IN THE SUPREME COURT OF NOVA SCOTIA

Citation: Johnston v. Clearwater Seafoods Ltd., 2008 NSSC 126

Date: 20080704
Docket: S.H. 243137
Registry: Halifax

Between:

William Johnston

Plaintiff

v.

Clearwater Seafoods Limited

Defendants

Judge:	The Honourable Justice Simon J. MacDonald
Heard:	December 10, 2007, in Halifax, Nova Scotia
Written Decision:	**July 4th , 2008**
Counsel:	Bernadette Maxwell, Counsel for the Plaintiff David Hirtle, Counsel for the Plaintiff Nancy F. Barteaux, Counsel for the Defendant

By the Court:

[1] This action involves a claim for wrongful dismissal. The plaintiff, William Johnston (herein the “Plaintiff” or “Mr. Johnston”) is a fisherman who began working for the Defendant Company (Clearwater) around 1990.

[2] Clearwater is a limited partnership operating in the global seafood industry. Amongst its operations it harvested and operated scallop vessels out of Lunenburg, Nova Scotia.

BACKGROUND:

[3] In the 1990's Clearwater harvested scallops on what is known as Wet Fish Vessels. Mr. Johnson worked in various fishing positions throughout that period for them. Later in the late 1990's Clearwater made a business decision to modernize its fleet of scallop vessels. The Wet Fish Vessels were replaced by frozen at sea vessels “FAS Vessels”. Wet fish vessels fished scallops at sea and they would be processed on shore. FAS vessels would fish, process and freeze scallops while at sea to ensure freshness and quality.

[4] From time to time however, Wet Fish Vessels would be used in order to fish additional quotas which Clearwater would obtain.

[5] In changing to the new operating system Clearwater called for new applications of employment and Mr. Johnson submitted an application and resume dated June 12, 2000 for a position on the FAS vessels.

[6] At around the same time, Clearwater began to engage its crews on what it called a voyage by voyage basis. There were different types of written contracts signed between the parties.

[7] In early 2003, Clearwater advised Mr. Johnston there were no more positions available for him as Captain or as Mate in the Wet Fish Vessels. They offered him a position as Deck Boss on one of the new FAS Vessels. He did not accept this position and consulted a lawyer. He contacted Rebecca Langille of Clearwater and advised her he was only going to work for Clearwater as a Captain or a Mate and not as a Deck Hand or a Deck Boss. He did not work for Clearwater for the early months of 2003.

[8] Later in 2003 as a result of a purchase of additional quota, Clearwater temporarily returned to service a wet fish vessel in order to fish the additional quota. Mr. Johnston was contacted and accepted a Captain's position on a Wet Fish Vessel, the T.K. Pierce in June of 2003 and executed a Single Trip Agreement. For the balance of 2003 he continued to work a number of trips on Wet Fish Vessels all under the Agreements.

[9] On or about mid December 2003, Mr. Johnston was called in by Clearwater's General Manager, Mr. Pittman, and was advised that he was going to go Mate on one of the FAS Vessels. In order to do so, he was told he would first have to go as a Deck Boss in order to be trained as a Mate on the FAS Vessels. This trip was made in January 2004.

[10] The Captain on Mr. Johnston's training trip aboard the Atlantic Guardian advised the Company that Mr. Johnston was not ready to act as Mate on board a FAS Vessel. He did not receive any offer of employment on such a vessel, as a result thereof.

[11] Mr. Johnston did, however, work as Captain on Wet Fish Vessels throughout 2004 in furtherance of additional Single Trip Agreements.

[12] On or about December 16, 2004, the General Manager of Clearwater Scallop Division wrote to all crew members, including Mr. Johnston advising the Company did not intend to offer any Wet Fish Vessels in 2005 because of an acquisition of two new FAS Vessels. At the same time all crew members were invited to apply for positions with the new FAS Vessels with a deadline of January 10, 2005.

[13] Mr. Johnston applied for employment on the FAS Vessels for the Captain or Mate positions in 2005. On January 17, 2005 Captain Keith Lohnes, Clearwater's Fleet Manager of Scallop Operations advised Mr. Johnston that the Company no longer required his services. Mr. Johnston's final Single Trip Agreement with Clearwater concluded on December 13, 2004.

