SUPREME COURT OF NOVA SCOTIA

Citation: *Brocklehurst v. Micco Companies Limited*, 2025 NSSC 192

Date: 20250611
Docket: Hfx No. 535727
Registry: Halifax

Between:

Craig Brocklehurst

Applicant

v.

Micco Companies Limited, carrying on business as Micco Companies

Respondent

D E C I S I O N

Judge:	The Honourable Justice James L. Chipman
Heard:	May 21, 2025, in Halifax, Nova Scotia
Written Decision:	June 11, 2025
Counsel:	Bradley Proctor, Oliver Grant and Mark Edgar (law student), for the Applicant Level Chan and Katharine Mack, for the Respondent

By the Court:

INTRODUCTION

[1] By Notice of Application in Court filed August 9, 2024, Craig Brocklehurst seeks wrongful dismissal damages from his former employer, Micco Companies Limited. By Notice of Contest filed September 18, 2024 Micco resists the application.

[2] The documentary evidence on this Application is as follows:

1. Mr. Brocklehurst's affidavit sworn and filed November 29, 2024 along with his reply affidavit sworn December 30, 2024 and filed the next day;
2. The affidavit of Julie Benoit, Micco's Director of Customer Experience sworn December 19, 2024 and filed the next day; and
3. Exhibit 1, Mr. Brocklehurst's response to undertakings.

[3] The oral evidence consists of the cross-examination and re-direct examination answers of Mr. Brocklehurst and Ms. Benoit.

[4] I found both witnesses to be credible and reliable. As all counsel acknowledged, this application turns on the legal interpretation of the employment agreement between the parties.

BACKGROUND

[5] Micco is a family owned group of local businesses that oversees a number of companies, including in the retail hospitality and alcohol beverage industries.

[6] Mr. Brocklehurst was previously employed as a sales representative for 8.5 years by Harvest Wholesale, a division of Micco.

[7] The terms of Mr. Brocklehurst's employment were governed by a letter of employment dated January 19, 2026 (the "Agreement") which was presented to him in a meeting that same day by Micco's Director of Human Resources. This followed Mr. Brocklehurst's successful interview with Micco's Chief Executive Officer and Director of Sales.

[8] The Agreement contained express provisions regarding the termination of the employment relationship. The "Termination of Employment" provision reads in part, as follows:

…

> **Termination Without Cause:**
>
> Your employment may be terminated by Micco without cause, upon provision to you of the following payments:
>
> (i) any portion of the annual salary and accrued vacation pay, if any, that has been earned by your [*sic* you] prior to the date of termination by [*sic*, but] not yet paid;
>
> (ii) continued participation in Micco group health plan for such time as may be required under Nova Scotia Labour Standards legislation; and
>
> (iii) only such minimum notice of termination, or pay in lieu thereof, and severance pay (if applicable) to which you are entitled under the Nova Scotia Labour Standards legislation.

[9] Mr. Brocklehurst read the Agreement before signing it and had the opportunity to ask questions.

[10] Under the heading "Compensation and benefits", the Agreement specified that Mr. Brocklehurst would be provided with a base salary, and would also be eligible to earn commissions pursuant to a separate "Sales Incentive Plan" ("SIP").

> In the first six (6) months of employment you will be guaranteed a base salary of $45,000 per annum. After the completion of six (6) months you will earn a base salary of $30,000 per annum plus a quarterly sales incentive as detailed in the Sales Incentive Plan attached. The Sales Incentive Plan may be amended from time to time.

[11] The SIP was not attached to the Agreement. Rather, it was provided to Mr. Brocklehurst about a month after he commenced employment with Micco.

[12] The Agreement concluded with the heading "Next Steps", inviting Mr. Brocklehurst to review the terms of "this Offer" and confirm his acceptance by returning a signed copy of "this Agreement" within five business days. Nevertheless, given his excitement to start the job, Mr. Brocklehurst signed the Agreement during the meeting.

