IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Greenlees v. Starline Windows Ltd.,* 2018 BCSC 1457

Date: 20180829
Docket: S1710443
Registry: Vancouver

Between:

James Greenlees

Plaintiff

And

Starline Windows Ltd.

Defendant

Before: The Honourable Mr. Justice Gomery

Reasons for Judgment

Counsel for the Plaintiff:	L. Moody
Counsel for the Defendant:	O. Hui
Place and Date of Hearing:	Vancouver, B.C. August 9, 2018
Place and Date of Judgment:	Vancouver, B.C. August 29, 2018

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Introduction

[1] The plaintiff, Mr. Greenlees, was employed by the defendant, Starline Windows Ltd. ("Starline") as a sales professional for 6 months, from March 3, 2017 until September 14, 2017, when he was fired without cause. He sues for wrongful dismissal.

[2] When Starline terminated Mr. Greenlees' employment, it paid him the equivalent of one week's notice. It now concedes that he was entitled to two month's notice. Mr. Greenlees contends that he was entitled to six months' notice. This dispute over the notice period is the main issue between the parties. There is also an issue concerning costs and the applicability of Rule 14-1(10) of the *Supreme Court Rules* in the circumstances of this case.

Procedure & evidence

[3] This matter comes before the Court for resolution on a summary application pursuant to Rule 9-7 and the parties agree that the case is suitable for resolution on a summary trial.

[4] The evidence consists of an affidavit sworn by Mr. Greenlees, extracts from Mr. Greenlees' examination for discovery, and an affidavit sworn by Gerry Moerman on behalf of Starline. Mr. Moerman joined Starline after Mr. Greenlees was hired. Mr. Greenlees' affidavit evidence of the circumstances of his hiring is therefore uncontradicted, except to the extent that it is qualified by his discovery evidence.

Facts

Background

[5] While he was employed by Starline and at the time of his firing, Mr. Greenlees was 43 years old. He had attended university, though he did not complete a degree. He had an employment history in sales in the Lower Mainland. Before he was hired by Starline, Mr. Greenlees was employed as an outside sales representative by Trevor Jarvis Contracting Ltd., a company engaged in landscaping construction.

[6] As Trevor Jarvis, Mr. Greenlees was receiving a base salary of $38,000 per year ($3,167 per month) plus commissions on his sales and a bonus. His total income was approximately $100,000 per year. He had a long history doing contract work for the company and had been an employee for approximately 18 months.

[7] Starline designs and builds windows for residential properties. It sells to builders and contractors. It employs a number of sales professionals, who report to a sales manager. When Mr. Greenlees was hired, in February 2017, the sales manager was Robert Parkinson. Starline fired Mr. Parkinson in August 2017. He was replaced by Mr. Moerman, and Mr. Greenlees reported to Mr. Moerman after that.

[8] Starline's business includes at least three categories of sales: new residential and commercial sales; new multi-family projects; and renovation projects. The distinction between sales to residential and renovation projects is important, because residential projects offer greater opportunity for a salesperson to develop leads and grow his or her income.

[9] Mr. Greenlees had no experience selling windows. He was hired on the basis that he had sales experience in the construction industry.

Hiring of Mr. Greenlees by Starline

[10] In January 2017, Mr. Greenlees was not actively looking for alternate employment. He received a cold call from Mr. Parkinson, who invited him to a meeting at Starline's premises to discuss a potential job opportunity. Mr. Greenlees accepted the invitation.

[11] At the meeting, Mr. Parkinson said that he had a position available as a sales professional, reporting to Mr. Parkinson. He offered the position to Mr. Greenlees and they discussed Starline's business and prospects and Mr. Greenlees' prospects if he took the position. Mr. Parkinson expressed "his vision for growth for the company and opportunities for the future". Mr. Greenlees told Mr. Parkinson that he would give the offer some thought.

[12] About one week later, Mr. Parkinson followed up and asked Mr. Greenlees to come back for a second meeting. Mr. Greenlees agreed. At the meeting, they again discussed the position and Mr. Greenlees' prospects, and Mr. Parkinson presented Mr. Greenlees with a written offer of employment dated February 17, 2017. Mr. Greenlees took the letter away. The next day he telephoned Mr. Parkinson to accept the offer. He signed the offer of employment, constituting it an employment agreement, and resigned his employment with Trevor Jarvis.

