IN THE SMALL CLAIMS COURT OF NOVA SCOTIA

Cite as: Costa v. Electec Engineering Inc., 2015 NSSM 1

Claim No: SCCH 424595

BETWEEN:

Name	Perry Costa	**Claimant**
Address	c/o Leon S. Tovey Burchell's LLP 1800 – 1801 Hollis Street Halifax, NS B3J 3N4	
Phone	(902) 423-6361	

Name	Electec Engineering Incorporated	**Defendant**
Address	c/o Kevin A. MacDonald Crowe Dillon Robinson 200 – 7075 Bayers Road Halifax, NS B3L 2C1	
Phone	(902) 453-1732	

Leon S. Tovey appeared for the Claimant.

Kevin A. MacDonald appeared for the Defendant.

Date of Hearing – October 28, 2014.

Date of Final Submissions – November 4 and 5, 2014.

DECISION ON MERITS

This is a claim for wrongful dismissal. The Claimant, Perry Costa was employed with the Defendant, Electec Engineering Incorporated, on a full-time basis until October 25, 2013. He was then employed in a shared capacity until January 2014, when his employment was terminated.

This decision is preceded by three others all addressing issues of procedure. While Small Claims Court adjudicators generally resist efforts of parties seeking to engage in procedural disputes, or as a colleague cleverly described them, "meta disputes", the various motions were not frivolous. The three matters involved (i) a successful motion by the Defendant for a stay of proceedings where there was a concurrent application pending before the Labour Board. That application has since been withdrawn; (ii) a motion by the Defendant seeking my recusal or disqualification as Adjudicator. That motion was denied and has been appealed to the Supreme Court of Nova Scotia, but to my knowledge, a decision has not yet been rendered. I recently read Justice Glen MacDougall's comments in *Killam Properties Limited v. Patriquin*, 2011 NSSC 338. In that case, his Lordship applied his reasoning in *R. v. Primrose*, 2009 NSSC 241, and held there is no jurisdiction to hear an appeal of Small Claims Court decisions and orders on interlocutory matters prior to an Adjudicator's decision on the case's merits; (iii) a decision seeking an adjournment pending the appeal of the recusal decision. This was found to be beyond the jurisdiction of this Court.

In the recusal decision, the Defendant sought a ruling on whether the hearing of this matter is *res judicata*. At the beginning of this hearing, Mr. MacDonald advised the Court he was not proceeding on that basis.

As I have described below, Mr. Costa was dismissed without cause and he has not yet been paid. The Defendant concedes that Mr. Costa is owed four weeks' pay plus accrued vacation. Thus, where liability is admitted, this matter is about the amount of damages to which Mr. Costa is entitled, and if applicable, any deductions for working notice, mitigation or benefits received.

The Facts

Perry Costa is 54 years of age and worked for the Defendant, Electec Engineering and Design Incorporated ("Electec"). While not specifically stated, his job title can be described as an Auto CAD Operator/Electrical Layout technician. He was employed for Electec from December 4, 2006 until his termination on January 21, 2014. He had worked there on a full time basis, typically working 37.5 hours per week to October 24, 2013, when he was assigned to a work share. He was working at that, essentially 50% of his working hours, until his termination. The balance of his reduced pay was supplemented through Employment Insurance.

There was no evidence to suggest there was anything wrong with Mr. Costa's work or any misconduct on his part. Indeed, the witnesses for the Defendant have described him as a good employee and conceded through their counsel he was dismissed without cause. Likewise, Mr. Tovey, on behalf of Mr. Costa, acknowledged that there was no "bad faith conduct or unfair dealing" in the course of the dismissal, such as would justify an increased award of damages pursuant to the Supreme Court of Canada's decision in *Wallace v. United Grain Growers Limited*, [1997] 3 S.C.R. 701.

