Court of King's Bench of Alberta

Citation: Babcock v Thuro Inc, 2026 ABKB 615

Date: 20260903
Docket: 2201 01997
Registry: Calgary

Between:

Dale Babcock

Appellant

– and –

Thuro Inc.

Respondent

Reasons for Decision of the
Honourable Justice D. Jugnauth

Appeal from the Decision of
Applications Judge J.T. Prowse
Dated the 22nd day of August 2024
Action No. 2201 01997

I. Introduction

[1] This appeal concerns the effect of long-term disability benefits on a claim for wrongful dismissal. The Appellant was provided approximately 13 months of working notice before his employment was scheduled to end. During the notice period, he became disabled and began receiving long-term disability benefits. The Applications Judge summarily dismissed the action after concluding that an earlier decision on similar facts was binding and that the Appellant could not establish any compensable loss.

[2] The Appellant argues that the Applications Judge misapplied the doctrine of horizontal *stare decisis* and failed to properly consider the legal significance of employee-funded disability

benefits. The Respondent argues that the case is governed by prior authority and that the Appellant suffered no recoverable loss once he became entitled to disability benefits.

[3] I would allow the appeal in part. In my view, the Applications Judge erred in treating the earlier decision as determinative of the outcome. On a proper application of the governing authorities, there is a genuine issue requiring a trial concerning whether the Appellant's long-term disability benefits should relieve the Respondent of its obligation to provide damages in lieu of reasonable notice.

[4] However, the record does not permit a fair and just determination of that issue on summary judgment. The order dismissing the action must therefore be set aside, but I am not prepared to grant summary judgment in favour of the Appellant.

II. Background

[5] The Appellant commenced employment with the Respondent in January 1998. He remained employed for approximately 24 years. He was 62 years old when he received notice that his employment would end.

[6] Throughout his employment, the Appellant worked in operational roles associated with the Respondent's sewer and water maintenance business. By late 2020, the Respondent had become concerned about the effect of the Appellant's rheumatoid arthritis on his ability to continue performing physically demanding field work. The Respondent considered whether the employment relationship had become frustrated. Ultimately, it elected not to pursue that course. Instead, it decided to provide the Appellant with advance notice that his employment would come to an end.

[7] By letter dated November 20, 2020, the Respondent advised the Appellant that his employment would terminate effective December 15, 2021 ("Termination Letter"). The Termination Letter offered an additional payment of $10,000 in exchange for a signed release. The Appellant did not sign the release and did not receive the additional payment.

[8] Following delivery of the Termination Letter, the Appellant continued to work for the Respondent. During that period, the Respondent contemplated transitioning him into a training-oriented role that would be less physically demanding than his previous duties. The Appellant did not fully transition into the training role. The Appellant remained actively employed until June 2021.

[9] On June 11, 2021, the Appellant commenced a medical leave of absence because of his rheumatoid arthritis. He received short-term disability benefits from June 19, 2021 until October 15, 2021. He subsequently qualified for long-term disability benefits (LTD) commencing October 16, 2021. The Appellant never returned to active employment after taking his medical leave and apparently remains a beneficiary of LTD.

[10] The Appellant's employment ultimately ended on December 15, 2021 in accordance with the notice previously provided by the Respondent. Thereafter, the Appellant commenced this action alleging that the approximately 13 months of working notice provided by the Respondent was insufficient at common law. He seeks damages for wrongful dismissal.

[11] The Respondent denies liability. It maintains that the working notice provided to the Appellant was reasonable. In the alternative, it argues that any entitlement to damages was extinguished once the Appellant became disabled and began receiving disability benefits. It was on that basis that the parties brought competing applications for summary judgment.

III. The Decision of the Applications Judge

[12] The Applications Judge heard competing applications for summary judgment. The Appellant sought summary judgment on liability and damages. The Respondent sought dismissal of the action. The central issue before the Applications Judge was the effect of the Appellant's receipt of disability benefits during the period of working notice.

[13] The Respondent argued that the case was materially indistinguishable from ***Belanger v Western Ventilation Products Ltd***, 2019 ABQB 571 (per AJ Farrington). It submitted that the Appellant received approximately 13 months of working notice and later qualified for long-term disability benefits. In those circumstances, any entitlement to damages was extinguished because the Appellant would have received disability benefits rather than employment income during any additional notice period. The Respondent further submitted that the doctrine of horizontal *stare decisis* required the Court to follow ***Belanger***.

[14] The Appellant argued that ***Belanger*** was wrongly decided and conflicted with authorities such as ***Sylvester v British Columbia***, [1997] 2 SCR 315, ***Noble v Principal Consultants Ltd***, 2000 ABCA 133, and ***Dunlop v BC Hydro & Power Authority* (1988)**, 32 BCLR (2d) 334 (BCCA). The Appellant submitted that damages for wrongful dismissal were to be assessed as of the date of the Termination Letter, and that subsequent disability benefits do not eliminate the employee's entitlement to damages flowing from unreasonable notice.

[15] In oral reasons, the Applications Judge concluded that ***Belanger*** was directly applicable and that horizontal *stare decisis* required him to follow it. He rejected the Appellant's submission that ***Belanger*** was distinguishable or inconsistent with binding appellate authority. In his view, AJ Farrington had carefully considered the authorities relied on by the Appellant so there was no basis to depart from ***Belanger***.

[16] Having concluded that ***Belanger*** governed the outcome, the Applications Judge held that the Appellant had not suffered a compensable loss arising from any alleged deficiency in the notice provided by the Respondent. The Appellant became disabled during the working notice period and thereafter received disability benefits. The Applications Judge concluded that the claim could not succeed as a matter of law.

[17] In the result, the Applications Judge granted summary dismissal of the action and dismissed the Appellant's cross-application for summary judgment. He made no findings concerning the appropriate reasonable notice period, the effect of the Appellant's disability benefits, or the Respondent's alternative frustration argument.

IV. Grounds of Appeal

[18] The Appellant argues that the Applications Judge erred in:

(i) Concluding that the doctrine of horizontal *stare decisis* required him to follow ***Belanger*** rather than applying binding authority from higher courts;

(ii) Concluding that the Appellant's disability and receipt of disability benefits during the working notice period defeated or reduced his claim for wrongful dismissal damages; and

(iii) Dismissing the action summarily because the record established that the Respondent provided insufficient notice of termination and failed to establish frustration of the employment contract.

V. Standard of Review

[19] In ***Housen v Nikolaisen***, 2002 SCC 33, the Supreme Court confirmed that questions of law are reviewed on a standard of correctness: at para 8. Questions of fact, including inferences drawn from facts, are reviewed for palpable and overriding error: ***Housen*** at paras 10 and 23.