[13] It appears from his discovery evidence that Mr. Greenlees does not clearly distinguish was he was told in the first and second meetings with Mr. Parkinson. This is not surprising, as both meetings would have covered similar ground.

[14] In his affidavit, Mr. Greenlees says that, in the first meeting:

> 6. Mr. Parkinson specifically told me that, if I accepted the position, I would be working *primarily* in the new residential construction projects with occasional work in renovation construction projects, the former of which was represented as having the earning *potential* of at least $100,000 per year.
>
> (emphasis added)

[15] Concerning the second meeting, Mr. Greenlees' affidavit evidence is more forcefully stated:

> 9. During the meeting, it was again represented to me that I could expect to earn at least $100,000.00 per year working in new residential construction projects and that the other Sales Professionals in that particular department averaged that amount.

[16] On discovery, Mr. Greenlees said that he was told that an income in excess of $100,000 per year was "realistic". There was discussion that he would have six to nine months, as a grace period, "to actually get your feet going". Mr. Parkinson told Mr. Greenlees that he would be working primarily in new construction projects, with occasional work on renovation projects. In both meetings, Mr. Parkinson forecast potential annual income for Mr. Greenlees, from new construction projects, in the range of $100,000 a year, taking commission income into account. Work on renovations would generate a lower income.

[17] Having regard to the discovery evidence, I find that Mr. Greenlees was not promised an income of at least $100,000 a year. Rather, this amount was presented to him as a reasonable forecast of what he might earn predicated on an expectation that he would be working primarily on residential sales, with the prospect of growing his income. I find that, as such, the forecast was important to Mr. Greenlees. There is no reason to think that he could have been motivated to leave Trevor Jarvis absent an expectation that his future income would be at least comparable to what he was already earning.

The employment agreement

[18] Under "Position Summary", the employment agreement states:

> This position will play a pivotal role in expanding our new and renovation construction window sales. Ensuring success in maintaining and growing market share in these areas.

[19] Mr. Greenlees' responsibilities were to be those of a front-line salesperson in the Lower Mainland. The employment agreement specifies that these would include:

- Support and nurture sales in the Lower Mainland
- Promote Starline Windows in the Lower Mainland Market
- Help identify potential sales opportunities

[20] Under the heading, "Compensation", it states:

> $3500/month salary
> Commission rate on all sales invoiced for Single Family will be paid at 3% (net of taxes & freight).
> Multifamily/Projects will be paid at 1 ½% subject to a cap of $500,000 per project. This compensation will be up for review on or before the 3-month probation date is reached and may be subject to change at that time or DATE

[21] Mr. Greenlees says that Mr. Parkinson advised him that, while the commission rate would start at 3%, after three months, this would be increased to 6%. He says that this was described as a guarantee and was reflected in the employment agreement. This seems to be intended as a reference to the term in the agreement that the compensation would be "up for review" on or before the three

month probation ended. In fact, the agreement does not promise an increase in the commission rate. While Mr. Greenlees initially presented a claim for lost commission income according to Mr. Parkinson's promises, at the hearing he presented a calculation based on earned commissions in the amounts actually paid.

[22] The employment agreement contains an "entire agreement" clause.

Why Mr. Greenlees took the job

[23] Why did Mr. Greenlees accept Starline's offer and resign his employment with Trevor Jarvis? Starline's offer represented a modest increase (in the order of 10.5%) in his base salary but the anticipated realistic overall remuneration was comparable. In his affidavit, he says that:

> Although I was not looking to leave Trevor Jarvis at the time, the representations that were made to me by Mr. Parkinson – inclusive of the representations regarding earning and growth potential – were too good to pass up …

[24] On discovery, he testified that, by comparison to the Trevor Jarvis job, the Starline job offered him "freedom". This answer was not explored further in the evidence.

[25] Having regard to the sequence of events, I accept Mr. Greenlees' evidence that he was persuaded to take the job by Mr. Parkinson's optimistic presentation of the company's prospects and his own long term prospects as an employee of Starline. I find that Mr. Parkinson's forecast that he might expect to earn income exceeding $100,000 a year, though contingent, was a factor in his decision.