[14] Mr. Johnston since then operated a small scallop dragger and worked as a crew member for various other employers. As well, he delivered ships. Then in January of 2006 Mr. Johnston with members of his family formed Johnston's

Fisheries and purchased an inshore scallop vessel which has been fishing since that time.

[15] Mr. Johnston, over this course of time cashed in RRSP funds.

[16] Mr. Johnston bases his claim on the Common Law of Wrongful Dismissal. He alleges his employment with Clearwater was for an indefinite term and he was dismissed in bad faith without just cause. He asks for augmented damages for wrongful dismissal.

[17] Clearwater's position is that at the time of Mr. Johnston's dismissal, he was working under a series of Single Trip Employment Agreements and the employment relationship between the parties ended at the end of each trip. Clearwater argues, they owed no duty to give reasonable notice of termination or pay in lieu thereof pursuant to the terms of the agreements.

[18] **Issues:**

(1) What was the legal nature of the plaintiff Johnson's employment relationship with the Defendant Company at the time of his dismissal?

(2) Does Mr. Johnston owe a duty to mitigate his damages and if so, did he mitigate same?

(3) If the Defendant dismissed the plaintiff, was it done in bad faith such as to merit an increase in the notice and thus augmented damages?

(4) If there is found to be an obligation for the Defendant to pay the plaintiff in lieu of notice, how much money is he entitled to?

Analysis and Conclusion:

[19] The fishing industry employment history was described by Mr. Pittman. He told how the industry evolved over time, especially as it related to the type of operations Clearwater developed. I accept that in the earlier days fishermen would show up at the wharf, be hired by the Captain, who would crew the vessel, and then go out on a trip. There would be no written contract. Their remuneration was that they would share in the proceeds from the sale of the fish obtained during the trip. The fishermen could move from one ship to another or even to another employment and a Company like Clearwater would be free to hire other individuals in their place. I find Mr. Johnston worked only for Clearwater when required continuously since early 1990.

[20] Clearwater decided to modernize and make their fishing operation more efficient in the late 1990's. They concluded FAS vessels were more efficient than wet fish vessels. They determined this would cut the fleet to about half. In making that decision Clearwater realized they would not need the same number of captains, mates and other crew members on the FAS vessels as they needed on the wet fish vessels.

[21] By letter dated May 12, 2000, Ex. #31, Vol. 4, Mr. Pittman, the General Manager of Clearwater, communicated in a letter entitled “Leaving the Past Behind” to all its Captains, Mates and crew members about the necessary changes taking place in the fishing industry from Clearwater’s perspective and the need for

fewer crew members. In the same letter, Clearwater invited letters of application and resumes from the wet fish crew for crew positions on the new FAS Vessels.

[22] I find Mr. Johnston was a fisherman employed by Clearwater until Clearwater decided to change its fishing operation from wet fish vessels to FAS vessels. As I reviewed the evidence and considered all the circumstances of this case including the number of years which he would report to work and the way their working relationship was I find Mr. Johnston was an employee for an indefinite term with Clearwater.

[23] I conclude from Mr. Pittman's letter that the fishermen working the wet fish vessels with Clearwater were terminated. This new process established by Clearwater changed the whole relationship between Mr. Johnston and the

Defendant. Clearwater was proceeding in a new manner and hiring all new staff for positions. Clearwater had made a conscious decision to move away from the old way of hiring fishermen to work on their vessels.

[24] In Mr. Pittman's letter above Mr. Johnston and others were invited to apply for a position as captain or mate, per the last paragraph which states as follows:

> "We are inviting your application for position of Captain or Mate with the new scallop vessels. We hope you are interested in an Officer's position at this exciting and challenging time in Deep Sea Trawlers growth and change, and would ask you to give your applications and resumes to Becky, who will see they are forwarded to me in confidence. Your application is requested prior to June 15th."

[25] My finding, Mr. Johnson was an employee of indefinite duration with Clearwater I infer is conceded by Ms. Barteaux on behalf of Clearwater in her pre-trial memorandum at page 6, paragraph 37.

