termination, pay in lieu of notice or severance pay whatsoever (whether pursuant to this Agreement, applicable employment standards legislation, common law, contract or otherwise). In the

> event of any change to your employment, the terms and conditions of this Agreement will continue to apply unless replaced by another written contract. Notwithstanding any changes in the terms and conditions of your employment which may occur in the future, including any change in position, duties or compensation, the termination provisions above will continue to be in effect for the duration of your employment unless otherwise amended in writing and signed by both you and HBC.

[45] Assuming for the moment that this clause could be enforced, its ambition is breathtaking. To accept HBC's offer, Mr. Pohl had to give up his common law entitlements arising from his termination on September 15, 2022, HBC could then:

a. terminate his employment within three months and pay him nothing; or

b. cancel his benefits and cut his hours to 1 per week without that constituting a constructive dismissal.

[46] HBC handed the letter to him on September 15, 2020, and required him to make his election "by September 17, 2020." HBC did not recommend to Mr. Pohl that he retain legal counsel to review this offer before deciding whether or not to accept it.

[47] The Court of Appeal has held that a reasonable person should be expected to accept an offer of continued employment with a former employer "[w]here the salary offered is the same, where the working conditions are not substantially different or the work demeaning, and where the personal relationships involved are not acrimonious": *Mifsud v. MacMillan Bathurst Inc*., 70 O.R. (2d) 701, at p. 710). HBC's offer to Mr. Pohl does not pass this test.

[48] The offer that HBC made to Mr. Pohl was not one of continued employment because it required him to "voluntarily relinquish" his former position along with all his acquired service. HBC offered Mr. Pohl nothing of substance in exchange for extinguishing his employment law claims. HBC now submits that because Mr. Pohl did not accept its offer, he should be denied all compensation beyond *ESA* minimums. I decline to do so. HBC's offer was unreasonable. No reasonable person would have accepted this offer: *Evans v. Teamsters Local Union No. 31*, 2008 SCC 20, [2008] 1 SCR 661, at para. 30.

Customer Site Experience Manager job offer

[49] In its factum, HBC submits that, "most critically," Mr. Pohl failed to apply for "a job opportunity with HBC in the role he held prior to his termination (Customer Experience Manager)." There are a number of flaws in HBC's submission.

[50] First, the position offered to Mr. Pohl on November 1, 2021, was actually called "Customer Site Experience Manager." The position was misdescribed both in the letter to Mr. Pohl advising of the position and, more surprisingly, in HBC's factum. Mr. Pohl never worked as a Customer Site Experience Manager.

[51] Second, the Customer Site Experience Manager job was entirely different than the one held by Mr. Pohl. I have described many of Mr. Pohl's duties in paragraph [16] above. HBC described the Customer Site Experience Manager role as follows:

> The Customer Site Experience team is responsible for Customer Experience measurement programs of Relationship LTR (Likelihood to Recommend) and Touchpoint CSAT (Customer satisfaction) and custom research to gather consumer/customer feedback. The Customer Site Experience Manager (CSE) is responsible for creating a positive website experience, ultimately leading to building a loyal and long term relationship that promotes advocacy for thebay.com
>
> To achieve this, the CSE understands the initiatives and goals of the customer and helps them meet their goals using curiosity, empathy, and innovative thinking to analyze the journey from a customer's point of view Refine and optimize the customer's journey by leveraging the voice of the customer (NPS) program, user stories and analytics to find the optimal experience. The CSE will assess and determine the overall satisfaction of the customer by building rating systems and ways to measure customer happiness including the likelihood to promote thebay.com.
>
> This role works with a portfolio of customers and collaborates with all internal stakeholders such as Product, Omni, Analytics, Marketing and Technology.

[52] Third, Mr. Pohl was in no way qualified for the Customer Site Experience Manager role, which required, at a minimum:

a. Minimum of 5+ years of experience in a related field.

b. Prior experience in customer experience manager, consulting, analytics or product management.

c. Strong communication skills and rapport building, while leveraging technology to interact with customers remotely.

d. Understanding of HTML, CSS, and Javascript;

e. Strong knowledge of enterprise technologies and systems.

