

Court of Queen's Bench of Alberta

Citation: Nelson v. Champion Feed Services Inc., 2010 ABQB 409

Date: 20100617
Docket: 0703 12531
Registry: Edmonton

Between:

Brad Nelson

Plaintiff

- and -

Champion Feed Services Inc.

Defendant

**Reasons for Judgment
of the
Honourable Mr. Justice Robert A. Graesser**

Introduction

[1] This is an action for wrongful dismissal, brought by Brad Nelson against his former employer, Champion Feed Services Inc. Mr. Nelson worked for Champion in various capacities for nearly 25 years. When his employment was terminated in June 2007, he was Plant Supervisor for Champion's Westlock, Alberta feed mill.

[2] He was not terminated for cause at the time of his dismissal, although Champion has since alleged that cause existed which they became aware of after the termination. At the time, he was paid severance of \$12,246.70, which had been calculated by Gary Golby to be Champion's obligations under the *Canada Labour Code*. That payment amounted to 58 days of basic salary. Mr. Golby, a major shareholder in Champion and the company's General Manager, believed such payment satisfied Champion's obligations to Mr. Nelson on termination of his employment.

[3] Mr. Nelson claims damages based on 2 years pay in lieu of notice, that such damages include bonus amounts he expected to receive, together with an amount in lieu of the 25 year long service award he expected to receive, as well as *Wallace*-type damages arising out of the manner of his termination.

Background

[4] Mr. Nelson went to work for Champion as a labourer when he was about 20 years old. He was 45 at the time of his termination. Over the years, he was promoted to foreman, and after about 10 years service, to Plant Supervisor. Champion is an Alberta corporation, and owns and operates 3 feed mills in Alberta. Mr. Golby is the CEO, having acquired a majority interest in the company in approximately 2000, and is a self-described “hands-on” manager, or “micro-manager”. The company appears to be successful, in a challenging business.

[5] Mr. Nelson’s job as Plant Supervisor, involves supervising the production workers. There were in excess of 20 workers reporting to him, including several foremen. The Westlock plant operated 24 hours a day, 7 days a week, depending on business levels. As Plant Supervisor, Mr. Nelson was expected to be at the Westlock facility for regular working days during the week, and to be on call for trouble-shooting the rest of the time.

[6] At the time of his dismissal, Mr. Nelson reported to the Westlock Manager, Penny Bilodeau (who happened to be Mr. Nelson’s older sister) and the Assistant Manager, Darren Lidberg. Above them was Mr. Golby, who worked principally out of Barrhead. He spent the majority of his time in Barrhead, but was in Westlock on average once a week, and also spent time in Champion’s Grande Prairie facility.

[7] The basic chronology and facts are not in issue. From about 2002, after Mr. Golby became the majority owner in Champion, he determined the level of bonuses to be paid to Champion’s employees. Bonuses were discretionary, at Mr. Golby’s call, but had been a regular occurrence since at least 2002. He described the bonuses as a profit share, but also based on performance. Over the period 2002 - 2006, Mr. Nelson received bonuses ranging from about \$2,000.00 to nearly \$10,000.00, depending on corporate profits for the relevant year, and Mr. Golby’s assessment of his performance.

[8] Bonuses were paid on the basis of the company’s March year end, but were not paid out until September, after the financial statements had been completed. In each of 2002, 2003, 2004 and 2006, the bonus cheques were accompanied by a letter from Mr. Golby, describing the basis for the bonus, and commenting on Mr. Nelson’s performance.

[9] In 2005, there was a bonus of \$9,818.00, but no letter. In 2006, the letter accompanying a cheque for \$4,892.00 was critical of Mr. Nelson's performance in some areas, noted improvement in others, and contained the following concluding remarks:

The tools are in your court Brad; make it happen! I sincerely do enjoy working with you as part of the Westlock Management team Brad.

[10] From Mr. Golby's perspective, Mr. Nelson's performance was not entirely satisfactory, although he candidly acknowledged that he had never warned Mr. Nelson that his job was in danger if his performance did not improve.

[11] From Mr. Nelson's perspective, the letters indicated to him that Mr. Golby wanted some "fine tuning" of Mr. Nelson's management skills. He did not view the messages from Mr. Golby as being negative, merely that there was a desire on Mr. Golby's part for some improvement. He did not consider that his job was in jeopardy, or that he was being negatively reviewed.

[12] Mr. Nelson was "written up" in the early part of 2007 for a work incident. There was no particular significance to that incident, other than Mr. Nelson had not recalled that when he was being cross-examined, but did recall the incident when the record was put to him. Mr. Golby placed no reliance on that incident. The relevance only goes to Mr. Nelson's credibility.

[13] Of greater significance, however, was an altercation between Mr. Nelson and Mrs. Bilodeau. I did not hear a lot of evidence about it, but in early June 2007, Mr. Nelson was meeting with an employee sorting out a problem. A customer was in the general vicinity, but not directly involved in the meeting. Mrs. Bilodeau entered the room, and attempted to get Mr. Nelson's attention for some reason. He appears to have ignored her. She then tapped him on the head a couple of times; he continued to ignore her and she left. The next day, even though he was away ill, he was called into work, called into her office, and was accused of being insubordinate. That incident was also written up, and Mr. Golby was made aware of it.

[14] The altercation with Mrs. Bilodeau took place a couple of days before Mr. Nelson was to leave on a week's holiday. He went on the holiday, and when he returned, was called into Mr. Golby's office where he was told that his position was being abolished and his employment was being terminated. Mr. Nelson asked if there was something else for him at Champion, even a labouring job, and he was told there wasn't. Mr. Golby gave him a termination cheque for \$12,246.70, based on what Mr. Golby believed to be Champion's obligations for termination pay under the *Canada Labour Code*.

[15] Several days later, Mr. Golby met with Mr. Nelson's parents in Westlock to talk to them about Mr. Nelson's termination from Champion. His intention was to negate any concern on the Nelson seniors' part that Mrs. Bilodeau had been involved in the termination. He knew and respected the Nelson seniors, as the incident with Mrs. Bilodeau had formed part of Mr. Golby's reasons for terminating Mr. Nelson's employment.

[16] Mr. Nelson was unhappy that Mr. Golby would meet with his parents, and discuss his termination with them at all. None of Mrs. Bilodeau or the Nelson seniors testified.

[17] Mr. Nelson requested a letter of reference, but Mr. Golby declined to provide one, despite having worked on a draft. Other events overtook the reference letter, although Mr. Golby mistakenly attributed one of them as being a demand letter from Mr. Nelson's lawyer.

[18] More importantly, on July 13, Mr. Golby learned for the first time of an incident which had occurred in the Westlock plant in November, 2006. He received notice of an administrative penalty from Canada's Food Inspection Agency. Following an investigation, the Agency determined that Champion's record keeping had been deficient and a \$4,000.00 administrative penalty was imposed on Champion.

[19] The records required to be kept by a feed mill such as Champion are intended to document that no animal parts found their way into feed intended for ruminants. Such record-keeping is mandated to ensure that Canada's food industry is free from risks such as bovine spongiform encephalopathy (mad cow disease).

[20] When a feed mill receives bulk materials to be made into feed, it is required to record a number of things, including whether the materials contain animal parts (meat). If animal parts are received, the truck and the receiving bin are required to be "flushed" or cleaned, so that the next load is not contaminated. The trucker is also required to keep records so that trucks are flushed after delivering meat, if the next load is intended for ruminants. If a flush is required, the details of the flush, including the quantity of flush material (usually soy), and its source are to be recorded. These records are subject to inspection and audit by the Food Inspection Agency.