[13] Mr. Brocklehurst worked continuously with Micco as a sales representative from January 19, 2016 until his employment with Micco was terminated on June 3,

2024. Micco did not allege cause. Mr. Brocklehurst's evidence was that there was nothing about the termination meeting on June 3, 2024 that was harsh or heavy handed.

[14] At the time of Mr. Brocklehurst's termination, he was paid a base salary of $36,000. His average annual earnings were considerably higher as they included commissions.

[15] Given his 8 years and 4.5 months service, Mr. Brocklehurst was provided with four weeks' pay in lieu of notice, commensurate with the minimum entitlement under the Nova Scotia *Labour Standards Code*, R.S.N.S, 1989, c. 246. He was also provided with $6,379.18 representing earned and unpaid commissions, all accrued and unpaid wages, and vacation pay throughout the statutory notice period.

[16] Mr. Brocklehurst was also provided with the option of accepting an additional payment equivalent to two weeks' pay upon signing a release in favour of Micco. He opted not to accept this offer, but instead filed the within Application in Court.

ISSUES

[17] The issues to be determined on this Application are as follows:

(a) Did Micco provide Mr. Brocklehurst with his legal entitlements to notice upon the termination of his employment?

(b) If it is determined that the Applicant is entitled to damages for notice of termination, what is the proper notice?

(c) What are the damages to be paid over the notice period?

(d) Was there a failure to mitigate?

LAW, ANALYSIS AND DISPOSITION

DID MICCO PROVIDE MR. BROCKLEHURST WITH HIS LEGAL ENTITLEMENTS?

Parties' Positions

Mr. Brocklehurst

[18] It is Mr. Brocklehurst's position that the Agreement's termination provision does not limit his common law notice entitlement for two reasons:

the termination provision is ambiguous and unclear; and

the termination provision is void for attempting to contract out of statute.

[19] Mr. Brocklehurst submits that either of these reasons entitle him to common law notice of termination. Since Micco did not provide Mr. Brocklehurst with this notice, he alleges that he was wrongfully dismissed.

Micco

[20] Micco argues that the termination clause contained in the Agreement clearly restricts his right to claim common law reasonable notice. They say that there is no ambiguity in the clause, which is plainly drafted and explicitly states that Mr. Brocklehurst will receive only the minimum pay-in-lieu of notice required by the Labour Standards legislation.

[21] Micco submits that pursuant to the Agreement Mr. Brocklehurst expressly agreed that his employment could be terminated without cause, on clearly specified terms as to the amount of notice and compensation to be provided to him. Micco submits that they terminated his employment in accordance with those terms and in exchange for a release, offered an additional sum of money.

DISCUSSION

[22] When interpreting an employment contract, the court must be cognizant of the entire context. In this regard, I refer to Justice Warner's recitation of the relevant law in *Kerr v. Valley Volkswagen*, 2014 NSSC 27 at para. 27:

> 27 In Geoff R. Hall, *Canadian Contractual Interpretation Law*, Second Edition (Markham: LexisNexis, 2012), at ch. 7.4.1 Hall makes similar contextual observations about employment contracts:
>
> > The interpretation of employment contracts is one of several areas in which policy goals other than interpretative accuracy affect the interpretative process ... . Unless there is a contractual provision to the contrary, an employment contract will be interpreted in a manner which further employment law principles, specifically the protection of employees who are vulnerable in dealings with their employers and for whom employment is important to their sense of self-worth. ...
> >
> > However, at the end of the day, interpretation of an employment contract is still an exercise in contractual interpretation, so in the absence of some basis for refusing to enforce a contract (such as unconscionability) the intention

> of the parties will generally prevail if they are clearly expressed, even if doing so detracts from the employment law goals which are otherwise presumed to apply. ...
>
> The courts go some considerable distance to protect employees, and in doing so will read many things into employment contracts, which may be hard to reconcile with the parties' intentions. At the same time, the courts are reluctant to override clear contractual interpretations and generally will give effect to those intentions if clearly expressed. ...