[26] In **Swinamer v. Unitel Communications Inc**. (1996), 147 N.S.R.(2d) 249 (NSSC), Goodfellow, J. said at para. 44 and 45 as follows:

> 44."An employer has every right to determine its priorities, and take what steps it deems necessary to address market and economic conditions as it sees fit. However it cannot do so and plead an entitlement to diminish its responsibility in law when it comes to the termination of the employment of its employees. Neither the wealth or lack of wealth of an employee or employer is a contractual concern warranting a diminished less than reasonable termination notice required in all the circumstances.
>
> 45. "Reorganization, downsizing, restructuring, financial mismanagement and redundancy are not factors to be taken into account in diminishing the appropriate reasonable period of notice."

[27] Similar reasons can be found in **McNair and Guy v. Bremner (J.D.) & Son Ltd.** (1983), 58 (N.S.R.) (2d) 222 (N.S.S.C.) and **MacDonald v. Royal Canadian Legion** (1995), 142 N.S.R. (2d) 174 (N.S.S.C.).

[28] I find there was a termination of the employee, employer relationship between Mr. Johnston and Clearwater upon the new system being implemented in accordance with Mr. Pittman's letter. I find there was a change in the terms of employment at that point in time which was unilaterally done by Clearwater. Mr.

Johnston as an employee for an indefinite term could not therefore be terminated without reasonable notice.

[29] **In Henley v. St. John's, City Of** [1981] N.J. No. 184, NFLDSC, Goodrich, J. said as follows at para. 3:

> 3. "The law on the matter is quite clear. Where there is a change in the terms of the employment, the employee may either accept it and continue employment or reject it and refuse to report for work. Condonation of the change constitutes acceptance. In Harris, Wrongful Dismissal, the author at pages 29 and 30, referring to the case of Lindsay v. Canadian Chamber of Commerce, [1977] 2 A.C.W.S. 367, said:
>
> "It is most significant to note that in all cases of constructive dismissal, the servant must quickly elect to consider the conduct of the Master as an act of dismissal by refusing to offer his services. Should he elect to continue in the employ, he will be said to have condoned the amended job description and hence will be estopped from relying upon the unilateral amendment as an act of constructive dismissal."
> See also Perry v. Ontario Die Co. 1986 Carswellont 2477.

[30] Cacchione, J. discussed this topic as well in **Langley v. G.H. Wood Wyant Inc.** [1998] N.S.J. No. 23 NSSC and he stated at para. 17:

> 17. "Employment law finds its roots in the law of contract. Once an employment contract has been formed neither party to the contract has the right to unilaterally change a significant term of a contract unless both parties agree to the change. An employee who is faced with a fundamental change in the employment contract

has a choice. The employee's choices were expressed as follows in the case of **Hill v. Peter Gorman Limited** (1957), 9 D.L.R. (2d) 124 at page 132:

> "He may accept the variation expressly or impliedly in which case there is a new contract. He may refuse to accept it and if the employer persists in the attempted variation the employee may treat this persistence as a breach of contract and sue the employer for damages, or while refusing to accept it, he may continue in his employment and if the employer permits him to discharge his obligations and the employee makes it plain that he is not accepting the variation then the employee is entitled to insist on its original terms."

[31] Mr. Johnston, applied for a new position under the new arrangement by letter dated June 12th, 2000 (Ex. #32, Vol 4) which states in part:

> "Thank you for your request of this letter of application and resume, enclosed your will find a complete and up to date resume of my experience in the fishing industry. I would be very interested in a position of captain or mate on one of the new factory freezer scallop vessels Clearwater is currently building and look forward to meeting the challenges ahead in making the transition from old to new in the scallop industry."

[32] Further, in the last line of the letter he says as follows:

> "I would look forward to working together with management in making the change over to the new manner of operations a success."

[33] I find on the whole of the evidence in the present case Mr. Johnston accepted the changes made by Clearwater in their employment contract when he applied for the new position and subsequently went to work for them.

[34] In reaching this conclusion I have looked at the facts objectively in order to decide if a reasonable interpretation of the facts supports the plaintiff's contention he was constructively dismissed as is mandated by the decision in **Fisher v. Eastern Bakeries Limited** (1986), 73 N.S.R. (2d) 336 (N.S.S.C.T.D.), affd. 77 N.S.R. (2d) 90 (N.S.S.C.A.D.)