Course and termination of Mr. Greenlees' employment

[26] A week or two after he started work, Mr. Parkinson met with Mr. Greenlees and told him that he would be working on renovation projects rather than new construction projects. He said that this was only temporary and Mr. Greenlees would be restored to working on new construction projects at the end of his probationary period. Mr. Greenlees decided to wait it out.

[27] At the end of the probationary period, in June 2017, Mr. Greenlees was not restored to new construction sales, nor was his commission rate increased to 6%. He says that Mr. Parkinson told him to be patient. Then Mr. Parkinson's employment was terminated in August 2017.

[28] When Mr. Greenlees spoke with Mr. Moerman about Mr. Parkinson's promises, Mr. Moerman told him that another individual had already been hired in the new residential construction project and he would not be moving out of the renovation construction department.

[29] As noted above, Starline terminated Mr. Greenlees' employment on 14 September 2017. While, as is usually the case, Starline had reasons to terminate Mr. Greenlees' employment, it is not contended that they amounted to cause.

[30] On termination, Starline paid Mr. Greenlees $807.69 on account of one week's wages, and $161.97 on account of one week's commission income.

[31] Starline refused to provide to Mr. Greenlees a letter of reference.

Events following the termination

[32] Mr. Greenlees began to look for other work immediately following his termination. He registered with three recruitment/placement firms and on job-seeking websites. He says that his search parameters were limited only by expected compensation and geography, as he was not looking to move outside the Lower Mainland. He applied to at least 42 companies, including every company in the window sales industry of which he was aware. He did not pursue jobs in automotive sales, based on past experience in that industry.

[33] Mr. Greenlees was invited for interviews at eight companies. He turned down two because the salary was significantly less than he had been earning, and one because he would not be comfortable selling cannabis products. The other five interviews did not result in offers of employment.

[34] Mr. Greenlees was unemployed for seven months until he obtained a position as an outside sale representative with a building products company at a base salary of $70,000 per year, plus commission. He started that job in early April 2018.

[35] Starline pleaded but did not pursue an allegation of a failure to mitigate.

Notice period issue

General principles

[36] Starline's employment agreement with Mr. Greenlees made no provision for termination of the agreement. The law imposes an implied term that, absent cause, it could only be terminated by Starline on reasonable notice to Mr. Greenlees.

[37] The general principles governing the assessment of reasonable notice were summarized by Watchuk J., in *Ostrow v Abacus Management Corporation Mergers and Acquisitions,* 2014 BCSC 938 at paras. 35-38:

> [35] The general principles governing the assessment of reasonable notice are well established. The purpose of reasonable notice is to provide the employee with a fair opportunity to obtain similar or comparable re-employment (*Bishop v. Carleton Co-Operative Ltd.*, [1996] N.B.J. No. 171 (C.A.), at para. 10).
>
> [36] In *Bardal v. Globe and Mail Ltd.* (1960), 24 D.L.R. (2d) 140 (Ont. H.C.) [*Bardal*], at p. 145, the factors to be considered when determining reasonable notice were described in the following oft-cited paragraph:
>
> > There can be no catalogue laid down as to what is reasonable notice in particular classes of cases. The reasonableness of the notice must be decided with reference to each particular case, having regard to the character of the employment, the length of service of the servant, the age of the servant and the availability of similar employment, having regard to the experience, training and qualifications of the servant.
>
> This passage was quoted with approval by the Supreme Court of Canada in *Machtinger v. HOJ Industries*, [1992] 1 S.C.R. 986, at pp. 998-999.
>
> [37] The British Columbia Court of Appeal adopted the *Bardal* approach in *Ansari v. British Columbia Hydro and Power Authority* (1986), 2 B.C.L.R. (2d) 33 [*Ansari*], which is the leading case in this province.[1] In *Ansari*, Chief Justice McEachern stated at p. 43:

[1] As appears from the citation, *Ansari* was a decision of McEachern C.J.S.C. in this Court. His judgment was affirmed by the Court of Appeal at (1986), 55 B.C.L.R. (2d) xxxiii.

> At the end of the day the question really comes down to what is objectively reasonable in the variable circumstances of each case, but I repeat that the most important factors are the responsibility of the employment function, age, length of service and the availability of equivalent alternative employment, but not necessarily in that order.
>
> In restating this general rule I am not overlooking the importance of the experience, training and qualifications of the employee but I think these qualities are significant mainly in considering the importance of the employment function and in the context of alternative employment.