[23] More recently the Ontario Court of Appeal provided guidance with respect to treating employment contracts as a whole and not on a piecemeal basis. In *Waksdale v. Swegon North America Inc*., 2020 ONCA 391, the Court stated as follows at para. 10:

> 10 We do not give effect to that submission. An employment agreement must be interpreted as a whole and not on a piecemeal basis. The correct analytical approach is to determine whether the termination provisions in an employment agreement read as a whole violate the *ESA* [*Employment Standards Act*, 2000, S.O. 2000, c. 41]. Recognizing the power imbalance between employees and employers, as well as the remedial protections offered by the *ESA*, courts should focus on whether the employer has, in restricting an employee's common law rights on termination, violated the employee's *ESA* rights. While courts will permit an employer to enforce a rights-restricting contract, they will not enforce termination provisions that are in whole or in part illegal. In conducting this analysis, it is irrelevant whether the termination provisions are found in one place in the agreement or separated, or whether the provisions are by their terms otherwise linked. Here the motion judge erred because he failed to read the termination provisions as a whole and instead applied a piecemeal approach without regard to their combined effect.

[24] Further, in the very recent Ontario Court of Appeal decision of *Bertsch v. Datastealth Inc.*, 2025 ONCA 379, the Court gave further guidance focussed on the reasonable interpretation of employment agreements. At para. 11 the Court stated:

> 11 In any event, the issue is not whether an ordinary person might arrive at an incorrect interpretation of the termination provisions of the employment agreement, but how the agreement can be reasonably interpreted. The termination provision specifically states that an employee who is terminated "with or without cause" will receive the minimum payments and entitlements under the *ESA* and its regulations. We see no error in the motion judge's conclusion that the termination provision in the employment agreement is unambiguous, and that, when reasonably interpreted, it does not depart from the minimum standards guaranteed

> by the *ESA*. As such, the termination provision is enforceable and precludes the appellant's claim for common law damages for wrongful dismissal.
>
> [emphasis added]

[25] Furthermore, the authorities confirm that to limit common law notice, a termination provision must contain express language that creates a high level of clarity that the agreement limits the employee's entitlement to common law notice. In *Bellini v. Ausenco Engineering Alberta Inc.*, 2016 NSSC 237, Justice LeBlanc noted at para. 8:

> [8] It is well-established that "employment contracts for an indefinite period require the employer, absent express contractual language to the contrary, to give reasonable notice of an intention to terminate the contract if the dismissal is without cause": *Machtinger v. HOJ Industries Ltd.,* [1992] 1 S.C.R. 986, [1992] S.C.J. No. 41, at para. 19. The intention to contract out of the obligation to give reasonable notice requires "clear, express language": Howard A. Levitt, *The Law of Dismissal in Canada*, 3d edn. (Toronto: Thomson Reuters, looseleaf) at §11:40:30. As the court said in *Cybulski v. Adecco Employment Services Ltd.*, 2011 NBQB 181, 2011 CarswellNB 401:
>
> > 12 In order to displace the presumption of reasonable notice, the language of a limiting clause must be clear and unequivocal. There must be a high level of clarity... It should be noted in this case that the Contract was prepared by [the employer]. There is a presumption that unless there is an agreement with express language to the contrary, an employee is entitled to reasonable notice of termination.
> >
> > [emphasis added]

[26] Applying this standard, Justice LeBlanc in *Bellini* (para. 2) held that the following termination provision failed to limit an employee's common law notice:

> [2] …
>
> Although the Company anticipates a long term employment relationship, our business is subject to economic factors which sometimes necessitates a reduction in workforce. We have therefore adopted a policy of specifying termination conditions in our employment letters. If it becomes necessary for us to terminate your employment for any reason other than cause, your entitlement to advance working notice or pay in lieu of such notice, will be in accordance with the provincial employment standards legislation.
>
> [Justice LeBlanc's emphasis]

[27] The Court went on to determine that the termination provision was, at best ambiguous as to whether the employee was entitled to the minimum notice under

the *Labour Standards Code*, or whether the employee was simply entitled to notice compliant with the *Labour Standards Code*. Justice LeBlanc noted that he should not apply a strained interpretation to limit an employee's entitlement to common law notice when the provision does not explicitly say so (para. 43).

