NOVA SCOTIA COURT OF APPEAL

Citation: Boutcher v. Clearwater Seafoods Limited Partnership, 2010 NSCA 12

Date: 20100223
Docket: CA 311111
Registry: Halifax

Between:

Cecil Boutcher and Clyde Knickle

Appellant

v.

Clearwater Seafoods Limited Partnership, a Nova Scotia Limited Partnership

Respondent

Judges: Hamilton, Fichaud, Beveridge, JJ.A.

Appeal Heard: January 25, 2010, in Halifax, Nova Scotia

Held: Allowed in part, per reasons for judgment of Fichaud, J.A.; Hamilton and Beveridge, JJ.A. concurring.

Counsel: Mark Tector, for the appellant
Nancy Barteaux and Isabelle French, for the respondent

Reasons for judgment:

[1] Cecil Boutcher and Clyde Knickle captained scallop vessels for Clearwater Seafoods. Their employment with Clearwater ended in January 2005, and they sued for wrongful dismissal. The trial judge decided Clearwater dismissed them without cause, and Captain Knickle was entitled to $55,498 damages plus interest, but Captain Boutcher's failure to mitigate disentitled him to damages. Captains Boutcher and Knickle and Clearwater all appealed. The issues turn on how the agreements and practices that governed Clearwater's fishing operations affect the principles of wrongful dismissal, particularly those respecting notice of termination, damages and mitigation.

Background

[2] Captain Boutcher was age 59 at trial. At 15 he went to sea. In 1971 he captained his first scallop vessel for Pierce Fisheries. In 1987 Clearwater Seafoods Limited Partnership ("Clearwater") acquired Pierce Fisheries, and Captain Boutcher moved to Clearwater. Clearwater harvests scallops, lobster, crab, shrimp and other species for sale on the Canadian and international markets. With Clearwater, Captain Boucher captained two scallop vessels, the *A.E. Pierce* until 2002, then the *Ocean Lady* until December 2004. The *Ocean Lady* was 130 feet with a crew of 19, and its normal trip lasted eight to ten days. It was a wetfish vessel which ices bags of scallops at sea. This differs from a frozen at sea (FAS) factory trawler which shucks the scallops then freezes them individually in a blast freezer.

[3] The trial judge found:

> 6. All the evidence before me is that Captain Boutcher was a good scallop vessel captain. He did his job well and knew where to find scallops. He did that based on his long experience catching scallops.

[4] Clyde Knickle was 61 at trial. He went to sea in 1969, worked for C.W. Macleod Fishery when Clearwater took it over in 1982, and captained scallop vessels for Clearwater since 1988.

[5] The trial judge said (¶ 163) that both captains “served the company well”, and “did good work for many years, and the company benefited from their skill at locating and catching scallops.” There is no suggestion of just cause for dismissal.

[6] Until 1998, Clearwater had no written contract of employment with its captains. By late 1996, Peter Matthews, vice president of Clearwater's fleet, decided to formalize the terms of employment. On December 4, 1996, Mr. Matthews met the captains and delivered a scripted statement that was adduced in evidence:

> 6. NOW I HAVE GOT TO ADDRESS HOW WE CONDUCT OURSELVES IN THE FUTURE AND OUR RELATIONSHIP WITH YOU, TO RECOGNIZE WHERE WE STAND LEGALLY. YOU ARE ALL AWARE THAT THE CURRENT TREND IS FOR DIS-SATISFIED EMPLOYEES TO GO TO THE NEAREST LAWYER, WHO WILL PROMISE THE EARTH AND PROCEED TO SUE THE COMPANY, WITH SOME WINNERS AND SOME LOSERS.
>
> NOT ONLY IS THERE A FINANCIAL CONSIDERATION BUT THIS IS A DISTRACTION AND A DRAIN ON THE COMPANY’S TIME IN RUNNING ITS BUSINESS.
>
> 7. WE HAVE TAKEN THE BEST LEGAL ADVICE AVAILABLE ON THIS ISSUE AND THEREFORE WE ARE ISSUING YOU LETTERS OF TERMINATION, EFFECTIVE APRIL 1998, AFTER WHICH TIME WE WILL REVIEW OUR REQUIREMENTS AND YOU MAY SUBMIT YOUR APPLICATION TO FILL THESE.
>
> 8. PLEASE UNDERSTAND THAT AS OF APRIL 1998 YOUR EMPLOYMENT AT DST IS TERMINATED, AND ANYTHING THAT HAPPENS AFTER THAT DATE WITH THOSE CAPTAINS AND MATES THAT WORK FOR US WILL BE ON A CONTRACTUAL BASIS.
>
> . . .
>
> - DOES NOT WANT ANY AMBIGUITY WHEN PEOPLE LEAVE THE ROOM. TERMINATION IS ON APRIL 30TH 1998.
>
> - CAPTAINS/MATES MAY RE-APPLY AFTER THAT DATE. WE WILL FILL OUR REQUIREMENTS ACCORDING TO OUR NEEDS

> AT THAT TIME. FUTURE EMPLOYMENT WILL BE UNDER CONTRACT.

[7] At the meeting of December 4, 1996, Captains Boutcher and Knickle each received from Clearwater a letter stating that their employment would cease by April 30, 1998:

> "Dear ... :
>
> The current state of the fishing industry requires that our company become more efficient. Accordingly, during the next eighteen (18) months we expect to undertake a reorganization of our fleet which will involve the retirement from service of certain vessels. This reduction in our fleet will in turn reduce the number of vessel captains.
>
> In order to permit you the opportunity to plan and organize your personal affairs, it is appropriate that we give to you as much notice as possible of our plans. Accordingly, we hereby give you formal notice that your engagement as a captain (and in all other positions as well) with our company shall terminate and be at an end effective April 30, 1998, (unless otherwise sooner terminated)"

[8] Captains Boutcher and Knickle each then discussed his employment situation with Clearwater's fleet manager, Captain Mike Pittman. Captains Boutcher and Knickle knew that Captain Pittman was subordinate in the company to Mr. Matthews, who had delivered the stern message of December 4,1996. Captain Pittman gave Captains Boutcher and Knickle verbal assurances that Clearwater would still employ them after April 1998. The nature of these assurances was an issue in the litigation and will be discussed later.