[21] On November 24, 2006, a delivery of meat was received. It was not properly recorded. No details of the delivery, or of the necessary flush, were documented at the time. Mr. Nelson became aware of this in November 27, 2006 when he was (as part of his regular duties) approving daily receiving logs. He knew that there had been a meat delivery on November 24, and noted on the log that the office should record details of the meat received and the flush. His uncontradicted evidence was that he had been advised by the Champion employee responsible for the delivery, Andy Bunning, that the meat had been received, and that the truck and bin had been properly flushed.

[22] The record was changed on November 27 by Mr. Bunning to reflect that the meat delivery had occurred, and that there had been a flush after that. But no details of the flush were recorded. On an inspection by a Food Inspection Agency inspector in January 2007, the irregular November 24 entry was noticed. It was, according to the Agency records, discussed with Mr. Nelson and Darrell Smethurst, and Mr. Nelson was instructed by the Food Inspection Agency inspector to record the quantity of soy used in the flush. Mr. Nelson did so.

[23] Mr. Smethurst was Champion's HACCP (Hazard Analysis and Critical Control Point) Coordinator. He had responsibility for Champion's safety programs, and reported to Mr. Golby as well as to Mrs. Biledeau and Mr. Lidberg with respect to Westlock. He did not report to Mr. Nelson.

[24] Neither Mr. Nelson nor Mr. Smethurst told Mr. Golby of the issue of November, 2006 when the incident occurred, or in January 2007 when the Agency inspector noticed the irregular records. He was unaware of this matter until July 2007, after Mr. Nelson's dismissal.

[25] Nothing more was apparently heard of the matter by Champion until Mr. Golby received the notice of fine on July 13. He considered at the time that Mr. Nelson had made a significant mistake in the way the incident had been handled: the records were improperly prepared by someone who reported directly to Mr. Nelson, and when Mr. Nelson became aware of the problem, he did not ensure that the records were properly fixed.

[26] Mr. Golby was concerned about the addition of the soy flush information by Mr. Nelson in January 2007, even though that appears to have been done at the direction of the Agency inspector. He appeared in his evidence to have some residual concerns as to whether the flush had actually been done.

[27] In any event, he testified that if he had known about the incident and the fine on June 25 when he had terminated Mr. Nelson's employment, he would have dismissed Mr. Nelson for cause.

[28] His rationale for that position was a combination of his general dissatisfaction with Mr. Nelson's performance over the preceding 5 years or so, the incident with Mrs. Bilodeau in June 2007, and the significance of record-keeping and relations with the Food Inspection Agency, in the context of the BSE and other scares, and potential consequences of a product recall.

[29] Mr. Nelson was not asked about the incidents by Mr. Golby after his dismissal. Mr. Golby could not recall if he discussed the incident with Mrs. Bilodeau or Mr. Lidberg. He made a business decision to simply pay the fine, which was reduced to \$2,000.00 because of early payment. The fine related solely to record-keeping.

[30] Learning of this matter was one of the reasons Mr. Golby did not provide a letter of reference for Mr. Nelson.

[31] Mr. Nelson was unhappy about his dismissal. He testified that he expected to work for Champion indefinitely and had no fixed plans to retire or take other employment. He felt that Mr. Golby was not candid in saying that there were no positions at Champion, as he learned while he was on holidays that at least one production worker had resigned. He was concerned about the timing of his termination, as he had recently committed to remortgaging his home to consolidate some debt and carry out some renovations and improvements. He was upset that Mr. Golby had

met with his parents and discussed the termination with them. He was unhappy that no letter of reference had been provided, despite his timely request, and he felt that a letter Mr. Golby had sent to many of Champion's suppliers announcing Mr. Nelson's termination had harmed his ability to find replacement employment.

[32] Mr. Nelson's evidence about his attempts to find new employment was somewhat troublesome. At trial, he testified that he had sought work at three locations in Westlock: the John Deere dealership, Case Tractor and Westlock Chevrolet Oldsmobile. On discovery, he had testified that he had only applied to the John Deere location and did not mention the other two potential employers.

[33] While there were some semantic differences between the questions asked at trial and on discovery, I conclude that Mr. Nelson was attempting, at trial, to exaggerate his attempts to find alternate employment. His discovery evidence is to be preferred: that he took a couple of weeks off, went to the John Deere dealership to see if they had anything available, and very shortly went into business for himself as a renovation contractor. He did not produce a resume, made no attempt to find employment outside of Westlock, and made almost no attempts to find a job in or around Westlock.

[34] He had considerable experience and skills as a production manager and facility manager, had a boiler engineer certificate that allowed him to have greater responsibilities within a facility that used that certain class of boilers.

[35] That being said, the question is not whether he failed to mitigate, but whether it was reasonable for him to mitigate by way of starting up his own business.

Positions of the Parties

Mr. Nelson

[36] Mr. Nelson maintains that he was dismissed without cause, despite the subsequent revelation about the record-keeping; that he was entitled to 24 months' pay in lieu of notice, including bonuses and the 25 year long service award, and Champion's conduct surrounding his termination warrant aggravated or *Wallace*-type damages of an additional 3 months pay.

[37] Mr. Nelson acknowledges receipt of severance pay in the amount of \$12,246.00, which should be offset from the 23 months of earnings he made working for Nelson Contracting and Reno's Ltd. Nelson Contracting's financial statements for 2008 and 2009 were put in evidence. Mr. Nelson was paid \$20,000.00 for the year ended July 31, 2008 and \$15,000.00 for the year ended July 31, 2009. In addition, he acknowledges that the company's after tax retained earnings as at July 31 in each year should be attributed to him by way of earnings related to his employment and mitigation. For 2008, there was a loss of \$426.00; for 2009, the after tax retained earnings were \$19,762.00.

[38] The parties agreed that Mr. Nelson's salary for 2007 and benefits were \$54,900.00 salary plus \$4,180.00 benefits. His bonuses for 2002 - 2006 were as follows:

2002	\$5,900.00
2003	\$9,851.00
2004	\$1,987.00
2005	\$9,818.00
2006	\$4,892.00

[39] While these were discretionary bonuses, there was a pattern of payment and Mr. Nelson expected that a bonus would be included in his compensation package each year. The average bonus over that 5 year period was \$6,490.00.

[40] The evidence was that bonuses were paid to some employees for 2007. No evidence was led concerning 2008 bonuses.

[41] The value of the 25 year award was \$5,000.00, being a gift certificate in that amount from a local jewelry store.

[42] Mr. Nelson's calculations are therefore:

(a) earnings for 24 months	$\$59,800.00 \times 2 = \$119,600.00$
(b) bonuses for 2007 and 2008	$\$6,490.00 \times 2 = \$12,980.00$
(c) lost gift certificate	\$5,000.00
(d) 3 months aggravated damages	$\$59,800.00 + 6,490.00 \times 3 = \$16,572.50$

Total: \$154,152.49

less:

(e) severance paid	\$12,246.00
(f) 2008 earnings from Nelson Contracting	\$20,000.00
(g) 2008 retained earnings	(\$426.00)
(g) 11/12 of 2009 earnings from Nelson Contracting	\$15,000.00
(h) 11/12 of 2009 retained earnings	\$19,762.00

Total \$66,582.00

Difference \$87,570.49

Champion's Position

[43] Champion argues a number of points. It abandoned at trial its position that the severance paid to Mr. Nelson at the time of his termination - \$12,246.70 - satisfied Champion's obligations

for pay in lieu of notice to Mr. Nelson. That position was clearly wrong: a nearly 25 year employee terminated without cause is almost invariably entitled to much more by way of notice or pay in lieu of notice than 10 weeks.

[44] Champion argued, however, that Mr. Nelson's termination should be treated as being for cause, because of the record-keeping incident and fine that Champion learned about shortly after Mr. Nelson was discharged. Champion maintains that the incident itself constituted just cause, and if Mr. Golby had known about it at the time of the incident, Mr. Nelson would have been terminated for cause immediately. Coupled with Mr. Golby's dissatisfaction with Mr. Nelson's performance, and the incident with Mrs. Bilodeau shortly before the termination, the totality of the circumstances warranted termination for cause if the record-keeping incident on its own did not.

