Cite as: Wilson v. Sobeys Inc., 1996 NSSC 21

S.H. No. 125285

IN THE SUPREME COURT OF NOVA SCOTIA

BETWEEN:

A. WALTER WILSON

PLAINTIFF

- and -

SOBEYS INC., a body corporate

DEFENDANT

DECISION

HEARD: at Halifax, Nova Scotia before the Honourable Justice Walter R. E. Goodfellow on November 12, 13 and 14, 1996

DECISION: November 21, 1996

COUNSEL: Peter Landry, for the plaintiff
Karin A. McCaskill, for the defendant

Goodfellow, J.:

1. BACKGROUND

A. Walter Wilson, now 47, commenced his employment as a pilot in the aviation industry in 1973 as flight instructor with the Halifax Flying Club. He has held a number of jobs as pilot since then and began his employment with Sobeys on June 17, 1995 and was dismissed September 19, 1995. Although he continued to be paid by Sobeys through to November 30, 1995, Mr. Wilson advances the view that he was required to enter into a two year contract with respect to certain training expenses paid for by Sobeys, and that he would not leave his "secure" employment with the Government of Nova Scotia until it was confirmed that he had secured a new position with Sobeys. He now seeks twenty-one months notice, the amount of pension contribution which Sobeys would have made for the period of notice and general damages.

Sobeys advanced the position that Mr. Wilson was dismissed on the basis of misrepresentation in his application and resume as to his employment history and on his marginal job performance. Further Sobeys points to the contract of employment and says that it was a probationary contract permitting Sobeys to dismiss Mr. Wilson at any time during the probation period for any reason.

2. ISSUES

Counsel state the issues differently. The plaintiff states them as:

(a) Was the Plaintiff wrongfully dismissed?
(b) If it should be found that the Plaintiff was wrongfully dismissed, then what, in the circumstances of this case, is an appropriate notice period?

The defendant states the issues as:

1. What is the requirement for the dismissal of a probationary employee?
2. In the alternative, was there just cause to dismiss the Plaintiff?
   (a) Did the Plaintiff perform marginally in his position?
   (b) Did the Plaintiff misrepresent a fact which revealed his character?
3. Was the Plaintiff guaranteed a two year term of employment?

The issues are as stated by the plaintiff, but before proceeding to answer the issues, it is necessary to make a number of findings as to fact. In doing so I will effectively answer the questions posed by the defendant as issues.

3. PRELIMINARY

The basic documentation that must be taken into account in making a number of findings of fact are the document entitled "Fax Message" from Alex Smith to Walter Wilson undated; the Application for Employment on a Sobeys form signed by Walter Wilson on June 12, 1995; a letter dated June 12, 1995 on Sobeys letterhead directed to Mr. A. Walter Wilson which concludes, "I accept this foregoing offer of employment and agree to the conditions specified." followed by the signature of Walter Wilson and dating of June 12, 1995; and finally the Agreement entered into June 12, 1995 on Sobeys letterhead signed Pilot - Walter Wilson and Per Sobeys Inc - E.A. Smith,

Because of the importance of these documents, they are produced herewith.

FAX MESSAGE

TO: Walter Wilson

FROM:

Sobeys inc.

AVIATION DEPARTMENT

Sobeys Inc. Aviation Dept.
549 Barnes Rd., Suite 50
Enfield, NS, Canada, B2T 1K3

PHONE: HANGAR 902-873-3997
24 HR. 902-465-2255

OUR FAX # 902-873-3936

No. of Pages 1

As per our phone conversation today June 2/95 Allan Rowe Senior VP Finance has approved an offer of employment as Captain on our Citation II aircraft. Your salary will start at $60,000 per year with 3 weeks paid holiday. You will be able to take advantage of all our standard corporate benefits. You will start on Saturday June 17, training to start in Wichita Kansas on Monday June 19th for two weeks. Formal offer of employment papers will be drawn up on my return as well as a Training contract with a 6 month probation clause. Welcome to Sobeys Aviation Dept.

APPLICATION FOR EMPLOYMENT

Sobeys

THIS APPLICATION IS DESIGNED TO HELP BOTH YOU AND US. IF YOU ARE EMPLOYED BY US, THE INFORMATION CONTAINED IN THIS APPLICATION WILL HELP US UNDERSTAND YOU AS A PERSON, YOUR NEEDS, YOUR CAREER GOALS, AND YOUR INTERESTS. THE INFORMATION YOU GIVE WILL BE TREATED AS CONFIDENTIAL AND WILL NOT BE MADE PUBLIC.

"CONSIDERATION FOR EMPLOYMENT IS BASED SOLELY ON QUALIFICATIONS WITHOUT REGARD TO RACE, COLOUR, AGE, RELIGION, SEX, MARITAL STATUS, ANCESTRY, PLACE OF ORIGIN, PHYSICAL DISABILITY, OR POLITICAL BELIEFS."