[35] Should I be in error on this point I find the plaintiff's continuation of working for Clearwater under the new system until finally terminated in early 2005 amounted to a condonation of the change in his employment contract. I find nothing in the evidence which satisfies me the plaintiff did not agree to continue

working for Clearwater after the new fishing system was established by Clearwater.

[36] Thus, I find on the facts of this case Mr. Johnston is estopped from including any of his years prior to the year 2000 of indefinite employment to count towards any notice time for any act of constructive or outright dismissal in this action.

[37] Under the new employment procedure Clearwater began employing its non-unionized wet fish crew on what has been referred to as "single trip agreements" and "multi trip agreements." It was Clearwater's intention those agreements would relate only to the type of trip the crew, including Mr. Johnston, would make. The Defendant argues the agreement was for the trip or trips only and at the conclusion of the trip or trips the relationship between Mr. Johnston and Clearwater was completed. In essence Clearwater argues these written agreements were to govern the employment relationship between Mr. Johnston and the Defendant.

[38] Each of the agreements Mr. Johnston signed contained a release of liability (e.g. Ex. 18, Vol. 1) as follows:

> "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 the Owner 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 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 the Owner."

[39] The agreements between Mr. Johnston and Clearwater, as well contained a clause similar to the following as seen in ex. 18, Vol. 1 at para. 30:

> 30.“The mate acknowledges that he has read and fully understood the entirely of this Agreement and agrees that he has had adequate opportunity to consult independent legal counsel in respect hereof and acknowledges that he has entered into this Agreement voluntarily and without duress.”

[40] In **Ceccol v. Ontario Gymnastic Federation** 55 O.R. (3d) 614; [2001] O.J. No. 3488, Court of Appeal for Ontario, MacPherson, JJ.A. speaking on behalf of the court said at para. 1 as follows:

> 1."In the domain of employment law, a fundamental common law principle is that "a contract of employment for an indefinite period is terminable only if reasonable notice is given": see Machtinger v. HOJ Industries Ltd. [1992] 1 S.C.R. 986 at pg. 97, 91 D.L.R.(4th) 491 (per lacobucci J.)("Machtinger"). The principle is not an absolute one; in Machtinger, Iacobucci J. Described it as a "presumption, rebuttable if the contract of employment clearly specifies some other period of notice, whether expressly or implied" (p.998 S.C.R.). Moreover, as Iacobucci J.'s statement of the general principle clearly indicates, it applies only to employees engaged for an indefinite period. The principle does not apply to fixed-term contracts. An employee whose contract is not renewed at the conclusion of a fixed term is not dismissed or terminated; rather her employment simply ceases in accordance with the terms of the contract: see Gagnon v. Chambly (Ville), [1999] 1 S.C.R. 8, 235 N.R. 265."

[41] He stated further at paras. 25 and 26 as follows:

> 25. "However, the consequences for an employee of finding that an employment contract is for a fixed term are serious: the protection of the ESA and of the common law principle of reasonable notice do not apply when the fixed term expires. That is why, as Professor Geoffrey England points out in his text Individual Employment Law (Toronto: Irwin Law 2000), "the courts require unequivocal and explicit language to establish such a contract, and will interpret any ambiguities strictly against the employer's interests" (p.222).
>
> 26. "It seems to me that a court should be particularly vigilant when an employee works for several years under a series of allegedly fixed-term contracts. Employers should not be able to evade the traditional protections of the ESA and

> the common law by resorting to the label of "fixed-term contract" when the underlying reality of the employment relationship is something quite different, namely, continuous service by the employee for many years coupled with verbal representations and conduct on the part of the employer that clearly signal an indefinite term relationship."

[42] I find the agreements were drafted by Clearwater and presented to employees such as Mr. Johnston on the day they were to go sea and fish. The evidence establishes I find, Mr. Johnston would arrive at about 8:30 a.m. like other fishermen and register to go to sea. He would attend at the Company's office, and be presented with the agreement to sign before he would be allowed to go to sea on one of Clearwater's vessels.

[43] The first group of agreements were called single trip agreements beginning on March 11, 1999. In that particular agreement it was stated the parties were not in a private relationship but were co-adventurers. This type of agreement continued for several months thereafter from approximately April to August of the same year.