[53] In light of this, I do not understand why HBC continues to characterize this hybrid IT / data analytics / marketing position as the role Mr. Pohl held prior to his termination. I find that the jobs are neither the same nor remotely comparable. Mr. Pohl did not err, much less

make a ‘most critical’ error in failing to apply for the Customer Site Experience Manager job.

Mitigation Efforts from February 10, 2021, to date

[54] HBC submits that Mr. Pohl made insufficient efforts to mitigate from February 10, 2021, until the date of the motion for summary judgment. HBC relies primarily on the job postings that it sent to Mr. Pohl commencing on February 22, 2021, which I have described above in paragraphs [21] to [27].

[55] In its factum, HBC criticizes Mr. Pohl for “only” applying to 112 positions, which at that time represented 23% of the job offers sent to him. As set out above, I do not accept how HBC selected these jobs or counted the number of opportunities that appear in the denominator of its calculation. I reject HBC’s evidence on these points. By the date of the summary judgment motion, Mr. Pohl had made 142 applications, but HBC remained critical of the number of applications he filed. The burden, however, is on HBC to demonstrate that Mr. Pohl did not apply for comparable positions. I adopt the reasoning of Papageorgiou J. in *Humphrey v. Mene Inc.*, 2021, ONSC 2539, at para 169:

> Mene also complains that as of January 16, 2020, Ms. Humphrey had only applied for a total of 18 positions. As noted above, it conducted various searches for positions involving "full- time postings with a salary of at least $90,000 with one or more of the keywords "consultant', 'management' 'director', 'operations' and 'marketing"" which showed there were many jobs which Ms. Humphrey did not apply for. This job search conducted by Mene resulted in the following types of positions: area sales manager, associate general manager, business consultant, business manager, in sales and advertising, corporate sales manager, director of stewardship and operations, director of sales and marketing, general manager, financial communications and other business services, general manager, financial communications and other business services, general manager, holiday service manager, management consulting service manager, managing director with some duties as management consultant, sales and marketing director. In my view, given that the burden is on Mene to demonstrate a lack of mitigation, it is not enough for it to simply search and produce listings of available business jobs and have Ms. Humphrey confirm she did not apply for them-it must demonstrate that they are comparable to the position which Ms. Humphrey had, and Mene has not done this.

[56] HBC also criticized Mr. Pohl’s efforts because he had only secured nine interviews, which seems to me to be a matter somewhat outside of his control.

[57] HBC submits that Mr. Pohl took too narrow a view of comparable employment suitable to his experience, often rejected positions due to lower salary, or due to his “perceived

inability to connect with the store's target audience." HBC cross-examined Mr. Pohl on the affidavit he swore in this proceeding but did not confront Mr. Pohl with a single specific job opportunity for which HBC believed he should have applied. They did not ask him any questions about why he did not apply to a particular job that HBC felt was appropriate. HBC's factum does not direct me to a single specific job opportunity to which Mr. Pohl should have applied. All of this undermines the force of HBC's submissions on this point. In response to a question from me, counsel could not point me to a case where an employee who submitted 142 job applications had been found to have been shirking their obligation to mitigate avoidable losses.

[58] I prefer Mr. Pohl's evidence was that he searched the Canada Job Bank, Google, Workopolis, and the job postings HBC sent to him. In his affidavit dated July 26, 2022, Mr. Pohl swore that he had identified 136 jobs that were comparable to his former position and that he had applied to every single one of them. He provided a comprehensive spreadsheet detailing his efforts. These efforts appear to me to be meaningful and energetic. Mr. Pohl's failure to obtain a new position is not attributable to a lack of diligent effort, it is due to the competitive job market he faces at his age, with his experience, and in his circumstances.

[59] I find that HBC has not met its burden to prove that from February 10, 2021, to the date of the summary judgment motion, Mr. Pohl failed to mitigate or that reasonable efforts would likely have found him a comparable position.

Mitigation efforts from date of termination of employment to February 10, 2021

[60] HBC also challenges Mr. Pohl's mitigation efforts from the date he was terminated until February 10, 2021.

[61] HBC terminated Mr. Pohl's employment on September 15, 2020. He described the "sudden and callous way in which he was informed that he was fired" and the modest settlement proposal from HBC, "felt like a kick in the gut." Mr. Pohl admits that did not begin his job search right away. He explained that he had feelings of humiliation, diminished self-worth, anxiety, and depression. He did not begin looking for work until February 2021, which was about six months after HBC terminated his employment.