GENERAL DATA

DATE OF APPLICATION: June 12, 1995

NAME IN FULL LAST	FIRST	MIDDLE	DO YOU HAVE A SOCIAL INSURANCE NO?
Wilson	A	Walter	☐ YES ☐ NO

ADDRESS NO & STREET	CITY OR TOWN	PROVINCE	POSTAL CODE	PHONE NO
7 Judy Anne Ct	Sackville	N.S.	B4C3X5	864-1158

PREVIOUS ADDRESS IN CANADA? — DATES YOU LIVED THERE: —

DO YOU HAVE A RELIABLE MEANS OF TRANSPORTATION?	DO YOU HAVE A VALID DRIVER'S LICENCE?	PROV	HAVE YOU EVER BEEN CONVICTED OF A CRIMINAL OFFENCE IN THE PAST 5 YRS	ARE YOU BONDABLE?
☒ YES ☐ NO	☒ YES ☐ NO		☐ YES ☒ NO	☒ YES ☐ NO

RELATIVES WORKING FOR THIS COMPANY? NAME — RELATIONSHIP — WHERE?

EDUCATION

	NAME OF SCHOOL	LOCATION OF SCHOOL	ATTENDED FROM MONTH YEAR	ATTENDED TO MONTH YEAR	YEARS COMPLETED	HIGHEST GRADE COMPLETED
HIGH SCHOOL	Trenton High	Trenton, N.S.		19		
COLLEGE				19		DEGREES DIPLOMAS
UNIVERSITY	St. F X	Antigonish NS		April 19 70		
BUSINESS OR VOCATIONAL				19		CERTIFICATES
OTHER				19		

OFFICIAL LANGUAGES SPOKEN	OFFICIAL LANGUAGES WRITTEN	CLASS STANDING
English	English	☐ TOP THIRD ☒ MIDDLE THIRD ☐ LOWER THIRD

HIGH SCHOOL OR UNIVERSITY ACTIVITIES: ☐ ATHLETICS ☐ SOCIAL ☐ DRAMATICS ☐ OTHER DESCRIBE — OFFICES HELD

WHAT SUBJECTS DID YOU LIKE BEST? — WHAT SUBJECTS DID YOU LIKE LEAST?

OFFICES OR OTHER MACHINES YOU OPERATE — ANY TRADE?

LIST ANY SPECIAL HOBBIES

PRESENT OR PAST MEMBERSHIP IN GROUPS (Do not list clubs or organizations that indicate race, colour, age, religion, sex, marital status, ancestry, place of origin, physical disability, or political beliefs.) — Do (did) you hold any office? ☐ YES ☐ NO

PERSONAL REFERENCES

OTHER THAN RELATIVES

	NAME	BUSINESS OR HOME ADDRESS	BUSINESS OR HOME PHONE NO
1	John Chisholm	Nova Const.	902-863-4004
2	Colin Gillis	Prov. N.S.	1-902-758-3438
3	Don Cameron		902-755-6111

ARE YOU (16) YEARS OF AGE OR OVER? ☐ YES ☐ NO

POSITION APPLIED FOR

PERMANENT | PART-TIME | CONTRACT

TYPE OF WORK DESIRED (1st choice)	(2nd choice)
PILOT	

AVAILABLE EMPLOYMENT	SALARY EXPECTED	LOCATION PREFERENCE (if any)	WOULD YOU BE WILLING TO ACCEPT A TRANSFER
Now		HALIFAX	☐ YES ☐ NO

ARE YOU NOW EMPLOYED?	IF YES, MAY WE CONTACT YOUR PRESENT EMPLOYER
☑ YES ☐ NO	☐ YES ☑ NO

ARE YOU ELIGIBLE FOR PERMANENT EMPLOYMENT IN CANADA	HAVE YOU PREVIOUSLY BEEN EMPLOYED BY THIS COMPANY?	DATES
☑ YES ☐ NO	☐ YES ☑ NO	

DO YOU HAVE AN ILLNESS OR DISABILITY WHICH MAY REASONABLY PRECLUDE YOU FROM THE PERFORMANCE OF DUTIES FOR WHICH YOU ARE APPLYING?	ARE YOU WILLING TO WORK ON STATUTORY HOLIDAYS?
☐ YES ☑ NO	☑ YES ☐ NO

HAVE YOU EVER BEEN RELEASED OR DISCHARGED FROM A JOB? (INCLUDE LAY-OFFS) ☐ YES ☑ NO

EMPLOYMENT HISTORY

PLEASE RECORD LAST FIVE POSITIONS BEGINNING WITH MOST RECENT EMPLOYER

PRESENT or LAST EMPLOYER

EMPLOYMENT DATES FROM MONTH	FROM YEAR	TO MONTH	TO YEAR	TITLE/POSITION	SUPERVISORS NAME	SALARY START	SALARY FINISH	REASON FOR LEAVING
	1984	Present		PILOT	COLIN GILLIS			

ADDRESS: Nova Scotia Government
NATURE OF DUTIES (BE SPECIFIC):
PHONE NO: 902 758 3438

SECOND LAST EMPLOYER

EMPLOYMENT DATES FROM MONTH	FROM YEAR	TO MONTH	TO YEAR	TITLE/POSITION	SUPERVISORS NAME	SALARY START	SALARY FINISH	REASON FOR LEAVING
	1981		1984	PILOT	JOHN Chisholm			

ADDRESS: NOVA CONSTRUCTION
NATURE OF DUTIES (BE SPECIFIC):
PHONE NO: 902 863 4004

THIRD LAST EMPLOYER

EMPLOYMENT DATES FROM MONTH	FROM YEAR	TO MONTH	TO YEAR	TITLE/POSITION	SUPERVISORS NAME	SALARY START	SALARY FINISH	REASON FOR LEAVING
	1978		1981	PILOT				

ADDRESS: IMP
NATURE OF DUTIES (BE SPECIFIC): AVIATION
PHONE NO: 902 873 3737

FOURTH LAST EMPLOYER

EMPLOYMENT DATES FROM MONTH–YEAR	TO MONTH–YEAR	TITLE/POSITION	SUPERVISORS NAME	SALARY START	SALARY FINISH	REASON FOR LEAVING
1977	1978					

ADDRESS: ATLANTIC Central Airlines
NATURE OF DUTIES (BE SPECIFIC):
PHONE NO: St. John NB.