[20] Questions of mixed law and fact fall along a spectrum: ***Housen*** at paras 28 and 36. Where an error can be attributed to the application of an incorrect standard, a failure to consider a required element of a legal test, or similar error in principle, such errors can be characterized as errors of law and are subject to a standard of correctness: ***Housen*** at para 36.

[21] However, where "the legal principle is not readily extricable, then the matter is one of 'mixed law and fact' and is subject to a more stringent standard. The general rule […] is that, where the issue on appeal involves the trial judge's interpretation of the evidence as a whole, it should not be overturned absent palpable and overriding error": ***Housen*** at para 36.

[22] On an application for summary judgment an Applications Judge's assessment of the facts, the application of the law to those facts, and the ultimate determination as to whether summary resolution is appropriate are all entitled to deference: ***Ma v Yang***, 2025 ABCA 35 at para 2, citing ***Hryniak v Mauldin***, 2014 SCC 7 at paras 81-84; ***Weir-Jones Technical Services Incorporated v Purolator Courier Ltd***, 2019 ABCA 49 at para 10.

[23] An appeal from an Applications Judge is ordinarily a review of the correctness of the decision on the record that was before the Applications Judge. Although Rule 6.14(3) of the *Alberta Rules of Court*, Alta Reg 124/2010, permits the introduction of additional relevant and material evidence on appeal, where no new evidence is adduced the appeal judge must determine whether the decision under review was correct: ***Lesenko v Wild Rose Ready Mix Ltd***, 2024 ABKB 333 at paras 14-15, 17.

VI. Analysis

a. Horizontal Stare Decisis

i. Positions of the Parties

[24] The Appellant submits that the Applications Judge erred in treating ***Belanger*** as binding under the doctrine of horizontal *stare decisis*. He argues that the doctrine of vertical *stare decisis* required the Applications Judge to first determine whether ***Belanger*** was consistent with binding appellate authority, particularly ***Sylvester***, ***Dunlop***, and ***Noble***. According to the Appellant, those authorities establish that wrongful dismissal damages are assessed as though the employee had worked throughout the reasonable notice period and are not reduced by a subsequent disability arising after the wrongful dismissal.

[25] The Appellant further submits that ***Belanger*** was wrongly decided because it conflated the question of entitlement to wrongful dismissal damages with the distinct question of whether disability benefits should be deducted from those damages. In the Appellant's view, ***Belanger*** departed from binding appellate authority by holding that an employee who becomes disabled during a period of insufficient working notice has suffered no compensable loss. He argues that a lower court decision that is inconsistent with binding authority cannot be followed under the guise of horizontal *stare decisis*.

[26] The Respondent submits that the Applications Judge correctly applied the doctrine of horizontal *stare decisis* and properly followed ***Belanger***, which addressed substantially identical facts and legal issues. According to the Respondent, ***Belanger*** does not conflict with binding appellate authority. Rather, AJ Farrington carefully considered and distinguished ***Sylvester***, ***Dunlop***, and ***Noble***, all of which arose in materially different circumstances. The Respondent emphasizes that those authorities concerned immediate termination cases, whereas ***Belanger*** and the present case involve employees who received working notice and subsequently became disabled while still employed.

[27] The Respondent further submits that ***Belanger*** falls outside the recognized exceptions to horizontal *stare decisis*. AJ Farrington's decision was reached following full argument, contained a detailed review of the governing authorities, and was subsequently upheld on appeal by Justice Eidsvik. In the Respondent's view, the Applications Judge was entitled to conclude that revisiting the same authorities and reaching a different result on materially identical facts would undermine the certainty, consistency, and judicial comity that the doctrine of horizontal *stare decisis* is intended to promote.

ii. Horizontal *stare decisis* and the appellate function

[28] The parties devoted considerable attention to the doctrine of horizontal *stare decisis* and the extent to which the Applications Judge was required to follow ***Belanger***. The issue arises in an unusual procedural context: the Applications Judge followed an earlier decision of a different applications judge that was affirmed on appeal by Justice Eidsvik of this Court.

[29] The Respondent argues that the doctrine of horizontal *stare decisis* compels me to follow Justice Eidsvik's ruling and effectively hold that ***Belanger*** is good law. The Respondent says that any legal error in ***Belanger*** should be left to the Alberta Court of Appeal to correct.

[30] This submission raises a preliminary question. Does the doctrine of horizontal *stare decisis* constrain a Justice hearing an appeal in circumstances such as this? There is a principled argument that it does.

[31] In ***R v Sullivan***, 2022 SCC 19, the Supreme Court of Canada affirmed that judges of a court of coordinate jurisdiction should ordinarily follow prior decisions of that same court. The doctrine is rooted in judicial comity and the rule of law: ***Sullivan*** at paras 65, 86.

[32] The objectives of the doctrine include consistency, certainty, predictability, fairness, and the orderly administration of justice. A judge is not free to depart from a prior decision merely because he or she disagrees with it. Departure is justified only in the limited circumstances identified in ***Re Hansard Spruce Mills***, [1954] 4 DLR 590 (BCSC).

[33] Applied here, one could argue that the Applications Judge correctly understood his obligations. ***Belanger*** was a prior decision of the same court addressing materially similar facts and the same central issue. If no recognized basis existed to depart from it, then the Applications Judge was required to follow it.

[34] On the view argued by the Respondent, horizontal *stare decisis* would effectively limit the scope of my role on appellate review. My role would be confined to determining whether the Applications Judge correctly followed ***Belanger***, not whether ***Belanger*** itself was correctly decided.

[35] Any challenge to the correctness of ***Belanger*** would be a matter for the Alberta Court of Appeal. Such an approach would preserve consistency within the Court of King's Bench by avoiding the prospect of conflicting legal conclusions emerging from decisions within the same court.

[36] However, I do not accept the Respondent's framing that a supervisory review is the proper characterization of my appellate function. That approach confuses the duties imposed upon a first-instance decision-maker with those imposed upon a judge exercising appellate jurisdiction.

[37] The question before the Applications Judge was whether horizontal *stare decisis* required him to follow ***Belanger***. The question before me is whether the order under appeal is legally correct.

[38] My jurisdiction arises from the statutory authority to hear and determine an appeal. I do not sit as a second first-instance decision-maker. I exercise appellate jurisdiction over the first-instance decision. That jurisdiction is concerned with the correctness of the result, not the path taken to reach it.

[39] ***Sullivan*** does not address the precise institutional setting before me. However, it does distinguish between the obligations of judges at first instance and the function of appellate review.