Based on the evidence of all witnesses, I find the reason for Mr. Costa's dismissal was purely due to financial difficulties experienced by Electec as a result of a consistent downturn in business. Further, while the timing and manner of notice is in dispute, I find the dismissal does not warrant a finding of bad faith or unfair dealings. While I am required to make certain findings of fact about the content and timing of his notice, this matter is strictly about the application of the law of wrongful dismissal to the facts of this case.

The Evidence

Mr. Costa testified that he commenced work with the Defendant on December 4, 2006 as an AutoCAD technician and draftsperson. He was one of two employees who were employed in this type of work, namely himself and Denis Comeau. AutoCAD is a computer assisted drawing program primarily used for architectural and drafting design. His role was to implement lighting and electrical design into the drawings. In order to enable him to use AutoCAD, it was necessary to complete a course. The course sounds fairly extensive as it ran for approximately six months at eight hours per day. At the time he started with Electec, Mr. Costa was earning approximately $31,250 per year while his salary was $43,060.79 at the time of his dismissal. His standard workday was 7.5 hours per day with an average of 37.5 hours week.

In October 2013, Mr. Costa was advised that work at Electec was slow and rather than terminating his employment or that of Mr. Comeau, he was advised he was being put on a work share program. As a result, Electec would pay him for two days per week and the remaining three days would be paid by Service Canada at 55% of his regular pay. He recalls the specific conversation that he would be given this opportunity rather than facing a layoff. His last day of full-time work was October 25, 2013. He testified that he was advised the work would last approximately six months, but if necessary it may extend a further six months. The work share lasted until his dismissal on January 21, 2014.

On January 21, Mr. Costa showed up at work as usual. He was stopped by Marc Joudrey and Rodney Bona, who advised him that his services were no longer required as the company "couldn't afford him". They presented him with a termination letter, which included an offer of severance pay of four weeks' salary provided he was prepared to sign a release. He did not sign the release. He has not received any funds to this day. There was some discussion about obtaining his belongings, although this appears to have been resolved.

After he was advised of his pending job share, he was concerned about the prospect of his employment, so he made several inquiries, including one to Mr. Darcy O'Connell at Burnside Consultants. He testified that since losing his job, he has contacted several employers and he maintained a log which was tendered into evidence. He applied for several computer and technical related jobs and took some training online. He declined interviews for positions outside of Nova Scotia as his wife has a job and they do not wish to relocate.

When asked by Mr. Tovey if he had ever been told by any of his bosses that he would be terminated before January 21, Mr. Costa unequivocally stated "no".

Mr. Costa testified that he currently receives approximately $862 every two weeks from his Employment Insurance. While he was working on the job share, he was receiving $558 every two weeks.

Under cross examination by Mr. MacDonald, he testified he and Mr. Comeau were working most of the time on AutoCAD work after other employees had left the company. When asked if the job share was the result of a significant lack of work, he replied that he had work, although he admitted that on a slow day he was caught by somebody on one occasion playing solitaire. He confirmed that his bosses came to him with respect to a work share. It was presented as a voluntary arrangement. He acknowledged that there was no guarantee of future work but he was adamant they did not say his job was in jeopardy. He was told the job would hopefully pick up in the next 30 days. They did not predict any work would be available.

He confirmed a meeting with Marc Joudrey ("Marc") on December 4. Mr. Costa testified that Marc advised him to start looking for additional work. He was adamant that he was not told he should look for work in the form of a new job.

Marc Andrew Joudrey owns 50% of the shares of Electec; Rodney Bona owns the other 50% of that company. He describes his role as a project manager. He has been in that position for over year. He took over the company from his father, Richard Joudrey ("Richard"). He has a Bachelor of Commerce with a major in Marketing. He works frequently with AutoCAD along with Building Code and Electrical Code work. He described the business as an electrical design consulting firm. He acknowledged having in his employ, both Mr. Costa and Mr. Comeau. Mr. Comeau worked the longer of the two, although neither worked for more than 10 years. He described their role as draftspersons. Neither employee had any managerial or supervisory authority; they did not have any contact with clients.