FIFTH LAST EMPLOYER

EMPLOYMENT DATES FROM MONTH	FROM YEAR	TO MONTH	TO YEAR	TITLE/POSITION	SUPERVISORS NAME	SALARY START	SALARY FINISH	REASON FOR LEAVING
	1976		1977					

ADDRESS: Labrador Airways
NATURE OF DUTIES (BE SPECIFIC):
PHONE NO: 1973-75. Halifax Flying Club.

I DECLARE THAT THE FACTS SET FORTH ABOVE IN MY APPLICATION FOR EMPLOYMENT ARE TRUE AND COMPLETE. I UNDERSTAND THAT IF I AM EMPLOYED, FALSE STATEMENTS ON THIS APPLICATION SHALL BE SUFFICIENT CAUSE FOR DISMISSAL REGARDLESS OF SENIORITY OR OTHER CONSIDERATIONS.

DATE: June 12, 1995 SIGNATURE OF APPLICANT: [signature]

Sobeys inc
118 KING STREET
STELLARTON, NOVA SCOTIA BOX 1800

This Agreement made the 12th of JUNE ,1995 between A. WALTER WILSON (the pilot) and Sobeys Inc. of Stellarton, Nova Scotia.

Whereas:

A: The Pilot is employed on a full time basis by Sobeys Inc.

B: Sobeys Inc. has trained or will be training the Pilot on the Citation 11 aircraft.

C: Sobeys Inc.has or will incur substantial cost in training the Pilot and familiarizing him with the Sobeys Inc. Aviation Dept, procedures.

In consideration of full time employment of the Pilot, the parties hereto agree as follows:

1. The Pilot acknowledges that Sobeys Inc has or will incur a minimum training cost of $20,000 in connection with the citation aircraft training.
2. The Pilot agrees to remain available for full time employment by Sobeys Inc. for at least a period of 24 months from the date of training. The Pilot shall have no further liability hereunder at the end of such 24 month period or should the Pilot be terminated by Sobeys Inc. or in the event of death or disability of the Pilot.
3. If the Pilot is not available for full time employment for a minimum of 24 months the Pilot agrees to pay Sobeys Inc. the amount of $20,000.00 less an amount of $833.33 for each completed month the Pilot has been:
   (i) available for full time employment
   (ii) under permanent medical disability whereby the pilot is unable to fly - provided that if such medical disability shall continue for a period of 12 months , than any obligation to pay any amounts under this agreement shall be terminated.
   (iii) This agreement shall be binding upon the parties hereto and their respective heirs, executors, administrators, successors and assigns.

IN WITNESS WHEREOF the parties hereto have executed this agreement-
SIGNED AND DELIVERED IN THE PRESENCE OF

WITNESS- PILOT-

WITNESS- per SOBEYS INC.-

Sobeys inc

115 KING STREET
STELLARTON, NOVA SCOTIA BOK 1S0

June 12, 1995

Mr. A. Walter Wilson
7 Judy Anne Court
Sackville, NS
B4C 3X5

Dear Mr. Wilson,

I am pleased to confirm our offer of employment to you as Captain with Sobeys Inc. commencing June 17, 1995.

Your starting salary will be $60,000 per annum it will be reviewed on June 1st 1996 and annually thereafter. Overtime is not available.

You are required to participate in the company group health and insurance program as per Sobeys' standard policy.

You will be eligible foe three weeks vacation per year as per Sobeys Inc. vacation policy.
You are required to join the Company Pension Plan and Preferred Profit Sharing Plan effective the date you commence your employment. 2.5% of gross salary goes toward the pension program to a maximum of $1000. which is matched by the Company.
Your employment is contingent upon the following:

- You possess a valid Canadian Airline Transport Pilots license with multi engine night and instrument ratings.

- You successfully pass a Pilot Proficiency check by Transport Canada on the Citation 11 aircraft.

- You agree to a two year contract covering initial training costs.

Sobeys inc
116 KING STREET
STELLARTON, NOVA SCOTIA BOX 150

As per industry standard you will be on probation until six months after you assume flying duties with Sobeys Inc. Sobeys Inc. may at any time during this probation for any reason terminate your employment.
I acknowledge that you have verbally accepted this offer of employment; however , we require that written acceptance be made by signing this offer.

I would like to welcome you to the Sobeys' team and wish you continued success.

E. ALEX SMITH
Aviation Manager/ Chief Pilot
Sobeys Inc.

E Alex Smith

cc: A.D. Rowe
J.K. Lynn

I accept this foregoing offer of employment and agree to the conditions specified.

Signature

June 12, 1995
Date

4. FINDINGS OF FACT

1. That A. Walter Wilson has extensive flying experience dating back to 1973 as exhibited on the three copies of his resume tendered into evidence.