[28] I find *Bellini* to be sound, thorough authority. To my mind, the findings in *Bellini* are directly applicable to the within Application. In this regard, I again refer to the relevant part of the Agreement's termination provision:

…

> **Termination Without Cause:**
>
> Your employment may be terminated by Micco without cause, upon provision to you of the following payments:
>
> (i) any portion of the annual salary and accrued vacation pay, if any, that has been earned by your [*sic* you] prior to the date of termination by [*sic*, but] not yet paid;
>
> (ii) continued participation in Micco group health plan for such time as may be required under Nova Scotia Labour Standards legislation; and
>
> (iii) only such minimum notice of termination, or pay in lieu thereof, and severance pay (if applicable) to which you are entitled under the Nova Scotia Labour Standards legislation.

[29] In my view, subsection (iii) is ambiguous. On fair reading, I believe that there are reasonable interpretations of subsection (iii) that do not limit Mr. Brocklehurst's common law entitlement to notice. For example, the qualifier, "to which you are entitled under the Nova Scotia Labour Standards legislation", may be read such that it does not apply to the notice of termination. This qualifier may be read to only apply to the severance pay. Accordingly, the termination provision does not clearly limit the Applicant's entitlement to common law notice.

[30] The Nova Scotia Arbitration decision, *Acadia University and AUFA, Re*, 2021 CarswellNS 643, analyzed a similar sentence in the context of a collective agreement. The sentence in *Acadia* was:

> The responsibilities of Lecteurs/Lectrices [or PADs] include the dissemination of knowledge through undergraduate teaching, tutorials, office hours, and other duties as may be assigned by the Head to a maximum of twelve (12) hours per week during the fall and winter semesters, or by amendments to the conventions governing exchanges of teaching assistants as per Article 1.15.2.

[31] The union argued that the qualifier, “to a maximum of twelve (12) hours” applied to each duty on the list. The employer argued that this qualifier only applied to the duties assigned by the head. Arbitrator Demont ruled in favour of the employer, noting at para. 87:

> 87 It is my view that this comma is, as argued by the Employer, an example of the serial or Oxford comma, separating the last from the next-to-last in the list of duties. The last item in the list is: "other duties as assigned to a maximum of 12 hours per week".

[32] Here, the qualifier, “to which you are entitled under the Nova Scotia Labour Standards Legislation”, may be reasonably interpreted such that it does not apply to “the minimum notice of termination” under the termination provision. Therefore, the termination provision does not contain express language regarding Mr. Brocklehurst’s common law notice entitlement. In the result, the Agreement fails to meet the *Bellini* standard of “express language” that creates a high-level of clarity, contracting out of the common law.

[33] Furthermore, even when I consider the Agreement’s wording “Nova Scotia Labour Standards legislation” as the *Labour Standards Code* under subsection (iii), this still does not limit Mr. Brocklehurst’s entitlement to common law notice. In this respect, subsection (iii) provides Mr. Brocklehurst with two entitlements:

- minimum notice of termination, or pay-in-lieu thereof; and
- “severance pay” (if applicable) under the *Labour Standards Code*.

[34] It is therefor reasonably conceivable that either one of these entitlements refers to common law notice. In this regard, “severance pay” does not appear anywhere in the *Labour Standards Code*. The only payment required by the *Labour Standards Code* upon a without cause termination is “pay-in-lieu of notice”. Pay-in-lieu of notice is only required when the employer does not give the employee adequate working notice of termination.

[35] To my reading, both “severance pay” and “minimum notice of termination” cannot refer to the minimum applicable notice of under the *Labour Standards Code*. Subsection (iii) connects these two entitlements with the word “and”. This necessarily contemplates a situation where Mr. Brocklehurst may receive his minimum notice of termination in addition to severance pay under the *Labour Standards Code*. Accordingly, this means that either:

- "minimum notice of termination" refers to the minimum notice of termination as required by the common law, and "severance pay" refers to the minimum pay-in-lieu of notice as applicable under the *Labour Standards Code*; or
- "minimum notice of termination" refers to the minimum notice of termination as required by the *Labour Standards Code*, and "severance pay" is a colloquial way of referring to common law notice.