[9] On April 28, 1998, Clearwater gave Captains Boutcher and Knickle each a letter confirming the termination of employment on April 30, 1998. The Captains were called to a meeting with Clearwater's Mr. Matthews, who told them they could continue with Clearwater only if they signed a written Multi Trip Agreement. Mr. Matthews' script for the meeting said:

> You cannot sail with us again unless you have accepted the terms and conditions of this new Agreement.

[10] This Multi Trip Agreement continued the historical calculation of the captain's compensation and provided for benefits. The captain's compensation was

four percent of the gross stock and the equivalent of one crew share per trip. A crew share is based on total catch less expenses. The Multi Trip Agreement discussed termination of employment in article 19:

> "This Agreement shall continue in effect until terminated by either party in accordance herewith. Either party may terminate this Agreement at any time upon the giving of thirty (30) days written notice to the other party, such termination to be effective on the later of the thirtieth (30th) day after the giving of such notice and the date specified in such notice; provided that:
>
> > (a) in lieu of giving such notice the Captain may pay to the Owner the sum of Five Thousand Dollars ($5,000.00) in full and final settlement of all of the Captain's obligations to the Owner hereunder excepting only the obligations of the Captain pursuant to Sections 11 and 16 hereof; and
> >
> > (b) in lieu of giving such notice the Owner may pay to the Captain the sum of Twenty-Five Thousand Dollars ($25,000.00) in full and final settlement of all of the Owner's obligations to the Captain under this Agreement."

[11] Captains Boutcher and Knickle each signed this Multi Trip Agreement.

[12] In December 1999, the 1998 Multi Trip Agreements were amended by agreement to comply with federal income tax requirements, but article 19 respecting termination of employment remained. In January 2002, when Captain Boutcher began his captaincy of the *Ocean Lady*, he signed a new Multi Trip Agreement, which retained the wording of article 19 from his 1998 Multi Trip Agreement.

[13] By the late 1990's Clearwater moved to modernize its fleet by the eventual replacement of its wetfish vessels with FAS vessels. Clearwater's first FAS vessel, the *Atlantic Leader*, entered service in June 2002. By June 2005 Clearwater had added three more FAS vessels. This changed modality involved a reconsideration of Clearwater's employment of its wetfish vessel captains.

[14] In January 2003 Clearwater presented Captains Boutcher and Knickle with a new document, a Single Trip Agreement. Clearwater did this without the prior notice or $25,000 payment that was prescribed in article 19 of the Multi Trip Agreement. The Single Trip Agreement provided for similar job functions and compensation as the earlier Multi Trip Agreement, except that the captain would

not participate in Clearwater's medical benefits. Unlike the former Multi Trip Agreement, the Single Trip Agreement applied to only one fishing trip and had to be re-signed before each embarkation. Captains Boutcher and Knickle understood that, if they did not sign, they could not leave port for Clearwater.

[15] The Single Trip Agreement had no provision, equivalent to article 19 of the former Multi Trip Agreement, providing for notice of termination or payment in lieu. The Single Trip Agreement said in article 24:

> "This Agreement constitutes the entire understanding, contract and agreement between the parties and supersedes all other oral or written understandings, agreements or contracts, formal or informal, between the parties or their representatives with respect to the subject matter of this Agreement. Without limiting the generality of the foregoing, the Captain hereby releases and forever discharges Clearwater Fine Foods Incorporated and all subsidiaries and affiliates thereof and its and their shareholders, directors, officers and employees, and its and their successors and assigns from any and all manner of actions, causes of action, debts, accounts, covenants, contracts, claims and demands whatsoever which the Captain has had, now has or which the Captain or his heirs, executors, administrators, successors or assigns or any of them hereafter can, shall or may have for or by reason of any cause, matter or thing existing up to the date hereof under any legislation, or contract, or in tort or otherwise, or for any other reason whatsoever with regard to the relationship at any time heretofore existing with respect to the Captain being the captain of or otherwise in any capacity whatsoever being an officer or member of the crew of the Vessel or of any other vessel owned or operated by Clearwater Fine Foods Incorporated."

[16] Captains Boutcher and Knickle signed Single Trip Agreements for each trip from January 2003 through December 2004.

[17] On December 16, 2004 Captain Boutcher received a letter from Clearwater saying that Clearwater would no longer fish wetfish vessels, such as the *Ocean Lady*. On January 17, 2005, Clearwater's Fleet Manager Captain Lohnes called Captain Boutcher to a meeting. At the meeting he gave Captain Boutcher a letter stating:

Capt. Cecil Boutcher

Dear Cecil:

As discussed with you throughout 2004, the vessel that you had been assigned to command will not be fishing with the offshore scallop fishing fleet operating from Lunenburg as of her last landing in December 2004. As announced, Clearwater is adding two FAS vessels to the offshore scallop fleet and is not planning to operate any Wetfish vessels in the fishing effort of the future. As of the end of your last fishing trip in 2004, your employment relationship with Clearwater was terminated as per the Agreement signed at the beginning of the trip. We are unable to offer any further Single Trips with the offshore scallop Wetfish fleet.

We are offering you the position of Captain of the Cape Keltic a fishing vessel that will be used for Research and Development, as well as Scientific Scallop Surveys for part of each year.

In retaining your services as a Captain on this vessel we are prepared to guarantee an annual salary (to be discussed) each year research is carried out.

We appreciate the need for you to consider the offer, and would like to receive a response by Wednesday, January 19th at 1600 hrs. at latest.

We are hopeful you will continue to work with Clearwater in this new role, and look forward to hearing from you.

Kind regards,

Capt. Keith Lohnes
Fleet Manager Scallop Operations

[18] Captain Boutcher was surprised by this offer for the *Cape Keltic* survey vessel. He had expected to be offered a captaincy on one of Clearwater's new FAS vessels. He consulted a lawyer and wrote to Clearwater for clarification. He received Clearwater's reply of January 27, 2005:

Dear Capt. Boutcher

This letter is in response to your letter of Jan 19, 2005 concerning the offer of employment as Captain of the Survey Vessel, *Cape Keltic*. I will respond to each of your inquiries individually below.

