IN THE SUPREME COURT OF THE YUKON TERRITORY

Citation: *Evans* v. *Teamsters (Union)*, 2005 YKSC 71

Date: 20051219
Docket No.: S.C. No. 02–A0178
Registry: Whitehorse

Between:

DONALD NORMAN EVANS

Plaintiff

And

TEAMSTERS LOCAL UNION NO. 31

Defendant

Before: Mr. Justice L.F. Gower

Appearances:

Grant Macdonald, Q.C. — Counsel for the Plaintiff
Leo McGrady, Q.C. — Counsel for the Defendant

REASONS FOR JUDGMENT

INTRODUCTION

[1] This is an action for wrongful dismissal. Mr. Evans was employed for 23½ years by the Teamsters Local Union No. 31 (the "Union") as a business agent in the Union's Whitehorse office. Following an election which resulted in a change in the Union's executive, the newly-elected President, Stan Hennessy, faxed a letter to Mr. Evans on January 2, 2003, informing him that, pursuant to a Union bylaw, his appointment as a business agent ceased as of that date. Later in the afternoon of January 2nd, Mr. Hennessy spoke with Mr. Evans over the telephone to discuss the status of his employment, his possible retirement and how much "cleanup time" he needed. Mr. Evans

responded by offering to accept 12 months of working notice plus 12 months pay in lieu of notice. The parties were unable to reach a settlement.

ISSUES

1. Was Mr. Evans wrongfully dismissed on January 2, 2003?
2. If Mr. Evans was wrongfully dismissed, what amount of reasonable notice of termination should he have received?
3. Should the period of notice be extended because of the conduct of the Union in terminating Mr. Evans' employment?
4. Did Mr. Evans fail to mitigate his damages?
5. If Mr. Evans is entitled to damages, how should they be quantified?

OVERVIEW OF THE FACTS

[2] After the election, but prior to assuming office, Mr. Hennessy sought a legal opinion on the termination of six employees, four of whom were business agents, including Mr. Evans. The opinion suggested that the Union could rely on its Bylaw 13, which purported to link the term of appointment of the business agents with the term of the Union's executive which appointed them. Since the new executive was to take power January 1, 2003, then it was arguable the employment of the business agents ceased as of December 31, 2002. However, the legal opinion recommended against that course of action for a number of reasons, including the fact that Mr. Evans was a senior, long-term employee and was likely on an indefinite term of employment. The opinion also recommended considering giving Mr. Evans a period of 24 months working notice.

[3] A faxed copy of the legal opinion inadvertently ended up in the hands of the outgoing Union President and ultimately, a copy was faxed to Mr. Evans on the morning of January 2, 2003.

[4] Later the same day, Mr. Evans received the faxed letter from Mr. Hennessy advising him that, pursuant to the Union's Bylaw 13, his appointment as a business agent ceased as of that date (the "termination letter").

[5] Mr. Hennessy then telephoned Mr. Evans in the afternoon of January 2nd and had a lengthy discussion with him about the status of his employment. Unbeknownst to Mr. Hennessy, Mr. Evans taped that telephone conversation and later prepared a transcript of it.

[6] On January 3, 2003, Mr. Evans retained legal counsel, who wrote to Mr. Hennessy claiming that Mr. Evans had been dismissed without reasonable notice. In the letter, counsel said that Mr. Evans would be prepared to accept 24 months notice of termination, through a combination of 12 months working notice and 12 months pay in lieu of notice.

[7] The Union's counsel, Mr. McGrady, responded with a letter on January 13, 2003, stating that Mr. Hennessy's letter of January 2nd was not intended as a termination without notice. The letter also confirmed that Mr. Evans would remain on full salary and benefits in the interim, while the Union considered its position.

[8] Following some unexplained delay and additional correspondence between counsel, a settlement meeting was held on April 3, 2003, but it was not successful. On May 23, 2003, the Union's counsel indicated by letter that there was no further basis for negotiating a settlement. The letter also requested that Mr. Evans return to his employment "to serve out the balance of his notice period of 24 months … from January 1, 2003 until and including December 31, 2004." Mr. Evans counter-offered to return to his previous employment status, that is, an indefinite term of employment, provided the Union rescinded the termination letter. The Union refused and because Mr. Evans failed to return to work, it purported to terminate him for cause on June 2, 2003.

ANALYSIS

Issue 1: Was Mr. Evan's wrongfully dismissed on January 2, 2003?

The Positions of the Parties

[9] Veale J. declared in his pre-trial order of March 11, 2004:

> "The Plaintiff's employment by the Defendant was terminated by notice from the Defendant to the Plaintiff on January 2, 2003."

[10] The plaintiff relies on that declaration as a conclusion that Mr. Evans' employment was terminated on January 2, 2003 and that consequently the Union did not provide him with reasonable notice of its intention to terminate.

[11] The Union argues that the termination letter must be interpreted together with the substance of the telephone conversation between Mr. Evans and Mr. Hennessy later that same day. The Union's counsel submits that it is abundantly clear from a close review of the transcript of that conversation that it was never the Union's intention to terminate Mr. Evans without notice. Rather, he says that Mr. Hennessy was attempting to negotiate a period of working notice or some combination of working notice and pay in lieu of notice.

[12] Ultimately, it is the Union's position that it gave Mr. Evans 24 months notice, comprised of 5 months of pay in lieu of notice and 19 months of working notice. It says it did this through its letter of May 23, 2003 to Mr. Evans' counsel, which in turn must be interpreted in conjunction with the initial letter from Mr. Evans' counsel dated January 3, 2003, offering to settle for a combination of working notice and pay in lieu of notice totalling 24 months. However, counsel for the Union concedes that at no point did the Union ever expressly say to Mr. Evans "you've got 24 months notice", or any other words to that effect.

The Termination Letter

[13] In drafting the January 2nd letter and in the subsequent telephone conversation with Mr. Evans, Mr. Hennessy was obviously relying closely on the legal opinion from the Union's counsel dated December 31, 2003. That opinion cautioned the Union against ultimately relying on Bylaw 13 as determinative of the fact that Mr. Evans was on a fixed-term contract of employment, which expired when the term of the previous executive expired on December 31, 2002. If Bylaw 13 did apply, then the legal opinion stated that there would be no obligation on the part of the Union to provide Mr. Evans with any notice or pay in lieu of notice. However, the Union's counsel stated that he had "serious reservations" about whether that conclusion would be upheld by a court. He also said that Bylaw 13 "probably does not bind the four business agents", and Mr. Evans in particular, for a variety of reasons:

1. Bylaw 13 was not in force at the time Mr. Evans was originally hired;
2. There had been no formal termination and renewal of Mr. Evans' contract after previous elections, which could be considered as a waiver of any fixed term to his contract of employment; and
3. Mr. Evans was a senior and long-term employee who was very close to retirement age.

[14] While the Union's counsel did not recommend taking the position that Mr. Evans was on a fixed-term, or definite, contract, he somewhat paradoxically advised that the Union:

> "may wish to place reliance on [Bylaw] 13 as an initial position, but abandon that position in the course of negotiations should [Mr. Evans] make a sustained claim to indefinite term status".

[15] With respect to the proposed letter of termination, the Union's counsel, again in my respectful view, somewhat paradoxically, recommended that the letter of termination:

> "… be kept as simple as possible to maximize the Local's options and to minimize its exposure to liability. I therefore recommend adapting the following or similar language to that purpose for the business agents:
>
> > "As you know, a new executive board was elected and took office today, January 2, 2003. Pursuant to Section 13 of the Bylaws your appointment as a Business Agent ceases as of this date.
> >
> > As a member of the Teamsters' Joint Council No. 36 Severance Pay Plan, you are entitled to a significant severance payment.
> >
> > In addition, we are prepared to meet and discuss with you the time required for you to wind up outstanding matters." "

[16] The legal opinion also advised the Union to consider the option of providing up to a maximum of 24 months working notice to Mr. Evans and suggested the following specific language be inserted in the proposed termination letter:

> "Our expectation is that you will remain in your current position receiving your current wages and benefits during the period of working notice. We should also point out that we expect that you will perform your duties in the normal course during this period."

[17] As it turned out, the termination letter to Mr. Evans was a verbatim reproduction of the suggested wording from the Union's counsel, with the following exceptions: (1) the first and third paragraphs were amended slightly; and (2) it did not use the suggested language for giving Mr. Evans 24 months of working notice, nor any other words to that effect:

> "As you know, a new executive board for Teamsters Local Union 31 was elected and took office today, January 2, 2003. Pursuant to Section 13 of the Bylaws governing the affairs of our local union, your appointment as a Business Agent ceases as of this date.
>
> As a member of the Teamsters Joint Council No. 36 Severance Pay Plan, you are entitled to a significant severance payment.

> In addition, we are prepared to discuss with you the time required for you to wind up outstanding matters as well as any other issues which are appropriate in the circumstances.
>
> We will be contacting you immediately to commence these discussions."

[18] I say that the legal advice from the Union's counsel was somewhat paradoxical, because it encouraged the Union to rely on Bylaw 13, while at the same time expressing serious doubt about whether it would apply to Mr. Evans. The advice to rely on Bylaw 13 was premised on the notion that Mr. Evans was on a fixed term of employment, when the Union's counsel believed that Mr. Evans would more likely be found to be on an indefinite term of employment, requiring reasonable notice of termination.