[36] In either event, this interpretation does not limit Mr. Brocklehurst's notice entitlement. In the final analysis, the above clearly demonstrates that the Agreement does not meet the *Bellini* standard of express language creating a high level of clarity to limit an employee's entitlement to common law notice. I say this in the context of having considered all of the evidence and reading the entirety of the Agreement, adopting a reasonable interpretation.

[37] By way of conclusion on this issue, I note that Micco relies on *Egan v. Harbour Air Seaplanes LLP*, 2024 BCCA 222, to argue that in Nova Scotia the standard for interpreting termination clauses is to apply "a practical, common-sense approach to contractual interpretation based on the time the parties entered into the contract".

[38] I would point out that in *Egan*, the British Columbia Court of Appeal notes that the Nova Scotia jurisprudence does not allow termination clauses to limit an employee's entitlement to common law notice unless the termination provision expressly limits the employee's entitlement. For example, at paras. 29 and 61 Justice Fisher states:

> 29 Some decisions in other provinces have taken a different approach in relation to legislation that uses "at least" language, by requiring that a termination clause clearly state the parties' intention to limit an employee's notice entitlement to the minimum statutory period -- i.e., by using words that convert "the statutory floor to a ceiling" as noted in the passage of Suleman endorsed in *Machtinger*: see, for example, *Holm v. AGAT Laboratories Ltd*, 2018 ABCA 23 [*Holm*]; *Movati Athletic (Group) Inc. v. Bergeron*, 2018 ONSC 7258 [*Movati*]; *Bellini v. Ausenco Engineering Alberta Inc.,* 2016 NSSC 237 [*Bellini*]. …
>
> …
>
> 61 As noted above, there are Ontario decisions that have found termination clauses that do not expressly limit notice entitlement to statutory minimums to be enforceable: see, for example, *Clarke; Nemeth; Cook*; and *Stevens*. The controversy about this issue was discussed at some length in Stevens at paras. 30-

> 50. In that case, Justice Leach rejected the argument that notice provisions in termination clauses will not displace the common law presumption if they ensure only minimum notice in accordance with legislative requirements, without also converting the statutory floor to a ceiling. The opposite conclusion was drawn after a similar discussion by the Supreme Court of Nova Scotia in *Bellini*. No appellate authority comprehensively addressing this issue has been brought to our attention.
>
> [emphasis added]

[39] Accordingly, in Nova Scotia termination provisions do not limit employee's entitlements to common law notice unless the termination expressly states that the notice requirements under the *Labour Standards Code* are "the ceiling".

[40] The authorities confirm that in Nova Scotia, termination provisions in employment agreements are held to a higher standard of clarity than ordinary contracts. The jurisprudence is clear that employees are presumptively entitled to common law notice of termination unless the wording of the standard of interpretation is higher than the usual contractual standard. Once again, the Supreme Court of Nova Scotia ruled on this issue in *Bellini* and the Supreme Court of Canada Court has ruled on this issue in *Machtinger v. HOJ Industries Ltd.,* 1992 CarswellOnt 892 and in *Matthews v. Ocean Nutrition Canada Ltd*., 2020 SCC 26.

[41] In conclusion on this issue I would add that in the face of ambiguity, the non-drafting party, the principle of *contra proferentem* instructs the court to adopt the interpretation that is most favourable to Mr. Brocklehurst. For authority, I refer to *Amberber v. IBM Canada Ltd.*, 2018 ONCA 571 (paras. 44 - 46). In the result, given all of what I have analysed, I am of the view that the Agreement does not limit Mr. Brocklehurst's entitlement to common law notice.

[42] Given my findings, I need not address Mr. Brocklehurst's secondary argument that the Agreement's termination provision is void for attempting to contract out of the *Labour Standards Code*.

WHAT NOTICE IS MR. BROCKLEHURST ENTITLED TO?