Annual Income:

- This would be dependant upon the number of survey trips during the year and the number of fishing trips that may be required.

- The pay rate for the survey trips as captain would be $450.00 per sea day, with an allowance of one additional day of pay for each survey.

- The pay rate for the fishing trips would be on a share basis as it has been in the past. An estimate would be between $3000 and $5500 per trip, but as you are aware, this will be dependent on the pounds landed.

- At the end of the first year we would review your employment and if all results where positive we would then be in a position to consider negotiating a salary for the following year for the survey work.

We anticipate,

- Three scallop surveys totalling 30 days at sea.

- One fishing gear survey totalling 15 days at sea.

- One clam survey totalling 30 days at sea.

We anticipate the starting time of the surveys to be in early May and to be completed in September of 2005. Any fishing trips that may be required can be expected to start in September of 2005 and could possibly continue until December of 2005.

[19] Captain Boutcher declined Clearwater's *Cape Keltic* offer. He estimated the *Cape Keltic* position would pay only $33,000 annually compared to his 2004 income of $135,000 with the *Ocean Lady*. In April 2005, Captain Boutcher sued Clearwater for wrongful dismissal.

[20] In January 2005, Captain Knickle was off work on workers' compensation. He also was called to a meeting on January 17, with Clearwater's Captain Lohnes, who told Captain Knickle that Clearwater would not offer him further employment. Clearwater paid him nothing for severance. In April 2005, Captain Knickle joined Captain Boutcher as a co-plaintiff in this wrongful dismissal action.

[21] Justice Douglas MacLellan of the Supreme Court of Nova Scotia heard the trial in November 2008. He issued a written decision on April 3, 2009 (2009 NSSC 107). The judge ruled that Captains Boutcher and Knickle were wrongfully dismissed and, subject to mitigation, would be entitled to damages. He analyzed the claims sequentially:

> (a) He concluded that the Captains' terminations of employment on April 30, 1998 did not attract damages because each had received working notice from December 4, 1996 of the termination on April 30, 1998. The judge held that 16 months 26 days sufficed as reasonable notice.
>
> (b) The judge said that Clearwater breached the Captains' employment contracts in January 2003, by terminating the Multi Trip Agreement without the 30 days notice required by article19. This breach entitled each captain, subject to mitigation, to the $25,000 prescribed by article 19.
>
> (c) The judge ruled that the Single Trip Agreements from 2003 through 2004 were void because they changed the terms of the Multi Trip Agreement without consideration from the Captains. He said that, from January 2003, the Captains were employed for an indefinite term without written contract. There being no just cause, Clearwater wrongfully dismissed them in January 2005. The judge ruled that, subject to mitigation, they were entitled to reasonable notice from January 2005, quantified as three months for these two years of service. This was in addition to the $25,000 mentioned above for the January 2003 breach.

[22] The judge ruled that Captain Boutcher's refusal to accept Clearwater's offered position with the *Cape Keltic* in January 2005 was failure to mitigate and disentitled Captain Boutcher both to the $25,000 damages for Clearwater's January

2003 breach and to the three months' damages for his wrongful dismissal in January 2005. The judge dismissed Captain Boutcher's action.

[23] The judge ruled that Captain Knickle did not fail to mitigate. He noted that Captain Knickle was on workers' compensation until April 2005, and that he could not find work in early 2005. He awarded Captain Knickle damages of $25,000, for Clearwater's breach of the Multi Trip Agreement in January 2003, plus three months' income (calculated as an average of his earnings for 2003 and 2004) in lieu of notice for his wrongful dismissal in January 2005.

[24] Captains Boutcher and Knickle appealed by separate notices of appeal and cross appeal. Clearwater filed a notice of contention and cross appeal.

Issues

[25] Captains Boutcher and Knickle say that Clearwater's notice of termination in December 1996 was modified by Captain Pittman's later verbal assurances that the Captains would still be employed after April 1998. So there was no clear and unequivocal notice of termination, and the Captains' employment was not terminated in April 1998 by working notice. They contend that Clearwater's conduct in January 2003 disentitled Clearwater from relying on article19 of the Multi Trip Agreement, and that their wrongful dismissals in January 2005 should attract reasonable notice based on their decades of service with Clearwater. They submit that up to 24 months is reasonable. They say there should be no reduction in their awards based on principles of mitigation. Captain Boucher claims approximately $190,000 to reimburse what he terms as mitigation expenses.

[26] Clearwater, on the other hand, submits that the judge correctly concluded that the Captains were given sufficient working notice from December 1996 through April 1998, that the Multi Trip Agreements' article 19 capped the compensation for the period up to January 2003 at $25,000, subject to mitigation, and that the reasonable notice for 2003-2004 would be no more than two or three months. Clearwater says that the Captains' actual earnings after January 2003 fully mitigated the $25,000 entitlement under article 19, that Captain Boutcher's damages for three months' reasonable notice from January 2005 are eliminated by his failure to mitigate by refusing the *Cape Keltic* captaincy, and that Captain

Knickle's award after January 2005 should be reduced from three to two months and should be calculated from his 2004 income.

[27] I will address the issues from all parties topically:

1. Did the judge err by ruling the Captains' employment terminated by sufficient working notice in April 1998?

2. Did the judge err by ruling that the Captains' award for wrongful dismissal included both $25,000 under article 19 of the Multi Trip Agreement plus compensation for the period of reasonable notice based on service in 2003 and 2004?

3. Did the judge err by deciding that Captain Knickle was entitled to three months' reasonable notice, based on average earnings for 2003 and 2004, for his wrongful dismissal in January 2005?

4. Did the judge err by not ruling that the Captains' employment earnings from January 2003 through December 2004 mitigated their entitlement to $25,000 under the Multi Trip Agreement?

5. Did the judge err by ruling that Captain Boutcher failed to mitigate by declining the *Cape Keltic* captaincy in January 2005?

6. Did the judge err by failing to compensate Captain Boutcher for his claimed mitigation expenses?

Standard of Review

[28] The appeal court's assessment of error at trial filters through the applicable standard of review.