> [38] The *Bardal* factors are not exhaustive, and no single factor is determinative (*Wallace v. United Grain Growers Ltd. (c.o.b. Public Press)*, [1997] 3 S.C.R. 701 at para. 82 [*Wallace*]). When assessing these factors the court must not apply a formulaic approach, but must assess the relevant factors on a case by case basis, looking at recent precedents from the court to determine an appropriate range (*Kerfoot v. Weyerhaeuser Co.*, 2013 BCCA 330 at para. 47 [*Kerfoot*]; and *Wallace* at para. 82). In *Honda Canada Inc. v. Keays*, 2008 SCC 39, the Supreme Court of Canada has made clear that, like all damages for breach of contract, in damages for wrongful dismissal the court must look at the reasonable expectation of the parties at the time the contract was made (paras. 55-56).

[38] Addressing the factor of length of service, cases involving short term employees are distinctive. Watchuk J. observed:

> [41] With regard to length of service, it has generally been accepted by the courts in this province that short term employees are entitled to a proportionately longer period of notice (*Saalfeld v. Absolute Software Corp.,* 2009 BCCA 18 at para. 15 [*Saalfeld*]; *Bavaro* at para. 19; and *Taner v. Great Canadian Gaming Corp.,* 2008 BCSC 129 at para. 40 [*Taner*]).

[39] In *Saalfeld v Absolute Software Corp.,* 2008 BCSC 760, aff'd 2009 BCCA 18, this Court and the Court of Appeal rejected an argument that short term employees in their 30's or 40's, whose function is significant for their employer but not one of senior management, should expect a notice period of five to six months as the norm. Rather, Huddart J.A. held at para. 15:

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

[40] Both counsel agreed that Mr. Greenlees and Ms Saalfeld were similarly enough situated that the two to three month starting point in *Saalfeld* for "a nine-

month employee in the shoes of the respondent when adjusted for age, length of service and job responsibility" should be considered as applicable in this case.

[41] In *Saalfeld,* it took the plaintiff nine months to find alternate employment, despite a reasonably diligent job search. The trial judge, L. Smith J., awarded five months' notice (at 2008 BCSC 760). Though the Court of Appeal characterized this as lying "on the very high end of an acceptable range" (at para. 18), it upheld the award. Huddart J.A. upheld the trial award primarily on the basis of an inference drawn that the length of her job search following termination implied that alternate employment was not available (at paras. 16-17). Whether this inference is justified, in the circumstances of this case, is a point of contention between the parties. Mr. Greenlees further argues that additional circumstances, including Starline's conduct to induce him to leave his previous employment, and what he describes as a 'bait and switch' tactic in the hiring, justify an increase in the notice period to 6 months, beyond the 5 months awarded in *Saalfeld.* Mr. Greenlees has not pleaded that Starline acted in bad faith or that the circumstances of his termination justify an extension of the notice period, as in *Wallace v United Grain Growers Ltd.,* [1997] 3 SCR 701.

[42] To summarize, the parties agree that *Saalfeld* suggests a two to three month starting point in the circumstances of this case, taking into account the factors of responsibility, age, and length of service. The availability of alternate employment is an important consideration, and in *Saalfeld,* limited availability justified a five month notice period. It is critical, however, that the court not apply a formulaic approach, and that the court have regard to the reasonable expectations of the parties at the time the contract was made.

Inducement and the reasonable expectation of the parties

[43] Mr. Greenlees submits that he is entitled to increased notice from the two to three month starting point because he was induced by Mr. Parkinson's representations to join Starline from his previous employment with Trevor Jarvis.

Starline submits that such representations as were made fell short of constituting 'inducement' as recognized in the cases.

