COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Pakozdi v. B & B Heavy Civil Construction Ltd.,* 2018 BCCA 23

Date: 20180119
Docket: CA43758

Between:

David Pakozdi

Respondent/
Appellant on Cross Appeal
(Plaintiff)

And

B & B Heavy Civil Construction Ltd.

Appellant/
Respondent on Cross Appeal
(Defendant)

Before: The Honourable Madam Justice Stromberg-Stein
The Honourable Mr. Justice Savage
The Honourable Mr. Justice Hunter

On appeal from: An order of the Supreme Court of British Columbia, dated June 3, 2016 (*Pakozdi v. B & B Heavy Civil Construction Ltd.*, 2016 BCSC 992, Vancouver Docket S151128).

Counsel for the Appellant: M. Pierce

Counsel for the Respondent: R.B. Johnson

Place and Date of Hearing: Vancouver, British Columbia
November 7, 2017

Place and Date of Judgment: Vancouver, British Columbia
January 19, 2018

Written Reasons by:
The Honourable Mr. Justice Hunter

Concurred in by:
The Honourable Madam Justice Stromberg-Stein
The Honourable Mr. Justice Savage

Summary:

The employer in a wrongful dismissal suit appeals the damage award on the basis that the employee suffered no loss from the termination because he had earned increased consulting income during the notice period. The employer also appeals the length of the notice period. The employee cross-appeals on the failure to award any damages for the loss of a matching program for RRSP payments. Held: Appeal and cross-appeal allowed in part. The trial judge erred in excluding all post-termination income from the calculation of damages and erred by awarding damages based on an eight month notice period for a 12 month employee. The employee is entitled to an award for the loss of the opportunity to participate in the matching program.

Reasons for Judgment of the Honourable Mr. Justice Hunter:

[1] An employee of indefinite duration who is discharged with inadequate notice is entitled to damages for breach of contract for losses arising from the breach that were not avoidable through reasonable mitigation and were not actually avoided through the employee's mitigation efforts.

[2] The respondent David Pakozdi was employed by the appellant for about a year, during which he also generated independent consulting income with the knowledge and consent of the appellant. After his termination, Mr. Pakozdi continued to receive consulting income, but increased his earnings considerably during the notice period.

[3] The trial judge held that the post-termination earnings should be disregarded when calculating damages arising from the inadequate notice Mr. Pakozdi received. Whether that was an error of law is the central question in this appeal.

[4] In addition to the mitigation question, the appellant challenges the notice period assessed by the trial judge, and Mr. Pakozdi cross-appeals on one head of damage denied to him.

Background

[5] Mr. Pakozdi is an experienced bid estimator and construction professional. As an estimator he prepares competitive tenders and competes for projects on behalf of

construction firms. He worked for various firms until July 2013, when he decided to set up his own business as a private consultant. At the time of trial, he was 55 years of age.

[6] In November 2013, he contacted the appellant, B & B Heavy Civil Construction Ltd. (“B & B”) to offer his services at a time when B & B was looking for a bid estimator to join the firm. At that time Mr. Pakozdi expressed a preference for working on a contract basis as a consultant and the parties proceeded on that basis for a month or so.

[7] In mid-December, B & B again raised the subject of Mr. Pakozdi joining the firm as an employee and this time Mr. Pakozdi expressed interest. This culminated in an employment agreement in early January 2014.

[8] The term of the employment contract was an issue at trial, but the trial judge concluded that the employment had no fixed term and was a contract of indefinite duration. That conclusion is not challenged in this appeal.

[9] When he commenced employment, Mr. Pakozdi advised B & B that he wished to continue to provide consulting services to some of his clients, particularly a client named Mainroad. B & B acceded to that request. At the time, B & B had a policy that employees could pursue outside employment, including self-employment, provided such employment did not unduly interfere with the employee’s regular duties with B & B or create a conflict of interest.

[10] During the latter part of 2014, Mr. Pakozdi provided services to Mainroad without objection by B & B. He also suffered some health setbacks arising from old injuries but the evidence was that B & B accommodated him when he needed time off work as a result of these injuries.

[11] In January 2015, B & B terminated Mr. Pakozdi’s employment and provided him with severance of $5,000, which equates to about two weeks’ notice. No cause was alleged. Mr. Pakozdi sued for wrongful dismissal.