Parties' Positions

Mr. Brocklehurst

[43] The applicant submits that he is entitled to eight to nine months' notice of his termination. In support of his position, Mr. Brocklehurst refers to the following:

- In *Bent v. Atlantic Shopping Centres Ltd.*, 2007 NSCC 231, the Nova Scotia Supreme Court held that a 35-year-old retail manager was entitled to ten months' common law notice for nine years of service;
- In *Kaiser v. Dural*, 2002 NSCA 69, the Nova Scotia Court of Appeal held that a 57 year old sales representative with less than a years' service was entitled to nine months' notice of termination;
- In *Donovan v. Richelieu Hardware Ltd.*, 2022 NBCA 45, the New Brunswick Court of Appeal held that 48-year-old salesman with ten years of service was entitled to 12 months' common law notice;
- In *Murphy v. Clarica Life Insurance Co*., 2003 NBBR 381, the New Brunswick Court of Queen's Bench held that 52-year-old insurance salesman with seven years of service was entitled to 12 months' common law notice;
- In *Osadca v. Recyclenet Corp.,* 2015 ONSC 4717, the Ontario Superior Court of Justice held that 34-year-old sales employee with seven and one half years of service was entitled to 12 months' common law notice; and
- In *Belton v. Liberty Insurance Co. of Canada*, 2004 CarswellOnt 3324 the plaintiffs included a 50-year-old salesman with eight years of service and a 51-year-old salesman with ten years of service. The Ontario Court of Appeal held that they were respectively entitled to 13 and 14 months' common law notice.

Micco Companies

[44] In their alternative argument, the respondent submits that a common law notice period of six months is supported by these cases:

- In *Naçu v. Watmec Ltd.*, 2003 CarswellOnt 3032, a 60-year-old salesperson with a 35-year career, and 8-year tenure with the employer, was awarded six months' common law notice;
- In *Cormier v. Hostess Food Products Ltd.*, 1984 CanLII 4223 (NB KB) a regional sales employee of over six years was awarded six months' common law notice; and
- In *Ferguson v. Western Beauty Supply Ltd.*, 1990 CanLII 1724 (BC SC), a 53-year-old commissioned salesperson was dismissed after six years of service, and was awarded six months' common law notice.

DISCUSSION

[45] In *Bellini*, Justice LeBlanc reviewed the *Bardal* factors at para. 44:

> 44 The factors in *Bardal v Globe & Mail Ltd.* (1960), 24 D.L.R. (2d) 140 (Ont. S.C. (H.C.J.) govern the quantification of reasonable notice. These factors are (1) the character of the employment; (2) the length of service of the employee; (3) the employee's age; and (4) the availability of similar employment, having regard to the experience, training, and qualifications of the employee. This analysis has been endorsed by the Nova Scotia Court of Appeal: *Silvester v. Lloyd's Register of North America Inc.,* 2004 NSCA 17, [2004] N.S.J. No. 37, at para. 20.

[46] I have carefully considered the *Bardal* factors in the context of the 52-year-old (at the time of termination) Mr. Brocklehurst and the position that he held at Micco for almost eight and one half years. I am alive to the availability of similar employment, given the resume of Mr. Brocklehurst (exhibit 1, tab 1). I have also borne in mind the authorities cited by both parties. In my view, the fair and proper notice period is eight months. I would add that Mr. Brocklehurst secured new employment (he continues in this liquor sales position) approximately nine months following his termination.

WHAT ARE THE DAMAGES TO BE PAID OVER THE NOTICE PERIOD?

Parties' Positions

Mr. Brocklehurst

[47] Given that the Agreement's termination provision is unenforceable, Mr. Brocklehurst submits that he is entitled to damages for his total compensation during the notice period. Mr. Brocklehurst received three different kinds of employment compensation:

- a base salary;
- commission; and
- benefits/car allowance.

[48] At the time of his termination, Mr. Brocklehurst earned $37,000 per year as a base salary. In his final two full years of employment, he received an average commission of $36,696. Prior to his termination in 2024, Mr. Brocklehurst was on

pace to exceed this amount in commission. Mr. Brocklehurst argues that his benefits equate with $10,000 per year and that total common law notice damages should be calculated on annual total compensation of $83,696.