[44] In *Nicholls v Columbia Taping Tools Ltd.,* 2013 BCSC 2201, Watchuk J. summarized the law relating to inducement and said:

> [224] Inducement to leave secure employment may be a factor that is considered when determining a dismissed employee's notice period.
>
> [225] The starting point with regard to the law on inducement is the Supreme Court of Canada's decision in *Wallace v. United Grain Growers Ltd.,* [1997] 3 SCR 701. In paras. 83-85 the court stated:
>
> (a) that inducements are another factor which may be added to the *Bardal* factors;
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> (b) that not all inducements will carry the same weight;
>
> (c) that the relevance of inducements is the expectation interests of the terminated employee on the basis of representations of job security and compensation;
>
> (d) the period of reasonable notice may be lengthened if the Court finds that an employer has induced an employee to leave previous secure employment; and
>
> (e) the significance of any inducement will depend on the circumstances of the case, and its effect on the notice period is a matter for the discretion of the trial judge.
>
> [226] In *Zeidel v. Metro-Goldwyn-Mayer Studios Inc. d.b.a. MGM Home Entertainment Canada*, 2004 BCSC 1415 (Zeidel), the court found no inducement where an employee was not reluctant to leave her current employer.
>
> [227] Where there is equal interest by both the employer and employee in forming the new employment relationship, courts have found that the employee was not "induced." (*Wright v. Feliz Enterprises Ltd.*, 2003 BCSC 267).

[45] It would seem clear from this summary of *Wallace* that inducement may be a matter of degree: it is a "factor which may be added to the *Bardal* factors", relevant to the expectation interests of the terminated employee, whose significance "will depend on the circumstances of the case", in the discretion of the trial judge.

[46] In *Wallace,* there was an inducement of the plaintiff to join the defendant by a guarantee or promise of job security, provided the plaintiff did not give the defendant cause to dismiss (at paras. 86-87). In *Sollows v Albion Fisheries Ltd.,* 2017 BCSC

376 (at paras. 44-48), Gropper J. declined to find inducement absent evidence of promises made by the employer beyond the usual course of business involving the hiring of employees. This was a case in which the employer wooed the employee through a series of overtures, but gave no guarantees.

[47] However, it is not simply a question of whether promises were made. In *Pollock v Patrick Cotter Architect Inc.,* 2005 BCSC 1799, the plaintiff applied to the defendant for work as an administrative assistant, on seeing an advertisement in a local newspaper. She made it clear, during two job interviews, that, at the age of 59, she did not want to leave her present secure employment for something less secure. The defendant did not promise her job security, but it did tell her that, if a slowdown occurred, she would not be the first to be laid off. In fact, she was terminated in consequence of a reorganization after five months. Fisher J. (as she then was) found that there was not an inducement as described in *Wallace* because there was not a promise of job security. There was, however, a basis for extending the notice period. She stated, at para. 18, that the defendant:

> … was aware of her circumstances and concerns, and implicit in the offer of employment was some assurance that the job would not change in the immediate future. This was not just the optimism that exists at the start of any new employment. In the context of this case, some weight should be given to this implicit assurance when determining the appropriate notice period.

[48] Consistently with the recognition in *Wallace* that inducement may be a matter of degree, *Pollock* stands for the proposition that there can be some degree of inducement without an explicit representation, promise or guarantee by the prospective employer.

[49] On the other hand, cases such as *Sollows* make it clear that any degree of inducement requires a finding of causation, taking into account that any change of employment involves some degree of risk on the part of the prospective employee, and employers are not to be viewed, absent express promises, as guarantors of job security. In *Ostrow*, (at para. 65), Watchuk J. declined to find inducement where the new employment was of equal interest to both parties. In *Saalfeld*, though the

plaintiff had been recruited by the defendant, the trial judge and Court of Appeal declined to accord significant weight to inducement as a factor in the determination of the notice period.

[50] The ultimate question is the reasonable expectations of the plaintiff, at the time he entered into the contract. Was it reasonable for Mr. Greenlees to have expectations of his future earnings and prospects, based on what he was told by Mr. Parkinson? Or were Mr. Parkinson's representations simply the sort of things prospective employers say, to be taken with a large grain of salt?

[51] In my opinion, the discussions between Mr. Greenlees and Mr. Parkinson gave rise to reasonable expectations on the part of Mr. Greenlees. His discussion with Mr. Parkinson was not focused on job security, as in *Pollock*. I have found, however, that forecasts of income and favorable future prospects were discussed. This is not a case in which the employer and prospective employee were equally eager at the outset. Mr. Greenlees had to be persuaded. He recognized that the forecasts were contingent, that they did not amount to promises or guarantees. Nevertheless, they were material and important to Mr. Greenlees' decision. By them, he was persuaded to take the job. I conclude that Mr. Parkinson's statements to Mr. Greenlees carry some weight as inducements affecting the notice period.