[62] In December 2020, Mr. Pohl began to see his family doctor about his depressive symptoms. In a report dated May 6, 2021, Dr. José Ricardo de Mello Brandão stated:

> [Mr. Pohl] has been followed by me due to depressive symptoms (with some traumatic dreams) since September 2020, after being fired from his job. Patient was showing signs of anhedonia (decreased desire to do things) and low mood. No previous history of depression or anxiety that would suggest any pre-existing condition. He has been doing online counselling and declined the offer to use antidepressant medication. Even though his evolution

> has been slow (mood mildly improved but has been able to start prospecting new jobs), his prognosis is good.

[63] In a clinical note dated January 1, 2021, Dr. de Mello Brandão noted that Mr. Pohl's score on a diagnostic quiz was compatible with severe depression. In another note dated February 5, 2021, Dr. de Mello Brandão noted that Mr. Pohl, "wants to look for new work but can't find the energy." Mr. Pohl testified on cross-examination that his doctor had told him that his depression was interfering with his job search.

[64] Mr. Pohl enrolled in and completed an online counselling program to which his physician referred him. He attempted to enroll in further talk-therapy counselling but was unable to obtain an appointment due to the increased demand during the pandemic.

[65] HBC submits that "a plaintiff must demonstrate that they were incapable of working during all or part of the claimed notice period" to avoid the duty to mitigate. I don't think that is a fair statement of the law. It is certainly true that "there can be no obligation to mitigate damages by finding alternate employment where the employee is totally incapable of working": *Brito v. Canac Kitchens*, 2012 ONCA 61, 100 CCEL (3d) 324, at para. 16.

[66] In *Reid v. Stratford General Hospital*, 2007 CanLII 58483 (ON SC), the court found that the plaintiff did not fail to mitigate despite not looking for work for 12 months during a period following her termination. The plaintiff presented medical evidence that is similar to what Mr. Pohl presented. The plaintiff was diagnosed with depression and anxiety, was prescribed Prozac and Ativan, and received counselling. The plaintiff was observed to be experiencing cognitive limitations, fatigue, and emotional instability. The court held that the defendant had not demonstrated that the plaintiff acted unreasonably in failing to pursue and secure alternate employment in the 12 months following her dismissal.

[67] A plaintiff who is totally incapable of working has no obligation to mitigate damages, but that does not mean that an employee will be found to have failed to mitigate during any period of time where they are suffering from a mental illness short of complete incapacity.

[68] Society's understanding of mental health has developed significantly over the past decades. Our jurisprudence must assist to break down myths and stereotypes surrounding mental illness. I do not think it is helpful to analyze mental health as a binary construct where a person is either completely incapable of working or is totally fine. Where a plaintiff has presented evidence of mental illness, particularly where the plaintiff's symptoms are triggered or exacerbated by the termination of employment, the court should adopt a nuanced approach and assess the extent to which that health condition affected the plaintiff's job search.

[69] In my view, the focus should remain on the primary question: has the former employer established that the employee failed to take reasonable steps and that had the employee's job search been active, the employee would have been expected to have secured not just a position, but a comparable position reasonably adapted to their abilities? In my view, HBC

has not met this burden with respect to the period from September 15, 2020, to early February 2021, for six reasons.

[70] First, courts regularly provide plaintiffs with "an appropriate amount of time to adjust to [their] situation and to plan for the future before fulfilling the duty to mitigate": *Bustos v. Celestica International Inc.*, 2005 CanLII 24598, at para. 38. In *Dixon v. Sears Canada*, the court held that a six-month delay was not unreasonable in the case of a 55-year-old sales manager who was terminated after 27 years of service and was emotionally distraught: *Dixon v. Sears Canada Inc.* 1995 CanLII 536 (BCSC), at para. 45. In *Corso v. NEBS Business Products Ltd.*, 72 CCEL (3d) 110 the court held that waiting 4.5 months before applying for alternative employment was reasonable. Leaving aside any other features of this case, I would provide Mr. Pohl with a period of approximately three months to adjust to his new situation.

[71] Second, the fall of 2020 was during the COVID pandemic. The pandemic was a disorienting time for everyone. I think it is reasonable to permit an additional period of time before commencing a job search due to the pandemic's effects.