[40] In applying the doctrine in that case, the Supreme Court held that the trial judge was required to engage with prior decisions of the Ontario Superior Court, but the Ontario Court of Appeal was not bound by those first-instance authorities: ***Sullivan*** at para 84. The appellate court was free to determine the underlying legal issue.

[41] The rationale is readily apparent. Horizontal *stare decisis* promotes coherence among judges exercising coordinate jurisdiction. It is not intended to immunize legal propositions from appellate review.

[42] Were it otherwise, an erroneous first-instance decision could become entrenched within a court so long as subsequent judges correctly concluded that they were required to follow it. The only issue on appeal of an applications judge's decision would be whether the later judge faithfully adhered to the earlier decision, not whether the earlier decision was legally correct.

[43] That result would be difficult to reconcile with the error-correcting purpose of appellate review.

[44] Nor does the availability of a further appeal to the Alberta Court of Appeal alter that conclusion. The existence of a further appellate route does not transform this appeal into a purely supervisory exercise. Section 12 of the *Court of King's Bench Act*, RSA 2000, c C-31 confers a right of appeal from a decision of an applications judge to a Justice of this Court.

[45] In hearing that appeal, I am required to determine whether the decision under review can stand in law. I do not read the *Court of King's Bench Act*, nor the doctrine of horizontal *stare decisis*, as limiting the scope of my review in an appeal like this to whether an applications judge correctly identified and followed his obligations under ***Sullivan***.

[46] The ultimate question is whether the legal proposition in ***Belanger*** correctly states the law. If not, the order cannot stand merely because the Applications Judge faithfully applied the doctrine of horizontal *stare decisis*. As such, this appeal engages an error-correcting appellate function rather than a purely supervisory one.

[47] This conclusion is reinforced by the decision in ***Lesenko***. In that case, Justice Feasby noted that superior courts perform an important jurisprudential function by providing guidance and stating the law: ***Lesenko*** at para 50 citing ***Reference re Code of Civil Procedure (Que.), art. 35***, 2021 SCC 27 at para 121.

[48] A review confined to whether the Applications Judge correctly followed ***Belanger*** would substantially undermine that function. A structure that insulates legal questions answered by applications judges from meaningful superior court review risks creating an unwarranted parallel judicial system: ***Quebec Reference*** at paras 121-123.

[49] While horizontal *stare decisis* may explain why the Applications Judge regarded himself as bound by ***Belanger***, it does not limit the scope of this appeal to that question. I must determine

whether the order under appeal is legally correct. That inquiry includes whether ***Belanger*** correctly states the law.

[50] I turn to that question now.

iii. The decision in Belanger

[51] In ***Belanger***, the plaintiff was a 43-year employee who received approximately one year of working notice of termination. During the working notice period, he became unable to work due to illness, commenced receiving disability benefits, and was eventually determined to be totally disabled. The parties agreed that his age, service, and position would otherwise have justified a 24-month reasonable notice period.

[52] The employee argued that the insufficiency of the working notice entitled him to damages equivalent to the compensation he would have earned during a 24-month notice period. The employer argued that the employee's disability meant he would not have worked during that period, so he did not suffer any compensable wage loss beyond the disability benefits he received.

[53] AJ Farrington accepted that wrongful dismissal damages are generally intended to place an employee in the same position they would have occupied had reasonable notice been provided. He reviewed ***Sylvester***, ***Dunlop***, and ***Styles***, and made a passing reference to ***Noble***, concluding that none required an award of damages on the facts before him.

[54] AJ Farrington interpreted ***Sylvester*** as addressing the deductibility of disability benefits from wrongful dismissal damages, not entitlement to damages itself. He understood the Supreme Court to hold that disability benefits must be deducted to avoid double compensation.

[55] AJ Farrington distinguished ***Dunlop*** on the basis that it involved an immediate termination rather than working notice. In his view, the working notice provided to Mr. Belanger allowed him to maintain access to disability coverage and benefits that would not have been available following an immediate termination. He further concluded that, although the length of the reasonable notice period is determined at the point where the employment contract is breached, subsequent events may remain relevant to the assessment of damages.

[56] Applying what he described as the principle that an employee should be placed in the same position they would have occupied had proper notice been given, AJ Farrington held that Mr. Belanger suffered no damages arising from the insufficiency of the working notice. Because he was unable to work during the notice period, the only payments Mr. Belanger would have received (had reasonable notice been given) were the disability benefits that he had in fact received. Accordingly, AJ Farrington concluded that there were no damages arising from the termination and granted summary dismissal of the claim.

[57] On appeal, Justice Eidsvik dismissed Mr. Belanger's appeal, agreeing with AJ Farrington that Mr. Belanger suffered no compensable loss.

iv. Was adherence to horizontal *stare decisis* warranted

[58] In ***Sullivan***, at para 64, the Supreme Court set out the framework that governs a judge faced with an earlier decision of coordinate jurisdiction. First, the Court must identify the earlier decision's *ratio decidendi*. Then the Court must determine whether the *ratio* is binding or distinguishable. If binding, the Court must determine whether any recognized basis exists to depart from that precedent.

[59] Importantly, the Supreme Court distinguished horizontal from vertical *stare decisis*. Vertical *stare decisis* concerns decisions from higher courts that are binding, absent narrow exceptions set out in ***Canada (Attorney General) v Bedford***, 2013 SCC 72 at paras 42-45: ***Sullivan*** at para 80.

[60] Horizontal *stare decisis* concerns decisions rendered by judges of the same court. Such decisions are not binding in the strict sense. Referring to the ***Spruce Mills*** exceptions, the Supreme Court in ***Sullivan*** stated, at para 75:

> Trial courts should only depart from binding decisions issued by a court of coordinate jurisdiction in three narrow circumstances:
>
> (i) The rationale of an earlier decision has been undermined by subsequent appellate decisions;
>
> (ii) The earlier decision was reached *per incuriam*;
>
> (iii) The earlier decision was not fully considered, e.g. taken in exigent circumstances.

[61] That is the lens through which the Applications Judge's decision must be analysed. In my view, the Applications Judge failed to consider whether any of the ***Spruce Mills*** exceptions applied before adopting the *ratio* in ***Belanger*** as dispositive of the instant case.

[62] In my view, ***Belanger*** falls within the *per incuriam* exception because the analysis did not account for the Supreme Court of Canada's decision in ***Waterman v IBM Canada Ltd***, 2013 SCC 70, concerning compensating advantages, deductibility, and the private insurance exception.