[12] At the time of his dismissal, Mr. Pakozdi was earning $130,000 per year, or $10,833 per month, from his employment with B & B, and had earned additional revenues from Mainroad in the five months prior to his dismissal. The earnings from Mainroad varied from month to month. The most productive month was October 2014, when Mr. Pakozdi worked 96 hours and generated $9,600 from his consulting work for Mainroad.

The Trial Judgment

[13] The principal issue for the trial judge was whether the employment contract was a five-year term contract as Mr. Pakozdi alleged or a contract of indefinite duration as asserted by B & B. The trial judge concluded that the evidence did not support a five-year term contract.

[14] The trial judge then turned to the proper length of notice for termination. After reviewing the circumstances and authorities, she initially concluded as follows:

> [72] In my view, in light of his experience, age and length of employment, the applicable notice period is five months. However, the plaintiff emphasizes that he was vulnerable at the time of his firing, and that should be taken into account to lengthen the reasonable notice …

[15] The trial judge gave effect to this submission. Citing *Ostrow v. Abacus Management Corporation Mergers and Acquisitions*, 2014 BCSC 938, the judge increased the period of notice by an additional three months to eight months in total on the basis that Mr. Pakozdi's physical and medical condition would make it more difficult for him to obtain new employment and accordingly, he was in a position of vulnerability that was known to his employer.

[16] The trial judge then turned to the mitigation issue and the argument of B & B that Mr. Pakozdi had mitigated his loss to the extent that he was not entitled to any damages. She summarized the positions of the parties in this way:

> [77] The defendant alleges that the plaintiff has mitigated his loss to the extent that he is not entitled to any damages. The defendant submits Mr. Pakozdi earned more after termination in three months than he would have at B & B, and therefore he is not entitled to any compensation, or only a

> nominal amount: *Strauss v. Albrico Services (1982) Ltd.*, 2008 BCCA 173; *Davidson v. Tahtsa Timber Ltd.*, 2010 BCCA 528.
>
> [78] The plaintiff agrees he has a duty to mitigate, but emphasizes the burden of proof is on the defendant to show he has not done so: *Szczypiorkowski v. Coast Capital Savings Credit Union*, 2011 BCSC 1376.
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> [79] The plaintiff says his physical and mental condition is a relevant consideration: *Systad v. Ray-Mont Logistics Canada Inc.*, 2011 BCSC 1202. In that case, even though the plaintiff made only minimal efforts to find employment, it was not found that he failed to mitigate. The plaintiff was recovering from a knee operation and the court said it was reasonable to take that and the possibility of future surgeries into account.
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> [80] I find this reasoning applies to Mr. Pakozdi and the difficulty he now faces from his physical injuries and his medication, which exacerbates his difficulties in finding other employment.

[17] She then cited *Redd's Roadhouse Restaurants Ltd. v. Randall*, 2014 BCSC 1464, for the proposition that where the employer was aware that the employee would be working at two jobs it was proper to exclude from the calculation of damages the post-termination income from the second job. Accordingly, she made no deduction for the post-termination consulting earnings of Mr. Pakozdi.

[18] The final issue addressed by the trial judge that is relevant to this appeal was whether Mr. Pakozdi was entitled to 5% of his wages through the company's RRSP matching program. The trial judge concluded that he was not entitled to this head of damage because there was no evidence that Mr. Pakozdi was making RRSP contributions during the notice period.

Issues on Appeal

[19] There are three issues contested by the parties on this appeal:

(i) B & B says that the trial judge erred in awarding Mr. Pakozdi damages based on an eight month notice period when he was only employed for 12 months;

(ii) B & B says that the trial judge erred in not deducting all or part of Mr. Pakozdi's post-termination earnings on the basis that they were replacement earnings and constituted at law avoided loss; and

(iii) Mr. Pakozdi says on cross-appeal that the trial judge erred by not awarding any damages for the loss of the opportunity to participate in the RRSP matching program during the notice period.

The Notice Period

[20] The trial judge determined the proper notice period in two steps. First she considered Mr. Pakozdi's length of service and the other circumstances of the case and concluded at para. 72 of her judgment that "the applicable notice period is five months." She then added three months for what was characterized as Mr. Pakozdi's vulnerability, making a total of eight months for a 12 month employee.

[21] In the absence of an error of law or principle, the standard of review of an award of damages is reasonableness: *Lau v. Royal Bank of Canada*, 2017 BCCA 253 at para. 36.