[72] Third, Mr. Pohl's job experience was in retail. The evidence before me is that in the 66 weeks after HBC terminated Mr. Pohl's employment, retail stores (with some exceptions) were open for shopping for only 39 weeks, often with limited admission of customers, plus some weeks of curb-side pickup. The first six months after the termination of Mr. Pohl's employment corresponded with this particularly challenging time. In this environment, I accept that it would be more daunting than usual to start a job search.

[73] Fourth, based on the evidence before me, I accept that Mr. Pohl's mental health made it more difficult for him to face and commence a job search. Mr. Pohl described feelings of humiliation, diminished self-worth, anxiety, and depression. His doctor diagnosed him as showing of anhedonia (decreased desire to do things) and low mood. He testified on cross-examination that reviewing the job bank listings caused him to experience physical anxiety. As of January 1, 2021, Mr. Pohl's score on a diagnostic quiz was compatible with severe depression. Even if he was not completely incapacitated, I conclude that Mr. Pohl's mental health interfered with his ability to commence his job search.

[74] Fifth, I accept Mr. Pohl's mental health was affected by the manner in which HBC terminated his employment, including its offer of continued employment. I describe this further below in the section on moral damages. HBC should not benefit from the effects of its conduct on Mr. Pohl's ability to look for work.

[75] Sixth, and perhaps most importantly, although Mr. Pohl delayed the start of his job search, the fact is that in the 18 months since he started looking for work, he remains without a job offer. I find this to be important evidence regarding whether or not I should find that Mr. Pohl failed to mitigate his loss during the six months before he started looking for work. I do not think that Mr. Pohl would have secured a comparable position had he started looking six months earlier. As Strathy J. (as he then was) held in *Corso*:

> [Counsel] submits that I should reduce the amount of damages to reflect what he submits was the plaintiff's unreasonable delay in commencing his search for employment: sec *Bustos v. Celestica International Inc* .... Although the plaintiff was slow off the mark in his efforts to mitigate his damages, I am not satisfied that this resulted in the loss of opportunity, given that some two years later he is without work. Considering the circumstances of his departure from the defendant's employment, the absence of a reference letter or any out-placement support from the defendant, it is my view that there should be no deduction.

[76] Mr. Pohl waited a significant amount of time to start his job search. On the evidence presented in this case, six months is close to the upper limit of what would be reasonable. However, I do not find that he failed to mitigate his losses during this period.

Damages calculation

[77] I have found that Mr. Pohl is entitled to damages equal to 24 months salary in lieu of reasonable notice of termination of employment. This should be calculated using his base salary of $61,254.00 per year. From this amount should be deducted the $40,050.64 that HBC paid to Mr. Pohl for his *ESA* entitlements.

[78] With respect to benefits, HBC submits that the damages award should reflect the cost to the plaintiff of his benefits, $89.23 toward his pension plan and $22.92 toward his medical and dental benefits. HBC provided no evidence of whether or not it pays anything toward the cost of employee group benefits.

[79] Relying on the employer's evidence, Mr. Pohl states that HBC contributed $193.18 per month to his pension. Mr. Pohl's evidence is that obtained quotes from Blue Cross ($225.61 per month for similar group health benefits but without life insurance) and Manulife Financial ($351.38 per month for individual health coverage and life insurance).

[80] In the alternative, Mr. Pohl suggests that I rely on the approach utilized by HBC in *Yee v Hudson's Bay Company*, 2021 ONSC 387, para. 29, and value benefits at 10% of base salary. This approach was also adopted in *Russell*, at para. 68; *Halupa v. Sagemedica Inc*., 2019 ONSC 7411 at para. 23; *Andros v. Colliers Macaulay Nicolls Inc*., 2019 ONCA 679, at para. 65; *Mikelsteins v. Morrison*, 2018 ONSC 6952, rev'd on other grounds 2019 ONCA 515 at paras. 21-24; *Ruston v Keddco Mfg. (2011) Ltd.*, 2018 ONSC 2919 at para. 117.

[81] Damages are meant to put Mr. Pohl in the position he would have been in had the company provided him with reasonable notice of termination. Providing him only with the cost he paid for group benefits, without regard to the employer contribution (if any) or his inability to access the economies of scale associated with a group plan would not make him whole. I do not accept HBC's submission that I should calculate damages based on the cost to Mr. Pohl of its group benefits.