[63] ***Waterman*** establishes that the general compensatory principle does not, by itself, determine whether a benefit received by a plaintiff reduces damages otherwise payable. The court must separately characterize the benefit and determine whether the applicable contractual arrangements and common-law principles require deduction.

[64] ***Belanger*** treated the employee's receipt of disability benefits as defeating compensable loss without undertaking that separate inquiry. In doing so, it conflated the existence of damages arising from deficient notice with the deductibility of benefits from those damages. Its analysis cannot be reconciled with the framework mandated by ***Waterman***. Accordingly, the Applications Judge was not required to treat ***Belanger*** as dispositive.

[65] This conclusion is also consistent with the authorities principally relied upon by the Appellant. In ***Sylvester***, the Supreme Court held that an employee who is wrongfully dismissed is entitled to damages consisting of the salary the employee would have earned during the notice period. Importantly, the Court stated that the fact an employee could not have worked during that period is irrelevant to the legal entitlement to damages: ***Sylvester*** at para 9.

[66] The issue in ***Sylvester*** was not whether the employee suffered a compensable loss. Rather, it was whether disability benefits received during the notice period should be deducted from damages that otherwise existed: ***Sylvester*** at para 10. The Court concluded that deduction was warranted because the disability benefits, entirely funded by the employer, were intended to replace salary: ***Sylvester*** at paras 14-15.

[67] The distinction between entitlement and deduction is significant. ***Sylvester*** proceeded on the premise that wrongful dismissal damages first arise from the employer's failure to provide reasonable notice. Only then does the Court consider whether disability benefits reduce those damages.

[68] The decision does not support the proposition that the receipt of disability benefits extinguishes the employee's claim at the outset, which is the result that AJ Farrington reached in ***Belanger***. To the contrary, in ***Sylvester*** the employee's entitlement to damages was conceded and the deductibility of the benefits was treated as a separate inquiry.

[69] Nor do ***Dunlop*** or ***Noble*** support the result reached in ***Belanger***. Those cases stand for the proposition that the employee's entitlement flowing from a failure to provide reasonable notice is determined by reference to the breach and is not altered by events occurring subsequent to the breach.

[70] While subsequent events may be relevant in assessing the damages actually suffered, they do not eliminate the employer's liability for breaching its notice obligation. In that respect, ***Dunlop*** and ***Noble*** address the employee's entitlement to reasonable notice and the consequences of the employer's failure to provide that notice. ***Sylvester*** addresses whether disability benefits should be deducted from damages otherwise payable. These authorities operate at different stages of the analysis and are not inconsistent with one another.

[71] In my respectful view, ***Belanger*** treated the receipt of disability benefits as defeating the existence of compensable loss. That approach bypasses the distinct deductibility analysis mandated by ***Sylvester*** and later explained in ***Waterman***. The proper question is not whether the employee received disability benefits, but whether those benefits should reduce the damages otherwise payable for the employer's breach.

[72] That ***Belanger*** was affirmed on appeal by another Justice of this Court does not change the result. Horizontal *stare decisis* yields where a coordinate decision cannot be reconciled with binding appellate authority. In that circumstance, fidelity to vertical *stare decisis* requires adherence to the higher court's direction: ***Sullivan*** at paras 59, 65, 80.

b. Entitlement to damages

i. Positions of the Parties

[73] The Appellant submits that he is entitled to damages for wrongful dismissal because the working notice provided by the Respondent was insufficient. He argues that damages for inadequate notice are assessed as of the date notice of termination is given (i.e., November 20, 2020), and that damages must be calculated on the assumption that the employee would have worked the entire reasonable notice period.

[74] As such, the Appellant argues his subsequent disability that prevented him from working throughout the entire reasonable notice period is irrelevant to the assessment of damages. The Appellant contends that he was entitled to 24 months' reasonable notice and seeks damages representing the difference between that period and the working notice actually provided.

[75] The Respondent submits that 12 months of working notice was reasonable. In the alternative, the Respondent argues that if the notice provided was inadequate, the Appellant suffered no compensable loss. The Respondent argues that working notice is not itself a breach of contract and that any breach arising from insufficient working notice occurs only at the expiry of the notice period.

[76] The Respondent contends that the Appellant went on disability leave and began receiving LTD during the working notice period and continued to do so when the alleged breach of contract crystallized. In this circumstance, the Respondent argues that a longer notice period would not have accrued any greater financial benefit to the Appellant than he actually received, which disentitles him to damages for unreasonable working notice.

ii. Was there a breach of contract?

[77] The first issue is whether the Respondent breached the implied term of the employment contract requiring it to provide the Appellant with reasonable notice of termination in the absence of just cause: ***Honda Canada Inc v Keays***, 2008 SCC 39 at para 50. In my view, it did.

[78] There is no dispute that on November 20, 2020, the Respondent provided the Appellant with approximately 13 months of notice that his employment would be terminated without cause. The question is whether that notice was reasonable having regard to the factors articulated in ***Bardal v Globe & Mail Ltd*** (1960), 24 DLR (2d) 140.

[79] Both parties accept that the applicable considerations are the employee's age, length of service, character of employment, and the availability of similar employment having regard to the employee's experience, training, and qualifications. What constitutes reasonable notice will vary with the circumstances of each case: ***Machtinger v HOJ Industries Ltd***, [1992] 1 SCR 986 at 998-999 citing ***Bardal*** at 145; ***Honda*** at para 29.

[80] Determining the period of reasonable notice is more art than science. No two cases are identical and there is no single right answer. Instead, most cases yield a range of reasonableness: ***Minott v O'Shanter Development Co*** **(1999)**, 42 OR (3d) 321 (ONCA) at para 62 (WL).

[81] The Appellant was 62 years old when notice was given and 63 years when his employment terminated. Age remains a significant factor because it bears directly upon an employee's prospects of obtaining comparable re-employment. At 63 years of age, the Appellant was nearing the end of his working career and could reasonably be expected to encounter substantial challenges in securing alternative employment following the termination of a long-standing employment relationship.

[82] By the conclusion of his employment contract, the Appellant had approximately 24 years of continuous service with the Respondent. Long service strongly favours an extended notice period. The Appellant devoted more than two decades of his working life to the Respondent and had become its most senior operator. As seen in many of the cases supplied by both parties in this matter, lengthy service has consistently attracted notice periods exceeding one year, particularly when coupled with an employee of advanced age: ***Paes v Cascades Canada ULC***, 2015 ONSC 7356; ***Larry Patterson v IBM Canada Limited***, 2017 ONSC 1264; ***Welch v Ricoh Canada Inc***, 2017 NSSC 174; ***Ciciretto* v *Embassy Cleaners Inc***, [1998] OJ No 3811, aff'd (1999), 126 OAC 274 (ONCA); ***Tatla et al v Western Fibres Ltd*,** 2004 BCSC 1770.