[19] It was also very risky to encourage the Union to rely on Bylaw 13, even if only as an initial position, because in doing so the Union might be seen as purporting to terminate Mr. Evans without reasonable notice. Indeed, the opening paragraph of the termination letter informed Mr. Evans that his appointment as a business agent had ceased as of January 2, 2003. Consistent with that communication, he was also told he was "entitled to a significant severance payment". An employee is not entitled to severance unless and until the employment contract is terminated. Conversely, severance is not paid to an employee who continues to be employed. The Union's offer to discuss the time required for Mr. Evans "to wind up outstanding matters" is hardly a clear invitation to discuss a period of working notice. In my view, it does not undermine a reasonable interpretation of the letter as an unequivocal notice that the Union was terminating Mr. Evans' employment as of that date.

[20] The termination letter also created the risk that it might be seen as a repudiation of the employment contract by the Union. Ordinarily, a party faced with a repudiation of a

contract by the other party would have an election to either sue for damages for breach of the contract or to sue for specific performance. However, employees are in an unusual situation in that they cannot insist on continuation of the employment contract if the employer has decided otherwise. Therefore, the only option left to the employee is to commence an immediate action for damages, which is precisely what Mr. Evans did.

[21] The British Columbia Court of Appeal in *Zaraweh* v. *Hermon*, *et al.,* 2001 BCCA 254, at para. 15, put it this way:

> "Where an employer does not wish the employee to work during the notice period and terminates the employment immediately, the employee has an immediate cause of action for damages for breach of the implied term of reasonable notice of termination. …"

Later, at para. 26, the Court of Appeal quoted the following excerpt from the decision of Lord Denning in *Hill* v. *C.A. Parsons & Co.,* [1971] 3 All E.R. 1345 (C.A.):

> "Suppose, however, that the master insists on the employment terminating on the named day? What is the consequence in law? In the ordinary course of things, the relationship of master and servant thereupon comes to an end: for it is inconsistent with the confidential nature of the relationship that it should continue contrary to the will of one of the parties thereto. As Viscount Kilmour L.C. said in Vine v. National Dock Labour Board, [1957] A.C. 488, referring at p. 500 to the ordinary master and servant case: "if the master wrongfully dismisses the servant, either summarily or by giving insufficient notice, the employment is effectively terminated, albeit in breach of contract." Accordingly, the servant cannot claim specific performance of the contract of employment. Nor can he claim wages as such after the relationship has been determined. He is left to his remedy in damages against the master for breach of the contract…"

[22] Thus, by placing initial reliance on Bylaw 13, the Union risked taking an irrevocable step, which could not simply be reversed in subsequent negotiations without Mr. Evans' agreement. That seems particularly strange given that it was the opinion of the Union's

counsel that Mr. Evans was likely an indefinite-term employee and thus one to whom reasonable notice, or pay in lieu of notice, *should* have been provided. Had the Union been advised more emphatically to approach Mr. Evans with an offer of a period of working notice as an initial position, it seems likely that this litigation might have been avoided entirely. Further, had the Union wished to protect its right to rely on Bylaw 13, surely it could have done so by expressly stating in the termination letter that it was not waiving that right by initially offering a notice period, or a willingness to negotiate such a period. After all, if Bylaw 13 *did* apply to Mr. Evans, then he would have *automatically* been terminated as of December 31, 2002.[1]

[23] To conclude on this topic, I find that the termination letter had the effect of repudiating the employment contract and putting it to an end. After that point, the employment contract was no longer binding upon the parties and there was no further obligation upon Mr. Evans to continue to work for the Union, other than to possibly mitigate his loss (which I will come to later in these reasons). I also find that Mr. Evans was an indefinite-term employee and the Union was obliged to provide him with reasonable notice or pay in lieu of notice.

The Telephone Conversation

[24] I am unable to accept the interpretation of the telephone conversation of January 2, 2003 put forward by the Union's counsel. He suggests it is obvious from that conversation that Mr. Hennessy was attempting to negotiate with Mr. Evans a period of working notice and/or pay in lieu of notice. My initial response to that suggestion is that absolutely nowhere in the conversation are the words "working notice", "pay in lieu" or even "notice"

[1] Transcript, June 2, 2003, page 38.

used. I appreciate that these words may be terms of art and that the parties would not be expected to have resorted to legal and formal language. However, there is nothing in the language which *was* used which even comes close to a specific reference to working notice or pay in lieu of notice.

[25] On the contrary, there is evidence throughout the conversation of Mr. Hennessy's continuing intention to rely on Bylaw 13 as authority for terminating Mr. Evans *as of that day*. Consistent with that position, Mr. Hennessy seemed open to the prospect of negotiating a *renewal* of Mr. Evans' term of employment, although that would have required a new contract. I will refer to a number of passages within the transcript of the conversation which support this conclusion (I have added emphasis to certain phrases):

Page 2:

"Stan	I'm not going to close the office down. **I was going to leave the office as is with Barb continuing her employment.**
Don	Right.
Stan	Um, and I wanted to know, basically, I guess, because I was under the understanding earlier that you were going to retire. The call today was to find out how much time you needed…"

Note: Mr. Hennessy did not refer to leaving the office "as is" with ***Mr. Evans*** continuing his employment.

Page 3:

"Stan	The problems that we have, of course, with the new administration and executive board is **the Bylaws are clear that we have to make a decision whether to continue employment or not. We have that ability to do it on the, on the heels of the election**."

Page 4:

"Don	"…**I know that I have to be terminated as of today**…
Stan	**That's what the letter says** …"

…

Don Okay, so am I still on the payroll as of five o'clock or am I off the payroll?

Stan No, no, **your appointment has been terminated,** …"

Note: My review of the audio tape of the conversation indicated some minor amendments from the transcript on this quote, but more importantly, Mr. Hennessy stressed the word "has" in saying "no, no, your appointment ***has*** been terminated …"

Page 5

"Don … **Stan, if you've got to terminate me, you got to terminate me**. I understand where you're coming from. You got to understand too, that **I will be fighting it as an unfair dismissal**. …

Stan **That's fine** …"

Note: Why would Mr. Evan's be considering legal action for "unfair dismissal" if he was still employed? And yet, Mr. Hennessy does not attempt to correct him on this point.

Pages 5 and 6:

"Stan **These are new bylaws**, Don; that was changed in the last couple of years.

Don Well, **it doesn't say we will be terminated on that date**, though.

Stan **Oh, yes it does**. Well, you know, my advice is that **if we're going to sever employment** we are going to have to make that decision."

Page 6 and 7

"Don … you're telling me because you guys take over January second, **you're terminating my service as of today**, and you guys take office. You're not saying, 'Don, we'll keep you on another year to try to figure out what's going on …

[There is further discussion regarding Bylaw 13]

Don … **So you're saying, effective today, I am terminated** because the other authority is gone?

Stan **That's right.**

Don Okay. **It does not say you cannot keep me on for another year, another four years, or another six months**. …

Stan What is says, is, **if in fact we were to renew the employment, we can renew** and it's under our mandate …"

Page 7

"Don … You guys take over power today, **I could be terminated today**. **But there is nothing in there says I can't be held on, then let go a year down the road, is there?**

Stan What I said to you Don … that's how I started the conversation out … if you can give me some general idea what you would like as far as clean up time, then I would made the commitment to keep you on for that time as well as I would keep the building open and Barb in place in her position. …"

[26] Nowhere in the above quotes does Mr. Hennessy seek to correct Mr. Evans' impression that he was terminated as of that day. On the contrary, Mr. Hennessy confirms that Bylaw 13 gives him the authority to do just that. To the extent that he talks about "clean up time", that appears to be in the context of a possible renewal of Mr. Evans' term of employment, rather than a continuation of his existing employment. Nor does Mr. Hennessy follow up on Mr. Evans' suggestion that he could simply be kept on for another six months or one year or longer under the existing contract of employment, which is tantamount to an offer of his willingness to consider a period of working notice. Despite the fact that Mr. Evans raised that option at two points during the conversation, Mr. Hennessy failed to respond in any affirmative way. That seems quite contrary to the repeated suggestion from the Union's counsel that it was Mr. Hennessy's intention to negotiate a period of working notice. If that was truly the case, then surely these were prime opportunities to follow up on the implied offers made by Mr. Evans, rather than rely on the strict application of Bylaw 13.

[27] Thus, I am unable to find on a balance of probabilities that Mr. Hennessy was attempting to negotiate with Mr. Evans a period of working notice and/or pay in lieu of

notice in this telephone conversation. Rather, I find that Mr. Hennessy intended to terminate Mr. Evans as of January 2, 2003, and that he was attempting to negotiate a renewal of Mr. Evans' employment for a fixed term. There are also numerous references in the testimony at trial to corroborate this finding.

Evidence at Trial

[28] Mr. Hennessy said in direct examination that he felt that Bylaw 13 stipulated that the employment of the appointed business agents ceased on the last day of the previous term, December 31, 2002, and therefore he had no option but to notify those employees as soon as possible.[2] If he did not, he was fearful that the appointed business agents would presume that they had been re-appointed for the following term.