[45] Champion argues in any event that a 24 month notice period is excessive, and that a proper notice period would have been in the 15 - 18 month range, having regard to Mr. Nelson's age, length of service and entry-level management position.

[46] Champion argues that no bonus should be included in any calculation, as it was discretionary in Mr. Golby's determination and there was no certainty that Mr. Nelson would have received further bonuses having regard to the sentiments expressed by Mr. Golby in the letters that accompanied previous bonus cheques.

[47] No position was taken by Champion with respect to the 25 year long service award or its value and Champion concedes that if its position either on cause or on mitigation is not upheld, Mr. Nelson would be entitled to the \$5,000.00 value of the award.

[48] Apart from its argument on cause, Champion seeks to limit Mr. Nelson's notice period and damages because it alleges that Mr. Nelson had decided, at the time of his dismissal, to retire from Champion after the Christmas party in December, 2007 and start his own business. Thus they say that his damages should be limited to a period ending December 31, 2007.

[49] Further, Champion argues that Mr. Nelson failed to mitigate his damages. He made little or virtually no effort to find a suitable alternate job in or near Westlock, and accordingly, he should be held to the severance actually paid to him.

[50] Finally, Champion notes that with respect to the earnings Mr. Nelson made through Nelson Contracting, the full amount of the management bonus and the before- tax retained earnings (-\$476.00 for 2008 and \$22,963.00 for 2009) should be attributed to him. As well, because the financial statements show rent paid (which was acknowledged as being paid or payable to Mr. Nelson as owner of the property the business was being run from), the amount of rent, or \$400.00 per month starting August, 2007, should also be attributed to Mr. Nelson's earnings in mitigation of his damages.

[51] Champion also denies that the circumstances of Mr. Nelson's dismissal, or Champion's conduct thereafter, warrant any aggravated or *Wallace*-type damages.

Issues

[52] The trial raised a number of issues:

1. Can Champion raise the record-keeping incident after the termination?
2. If so, did Champion have cause, either by virtue of the record-keeping incident itself or in combination with the other circumstances, to terminate Mr. Nelson's employment without notice or payment?
3. If no cause existed, what is the reasonable notice period?
4. If the reasonable notice period extended beyond December 31, 2007, has Champion established that Mr. Nelson would have retired by then anyway, and has thus suffered no loss or damage after that date?
5. Should Mr. Nelson's earnings be calculated to include an amount for bonuses, and if so, in what amount?
6. Is Mr. Nelson entitled to the long service award value?
7. Has Mr. Nelson failed to mitigate his damages, and if so, what effect does that have on his claim?
8. Is Mr. Nelson entitled to any aggravated or Wallace-type damages, and if so, in what amount?

Credibility Issues

[53] Champion argued that Mr. Nelson's evidence was not credible in some instances and Mr. Nelson was cross-examined on inconsistencies between his discovery evidence and his evidence at trial. Certainly, Mr. Nelson was not a perfect witness. However, there were few situations where Mr. Nelson's evidence at trial differed in any material or significant way from the evidence of others. I have, in two instances, commented on Mr. Nelson's credibility. Firstly, I have preferred Ms. Yurchak's evidence to his, and I have found that he exaggerated to some extent his evidence on his efforts to mitigate following his dismissal. Generally, however, I found Mr. Nelson to be a credible witness and basically accept his evidence.

[54] Similarly, with Mr. Golby, while he was challenged on his lack of candour with Mr. Nelson's parents regarding Ms. Bilodeau, his statement to Mr. Nelson that there were no

positions available at Champion when Mr. Nelson was dismissed, and the sincerity of his belief that *Canada Labour Code* requirements satisfied Champion's obligations on termination, his evidence on the whole was credible and I basically accept his evidence.

[55] It will be obvious in this decision that little turns on the credibility of the witnesses who testified.

1. Can Champion raise the record-keeping incident after the termination?

[56] There is no doubt that when Mr. Golby dismissed Mr. Nelson on June 25, 2007, he did not intend to dismiss him for cause. He wanted to terminate Mr. Nelson's employment, but also intended to pay him what the law required. He mistakenly thought that his obligations were satisfied by payment of the amount required to be paid by the appropriate statute - the *Canada Labour Code* - for Mr. Nelson's 24 plus years of service. Despite an earlier wrongful dismissal claim against Champion where the dismissed employee recovered significantly more than the statutory amount (*Henson v. Champion Feed Services Ltd.*, 2005 ABQB 215), Mr. Golby calculated the amount himself and paid that out to Mr. Nelson on the day he was dismissed.

[57] With respect to the ability to rely on after-acquired knowledge to uphold an employee's dismissal for cause, Champion cites *Carr v. Fama Holdings Ltd.*, 1989 CanLII240 (B.C.C.A.), *McIntyre v. Hopkin*, (1889), 16 O.A.R. 498 (Ont.C.A.), *Letendre v. Deines Micro-Film Services Ltd.*, 2001 ABQB 26, *Milsom v. Corporate Computers Inc.*, 2002 ABQB 877, *McKinley v. BC Tel*, 2001 SCC 38, and *Dowling v. Ontario (Workplace Safety and Insurance Board)*, 2004 CanLII 43692 (Ont. C.A.).

[58] In *McKinley*, the Supreme Court of Canada considered employee dishonesty in the context of dismissal for cause. The Court confirmed that employee dishonest could in appropriate circumstances give just cause for summary dismissal, but that an analytical framework was required to review the particular facts and circumstances of each case. Dishonesty "going to the core of the employment relationship" was held to "carry the potential" to warrant summary dismissal. See paras. 39, 40 and 57:

To summarize, this first line of case law establishes that the question whether dishonesty provides just cause for summary dismissal is a matter to be decided by the trier of fact, and to be addressed through an analysis of the particular circumstances surrounding the employee's behaviour. In this respect, courts have held that factors such as the nature and degree of the misconduct, and whether it violates the "essential conditions" of the employment contract or breaches an employer's faith in an employee, must be considered in drawing factual conclusions as to the existence of just cause.

But a second branch of jurisprudence sets out a separate analytical structure for this issue, and suggests that the only question for a trier of fact is whether

employee dishonesty exists. Once this is established, the conclusion that must be reached as a matter of law is that the employer had the right to dismiss its employee. It is to this second line of authority that I now turn.

...

Based on the foregoing considerations, I favour an analytical framework that examines each case on its own particular facts and circumstances, and considers the nature and seriousness of the dishonesty in order to assess whether it is reconcilable with sustaining the employment relationship. Such an approach mitigates the possibility that an employee will be unduly punished by the strict application of an unequivocal rule that equates all forms of dishonest behaviour with just cause for dismissal. At the same time, it would properly emphasize that dishonesty going to the core of the employment relationship carries the potential to warrant dismissal for just cause.

[59] *Dowling v. Ontario* considered misconduct, and stated at para. 56:

...the question is whether all the misconduct, characterized in context, was sufficiently serious that it gave rise to a breakdown in the employment relationship.

[60] In *Carr v. Fama*, the Court allowed the employer to argue that the employee's performance was unsatisfactory, despite a termination letter that suggested the contrary. The British Columbia Court of Appeal cited with approval *McIntyre v. Hockin* at page 501:

...It is now settled law that if a good cause of dismissal really existed, it is immaterial that at the time of dismissal the master did not act or rely upon it, or even did not know of its existence, or that he acted upon some other cause in itself insufficient. The main question always is were there at the time of the dismissal facts sufficient in law to warrant it....

[61] In *Letendre v. Deines*, the Court found that *Letendre* had perpetrated a fraud on the employer, and had lied at trial. Moen J. considered the after-acquired knowledge, and stated at para. 35:

The fraud was discovered following Letendre's termination. It is clear that an employer may rely on subsequently ascertained cause to justify termination without notice. *Lake Ontario Portland Co. Ltd. v. Groner* (1961), 28 D.L.R. (2d) 589 (S.C.C.) at 599; *Agarand v. Farm Business Consultants Inc.*, [2000] A.J. No. 421 (QB).