[44] In the year 2000 there was a series of agreements signed by Mr. Johnston, and the Company which can be called single trip employment agreements.

[45] Around mid 2000 Mr. Johnston signed a Co-Adventurer Agreement once again and was not referred to as an employee.

[46] After that trip the agreements went back to Mr. Johnston being referred to as an employee as can be seen in the July 25, 2000 and August 15, 2001 agreements.

[47] The agreements again changed, for example the February 20th 2002 became an Indefinite Term Employment Agreement between the parties. The evidence also revealed he was to receive a $15,000.00 payment upon completion of this agreement in lieu of notice but he was not paid same by Clearwater.

[48] On October 25th, 2002 Mr. Johnston was presented with another single trip agreement and he continued with single trip agreements until his employment relationship with Clearwater ended. As well, there were occasions when Mr. Johnston fished without signing any agreement.

[49] I find there were numerous changes in the contracts as to the nature of the employment relationship between Mr. Johnston and Clearwater. I find as well on the evidence, a lot of these contracts were undated. I find a lot of the contracts were not properly witnessed. The witnesses signature was sometimes affixed after the contract was signed. I as well find in some of the contracts, they were not witnessed at all. Sometimes there was not even a contract.

[50] Upon presentation of the contract to Mr. Johnston for signature it was according to Mr. Strawbridge, explained to him. Then on cross-examination he agreed he did not explain all the important terms. The evidence reveals Mr. Johnston either signed this contract or he would have no work. I find important terms such as severance or pay in lieu of notice were not properly explained to Mr. Johnston. It must be remembered this was all done in a very short period of time because Mr. Johnston had to be on the vessel and ready to sail around 9:00 a.m. I have a concern he would not have time to read the agreement let alone understand its terms.

[51] I find on the facts this was standard procedure. Mr. Johnston would attend at the office to go fishing. The Agreements were placed in front of him as he said

within five to ten minutes before he was ready to go on the boat to sea and told to sign or he would not be able to go. It was the Company who had the control as to whether or not he was going. They drafted the contract, and the defects as to the draft should be held against them. Clearwater set the rules and I find there was an imbalance of power used by Clearwater as I review the evidence.

[52] As I said Clearwater drafted these contracts and under the circumstances here they should have been the one to insure the contracts were properly prepared, properly explained and properly signed by the parties. In a lot of cases this was not done.

[53] I also conclude and find when you consider the evidence, the re-organization of the Company, the nature of the contracts, these contracts were really used as a device designed to disguise a contract of indefinite employment of Mr. Johnston. Clearwater was attempting to become more efficient and I conclude they were using these agreements so as to avoid possible reasonable notice costs if an employee became one under a term of indefinite employment.

[54] Some contracts where Mr. Johnson was employed as mate in Vol. 2 of the Exhibit Books, provided in paragraph 11 that as a mate, Mr. Johnston ought not to participate in group or medical plans. However, I conclude from the whole of the evidence, in fact these deductions were made from his income.

[55] I find comfort in that position from the fact Clearwater continued to deduct his health and benefits costs for example, even while he was on leave. In a letter dated April 28, 2007 from Rebecca Langille, and Administrator with Clearwater, to Mr. Johnston, Ex. 23, Vol. 4 states in part:

> "We are pleased to continue your Blue Cross benefits during your period of personal leave to date. We do wish to point out that our employees are still required to pay their portion of Blue Cross premiums during a period of leave."

[56] Ms. Langille stated in evidence this was an oversight and went out in error. I reject that was the case and find this to be but an example of Clearwater not using the employment agreements for the purpose stated but rather to try and get around Mr. Johnston's continual employment as an employee under an indefinite term contractual arrangement.

[57] Another example is contained in Exhibit Book 2, tab 13 wherein pursuant to this agreement, he was to receive a severance pay of $15,000 from Clearwater. This was never paid to him. These are but a few of the examples wherein these contracts were treated in such a manner that leads me to the conclusion they were simply used to try and avoid an indefinite employment situation between Mr. Johnston and the Company.