[29] Mr. Hennessy also testified that it was his intention as the newly elected President to govern the Teamsters Local Union 31 "by the bylaws".[3]

[30] Mr. Hennessy repeatedly testified that Mr. Evans was "terminated" as of January 2, 2003.[4] He further conceded that his intention in the telephone conversation was to discuss a re-hiring or renewal of Mr. Evans term, but not for a full five years. Rather, he intended to negotiate a term equivalent to what Mr. Evans would otherwise be entitled to as a period of working notice, or alternatively, pay in lieu of notice, or a combination of both.[5]

[31] My conclusion that this was Mr. Hennessy's intention is corroborated by Mr. Davies, the Union's director of legal resources, who consulted with Mr. Hennessy about the legal opinion dated December 31, 2002, and also was present during the January 2nd telephone conversation. He agreed that if Bylaw 13 applied to Mr. Evans, his employment ended at midnight on December 31, 2002, with the possibility that he could be then re-appointed for

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[2] Transcript, June 1, 2005, pages 38 and 41.
[3] Transcript, June 1, 2005, page 87.
[4] Transcript, June 1, 2005, pages 108, 110 and 119.
[5] Transcript, June 1, 2005, page 119.

whatever length of time the new executive wanted, which is what he thought Mr. Hennessy was exploring.[6]

[32] Returning to Mr. Hennessy's evidence, he said that at the end of the telephone conversation, Mr. Evans indicated that he would be sending Mr. Hennessy a "one time offer" the following day and that if it was not acceptable to the Union, then Mr. Evans would be seeking legal counsel.[7] Mr. Hennessy concluded this portion of his evidence by saying that he "agreed" with Mr. Evans. This was obviously a reference to Mr. Evans having said earlier that he was considering seeking legal advice on the possibility of a wrongful dismissal action. Thus, I infer from Mr. Hennessy's evidence on this point that he understood and accepted that Mr. Evans would pursue the option of a wrongful dismissal law suit if he and the Union were unable to agree on a resolution to the problem. Clearly, the problem was what length of time Mr. Evans would be allowed to continue working for the Union. Further, any continuation of Mr. Evans' employment would have to be under a renewed term of employment, as opposed to an extension of his existing employment. That is consistent with Mr. Hennessy's apparent expectation that Mr. Evans may have to launch a wrongful dismissal law suit in the absence of an agreement. Surely he would not have expected an employee to sue for wrongful dismissal if they had not been dismissed. Conversely, one *would* expect such a law suit from an employee who *had* been dismissed.

[33] Even the Union's counsel submitted in his opening statement that the letter of January 2nd did terminate Mr. Evans:

> "… he was terminated on that date …" [8]
> [and later]
> "… he had been told he was terminated effective that day …"[9]

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[6] Transcript, June 2, 2005, pages 39 and 47.
[7] Transcript, June 1, 2005, page 98.
[8] Transcript, February 3, 2005, page 154.

Finally, the Union's counsel conceded that the pre-trial order of Mr. Justice Veale made March 11, 2005, confirmed this fact by declaring that the plaintiff's employment with the Union was terminated on January 2, 2003.[10]

[34] The Union's approach here seems particularly perplexing since an employer can always terminate an employee upon reasonable notice. Therefore, even if Mr. Evans assumed that he had been re-appointed to another five-year term on January 1, 2003, as the Union feared he might, it could still have given him reasonable notice of termination. Therefore, the Union did not gain any advantage by purporting to terminate Mr. Evans *immediately* and then attempting to engage him in negotiations on rehiring him for a fixed term. Conversely, there was no prejudice to the Union to wait until after the commencement of the new five-year term and then provide Mr. Evans with reasonable notice of his termination. After all, I understood the Union and its counsel to concede that, as Mr. Evans was likely an indefinite-term employee, he would have been entitled to reasonable notice of termination in any event.

[35] Indeed, the Union's own director of legal resources testified in cross-examination as follows:[11]

> " … I don't think there's anything in our bylaws that indicates that the local union can't end the employment of an appointed business agent short of their appointed term. It's just that I would imagine they would have to be given appropriate notice, or pay in lieu of notice."

[36] The Union also placed considerable reliance on the case of *George* v. *Hardman Group Ltd.*, [1984] N.S.J. No. 45. In that case, the employer had decided to phase out the plaintiff employee, Mr. George. At an initial meeting to discuss the issue, the employer

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[9] Transcript, February 3, 2005, page 157.
[10] Transcript, February 3, 2005, page 154.
[11] Transcript, June 2, 2005, page 56.

said “I think we should go our separate ways”. Mr. George thought that he had been fired then and there. However, the trial judge found that the employer did not intend to terminate the employment, but rather was looking at ways in which Mr. George could be phased out over time, during which his employment would continue. As the trial judge said at para. 17, the employer “had in mind, in other words, a period of notice”, and that the plaintiff incorrectly concluded that he had been terminated as of the initial conversation. The trial judge then went on to discuss the law and the obligation of employers to give employees notice of any intended termination of the employment contract. At para. 20 he said:

> “It is important to note that where an employee is entitled to notice of dismissal, the choice of whether he shall continue to work through the notice period or be paid a sum in lieu of notice lies with the employer and not with the employee. Upon being advised of his dismissal, the employee does not have the right to withdraw his services and demand a payment in lieu of notice because the employer still has the right to insist that he continue to discharge his service obligations at the agreed rate of pay until the contract finally terminates at the end of the notice period.”

[37] However, the *George* case is distinguishable from the case at bar, as I have already found that it was not Mr. Hennessy’s intention during the telephone conversation of January 2nd to discuss a period of working notice or pay in lieu of notice. Rather, Mr. Hennessy was of the view that Mr. Evans’ term of employment had ceased as a result of the application of Bylaw 13 and he was seeking to negotiate a renewed and fixed term of employment with Mr. Evans.

[38] The fact that the Union continued to pay Mr. Evans his full salary and benefits from January through May 2003 is not determinative of the legal relationship between the parties, although it can be seen as a proper means of paying damages which flow from the

termination without notice: *Marshall* v. *Artek Group Ltd.*, [1993] B.C.J. No. 51, at p.2 (Q.L.). For what it is worth, Mr. Evans telephoned the payroll clerk for the Union, informed her that he had been terminated and did not wish to receive any more paycheques. However, the clerk informed him that she could not stop sending the paycheques because she had not been ordered to stop.[12]

[39] To summarize, I conclude that what the Union did was terminate Mr. Evans and then attempt to re-hire him for an additional term. However, the negotiations to enter into such a new contract of employment ultimately failed. Thus, the Union's termination of Mr. Evans' employment on January 2, 2003 was without cause and without reasonable notice and therefore constitutes a wrongful dismissal.

Issue 2: If Mr. Evans was wrongfully dismissed, what amount of reasonable notice of termination should he have received?

[40] In the absence of just cause, an employer must provide an employee with a reasonable period of notice of termination. What is reasonable must be decided with reference to each particular case and depends on a variety of factors including:

1. the character the employment;
2. the length of the employee's service;
3. the employee's age; and
4. the availability of similar employment, having regard to the employee's experience, training and qualifications.[13]

[41] It is probably fair to describe Mr. Evans as a career business agent. His only previous experience was in truck driving, which he can no longer do because of health reasons. His formal education is limited to a grade 10 level and he has taken no upgrading or other academic or technical training. He was 58 years old at the time of his termination

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[12] Transcript, February 3, 2005, page 64.
[13] *Bardal* v. *The Globe and Mail Ltd.* (1960), 24 D.L.R. (2d) 140 (Ont. H.C.); and *Ansari* v. *British Columbia Hydro and Power Authority*, [1986] B.C.J. No. 3005 (S.C.).

and had been employed as a business agent for the Union for approximately 23½ years. His duties and responsibilities included organizing workers, negotiating collective agreements, handling grievances from members and attending upon arbitrations. He also assisted Union members with a variety of related matters including workers' compensation appeals, employment insurance appeals and defending traffic and motor vehicle charges. He was one of only two employees of the Union in Whitehorse, the second being the part-time secretary for the office, who incidentally happened to be Mr. Evans' wife. Mr. Evans was largely unsupervised and apparently had the confidence of the Union to manage its operations in the Yukon as he saw fit.

[42] There was virtually no evidence of other similar employment available in the Yukon.

[43] In his legal opinion of December 31, 2002, the Union's counsel indicated that the maximum period of notice in this case would be 24 months. That opinion is generally supported by the case law.

[44] McEachran C.J.S.C., as he then was, said in *Ansari,* cited above at note 13, that the rough upper limit for reasonable notice in wrongful dismissal cases is 18 to 24 months, subject to exceptional cases and/or extenuating circumstances.

[45] Mr. Evans relies on *Moody* v. *Telus Communications Inc.*, 2003 BCSC 471, for the general proposition that cases justifying a notice in the range of 24 months commonly involve employees who are put in a particularly vulnerable position by the termination and, because of circumstances affecting such employees uniquely, are put at an unusual disadvantage in seeking comparable employment. Indeed, that was the case with Mr. Moody. He was employed for approximately 27 years and was terminated as a result of a corporate re-organization. He was 51 years old and had occupied a low to mid-management position, where he had expertise with a product that was unique to his

employer. At the time of his termination he was in recovery for cancer treatments. He was offered 18 months salary and benefits in lieu of notice. While Cullen J. noted at para. 36 that the most significant factor bearing on the amount of notice was the issue of Mr. Moody's health, he went on at para. 38 to discuss Mr. Moody's "particular position of vulnerability", given the difficulty he would likely have finding comparable employment. Mr. Moody was awarded a notice period of 24 months.

[46] While *Moody* is arguably distinguishable because of the importance of the health issue in that case, it is also comparable to the case at bar in the sense that Mr. Evans is in a particularly vulnerable position, given the uniqueness of his position and experience and the unlikelihood that he will find comparable employment in the Yukon.

[47] Mr. Evans' counsel also relies on *Brazeau* v. *International Brotherhood of Electrical Workers,* 2004 BCSC 251, upheld in 2004 BCCA 645. He argues that this case supports the proposition that age and lack of transferable skills militate in favour of an award at the rough upper limit of 24 months. However, the Union's counsel seeks to distinguish *Brazeau* for a number of reasons. First, Mr. Brazeau's position as an international representative for the Union was a more senior management position than that of a business agent. Second, his length of service was considerably longer than Mr. Evans. Not only had Mr. Brazeau held his position as international representative for over 26 years, he had also been employed prior to that as president, business manager and financial secretary for approximately 6 years. Therefore, his total length of service with the Union was about 32 years. Third, Mr. Brazeau was 69 years old when he was dismissed, whereas Mr. Evans was 58.