[52] I should add that, while I believe there was inducement, this case is close to the line. While some increase in the notice period is justified by this consideration, I give it only modest weight.

The 'bait and switch' argument

[53] Counsel for Mr. Greenlees, Ms Moody, contended that Mr. Greenlees was the victim of a 'bait and switch'. Instead of being assigned to new construction projects, as Mr. Parkinson had forecast, Mr. Greenlees was assigned to renovation projects, with a reduced opportunity to earn income. His commission rate was not increased to 6% at the end of the probation period. Mr. Greenlees' commission income over the last three months of his employment averaged $1,395 per month, well below the roughly $4,800 per month required to achieve a forecast "realistic" income of

$100,000 annually. In *Saalfeld*, it will be recalled, Huddart J.A. listed reasons for extending the notice period such as "a specialized or otherwise difficult employment market, bad faith conduct, or some other reason for extending the notice period". Ms Moody said that Starline's egregious conduct constituted "some other reason for extending the notice period".

[54] In his affidavit, Mr. Greenlees understandably describes this as "a stressful and, frankly, disappointing experience". He says:

> … I strongly believe that I was made a number of promises that induced me to leave secure employment to come and work for Starline, and then completely deprive of any and all of the tools that I would have needed to make these promises manifest.

[55] I have concluded that this is not the kind of conduct on the part of the employer warranting an increase in the notice period. My reasons are as follows.

[56] In *Ansari v BC Hydro and Power Authority,* McEachern C.J.S.C. stated:

> [12] It is not the function of damages for wrongful dismissal to penalize the employer for the manner of dismissal nor to compensate the employee over and above the damages flowing from the breach of the contract of employment for his loyal or useful service to the employer. This had been settled law since at least 1883 …
>
> [14] In short, damages for wrongful dismissal are founded in contract and the focus of the inquiry is what damages, assessed in accordance with the principles I shall discuss, flow from the breach.

[57] In *Vorvis v ICBC,* [1989] 1 SCR 1085, the court held that employer misconduct falling short of an independent actionable wrong does not give rise to increased damages in an action for wrongful dismissal.

[58] *Ansari* and *Vorvis* were qualified by the later decision in *Wallace*, establishing that bad faith conduct on the part of the employer in the manner of dismissal can give rise to an increased notice period, and increased damages. Mr. Greenlees' complaint is not with the manner in which he was dismissed, and he has not pleaded bad faith. The general principle, that a claim for wrongful dismissal is governed by principles of contract law, remains valid.

[59] The question is whether, consistently with principles of contract law, the court can take into account the employer's failure to follow through on representations made on hiring, in the assessment of the notice period. If the representations give rise to contractual expectations, the court may take them into account in the assessment of damages. Having regard to the entire agreement clause in the contract, Mr. Greenlees has not presented his case on that footing. He calculates his damages based on the written agreement, not Mr. Parkinson's representations.

[60] In the circumstances, I am obliged to approach the matter on the footing that Mr. Parkinson's representations did not have contractual effect.

[61] Absent cause, a claim for wrongful dismissal has only two elements; breach of the contract of employment, and the assessment of damages for the breach. The contract of employment is made when the employee is hired. For the most part, the reasonable expectations of the parties are settled at that time. The authorities addressing the question of inducement, reviewed above, focus on the reasonable expectations of the parties at the time of hiring.

[62] Starline's unfortunate conduct subsequent to hiring – the "switch" part of the bait and switch argument – has no bearing on an assessment of the reasonable expectations of the parties at the time the contract was made.

[63] The assessment of what constitutes reasonable notice takes into account what happened subsequent to the hiring, by considering such matters as the duration of the contract of employment and the employee's age on termination of the contract. This reflects the law's recognition of employment contracts as "relational contracts" requiring flexibility and the liberal use of implied terms to operate successfully; see *Lacey v Weyerhauser Company Limited*, 2013 BCCA 252, (at para. 64), quoting Geoff England, Innis Christie & Merran Christie, *Employment Law in Canada*, 3d ed., looseleaf (Toronto: Butterworths, 1998) at paras. 7.61 and 7.62. However, the argument that it should take into account the employer's failure to fulfill non-contractual representations while the contract was on foot seems to me to go much further, and to be inconsistent with the general rule that the action is one for

breach of contract rather than an action to address perceived misconduct on the part of the employer.