[58] Ms. Barteaux argued the contracts were available for Mr. Johnston to take and seek legal counsel and as well, to have the release properly explained to him. She also argued although it might not have applicability on the first day he went to work and signed the contract he would have had plenty of subsequent contracts to take to counsel to review and obtain an opinion and make a decision as to his action.

[59] Ms. Barteaux argued Mr. Johnston continued to come to work and signing agreements with the Company and therefore acquiesced in the agreements and be deemed to have knowledge of their contents.

[60] I have considered that argument but am not persuaded by it because I have concluded from the documents, the parties conduct and the surrounding circumstances, the purpose of these contracts was to avoid Mr. Johnston being classified as an employee under an indefinite term contractual agreements.

[61] I conclude these agreements should not affect Mr. Johnston's argument and position that he was an indefinite employee of the Company. I find I agree with his position in this matter.

[62] The Defendant argued Mr. Johnston terminated his position after his training trip on an FAS vessel in early 2003.

[63] This issue arose in May 2003 when Mr. Johnston was informed by Clearwater he was going to be trained on a factory freezer vessel as a deck boss. Mr. Johnston was not happy with that and he was dismayed he was not going to be trained as a mate or a captain. He asked for leave and then sought legal advice. After he sought legal advice he contacted Rebecca Langille at the Company and advised he would return to work on a factory vessel as a captain or mate.

[64] I find on the evidence he took a leave at this point in time. Even Ms. Langille referred to it as a leave. I reject he terminated his employment.

[65] In May or June of 2003, Captain William Pittman approached Mr. Johnston to become captain on the T.K. Pearce, a wet fish vessel. I conclude from Mr. Johnston's evidence he was happy with this position.

[66] Later, Mr. Pittman congratulated him for doing a good job on the wet vessels and advised him he would be going mate on one of the factory freezers.

[67] Mr. Johnston was aware that to get on an FAS vessel most people took a lower position, trained and were subsequently promoted. In Mr. Johnston's case, he went to the FAS vessel, Atlantic Guardian, and was advised he would be going as deck boss by Mr. Daniel Matthews and not as mate. He was as well told he would be trained by Lloyd Williams and Keith Lohnes, who were the captain and mate.

[68] Mr. Johnston had misgivings about being trained by these two individuals. He claimed they had animosity toward him but I am not satisfied this existed even though there was a confrontation.

[69] The training trip did not go well for Mr. Johnston and in fact, the report from Mr. Lohnes summarized his training as he not being qualified at this time to go on an FAS vessel as a captain or mate.

[70] Mr. Johnston then returned to fishing on the wet fish vessels and he took his last trip as a captain or mate as he said in the trip, December 3rd to December 13th, 2004. He said that trip was the end of their quota for the year and the vessel was tied up.

[71] In a letter dated January 17, 2005 (Ex. 25, Vol. 4) Mr. Lohnes terminated Mr. Johnston's employment with Clearwater. Mr. Johnston had no more conversation with Clearwater from that date. I find he received no remuneration in lieu of notice as an employee under an indefinite term contractural agreement with Clearwater.

Mitigation:

[72] A party claiming he was wrongfully dismissed has a duty to mitigate his losses. MacAdam, J. in **MacDonald v. Royal Canadian Legion** (1995) 142 N.S.R. (2nd) 174 (S.C.) said at para 47:

> 47. "...The obligation of an employee to mitigate their damages, following wrongful dismissal, has long been accepted and the three related rules are explained in **McGregor on Damages** (15th Ed. 1988), at pp. 168-169, as follows:
>
> > "(1) The first and most important rule is that the plaintiff must take all reasonable steps to mitigate the loss to him consequent upon the Defendant's wrong and cannot recover damages for any such loss which he could thus have avoided but has failed, through unreasonable action or inaction, to avoid. Put shortly, the plaintiff cannot recover for avoidable loss:
> >
> > "(2) The second rule is the corollary of the first and is that, where the plaintiff does take reasonable steps to mitigate the loss to him consequent upon the Defendant's wrong, he can recover for loss incurred in so doing; this is so even though the resulting damage is in the event greater than it would have been had the mitigating steps not been taken. Put shortly, the plaintiff can recover for loss incurred in reasonable attempts to avoid loss.
> >
> > "(3) The third rule is that, where the plaintiff does take steps to mitigate the loss to him consequent upon the Defendant's wrong and these steps are successful, the Defendant is entitled to the benefit accruing from the plaintiff's action and is liable only for the loss as lessened; this is so even though the plaintiff would not have been debarred under the first rule from recovering the whole loss, which would have accrued in the absence of his successful

> mitigating steps, by reason of these steps not being ones which were required of him under the first rule. Put shortly, the plaintiff cannot recover for avoided loss."