[48] The Union provided a helpful table of cases on the issue of the notice period. It sought to distinguish those cases involving higher level executive or management positions

from those where the plaintiffs had lower levels of responsibility, where the periods of employment ranged between 21 and 30 years.[14] The Union says these cases set the range of notice for Mr. Evans between 18 and 22 months. The Union then seeks to distinguish the cases on the upper end of that range, *MacGillivray, Rickards Estate* and *Dynes*, on the basis that the plaintiffs in those cases had more senior management positions than Mr. Evans.

[49] The *Inskip* case, cited above at note 14, involved a plaintiff who was 51 years old and had worked for an automobile dealership for a total of 28½ years. He initially joined as a salesman and 12 years later became the sales manager, a position which he held until his dismissal about 16 years later. His position as sales manager was described by the court (at para. 10) as an "executive position" at the high end management level. However, the court did not accept that the plaintiff fell into "the category of long serving senior employees entitled to the rough upper limit of 24 months notice". Given that the plaintiff was 51 years old when he was dismissed and had served what would probably be most of his working life with his employer, and considering that there was a limited opportunity for the plaintiff to obtain similar employment in the area, the court held that 22 months was an appropriate length of notice.

[50] The Union also sought to distinguish *Inskip* on the basis that the plaintiff had more years of service and earned a significantly greater salary than Mr. Evans. However, I find those facts are balanced out by the facts that Mr. Evans is older than Mr. Inskip and had a very high level of responsibility representing the Union in the Yukon; indeed he was

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[14] *MacGillivray* v. *Telus Communications Inc.,* 2004 BCSC 1394;
Rickards Estate v. *Diebold Election Systems Inc.,* 2004 BCSC 1357;
Dumont v. *Vernon (City),* 2002 BCSC 1692;
Inskip v. *Jacobson Ford Mercury Sales Ltd.*, [1999] B.C.J. No. 1248 (S.C.) (Q.L.); and
Dynes v. *Jonah Apparel Group Ltd.,* [1997] B.C.J. No. 1418 (S.C.) (Q.L.).

virtually autonomous in doing so. Therefore, in my view the *Inskip* case is quite comparable and persuasive.

[51] Finally, the Union argued that in the telephone conversation of January 2, 2003, Mr. Evans indicated that he intended "to retire at age 60, which is another year and a half down the road" and that this places a cap of 18 months on the notice period, since Mr. Evans would have ceased working at that time in any event. I reject that submission. First, the comment made by Mr. Evans during the telephone conversation (at page 1 of the transcript) was specifically "I am *looking to* retire at age 60 …" (my emphasis). In other words, he did not commit to retiring at that age, but rather was simply indicating that he was thinking about doing so. There was certainly no requirement upon Mr. Evans to retire at the age of 60. Had he continued with his employment, changed his mind and worked beyond the age of 60, the Union would likely have had no recourse, in the absence of just cause. In short, there is no legal significance to Mr. Evans' musings his retirement.

[52] Once again, I am perplexed by the Union's evidence on this issue of reasonable notice. Mr. Hennessy was asked in cross-examination about the demand letter of January 3, 2003 from Mr. Evans' counsel which offered a total period of 24 months:[15]

> "Q And you certainly didn't accept the proposal that was conveyed in it?
>
> A Actually, that's not quite true either, Mr. Macdonald. That letter was sent to me, which I turned over to our counsel. In it you outlined what you believed - - I believe it's the letter, what Don was entitled to and *I didn't take issue with that*."
>
> (Emphasis added)

If that was truly the case, then it is beyond me why the dispute was not settled then and there.

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[15] Transcript, June 1, 2005, commencing at page 99, line 17.

[53] Having considered all the cases submitted by counsel, the evidence and the factors noted in the *Bardal* and *Ansari* cases, I find that an appropriate period of notice for Mr. Evans is 22 months.

Issue 3: Should the period of notice be extended because of the conduct of the Union in terminating Mr. Evans' employment?

[54] The leading case on this issue is *Wallace* v. *United Grain Growers Ltd.,* [1997] 3 S.C.R. 701. That case recognized that employers have an obligation of good faith and fair dealing when dismissing an employee and a breach of that obligation may be compensated for by extending the period of reasonable notice. Iacobucci J., speaking for the 6 to 3 majority of the Supreme Court of Canada, said at para. 88 that he does not condone employers who subject employees to "callous and insensitive treatment in their dismissal, showing no regard for their welfare." He continued at para. 95 where he noted that:

> " … the loss of one's job is always a traumatic event. However, when termination is accompanied by acts of bad faith in the manner of discharge, the results can be especially devastating. …"

At para. 98, Iacobucci J. acknowledged that the obligation of good faith and fair dealing cannot be precisely defined. However, at a minimum he said that employers ought to be "candid, reasonable, honest and forthright" with their employees and to refrain from being "untruthful, misleading or unduly insensitive." Finally, at para. 103, he recognized that it has long been accepted that a dismissed employee is not entitled to compensation for injuries arising from the fact of the dismissal itself, but rather from the manner in which the dismissal occurred:

> " … Thus, although the loss of a job is very often the cause of injured feelings and emotional upset, the law does not recognize these as compensable losses. However, where an employee can establish that an employer engaged in bad faith

> conduct or unfair dealing in the course of dismissal, injuries such as humiliation, embarrassment and damage to one's sense of self-worth and self-esteem might all be worthy of compensation depending upon the circumstances of the case. …"

[55] In this case, Mr. Evans' counsel argues that the circumstances of the termination were particularly unfair. On January 2, 2003, without any prior warning, Mr. Evans was instructed to stand by for a telephone call from Mr. Hennessy, following which he received the termination letter by fax. While it is true that Mr. Evans had previously reviewed a copy of Mr. McGrady's legal opinion of December 31, 2002, the Union did not know that at the time that it purported to terminate Mr. Evans. In any event, the Union then sought to rely upon the provisions of Bylaw 13, even when it had been advised by Mr. McGrady that the Bylaw "probably" did not apply to Mr. Evans. Finally, although the Union suspected that Mr. Evans was planning to retire, no one had the common decency to telephone him prior to January 2nd to find out more about his true retirement plans.

[56] Mr. Evans' counsel argues that this case is similar to the case of *Brougham* v. *Carrier-Sekani Tribal Council,* [1998] B.C.J. No. 2319 (S.C.). In that case, Ms. Brougham was 35 years of age and had been employed by the tribal council for nearly 12½ years, which was essentially all of her working life. Her position was described as a very responsible one. Two years prior to the termination, a new tribal chief had been elected and, while Ms. Brougham and the new chief initially got along, their relationship had deteriorated. On the morning of the day of the termination, the chief telephoned Ms. Brougham and advised her that her employment had been terminated and that a letter would be sent to her. Ms. Brougham received the termination letter about 5 days later. The court described the manner of Ms. Brougham's dismissal as "very callous", "insensitive" and "shabby".

[57] It is important to note that Mr. Evans' counsel is not arguing that the insensitive treatment of Mr. Evans on the day of the termination should result in *more than* 24 months notice. Rather, counsel submits that the poor treatment should serve as a basis for concluding that the period of reasonable notice should be set at the upper limit of the range, that is *at* 24 months.

[58] The Union's counsel argues that the *Brougham* case is distinguishable from that of Mr. Evans, as the termination letter of January 2, 2003 was quickly followed up by the telephone call from Mr. Hennessy to discuss the situation. I agree. While I have already found that what Mr. Hennessy was doing was attempting to negotiate with Mr. Evans the length of a renewed period of employment, nevertheless, he was attempting to negotiate an alternative to the immediate cessation of employment. Also, Mr. Hennessy maintained a generally friendly and respectful tone throughout the conversation. Admittedly, the termination letter did not include the suggested wording from Mr. McGrady on working notice, but then his advice was that the Union may wish to "place reliance on [Bylaw 13] as an initial position, but abandon that position in the course of negotiations" should Mr. Evans argue that he was an indefinite-term employee. Thus, it can be said that Mr. Hennessy was following Mr. McGrady's advice almost to the letter. While I am of the view that Mr. McGrady's advice on that score was lacking, I cannot say that Mr. Hennessy was intentionally being untruthful, misleading or unduly insensitive in relying upon that advice.

[59] Further, after receiving the demand letter from Mr. Evans' counsel dated January 3, 2003, the Union's counsel responded by letter on January 13th, indicating that Mr. Evans remained on full salary and benefits (I understand that the intervening delay of 10 days was due to an administrative problem with the forwarding of the demand letter from the Union to its counsel).

[60] All these circumstances lead me unable to conclude that the Union acted in bad faith in the manner of its termination of Mr. Evans and I decline to extend the notice period as a result.

Issue 4: Did Mr. Evans fail to mitigate his damages?

[61] The Union's counsel broke this issue down into several sub-issues and I will attempt to address each in turn.

Did Mr. Evans fail to engage in a meaningful job search?

[62] The Union argues that Mr. Evans made no effort to pursue other comparable employment. In his examination for discovery he was asked whether he used a résumé in his job search and he replied "What job search?" In his cross-examination he was asked the following questions and gave the following answers:[16]

> "Q I take it you've not prepared or updated a resume for yourself or a *curriculum vitae*, or whatever you wish to call it?
> A No, I don't.
> Q You've not prepared one?
> A No. It'd be two lines; White Pass, Teamsters.
> Q I think you told us on another occasion that your job search had consisted of talking to people in the coffee shop and the truck drivers' shop?
> A Yes.
> Q I think you told us you talked about - - to about six people?
> A Well, I mean, I don't know exactly how many, approximately six or more, whoever's sitting in there. The word got out that I was out there looking.
> Q You're not able to tell us the names of any one you've sought employment with?