[62] In *Milsom v. Corporate Computers*, Veit J. cited with approval the decision in *Carr v. Fama*.

[63] Mr. Nelson cited *Langan v. Kootenay Region Metis Assn.*, 2008 BCSC 1169, *Tracey v. Swansea Construction Co. Ltd.*, [1964] O.J. No. 878 (H.C.J.), *Olsen v. Ritchie Bros. Construction Ltd.*, [1994] A.J. No 701 (Q.B.), *Stone v. SDS Kerr Beavers Dental, A Division of Sybron Canada Ltd.*, [2006] O.J. No. 2532 (S.C.J.), and *Lloyd v. Imperial Parking Ltd.*, [1996] A.J. No. 1087 (Q.B.).

[64] *Langan v. Kootenay* contains a useful summary of the law as it relates to just cause and incidents of dishonesty. The court looked at the circumstances to determine if the incident caused a legitimate failure in the confidence and trust that must exist between the employer and the employee. That concept, however, is one that pertains to honesty and trustworthiness, and not performance-related issues.

[65] Crawford J. recognized that a dismissal can be justified by proof of subsequently - ascertained facts on grounds differing from those alleged at the time of the dismissal (at para. 68) but also noted that in such cases, “the Court must assess whether there is a legitimate reason for the termination or whether what is being raised is simply an excuse by an employer who is seeking to escape its contractual obligations to the former employee”.

[66] That is essentially the point in *Stone v. SDS*, where Aitken J. characterized the employer’s use of reasons for dismissal other than those given at the time of dismissal as being “disingenuous” (at para. 104).

[67] *Tracey v. Swansea* and *Olsen v. Ritchie Bros.* relate to condonation of misconduct, which Mr. Nelson raises because of Mr. Smethurst’s involvement in the January, 2007 meeting with the Food Inspection Agency inspector, and Mr. Smethurst’s apparent knowledge (as one of Mr. Nelson’s superiors) of the improper record-keeping and the additions to the records made at that time.

[68] *Lloyd v. Imperial Parking* turns on its facts. There, Sanderman J. acknowledged that after-acquired knowledge can in appropriate circumstances be relied on to support a just cause dismissal, but there found that the conduct in question was not intentional dishonesty.

[69] As a result of my review of these cases, I conclude that Champion can rely on after-acquired knowledge of misconduct to support an allegation that cause for dismissal existed at the time of the dismissal, whether or not the dismissal was for cause or convenience at the time. *Carr v. Fama*, suggests that allegations of cause can be made after termination, even where the employer knew of the misconduct at the time of dismissal but chose not to rely on it at the time.

[70] *Lloyd v. Imperial Parking* suggests that after-acquired knowledge may be used to resist a claim for constructive dismissal.

[71] Of course, the extent of the employer's knowledge at the time of dismissal and the circumstances surrounding the dismissal are all relevant to the credibility of the employer's subsequent allegation of just cause. In *Carr v. Fama*, it is undoubtedly relevant that the employer thought that it had a right to terminate Ms. Carr on minimal notice, and only raised cause when a more substantial claim was advanced.

[72] Here, Mr. Golby did not suggest that he thought he had cause to summarily dismiss Mr. Nelson on June 25. Indeed, his actions indicate the contrary. He thought he was obliged to give Mr. Nelson pay in lieu of notice. His mistake did not relate to cause, it related to the amount of pay in lieu of notice.

[73] That being said, it is not improper for Mr. Golby to raise issues of dissatisfaction and employee misconduct after the fact. Alberta law does not recognize "near cause" as a basis for reducing the notice period or required pay in lieu of notice, although "near cause" might be combined with after-acquired knowledge of misconduct to amount to a totality of just cause retroactive to the time of dismissal. Despite Mr. Renouf's argument to the contrary, I do not characterize Champion's raising of the records issue post-termination as disingenuous.

2. Did Champion have cause, either by virtue of the record-keeping incident itself or in combination with the other circumstances, to terminate Mr. Nelson's employment without notice or payment?

[74] The record-keeping incident does not suggest any dishonesty on Mr. Nelson's part. Mr. Golby initially suggested that altering the bulk receipt record in January 2007 amounted to dishonesty, by fabricating records. But the evidence was clear and uncontradicted that the January 2007 entry was directed to be done by an inspector from Food Inspection Agency. As suspicious as Mr. Golby might be as to the accuracy of the information recorded by Mr. Nelson, and the accuracy of the information provided to Mr. Nelson by Mr. Bunning, there was no evidence called on behalf of Champion to suggest that Mr. Nelson fabricated any entries, or did anything that might be characterized as dishonest.

[75] I have no doubt that Mr. Golby takes record-keeping very seriously, and accurate records are fundamental to satisfying the Food Inspection Agency requirements and preventing contaminants from getting into the animal food stream. But it cannot be said that Mr. Nelson's role in the incident, and the resulting fine, had anything to do with dishonesty on Mr. Nelson's part.

[76] At worst on the evidence before me, an employee working under Mr. Nelson failed to properly document the receipt of the meat and the soy flush that followed. There is no evidence that Mr. Nelson knew of this, or should have known about this on November 24, 2006 when the

meat was delivered. Mr. Nelson caught the problem with the records on November 27, when he was reviewing them for the purposes of signing off. So far, he was doing his job properly. His failing on November 27 was in not ensuring that the record was properly amended by adding accurate and complete details of the flush to the record. He might also be criticized for not taking disciplinary action against Mr. Bunning, who is the one that had failed to properly create the record in the first place.

[77] Having regard to the necessity for keeping accurate records, the reasons for the requirement and the consequences of not keeping accurate records, Mr. Nelson can indeed be faulted for not ensuring that the records were properly amended. He can perhaps also be faulted for not taking stronger disciplinary action against Mr. Bunning, but since he was satisfied that the flush had occurred, and no evidence was led concerning Mr. Bunning's work history or record, Mr. Nelson's approach to discipline may not have been inappropriate.

[78] But there was no evidence of dishonesty and no evidence of dishonest intent. I accept Mr. Nelson's evidence in that regard. The most that can be said is that Mr. Nelson did not do his job properly. I do not think an incident of poor performance can necessarily be characterized as misconduct, and in this situation, I do not find that Mr. Nelson's error in record keeping amounted to misconduct. It was a serious error, but without any wilfulness or bad intent.

[79] Even if the error, in a critical area such as source records, could be characterized as misconduct, one incident such as was described in the evidence is not sufficient to warrant summary dismissal. There was no evidence of any other record-keeping errors. Champion has had over 2 years since the date of dismissal to search its records for other errors. Indeed, I heard in the evidence that Champion had been commended at some stage for the quality of its record-keeping. Some credit for that must go to Mr. Nelson, as it appears that it was the employees who reported to him that were directly responsible for creating the records in the first instance.

[80] Some serious errors might result in summary dismissal, but that will depend on the circumstances and potentially the consequences. Here, the circumstances and consequences do not warrant summary dismissal. Mr. Golby's loss of faith in all of Mr. Nelson's record-keeping as a result of this one incident was, in my view, an exaggerated response disproportionate to the incident itself.

[81] No doubt that this incident could be considered in the context of other unrelated incidents of unsatisfactory performance. But Mr. Nelson had not been warned of potential consequences of errors or further unsatisfactory performance. He was unaware (legitimately) that his job was in jeopardy, because that had never been expressed to him by Mr. Golby. Had the record-keeping incident occurred following warnings arising out of earlier incidents or performance issues, the result might be different. But in the absence of warnings for a nearly 25 year employee who had received a performance-related bonus less than a year earlier and a raise for 2007, the combination of issues is clearly insufficient to warrant summary dismissal.