[83] With respect to the character of employment, the parties disagree about whether the Appellant occupied a supervisory position. The Respondent characterizes the Appellant primarily as a vacuum truck operator performing manual labour. The Appellant emphasizes his additional responsibilities, including training new operators, supervising helpers assigned to him, assisting with inventory management, monitoring maintenance matters, and providing input during hiring processes.

[84] While the evidence does not establish that the Appellant occupied a senior management role, it does demonstrate that he held responsibilities beyond those of a typical labourer and was entrusted with significant operational knowledge and experience. In my view, this factor modestly favours a longer notice period.

[85] The availability of comparable employment strongly supports a notice period exceeding 13 months. The Appellant's experience was concentrated within a specialized segment of the sewer, water maintenance, and vacuum-truck industry. As of his termination date, the Appellant was 63 years old and had spent 24 years with a single employer. Further, the Appellant received notice in November 2020 at a time when the labour market was experiencing considerable disruption arising from the COVID-19 pandemic.

[86] These circumstances would reasonably have prolonged the period required for the Appellant to secure comparable employment: ***Paquette v TeraGo Networks Inc***, 2015 ONSC 4189, appealed on other grounds 2016 ONCA 618, at para 27 citing ***Corbin v Standard Life Assurance Co et al* (1995)**, 167 NBR (2d) 355 at para 17 (NBCA); ***Chalmers v Airways Transit Service Ltd. and Badder Capital Group Ltd***, 2023 ONSC 5725 at para 129.

[87] The comparators relied upon by the parties are also instructive. The Respondent cites authorities supporting notice periods in the range of 10 to 15 months for older employees occupying largely manual or operational roles. However, many of those employees had shorter service, were younger than the Appellant, or lacked his combination of age and tenure.

[88] Conversely, the Appellant relies on authorities awarding notice periods between 18 and 21 months to employees of similar age and service occupying technical or skilled positions. Those authorities are not directly analogous, but they provide a more persuasive benchmark given the Appellant's age, length of service, and diminished re-employment prospects.

[89] In my view, a reasonable notice period lies between the positions advanced by the parties. Although the Appellant seeks 24 months, his role was not managerial or executive in nature. At the same time, the Respondent's position that 12 months was sufficient does not adequately account for the combined effect of the Appellant's advanced age, 24 years of service as of the date of termination, specialized experience, and the economic circumstances prevailing during the COVID-19 pandemic and its immediate aftermath.

[90] Having regard to the ***Bardal*** factors, considered against the range established by the authorities cited by the parties, I conclude that the Appellant was entitled to 20 months of reasonable notice. That assessment is broadly consistent with notice periods awarded to long-service employees in their sixties who occupied skilled or technical positions and faced significant obstacles to re-employment.

[91] Therefore, the Respondent failed to provide reasonable notice. I next consider when that failure constituted a breach of contract.

iii. When did the breach occur?

(i) First principles

[92] The Appellant forcefully argued that the date of the breach was November 20, 2020, being the date on which the Appellant received notice of termination. Presumably, this argument is advanced in support of the Appellant's larger contention that his disability leave arose after the breach of contract and is therefore irrelevant to the assessment of wrongful dismissal damages.

[93] The Appellant's position does not reconcile with fundamental principles of contract law outlined in ***Potter v New Brunswick Legal Aid Services Commission***, 2015 SCC 10. In concurring reasons, Justice Cromwell expressly stated that "[t]he whole of the law of wrongful dismissal is grounded in the broader contract law principles relating to repudiation and anticipatory breach": ***Potter*** at para 143.

[94] Justice Cromwell also defined his preferred terminology, which I adopt in these reasons:

- "The term repudiation refers to the situation in which a breach of contract by one party gives rise to the right of the other party to terminate the contract and pursue the available remedies for the breach": ***Potter*** at paras 144, 147.

- "[A] breach is a repudiation of the contract if it is a breach of a contractual condition or of some other sufficiently important term of the contract so that there is a substantial failure of performance": ***Potter*** at para 145;

- "Acceptance" of the repudiation refers to the choice of the non-breaching party to treat the contract as over: ***Potter*** at para 147;

- A "repudiatory breach" is a type of breach that is sufficiently serious to constitute repudiation of the contract: ***Potter*** at para 148; and

- An "anticipatory breach" occurs when one party manifests, through words or conduct, an intention not to perform or not to be bound by provisions of the agreement that require performance in the future: ***Potter*** at para 149.

- "Anticipatory breach" gives rise to "anticipatory repudiation" when the anticipated future non-observance relates to important terms of the contract or shows an intention not to be bound in the future: ***Potter*** at paras 149, 154-155.

[95] Based on these definitions, the focus of an anticipatory breach is not on a present failure to perform, but on what the impugned conduct objectively communicates about a party's intention to perform the contract in the future. At para 144, Justice Cromwell explained that repudiation, whether immediate or anticipatory, gives rise to a choice on the part of the innocent party to accept or reject the repudiation.

> If the other party "accepts" the repudiation, the contract is over. If the other party does not accept the repudiation, the contract continues (subject to various other doctrines). In either case, the non-breaching party can pursue the available remedies which may vary depending on whether that party has accepted the repudiation or affirmed the contract.

[96] As the Supreme Court's analysis in ***Potter*** explains, an anticipatory repudiation and actual breach of contract are related concepts. Central to the determination is a consideration of the intention of the notifying party: ***Potter*** at paras 30-31.

[97] In my view, applied in the context of a breach of the implied condition to provide reasonable notice, these principles give rise to the following basic propositions.

(i) Where an employer terminates employment immediately, without cause and without providing reasonable notice, the breach of contract and the termination occur at the same moment. The employer's failure to provide reasonable notice constitutes an immediate repudiation of the contract. Damages are assessed as of that date.

(ii) Where an employer communicates its intention to terminate employment on a future date while leaving the contract in force in the interim, the employee continues to be employed. The parties remain bound by the rights and obligations of the employment relationship until the proposed termination date arrives.

(iii) Where an employer communicates its intention to terminate employment at a future date and fails to provide reasonable working notice, the employer has communicated an intention not to perform the contract according to its terms as of that specified future date.

This constitutes an anticipatory repudiation because the employer has objectively communicated an intention not to perform an important contractual obligation in the future. Whether that repudiation matures into an actionable wrongful dismissal claim depends upon the employee's response.