[16] Transcript, February 4, 2005, commencing at page 82, line 19.

A The way it works up here, if a job comes open for a truck driver or a pilot car driver, you go and hang out at Trails North, the truckers' place, and honest to God, not one person approached me.

Q I'm sorry.

A Not one person approached me while I was - - I still hang out there to this day.

Q And you're not able to give us any names of any one that you've approached about a job?

A I just told you, I went up to the coffee shop, and said to you I let the people know in that coffee shop I was available for pilot car driving or whatever.

Q And did - -

A Okay, Steve Clare, who used to own Trails North, Dave Gegan (phonetic) who's now the new owner of Trails North, are the people that would know what was going on. Eddy Coates who owns Coates Dump Truck Service. People like that that I've know for years. And my phone did not ring off the hook by any of these people because they knew of my Union activity.

Q But you didn't, at any point, speak with those people, I take it, about your looking for work, tell them you're actively looking for work?

A Everybody in town knew I was fired. So they knew I was looking for work. It was in the newspapers.

Q So I take it you didn't actually talk to anybody about seeking employment?

A I don't follow your reason of questions, so help me out.

Q Let's not worry about the reasoning. You didn't talk to anyone about seeking employment, any prospective employer?

A There is no jobs for unions in this town. The only job I had where somebody approached me was the guy from the United Food Workers, Retail Workers, whatever it's called. I

> didn't get a call this time while they're down their raiding the Superstore because they still know I'm loyal to the Teamsters.
>
> Q Now, what was this gentlemen's name, please?
>
> A I'm quite sure his last name was Toovey. …"

Mr. Evans then went on to testify about how he declined the opportunity with United Food Workers, as he thought their proposal to "raid" a number of retailers in Whitehorse was illegal and he did not want to get involved in it. He also testified about a business agent job being available within the "government union", but said that was filled from "in house".[17]

[63] In his direct examination, Mr. Evans said this:[18]

> "Q Tell us, please, what job skills do you possess as a result of your years of employment?
>
> A Right now?
>
> Q Right.
>
> A I'm trained as a union business agent. My life has been as being part of a union.
>
> Q Yes. In your prior life, you were a truck driver?
>
> A Well, that was 35 years ago and things have changed since then. I don't even think I could get into a Kenworth now. Not because of my weight. I just don't think I'm qualified to drive one anymore. My knee wouldn't take it; I've got a bad knee.
>
> Q What can you say as to the employment market for you in Whitehorse –
>
> A Zip.
>
> Q – – since June of 2003?
>
> A Zip.
>
> Q Zip?

[17] Transcript, February 4, 2005, p.86.
[18] Transcript, February 3, 2005, commencing at page 85, line 8.

> A Zip. Nothing. There has not been a union job come open, as a business agent or an organizer. I sit in restaurants, let people know I'm available to drive pilot car or leave my name around, saying that, you know. People just avoid me like a plague. Superstore is not going to hire me at $8 an hour. I'm not going to work for $8 an hour. I don't have a problem with it, but I'm just too old to start stocking shelves."

[64] The law in this area was well summarized by Brenner J. in *Carlysle–Smith* v. *Dennison Dodge Chrysler Ltd.*, [1997] B.C.J. No. 3075. At para. 26 he cited the leading Supreme Court of Canada case of *Red Deer College* v. *Michaels and Finn,* [1975] 5 W.W.R. 575, and stated that the burden is on the employer to prove that the former employee has failed to mitigate his loss arising from the termination of his employment:

> "…***The relatively high standard of proof*** that the law imposes upon an employer advancing a mitigation defense was addressed by Locke J. (as he then was) in Bird v. Warnock Hersey (1980), 25 B.C.L.R. 95 where he stated:
>
> > I was not much impressed, however, with the efforts - I should say lack of effort - by the Plaintiff to obtain other reasonably comparable employment. But ***the onus here is on the Defendant to prove not only the failure in fact, but that had the Plaintiff taken reasonable steps to mitigate, he would have been likely to obtain comparable alternative employment***: see Munana v. MacMillan Bloedel Ltd. (1977) 2 A.C.W.S. 364. I do not think the Defendant satisfied the burden on the latter point so I will not reduce the award."
>
> (Emphasis added)

Brenner J. went on to say at para. 32:

> "However, if there is a lack of evidence of a specific job foregone or the terms of that job, how is the court to calculate or assess the loss? To put it another way, in these circumstances how is the court to quantify the failure to mitigate?"

And later, at para. 39 he said:

> "… If an employee has not taken reasonable steps, but if the court is satisfied that even if such steps were taken that it is unlikely that such alternative employment would have been achieved, then presumably little or no reduction in the notice period would be appropriate."

[65] In *Smith* v. *Aker Kvaerner Canada Inc.*, 2005 BCSC 117, Burnyeat J., at para. 32, quoted from *Petersen* v. *Labatt Breweries of British Columbia*, 25 C.C.E.L. (2d) 241 (B.C.S.C.), as follows:

> "The onus on a defendant alleging a plaintiff has failed to mitigate in an action of this kind is "by no means a light one". …"

Burnyeat J. described this as a "heavy onus" and then went on to find (at para. 36) that even if the plaintiff had failed to make reasonable efforts to mitigate his damages, there could be no reduction in the award of damages where the employer had not proven that the plaintiff would otherwise have found appropriate work.

[66] Mr. Evans' situation is comparable to that of the plaintiff in *Brazeau* v. *International Brotherhood of Electrical Workers*, cited above at para. 47, where the trial judge held at para. 266:

> "The plaintiff had held his position for over 25 years. While some of his skills may have been transferable, I find it unlikely that he would have secured a similar position elsewhere, with comparable remuneration and benefits to those earned through his long tenure with the defendant."

And later at paras. 268 and 269:

> "The onus to prove failure to mitigate rests with the defendant. To succeed, it must prove both that the plaintiff failed to make reasonable efforts to find work, and that, had he done so, he likely would have found replacement work: England, Christie, and Christie, supra at para. 16.71.
>
> I find the evidence insufficient to meet that onus here. While the plaintiff's examination for discovery evidence suggests he did

> not fully explore some potential employment opportunities, it falls short of establishing that suitable positions were available to him, had he done so. …"

The trial judge's conclusion on the issue of mitigation was upheld by the British Columbia Court of Appeal: 2004 BCCA 645, at para. 26.

[67] Like Locke J. in the *Bird* case, cited above at para. 64, I was not particularly impressed by the efforts of Mr. Evans to obtain alternate employment. However, I am also not satisfied that the Union has met the "relatively high standard of proof" that not only did Mr. Evans fail to make reasonable efforts to find work, but that had he done so, he likely would have found comparable alternative employment in the Yukon. I agree that he put minimal effort into the task, but there is little or no evidence that it would have made a difference if he had done more.

Did Mr. Evans fail to take an alternative position as a business agent for the Union in Prince George?

[68] The Union argued that Mr. Evans had the option to exercise his seniority to "bump" one of the existing business agents in Prince George and take over that position and that it was unreasonable for him to refuse to relocate in all the circumstances. It says that the option to bump another employee from their position is based on the concept of seniority, which applies to employees of the Union, regardless of whether they are covered by a collective agreement.

[69] In the January 2, 2003 telephone conversation, Mr. Evans at one point stated:

> Page 4:
>
> | | |
> |---|---|
> | "Don | … I guess the only option open to me is to exercise my seniority and bump into Prince George. |
> | Stan | I guess that option is there for you, Don. |
> | Don | Yeah, and I really don't want to have to, you know, with John Ellis, or Jim [Jeffery], I don't think it's fair to them." |

Nothing further was said by either party about the "option" of Prince George in that conversation. However, it is interesting to note that Mr. Hennessy did say earlier in the conversation (at page 2) that he looked at the membership in Prince George and said he was "keeping John Ellis on".

[70] Indeed, there is no further reference to Prince George as an option in any of the subsequent correspondence through the period of negotiations up to and including June 2, 2003.

[71] In Mr. Evans' examination for discovery he was asked the following questions and gave the following answers:[19]

> "Q And then if they'll go to the next - - if you'll go to the next entry by you, "I guess the only option open to me is to exercise my seniority and bump into Prince George."
>
> A Right.
>
> Q And tell us about what that meant, please?
>
> A I just told him that I thought it. I should have been given the option to bump, exercise my seniority to bump into Prince George and bump John Ellis and Jim [Jeffery].
>
> Q And he says, "I guess that option is there for you, Don."
>
> A Never had a chance to exercise it. He fired me that day.
>
> Q Where do we find that?
>
> A Down further when he says your appointment is finished as of today, you're terminated.
>
> Q But he had said that in the letter as well?
>
> A But he also said it in the full conversation too, so if I'm terminated at five o'clock, effective that day, the 2nd, I'm no longer working for the Teamsters. How do I express my option to transfer?

[19] Transcript, June 2, 2005, commencing at page 127, line 9.

Q But, you see, that was also in your letter that you had at hand, the letter from the local. It also said you were terminated, and yet here you were discussing with your boss notice?

A He phoned me. I didn't phone him.

Q But you were discussing with him continuing to work until you retired?

A He phoned me.

Q Yes.

A I didn't phone him, Leo.

Q But you say here, "I guess the only option open to me is to exercise my seniority and bump into Prince George." At no point did you ever pursue that further with him, did you?