2. That on none of the earlier resumes, that is prior to the resume dated January, 1996, did Mr. Wilson note the period of approximately two and a half weeks when he was employed by Eastern Provincial Airlines. During this period, he began training on the Hawker Siddeley 748. After a fall out with E.P.A., he continued and successfully completed the training on the HS 748 with Austin Airways at his own expense. He variously described this as a training period, an insignificant period in which he did not fly any aircraft for E.P.A. He noted that it was a brief time period, ten years prior to the filing of his first resume in 1988 with Sobeys, and that he has only included it on his January, 1996 resume because Sobeys Inc., in dismissing him, made an issue of it and described it as misrepresentation warranting consideration as just cause.

Mr. Wilson gave evidence that he wanted to work for EPA because it was a regional airline. He filed a resume with EPA and received an offer which he accepted and commenced their training program at ground school. EPA did not have a simulator, and the training moved into the aircraft, a Hawker Siddeley 748. He viewed the situation as an offer for employment, and on completion of training he expected to work for them. His trainer was Cyril Dunbar, a former military pilot employed by EPA. Mr. Wilson proceeded with the two weeks of ground school which dealt with the airplane systems, etc. and he successfully completed an examination and moved to the training program in the aircraft.

This in-flight training lasted approximately 4.5 hours. An incident occurred on take off where Cyril Dunbar was sitting in the Captain's seat, another trainee in the right seat and Mr. Wilson in the jump seat observing. A difference of opinion developed between Mr. Dunbar and Mr. Wilson in the operation of the plane. After this Mr. Dunbar brought the plane in to land and in the debriefing responded to Mr. Wilson with words to the effect, "we got away with it, we handled it." The next day, after a very brief flight, Mr. Dunbar indicated to Mr. Wilson that it was not going to work out for him with EPA and refused any discussion. Mr. Wilson then went, at his own expense, and secured an endorsement on the HS 748 at Austin Airways. There was no evidence before me that Mr. Dunbar had the authority of release and dismissal or that the departure of Mr. Wilson from EPA, for whatever reason, was formalized. When asked why he did not list this brief period with EPA on his resume, he indicated that it was a long time ago, and he did not think he worked for EPA because he did not have any flight tests, nor did he ever fly passengers as was intended to be in his employment. He never thought it was of any significance, and it did not come to his mind as a period of employment when he prepared his resume.

I am satisfied and find as a fact that Mr. Wilson did not intend to mislead Sobeys or anyone by the omission of this brief period he spent with EPA.

There is no evidence before me of any determination by EPA questioning the competency of Mr. Wilson as a pilot or on any material aspect that would be relevant in his fulfilling the terms of his employment with Sobeys. Mr. Wilson's evidence as to why he did

not include it by omission in his resume is consistent with what he advised Sobeys when Sobeys' chief pilot, Mr. Smith inquired of him as to this brief period with EPA. Mr. Rowe, the Vice President of Sobeys, who had the ultimate authority to terminate Mr. Wilson's employment related Mr. Wilson's EPA period as a failure to reveal a matter that reflected on his performance as a pilot, a conclusion that goes somewhat further than the evidence warrants particularly as no inquiry was ever made by Sobeys or anyone of Mr. Dunbar or EPA to ascertain if the situation was other than as related by Mr. Wilson.

Mr. Rowe indicated that Sobeys had a policy to dismiss any employee who had failed to make full disclosure on her/his application for employment, and the chief pilot, Mr. Smith, indicated that had it been known at the outset of the EPA period of employment, Mr. Wilson would not have been offered employment as a pilot with Sobeys. On a balance of probabilities, I am satisfied that had the reference to EPA been placed upon Mr. Wilson's resume, this would not have changed or deterred Sobeys from their engagement and employment of Mr. Wilson as a pilot. Mr. Wilson was well known to the Company. The aviation community is a relatively small community and in fact Mr. Wilson, while an instructor at the Halifax Flying Club, was Mr. Rowe's instructor when he obtained his pilot's license. When the offer of employment was given by Sobeys to Mr. Wilson, the Company had already been turned down by the only other two persons on their short list. Had their been a reference to EPA on Mr. Wilson's resume, I am completely satisfied Sobeys would have proceeded to offer him employment rather than commence again with a blind add and recruitment.

I find that the terminology used on the application form, warning the applicant of the consequences of a false statement, was wide enough to encompass any omission that was relevant and upon which the Company would have acted otherwise than they did.

In all of the circumstances I conclude and I accept the evidence of Mr. Wilson that the omission was not only unintentional but it did not impact upon his professional competency as a pilot and was of such a short duration, it did not amount to an omission to, by itself, justify termination of his employment.

I am satisfied that, even with the stated policy of Sobeys not to hire anyone who has been dismissed form a chartered airline employment, had Mr. Wilson listed this brief period he was with EPA, his employment with Sobeys would have followed the same path that occurred.

3. I find that, had Mr. Rowe considered the overall performance without reference to the EPA aspect which he elevated to a matter of professional performance, he would not have terminated the employment of Mr. Wilson as of the 19th of September, 1995. It is interesting that Mr. Wilson, after adding this brief period with EPA to his resume, has, since his dismissal by Sobeys, secured employment as a first officer pilot with a scheduled airline.