[82] Equally, damages should not overcompensate Mr. Pohl or confer a windfall on him. The best evidence of what it would take to put Mr. Pohl in the position he would have been in but for HBC's failure to provide him with reasonable notice is the quote Mr. Pohl obtained from Manulife for near equivalent benefits.

[83] In respect of Mr. Pohl's benefits, I award damages equal to 24 months at $351.38 per month, less the 8 weeks (or 1.2 months) that Mr. Pohl remained on HBC's benefit plans post-termination. In respect of the employer's contribution toward his pension plan, I award damages equal to 22.8 months at 193.18 per month.

[84] Finally, the notice period I have awarded does not extend past the date of judgment. It is, therefore, unnecessary to consider whether or not to discount the award to account for Mr. Pohl's ongoing duty to mitigate.

Unpaid wages

[85] Mr. Pohl claims damages of $1766.94 resulting from HBC's unilateral decision to reduce his wages by 25% from April 12 to June 1, 2020.

[86] On or about April 3, 2020, HBC sent an email advising that it had unilaterally decided to cut employee wages. It described its decisions in an email to staff that read, in part, as follows:

> In response to the evolving circumstances around COVID-19. we are working to make thoughtful decisions that are right for our Associates, customers and business in each of our markets. As we all work to address the situation, it is clear that it is not the right time to re-open stores and we are extending the temporary closures. In line with this, we are making some temporary adjustments to our organization.
>
> - Effective April 16, 2020 all full-time store executives (semi-monthly) will remain active and their base salary will be temporarily reduced by 25%.
> - Effective April 12, 2020 all managers (bi-weekly) will remain active on payroll and their base salary will be temporarily reduced by 25%.
> - Effective April 5. 2020 all full-time hourly store associates will be paid base rate for 75% of their regular scheduled hours.

[87] On April 4, 2020, Mr. Pohl wrote to Colin Humphries at HBC. Mr. Pohl stated, "As you know, I do not consent to my salary being reduced. Could you please let me know who I should deal with directly on this issue?" Nathan Vaux, District Manager for Ontario East, responded to Mr. Pohl's email and invited Mr. Pohl to contact him to discuss the matter. There is no evidence in the record about what happened next. In any event, Mr. Pohl

continued to work from April 12, 2020, to June 1, 2020, while his wages were reduced by 25%.

[88] HBC submits that it was "entitled to make unilateral changes to the terms and conditions of Mr. Pohl's employment, including his compensation, especially in the context of the impact of COVID-19 on HBC's business." HBC cites no authority for this proposition.

[89] In her affidavit, Ms. Durand states that "at the time of hire, [Mr. Pohl] agreed to certain express and implied terms, including…(c) in the event of a global pandemic or other crisis beyond the control of the parties, which impacted HBC's business, HBC was permitted to temporarily reduce [Mr. Pohl's compensation]." Ms. Durand does not state the source of her information and belief regarding the terms of Mr. Pohl's contract, which he entered into almost 29 years previously.

[90] Ms. Durand also states in her affidavit that Mr. Pohl "did not object to the reduction of his base salary and resigned his employment." I do not accept this evidence. Mr. Pohl did object to the reduction of his base salary by email on April 4, 2020.

[91] I do not accept that HBC was entitled to reduce Mr. Pohl's salary by 25% without consequence. I would not imply such a term into Mr. Pohl's contract as a matter of custom or usage, to give business efficacy to the contract, or on basis of presumed intention: *Canadian Pacific Hotels Ltd. v. Bank of Montreal*, [1987] 1 S.C.R. 711.

[92] I find that HBC unilaterally breached the employment contract with Mr. Pohl by substantially altering an essential term of the contract, namely, cutting his wages (but not his hours worked) by 25%. I find that a breach like this, absent consent of the employee, would be sufficiently serious to have constituted constructive dismissal: *Potter v. New Brunswick (Legal Aid Services Commission)*, 2015 SCC 10, [2015] 1 SCR 500 at paras. 30 to 36.