[22] The leading judgment on what constitutes reasonable notice of termination is Chief Justice McRuer's statement of principles in *Bardal v. Globe & Mail Ltd.* (1960), 24 D.L.R. (2d) 140 at 145 (Ont. H.C.):

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

[23] The trial judge gave consideration to these factors in her initial decision that the applicable notice period was five months, but then added three months to the notice period because of what she characterized as Mr. Pakozdi's vulnerability.

[24] Two issues arise from this approach: whether a notice period of eight months is within the range of reasonableness for an employee of 12 months in the circumstances of this case, and whether the approach of adding on an amount in respect of the respondent's medical condition is supportable.

[25] The appellant's position is that for a short-term employee of a year or less, a notice period of two to three months is the range of reasonableness that has been established in this jurisdiction. There is support for that position in the jurisprudence.

[26] In *Saalfeld v. Absolute Software Corporation*, 2009 BCCA 18, a nine month employee was awarded damages based on five months' notice. This court reviewed the recent jurisprudence in this province and made the following comment:

> [15] … Absent inducement, evidence of a specialized or otherwise difficult employment market, bad faith conduct or some other reason for extending the notice period, the B.C. precedents suggest a range of two to three months for a nine-month employee in the shoes of the respondent when adjusted for age, length of service and job responsibility…

[27] Notwithstanding this comment, the five month notice period was upheld, primarily as the employee had required nine months to find employment after her termination. This Court regarded the notice period as "on the very high end of an acceptable range" but not unreasonable (at para. 18).

[28] The two or three month range was applied by this Court in *Hall v. Quicksilver Resources Canada Inc.*, 2015 BCCA 291, in which a seven month notice period for a nine month employee was reduced to three months.

[29] More recently, a 14 month employee who had been awarded damages based on a six month notice period had the period reduced to four months in *Cabott v. Urban Systems Ltd.,* 2016 YKCA 4. The Court commented that:

> [18] … Accepting the description of the range of notice for specialized employees in short term positions as two to three months as observed in *Saalfeld* and *Hall,* the character of this employment would justify an award modestly beyond that range.

[30] In my view, the initial assessment by the trial judge that the applicable notice period is five months is within the range of reasonableness having regard to this jurisprudence, though perhaps on the high side. Adding three months for the respondent's vulnerability takes the notice period outside the range of reasonableness unless there are very special circumstances that could support this assessment.

[31] The trial judge explained the basis for the additional three months' notice period in these terms:

> [75] The vulnerability comes from the fact that B & B was aware and accommodating of Mr. Pakozdi's condition. When he searches for new employment, he needs to be candid with employers about his now worsened medical condition, and I agree with his position that it will make him less attractive as a candidate. In my view, this justifies lengthening his period of notice.

[32] I cannot agree that an employee's "worsened medical condition" provides a basis for increasing the notice period beyond the period assessed by reference to the *Bardal* factors, particularly in circumstances where the employee was able to and did in fact work full-time during the notice period and beyond.

[33] Justice Goepel dealt with a similar argument in *Waterman v. IBM Canada Limited*, 2010 BCSC 376, aff'd on other grounds 2013 SCC 70:

> [23] Mr. Waterman's health is not a factor to increase the notice period. In that regard, I adopt the comments of McLachlin J. (as she then was) in *Nicholls v. Richmond (Township)* (1984), 52 B.C.L.R. 302 (S.C.) at 309-10 in which she held that the employee was not entitled to an increased notice period due to ill health.

[34] It may be that in an appropriate case an employee's health could be relevant to the assessment of reasonable notice (as opposed to an independent factor increasing the notice period), but I can see no basis on which it would be a relevant consideration in this case. Mr. Pakozdi was working throughout his notice period and was not required to search for new employment. When Mr. Pakozdi was hired by B & B, he had a consulting business on the side. He continued to work in his consulting business while employed with B & B, and after his dismissal he carried on his consulting business on an accelerated basis.

[35] In my opinion, Mr. Pakozdi's medical condition was not a proper basis on which to extend the five month notice period to eight months, which is outside the range of reasonableness for an employee in Mr. Pakozdi's circumstances. I would allow the appeal on this ground to the extent of reducing the notice period to five months, as the trial judge initially determined.

The Mitigation Issue

[36] In the assessment of damages for breach of contract, mitigation can arise in one of two ways. First, it can be argued that the claimant could have reduced the loss by taking reasonable steps to replace the lost income through new employment. This is somewhat awkwardly referred to as the "duty to mitigate" but would be more accurately expressed as the principle that the party not in breach cannot recover for avoidable loss.