[29] The judge must be correct on legal issues. The standard for facts and questions of mixed fact and law with no extractable legal error is palpable and overriding error. This means a plainly identified error that is shown to have affected the result. *H.L. v. Canada (Attorney General)*, [2005] 1 S.C.R. 401, at ¶ 65

and 69; *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235, at ¶ 8, 10, 19-25, 31-36. In *H.L.*, Justice Fish for the majority elaborated:

> 72 I have not overlooked that, according to the majority in *Housen*, the test to be applied in reviewing inferences of fact is "not to verify that the inference can be reasonably supported by the findings of fact of the trial judge, but whether the trial judge made a palpable and overriding error in coming to a factual conclusion based on accepted facts" which, in its view, implied a stricter standard (para. 21 (emphasis in original)). The apparent concern of the majority was that, in drawing an analytical distinction between factual findings and factual inferences, the minority position might lead appellate courts to involve themselves in reweighing the evidence (para. 22). As well, the majority stated:
>
> > If there is no palpable and overriding error with respect to the underlying facts that the trial judge relies on to draw the inference, then it is only where the inference-drawing process itself is palpably in error that an appellate court can interfere with the factual conclusion. [Emphasis in original; para. 23.]
>
> 73 These passages from the majority reasons in *Housen* should not be taken to have decided that inferences of fact drawn by a trial judge are impervious to review though unsupported by the evidence. Nor should they be taken to have restricted appellate scrutiny of the judge's inferences to an examination of the primary findings upon which they are founded and the process of reasoning by which they were reached.
>
> 74 I would explain the matter this way. Not infrequently, different inferences may reasonably be drawn from facts found by the trial judge to have been directly proven. Appellate scrutiny determines whether inferences drawn by the judge are "reasonably supported by the evidence". If they are, the reviewing court cannot reweigh the evidence by substituting, for the reasonable inference preferred by the trial judge, an equally -- or even more -- persuasive inference of its own. This fundamental rule is, once again, entirely consistent with both the majority and the minority reasons in *Housen*.
> [Justice Fish's emphasis]

More recently, in *F.H. v. McDougall*, [2008] 3 S.C.R. 41, at ¶ 55, Justice Rothstein for the Court said:

> 55. An appellate court is only permitted to interfere with factual findings when "the trial judge [has] shown to have committed a palpable and overriding error or made findings of fact that are clearly wrong, unreasonable or unsupported

> by the evidence" (*H.L. v. Canada (Attorney General)*, [2005] 1 S.C.R. 401, 2005 SCC 25, at para. 4 (emphasis deleted), *per* Fish J.). Rowles J.A. correctly acknowledged as much (para. 27). She also recognized that where there is some evidence to support an inference drawn by the trial judge, an appellate court will be hard pressed to find a palpable and overriding error. Indeed, she quoted the now well-known words to this effect in the judgment of Iacobucci and Major JJ. in *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235, 2002 SCC 33, at para. 27 of her reasons (para. 22 of *Housen*).

First Issue-
Effect of Notice of Termination in December 1996

[30] Captains Boutcher and Knickle acknowledge receiving the notice from Clearwater in December 1996, that their employment would terminate in April 1998. But, after this, they each spoke to their direct superior, Captain Pittman. They say Captain Pittman assured them they would have jobs with Clearwater after April 1998. These assurances, they contend, diluted Clearwater's message to something less than the clear and unequivocal notice of termination that is required for working notice. It follows that they would not be terminated by notice in April 1998, and their employment before April 1998 would count in any calculation of reasonable notice for their later wrongful dismissal.

[31] Sufficient and effective working notice terminates an employment contract: *Evans v. Teamsters Local Union No. 31*, [2008] 1 S.C.R. 661, ¶ 28-29. England, Wood and Christie, *Employment Law in Canada* (LexisNexis Butterworths 4th ed-looseleaf), ¶ 14.75 states the requirements of effective working notice:

> The courts require that, in order to be effective in starting the notice period countdown, the notice itself must be “specific, unequivocal...and clearly communicate[d] to the employee that his employment will end on a certain date”. The use of precise or formal language is not required provided that the employer's intention to end the relationship is objectively manifest.

[32] The trial judge found:

> [129] While I conclude that Captain Pittman did give to both plaintiffs some assurances about them having a job with the company after April 1998 I cannot conclude that such comments on his part can be construed as an alternative to the clear message being delivered by the written correspondence from the company.

[33] There was significant evidence to support the trial judge's finding that Clearwater's termination notice was an undiluted "clear message". Mr. Matthews scripted statement at the December 4, 1996 meeting was:

> 8. PLEASE UNDERSTAND THAT AS OF APRIL 1998 YOUR EMPLOYMENT AT DST IS TERMINATED, AND ANYTHING THAT HAPPENS AFTER THAT DATE WITH THOSE CAPTAINS AND MATES THAT WORK FOR US WILL BE ON A CONTRACTUAL BASIS.
>
> ...
>
> - DOES NOT WANT ANY AMBIGUITY WHEN PEOPLE LEAVE THE ROOM. TERMINATION IS ON APRIL 30th 1998.
>
> - CAPTAINS/MATES MAY RE-APPLY AFTER THAT DATE. WE WILL FILL OUR REQUIREMENTS ACCORDING TO OUR NEEDS AT THAT TIME. FUTURE EMPLOYMENT WILL BE UNDER CONTRACT.

Clearwater's letter of December 4, 1996 to Captains Boucher and Knickle said:

> In order to permit you the opportunity to plan and organize your personal affairs, it is appropriate that we give to you as much notice as possible of our plans. Accordingly, we hereby give you formal notice that your engagement as a captain (and in all other positions as well) with our company shall terminate and be at an end effective April 30, 1998, (unless otherwise sooner terminated).

[34] Mr. Matthews, who delivered these statements, was vice president of Clearwater's fleet and, to the knowledge of Captains Boutcher and Knickle, superior to Captain Pittman in Clearwater's organization. Mr. Matthews' message was that, after the current employment terminated on April 30, 1998, Clearwater would receive applications for new employment under a new contract of employment. The trial judge was of the view (¶ 136) that Captain Pittman's comments to Captains Boutcher and Knickle referred to the prospect of new employment under such a "new arrangement". This did not diminish Mr. Matthews' unequivocal notice in 1996 that the Captains' existing terms of employment would cease on April 30, 1998.