[93] However, although he advised HBC that he did not consent to the wage cut, Mr. Pohl ultimately acquiesced to HBC's decision and continued to work both through the period of temporary wage reduction and after his wages were restored. If an employee acquiesces to the employer's modification of the contract, the change ceases to be a unilateral act, does not constitute a breach, and does not amount to a constructive dismissal: *Potter*, at 37; *McGuinty v. 1845035 Ontario Inc*., 2020 ONCA 816, 154 O.R. (3d) 451, paras. 21 to 26.

[94] I find that Mr. Pohl did not treat HBC's actions as a repudiation of the contract. He condoned HBC's course of conduct by continuing to work during and after the period of wage reduction. He did not treat the contract as an end or claim that he was constructively dismissed. I would not award damages for the temporary reduction in his wages.

Moral or aggravated damages

[95] Mr. Pohl seeks moral or aggravated damages in the amount of $50,000. HBC submits that moral damages are not appropriate in the circumstances of this case.

[96] Moral damages are available where the employer engages in a breach of the duty of good faith and fair dealing at the time of termination. An employer can breach this duty, for example, by being untruthful, misleading, or unduly insensitive. No independent actionable wrong is required to sustain an award of damages for mental distress resulting from a breach of the employment contract. If an employee can prove the manner of dismissal caused mental distress that was in the reasonable contemplation of the parties, the court may make an award that reflects the actual damages: *Honda Canada*, at paras. 54-57; *Galea v. Wal-Mart Canada Corp.*, 2017 ONSC 245 at para. 232; *McLean v. Dynacast*, 2019 ONSC 7146, at para. 92.

[97] Moral damages are intended to compensate employees for moral distress beyond the usual distress and hurt feelings associated with being dismissed. The court is to look at how the employer carried out the termination of employment, including conduct at and after the time of the termination, if it is related to the dismissal: *Doyle v. Zochem Inc.*, 2017 ONCA 130, [2017] OJ No 748 (QL) at paras. 26, 39, and 47. There needs to be some evidence to support the requisite degree of mental distress, but it need not be proven by medical evidence: *Groves v. UTS Consultants Inc* 2019 ONSC 5605, 2019 CarswellOnt 15272 rev'd on other grounds 2020 ONCA 630, [2020] OJ No 4214(QL) at paras. 113-114; *Russel* at para. 56.

[98] I find that there are four factors that justify an award of moral damages in this case.

[99] First, HBC's decision to walk Mr. Pohl out the door was unduly insensitive. Mr. Pohl was a loyal, 28-year employee. HBC decided to eliminate his position in a nation-wide restructuring driven by economic considerations. Mr. Pohl had committed no misconduct. There was no reason to treat him so insensitively.

[100] Second, I find that the offer of a sales associate job was misleading and a breach of the duty of good faith and fair dealing. For the reasons set out in paragraphs [41] to [48], this offer was carefully designed and would have extinguished Mr. Pohl's rights on termination. HBC's decision to include a clause that would allow it in the future to gut Mr. Pohl's contract while purportedly not triggering a constructive dismissal says the quiet part out loud. HBC offered him nothing of substance in exchange for waiving his right to pay in lieu of notice of termination on a 28-year career, and forward-looking provisions that would have permitted HBC to never schedule him for a single shift. The employee is most vulnerable at the time of termination and that is the time when an employee is most in need of protection: *Wallace v. United Grain Growers Ltd.*, [1997] 3 S.C.R. 701 at para. 95; *Evans*, at para. 94. HBC sought to take advantage of Mr. Pohl at a moment of extreme vulnerability. I accept Mr. Pohl's evidence that he "concluded that my employer of 28 years was attempting to trick or induce me into giving up my right to such compensation without corresponding benefit. My feelings of humiliation, diminished self-worth and anxiety deepened and I became depressed."

[101] Third, HBC violated the *ESA* by not paying out the wages it owed to Mr. Pohl in a lump sum within the required period of time. Subsection 11(5) of the *ESA* provides that if an employee's employment ends, the employer shall pay any wages to which the employee is entitled not later than the later of seven days after the employment ends and the day that would have been the employee's next pay day. The *ESA* defines wages to mean any payment required to be made by an employer under the *ESA*. This includes termination pay (s. 61(1)) and severance pay s. 66(1)).[1] HBC did not pay the wages it owed to Mr. Pohl within seven days (September 22, 2020) or on his next pay day (no later than September 30, 2020).