[82] At best, some disciplinary action would be warranted. But not dismissal.

[83] Champion has failed to establish that grounds for summary dismissal existed as a result of the record-keeping incident itself or in combination with other performance-related issues.

[84] I thus need not deal with whether Champion's ability to rely on the record-keeping incident after Mr. Nelson's dismissal because it was apparently known by Mr. Smethurst, one of Mr. Nelson's superiors. Mr. Nelson's evidence, which I accept, was that Mr. Smethurst was present when the record-keeping deficiencies were discussed with the Agency inspector in July, 2007. That is confirmed to some extent in the correspondence sent to Champion in July, 2007 with the notice of fine. However, the person responsible for hiring and firing was Mr. Golby. He made the personnel decisions, not Mr. Smethurst. I do not think it can be said that Champion condoned Mr. Nelson's errors because nothing was done about them when Mr. Smethurst learned of them. It is Mr. Golby's knowledge that is relevant, and he did not become aware of the incident until July 13, 2007. He was entitled to consider the incident and act on it when he got notice of it, regardless of whether another employee (not in the hiring and firing process) had such knowledge.

[85] I also need not deal with Champion's submissions that there should be an adverse interest drawn against Mr. Nelson for failing to call witnesses relating to the record-keeping incident. I was referred to *Howard v. Sandau*, 2008 ABQB 34, which is a useful analysis of that area of the law. But I need not embark on any analysis myself. Champion seemed to be of the view that Mr. Nelson was required to prove the accuracy of the records; the opposite is true. If Champion wanted to establish cause for dismissal, it had to prove that the records were false. They have not done so. Mr. Nelson was not required to call Mr. Benning or any other former colleague himself.

3. If no cause existed, what is the reasonable notice period?

[86] No two cases are identical. And there is no set formula that is to be applied. *Bardol v. Globe and Mail Ltd.*, (1960), 24 D.L.R. (2d) 140 (Ont. H.C.) At p. 145 (confirmed in *Wallace v. United Grain Growers Ltd.*, [1997] 3 S.C.R. 701) gives instruction as to the calculation of the appropriate notice period. It requires an analysis of a number of factors in the context of determining how long it is likely to take this employee to find suitable alternate employment. The analysis is performed prospectively, at the time of the dismissal, rather than retrospectively at the time of trial. The length of time it actually takes the dismissed employee to find suitable alternate employment may be a relevant consideration, but is not determinative.

[87] The *Bardol* factors are:

1. The nature of the employment - the more senior the position, the longer it is likely to take to find a replacement position. There are fewer senior management jobs around.

2. The length of service - the longer an employee has worked for one employer, the more difficult it may be to find an alternate job. Either because the employee has narrowed his or her skills by working for one employer for a long time, or the employee has been paid more than the job is worth because of long service.
3. The age of the employee - the older the employee is, the less likely he or she is to find a suitable position, or the longer it is likely to take. Older employees are sometimes perceived as less worthwhile to invest in.
4. The availability of suitable similar employment having regard to the employee's experience, training and qualifications together with surrounding economic circumstances - what is the realistic prospect of this employee getting a similar replacement job? What is the job market like? In good economic times, jobs may be plentiful and the employee may have little difficulty finding a good replacement job; in poorer times, there may be few jobs around.

[88] As to the nature of his employment, Mr. Nelson was in a lower level management position, with no powers of hiring or firing. He did have a number of people working under him and reporting to him, and he was certainly within Champion's management team in Westlock. His job skills appeared from the evidence to be portable. He supervised production workers and made sure a manufacturing facility was operational. He had hands on experience and qualifications with respect to boilers in smaller facilities. There was nothing about Mr. Nelson's experience, qualifications or the nature of the position to suggest that Mr. Nelson might have a difficult time finding another suitable job. His salary did not appear to be so high as to rule out a number of other positions that might be suitable for him.

[89] His length of service is a factor that cuts both ways. It demonstrates loyalty and shows a history of reasonably satisfactory work (despite the termination). Long term employees might be more attractive to a new employer, especially a competitor of the old employer. While it generally suggests a longer notice period than for employees with less years of service, this is a factor that ties in with the likelihood of finding similar employment. Notice or pay in lieu of notice is not intended to be a reward for long service; rather it is a measure of damages for breach of the contractual obligation to give reasonable notice. Damages flow from the assessment at to the likelihood and timeliness of the employee finding alternate employment, not as a function of the length of service. There is nothing in Mr. Nelson's length of service with Champion that I would characterize as a negative factor in him finding alternate employment.

[90] Here, although he had nearly 25 years of service, Mr. Nelson was only 45 years old at the time of his dismissal. He had not reached an age where this was likely to be a significant factor in his ability to find a new job.

[91] With respect to the availability of suitable replacement employment, the evidence at trial was scant. Mr. Nelson made few inquiries as to new employment, and made little effort to test

the marketplace. He was concerned that the letter to Champion's suppliers announcing his termination may have adversely affected his chance of finding another job, especially with the recipients of the letter. But there was no evidence as to the availability of work in Westlock or area. There was a suggestion that there might have been an opportunity for Mr. Nelson at the Champion pet food plant in Morinville, but that was speculative.

[92] Mr. Nelson made a fairly quick decision that rather than look for other employment, he would start up his own renovation business. He was dismissed on June 25 and testified that he had essentially taken a couple of weeks off and then decided to start his own business. His new renovation business was apparently operating by August 1, so he was out of work for only a little more than a month. There was little in the evidence for me to deal with in connection with the fourth *Bardol* factor.

[93] A number of cases were submitted by counsel:

Bagby v. Gustavson International Drilling Co. Ltd., [1980] A.J. No. 743; *Birch v. Grinnell Fire Protection a division of Tyco International of Canada*, [1998] B.C.J. No. 1602; *Burry v. Unitel Communications Inc.*, [1997] B.C.J. No. 2790; *Carlson v. Ideal Cement Co.*, [1986] B.C.J. No. 2575; *Carlson v. Ideal Cement Co.*, [1987] B.C.J. No. 1827; *Ferguson v. Kodak Canada Inc.*, [1992] B.C.J. No. 2545; *Girling v. Crown Cork & Seal Canada Inc.*, [1994] B.C.J. No. 164; *Girling v. Crown Cork & Seal Canada Inc.*, [1995] B.C.J. No. 1873; *Herman v. Manalta Coal Ltd. and Loram Co. Ltd.*, [1978] A.J. No. 863; *Johnston v. Algoma Steel Corp.*, [1989] O.J. No. 124; *Millha, v. B.C. Transit*, [1995] B.C.J. No. 1161; *Walsh v. UPM-Kymmene Miramichi Inc.*, 2003 NBCA 32; *Waterman v. Frisby Tire Co. (1974) Ltd.*, [1995] O.J. No. 1877; and *Webster v. British Columbia (Hydro and Power Authority)*, [1992] B.C.J. No. 911, *aff'd* [1994] S.C.J. No. 92.

[94] The cases cited show a range of 15 to 24 months, for management - type employees with lengthy service. The majority of the cases were ones where 18 months was found to be the appropriate notice period. All of these cases involved lengthy service, although Mr. Nelson appears to be younger by at least 10 years than the most of the plaintiffs in those cases. I do not intend to distinguish each of the cases individually. They support general proposition that there is a practical ceiling of 24 months notice or pay in lieu of notice in Alberta. It takes exceptional circumstances to go beyond that level. No such circumstances are present here, and Mr. Nelson does not argue that he is entitled to more than 24 months notice.

[95] While employment standards legislation in Alberta tops out at 8 weeks for employees with 10 years or more service, legislated periods are statutory entitlements that are not particularly relevant to common law notice requirements in that they set a floor, but by no means a ceiling.