[35] Clearwater never suggested it would abandon the scallop fishery on April 30, 1998. It was always obvious that Clearwater would need scallop captains after

that date. But it was also obvious from December 1996 that, as of April 30, 1998, the prior terms of employment would end. That Clearwater might accept an application by Captains Boutcher or Knickle for re-employment, on substantially different terms, after April 30, 1998 did not negate the clear notice that their existing employment contracts would terminate on that date.

[36] The trial judge considered whether the notice of termination was "clear" (¶ 129), applying the correct legal standard. He made no palpable error in his assessment of the evidence, taken as a whole, respecting the clarity of Clearwater's communicated intention to end the employment on April 30, 1998.

[37] The trial judge held that the working notice of 16 months 26 days from December 4, 1996 to April 30, 1998 was reasonable and sufficient given the Captains' employment history at the time. There is no error in that conclusion.

[38] I would dismiss the Captains' ground of appeal that challenges the validity of the notice of termination from December 1996 to April 1998.

Second Issue-
Calculation of Award for Wrongful Dismissal

[39] The judge's ruling that the Captains were dismissed by proper working notice on April 30, 1998 meant that, when the Captains were dismissed in January 2005, the period of their employment that the trial judge considered to calculate damages excluded their service before May 1998. In my view, for the reasons I have given, the trial judge did not err by excluding the Captains' employment before May 1998.

[40] This case is unlike *Braiden v. La-Z-Boy Canada Ltd.*, 2008 ONCA 464, cited by Captains Boucher and Knickle. In *Braiden*, at ¶ 46-61, Justice Gillese said that an employer may not substantially change an employment contract, for instance by altering the provision for notice of termination, without new consideration moving from the employer, and that mere continuation of the employee's service may not suffice as the new consideration. See also England, Wood and Christie, *Employment Law in Canada* ¶ 14.86 and authorities there cited. Had the employment of Captains Boutcher and Knickle not been validly terminated by working notice on April 30, 1998, I would agree that: (1) the new

notice provision in clause 19 of the Multi Trip Agreement, i.e. 30 days notice or $25,000 in lieu, would be without consideration and therefore inapplicable, and (2) the period of employment to be considered for the Captains' later dismissals without cause would include their employment before May 1998.

[41] But, as discussed, the Captains' employment was validly terminated on April 30, 1998. The Captains and Clearwater then signed new contracts of employment, the Multi Trip Agreements, with mutual rights and obligations that constituted an exchange of consideration. The trial judge considered *Braiden* and (¶ 159) correctly ruled that, starting in May 1998, the Captains' terms of employment were governed by the Multi Trip Agreements, including clause 19.

[42] Starting in January 2003, Clearwater had the Captains sign the Single Trip Agreements which, in article 24, stated that the Captains released Clearwater from existing claims (see above ¶ 15). At the trial Clearwater submitted that article 24 released any claims the Captains might have for Clearwater's failure in January 2003, to give notice or payment of $25,000 under article 19 of the Multi Trip Agreement. The trial judge rejected Clearwater's submission. Before terminating the Captains' Multi Trip employment in January 2003, Clearwater had given neither reasonable working notice, as had been done in December 1996, nor the prescribed 30 day notice or $25,000 under article 19 of the Multi Trip Agreement. So Clearwater had not validly terminated the Multi Trip Agreement. The trial judge (¶ 160-61) ruled that, following *Braiden*, clause 24 of the Single Trip Agreements was without consideration to the Captains, and the Single Trip Agreements were void. Clearwater has not appealed that ruling, and the Captains do not challenge it in the Court of Appeal. So I take the Single Trip Agreements as void, and clause 24 of those Agreements does not release the Captains’ claims in this proceeding.

[43] Clearwater submitted at trial that, if the Single Trip Agreements were void, then the Captains' Multi Trip Agreements continued, and article 19 of the Multi Trip Agreements capped any compensation for wrongful dismissal at $25,000.

[44] The Captains take the opposite view. In the Court of Appeal, they contend that Clearwater's legally deficient attempt to implement Single Trip employment in January 2003 jettisoned the Multi Trip Agreements, including article 19. So the $25,000 cap would be irrelevant. This, they submit, leaves the Captains with indefinite employment and a right to reasonable notice after their wrongful

dismissal in January 2005. They say that, in calculating reasonable notice, the court may consider the Captains' full period of employment with Clearwater, including their employment during the Multi Trip regime before January 2003. They request up to 24 months' reasonable notice.

[45] The judge steered between these two positions. He ruled that article 19 of the Multi Trip Agreement governed the period up to January 2003 when Clearwater attempted to impose the new Single Trip regime. So, subject to mitigation, the Captains were entitled to $25,000 under article 19 for Clearwater's breach of the Multi Trip Agreements. The judge added that, from January 2003 until the Captains' dismissal in January 2005, they were employed for an indefinite term without a written contract of employment. This meant the Captains were also entitled to reasonable notice (based on their 2003-2004 employment) for their wrongful dismissals in January 2005.

[46] In *Machtinger v. HOJ Industries Ltd*, [1992] 1 S.C.R. 986, at pp. 997-98, Justice Iacobucci noted the complex relationship between contractual intention and the implication of terms to govern the termination of employment, then summarized:

> ...I would characterize the common law principle of termination only on reasonable notice as a presumption, rebuttable if the contract of employment clearly specifies some other period of notice, whether expressly or impliedly.

[47] During the currency of the Multi Trip Agreements article 19 rebutted the presumption of reasonable notice. After January 2003, when Clearwater terminated the Multi Trip regime, the presumption was not rebutted. In my view, the judge skilfully alloyed the contractually expressed standard in article19 and the legally implied term of reasonable notice. He considered that the parties had signed and acted under enforceable Multi Trip contracts, with mutual consideration, up to January 2003. He considered Clearwater's attempt, beginning in January 2003, to alter that employment relationship in a manner that Clearwater does not now dispute was legally unsupportable. The judge (¶ 174) said that he wanted "to achieve some form of fairness to the plaintiffs ... [who] had no control or input over what was placed before them as far as employment contracts were concerned".