4. The fax message (p. 3) in referring to, "as per our phone conversation today, June 2, 1995" effectively dates the fax message, and I accept the evidence of Mr. Smith that he

hand delivered that document to Mr. Wilson that very day, June 2, 1995 and not as Mr. Wilson suggests that it might not have been given to him until the 12th of June, 1995. I am satisfied that in the telephone conversation of June 2, 1995, Mr. Wilson indicated to Mr. Smith that he would require something in writing before giving notice to his then employer, the Province of Nova Scotia, and he did not give notice until after receipt of this fax message. Mr. Wilson indicates he gave a week's notice to the Province of Nova Scotia and his employment with Sobeys commenced the 17th of June, 1995 as indicated in the fax message.

5. Mr. Wilson had the fax message from the 2nd of June, 1995, therefore an opportunity to raise any questions as to its contents, including the reference to a six-month probation clause prior to his formal acceptance of employment by signing the letter to him of the 12th of June, 1995 and further that he did not raise any questions or comment upon the reference to a six-month probation clause.

6. That in the letter of acceptance, dated June 12, 1995, Mr. Wilson agreed to the conditions specified. His acceptance was without questioning the probationary term.

7. That the probationary term was not, as suggested by Mr. Wilson, related to a time frame for Mr. Wilson to meet the contingencies of employment required in the employment contract of June 12, 1995. He had a valid Canadian Airline transport pilot's license before signing the letter of June 12th and simultaneous with signing that letter, he signed the two-

year contract covering initial training costs and knew that he would in relatively short order be taking his pilot proficiency check on the Citation II aircraft which he in fact successfully obtained July 20, 1995.

8. Was Mr. Wilson a probationary employee?

The contract entered into by the parties anticipated employment of Mr. Wilson for an indefinite period, but nevertheless it projected employment of some duration. The contract speaks of an annual salary to be reviewed a year later in June, 1996, summer holidays, pension plan, etc. Sobeys, by separate document required reimbursement by Mr. Wilson of its training investment in the event Mr. Wilson left the company's employment on his own accord. This separate agreement, at page 6, is a training expenses recovery agreement, and it does not define or establish a term of employment. I have already found that the employment was of an indefinite nature but nevertheless, it is inescapable that the parties anticipated they were entering into an employment arrangement projected to be of some duration. The contract itself contains a probationary period described as one being "as per industry standards". The industry referred to is of course the aviation industry, and the probationary term in the contract directly relates to flying duties. It is essentially a provision that highlights the necessity of the employee securing the level of proficiency and performance to meet the duties required. Although a specific time frame is mentioned, it is in the context of the overall clear intent that the level of proficiency and performance be achieved within the stated probationary time frame. Provision for dismissal "for any reason"

while broad terminology which gives the Company a very wide latitude, it nevertheless is subject to reasonableness.

A contract which contains a provisionary term is setting, in essence, a deadline to attain the level of performance acceptable to the employer and is somewhat different than the standard probationary employee contract. A probationary employee contract is one where the prospective employer is hired for a specific term, and the contract provides for termination at the end of that specific period unless an offer of employment is then made by the employer and accepted by the employee. Obviously there are a myriad of variances; however, the contract of employment in this case does not constitute Mr. Wilson as a probationary employee with a set predetermined termination date, but rather a contract of employment which anticipated employment of some duration but set out in a term of the contract an outside period for attainment by Mr. Wilson of a standard of performance required by the Company. I will address this matter further under consideration as to the reasonableness of notice required in this situation.

9. Mr. Wilson's counsel suggests that Sobeys ought to have provided a support system for Mr. Wilson, by counselling or otherwise, and that the manner in which the dismissal was conducted was lacking in any reasonable consideration for Mr. Wilson and his family warranting consideration either in relation to the period of notice or under the heading of damages.

I find no fault whatsoever with the manner in which Mr. Rowe conducted the termination of Mr. Wilson's employment. He recognized the need to be specific, and the desirability of conducting the dismissal with as much attention as possible to Mr. Wilson's personal privacy and in a manner likely to minimize or at least not exacerbate the possible difficulties Mr. Wilson would incur in securing future employment in a relatively small aviation community. Mr. Smith neither recommended the dismissal nor the retention of Mr. Wilson and the manner in which Mr. Rowe handled the dismissal recognized that it was his sole obligation to make that determination, and that it was desirable for both Mr. Wilson and Mr. Smith that no animosity be created as they would undoubtedly come in contact with each other from time to time in the limited aviation community.

Mr. Rowe made it clear that the determination was a corporate decision with the recognition that the aviation community lives in close quarters and is a small community and that Mr. Wilson would be continuing to work within that community, as would Mr. Smith. Rather than running the risk of speculation, Mr. Rowe quite properly invited in Mr. Smith's other pilot with Sobeys and explained to him in confidence that it was a corporate decision. He did not comment upon, in any adverse manner on Mr. Wilson's performance, and in fact did not discuss Mr. Wilson's performance with the other Sobey's pilot. The termination of Mr. Wilson was done in private. It is acknowledged by Mr. Rowe that Mr. Wilson was shocked. There was a clear awareness of the magnitude of the impact that would result upon Mr. Wilson and his family, and to Sobeys' credit, the Company did not cut off his remuneration immediately, but there is nothing in the evidence that suggests counselling for

employment, psychological or other reasons was necessary or even appropriate. Overall, no criticism or damages flow from the manner in which Mr. Wilson was terminated. Mr. Wilson can take comfort from the fact that he received a great deal of support from many members of the aviation community, and this speaks highly of his professional and personal standing within the community.