[37] Avoidable loss is not an issue in this case.

[38] The second way in which principles of mitigation can lead to a reduction in damages for breach of contract arises when the party not in breach does in fact reduce the loss by replacing the income with new income that would not have been earned if the employment relationship had continued. This is termed "avoided loss" and is the issue raised by B & B in this appeal.

[39] B & B's argument is that after his dismissal, Mr. Pakozdi ramped up his consulting business and replaced the employment income he would have earned with B & B during the notice period with consulting income. If Mr. Pakozdi has effectively avoided the loss, he cannot recover from B & B.

[40] To support this argument, B & B relies on the evidence of the increased consulting work Mr. Pakozdi did after termination of his employment with B & B.

[41] The evidence was that prior to his dismissal, Mr. Pakozdi worked the following hours and generated the following income from Mainroad:

Month	**Hours worked for Mainroad**	**Fees billed to Mainroad**
August 2014	39.0	$3,900
September 2014	68.5	$6,850
October 2014	96.0	$9,600

November 2014	88.0	$8,800
December 2014	17.5	$1,750

[42] Following his dismissal, the evidence was that Mr. Pakozdi worked the following hours and generated the following income from Mainroad:

Month	**Hours worked for Mainroad**	**Fees billed to Mainroad**
January 2015	46.0	$4,600
February 2015	156.0	$15,600
March 2015	177.0	$17,700
April 2015	153.0	$15,300
May 2015	196.0	$19,600
June 2015	189.0	$18,900

[43] The trial judge did not give effect to this argument. She took the view that the judgment of my colleague Justice Savage in *Redd's Roadhouse Restaurants Ltd. v. Randall*, 2014 BCSC 1464 established the principle that when an employee had, to the knowledge of the employer, been working at two jobs prior to the dismissal and continued working at the second job after dismissal, it was proper to exclude the earnings from the second job from the calculation of damages for wrongful dismissal from the first job.

[44] Before us, Mr. Pakozdi supported this approach by reference to the following passage from a recent Ontario Court of Appeal judgment, *Brake v. PJ-M2R Restaurant Inc.*, 2017 ONCA 402:

> [140] In a wrongful dismissal action, an employer is generally entitled to a deduction for income earned by the dismissed employee from other sources during the common law notice period. However, as Rand J. explained in

> *Karas v. Rowlett*, [1944] S.C.R. 1, at p. 8, for income earned by the plaintiff after a breach of contract to be deductible from damages, "the performance in mitigation and that provided or contemplated under the original contract must be mutually exclusive, and the mitigation, in that sense, is a substitute for the other." Therefore, if an employee has committed herself to full-time employment with one employer, but her employment contract permits for simultaneous employment with another employer, and the first employer terminates her without notice, any income from the second employer that she could have earned while continuing with the first is not deductible from her damages: see S.M. Waddams, *The Law of Damages*, loose-leaf (Rel. Nov. 2016), 2d ed. (Toronto: Canada Law Book, 1991), at para. 15.780.
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> [Emphasis added.]

[45] I have emphasized the qualification in *Brake* that it is post-termination income from the second employer that could have been earned while continuing with the first employer that is not deductible from her damages, not simply all earnings from the second employer.

[46] In my opinion, the principle as stated by the trial judge is too categorical. It is not *all* income from the second job that is excluded from the damage calculation, but rather income from the second job that could have been earned had the employment from the first job continued. In other words, the question is whether the new income is replacement income regardless of the source of the income or a continuation of supplementary income being earned prior to the dismissal. I do not see the judgment in *Redd's Roadhouse* as inconsistent with this principle.

[47] The Ontario Court of Appeal in *Brake* was alive to this distinction, pointing out that:

> [145] Whether Ms. Brake's Sobey's income exceeded an amount that could reasonably be considered as "supplementary" and, therefore, not in substitution for her employment income was not argued. On the facts of this case, the amounts received from Sobey's do not rise to such a level that her work at Sobey's can be seen as a substitute for her work at PJ-M2R. I leave for another day the question as to when supplementary employment income rises to a level that it (or a portion of it) should be considered as a substitute for the amounts that would have been earned under the original contract and, accordingly, be treated as deductible mitigation income.