[48] The judge made no error in his conclusion that the Captains were entitled to both $25,000 as of January 2003 plus compensation for the period of reasonable notice respecting their employment from January 2003 to their dismissal without cause in January 2005.

Third Issue-
Captain Knickle's Award for
Reasonable Notice from January 2005

[49] Clearwater's cross appeal submits that Captain Knickle's reasonable notice, based on his 2003-2004 employment, should be two months instead of the three months awarded by the judge. Clearwater says that it had informed its workforce before January 2005 that Clearwater would replace the wetfish vessels with FAS vessels, and Captain Knickle should have known his captaincy prospects on an FAS vessel were uncertain. Clearwater submits that the judge erred by giving insufficient weight to that fact.

[50] There is no merit to Clearwater's submission. Essentially, the submission asks the court to treat Captain Knickle as under *quasi* working notice well before January 2005. If there was proper working notice Captain Knickle would not be entitled to even the two months' notice suggested by Clearwater. The judge found that the January 2005 dismissals were without notice. There is no basis for the Court of Appeal to conclude that the trial judge made a palpable and overriding error by his failure to find, in the period leading to January 2005, the clear and unequivocal message that is required for working notice.

[51] An employer's ambivalent message respecting an employee's prospects of termination, without the clarity needed for working notice, does not re-access the legal analysis camouflaged as a factor governing the length of reasonable notice. In *Dowling v. Halifax (City)*, [1998] 1 S.C.R. 22, the Court rejected the "near cause" doctrine that had operated in Nova Scotia's courts. Clearwater's submission propounds a "near notice" principle. I reject the submission. If Clearwater's message to Captain Knickle was not sufficiently clear and unequivocal to constitute working notice before January 2005, then speculative inferences from the message should not abridge Captain Knickle's period of reasonable notice. I note that I am not discussing a case where impermanence is a term of employment, for instance probationary service. I confine my comments to the effect of an

employer's vague and equivocal message about the employee's prospects of dismissal at some indefinite future time.

[52] Clearwater raises a second issue concerning Captain Knickle's award. The judge calculated Captain Knickle's base income for the three months' reasonable notice as the average of Captain Knickle's income for 2003 and 2004. He earned $11,333 per month in 2003 and $9,000 per month in 2004. So the judge awarded $10,166 monthly for three months. Clearwater's cross appeal submits that the judge erred with the base income and that the three months' award should derive from Captain Knickle's 2004 income only, i.e. $9,000 per month.

[53] Clearwater's factum says that the purpose of wrongful dismissal damages "is to put the dismissed employee in the same position he would have been in had he received reasonable notice of termination". Clearwater's factum then submits that, "given the significant fluctuations in annual earnings in the fishing industry, this [Captain Knickle's projected income in early 2005] would have been best achieved by looking only to Captain Knickle's earnings in the year immediately prior to his termination, i.e. 2004".

[54] I agree that the purpose is to compensate the dismissed employee as he would have been compensated had he received the reasonable notice. *Red Deer College v. Michaels*, [1976] 2 S.C.R. 324 at pp. 330-331. But I disagree that the significant fluctuations of earnings in the fishing industry exclude the use of a two year average. To the contrary, income fluctuations may be better addressed by a multi year average than by taking the employee's income snapshot at his dismissal date. In any case, the judge's prediction of Captain Knickle's hypothetical income for early 2005 was a question of fact, and there is no palpable and overriding error in the judge's use of a two year average.

[55] I would dismiss Clearwater's grounds of cross appeal respecting Captain Knickle's award for the period of reasonable notice after his dismissal without cause in January 2005.

Fourth Issue-
Mitigation of the $25,000 by 2003-2004 Earnings

[56] Clearwater's cross appeal submits that in 2003 and 2004 each Captain's earnings far exceeded $25,000, and this actual mitigation eliminates their entitlement to the $25,000 award from Clearwater's January 2003 breach of article 19.

[57] The question is whether the $25,000 prescribed by article19 is even subject to mitigation. In my view, it is not. The $25,000 was fixed by contract, and is not diminishable by the employee's later earnings.

[58] Article 19 says that either party may terminate the agreement by giving 30 days notice or "in lieu of giving such notice the Owner may pay to the Captain the sum of Twenty-Five Thousand Dollars ($25,000) in full and final settlement of all the Owner's obligations to the Captain under this Agreement".

[59] Various authorities have considered the effect on the mitigation principles of a provision in an employment contract that fixes an amount payable to the employee as full settlement for dismissal without cause. In *Rossi v. York Condominium Corp. No. 123*, [1991] O.J. No. 3174 (C.A.) ¶ 1, affirming [1989] O.J. No. 1424 (H.Ct.J.) the Ontario Court of Appeal said mitigation was irrelevant to a reasonable "contractual pre-estimate of the damages" in an employment contract. A Western line of cases applies a debt analysis. If the provision may be interpreted to create a fixed debt from the employer to employee, then the amount is not reduced by any amount the employee earned or could have earned after the debt became due. See: *Mills v. Alberta*, [1986] A.J. No. 605 (C.A.) (QL); *Paquin v. Gainer's Inc*, [1991] A.J. No. 464 (C.A.) (QL); *Philip v. Expo 86 Corp.*, [1987] B.C.J. No. 2127 (C.A.) (QL) per Lambert, J.A. for the majority. Recent Ontario authorities analyze the contractual wording to determine whether the parties have waived the employee's duty to mitigate: *Graham v. Marleau, Lemire Securities Inc.*, [2000] O.J. No. 383 (Ont. S.C.J.), ¶ 50-53; *Eady v. TrekLogic Technologies Inc.*, [2008] O.J. No. 1693 (Ont. S.C.J.), ¶ 130-134, affirmed 2009 ONCA 710, ¶ 7; *Wronko v. Western Inventory Service Ltd.*, 2008 ONCA 327, addendum 2008 ONCA 479 (point discussed in addendum).