He testified he had little work for either Costa or Comeau to do during the year. In the interests of the financial well-being of the company, they actively sought new business and made a concerted effort to obtain new clients. That still did not yield enough business for two draftspersons. Consequently, the decision was made to consider a work share arrangement. He testified to speaking with Costa in the middle of September and advised him he would be put on a work share program. He was given the choice of either accepting the assignment or risk being laid off. Mr. Costa chose to proceed with the work share. He testified that Electec would like to pick up additional work, but there was definitely not a guarantee of that happening.

He and Mr. Costa had subsequent discussions on December 4. He and Mr. Costa discussed that he "needs to start looking for work." He acknowledged having offered Mr. Costa four weeks pay plus lost benefits.

Under cross examination by Mr. Tovey, he testified that Costa was to be paid four weeks pay plus unpaid vacation pay, in full satisfaction of any claim against Electec. When asked about the conversation concerning Mr. Costa needing to "look for work" or "look for other work", he stated that he did not know the wording exactly. He acknowledged he did not tell him he would be terminated at a certain date.

He acknowledged paragraph 2 of the termination letter stated that funds were being paid "in lieu of notice". He testified that Costa was told in September his position would be ending. On December 4, he was told it would be ending unequivocally. He denies telling Costa the work share was temporary or permanent, only that it was a way to not lay him off. When pressed as to why he chose four weeks in lieu of notice, he testified, simply that it was what he understood was required by the Labour Standards Code. He acknowledged his application for a work share agreement confirming that was a shortage up to 26 weeks. He acknowledged things returned to normal on April 2, 2014. Mr. Costa's position has since been filled effective early October. He denies ever having mentioning a six months extension to the work share. He told Mr. Costa once the period had ended, the job was over.

Richard Brian Joudrey is the previous owner of Electec Engineering. He started the business in 1990 and ran it until October 2013 when ownership was transferred to his son, Marc Joudrey, and Rodney Bona. He testified that he was involved in the meeting with Mr. Costa and Marc. The purpose of the meeting was to introduce Mr. Costa to the work share plan and its function. He testified that the plan would last up to 26 weeks, pending the availability of future work. He reviewed the appropriate sections with Costa to inform him of the details. He indicated that Mr. Costa had the choice whether to take part. The compensation was to be paid for two days at his current rate by Electec and the remainder was to be compensated pursuant to the Employment Insurance program. He testified that there is no guarantee that things would work out and success was dependent upon the workload. There were no meetings held afterward and there were no discussions with respect to its success with anyone. Mr. Joudrey promised simply to do his best to find additional work, which to his mind he did by calling existing or new clients to find additional consulting work.

Under cross examination he acknowledged that work did indeed pick up. He confirmed that the position was advertised on August 29, 2014 and a new person was hired on October 1, 2014.

In giving redirect evidence, Mr. Joudrey testified that Electec received a sizable drafting contract of 10 weeks duration. It would require two draftsmen on a full-time basis for two weeks. The employees were not hired on a full-time basis, but rather on a contract.

John Rodney Bona is the other 50% owner of the Defendant, Electec. He testified that he initiated the formation of the work share program at Electec. He confirmed the program was scheduled to last for 26 weeks and could be extended at the discretion of EI. He was not present at the meeting between Marc Joudrey and Perry Costa.

Following the meeting, Mr. Bona received a phone call from Darcy O'Connell confirming that Mr. Costa had contacted Mr. O'Connell respecting a new job. Mr. O'Connell forwarded an e-mail trail between Mr. Costa and himself. Hard copies of these e-mails were entered into evidence. In it, Mr. Costa writes to Mr. O'Connell advising that he is looking for work. He indicated that he is working "two days a week right now, and I am looking for more." Mr. O'Connell declined an

opportunity to hire Mr. Costa indicating that he has a person to do his drafting. He concluded with the sentence:

"Don't jump ship, the new year will be better!"