[64] I therefore conclude that the "bait and switch" argument does not justify an increase in the notice period. I have concluded that Starline's representations, through Mr. Parkinson, should be given some weight as inducements. The representations were the bait, and Mr. Greenlees took the bait. In my opinion, in assessing the period of reasonable notice period, it makes no difference that the representations were not made out.

Limited availability of alternate employment following termination

[65] While the notice period is not to be equated with the period a dismissed employee was off work, searching for new employment, the court may draw an inference as to the limited availability of reasonably comparable alternate employment from the fact of a lengthy job search following a relatively short period of employment. The court drew such an inference in *Bavaro v North American Tea, Coffee & Herbs Trading Co. Inc.*, 2000 BCSC 419, varied 2001 BCCA 149, (at para. 7); *Saalfeld, (*at para. 16) (CA); *Ostrow,* (at paras. 55 and 57); and *Sciancamerli v Comtech (Communications Technologies) Ltd.,* 2014 BCSC 2140, (at paras. 36-39). It declined to draw such an inference on the facts in *Miller v Integrated Health Service Clinic*, 2016 BCPC 440, (at paras. 40-42). *Miller* demonstrates that the inference is not justified simply because the defendant has not made out a failure to mitigate.

[66] In my opinion, the inference is justified in this case. Mr. Greenlees' job search was diligent and I am not persuaded that he was overly picky. He may have been hampered by the hole in his resume represented by his employment with Starline and its refusal to provide a letter of reference.

[67] I conclude that the factor of limited availability of alternate employment following termination warrants an increase in the notice period.

Assessment and conclusion on notice period

[68] To summarize, I have concluded that there should be an upward adjustment to the notice period from the two to three month starting point identified in *Saalfeld* for two reasons: (1) limited availability of alternate employment, and (2) some degree of inducement of Mr. Greenlees to take the job with Starline. The first of these considerations carries more weight.

[69] Despite a diversity of ages and job descriptions, of the "limited availability" cases discussed above, *Bavaro*, *Saalfeld, Ostrow* and *Sciancamerli* all recognized a two to three month starting point based on age, length of service and responsibility.

[70] In *Bavaro*, the plaintiff was a 35 year old purchasing manager employed for 14 months. His job search lasted 10.5 months and the court found that the limited availability of alternate employment justified a notice period of six months.

[71] In *Saalfeld*, the plaintiff was a 35 year old software salesperson employed for nine months. Her job search lasted nine months and the court found that the limited availability of alternate employment justified a notice period of five months.

[72] In *Ostrow*, the plaintiff was a 40 year old tax professional employed for nine months. His job search lasted six months and the limited availability of alternate employment, together with considerations of specialization, assurances of job security and the presence of a non-competition clause in the plaintiff's contract of employment, justified a notice period of six months.

[73] In *Sciancamerli,* the plaintiff was a 57 year old senior account executive (salesperson) employed for ten months. He remained unemployed at the time of the hearing, when his job search had already lasted 11.5 months. A degree of specialization required for his job and the limited availability of alternate employment justified a notice period of five months.

[74] As already noted, *Pollock* is a case in which the court increased the notice period having regard that the employer gave assurances of job security to a

prospective employee who had made a point of her concern about job security in the job interviews. The plaintiff was a 59 year old administrative assistant who was terminated after five months. From a starting point of two to three months, the court found that a notice period of five months was justified.

[75] The defendant relied on *Balogun v Deloitte & Touche LLP*, 2011 BCSC 1314, where the plaintiff, a 49 year old a tax professional, was employed by the defendant for 7.5 months. The court determined a reasonable notice period to be two months, noting the absence of aggravating factors such as the employer's unreasonable failure to provide a letter of reference (citing *Lin v Delrina*, 1995 CarswellOnt 296). Lacking the factors I have identified that justify an increase in the notice period, I do not find this case helpful.

[76] To recapitulate, Mr. Greenlees was 43 years old and was employed by Starline for six months, after which he spent seven months searching for alternate employment. His job search was shorter than the job searches in *Bavaro*, *Saalfeld* and *Sciancamerli* and the inference of limited availability is accordingly weaker, though that is offset, to a certain extent, by Starline's refusal to provide a letter of reference. The job search in *Ostrow* lasted less time, but there are factual differences between that case and this one that make it less helpful. The inducement I have found carries some weight. Taking all this into account, I conclude that six months' notice was required in this case.