Micco Companies

[49] Micco submits that even if Mr. Brocklehurst is entitled to common law notice, his entitlements over that period should be limited to base salary only, thus excluding commissions.

[50] Micco submits that any damages owing to Mr. Brocklehurst should be calculated based on an average of his earnings over the last five years, excluding 2020 which was an outlier as a result of the pandemic. They assert that his total compensation (including commissions) and taxable benefits (including group benefits premiums, car benefits, and gym membership benefits) reported in his T4 forms were as follows:

Year	Total Earnings (Box 14)	Commissions (Box 42)	Taxable Benefits (Box 40)
2019	$52,283.47	$18,458.95	$297.50
2021	$44,491.97	$5,417.65	$323.05
2022	$69,032.19	$32,792.19	$287.98
2023	$76,774.84	$40,600.00	$174.72
Average:	**$60,645.62**	**$24,317.20**	**$270.81**

DISCUSSION

[51] There is only one commission plan in evidence, the SIP discussed at paras. 10 and 11 of this decision. The SIP full title is noted at the top of the two-page document: "Sales Incentive Plan Fiscal 2016 Sales Representative". Once again, the evidence discloses that Mr. Brocklehurst received this about a month after he commenced employment with Micco. The SIP includes this provision under the heading "Sales Incentive Payout":

> Once the minimum threshold of $600,001 is reached the sales incentive is eligible to payout.

> A participant, who terminated employment with Micco Companies for any reason, whether voluntarily or involuntarily, shall immediately cease to participate in the plan as of the Date of Termination and shall not be eligible to receive any payment under the plan. Date of Termination means the date that the participant provides written notice of termination or is provided with written notice of termination by Micco Companies.

[52] In addition, the SIP includes this provision under the heading "Amendment / Termination of the Plan":

> Micco Companies reserves the right to amend, reduce payment or discontinue this plan before, during or after the fiscal year. Micco Companies may also exercise complete discretion when determining financial component scores. Sales Incentive percentages may, from time to time, be changed and restated by the company.

[53] The evidence confirms that the SIP was the only written sales commission plan received by Mr. Brocklehurst during his time with Micco. Nevertheless, Mr. Brocklehurst confirmed in his oral evidence that various verbal plans were implemented over the years as his commission structure changed.

[54] On all of the evidence I cannot accept Micco's assertion that Mr. Brocklehurst, for the entirety of his time with Micco, "earned commissions pursuant to the SIP…". Indeed, Micco continues the above sentence (in their pre-hearing brief) by adding in parentheses "as amended and restated". In the result I find that the SIP does not limit Mr. Brocklehurst's commission entitlement.

[55] I note that the SIP explicitly limits its application to the "2016 fiscal year period". In *Matthews v. Ocean Nutrition,* the Supreme Court of Canada held that employees are entitled to their bonus during their common law notice period unless the wording of the plan unambiguously alters or removes the employee's common law rights. The SIP does not unambiguously remove Mr. Brocklehurst's common law rights because it clearly states that it applies to the 2016 fiscal year and not beyond.

[56] Mr. Brocklehurst was terminated in the 2024 fiscal year period. At the time, Micco's commissions were based on a different plan. The SIP was not in effect at that time. Accordingly, it does not unambiguously alter or remove Mr. Brocklehurst's common law rights in 2024. In the result, I find that Mr. Brocklehurst is entitled to damages for his total compensation (base salary, commission and benefits) during the notice period.

[57] With respect to the value of Mr. Brocklehurst's car allowance, the T4 slips provided at tab 3 of exhibit 1 disclose the reported amounts. While recognizing these "base numbers", I am also alive to Mr. Brocklehurst's uncontradicted *viva voce* evidence to the effect that he regularly used his company car for errands, weekend excursions and the like.

[58] When I consider all of the evidence inclusive of Mr. Brocklehurst's base salary, commission, benefits (inclusive of car allowance) (and factoring in adjustments referrable to the effect of the Covid pandemic), I arrive at a global total compensation figure of $80,000.00 per annum.