[96] There is also no particular force to a “month per year of service” rule of thumb, although it can be useful in some cases as a measuring stick for checking purposes. Because of the practical ceiling, that rule of thumb becomes less helpful as the length of service increases.

[97] The cases at the lower end of the range suggested are situations where the length of service is not particularly long, or the terminated employee is not particularly old, or where the nature of the employment was not particularly specialized (such as high management, or job-specifically skilled), or where the circumstances were such that finding suitable alternate employment was not expected to be difficult.

[98] Some element of guess-work is required when the notice period is being set in advance (i.e. before the employee has a new job, or if the employee has not found a suitable job by the time of trial) and the trial date is still within the “range” of possible notice periods. The latter is a rare occurrence in Alberta.

[99] More often than not, the employee has found a job by the time of trial, and the parties are arguing as to whether the date of the new job is or is not determinative of the appropriate notice period.

[100] Here, Mr. Nelson created a new job for himself, well within any notice period that might be found reasonable. But that does not answer the issue, because damages are based on the difference between what would have been earned from the old employment over the notice period and what was actually earned or deemed to be earned over the notice period.

[101] Mr. Nelson had lengthy service. He was in a management position, but the evidence suggests that the skills he had were somewhat portable and his management position was not so high that there would be few jobs around at that level. His age would not appear to be a significant factor as he was about 45 at the time of his dismissal. There is no significant evidence as to what the job market was within the Westlock area or for that matter other areas if relocation was necessary.

[102] I can and do take judicial notice of the fact that the period from July, 2007 until the sub-prime mortgage crisis in the US, the fallout of that in Canada, and the huge drop in oil and commodity prices in the summer and fall of 2008, the economy in Alberta generally was buoyant and the unemployment rate was low.

[103] There was no evidence before me that there were plenty of jobs available to someone with Mr. Nelson’s qualifications and skills at any period; conversely there was no evidence that such jobs were scarce. Nevertheless, when someone’s employment is terminated in buoyant economic times, one would expect that the finding of suitable replacement employment would not be too difficult, barring negative factors such as advancing years or highly specialized skills.

[104] Because of all of these factors, I conclude that the reasonable notice period here should be set at 15 months. I am satisfied that with diligence, Mr. Nelson would likely have been able to find replacement employment within that period of time, if not sooner. This would take the notice period to the end of September, 2008.

4. If the reasonable notice period extended beyond December 31, 2007, has Champion established that Mr. Nelson would have retired by then anyway, and has thus suffered no loss or damage after that date?

[105] Mr. Nelson testified that he did not plan to retire after his 25th anniversary, in December, 2007. He denied that he told his co-worker Tamara Yurchak of these plans. He denied that markings on his wall calendar for 2007 were related to counting off the weeks he had left to work with Champion.

[106] Ms. Yurchak testified that Mr. Nelson asked her about the timing of the Christmas party, and told her that he planned to retire by the end of 2007 and start his own renovation business.

[107] I accept Ms. Yurchak's evidence in that regard. Her evidence was clear, she had no personal interest in the issue, and she was not shaken in cross-examination. That by extension means that I reject Mr. Nelson's testimony that he had no such discussion with Ms. Yurchak. I do not go so far as to say that he was attempting to mislead the Court; he may have been mistaken or forgot about the conversation. He may at the time have been expressing some restlessness.

[108] That being said, there is a difference between having a conversation with a co-worker about retirement plans and putting those plans into effect. Mr. Nelson expressed no discontent about working at Champion. By his evidence, he was doing a good job, and any dissatisfactions expressed to him by Mr. Golby were treated as "fine tuning". He did not think that his job was in jeopardy.

[109] Nevertheless, there was evidence of a strained relationship with his sister, who was his superior at the company. I accept that Mr. Nelson was considering retirement or changing careers, but that he had not yet acted on those plans.

[110] The evidence about the refinancing of Mr. Nelson's home is interesting in this regard. While Mr. Nelson argues that the timing of his dismissal was inappropriate because of Champion's knowledge that he was refinancing his home, the documents in evidence satisfy me that Mr. Nelson elected to proceed after his termination, and despite his termination. The refinancing is not an aggravating feature to the termination itself. The availability of the proceeds of refinancing turned out to be a benefit, as Mr. Nelson was able to divert some of the funds from home renovations into his new renovation business.

[111] The case submitted by Mr. Massing: *Magnan v. Brandt Tractor Ltd.*, 2007 ABQB 437, (appeal allowed, 2008 ABCA 345), along with the Plaintiff's cases: *Tolman v. Gearmatic Co.*,

[1986] B.C.J. No. 481 (C.A.), *Hewitt v. Craig Brothers Ltd.*, 2005 SKQB 392 and *Randall v. Wayne Pitman Ford Sales Ltd.*, [1992] O.J. No. 184 ((C.J. Gen. Div.), establish that an intention to retire is important to the question of damages (*Magnan* at para. 24).

[112] I have also considered *Johnston v. Algoma Steel Corp.*, [1989] O.J. No. 124 (Ont. S.C.); *Leonetti v. Hussmann Canada Inc.*, [1998] O.J. No. 1911 (Ont. C.A.); *Tolman v. Gearmatic Co.*, [1986] B.C.J. No. 481 (B.C.C.A); *McLaren v. Pacific Coast Savings Union*, 2001 BCCA 388; *Hewitt v. Craig Brothers Ltd.*, 2005 SKQB 392; and *Robinson v. Team Cooperheat-MQS Canada Inc.*, 2008 ABQB 409.

[113] In *Magnan*, Sirrs J. found at trial that Mr. Magnan would have retired on March 31, 2005 and limited his damages for wrongful dismissal (based on constructive dismissal) to that date. The issue in that case related to Brandt Tractor believing that Mr. Magnan was going to retire on his 65th birthday and announcing that his replacement had been hired as of that future date. Mr. Magnan advised that he did not intend to retire or resign, and subsequently treated the circumstances as being constructive dismissal.

[114] The Court of Appeal allowed Mr. Magan's appeal and extended Mr. Magnan's damages by an additional 7 months, although there decision was based on the fact that the retirement issue had not been pled.

[115] The cases cited by Mr. Nelson are, in my view, closer to the situation here. In each of those cases, retirement plans had been expressed, but not committed to. Randall *Tollman* and *Hewitt* all discuss estoppel, and all of those cases emphasize the need to look at whether the employee has acted on the intention to retire.

[116] The other cases referred to are to similar effect.

[117] Here, there is no issue of estoppel. Mr. Gobly did not know about Mr. Nelson's "plans" until after Mr. Nelson had been dismissed, so could not have relied on the plans.

[118] This is not a situation where Mr. Nelson had announced his retirement in any formal way, or taken any steps to commit to retirement. He was not approaching customary retirement age. If he was thinking of retirement, or other options outside of Champion, he was not bound by those, and essentially was keeping all options open.

[119] Even if he planned to retire at the end of December 2007, he was under no obligation to do so, and until he actually announced his retirement or resignation and Champion acted on that in some way to their detriment, he could always change his mind.

[120] In these circumstances, Champion is not in a position to hold Mr. Nelson to these uncertain retirement plans and use the end of 2007 as a cut-off for any notice period or compensation period.

5. Should Mr. Nelson's earnings be calculated to include an amount for bonuses, and if so, in what amount?

[121] Whether or not bonuses are to be included in the compensation package for damages purposes is dealt with in *Lippa v. Can-Cell Industries Inc.*, 2009 ABQB 684 and *Herman v. Manalta Coal Ltd. and Loram Co. Ltd.*, [1978] A.J. No. 863 (C.A.).

[122] In *Lippa*, Verville J. summarized the principles relating to bonuses, quoting from *Leduc v. Canadian Erectors Ltd.*, (1996), C.C.E.L. (2d) 216 (Ont. Gen. Div.) At para. 96:

(a) The starting point is always to attempt to determine if there is any evidence of the intention of the parties regarding the entitlement to, and the quantification of, the bonus.