[73] Mr. Johnson, in this particular case sought work on his own with other fishing vessels. He testified that he applied to every scallop fishing Company he could think of in order to seek employment on fishing vessels. He went so far as to obtain employment by delivering a vessel to the United States. As well, he made several trips out of the province searching for vessels.

[74] There was evidence from the Defendant that there was a possibility Mr. Johnston could obtain fishing work in Newfoundland from contracts over which Clearwater had some control.

[75] The Court has been referred to case authorities which state an employee who has been wrongfully dismissed has a duty to return to work in different positions with the same employer in reasonable situations to mitigate damages. Bastarache, J. said in **Evans v. Teamsters Local Union** No. 31, [2008] SCJ No. 20 (SCC) at para 30:

> 30.“I do not mean to suggest with the above analysis that an employee should always be required to return to work for the dismissing employer and my qualification that this should only occur where there are no barriers to re-employment is significant. This Court has held that the employer bears the onus of demonstrating both that an employee has failed to make reasonable efforts to find work and that work could have been found (**Red Deer College v. Michaels**, [1976] 2 S.C.R. 324). Where the employer offers the employee a chance to mitigate damages by returning to work for him or her, the central issue is whether a reasonable person would accept such an opportunity. In 1989, the Ontario Court of Appeal held that a reasonable person should be expected to do so”[w]here the salary offered is the same, where the working conditions are not substantially different or the work demeaning, and where the personal relationships involved are not acrimonious” (**Mifsud v. MacMillan Bathurst Inc.** (1989), 70 O.R. (2d) 791). In **Cox**, the British Columbia Court of Appeal held that other relevant factors include the history and nature of the employment, whether or not the employee has commenced litigation, and whether the offer of re-employment was made while the employee was still working for the employer or only after he or she had already left (paras. 12-18). In my view, the foregoing elements all underline the importance of a multi-factored and contextual analysis. The critical element is that an employee “not [be] obliged to mitigate by working in an atmosphere of hostility, embarrassment or humiliation” (Farquhar, 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 (**Reibi 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.”

[76] I am not satisfied there was any concrete proposal put to Mr. Johnston, nor did he refuse any employment position offered to him by Clearwater.

[77] I am satisfied he did attempt to get work on his own until eventually he formed his own Company with his family to get a scallop fishing boat and license

which he now uses. He did not stand idly or unreasonably by, but I find he actively sought other employment.

[78] I do have some concern about the information supplied to Clearwater about Mr. Johnson's mitigation claim. Ms. Barteaux indicated that she had constantly been requesting material to support this aspect of the claim but none was forthcoming.

[79] I conclude Mr. Johnston did take steps to mitigate his losses and those steps were reasonable. I have reviewed his income and his evidence with regard to what he did in mitigation, as well as the arguments of Ms. Barteaux. I have considered same in my assessment as to what a proper notice period should be.

RRSP Funds:

[80] The plaintiff is claiming reimbursement for R.R.S.P funds he used to supplement his income from the date his employment was terminated. Ms. Barteaux has pointed out in her cross-examination of Mr. Johnston he had withdrawn his RRSP contributions on different occasions from time to time when

he needed money. He did so, for example in a year when he earned over $100,000.00. However, on the facts I find his use of RRSP ought not to be classified as income to be deducted from any notice award. I am also satisfied he would have used his RRSP funds for his use as he did in the past and he should not be reimbursed for his RRSP funds as well.

Augmented Damages:

[81] The plaintiff is also seeking increased notice time for what he considers to be the bad faith matter in which he was essentially set up to fail in his attempt to be taken on as a mate on a factory freezer trawler. As the trial went on the Defendant added to that particular allegation the manner in which he received his letter of termination from Mr. Lohnes as being sufficient to entitle him to an increased notice period as set forth in **Wallace and United Grain Growers** [1997], 3 SCR 701.