OTHER DAMAGES

[59] As conceded by Mr. Brocklehurst's counsel during the hearing, there is no evidence to support a claim for bad faith and accompanying damages.

MITIGATION

[60] Micco alleges that any notice period granted ought to be reduced on account of Mr. Brocklehurst's failure to mitigate. In fashioning this argument Micco refers to *Chambers v. Axia Netmedia Corp.*, 2004 NSSC 24 at paras. 99 - 101:

> 99 On the other hand, there are two aspects of his search for work that weigh on whether he has fully mitigated his loss. He stated that for some time he avoided looking for work in the same industry in which he had been employed with the defendant. It appears there was no reason for this choice, other than a desire to try something new.
>
> 100 Also, his efforts to find work were largely, on his own evidence, confined to using the internet to transmit his resume to various employees. Although the emerging use of the internet as a vehicle in searching for employment opportunities and contacting potential employers has become more common, I am not satisfied it is the only avenue to be pursued. Clearly, the efforts of Mr. Chambers were to a large extent confined to reading the local newspaper and forwarding his resume to employers. Although commendable, I am satisfied, by restricting his search to this one vehicle, the effort was too limited. Although there is no evidence as to whether these other efforts would necessarily have produced a positive result, earlier than he was able to find the employment he did, I am satisfied there was, to some extent at least, a failure to take all reasonable steps to mitigate.
>
> 101 In *McNeil, supra*, the period of compensation awarded was reduced from 12 months to 6 months because of the failure of the plaintiff to properly mitigate his loss. In the present circumstance, a reduction of 3 months from the 11 months otherwise awarded would appear reasonable.

[61] In Mr. Brocklehurst's case, I am mindful of his extensive internet and related searches as he deposed to in his affidavit and as evidenced at the tab 2 of exhibit 1 entitled "updated employment efforts". I find that his job search efforts were in no way diminished through his cross-examination answers. In particular, I have no difficulty with the notion that an individual with over twenty years experience, primarily in the liquor (and related products) sales force would endeavour to secure a sales position in this and other fields.

[62] I would add that the above quoted passage from *Chambers* obviously dates back over twenty years. This was when the internet was fairly new, before it was fully integrated into all aspects of life. To my mind, in today's society using the internet as a primary method for a job search cannot be viewed as a failure to mitigate. In any case, the evidence discloses that Mr. Brocklehurst's searches involved a combination of internet-based job postings and reaching out to contacts in the industry via email.

[63] Our Court of Appeal had cause to discuss mitigation in the context of employment law in *Coleman v. Sobeys Group Inc*. 2025 NSCA 142. Justice Fichaud noted as follows at para. 49:

> 49 On the merits of this avoidable loss issue, in my view, Sobeys' appeal should be dismissed. The party who alleges failure to mitigate has the onus of proof. Sobeys must establish by evidence that Mr. Coleman failed to act reasonably to mitigate his losses. To satisfy the onus, it is insufficient that Sobeys merely criticizes Mr. Coleman. It is necessary that there be evidence (a) that Mr. Coleman failed to make reasonable efforts to find other work, and (b) had he done so, he likely would have found replacement work. *England, Wood and Christie* (4th ed.), para. 16.85.
>
> [emphasis added]

[64] The onus is on the respondent to show a failure to mitigate, and there is no evidence that the applicant could have made further efforts to secure a job. Micco simply points to the applicant's experience as evidence that he could have received a job sooner. This is not evidence that the applicant failed to mitigate his damages. Instead, it is evidence of the unavailability of similar employment for Mr. Brocklehurst. In the result, I conclude that Micco has not met its onus to prove a failure to mitigate.

CONCLUSION

[65] Given the totality of the evidence and authorities, I hereby confirm that Mr. Brocklehurst was wrongfully dismissed by Micco. His entitlement to damages is made out for a period of eight months. On the math this amounts to $53,333.33 (less deductions for applicable amounts already paid by Micco) together with prejudgment interest and costs. If the parties cannot agree on costs, I invite written submissions within thirty days of this decision.

Chipman, J