10. I have already concluded that Mr. Wilson would not have had his employment terminated as of September 19, 1995 if his resume had disclosed the brief period of employment with EPA. I find also that while Sobeys' chief pilot considered the overall pilot proficiency check of July 20, 1995 to be a marginal performance by Mr. Wilson, the highly trained and experienced civil aviation inspector, Mr. Plumstead, of Transport Canada, provided a somewhat more objective conclusion. He would not call it marginal, and at no time did he consider Mr. Wilson's performance during the test as unsatisfactory. He confirmed that Mr. Wilson passed the proficiency check, but he did express some surprise that Mr. Wilson had some difficulties with respect to knowledge of the systems, etc. because Mr. Plumstead knew Mr. Wilson had recently completed the flight safety training program in the United States. In Mr. Plumstead's experience, one who has completed that course is usually completely up-to-date and on top of such things as systems. Much of Mr. Plumstead's evidence supports the difficulty in transition from propeller to jet aircraft and Mr. Wilson's own evidence that the initial training he undertook for Sobeys with flight safety was not without its difficulties in that his particular instructor was not entirely focused and the pilot with whom he was paired was from Yugoslavia and had a severe language problem

which caused real limitations in working with a partner throughout portions of the flight safety school program. It is noted that Sobeys raised this issue with the flight safety school, and in due course received approximately 50% of the cost of Mr. Wilson's training as reimbursement. Although the school did not acknowledge any short comings in the training of Mr. Wilson, its reimbursement speaks to the contrary. I find that Mr. Wilson was the unfortunate victim of less than the normal adequate training the industry expected from flight safety and that Sobeys, in particular, anticipated and assumed he had achieved.

Mr. Plumstead spoke highly of Mr. Smith and confirmed my own assessment of him as a competent professional who maintained and sought, if not perfection, a very high standard.

I find that as of the date of termination, the 19th of September, 1995, Sobeys had already, prior to that date, put in place attendance of Sobeys' pilots, Mr. Smith, Mr. Mazzorama and Mr. Wilson for flight safety school in California in October, 1995 which would have provided an update and independent assessment of Mr. Wilson's proficiency and performance. The performance evaluation by Mr. Smith and Mr. Wilson internally to Sobeys, while critical in some respects, did not contain any recommendation for the termination of Mr. Wilson's employment and acknowledged amongst Mr. Wilson's strengths in job performance, his hands-on flying skills, his good, basic flying skills, attitude and desire to learn. The appraisal checks in the affirmative the question, "Is employee suited for the type of work he/she is presently performing?" I find, and will refer to further in the

decision that Sobeys ought to have awaited the scheduled training and assessment with Flight Safety in October, 1995 to meet a minimum standard of reasonableness in all the circumstances.

5. CASES

1. ***Rocky Credit Union v. Higginson*** (1995), 10 C.C.E.L. (2d) 1 (Alta. C.A.)

Mr. Higginson entered a written employment contract as General Manager of the Credit Union and it provided for a six month probation period. He left the General Managership of another Credit Union and commenced employment November 1, 991 and was dismissed by the Board of Directors April 8, 1992. Generally until April 6, 1992, he was considered to be performing his duties in a satisfactory manner. Dismissal was not being contemplated.

On April 6, 1992, he presented a long over due claim for relocation expenses and the audit committee felt it contained claims not covered by the contract and submitted the matter to the Board of Directors. After discussing the claim, the contract of employment, and an overdue line of credit, as well as other concerns about his failure to follow Board directions, the Board decided that they had lost confidence in him and in his ability to continue as the General Manager and voted for his dismissal.

The trial judge held the dismissal was premature and the Alberta Court of Appeal

determined at p. 4:

> To establish justification for the dismissal of a probationary employee, the employer need only establish that (1) he had given the probationary employee a reasonable opportunity to demonstrate his suitability for the job; (2) he decided that the employee was not suitable for the job; (3) that his decision was based on an honest, fair and reasonable assessment of the suitability of the employee, including not only job skills and performance but character, judgment, compatibility, reliability, and future with the company. In cases of a probationary review, the court will not require that the employer establish actual cause, just that the employer decided that the employee was unsuitable, on the criteria indicated above.

The Alberta Court of Appeal overturned the trial Justice's decision on the basis she erred in principle in assessing each ground or concern individually and in failing to assess the totality of the concerns and the cumulative effect of various problems in the context of the position of trust and responsibility of Mr. Higginson as the General Manager. The Court of Appeal concluded, on the totality of the evidence, that the Board of Directors had just cause for the summary dismissal of Mr. Higginson.

2. ***Jadot v. Concert Industries Ltd.*** (1995), 10 C.C.E.L. (2d) 13 (B.C.S.C.)

The trial Justice determined that Ms. Jadot was a probationary employee, and that her probationary period ran for three months from the time she began working full time. The trial Justice reviewed several decisions dealing with what an employer is entitled to do in regard to terminating an employee during a probationary period. Sigurdson, J. determined in the factual situation before him that:

> The purpose of a probationary period is not simply a time to consider the technical skills of a potential permanent employee. It is an opportunity for the employer to assess the character of the applicant and determine if the

employee will work in harmony with the organization if hired permanently.

It was clear that personality and style were extremely important in the relatively small operation represented by Concert Industries Ltd. and compatibility, as an important issue, was made clear to Ms. Jadot. Many of the employees found it impossible to work with Ms. Jadot. In addition, the corporate solicitor indicated that he and his secretary could not continue to work for the company if the situation continued.