[60] Under any approach, the court must enlist the first principle of mitigation stated by Chief Justice Laskin in *Red Deer College*, page 330:

> . . . The parameters of loss are governed by legal principle. The primary rule in breach of contract cases, that a wronged plaintiff is entitled to be put in as good a

> position as he would have been in if there had been proper performance by the defendant, is subject to the qualification that the defendant cannot be called upon to pay for avoidable losses which would result in an increase in the quantum of damages payable to the plaintiff. The reference in the case law to a "duty" to mitigate should be understood in this sense.

The court should determine, from the words of the employment contract objectively interpreted, whether the contractually stipulated sum for dismissal was intended to be paid regardless of any income the employee either earned or reasonably could have earned after his dismissal. If that was the contractual intent, then payment of the full contractual sum puts the dismissed employee "in as good a position as he would have been in if there had been proper performance" by the employer. On the same premise, payment of the full contractual sum would not "result in an increase in the quantum of damages payable" to the employee beyond that contemplated by the employment contract. So the full contractual sum would not be diminishable by principles of mitigation.

[61] In this case, article 19 prescribed a fixed $25,000 to fully and finally settle Clearwater's obligations under the employment contract. Nothing in the contract varied that sum based on any factors, such as those summarized in *Bardal v. Globe & Mail Ltd.* (1960), 24 D.L.R. (2d) 140 (Ont. H.C.), that affect the calculation of reasonable notice. As "reasonable notice" is irrelevant, it would be incongruous to deduct the employee's actual earnings during a period of hypothetical reasonable notice. Nothing in article 19 varied the $25,000 based on actual or potential earnings of the employee after his dismissal by Clearwater. Rather article 19 shows an intent that a fixed $25,000 buys closure. Opening a dispute over the employee’s actual or potential earnings for an ongoing indeterminate period is the opposite of closure.

[62] Article 19, objectively interpreted, exhibits a contractual intent that Clearwater's payment of $25,000 for its January 2003 breach of the Multi Trip Agreement be undiminished by any earnings that the Captains afterward either earned or reasonably could have been earned.

[63] Clearwater's cross appeal asks that the entitlement of both Captains Boutcher and Knickle to the $25,000 under article 19 be eliminated, under principles of mitigation, because of the Captains' actual earnings from Clearwater after January 2003. I would dismiss that ground of cross appeal.

Fifth Issue-
Did Captain Boutcher Fail to Mitigate in 2005?

[64] The judge held that Captain Boutcher's refusal of the *Cape Keltic* captaincy in early 2005 was an unreasonable failure to mitigate, and eliminated Captain Boutcher's entitlement to both the $25,000 from article 19 of the Multi Trip Agreement and the award for three months' reasonable notice from his dismissal in January 2005. Captain Boutcher appeals that ruling.

[65] I have explained my view that the $25,000 from article 19 was not diminishable by principles of mitigation. The $25,000 was contractually fixed, and not subject to reduction either by Captain Boutcher's actual earnings in 2003 and 2004, as discussed above, or by his failure to accept alternate employment in 2005. In my view the judge erred in law by misinterpreting article 19. I would allow Captain Boutcher's appeal respecting the $25,000.

[66] I turn to mitigation respecting the three months' reasonable notice for Captain Boutcher's two years' employment that preceded January 2005.

[67] In *Evans*, Justice Bastarache for the majority set out the principles that govern the "multi-factored and contextual analysis" to determine when a dismissed employee's failure to accept re-employment from his former employer will be an unreasonable failure to mitigate. Justice Bastarache said (¶ 30):

> The critical element is that an employee “not [be] obliged to mitigate by working in an atmosphere of hostility, embarrassment or humiliation” (*Farquar*, at p. 94), and it is that factor which must be at the forefront of the inquiry into what is reasonable. Thus, although an objective standard must be used to evaluate whether a reasonable person in the employee's position would have accepted the employer's offer (*Reibl v. Hughes*, [1980] 2 S.C.R. 880), it is extremely important that the non-tangible elements of the situation – including work atmosphere, stigma and loss of dignity, as well as nature and conditions of employment, the tangible elements – be included in the evaluation.

[68] The judge's reasoning, that Captain Boutcher failed to mitigate, was:

> 185. I conclude the decision to not take the job as captain of the Cape Keltic should be considered a failure to mitigate on the part of Captain Boutcher. While

> his concerns about what he would make were well founded he had operated for many years working as a captain in circumstances where the amount of income he got depended on many factors such as weather conditions, the availability of scallops and the availability of quota for the company.
>
> 186. He was being offered a job with a certain amount of certainty as far as the scientific side was concerned and while the number of actual fishing trips was uncertain it did have potential to produce significant income. The fact that the Cape Keltic had about 99 days fishing in 2005 in addition to the scientific work does confirm that potential. Captain Boutcher of course would not necessarily foresee that amount of fishing. If he had he probably would have taken the job as captain of the Cape Keltic.
>
> 187. I conclude that Captain Boutcher's failure to mitigate should disentitle him to any pay in lieu of notice based on the single trip agreements entered into from 2003 to the end of 2004.

[69] In my respectful view, the judge erred. Though the judge did not refer to *Evans* or its tests, the error does not involve a misapplication of Justice Bastarache's analytical framework concerning work atmosphere, stigma and dignity. Rather the error relates to timing.

[70] Clearwater dismissed Captain Boutcher on January 17, 2005. The judge said Captain Boutcher was entitled to three months' reasonable notice, from January 17 to April 17, 2005. Clearwater's letter of January 27, 2005 (above ¶ 18), giving particulars of the *Cape Keltic* offer, told Captain Boutcher: "We estimate the starting time of the surveys to be in early May". There was nothing from Clearwater to Captain Boutcher, at the date Captain Boutcher rejected the *Cape Keltic* captaincy, offering employment before the expiry of his period of reasonable notice on April 17, 2005.

[71] In *Evans* ¶ 28, Justice Bastarache said:

> ...damages are meant to compensate for lack of notice, and *not* to penalize the employer for the dismissal itself. The notice period is meant to provide employees with sufficient opportunity to seek new employment and arrange their personal affairs, and employers who provide sufficient working notice are not required to pay an employee just because they have chosen to terminate the contract. Where notice is not given, the employer is required to pay damages in lieu of notice, but that requirement is subject to the employee making a reasonable effort to mitigate the damages by seeking an alternative source of income.