[48] B & B argues that the question left for another day in *Brake* arises squarely in the case at bar. The argument is that because in each of the months following the

month of dismissal, Mr. Pakozdi earned more from his consulting job than he would have earned with B & B, he has successfully avoided the loss arising from termination and is not entitled to any damages from B & B.

[49] That proposition also is too categorical because it fails to take into account the fact that at least some of the consulting income earned post-termination could have been earned if the respondent's employment with B & B had continued, and therefore is not properly characterized as replacement income.

[50] Mr. Pakozdi was dismissed in mid-January 2015. His earnings from his consulting work over the next five months was approximately $80,000. The task then is to make an assessment of how much of this post-termination income is to be considered replacement or substitute income, and therefore deductible from his damage claim, and how much is to be considered supplementary income that he could have earned if his employment with B & B had continued, and therefore not deductible from his damage claim.

[51] I will address this assessment later in my judgment.

The RRSP Matching Program

[52] The final issue is raised by Mr. Pakozdi's cross-appeal concerning the company's RRSP matching program. Under this program, Mr. Pakozdi was entitled to join the B & B Group Registered Retirement Savings Plan after one year of employment, which was approximately the date of his dismissal. The benefit under the matching program is described in the Employee Guidebook:

> Each pay period your employer will match your contributions by 100% up to a maximum of 5% of your salary.

[53] The trial judge declined to make any award for the loss of the opportunity to benefit from this matching program on the following basis:

> [88] … The defendants say there was no evidence that Mr. Pakozdi was making RRSP contributions during the notice period and therefore it is not compensable: *Matusiak v. IBM Canada Ltd.*, 2012 BCSC 1784 at para. 118-119. I agree.

[54] The trial judge was applying the principle from *Wilks v. Moore Dry Kiln Co. of Canada* (1981), 32 B.C.L.R. 149 (S.C.), to the effect that a plaintiff cannot recover for fringe benefits that would have been paid by the employer unless the employee has in fact incurred the expense during the notice period. This principle has been applied to expenses such as dental expenses but does not fit well with benefits such as matching expenses to a group plan, where the employee cannot make the expenditure that would trigger the employer match once he has been dismissed.

[55] Justice Prowse made a similar point in *Steven Shinn v. TBC Teletheatre B.C. et al.*, 2001 BCCA 83 at para. 37:

> … The decision of Madam Justice McLachlin (as she then was) in *Wilks v. Moore Dry Kiln Co. of Canada* (1981), 32 B.C.L.R. 149 (B.C.S.C.), applied by this Court in *Sorel v. Tomenson Saunders Whitehead Ltd.* (1987), 16 C.C.E.L. 223 [B.C.C.A.], does not stand for the proposition that the amount of an employer's contributions to an employee's Canada Pension Plan during the notice period can never be recovered as damages. Rather, damages will be awarded where the employee can show that he or she has suffered a loss by virtue of the employer's failure to pay the benefits during the notice period.

[56] In my opinion, the applicable principle is that damages in a wrongful dismissal action are to be assessed on the basis of the plaintiff's entitlement to benefits throughout the period of reasonable notice. A plaintiff is entitled to compensation for the loss of the opportunity to share in whatever pecuniary benefits would have flowed from being an employee during the notice period: *Hawkes v. Levelton Holdings Ltd.*, 2012 BCSC 1219 at para. 309, aff'd 2013 BCCA 306.

[57] Chief Justice McEachern explained this principle in *John Iacobucci v. WIC Radio Ltd. et al.*, 1999 BCCA 753 at para. 24:

> Applying the foregoing to the facts of this case, it is my view that the plaintiff was entitled to recover damages equivalent to the benefits he would have received if he had remained as an employee until the expiration of a period of reasonable notice. It makes no difference, in my view, that he cannot require WIC Western to accept his attempted exercise of future options. The value of such a right is a part of the measure of the damages he is entitled to recover from WIC Radio.

[58] Justice Saunders made a similar observation in *Gillies v. Goldman Sachs Canada Inc.*, 2001 BCCA 683 at para. 20:

> On the basis of these authorities and the clear principle that Mr. Gillies is entitled to be treated, for remedial purposes, as if he were an employee throughout the notice period, the issue here is whether Mr. Gillies would have been entitled to participate in the IPO had it been issued during the period of reasonable notice.

[59] Mr. Pakozdi is therefore entitled to compensation for the loss of the opportunity to participate in the RRSP matching program during the five month notice period.