Sigurdson, J. held that in the circumstances, the company did not have to advise the employee of its concerns nor extend an opportunity to respond. He concluded that the company took reasonable steps and reached the opinion to dismiss, in good faith, on the basis that Ms. Jadot was not compatible within the organization and accordingly, found she was not wrongfully dismissed and that her employment was lawfully terminated during the probationary period.

3. ***Ritchie v. Intercontinental Packers Ltd*** (1982), 2 C.C.E.L. 147 (Sask. Q.B.)

Noble, J. adopted the term "probationary employee" in ***Mitchell v. R.*** (1979), 23 O.R. (2d) 65 at p. 83, at the bottom of p. 152:

> ... the term is well understood in business and industry as an employee who is being tested to enable the employer to ascertain the suitability of the employee for its purposes. Probation is a period when the employee may prove that he is suitable for regular employment as a permanent employee and will meet the standards set by the employer.

After adopting this definition, Noble, J. stated at p. 153:

> ... Thus where such an employee is fired, it seems to me that the only onus that rests on an employer to justify the dismissal, is that he show the Court that he acted fairly and with reasonable diligence in determining whether or not the proposed employee was suitable in the job for which he was being tested. So long as the probationary employee is given a reasonable opportunity to demonstrate his ability to meet the standards the employer sets out when he is hired, including not only a testing of his skills, but also his ability to work in harmony with others, his potential usefulness to the employer in the future, and such other factors as the employer deems essential to the viable performance of the position, then he has no complaint. As for the employer, he cannot be held liable if his assessment of the probationary employees' suitability for the job is based on such criteria and a fair and reasonable determination of the question. In my opinion the law does not require the employer to do anything more.

6. NOTICE

The reasonableness of notice is not determined in the abstract or by any fixed yardstick. There is no exhaustive list of factors to be considered. Each factual situation will give rise to a number of factors that need be considered in that specific factual situation.

Factors that are worthy of some consideration are set out in my decision of **Swinamer v. Unitel Communications Inc.** (1995) 147 N.S.R. (2d) 241. They include:

1. Character of the employment;
2. Length of service;
3. Age;
4. Availability of similar employment;
5. Financial - economic position of employer;

6. Other factors

> There is no exhaustive list of factors to be taken into account. Each factual situation will determine what factors are relevant. For example, in **Annand v. Cox (Peter M.) Enterprises Ltd.** (1992), 111 N.S.R. (2d) 196; 303 A.P.R. 196 (T.D.), the factors were:
>
> 1. Previous employment;
> 2. Character of employment;
> 3. Standard of employment achieved;
> 4. Length of service;
> 5. Age;
> 6. Availability of similar employment;
> 7. Self-imposed limitations on employment.

7. Geographical location of employee outside the mainstream of an industry may necessitate an additional time period for relocation.

As I have already indicated, there is no exhaustive list.

It seems to me that in this factual situation, that the fact Mr. Wilson entered a contract containing a probationary period is a factor for consideration either under a heading such as "character of employment" or by itself and highlight that the security of employment anticipated by both parties was, however, subject to the contingency of performance satisfactory to the employer so that the employee could not reasonably anticipate the duration of notice that would usually be attached to projected secure employment. An employee who signs, as did Mr. Wilson, a term of employment that contains a probationary element, particularly where he was advised of such many days prior, brings home to the employee that she/he has entered a contract of employment which might indeed turn out to be of a very short and limited duration. This recognition mitigates

against the kind of notice that occurs, for example, in a factual situation where an employer entices an employee from secure employment with express representations as to the security of duration and future in the new employment.

Counsel have provided some cases dealing with notice where the contract of employment contained a probation period or where the employee was a probationary employee with a set pre-determined employment period. These cases must be read with some caution as the factual situation in one case often has factors not present in the situation before the court or similar factors which in the total circumstances of a particular factual situation are properly weighed either more heavily or of less significance.

7. ISSUE #1(a) Was the Plaintiff wrongfully dismissed?

I have already concluded that Mr. Wilson was subject to a probationary term but he was not in the true sense a probationary employee. In many cases, a probationary employee has her/his contract concluded or terminated by reaching the end of the probationary term. In this factual situation, Mr. Wilson was employed for an indefinite period under a contract which contained a probationary term to achieve a leval of proficiency and performance satisfactory to the employer. That level is subject to reasonableness, and in the circumstances the termination of Mr. Wilson for his failure to disclose a brief time of employment with EPA did not justify his dismissal, and his dismissal as of September 19, 1995 was therefore premature. Sobeys acknowledge Mr. Wilson would not have been discharged at that time had it not been for the failure to record his EPA employment on

his resume; therefore Sobeys wrongfully dismissed Mr. Wilson.

8. ISSUE #1(b) If it should be found that the Plaintiff was wrongfully dismissed, then what, in the circumstances of this case, is an appropriate notice period?

1. **Character of employment**

Mr. Wilson was employed in a skilled capacity in an area of employment that has considerable responsibility. Indeed, it can be said to encompass the ultimate responsibility to the employer and others by virtue of the trust in skill and judgment with their very lives.

2. **Length of service**

While the employment was anticipated to be of lengthy duration, it turned out to be of very short duration which lasted approximately three months, and on termination provided remuneration to a maximum extension from termination of 2 ½ months.