[102] On November 4, 2020, counsel for Mr. Pohl requested that HBC comply with the *ESA* and pay out the wages it owed to Mr. Pohl in a lump sum. Having received no response on this issue, counsel for Mr. Pohl followed up again on November 26, 2020. In response to this message, on December 1, 2020, counsel for HBC indicated that it intended to continue to pay out the money until May 2021. Counsel wrote:

> In terms of the ESA payments, Mr. Pohl is currently receiving salary payments from HBC that are inclusive of any entitlements to notice and severance under the ESA. It is HBC's intention to continue making those payments until May unless directed otherwise. Is it Mr. Pohl's direction to cease the payments and to pay out his ESA severance pay entitlement as a lump sum?

[103] On December 3, 2020, counsel for Mr. Pohl responded and noted that the direction had been given on November 4, 2020, and that plaintiff had pleaded the breach of the *ESA* in the statement of claim. On December 10, counsel for Mr. Pohl followed up again with respect to the lump sum payment.

[104] HBC finally made the payment of the wages owed to Mr. Pohl on December 24, 2020. In her affidavit filed on this motion, Ms. Durand explained HBC's decision as follows:

> Pohl elected not to accept the separation package and rejected HBC's offer of continued employment. As such, HBC provided Pohl with bi-weekly severance payments to December of 2020. However at the request of his counsel, HBC ceased the severance payments and paid the remainder of his entitlements under the ESA as lump sum.

[105] Compliance with the *ESA* is not optional. HBC did not require a direction from Mr. Pohl to comply with the law.

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[1] Pursuant to s. 66(1) of the *ESA*, an employer may pay severance pay to an employee who is entitled to it in instalments only with the agreement of the employee or the approval of the Director. Mr. Pohl did not agree to receive his severance pay by instalments and there is no evidence the Director approved payment by way of instalment

[106] HBC provided no evidence why, after Mr. Pohl's counsel requested on November 4, 2020, that HBC comply with the law and pay the money out in a lump sum, it took HBC almost two months to comply.

[107] I find that HBC deliberately violated the *ESA* by paying out Mr. Pohl's termination and severance pay by way of instalment instead of in a lump sum. HBC's conduct is entirely unacceptable. It is a large, sophisticated employer and there is no excuse for it not complying with its obligations under the *ESA*. HBC is not at liberty to improve its cash flow by withholding money it was statutorily obliged to have paid to Mr. Pohl and turning him into an unsecured creditor. As noted above, employees are extremely vulnerable at the moment of termination: *Wallace*; *Evans*. Employers are required to comply with the *ESA* and should not be surprised when they face consequences if they fail to do so. I accept Mr. Pohl's evidence that HBC's "dishonest conduct…only increased my sense of exploitation, humiliation, and depression."

[108] Fourth, HBC was required to issue a record of employment ("ROE") to Mr. Pohl within five days after the interruption of his employment, which occurred seven days after his termination: s. 19(3)(i) of the *Employment Insurance Regulations*, SOR/96-332. HBC did not do so. It issued the two ROEs, each December 24, 2022. Each ROE incorrectly described the reason for issuing the document as "shortage of work / end of contract or season." Each ROE incorrectly stated that the expected date of recall for Mr. Pohl was "unknown," when they should have selected "not returning." One ROE incorrectly stated that the last day for which he was paid was December 5, 2020; the other ROE incorrectly stated that the last day for which he was paid was November 21, 2020.

[109] Mr. Pohl asks me to find that HBC paid him salary continuance, declined to issue an ROE when required to do so, and submitted incorrect information on his ROE to facilitate RBC fraudulently claiming subsidies under the Canada Emergency Wage Subsidy. Despite Mr. Pohl clearly raising this issue in both his affidavit and his factum, HBC did not provide responding evidence or submissions on this point.

[110] I am not prepared to find that HBC engaged in this conduct for the purpose of obtaining benefits to which it was not entitled. I accept, however, that Mr. Pohl concluded that HBC was placing its interests above his and that this "increased [his] sense of exploitation, humiliation, and depression."

[111] Mr. Pohl also raises the fact that he was not able to access the job portal promised in HBC's letter of termination and that HBC did not offer him a reference letter. There is no evidence that Mr. Pohl raised those issues at the time with HBC. I do not consider these two facts to justify an award of moral damages.