(iv) When confronted with an anticipatory repudiation, the employee must choose whether to accept that repudiation and seek a remedy, or to affirm the contract and hold the employer to its terms until the future date of termination.

(v) Where the employee affirms the contract and the working notice is not reasonable (as assessed at the conclusion of the employment relationship), the employer will have breached the contract as of the termination date. Damages will be assessed as of the date of the breach, i.e., the date the employment relationship actually came to an end.

[98] The proposition in point (v) is reinforced by the very nature of working notice. When notice is first communicated, neither party can know with certainty how long the employment relationship will continue because the duration of the working notice period may change. For example, the parties may agree to extend the employment relationship based on changes in market conditions, for operational considerations, or on account of other developments.

[99] For that reason, in working notice cases where the employee rejects an anticipatory repudiation (for example, by continuing to work), reasonable notice is assessed against what the employee actually received rather than by what the employer initially contemplated providing. The sufficiency of the working notice period is only known when the employment relationship comes to an end. Until that day arrives, the employee's actual period of notice has not yet been fixed.

[100] Before applying these principles to the facts of this case, I wish to address a significant argument advanced by the Appellant.

(ii) Limitations cases do not assist

[101] The Appellant relies on a series of limitations cases to support his contention that the breach of contract occurred on November 20, 2020 – the date on which he received notice of his future termination in December 2021. In particular, the Appellant cites ***Jones v Friedman* (2006)**, 206 OAC 214 (ONCA) at para 4, which states:

> A limitation period commences when the cause of action arises. In a breach of contract, the cause of action arises when the contract was breached. <u>For the purposes of a wrongful dismissal action, the employment contract is breached when the employer dismisses the employee without reasonable notice.</u>
>
> [Emphasis in Appellant's Factum]

[102] The Appellant's argument fails for several reasons. First, the issue in ***Jones*** was whether a breach of an employment contract, *as pled by the Appellant*, was outside of the applicable limitations period. This case did not consider or determine whether, or when, a breach of contract actually occurred in circumstances where an employer provided notice of a future termination date.

[103] Second, the underlined passage above is consistent with ***Potter***. As discussed above, where working notice is provided, the assessment of whether the notice period was reasonable can only occur once the employment relationship is at an end (i.e., when the employee was dismissed). A plain reading of the passage from ***Jones*** does not suggest otherwise.

[104] Third, the Appellant cites the more recent decision of the Ontario Court of Appeal in ***Bailey v Milo-Food & Agricultural Infrastructure & Services Inc***, 2017 ONCA 1004 for the proposition that "*Jones* stands for the principle that a cause of action for wrongful dismissal arises on the date of notice of termination": ***Bailey*** at para 6. That may be so, but it does not assist in resolving the instant case.

[105] That is because ***Bailey*** addresses a different question. Determining when a cause of action arises is legally distinct from determining when a breach of contract occurs. This is evident from the language of the *Limitations Act*, RSA 2000, c L-12. Section 3 restricts a claimant's ability to seek a remedial order to "2 years after the date on which the claimant first knew, or … *ought to have known* …" that the claimant suffered an injury attributable to the conduct of the defendant. Similar language appears in the Ontario *Limitations Act*, SO 2002, c 24, Sch B, s 5(b).

[106] As I understand the *ratio* of ***Bailey***, an employer's first communication advising an employee of an unreasonable working notice period is relevant to the discoverability of a claim. In my view, the Appellant's suggested interpretation of ***Bailey*** is inconsistent with fundamental principles of contract law set out by the Supreme Court in ***Potter***. Moreover, I am bound by the latter.

(iii) Application to this case

[107] Contrary to the thrust of the parties' submissions, the issue is not whether the Appellant became disabled before or after the Respondent's breach of contract. Rather, the issue is whether the Respondent had provided reasonable notice of termination as of the date the employment relationship ended.

[108] Here, the Appellant did not accept the Respondent's anticipatory repudiation of the contract. Instead, he continued working throughout the notice period until illness prevented him from doing so. The parties continued to operate under the employment contract for many months after notice was given. During that period, the Appellant remained entitled to the benefits of the contract and remained subject to its burdens.

[109] It follows that the Respondent's notice of termination did not itself constitute a breach of contract. The alleged breach could only be assessed after the employment relationship came to an end and it became possible to determine whether the Respondent had provided sufficient

notice. Until that date arrived, it was not possible to know whether the notice actually provided would satisfy the Respondent’s contractual obligation to provide reasonable notice.

[110] In this case, the employment relationship between the Appellant and Respondent ceased on December 15, 2021. The working notice was approximately 13 months. For the reasons stated above, that amount of working notice was not reasonable.

[111] In the result, the Respondent breached the Appellant’s employment contract on December 15, 2021. Damages are to be assessed as of that date.

[112] The remaining issue is what, if any, damages ought to flow from that breach. This includes a consideration of whether the Appellant’s subsequent disability benefits affect his entitlement to damages arising from the deficient notice period.

[113] However, before I address the issue of deductibility, I wish to address the Respondent’s argument on frustration.

c. Frustration

[114] Frustration of a contract occurs when a situation arises for which the parties made no provision in the contract and performance of the contract becomes “a thing radically different from that which was undertaken by the contract”: ***Naylor Group Inc v Ellis-Don Construction Ltd***, 2001 SCC 58 at para 53. When those circumstances arise, the court is asked to intervene to relieve the parties of their bargain because a supervening event has occurred in the absence of fault by either party: ***Naylor Group*** at para 55.

[115] Here, the Respondent argues that the employment contract was frustrated by the Appellant’s disability. I reject that submission.

[116] Frustration requires evidence capable of establishing that the employee’s incapacity rendered future performance of the employment contract impossible or radically different from that which the parties originally undertook: ***Lippa v Can-Cell Industries Inc***, 2009 ABQB 684 at paras 72-85. The record does not establish frustration as a matter of law.

[117] The Respondent’s own evidence confirms that before providing notice of termination it considered whether the Appellant’s medical condition had frustrated the employment relationship. It ultimately elected not to proceed on that basis.

[118] Instead, the Respondent chose to terminate the Appellant’s employment without cause and provide approximately 13 months of working notice. The Respondent’s evidence does not disclose that it had any medical information concerning the Appellant’s condition when that decision was made. Nor is there evidence that the Respondent required the Appellant to undergo an independent medical examination or participate in a functional assessment of the Appellant’s abilities. These omissions substantially undermine the Respondent’s position on frustration.

[119] On the record before me, the Respondent’s decision to provide working notice was predicated on the opposite assumption: that the Appellant remained capable of continuing his

employment for a significant period of time. Indeed, the Appellant continued working for approximately seven months after the notice was provided.