[72] The employee mitigates his loss that generates the damages award that compensates the employee for the employer's lack of reasonable notice. There is a continuum from the period of reasonable notice to mitigation. The employee's responsibility to mitigate applies during the period of reasonable notice, for which the employer pays damages in lieu of notice. The employee's career choices after the expiry of the period of reasonable notice, here after April 17, 2005, do not impact his damages award, and are not the employer's affair.

[73] Under Chief Justice Laskin's formulation from *Red Deer College* (above ¶ 60), "if there had been proper performance by the defendant", then Clearwater would have given Captain Boutcher working notice on January 17, 2005 that his employment would end April 17, 2005. Then Captain Boutcher could not have earned employment income from a source other than the *Ocean Lady* captaincy between those two dates. To award him the full three months' income from Clearwater, in lieu of the notice, in addition to employment income from another source between those dates would be a windfall, or, in Chief Justice Laskin's words, "an increase in the quantum of damages payable to the plaintiff". This windfall is what the mitigation principle seeks to avoid.

[74] Had Clearwater given Captain Boutcher working notice on January 17 that his employment would have ended on April 17, Captain Boutcher could have worked on the *Ocean Lady* from January 17 through April 17, earned his three months' income for that period, then decided for his own reasons whether to work in May. His decision in May would have no impact on his availability for the *Ocean Lady* in January through April during Clearwater's working notice. If he decided to work in May, he would still have earned, and could keep, his income from Clearwater for January 17 through April 17. His May income would be for May work and would give him no windfall.

[75] Similarly, given Clearwater's failure to provide three months' working notice, Captain Boutcher's "loss" was his unpaid earnings for January 17 through April 17. His "avoidable loss", in Chief Justice Laskin's words, was a subset of his "loss" – i.e. that portion of *those three months*' income which Captain Boutcher could reasonably have replaced by alternative employment income.

[76] The judge did not consider this timing issue. In my view, the judge erred in law by treating the employee's duty to mitigate as applying to the employee's hypothetical income after the expiry of the period of reasonable notice.

[77] I would allow Captain Boutcher's ground of appeal from the judge's rulings that Captain Boutcher's refusal of the *Cape Keltic* captaincy was a failure to mitigate, respecting both the $25,000 and the payment in lieu of three months' reasonable notice.

Sixth Issue-
Captain Boutcher's Claim for Mitigation Expenses

[78] Captain Boutcher claimed from Clearwater approximately $189,000, being the cost of a lobster vessel, license and his outlay to establish a lobster fishing business. He purchased the vessel and license in late March 2005 and paid the other costs later in 2005. He says these were reasonable mitigation expenses.

[79] The judge's decision did not comment on this claim.

[80] A wrongfully dismissed employee may recover reasonable expenses of mitigation. England, Wood Chrisite, *Employment Law In Canada* ¶ 16.79 says:

> . . . First, and most widely endorsed, is the well-established principle that a plaintiff can offset reasonable costs incurred in mitigating his or her losses. The rationale is that since the employer obtains a benefit from the duty of mitigation in that earnings obtained during the notice period are deducted from the employee's damages, it is only fair that the employer should finance the employee's costs in finding such a job.

[81] Captain Boutcher's costs to acquire a lobster vessel, license and fishing business lie outside this principle and its rationale. Captain Boutcher's compensable loss was three months' income from January 17 to April 17, 2005. A reasonable mitigation expense should attempt to mitigate that loss. The cost of Captain Boutcher's vessel, licence and lobster fishing business was not an expense to mitigate his lost income before April 17, 2005. It was an investment to generate long term income apparently commencing after the expiry of Clearwater's three months' notice period. When asked when he started lobster fishing in 2005, Captain Boucher said, "It would be April or May or whenever." There was no

evidence that he fished lobster before April 17, 2005. Captain Boutcher does not claim expenses for job search, relocation, retraining, counselling, and the like, that normally constitute a claim for mitigation reimbursement. The claimed $189,000 was outlay to purchase capital assets that Captain Boutcher would keep and use long after Clearwater, if this claim succeeded, pays him for his acquisition costs. Yet there was no attempt, in evidence or argument, to amortize or apportion these capital costs to the period of reasonable notice ending April 17, 2005.

[82] It may be colloquially reasonable that Captain Boutcher fish lobster. But the $189,000 he claims from Clearwater is not, in the legal sense, reasonably related to the mitigation of his lost income between January 17 and April 17, 2005.

[83] I would dismiss Captain Boutcher's ground of appeal on this matter.

Conclusion

[84] I would allow Captain Boutcher's appeal from the judge's ruling that Captain Boutcher failed to mitigate by rejecting the *Cape Keltic* captaincy. I would order Clearwater to pay Captain Boutcher $25,000 plus three months' income for January 17 to April 17, 2005, based on an average of Captain Boutcher's annual income for 2003 and 2004, similar to the method the judge used for Captain Knickle. Captain Boutcher's factum in the Court of Appeal did not address quantum. So I will not attempt an exact calculation. I would order that, if the parties cannot agree on the calculation, then that matter be remitted to the trial judge.

[85] I would order that Clearwater pay Captain Boutcher prejudgment interest on this award. The judge's order reserved the calculation of prejudgment interest on Captain Knickle's award. The calculation of prejudgment interest on Captain Boutcher's award in this decision similarly would be remitted to the trial judge, if the parties cannot agree.

[86] Subject to ¶ 84 and 85, I would dismiss Captain Boutcher's other grounds of appeal. I would dismiss Captain Knickle's appeal and Clearwater's cross appeal.

[87] The trial judge reserved the issues of costs at trial, and I would not disturb that disposition. I understand from counsel that those trial costs have not yet been

determined. I would assume that the judge would take note that, after this appeal, Captain Boutcher has succeeded in the recovery of substantial damages.

[88] For the appeal, I would order Clearwater to pay Captain Boutcher costs of $3,000 plus disbursements.

Fichaud, J.A.

Concurred in:

Hamilton, J.A.

Beveridge, J.A.