...

(f) If, in the case of quasi or non-formula bonuses, they are routinely awarded in a certain amount or in a certain range, they should be included in the assessment of damages, just like any other fringe benefit.

(g) In the case of quasi or non-formula bonuses, which, due to their very nature, require an element of discretion, that discretion must be exercised reasonably and, wherever possible, on the basis of objective criteria.

(h) A bonus scheme that, historically, has become an integral part of an employee's wage or salary structure is a benefit that has a value and should form part of the calculation of the employee's damages.

(i) If the historical conduct of the parties gives rise to a reasonable expectation of a bonus, then the bonus is a benefit that has a value and should form part of the calculation of the employee's damages.

(j) A distinction must be made between the entitlement to a bonus and the quantification of the bonus. If the former is established the court will grapple with the latter.

[123] To the above list I would add that, with respect to quasi and non-formula bonuses, there may be instances where it would be appropriate, in quantifying the bonus, to allow for positive and negative contingencies.

[124] *Herman v. Manalta* emphasizes the importance of looking to the history of bonuses.

[125] Despite the fact that the bonuses were discretionary in Mr. Golby's hands, the evidence shows that for all of the years for which I was provided with information, bonuses were paid. Even where Mr. Nelson's review by Mr. Golby might objectively be viewed as less than satisfactory, a bonus was still given to Mr. Nelson. From the pattern of conduct, Mr. Nelson had every reason to expect a bonus in 2007, and for so long as the pattern of bonuses continued. The bonuses had become part of the usual compensation package.

[126] As to the amount, the fairest way is to use the average of all of the years for which information has been provided. Mr. Renouf suggests that the lowest year be deleted from the averaging, as that was an unusual year where profits were down. Were I to delete the lowest year, I would also delete the highest year for the same reason as that might reflect a year where the profits were unusually high. As a result, the bonus component of the compensation package should be calculated using the average of the years 2002 to 2006, namely \$6,490.00.

6. Is Mr. Nelson entitled to the long service award value?

[127] There is no significant issue about this. The evidence was clear that long service employees were historically given a \$5,000.00 jewelry certificate from a local jeweller. The notice period would have extended well past Mr. Nelson's 25th anniversary with Champion, such that he could reasonably have expected to receive the award or its value. The amount of \$5,000.00 should be added to the compensation package that Mr. Nelson would have received over the notice period.

7. Has Mr. Nelson failed to mitigate his damages, and if so, what effect does that have on his claim?

[128] It is clear from *Michaels v. Red Deer College*, [1976] 2 S.C.R. 324 that the onus is on the defendant in a wrongful dismissal action (as in any other action, to establish that the plaintiff has failed to mitigate his or her or its damages. The plaintiff is not under any primary onus to prove that proper mitigation efforts were undertaken. Further, from *Michaels*, it is clear that the even if the defendant proves that the plaintiff did little or nothing to mitigate, it is up to the defendant to prove the financial consequences of the plaintiff's failure. In other words, the onus is on the defendant to show that with reasonable efforts to mitigate, the plaintiff would have been able to earn a certain amount of money. A plaintiff who sits at home and does nothing to find alternate employment is not automatically disentitled to compensation.

[129] The Defendant argued that Mr. Nelson's attempts to mitigate his damages were inadequate, in that he spent only a short time following his dismissal considering other employment within Westlock, and that he never looked at potential employment with Champion Pet Foods in Morinville. But no specifics were put in evidence of any actual job opportunity that might have been suitable for Mr. Nelson during the period immediately following the termination, or for that matter, during the entire notice period.

[130] Mr. Nelson's evidence was that he made a few inquiries with car and implement dealers, concluded that there was not anything available for him, and quickly decided to start his own renovation business. That is consistent with his discussion with Ms. Yurchak as to his retirement plans. I infer from the evidence that Mr. Nelson's long term plans were to start his own renovation company. Those plans were accelerated by his termination. Faced with looking for another job, and perhaps having to relocate or face longer drives to and from work, he took the opportunity to start the business he had hoped to start some day.

[131] In the absence of evidence from the Defendant as to other employment available to Mr. Nelson at the time, I do not think it was unreasonable for Mr. Nelson to start his own business. Indeed, the results from that business show that he was successful in the first year of operations in earning more than his basic salary from Champion.

[132] It would be pure speculation on my part to find that Mr. Nelson could have found a more remunerative job shortly after his dismissal. He might be criticized mildly for taking the rest of June and July "off" before starting up his own business, but in the circumstances of a dismissal without notice after nearly 25 years of employment with Champion, some period of adjustment is understandable. Indeed, from a mitigation point of view, it appears that he was working full time at his new business within 5 weeks of his dismissal, and he had previously planned to take some time off work over the summer.

[133] Champion relied heavily on a recent Ontario decision, *Plotogea v. Heartland Appliances Inc.*, [2007] O.J. No. 2717, where Reilly J. reduced the 9 month notice period he ordinarily would have awarded to two months, because he failed to take reasonable steps to secure alternate employment after his dismissal. It is difficult to reconcile this case with *Michaels* as it appears to place the onus on the dismissed employee rather than the employer. However, there was evidence that the employee had been building houses, living in them briefly, selling them at a significant tax-free profit (as a capital gain on a principal residence) and then starting again with the next house. O'Reilly J. found that the plaintiff had continued to focus on his house-building activities. The amount of the profits was not before the court, but he found that "Mr. Plotogea gained significant income from house building, whether taxable or not." No analysis of the law relating to mitigation was done, and I do not see this case as a precedent which might be seen as contradicting *Michaels*. It appears that the judge was satisfied on the evidence that the plaintiff had suffered no loss, rather than that the plaintiff had failed to mitigate (even though the decision was expressed in the latter terms). To the extent that it is viewed as a case on the duty to mitigate, I am unable to agree with it, and I would view it as a case where the judge came to the right result but for the wrong reasons.

[134] At the end of this analysis, I am not satisfied that Mr. Nelson failed to mitigate his damages. Starting his own company was reasonable in the circumstances, and there was no untoward delay in doing so.

8. Is Mr. Nelson entitled to any aggravated or Wallace-type damages, and if so, in what amount?

[135] The Supreme Court has put limitations on “*Wallace*” damages in *Honda Canada Inc. v. Keays*, 2008 SCC 39. There, the majority of the Court reconsidered *Wallace v. United Grain Growers*, [1997] 3 S.C.R. 701, and held at para. 57:

Damages resulting from the manner of dismissal must then be available only if they result from the circumstances described in *Wallace*, namely where the employer engages in conduct during the course of dismissal that is “unfair or is in bad faith by being, for example, untruthful, misleading or unduly insensitive”...

[136] Relying on *Fidler v. Sun Life Assurance Co. of Canada*, [2006] 2 S.C.R. 3, 2006 SCC 30, the Court held that it was no longer necessary to prove that the employer had committed an independent actionable wrong before it can be liable for mental distress damages to an employee, reversing to some degree *Vorvis v. Insurance Corp. of British Columbia*, [1989] 1 S.C.R. 1085 and *Wallace* on the subject of damages beyond damages for breach of contract.

[137] Where mental distress for breach of the employment contract is within the reasonable contemplation of the parties at the time of the contract, such damages may be available (at para. 55).

[138] *Wallace* damages for bad faith dismissal are limited to circumstances “where the employer engages in conduct during the course of dismissal that is unfair or is in bad faith by being, for example, untruthful, misleading or unduly insensitive” (at para. 57), but the Court imposed the additional requirement that such damages must only be awarded under the “reasonable contemplation of the parties” principle in *Hadley v. Baxendale*, (1854), 9 Ex. 341, 156 E.R. 145.

[139] The Court confirmed that “normal distress and hurt feelings resulting from dismissal are not compensable” (at para. 56).