A Because Stan knows. He was at the meeting with a bunch of us at Harrison Hot Springs where it was discussed that we cannot exercise our seniority to bump another rep. I wanted to see what Stan would say, and he knew we could not exercise it. It goes back to the days of Bill Henstock when he went to Vernon. And that is where we were told we no longer had that option. Why didn't Stan say to me, "We have an opening in Abbotsford, we have an opening in the Vancouver office, we're going to transfer you down there"? He never made that offer.

Q But, you see, he goes on and answers you and says, "I guess that option is there for you, Don, so he tells you?"

A He guesses that option is there for me.

Q No, let me finish. He tells you that you have this option to bump into Prince George?

A Yeah, and after consideration, I wasn't going to disrupt my life to move myself, my wife and my family down to the Prince George area at that time.

Q Yes. So you didn't choose that option, did you? That was your choice?

> A No, I didn't choose that option after consideration. I know what is would cost my family."

[72] At the trial, Mr. Evans testified as follows on cross-examination:[20]

> "I'm not going to lie to the Court. No, I would not like to move. My wife has a family here. My best friend sits in the courtroom here. We go fishing. We do everything together. He's gone through cancer treatment. I couldn't leave him."

[73] The Union submits that it was unreasonable for Mr. Evans not to pursue the Prince George option for the following reasons:

1. He was raised in that city and worked there briefly before moving to the Yukon, and therefore was familiar with the area;
2. The position available in Prince George was a business agent, which was the same position he had in Whitehorse; and
3. He would not necessarily have been required to move. Rather, he could have continued to reside in Whitehorse and commute to Prince George once a month for a few days at a time.

[74] I find that the passing reference to Prince George in the telephone conversation of January 2, 2003 did not constitute a serious offer by the Union for Mr. Evans to take a position as a business agent in Prince George. First, that was the one and only time that the topic was ever discussed in the post-termination negotiations. Further, Mr. Evans immediately dismissed the idea, telling Mr. Hennessy that he really did not want to bump John Ellis or Jim Jeffery as he did not think it was fair to them. Mr. Hennessy made no further mention of the possibility.

[75] Second, Mr. Hennessy had sent a letter by fax to Mr. Ellis on January 2, 2003 confirming his re-appointment for another five-year term, whereas Jim Jeffery had received

[20] Transcript, February 4, 2005, page 88.

a termination letter on the same day, similar to the one sent to Mr. Evans. Therefore, the only person for Mr. Evans to "bump" at that time was Mr. Ellis. However, Mr. Hennessy stated in the telephone conversation that he was "keeping John Ellis on", which seems inconsistent with any realistic possibility of Mr. Evans successfully bumping him.

[76] Third, the Union seems to presume that Mr. Evans would have had the legal right to bump Mr. Ellis. However, they provided no authority for that proposition. Mr. Evans and the other business agents were not governed by a collective agreement. Therefore, at common law if Mr. Ellis was transferred or terminated to make way for Mr. Evans, I would expect that he would have grounds for legal action against the Union. There was certainly no precedent which Mr. Hennessy could point to of such a thing being done before.[21] Thus, I remain unconvinced that it would have been legally possible for Mr. Evans to bump into a business agent position there. Similarly, I reject the Union's proposition in its memorandum of argument that such a position was truly "available" to Mr. Evans in Prince George.

[77] Fourth, there was evidence that the Union constitution requires that a business agent in the northern British Columbia area could only be hired "after consultation" with the Union members in the area.[22] And, Mr. Hennessy testified that if Mr. Evans *had* replaced Mr. Ellis, he would very likely have experienced resistance from the membership in that district.[23] I expect that would particularly be the case if Mr. Evans "parachuted" into the community for a few days each month, as the Union suggested was possible.

[78] Fifth, given Mr. Evans' age, the length of time that he has lived in Whitehorse, and the connection both he and his wife have with the Whitehorse community, it was not

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[21] Transcript, June 1, 2005, page 114; Transcript, June 2, 2003, page 54.
[22] Transcript, June 2, 2003, page 51.
[23] Transcript, June 1, 2003, page 115.

unreasonable for him to refuse to consider that option any further. He had not lived in Prince George since his early days as a highway truck driver prior to his move to the Yukon in 1969. Therefore, it is hardly accurate for the Union to suggest that he would still be "familiar" with the Prince George area. Further, personal and family reasons, moving costs and the necessity of selling one's home and purchasing an alternate residence in the new location have all been accepted as legitimate in reasonably refusing such a move: *Schalkwyk* v. *Hyundai Auto Canada Inc.*, [1995] O.J. No. 3964, at paras. 55 and 61-63.

[79] Finally, the Union's legal director, Don Davies, testified that, after this conversation, the Union was waiting for Mr. Evans to confirm his request to move into Prince George.[24] However, if Mr. Hennessy genuinely felt this was a legitimate and serious option, I would have expected him to take the initiative and pursue it further in an attempt to accommodate Mr. Evans' needs. That would be particularly the case regarding the proposition that Mr. Evans could have commuted from Whitehorse to Prince George once a month for several days at a time. I do not accept the Union's argument that the onus was on Mr. Evans to explore these possibilities, especially when there is evidence that the entire topic of "bumping" was apparently one of some controversy within the Union.

[80] It must also not be forgotten that this is a mitigation issue and that the employer bears the onus of proving the employee failed to take reasonable steps to mitigate. Furthermore, the topic of Prince George must be considered within the broader notion of whether an employee has an obligation to accept new or continued employment with the same employer who terminated him, which I will discuss next.

[24] Transcript, June 2, 2005, page 73.

Was Mr. Evans' failure to return to work on June 2, 2003 unreasonable?

[81] The Union argued in its memorandum that it was "completely unreasonable" for Mr. Evans to refuse to return to work on June 2, 2003, regardless of whether the letter from its counsel of May 23, 2003 was characterized as a request by the Union for him to return to work or as an offer of re-employment for a period of 19 months. I find that the letter was neither. The critical paragraphs stated as follows:

> "On behalf of the Local, ***we request*** that Mr. Evans return to his employment no later than June 1, 2003, to serve out the balance of his notice period of 24 months. To be clear, the total notice period is 24 months from January 1, 2003 until and including December 31, 2004.
>
> ***If Mr. Evans refuses*** to return no later than June 1, 2003, ***my client will*** treat that refusal as just cause, and formally ***terminate him*** without notice."
>
> (Emphasis added)

Although the letter is framed as a request, it is really a demand which, if refused, would result in Mr. Evans' termination; and it is entirely incapable of being interpreted as an offer of re-employment.

[82] The Union says that it does not matter whether it had a legal right to order Mr. Evans back to work on June 2, 2003. Rather, it argues that there was a *bona fide* opportunity for Mr. Evans to accept the position of business agent on June 2, 2003 in order to mitigate his damages. Once again, I disagree. Mr. Evans *was* prepared to return to work, providing the Union rescinded the termination letter and he returned to his previous status as an indefinite-term employee, as was the case with Mr. Owens. That was not an unreasonable expectation, nor was his decision not to return to work when the Union refused to meet this expectation.

[83] The Union further argued extensively that there is a good deal of evidence to show that Mr. Evans had nothing to fear from a continued relationship with Mr. Hennessy and the

new executive. However, there are also a number of reasons which provide support for Mr. Evans' apprehension about continuing that relationship:

1. From Mr. Evans' subjective perspective, he had been "treated like a dog" by Mr. Hennessy when he was terminated without cause or notice on January 2nd.[25]
2. Mr. Evans also knew, from the opportunity to review Mr. McGrady's legal opinion of December 31, 2002, that this was a planned and deliberate course of action by the Union.
3. When Mr. Hennessy called Mr. Evans on the telephone to discuss the matter, he made no mention whatsoever about working notice or pay in lieu of notice. Rather, as I have found, the only accommodation Mr. Hennessy was prepared to make, and even that was less than clear, was to mention the possibility of re-hiring Mr. Evans for a renewed fixed term of employment.
4. In March 2003, the Union sent in KPMG Chartered Accountants to perform an audit of the Whitehorse office without any prior notice whatsoever to Mr. Evans. Although the Union's evidence was that this was done strictly for the purpose of assessing property management issues relating to the Union's office building, it appears as though the auditors acted more like a forensic team in their comprehensive search and seizure of documents.[26] Understandably, Mr. Evans felt threatened and demeaned by the audit and his concerns in that regard were no doubt exacerbated by the fact that Mr. McGrady's letters of April 3rd, May 5th and May 23rd, 2003 were all prefaced as regarding the "KPMG Report".

[25] Transcript, February 4, 2005, page 8.
[26] Transcript, February 3, 2005, commencing at page 65, line 14.

5. Mr. Evans' fellow business agent in Prince George, Jim Jeffery, who had also been terminated on January 2, 2003, was re-instated effective January 15th with seven months working notice. However, he was subsequently terminated for cause and he telephoned Mr. Evans to inform him of this turn of events.
6. On the other hand, another of Mr. Evans fellow business agents, Ron Owens, who was also terminated on January 2, 2003, had been re-instated effective January 16th and his termination letter had been rescinded. Mr. Evans could not fathom why he was being treated differently from Mr. Owens. Thus, it is understandable that he would have assumed the worst about the Union's motives towards him.
7. There is evidence from Mr. Evans that it was well known in Whitehorse that he had been terminated by the Union. Consequently, Mr. Evans' belief that he would no longer have the respect of employers and would not be able to perform effectively as a business agent was not without foundation.
8. There was also evidence from Jim Fairbrother, the Union's dispatcher in the Vancouver office, that after the election of the new executive, he felt ostracized because he had previously supported the outgoing president, Mr. Zimmerman. He felt the conditions in the Vancouver officer were "quite bad" and that he found it difficult to work under those conditions.[27] Further, Mr. Fairbrother was of the view that Mr. Hennessy and Mr. Peterson, the newly elected secretary treasurer, both had "an absolute hatred" towards the

[27] Transcript, February 2, 2005, pages 43-46.

appointed business agents.[28] Finally, after Mr. Fairbrother learned that Mr. Evans had been terminated, he telephoned him and talked to him about what was happening in the Vancouver office. The Union's counsel argued that, viewed objectively, Mr. Fairbrother's complaints about being treated badly in the Vancouver office were over-stated and without foundation. While that may be, there is no reason that Mr. Evans should have known that at the time he received this information from Mr. Fairbrother. Therefore, it was not unreasonable for Mr. Evans to consider this information and rely upon it as part of his overall assessment of whether he could continue to work with the Union in all of the circumstances.