Mr. Costa's reply was simple:

"Thanks Darcy, Mark told me I need to find another job. It is not that I am wanting to jump ship."

Under cross examination, Mr. Bona testified that he was called by Mr. O'Connell because they, Bona and O'Connell, have a previous working relationship. It was a courtesy call. When asked by Mr. Tovey if he expected Mr. Costa to look for work after December 4, he said "no, not fully". He did not expect that Mr. Costa would be told that he would be terminated at the end of the work share or on January 21. Mr. Bona also confirmed Mr. Costa's salary at $43,060.79. He indicated his net biweekly pay was $1134.91, describing it as reasonably accurate nest of all deductions. Mr. Costa received bonuses of approximately $750-1000 per year based on performance. He also received a gym membership.

The Law and Findings

It is well settled that on termination, the terminated employee is entitled to reasonable notice or payment *in lieu* of notice. The issue of what constitutes reasonable notice has received extensive judicial consideration in Canada. The leading case on the point is *Bardal v. Globe & Mail Ltd.*, [1960] O.J 149 (HC), where Chief Justice McRuer stated the following:

"There can be no catalogue laid down as to what is reasonable notice in particular classes of cases. The reasonableness of the notice must be decided with reference to each particular case, having regard to the character of the employment, the length of service of the servant, the age of the servant and the availability of similar employment, having regard to the experience training and qualifications of the servant."

This case has been cited and applied with approval by many courts in Canada, including the Supreme Court of Canada in *Wallace* (*supra)* and by our Court of Appeal, in *Bureau v. KPMG Quality Registrar Inc.*, 1999 NSCA 1479 and subsequent cases. I hasten to add that the law today is simply known as "employment law", rather than the archaic term, "master-servant".

In awarding damages for wrongful dismissal, it is important to note that the dismissal of an employee is not in and of itself, grounds for a cause of action. It is the period of reasonable notice which is required based on the application of the *Bardal* factors and, while not applicable in this case, the basis for *Wallace* damages.

Some cases and authors discuss "a rule of thumb" in damages for wrongful dismissal as one month's notice or pay in lieu for each year of employment. The cases have been quick to point out that this is not a legal standard and emphasize that the award is based on the facts in each case. I have reviewed the various summaries of awards reviewed by the leading Canadian works,

namely, David M. Harris, *Wrongful Dismissal* and H. Levitt, *The Law of Dismissal in Canada* (3rd Edition), for guidance. In addition, I reviewed the impressive work of my colleague, Michael J. O'Hara, in his compilation of wrongful dismissal damage awards in Nova Scotia found on the website of the Nova Scotia Barristers' Library.

The Defendant has submitted several times that the required amount of notice is based on the time lines set out in the *Labour Standards Code*. I recently had occasion to address this issue in another wrongful dismissal case, namely, *MacKenzie v. AMEC Environment & Infrastructure Ltd.*, 2014 NSSM 34:

"The *Labour Standards Code*, R.S.N.S. 1989, c. 246, as am., provides a legislatively prescribed means of addressing employment issues. It is considered a minimum standard and has been accorded curial deference when a party has elected to pursue a remedy both in common law and under the *Code* (*Fredericks v. 2753014 Canada Inc.*, 2008 NSSC 377). However, unlike some provinces, the Code does not oust the jurisdiction of the Court. Rather, it gives an affected party a choice of forum. In looking at the provisions of the Code, an employee who has been employed for a period of less than five years is entitled to two weeks' notice or payment in lieu (s.72(1)(b)). Section 78 provides that if the employee does not receive payment, he may make a complaint to the Director of Labour Standards under s. 21 of the Code. Section 21 provides authority for the conduct of a hearing.