3. **Age**

Mr. Wilson is now 47 and would have been approximately 45 at the time of entry into Sobeys' employment. Mr. Wilson had attained the age where one who has been employed has secured a great deal of experience and yet is likely to find increased competition from younger persons in the same trade of profession.

4. **Availability of similar employment**

All witnesses agreed that the aviation community is relatively small, and it has not

been immune from the downsizing and restructuring by both governments and corporations. The fact that Mr. Wilson took the better part of a year to secure alternate employment at a dramatically reduced income confirms the very limited availability of employment as a pilot in the aviation industry and greater lack of availability of employment at the level of remuneration Mr. Wilson enjoyed while employed with Sobeys and with the Provincial Government.

5. **Probationary period**

This is a limiting factor because it brought home to Mr. Wilson, or ought to have, that his engagement by Sobeys was far from guaranteed employment and subject to the contingency of satisfying Sobeys as to his performance and proficiency. He knew of his total lack of experience in flying jet aircraft, and he was aware this would necessitate training and the attainment of proficiency.

All the factors that I have recited remove this case a considerable distance from those that provide notice in the range of 21 months as sought by Mr. Wilson. In addition to consideration of the factors, I note those factors that do not exist here which have warranted in many of the cases the kind of notice sought by Mr. Wilson. While Sobeys actively sought out Mr. Wilson in 1988 when they set up their aviation department, such was not the situation in 1995. The situation, in fact, was reversed in that there was no inducement or enticement by Sobeys to have Mr. Wilson leave his employment with the Province of Nova Scotia in 1995. Mr. Wilson took the initiative, made the inquiry and applied for employment with Sobeys. While he did require something in writing when

offered employment, that something in writing clearly indicated the contingency aspect of probation, and this was repeated in the actual terms of the contract presented to Mr. Wilson which he chose to accept.

His employment with the Province of Nova Scotia was "secure"; however, the climate had changed from what it was in 1988 in that the Province had downsized the aircraft being flown by Mr. Wilson. There were no relocation expenses. Mr. Wilson knew or ought to have known the risks involved in taking employment of the nature that was offered to him, and therefore on termination, reasonableness of notice must be determined bearing that in mind.

9. CONCLUSION

The factual situation before me is considerably different than the factual situation in the cases I have reviewed. In a case such as this, where the contract of employment has a probationary aspect which encompasses overall suitability of the employee, but is primarily centred and focused upon that employee's proficiency to perform a fundamental function, ie. flying it's corporate aircraft, the duty upon the employer is to conduct itself reasonably. I have difficulty suggesting that fairness is a part of the appropriate testing mechanism because fairness is a subjective approach whereas reasonableness provides greater guidance because its an objective standard. This means that the employer must provide the employee with the normal basic requirements for the job, ie. in-house training or otherwise, basic equipment, minimal staff, if that is a normal element, etc. In essence the basic where-with-all to develop and perform the employment requirements to the standard anticipated and

directed by the contract of employment. The employer is entitled to set the standard of time for the achievement of this standard of employment. This must present a reasonable time frame for the employee to demonstrate suitability. In this case, it is unreasonable of Sobeys to have terminated Mr. Wilson's employment prior to the independent testing, which had already been scheduled in October, 1995. Given an indication from Mr. Wilson that the training program directed by Sobeys had significant deficiencies, the extensive flying experience and Mr. Wilson being limited to non-jet aircraft, given the age, the character of employment, that although Sobeys did not entice or induce Mr. Wilson to leave his relatively secure employment with the Province of Nova Scotia, they nevertheless were aware of it. All of these circumstances taken in totality lead me to conclude that when the October testing had been completed, if Sobeys wished to terminate Mr. Wilson's employment such was their right, subject to a measure of reasonableness, then they could do so with relatively minimal notice which I would fix at two months from October 31, 1995. Sobeys did in fact provide notice and remuneration to the 30th of November which falls but one month short of what I have determined would be appropriate notice. If Sobeys wished to give notice as of the 19th of September, then in my view reasonable notice would have been to the end of the year, the 31st of December, 1995. Mr. Wilson is accordingly entitled to one month's additional remuneration which I take to be approximately $5,000. I will rely upon counsel to do the mathematical calculations, and there may well be a credit due from some very minimal flight or employment income if Mr. Wilson in fact received such up to and inclusive of December 31, 1995. I am under the impression that counsel intended to address this aspect themselves. If there is any difficulty, the Court may be spoken to.

Similarly I am under the impression that if there is any adjustment with respect to pension or other benefits, counsel will be able to resolve that aspect. Counsel might find some assistance in **Knox v. Interprovincial Engineering Ltd. et al.** (1993), 120 N.S.R. (2d) 288.

10. DAMAGES

The termination of Mr. Wilson's employment was somewhat of a shock to him, and undoubtedly a matter of grave concern to him and his family; however, the evidence before me does not support that a claim for damages has been established. **Urban Consultants Ltd. v. Savard** (1990), 29 C.C.E.L. 222 N.S.C.A.

11. COSTS

Subject to being advised of any factors such as payment into court or offers to settle, the "amount involved" would be the amount recovered. Costs in accordance with tariff "A" scale 3 would be $1,250 plus disbursements.

I have attempted to provide guidance with respect to costs; however, counsel are entitled to be heard, and if they are unable to agree on costs and disbursements, I ask that they file and exchange their written representations on or before the 28th of November, 1996.

J.