9. Further, the outgoing president, Garnet Zimmerman, testified that the campaign prior to the election in December 2002 had been hard fought and difficult. In direct examination he said:

> " … Teamster politics are tough at the best of times, but this was a fairly contentious - - I think it was nasty election. It certainly wasn't run on the cleanest fronts, I will say, with our opposition. I think that they used every trick in the book that they could and ultimately were successful in it."[29]

Mr. Hennessy was asked in cross-examination whether the election was "bitterly contested". He replied, "It was a hard worked election, yes", and that he and Mr. Zimmerman were not really on speaking terms afterwards.[30] Mr. Evans had been a supporter of Mr. Zimmerman during the campaign and the two spoke over the telephone about the issue of Mr. Evans' termination. Mr. Evans was aware of the contentious nature of the election and it was not

[28] Transcript, February 2, 2005, page 46.
[29] Transcript, February 2, 2005, page 110.
[30] Transcript, June 1, 2005, page 83.

> unreasonable for him to factor this into his consideration of whether to return to the Union's employment.

[84] The Union relied on a number of cases for the proposition that where a former employee fails to accept work with the employer who terminated them, even where the former employee has commenced a wrongful dismissal action, this may constitute a failure to mitigate. However, most of those cases were constructive dismissal situations and are therefore distinguishable for that reason alone.

[85] In *Mifsud* v. *MacMillan Bathurst Inc.*, [1989] O.J. No. 1967, the Ontario Court of Appeal said at page 7 (Q.L.):

> "The fact that the transfer to a new position may constitute in law a constructive dismissal does not eliminate the obligation of the employee to look at the new position offered and evaluate it as a means of mitigating damages."

However, the Court went on to say that there may be many situations where it would be "patently unreasonable" to expect an employee to accept continuing employment with the same employer in mitigation, especially when the personal relationships involved are acrimonious.

[86] *Cox* v. *Robertson,* 1999 BCCA 640, is one of the few cases on this point that did not involve a constructive dismissal. At para. 11, MacEachern C.J.B.C., speaking for the British Columbia Court of Appeal, said that the circumstances in which a former employee may have a duty to accept employment with the former employer will be rare:

> "Probably the leading case on mitigation by re-employment is the judgment of this court in *Farquhar* v. *Butler Brothers Supplies Ltd*. (supra) where the Court stated, at p. 94, that in mitigation of losses, an employee is only required to take such steps as a reasonable person would take. **Each case, of course, will be different, but it is clear that while an employee may be under a duty to accept re-employment on a temporary basis in some circumstances, such obligation will arise infrequently because "[v]ery often the**

> **relationship ... will have become so frayed that a reasonable person would not expect both sides to work together again in harmony..."** (per Lambert J.A., writing for the Court, at 94)."
>
> (Emphasis added)

[87] Similarly, in *Michaud* v. *RBC Dominion Securities Inc.,* 2002 BCCA 630, Newbury J.A., speaking for the Court at para. 10, said this type of situation is not common:

> "The circumstances in which an employee may be expected to "remain" on were referred in a judgment of this court, *Farquhar* v. *Butler Brothers Supplies Ltd*. (1998) 23 B.C.L.R. (2d) 89. The trial judge reproduced the following extract from the reasons of Mr. Justice Lambert in 1994:
>
> > "... **The employee is not obliged to mitigate by working in an atmosphere of hostility, embarrassment, or humiliation**. But once the employer is clearly told, by words or equivalent action, that the termination is accepted by the employee, then, if the employer continues to offer a position to the employee, and the position is such that a reasonable employee would accept it, if he were not counting on damages, then the duty to mitigate may require the employee to accept the position, on a temporary basis while he looks for other work, even if it is roughly his old position before the constructive dismissal. **Such circumstances may not arise frequently.** …"
>
> (Emphasis added)

[88] Further, *Michaud* is distinguishable on its facts from the case at bar. First, it was a constructive dismissal case. Second, at para. 11, Newbury J.A. noted that the trial judge concluded the case was one of those "unusual cases" in which the employment relationship was not so frayed as to prevent Mr. Michaud from continuing in his job. He had said nothing about being humiliated by any treatment from his employer. Rather, he said that he did not think it would have been "fair" to look for another job while he remained in his position. In particular, the trial judge commented as follows:

> "There is no hint in the evidence that, had the plaintiff worked out his period of notice, he would have done so in an "atmosphere of hostility, embarrassment, or humiliation." The evidence is quite to the contrary. Relations between the plaintiff

> and his superiors remained cordial and they were anxious to have him continue with the firm."

That situation is contrasted with the one Mr. Evans found himself in, where he believed the working relationship had been poisoned by the circumstances that led up to and followed his termination on January 2, 2003. While some of Mr. Evans' fears in that regard may have been over-stated, they were not without foundation and were therefore not unreasonable.

[89] The Union also placed considerable reliance on *Boyes* v. *Saskatchewan Wheat Pool*, [1982] S.J. No. 769, for the proposition that where the prospect of obtaining comparable employment is remote, there is a greater obligation on the former employee to accept employment with the former employer to mitigate his losses. However, this is a somewhat exceptional case. Mr. Boyes was a long-time employee of the Saskatchewan Wheat Pool, who was 57 years old at the time he was fired in his capacity of area supervisor. The employer had previously offered Mr. Boyes a demotion to the position of elevator agent, and when that was declined, a subsequent offer was made for the lesser job of audit supervisor. There was a long history of poor performance and insubordination by Mr. Boyes. In the end, Halvorson J. felt that the employer had treated Mr. Boyes reasonably and fairly throughout the tenure of his employment and found that he had been dismissed for good cause. Thus, the court's comments about damages were *obiter dicta*.

[90] In any event, Halvorson J. continued that, had Mr. Boyes succeeded, he would have only awarded him token damages. He noted that Mr. Boyes made no attempt to locate work in the grain business elsewhere and moving should not have been an impediment, because he had moved on numerous occasions in the past. The inference is that Mr. Boyes could have found other employment in the grain business elsewhere in Saskatchewan. While Halvorson J. recognized at para. 28 that "each case should be

viewed on its own facts", he determined that Mr. Boyes' situation called for "less sensitivity", presumably because of the history of poor performance by Mr. Boyes and the apparent generosity of his employer in offering not one but two lesser positions.

[91] In contrast, there is little or no evidence from which to infer that Mr. Evans could have found employment comparable to that as a business agent elsewhere in the Yukon. Further, Mr. Evans does not have a history of moving for employment purposes. On the contrary, he and his wife are firmly rooted in the Yukon.

[92] The case of *George* v. *Hardman Group Ltd.*, cited above at para. 36, also goes against the Union on this point. The employee, Mr. George, mistakenly thought he had been terminated during an initial conversation with the employer, when in fact it was the intention of the employer to provide a period of working notice of approximately 4⅓ months, which was mentioned in a subsequent letter. In any event, the employer and Mr. George were unable to come to terms and he was provided with a separation slip and asked for his resignation. The trial judge found that the period of 4⅓ months was not reasonable and therefore Mr. George had been wrongfully dismissed. What is most interesting is that the trial judge did not accept the submission of the employer that, notwithstanding that he had been wrongfully dismissed, Mr. George had a duty to accept employment with the employer over the notice period of 4⅓ months. At para. 29, he quoted Innis Christie's text, *Employment Law of Canada,* (Toronto: Butterworths, 1980) at p. 401 as follows:

> "A major modification to the law of mitigation peculiar to the law of wrongful dismissal is that ***an employee will normally not be required to mitigate his losses by accepting employment with the employer who has wrongfully dismissed him***."
>
> (Emphasis added)

That finding was upheld by the Nova Scotia Court of Appeal, [1985] N.S.J. No. 511, at para. 18, where Jones J.A. said that once Mr. George had been wrongfully dismissed:

> "… The only remedy left to the employee was an action in damages. The requirement to mitigate was to seek ***other*** employment. Continued employment was not a matter of mitigation. …"
>
> (Emphasis added)

Of course, the "continued employment" there meant with the same employer.

[93] Reading all of these cases together, it appears that it is truly the rare case when wrongfully dismissed employees will be considered in breach of their duty to mitigate their damages by failing to return to the employment from which they had been dismissed. I find that, in all of the circumstances, Mr. Evans did not breach his duty to mitigate by failing to return to the Union's employment after he was terminated.

[94] Before leaving this issue, I must address the remaining related arguments of the Union.

[95] The Union says that it did not rescind Mr. Evans' termination letter because doing so would have effectively given Mr. Evans 29 months notice – that is, the five months of pay in lieu of notice from January through May, 2003, plus an additional 24 months notice commencing June 2, 2003. Put another way, the Union stated in its memorandum of argument that the letter from Mr. Evans' counsel dated May 30, 2003 (which indicated that Mr. Evans was prepared to return to work on June 2, 2003, providing the termination letter was rescinded), effectively meant that Mr. Evans would come back to work "provided he received no less than a further 24 months working notice commencing June 1, 2003".[31] With respect, I am unable to follow the logic of the Union's counsel on this point.