[82] In **Mulvihill v. Ottawa (City)** [2008] O.J. No. 1070, E.E. Gillese, J.A. said at paras 44 and 45:

> (44)"In **Wallace**, the supreme Court of Canada held that an employee may be compensated, by an extension of the reasonable notice period, when the employer's conduct in the manner of dismissal falls below an acceptable standard. At para. 98, the court explained the standard that employers must meet, when dismissing an employee, in the following terms:
>
> > [A] t a minimum, I believe that in the course of dismissal employers ought to be candid, reasonable, honest and forthright with their employees and should refrain from engaging in conduct that is unfair or is in bad faith by being, for example, untruthful, misleading or unduly insensitive.
>
> (45)In short, when dismissing employees, employers are to act fairly. They should be candid, reasonable, honest and forthright. If they act otherwise during the dismissal process - for example, by being untruthful, misleading or unduly insensitive - they may be held to have conducted themselves in an unfair or bad faith manner. The onus is on the employee to establish that the employer engaged in bad faith manner. The onus is on the employee to establish that the employer engaged in bad faith conduct or unfair dealing in the course of dismissal, and that the employee's injuries flow not from the dismissal but from the manner in which dismissal was effected (*Wallace* at para. 103)"

[83] I do not find the Defendant was driven by malice, bad faith or any other improper motive, as was suggested by the plaintiff. Nor was Clearwater's action reckless, deliberately harmful or reprehensible. It was a business decision they made. I find Mr. Johnston did not suffer any injury from the manner in which dismissal was effected.

[84] Accordingly, I hold there is no justification to extend the notice period based on the principles in **Wallace** as urged by the plaintiff, nor is there a basis to award punitive damages.

[85] The plaintiff seeks the equivalent of one month per year service which he states is approximately 16 months by his mitigation calculation. The plaintiff claims the monthly income should be based over the last three years of his employment which averaged out to be $112,485. Ms. Maxwell argued that Mr. Johnston should receive 16 months pay amounting to $149,980.

[86] As I said earlier the documentation of Mr. Johnston's earnings were a matter of concern. The records from his business were presented just prior to the start of the trial. The Defendants claim they were at a disadvantage because they did not have an opportunity to have their records properly looked at from the family business to insure, what in fact, Mr. Johnston's real income would be.

[87] I found it difficult to ascertain Mr. Johnston's income over the past years as indicated by counsel with the materials in front of me and tendered as exhibits. I do conclude however, according to a copy of his income tax return for the year

2005 tax year, he showed a total income of $72,323.96 which consisted of unemployment insurance earnings of $18,585.00 and R.R.S.P. income of $54,288.96.

[88] Mr. Johnston's 2006 T1 General Tax Form shows his total income as being received from R.R.S.P. income in the amount of $30,990.21. Mr. Johnston's family business, Johnston's Fisheries Ltd. showed a loss.

[89] I find his average earnings over three years prior to his termination to be $112,485. His average monthly income would be $9,373.85, which I round off to $9400.00. Although the rule of thumb is one month for each year of service employment I am satisfied this is not always the rule that is followed.

[90] In determining what constitutes reasonable notice of termination, the courts have generally applied the principles articulated by **McRuer** C.J.H.C in **Bardal v. Globe & Mail Ltd.** (1960), 24 D.L.R. (2d) 140 (Ont. H.C.), at p. 145:

> "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."

[91] Neither employment insurance benefits nor the registered retirement savings plan income are to be deducted in calculating damages. (See: Jack Dawe Ltd. V. Jorgenson (1980) 111 D.C.R. (3d) 577 (S.C.C.)

[92] One must look at all the facts in the case and assess each case individually as referred to above. Considering all the facts of this case, and applying the above principles, I assess Mr. Johnston ought to receive five months pay in lieu of proper notice which would amount to $47,000.00.

[93] I therefore award Mr. Johnston damages for wrongful dismissal in the amount of $47,000.00. The plaintiff withdrew his Special Damages claim after trial.

[94] Counsel may make submissions in writing of no more than five pages on the matter of costs and interest to be received by me no later than 30 days from today.

J.