[112] In conclusion, for the reasons set out above, HBC breached the duty of good faith and fair dealing at the time of termination. HBC was untruthful, misleading, and unduly insensitive.

[113] I am satisfied that it was within the reasonable contemplation of HBC that its conduct would cause Mr. Pohl mental distress. For the reasons set out at paragraphs [61] to [64],

[73], and in this section, I find that the wrongful conduct of HBC caused Mr. Pohl mental distress beyond the understandable distress and hurt feelings normally accompanying a dismissal.

[114] I have reviewed comparable cases including *Halupa v. Sagemedica Inc*., 2019 ONSC 7411; *Johnston v. The Corporation of the Municipality of Arran-Elderslie*, 2018 ONSC 7616; *McLean v Dynacast Ltd*., 2019 ONSC 7146; *Strudwick v. Applied Consumer & Clinical Evaluations Inc.*, 2016 ONCA 520; *Middleton v. Highlands East (Municipality)*, 2013 ONSC 763; *Nagpal v. IBM Canada Ltd.*, 2021 ONSC 6853 (CanLII), *Ruston*; and *Russell*.

[115] In my view, an award of $45,000 in moral damages is appropriate in the circumstances of this case.

Punitive damages

[116] Mr. Pohl seeks a punitive damages award in the amount of $100,000, to be reduced as required to comply with the $200,000 limit under Rule 76. HBC submits that no award of punitive damages is appropriate.

[117] I agree with HBC's submission that punitive damages are only awarded in exceptional cases for malicious, oppressive, and high-handed conduct that offends the court's sense of decency and is deserving of punishment. Awards of punitive damages should only be made to punish misconduct that represents a marked departure from ordinary standards of reasonable behaviour or can be described as "harsh, vindictive, reprehensible and malicious": *Whiten v. Pilot Insurance Co.*, [2002] 1 S.C.R. 595 at para. 36.

[118] HBC submits that at all material times it treated the plaintiff with honesty and good faith. I disagree. In my view, the failure to pay out the wages owing to Mr. Pohl in accordance with the *ESA* (or upon repeated demand by his counsel) and the failure to issue a timely or correct ROE justifies an award of punitive damages.

[119] In *Halupa*, O'Brien J. awarded $25,000 in punitive damages against an employer that issued a false ROE and failed to comply with the *ESA* upon termination:

> In this case, the Defendants' conduct was high-handed and deserving of denunciation. I rely, in particular, on the fact that the Defendants unilaterally filed a false or deceptive ROE for their own ends, failed to pay wages contrary to ss. 11 and 13 of the ESA, and failed to provide any written notice of termination or termination pay contrary to ss. 54 and 61 of the ESA. These latter violations are flagrant breaches of the minimum statutory employment standards in this province.

[120] The employer in *Halupa* did not pay the employee any pay in lieu of notice of termination. In this case, HBC did continue to pay Mr. Pohl but it did not comply with the *ESA* and pay the amount out in a lump sum. Similarly, in my view, the conduct here does not rise to the level seen in *Galea*.

[121] I award Mr. Pohl $10,000 in punitive damages.

Conclusion

[122] I award the following damages to Mr. Pohl:

2 years annual salary of $61,254.00	$122,508.00
Less – ESA entitlements already paid	-$40,050.64
Cost of replacement benefits at $351.38 per month for 22.2 months	$7,800.64
Employer contribution to pension	$4,404.50
Moral damages	$45,000.00
Punitive damages	$10,000.00
Total	$149,662.50

[123] The award will bear pre-judgment and post-judgment interest in accordance with s. 128 and s. 129 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43.

[124] At the conclusion of the hearing, the parties indicated that they would likely be able to resolve the issue of costs once they had my decision. I encourage them to do so. If they are able to resolve costs, I ask that they advise my judicial assistant that there will be no submissions.

[125] If the parties are not able to resolve costs, Mr. Pohl may deliver a costs submission of no more than three double-spaced pages (exclusive of bill of costs and offers to settle if any) to be emailed to my judicial assistant on or before September 22, 2022. The plaintiff may file responding submissions of no more than three double-spaced pages (exclusive of bill of costs and offers to settle if any) on or before September 29, 2022. No reply submissions are to be filed without leave.

Robert Centa J.

Date: September 15, 2022