[140] Applying these principles to the case at bar, there is no evidence that the parties contemplated, when Mr. Nelson was hired in 1982 at age 20, that he would suffer unduly from dismissal, or that any special circumstances existed to alert Champion to the likelihood of mental distress from Mr. Nelson’s dismissal. There is thus no basis under *Honda v. Keays* to award any aggravated damages for mental distress, or damages for bad faith dismissal under *Wallace* as subsequently limited by *Fidler* and *Honda*.

[141] Beyond that, the evidence falls far short of establishing that Mr. Nelson’s dismissal was unfair or was in bad faith. There was no undue sensitivity on Mr. Golby’s part, and the only statement that may have been untruthful was Mr. Golby’s response to Mr. Nelson’s question as to whether there were any other positions available. Instead of saying to Mr. Nelson that there

were other positions, but Champion was not prepared to offer one of them to Mr. Nelson, Mr. Golby told Mr. Nelson that there were no other positions, even at the labourer level. The specific response appears to have been untruthful (having regard to Mr. Nelson's evidence that one of the production workers had quit the week before Mr. Nelson's termination), although was not what I would characterize as unduly insensitive.

[142] The conversation Mr. Golby had with Mr. Nelson's parents may have been objectionable to Mr. Nelson, but it occurred after his termination. Mr. Golby's evidence as to the conversation he had with Mr. Nelson's parents (which was the only evidence on the subject) was to the effect that he avoided disclosing anything that might be personal to Mr. Nelson, and his motivation was to try to head off any family discord in the event their daughter and Mr. Nelson's sister, Ms. Bilodeau, was suspected of having something to do with the termination. While he may not have been completely candid to the Nelsons about that, his motives were pure and there was no evidence that this discussion caused Mr. Nelson any difficulties with his parents.

[143] Aggravated damages or bad faith dismissal damages are not automatically awarded if the employer is not entirely candid with the employee at the time of dismissal; the employee's reaction or response must also be considered. Here, the evidence did not suggest that Mr. Nelson was anything more than unhappy at being dismissed. He did not express anger, and was not (in the evidence before me) particularly upset or distressed about his dismissal.

[144] The issue about the refinancing is of no assistance in this regard. As discussed above, Mr. Nelson could have cancelled the refinancing if he had been concerned about his ability to make the higher payments.

[145] Even if mental distress or upset had been in the contemplation of the parties when Mr. Nelson was hired, he did not suffer anything more than the "normal distress and hurt feelings" resulting from his dismissal.

[146] *Wallace*-type damages have sometimes been awarded where the employer has refused to provide the employee with a letter of reference. *Honda* may have reversed that type of award. Of course, if the employer is maintaining a dismissal for cause position, it is in a catch-22 situation. How does the employer provide a letter of reference for an employee (other than one that simply confirms that the employee worked at a certain position for a certain length of time and was paid a certain salary) while maintaining a just cause defence? But if the employer loses the just cause argument, the employee's damages are potentially aggravated by the absence of a letter of reference. The absence of a letter of reference may well have a negative effect on the employee's ability to mitigate, which may have the effect of increasing the damages if the employee is successful in the litigation. But that conundrum is for the employer to resolve early in the dispute. An employer who dismisses an employee for cause and maintains that position risks paying the employee significantly more than if the employee had been dismissed on notice or pay in lieu of notice.

[147] Here, Champion refused to provide a letter of reference to Mr. Nelson. Mr. Golby had drafted one, but did not provide it promptly (or at all) when he learned of the fine from Canada Food Inspection Agency. This, together with the curious letter to Champion's suppliers that Mr. Nelson was no longer working for Champion, could have had an impact on Mr. Nelson's mitigation efforts, and could have led to a measure of Wallace-type damages. But the absence of a letter of reference did not impact on Mr. Nelson's mitigation efforts. There was nothing defamatory about the letter sent to the suppliers, but it might have had a chill effect on Mr. Nelson's prospects of employment with any of them.

[148] But Mr. Nelson had not even prepared a resume himself, before deciding to start his own business. And he did not apply to any of Champion's suppliers for a job. As a result, no damages were suffered as a result of either of these matters.

Conclusion

[149] Mr. Nelson was wrongfully dismissed. His contract of employment was broken when Champion failed to give him reasonable notice of the termination of his employment. Champion did not have cause at the time of his dismissal, nor did the after-acquired knowledge of the documentation errors give grounds for termination without notice.

[150] In the particular circumstances of Mr. Nelson's employment, a period of 15 months' notice was reasonable. The payment of 58 days' basic pay was insufficient.

[151] For the purposes of calculating the remuneration Mr. Nelson would have earned over the notice period, a bonus amount of \$6,490.00 per year, based on the average of the bonuses paid to Mr. Nelson from 2002 to 2006 should be included as part of his compensation package. Additionally, for 2007 Mr. Nelson is entitled to receive \$5,000.00 in lieu of the long service award he would have received by reaching 25 years' employment with Champion in December, 2007.

[152] Champion has not proven that Mr. Nelson failed to mitigate his damages by starting his own renovation business rather than searching for alternate employment. Nor is Champion entitled to shorten the notice period because Mr. Nelson was contemplating retirement at the end of 2007 as he had not committed to retirement at that time.

[153] Mr. Nelson is not entitled to any aggravated damages, mental distress damages, or *Wallace*-type damages.

Calculation of Damages

[154] The parties are agreed that Mr. Nelson's basic salary was \$54,900.00 as at the time of his dismissal. The value of his benefits was \$4,180.00. His average bonus adds \$6,490.00 to that amount, for a total annual compensation package of \$65,570.00.

[155] Mr. Nelson would have earned \$81,961.25 over the 15 month notice period, plus an additional \$5,000.00 by way of the long service award, for a total of \$86,962.50.

[156] To be deducted from that amount is the \$12,246.70 paid to him on the termination of his employment.

[157] Champion is also entitled to the benefit of Mr. Nelson's earnings through his new company by way of mitigation. Mr. Nelson earned \$20,000.00 in 2007 - 2008 but Nelson Contracting suffered an overall loss of \$420.00. That amount should be deducted from Mr. Nelson's earnings. I agree with Mr. Massing that the rent shown in the company's financial statements was essentially additional income to Mr. Nelson, so an additional \$4,800.00 per year (\$400.00 per month) should be added to Mr. Nelson's earnings for mitigation purposes.

[158] Mitigation from August 1, 2007 to July 31, 2008 is thus set at \$24,380.00.

[159] For the period August 1, 2008 to September 30, 2008, Mr. Nelson is deemed to have earned 1/6 of his 2008-2009 earnings from his company (\$15,000.00) plus the rent (\$4,800.00), plus 1/6 of the company's after-tax retained earnings (\$19,662.00). This results in mitigation for the final 2 months of the notice period of \$6,577.00.

[160] The total deductions from Mr. Nelson's damages are therefore \$43,203.70.

[161] While I would be inclined to accede to Mr. Massing's argument that the before-tax earnings should be used for the purposes of mitigation, and I am of the view that his argument is correct, the Court of Appeal came to the opposite conclusion in *Homes v. PCL Construction Management Inc.*, [1994] A.J. No. 850 (C.A.), and I am bound to follow that case despite my disagreement with that aspect of it.

[162] As a result, I award Mr. Nelson \$38,758.80 in damages. He is entitled to prejudgment interest on that amount from June 25, 2007, and costs on the appropriate column (subject to the impact of any offers of judgment, if any). If the parties are unable to agree on costs, they may speak to me about them within 30 days from the dates of this decision.

[163] I am grateful to counsel for the professional manner in which this case was presented and argued.

Heard on the 6th day of May, 2010.

Dated at the City of Edmonton, Alberta this 16th day of June, 2010.

Robert A. Graesser
J.C.Q.B.A.

Appearances:

Simon M. Renouf, Q.C.
for the Plaintiff

Barry J. Massing
for the Defendant