[120] It was only later that the Appellant commenced a medical leave and qualified for short-term, and then long-term, disability benefits. Those later developments may be relevant to the parties' competing positions concerning damages; however, they do not establish that the employment contract was frustrated prior to the breach.

[121] Accordingly, I reject the Respondent's submission that the employment contract had become frustrated.

d. Damages

[122] The ordinary remedy for wrongful dismissal is damages for breach of the employment contract. At common law, an employer may terminate an employee without cause but must provide reasonable notice of termination. A failure to provide reasonable notice constitutes a breach of the employment contract and gives rise to an award of damages in lieu of the notice that ought to have been provided: ***Matthews v Ocean Nutrition Canada Ltd***, 2020 SCC 26 at para 43; ***Potter*** at para 31.

[123] The general compensatory principle is that damages for breach of contract should place the plaintiff, so far as money can do so, in the economic position the plaintiff would have occupied had the contract been performed: ***Waterman*** at para 2. The appropriate focus is not whether the employee has an independent entitlement to a particular benefit following termination: ***Matthews*** at para 48.

[124] In the wrongful dismissal context, this requires the Court to determine the compensation the employee would have received had the employer performed its obligation by providing reasonable notice: ***Waterman*** at paras 2, 21. Damages, as the remedy, represent what the employee would have earned during that period: ***Matthews*** at paras 48-49.

[125] Therefore, the assessment proceeds on the premise that the employment contract continued throughout the reasonable notice period. Subject to mitigation and any enforceable contractual limitation, the employee is entitled to the salary, benefits, bonuses, and other components of compensation that the employee would have received during that period: ***Matthews*** at paras 49-55.

[126] The relevant inquiry is whether the employee would have received the benefit as part of their compensation during the reasonable notice period. If so, the court must determine whether the employment contract or governing plan unambiguously removes or limits that common law entitlement: ***Matthews*** at para 55.

[127] The compensatory principle is important, but it is not applied mechanically or inflexibly: ***Waterman*** at para 35. A strict application of the principle may produce unsatisfactory results where a plaintiff has received a collateral benefit or compensating advantage: ***Waterman*** at para 3.

[128] The fact that a benefit is connected to the breach, or that its receipt produces an apparent overlap with the damages claimed, identifies a potential deductibility issue. It does not itself determine whether the benefit must be deducted: ***Waterman*** at paras 15-16, 20-23, 28, and 31-32.

(i) Deductibility of Disability Benefits

[129] In ***Waterman***, the Supreme Court addressed when a benefit received by a plaintiff should reduce damages otherwise payable for wrongful dismissal. A compensating advantage issue may arise where the plaintiff receives a benefit that produces compensation beyond the plaintiff's actual economic loss, and either the benefit would not have been received but for the defendant's breach or the benefit was intended to indemnify the plaintiff for the kind of loss caused by the breach: ***Waterman*** at paras 23-32.

[130] The existence of that connection does not resolve deductibility: ***Waterman*** at paras 31-32. The Court rejected the proposition that either causation or the general compensation principle provides a complete answer: ***Waterman*** at paras 15-16 and 31-32. The common law recognizes exceptions under which a benefit is not deducted even though the plaintiff may be placed in a better economic position than if the contract had been performed: ***Waterman*** at paras 31-38.

[131] One example is the private insurance exception. The core principle is that benefits received through private insurance are generally not deducted from damages: ***Waterman*** at para 41. The exception is not confined to payments under contracts formally characterized as insurance. It may extend by analogy to other benefits having the relevant characteristics, including certain disability and pension benefits: ***Waterman*** at paras 16 and 41-42.

[132] The private insurance exception can apply in a wrongful dismissal action: ***Waterman*** at para 48. Nor is it categorically excluded because the right to the benefit and the claim for wrongful dismissal damages arise from the same employment relationship, i.e., a single contract: ***Waterman*** at paras 50-52.

[133] Where an employment benefit and the right to wrongful dismissal damages arise under the employment contract, the Court must examine the contractual arrangements and the parties' intentions concerning whether both amounts may be received: ***Waterman*** at paras 41, 50-52, and 87-88.

[134] The nature and purpose of the benefit are central to the analysis. Two considerations have been particularly important: (i) whether the benefit is intended to indemnify the employee for the same type of loss caused by the breach (such as lost employment income); and (ii) whether the employee contributed, directly or indirectly, to obtaining the benefit: ***Waterman*** at paras 55-56, and 64-69.

[135] At para 56, the Court summarized some general propositions that have emerged from prior Supreme Court jurisprudence:

- benefits have not been deducted where they were not intended to indemnify the plaintiff for the kind of loss caused by the breach and the plaintiff contributed to the entitlement;

- benefits have also not been deducted in cases where the plaintiff contributed to an indemnity benefit; and

- benefits have been deducted where they were intended to indemnify the plaintiff for the kind of loss caused by the breach and the plaintiff did not contribute to obtaining the benefit.

[136] These propositions do not establish a rigid or exhaustive test. The Court cautioned that there is no single marker that determines whether a benefit falls within the private insurance exception: ***Waterman*** at paras 31, 54, and 76.

[137] The more closely the nature and purpose of the benefit resembles an indemnity against the loss caused by the breach, the stronger the case for deduction: ***Waterman*** at para 76. Employee contribution remains relevant, as may broader considerations such as equal treatment, appropriate incentives, and the desirability of clear and workable rules: ***Waterman*** at para 76. See also ***Korpan Tractor and Parts (Parriwi Management Inc.) v Denton*** 2026 SKCA 44 at paras 87-92.

[138] The terms of the governing policy or plan are important. They may reveal whether the benefit is intended as wage replacement, whether it is reduced by other income or compensation, whether the employee may receive the benefit concurrently with other amounts, and whether the insurer has a right of repayment, reimbursement, subrogation, or set-off.

[139] In ***Waterman***, the Court's treatment of the disability benefits considered in ***Sylvester*** turned materially upon the terms and purpose of the plans. Those benefits replaced wages, were reduced by other income, and were not funded by employee contributions: ***Waterman*** at paras 46, and 80-81.

[140] By contrast, the private insurance exception applied in ***Waterman*** because the pension benefits were not an indemnity for wage loss and the employee had contributed to their acquisition through his years of service. The Court concluded that the general compensation principle should not be applied strictly in those circumstances: ***Waterman*** at paras 57, 68-69 and 77-78. In ***Potter***, the Supreme Court applied the same principles to reach the same result: ***Potter*** at paras 112, 118-121, and 128-130.