Section 6 of the Labour Standards Code provides the following:

"6. This Act applies notwithstanding any other law or any custom, contract or arrangement, whether made before, on or after the first day of February, 1973, but nothing in this Act affects the rights or benefits of an employee under any law, custom, contract or arrangement that are more favourable to him than his rights or benefits under this Act." (emphasis mine)

This provision is significant as it confers on every employee the more favourable applicable right or benefit provided by law - an entitlement which cannot be modified by contract.

The impact of s. 6 has been considered by Justice Duncan in the *Fredericks* case referenced above. Specifically, Justice Duncan reviewed the doctrine of curial deference and stated the following regarding the awarding of damages for wrongful dismissal:

"Does the *Code* provide effective redress for wrongful dismissal?

[47] In *Deagle v Shean Co-Operative Limited* , [1996] N.S.J. 504 (NSCA), the employer argued that an existing order of Labour Standards Tribunal estopped their former employee from advancing a claim for damages arising from wrongful dismissal. Writing on behalf of the court, Flynn, J.A. said:

> 17 In dealing with a complaint under s. 72 of the Act, the Labour Standards Tribunal makes no inquiry, as would a court in a wrongful dismissal action, as to what notice requirements would be reasonable given the circumstances of both the respondent and the appellant. It makes no inquiry concerning other benefits which the employee has lost as a result of being dismissed, and it makes no inquiry as to other damages such as punitive damages, damages for mental distress, etc
> 18 Further, the Act clearly contemplates additional benefits being sought by the respondent in another forum.
> 19 Section 6 of the Act provides as follows:
>
> > 6. This Act applies notwithstanding any other law or any custom, contract or arrangement, whether made before, on or after the first day of February, 1973, but nothing in this Act affects the rights or benefits of an employee under any law, custom, contract or arrangement that are more favourable to him than his rights or benefits under this Act."
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> 20 The purpose of s. 72 of the *Code* is to require an employer to meet certain minimum standards when dismissing an employee who has not "been guilty of wilful misconduct or disobedience or neglect of duty that has not been condoned by the employer". These are minimum requirements, and vary with the length of

> service of the employee. Most employers voluntarily comply with the provisions of s. 72. In such cases, and because of s. 6 of the *Code*, the employer could not be heard to say that the employee has no further claim for damages for wrongful dismissal in the appropriate case. There is no reason why there should be any difference where the employer is forced to comply following a complaint made against him by the employee. If there was such a difference, employers would be encouraged not to comply with s. 72 of the *Code* if they thought a hearing before the Labour Standards Tribunal would fully resolve the dismissed employee's claim. That is not the purpose of s. 72 of the *Code*.
>
> [48] The policy of judicial deference to specialized tribunals in the field of labour relations was already enunciated by the time of *Deagle* - the cases of *St. Anne Nackawic Pulp & Paper v. Canadian Paper Workers Union, Local 219*, [1986] 1 S.C.R. 704 and *Weber v. Ontario Hydro*, [1995] 2 S.C.R. 929, perhaps being the most notable to that time. It must be taken that the court in *Deagle* was alert to the policy....
>
> [49] Subsequent judicial statements such as those in *Vaughan* and *Adams* have not changed the underlying principle as Flynn J.A. saw it. To restate it in the current context, a claim for wrongful dismissal does not attract effective redress under the *Labour Standards Code*. It provides a statutory minimum. Section 6 of the *Code* preserves to the plaintiff the more favourable benefit or rights in the common law that a court may find, and which are not otherwise available." (underscoring mine)

Justice Duncan went on to award a 46-year-old employee of five years employment (less three days) five months pay, notwithstanding the ruling of the Labour Standards Tribunal."

As in the *MacKenzie* decision, I am not bound by the provisions of the *Labour Standards Code* in this matter. Mr. Costa has withdrawn his complaint before the Labour Board. There has been no hearing or decision. The Claimant has elected to pursue the matter in the Small Claims Court. The common law principles of wrongful dismissal apply. I turn now to a review of the *Bardal* factors and their application to the facts of this case. I shall review each factor as listed above.