Assessment of Damages

[60] I have concluded that the trial judge erred in principle in three respects. First, the notice period on which damages were based was outside the range of reasonableness for a 12 month employee and should not have been increased from the five months initially assessed on the basis of Mr. Pakozdi's health issues, which did not prevent him from earning substantial consulting income during the notice period.

[61] Second, she erred in failing to deduct any of the post-termination income received by Mr. Pakozdi, although I do not agree that *all* of the post-termination income should be deducted, as urged by the appellant. A determination must be made as to how much of the post-termination consulting income should be characterized as replacement income and how much is more properly regarded as a continuation of the supplementary income he was earning prior to his dismissal.

[62] Finally, I have concluded that the trial judge erred in not providing any award for the loss of opportunity to participate in the RRSP Matching Program of the employer. This head of damage will be modest, but there is a loss that merits some compensation.

[63] In the ordinary course, I would remit the matter back to the trial judge for assessment of damages based on these principles. However, under s. 9 of the *Court*

of Appeal Act, R.S.B.C. 1996, c. 77, this Court has the power to make any order that could have been made by the court appealed from, including an order assessing damages. In my view, given the extent of reduction that will accompany this judgment, it would not be in the interests of justice to require the parties to incur the costs of further proceedings in the Supreme Court: see *Mainstream Canada v. Staniford*, 2013 BCCA 341 at paras. 52-54. Accordingly, I propose to assess the damages that result from the principles set out in this judgment.

Damages for Inadequate Notice

[64] The reduction in the notice period leads to a reduction in damages for inadequate notice that can be calculated with precision. Five months' notice at Mr. Pakozdi's salary would entitle him to $54,165, subject to the issue of mitigation.

Reduction for Avoided Loss

[65] The reduction for avoided loss cannot be calculated with precision. Drawing the line between that portion of earnings in the notice period that is properly to be regarded as replacement income and that portion that should be regarded as a continuation of his supplementary income cannot be done in an exact way.

[66] Justice Pitfield described this task more generally in *Wilson v. UBS Securities Canada Inc.*, 2005 BCSC 563 at para. 63:

> The computation of damages in a wrongful dismissal case is not a mathematical calculation but an assessment of that which would likely have been earned had the proper period of working notice been provided to the employee.

[67] I propose to make an assessment on that basis, having regard to the evidence that was led concerning Mr. Pakozdi's consulting income before and after dismissal.

[68] The evidence indicates that Mr. Pakozdi was able to engage in consulting work for as much as 96 hours in October 2014 without apparently interfering with his duties at B & B. This work generated $9,600 for that month, in addition to his earnings with B & B. Thus, it seems reasonable to assume that in the five month

notice period, Mr. Pakozdi could have earned as much as $50,000 in what can be characterized as supplementary income. The balance of his earnings can reasonably be regarded as replacement income and thus deductible from his damage claim.

[69] This analysis suggests that an amount of approximately $30,000 earned by Mr. Pakozdi during the five month notice period is properly characterized as replacement income and must be deducted from the damages otherwise payable.

[70] The result of this assessment is that Mr. Pakozdi is entitled to $54,165, representing five months of his employment income, less $30,000 representing the portion of his post-employment income that is designated as replacement income, for a net damage award of $24,165 in respect of his salary.

Damages for Loss of the RRSP Matching Program

[71] I have concluded that Mr. Pakozdi is entitled to a modest sum in respect of the loss of the opportunity to participate in the RRSP Matching Program. This again is a matter for assessment rather than calculation, as it is not possible to know whether Mr. Pakozdi would in fact have taken advantage of the program. I would assess damages for this head of damages at $2,500.

Disposition

[72] For these reasons, I would allow the appeal and the cross-appeal in part, and vary the order under appeal in the following respects:

(a) the notice period for the calculation of damages is reduced to five months;

(b) the damage award for the salary component of the compensation is reduced to $24,165; and

(c) the damage award is increased by $2,500 to account for the loss of the opportunity to participate in the group RRSP matching program.

[73] The order of the trial judge is varied in accordance with these reasons. In light of the divided success and subject to any arrangements as to costs that have not been brought to our attention, I would order that each party bear their own costs.

"The Honourable Mr. Justice Hunter"

I AGREE:

"The Honourable Madam Justice Stromberg-Stein"

I AGREE:

"The Honourable Mr. Justice Savage"