[141] On the evidentiary record before me, I am unable to determine whether the disability benefits received during the reasonable notice period should be deducted from damages that are otherwise payable.

[142] Significantly, the disability policy is not in evidence. The record only contains a "Benefits Handbook" and correspondence dated November 2, 2021 between the benefits administrator and the Appellant summarizing certain general conditions of his claim.

[143] The handbook is dated February 10, 2020, and appears to be a summary of benefits available under the Respondent's policy, which came into force on January 1, 2020. The handbook is not a substitute for the actual contract.

[144] The November 2021 correspondence expressly directs the Appellant to the group policy and states that the policy provides for reductions arising from certain sources of income. However, the sentence describing "Other Income" that may reduce disability benefits ends with "etc." This language implies that the list of other sources of income is not exhaustive. Nor does that correspondence reproduce the complete contractual terms governing the disability benefits.

[145] Absent the disability policy, I cannot determine the full nature and purpose of the benefit or the parties' contractual intention respecting concurrent receipt of disability payments with wrongful dismissal damages. More specifically, I cannot determine whether the policy contains a repayment, reimbursement, subrogation, offset, or overpayment provision applicable where a beneficiary's employment is terminated and the beneficiary subsequently receives damages in lieu of reasonable notice.

[146] This gap in the evidence is potentially material. If the insurer has a right to recover benefits from any damages awarded for the corresponding period, there may be no excess recovery and therefore no compensating advantage requiring deduction from the damages award: ***Waterman*** at paras 23-24.

[147] Conversely, if the policy characterizes the benefits as wage replacement and permits a reduction based upon damages or other compensation received for the same period, that contractual language may support deduction: ***Waterman*** at paras 55-56, 61 and 80-81.

[148] Further, during oral argument the parties disputed the meaning of the term "salary continuation." A document titled "Claimant's Statement" was tendered as part of the record and describes "salary continuance" as the continuation of salary or wages by an employer while an employee is absent because of injury or sickness.

[149] That description only appears in a claim form. It does not establish whether "salary continuation" is a defined term under the policy or delimit the meaning the contracting parties intended it to bear.

[150] Without the policy, I cannot determine whether "salary continuation" is limited to direct salary payments made by the employer or whether it also includes damages awarded in a wrongful dismissal action. Nor can I determine whether such damages would reduce the disability benefits, trigger a repayment obligation, or have no effect on the beneficiary's entitlement.

[151] The party seeking deduction must establish the factual and contractual foundation necessary for the Court to characterize the benefit and apply the principles in ***Waterman***. On this record, determining deductibility would require speculation about contractual provisions that are not before the Court. I therefore decline to determine whether the disability benefits received during the reasonable notice period are deductible from the damages award.

(ii) Damages are not suitable for summary determination

[152] In determining whether a matter may properly be resolved on a summary basis, the question is whether the record permits the Court to make the necessary findings of fact, apply the law to those facts, and reach a fair and just determination of the issue before it: ***Weir-Jones Technical Services Incorporated v Purolator Courier Ltd***, 2019 ABCA 49 at paras 21, 25-26 citing ***Hryniak v Mauldin***, 2014 SCC 7.

[153] I am satisfied that standard has been met with respect to liability and reasonable notice. The evidentiary record permits me to determine that the notice provided by the Respondent was insufficient and that the Appellant was entitled to a reasonable notice period of 20 months.

[154] However, the record does not permit a final determination of damages, especially regarding the deductibility issue. The party seeking the deduction bears the burden of establishing the factual and contractual foundation necessary for the Court to characterize the disability benefits and apply the principles articulated in ***Waterman***.

[155] Without the disability policy forming part of the record, there is insufficient evidence to determine whether the policy contains any repayment, reimbursement, subrogation, offset, or reduction provisions that may be engaged where an employee receives damages in lieu of reasonable notice following termination of employment.

[156] Similarly, the Court has not been provided with the contractual instrument necessary to determine whether the expression “salary continuation” is a defined term and, if so, the scope of its intended meaning.

[157] In the absence of the disability policy, I am unable to make several findings of fact that are potentially material to the deductibility analysis. The issue is not whether some further evidence might emerge later. Rather, the difficulty is a lack of confidence in the factual record to characterize the benefits in question and fairly apply the ***Waterman*** framework to adjudicate the issue on a summary basis: ***Weir-Jones*** at paras 36, 39, 46-47.

[158] The Appellant correctly submits that summary judgment applications are decided on the record actually before the Court and that parties must put their best foot forward: ***Weir-Jones*** at para 37. The Respondent elected to advance a deductibility argument without placing the disability policy before the Court. That omission significantly impairs the Court’s ability to assess the nature of the benefits and the contractual treatment of wrongful dismissal damages under the plan.

[159] However, it does not follow that the consequence of that omission is that the Court must necessarily determine the issue in the Appellant’s favour. The same evidentiary deficiency that prevents the Respondent from establishing deduction also prevents the Court from making findings necessary to conclusively determine that a deduction should not be made.

[160] In my view, it would be inconsistent with the fairness concerns that underpin summary adjudication to treat the Respondent’s failure to adduce the disability policy as determinative of the issue. In the absence of that evidence, I do not have the degree of confidence in the factual

record necessary to fairly and justly adjudicate the deductibility issue on a summary basis: ***Weir-Jones*** at paras 21, 41, and 46-47.

[161] Accordingly, there remains a genuine issue for trial concerning damages for the deficient portion of the reasonable notice period, including whether disability benefits received in respect of that period are deductible: ***Sylvester*** at para 23.

VII. Conclusion

[162] In the result, the appeal is allowed in part. The decision of the Applications Judge is vacated. The Respondent breached the Appellant's employment contract by failing to provide reasonable notice of termination. The appropriate notice period is 20 months.

[163] The matter is remitted for trial solely in relation to the assessment of damages. In particular, the trial judge shall determine whether the disability benefits received by the Appellant during the reasonable notice period are deductible from the damages otherwise payable.

[164] The Appellant was substantially successful and is entitled to costs. If the parties are unable to agree on costs, the Appellant may file and serve his position in writing within 30 days of this decision. The Respondent shall file and serve any response not more than 15 days later. In all cases, the submission of a party shall not exceed three pages, excluding authorities and other relevant materials, such as a Bill of Costs.

[165] Counsel for the Appellant shall prepare the formal Order arising from these reasons.

Heard on March 2, 2026.
Dated at the City of Calgary, Alberta this 3rd day of September 2026.

D. Jugnauth
J.C.K.B.A.

Appearances:

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