Character of Employment

The character of employment is relevant as it assumes the more responsible the position or the more expertise required, the more difficult it will be to find comparable employment.

Mr. Costa was employed as an AutoCAD technician/draftsperson. His role required specific technical skills and aptitude. He testified to taking a course to obtain and upgrade his training to demonstrate his proficiency. I accept that is required. Indeed, it is reasonable to assume that many technical computer applications and software requires regular, if not continuous, upgrading by its users.

Likewise, I find Mr. Costa was not a managerial or supervisory employee. Further, he did not have direct contact with customers.

While not a traditional profession, his work required specific experience and training. He was not an "unskilled employee". He was what could be described as a technical employee.

I have reviewed the damage awards found by Harris and Leavitt in the category of technical employees. They range anywhere from half a month per year of service to well over one month per year. The type of work performed by Mr. Costa is fairly unique, in that it relates only to firms involving architects and engineers. Several draftsperson positions are listed but they are at a management level, or fit the description of "architectural technician" (e.g. *Elms v. Hywel Jones*

Architect Ltd., (1997) 29 CCEL (2d) 69 (BCSC)). As noted, the evidence suggests Mr. Costa's position does not fit that description.

The Nova Scotia Court of Appeal held in *Crowe v. Blaikies Dodge Chrysler Ltd.*, 2000 NSCA 133, per Cromwell J.A. (as he then was), that a 16 year employee auto body technician who was awarded 12 months' salary was "at the high end of an acceptable range, it is certainly not so inordinately high as to require appellate intervention."

I find the position places Mr. Costa at the "mid to high end" of the range.

Length of Service

The case law is clear that the longer one is employed, the greater the amount of notice or payment one is entitled to receive.

It is not disputed and I find that Mr. Costa was employed from December 4, 2006 to January 21, 2014. That is a period of 7 years, 1 month and 17 days or 7.13 years.

In the case of *Law v. Truro International Inc.*, 1997 NSSC 1639, Hall J. stated the following:

"Mr. Rogers referred the Court to an interesting and informative article by Michael J. O'Hara in the October, 1997, issue of the **Nova Scotia Law News.** In the article the author provided a table of wrongful dismissal cases decided by Nova Scotia Courts in recent years and set out the notice period determined by the courts in relation to the length of service. It is interesting to note that in the case of one to 4.5 years or service the notice periods ranged from one month to fifteen months with an average of 2.51 months notice for each year of service. In the case of employment of from five to ten years, the range was from five months to twelve months for an average of 1.27 months notice per year of service. The table indicates an overall average of 1.6 months notice per year of service where the employment ranged from one to ten years."

A review of the O'Hara table currently digested to 2010 shows a similar result. However, none of those positions are draftspersons.

Age of the Employee

Reference is made to the Ontario case of the case of *Piresferreira v. Ayotte*, [2008 O.J. 5187 (SCJ)], where the court stated:

"Her age and the corresponding difficulty that creates for her seeking other employment, suggests a longer notice. I consider this a very significant factor in determining the length of notice appropriate in this case....

On balance, I find that Piresferreira-even if medically able to seek alternate employment-would have had difficulty obtaining similar employment."

In that case, the plaintiff was a 61 year old seasonal employee of a golf course.

Mr. Costa is 54 years of age. He has significant experience but less opportunity to retrain or requalify than someone who is younger. He is acknowledged to be a valuable employee capable of working fairly sophisticated software. He can still be retrained.

Availability of Similar Employment

This factor addresses the prospects of finding similar employment in related industries. As noted previously, an AutoCAD draftsperson is a unique job where opportunities are scarce. This will be a factor in determining an appropriate length of notice.

Mr. Costa tendered into evidence a log showing his job search efforts. I am satisfied he is having difficulty finding other related employment.