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[31] June 1, 2003 was a Sunday, so June 2nd would have been the first business day of that month.

[96] In his previous letter of May 23rd, Mr. Evans' counsel stated as follows:

> "If Mr. Evans is now to consider accepting the employer's offer to mitigate his damages by continuing his employment for a period of 24 months commencing January 1, 2003, one issue that must also be resolved is …"

The letter went on to deal with the question of the employment of Mr. Evans' wife, which had earlier been a factor in the negotiations. However, the important point is that the letter of May 23rd indicates that Mr. Evans viewed the employer's offer to mitigate as one which involved a further period of 24 months employment beginning *January 1, 2003* and not at any subsequent date.

[97] Further, the Union acknowledged in its memorandum of argument that it had discussions with Mr. Owens after he received his January 2, 2003 termination letter and "arrived at a suitable arrangement concerning the cessation of [his] employment consistent with [Bylaw] 13", and that it was on that basis that the termination letter was rescinded. While I am unsure whether there was any evidence about this at the trial, I will take that as an admission on the Union's part. Thus, it was possible to rescind Mr. Owens' termination letter and, as the Union's letter to Mr. Owens of January 16, 2003 stated, his "conditions of employment with [the Union] will revert to those same conditions that existed prior to the January 2, 2003, communication". That letter does not refer to a "suitable arrangement" arrived at between Mr. Owens and the Union concerning the cessation of his employment consistent with Bylaw 13. Therefore, I infer that the "arrangement" was made after the termination letter was rescinded.

[98] Surely if that was done for Mr. Owens, it could also have been done for Mr. Evans. In other words, it was also open to the Union to rescind Mr. Evans' termination letter, restore him to his pre-termination status as an indefinite-term employee, and then attempt to come to a suitable arrangement regarding the cessation of his employment. Such

discussions could easily have taken into account any concrete retirement plans by Mr. Evans, as well as the fact that he had already received five months pay in lieu of notice to that point. Indeed, had that been done, it seems highly unlikely that Mr. Evans would have been able to successfully argue for an *additional* period of 24 months notice, when he had already received five months pay in lieu of notice. That is especially so when both parties agree that 24 months notice, regardless of whether it is a combination of working notice or pay in lieu, is the probable maximum in these circumstances.

[99] In that same vein, it is inaccurate for the Union to submit that Mr. Evans' responses to the directions of the Union to return to work in late May 2003 confirmed his clear ability to return to work, but that he simply desired a "longer notice period". The fact that Mr. Evans' final condition was rescission of the termination letter cannot be interpreted as a desire for a longer notice period. Rather, it is evidence of his desire to be treated in the same manner as his brother business agent, Mr. Owens.

[100] Finally, the Union argued that there was no evidence to indicate that Mr. Evans would have been unable to perform his duties as a business agent because of lost respect from employers. However, once again, it is the employer who bears the onus of proof on the issue of mitigation and if the evidence on this point is lacking, other than that of Mr. Evans himself, it is the employer who suffers the result.

Conclusion on Mitigation

[101] Having considered all of the Union's arguments on this issue, I find that it has not satisfied the relatively high standard of proof required to show that Mr. Evans failed to mitigate his damages in any of the ways suggested.

Issue 5: If Mr. Evans is entitled to damages, how should they be quantified?

[102] It is agreed that Mr. Evans' regular bi-weekly salary was $2,434.83. That translates to an annual salary of $63,305.58 or $5,275.47 per month.

[103] There is further agreement that Mr. Evans' annual remuneration included the Union's contributions to the Teamsters Joint Council No. 36 Severance Plan, in the amount of $66 per month, or $792 per year.

[104] It is also agreed that Mr. Evans is entitled to two return airfares to Vancouver each year. However, there was no evidence led by Mr. Evans as to the value of those airfares. He said in his direct examination:[32]

> "I relieved [should read received] two airfares paid out to me every year in the full amount of two return tickets to Vancouver and back."

His counsel argued at trial that this means two "full fare" tickets, which are typically $1,500 each. However, in his letter of May 12, 2003, which was part of the correspondence exchanged during the negotiations, Mr. Evans' counsel referred to two "regular economy fares". In any event, I cannot say whether Mr. Evans meant to say that he received the value of two full fare tickets or something else. The Union estimates the value of these tickets at $600 each and I accept that as reasonable. That would result in additional remuneration of $1,200 per year or $100 per month.

[105] In addition, Mr. Evans claims that he received a monthly car allowance of $600. The Union says that this car allowance was not remuneration, but reimbursement for expenses incurred by employees for the use of their vehicle. Further, since Mr. Evans was not actively employed over the notice period, he has not incurred any vehicle-related expenses and is not entitled to this amount as damages.

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[32] Transcript, February 3, 2005, page 38.

[106] Mr. Evans also claims that he received a monthly expense allowance of $225. Once again, the Union argues that this was not remuneration, but reimbursement for expenses incurred. Since Mr. Evans did not incur these expenses during the notice period, he is not entitled to be reimbursed for them as damages.

[107] Unfortunately there is precious little evidence on either point. Mr. Evans testified in direct examination as follows:[33]

> "Q Now, I want to ask you, Mr. Evans, about the remuneration that you received for acting as a business agent, and we'll just focus in the year 2002, the last full year. What remuneration did you receive during 2002 for acting as business agent?
>
> A I would receive a bi-weekly pay cheque every two weeks, and then a car allowance at the end of the month for $600 - -
>
> Q Yes?
>
> A - - plus another cheque for $225 that would pay for your parking meters or parking tickets. I had my insurance paid for my vehicle. My health and welfare - -
>
> Q Okay. I just want to slow you down and - -
>
> A I'm sorry if I'm getting ahead of you.
>
> Q Your bi-weekly pay, can you recall what that was?
>
> A Approximately $2,400 clear, every two weeks.
>
> Q Okay. And then you mentioned a car allowance of $600?
>
> A That's correct.
>
> Q And another payment of $225?
>
> A That's correct.
>
> Q How was the second payment defined, the $225 payment?

[33] Transcript, February 3, 2005, commencing at page 36, line 14.

A It was for paying - - if I was in negotiations if I got a parking ticket I would use that money to pay for the parking ticket. If I took shop stewards out for coffee, that's what we felt the money was there for, to pay for their coffees. If we were in negotiations and lunches were supplied, then the Union would pick up that big portion of the bill.

…

Q I believe you mentioned your motor vehicle?

A My motor vehicle. I supplied the car, the truck. The company would supply - - the Union, I'm sorry, I shouldn't use the company. They would buy all my fuel, pay all my maintenance costs. If I needed six new tires, because I have a dually, I would go ahead and buy them and the Union would pay for them, even though I got a $600 a month car allowance.

Q Yes?

A If I went on holidays, if I took my motorhome, the Union would pay for my gas for that."

[108] With respect to the car allowance, I understand from Mr. Evans's testimony that he was reimbursed for all actual expenses for such things as fuel and tires "even though" he received the $600 monthly car allowance. Therefore, I find this allowance was over and above his actual expenses and was part of his remuneration.

[109] However, Mr. Evans' evidence about his monthly expense allowance was less clear. It appears to have been a reimbursement to Mr. Evans for his payment for such things as parking tickets, coffee and lunches, both for himself and other Union members. However, it was not clear whether he received this as a regular monthly allowance, regardless of whether the expenses were incurred or, whether he was reimbursed for expenses actually incurred up to a maximum of $225 per month. I find that Mr. Evans has failed to satisfy me

on a balance of probabilities that this allowance was part of his monthly remuneration and I disallow this portion of his claim for damages.

[110] Mr. Evans also claims that his annual remuneration included benefits under the Union Health Benefit Plan. However, once again, his evidence on these damages was severely lacking:[34]

> "A For the year. I think if - - now, I'm just taking a rough guess. I think my costs were between 5 and $6,000 a year for health care. I could [be] wrong. It could be less, it could be more."
>
> Q Is it a system where you pay and then claim reimbursement?
>
> A Yes…"

The Union submits that Mr. Evans has not tendered any evidence of receipts for any medical expenses related to this coverage and that he has generally failed to prove these damages. I agree that Mr. Evans bears the onus of proving the extent of his damages, that he has failed to do so in this respect and he is disallowed this portion of his claim. For what it is worth, the Union also submitted in its memorandum of argument that Mr. Evans will be covered by the Union Health Benefit Plan in any event, so long as his wife continues to be employed with the Union. I understand she remains so employed to date.

[111] Finally, it is agreed that the Union is entitled to credit for $32,903.35, which it paid to Mr. Evans from January to May, 2003, inclusive.

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[34] Transcript, February 3, 2005, commencing at page 39, line 22.

[112] In summary, Mr. Evans is entitled to damages calculated as follows:

Monthly salary	$5,275.47
Monthly car allowance	$600.00
Monthly portion of airfare allowance	$100.00
Union's contribution to severance plan	$66.00
Subtotal	$6,041.47
x 22 months	$132,912.34
Less	($32,903.55)
NET TOTAL	**$100,008.79**

[113] Mr. Evans argued for pre-judgment interest on the award of damages pursuant to s.35 of the *Judicature Act*, R.S.Y. 2002 c.128. While this relief was not specifically pled in the statement of claim, the Union took no position on the point. In any event, I find I have the discretion to award such interest as "further or other relief", which was pled, and I so order.

[114] Finally, Mr. Evans is entitled to his costs for this proceeding, to be assessed under Scale 3 of Appendix B of the *Rules of Court*.

GOWER J.