Damages

[77] The calculation of damages presented in Mr. Greenlees' written argument is not disputed. He is entitled to six months' pay at $3,500 per month, or $21,000, less the $807.69 he was paid on termination. The difference is $20,192.31. He is also entitled to compensation of lost commission income, estimated at $8,370.54 based on his average commission income over the final three months of employment ($1,395.09), less the $161.97 he was paid on termination. The difference is $8,208.57. The total of these two amounts is $28,400.88. Mr. Greenlees' is also

entitled to prejudgment interest from September 14, 2017 to the date of judgment pursuant to the *Court Order Interest Act*, RSBC 1996, c. 79.

Costs

[78] Mr. Greenlees has recovered judgment for an amount falling within the monetary jurisdiction of the Small Claims Court (currently $35,000). Rule 14-1(10) provides:

> **Costs in cases within small claims jurisdiction**
>
> (10) A plaintiff who recovers a sum within the jurisdiction of the Provincial Court under the *Small Claims Act* is not entitled to costs, other than disbursements, unless the court finds that there was sufficient reason for bringing the proceeding in the Supreme Court and so orders.

[79] Accordingly, Mr. Greenlees is entitled to costs only if there was sufficient reason for bringing the proceeding in this Court. The matter must be assessed according to what was known to Mr. Greenlees and his counsel at the time the action was commenced on November 7, 2017; *Gehlen v Rana*, 2011 BCCA 219, (at para. 24). Likely quantum is the most important factor, but other circumstances may qualify if they are persuasive and compelling (at para. 37). The onus is on the plaintiff. In *Gradek v DaimlerChrysler Financial Services Canada Inc.,* 2011 BCCA 136, it was held that a claimant's need for the assistance of counsel due to language difficulties qualified as sufficient reason in the circumstances of that case.

[80] Ms. Moody offers three reasons for commencing the action in this Court rather than the Small Claims Court:

a) It was not clear at the commencement of the proceeding that Mr. Greenlees would not be able to claim on the basis of the forecast of income of $100,000 per year, in which case he would have recovered an amount in excess of the Small Claims limit;

b) This seemed an appropriate case for oral discovery, including an examination of Mr. Parkinson. In the result, Mr. Parkinson could not be located, but she could not have anticipated that at the outset; and

c) The summary trial procedure is available in this Court, by which the case could be (and was) resolved in a hearing lasting a day, as opposed to a Small Claims trial of two or three days.

[81] I am not persuaded that the third reason is cogent. If this Court's procedures are less extensive and expensive than the Small Claims procedures in some cases, that is to the benefit of both parties and not a reason for the plaintiff to recover costs that would not be recoverable in the Small Claims Court. I should add that I think it more likely that, in most cases, the procedures in this Court will result in greater expense to the parties.

[82] I view the first and second reasons, taken together, as persuasive and compelling. It was reasonable for counsel, having regard only to Mr. Greenlees' account of events and giving the matter some thought, to view the claim as one based on an expectation of income in the range of $100,000 per year and to anticipate a conflict in the evidence of Mr. Greenlees and Mr. Parkinson. On close analysis, the claim was smaller and Mr. Greenlees conceded as much by the time of the hearing, but I doubt that it is reasonable to expect him to have understood that at the outset. Where the claim could plausibly exceed $35,000, a responsible counsel will usually opt to proceed in this Court because a Small Claims Court action requires the abandonment of damages exceeding $35,000.

[83] I find that Mr. Greenlees had sufficient reason to commence his action in this Court and is therefore entitled to costs. Pursuant to Rule 14-1(f)(i), these must be assessed as Fast Track Litigation costs under Rule 15-1(15) and (17), at $8,000 plus taxes and disbursements.

[84] If there are circumstances pertaining to the assessment of costs that have not been drawn to my attention, the parties may raise them by letter to the Supreme Court registry.

Conclusion

[85] For these reasons, Mr. Greenlees is awarded judgment against Starline in the amount of $28,400.88 together with prejudgment interest from September 14, 2017, and costs of $8,000 plus taxes and disbursements.

"Gomery J."
The Honourable Mr. Justice Gomery