Summary of Length of Notice

In reviewing the above factors, I find the Claimant is a 54 year old, technical employee trained in computer based drafting applications. The current market for such positions is thin. He has attempted to retrain and seek other employment. Having observed him in court, I am certain he will be successful. He might be able to find other employment if he were willing to relocate. He feels relocation is currently not an option for him as his wife is still gainfully employed. His reluctance in my view is justified. He need not move as part of his mitigation. Indeed, there is no evidence of offers from outside of Nova Scotia anyway. His length of service was noteworthy but not extensive. The reasons for his dismissal were the poor economic prospects of the company at the time of his dismissal.

Considering all of the above factors, I find Mr. Costa is entitled to a substantial period of notice but not to the rate of 1 month per year of service. Given that there are 4.33 weeks in a given month (based on 52 weeks per year), I find the "rule of thumb" would amount to 30 weeks notice. I am not bound by that formula.

I find Mr. Costa is entitled to 25 weeks notice, beginning on the first day of actual notice.

Delivery of Notice

The next issue to be determined is the date actual notice was given by Electec.

The Nova Scotia Court of Appeal stated the following *in Boutcher v. Clearwater Seafoods Limited Partnership* (2010), 288 NSR (2d) 177; 2010 NSCA 12:

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

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

In Tab 13 of his book of exhibits, Mr. Tovey included that same statement from a later version of the text cited with approval by our Court of Appeal.

In addition, I refer to the following from Chief Justice Kennedy in *Bent v. Atlantic Shopping Centres Ltd.* (2007), 258 NSR (2d) 352; 2007 NSSC 231:

[22] Judicial analysis of the sufficiency of a notice of termination is, in reality, a consideration of whether or not the employer was fair to the employee. The following question must be answered by the court: Did the purported notice of termination fairly communicate to the employee that the employment relationship would definitely end and when it would do so? The courts require employers to be fair to the employee who must, following the announced termination, find alternate employment. The courts are aware of this dramatic negative effect that an employee is likely to suffer when a job is ended. The employer holds the disproportionate power in the relationship and so fairness to the employee is mandated. This requirement of fairness applies to both the communication of the notice and the time that it allows the employee to adjust to the loss of job.

[23] As a result, when appropriate and adequate notice of termination is raised as a defence, the employer bears the burden of proving its acts constitute reasonable notice of termination. This statement of the burden was clearly set forth in *Yeager v. R.J. Hastings Agencies Ltd.*, [1984] B.C.J. No. 2722 (S.C.) [QL] per Wood, J. at paragraph 40:

> The onus of proving that such a notice has been given rests upon the employer who seeks to raise it as a defence to an action for damages for wrongful dismissal.

[24] The test to determine if documents or conduct constitutes appropriate notice of dismissal is an objective one that is employed on a contextual basis. This statement of the nature of the test was clearly set forth in *Wilson v. Crown Trust Co.*, [1992] O.J. No. 1765 (G.D.) [QL] per Craig J. at page 3:

> I adopt as the applicable test for notice of termination an objective test as follows:
>
> > 'What would a reasonable man understand from the words used in the context in which they were used in the particular industry, in the particular working place, and in all of the surrounding circumstances? Ellen E. Mole, *Wrongful dismissal Practice Manual*, (1984), Sect. 216'.

The objective and contextual nature of the test has been accepted and applied in: *Kalaman v. Singer Value Co.*, [1997] B.C.J. No. 1393 (C.A.) [QL] at paragraph 38; and *Holmes v. Irving Shipbuilding Inc.*, [2001] N.B.J. No. 307 (Q.B.) [QL] at paragraph 53.

[25] In H. Levitt, *The Law of Dismissal in Canada*, 3rd ed., Looseleaf, (Aurora, Canada Law Book: 2007) (Release # 5 May 2007), the learned author states the general rule concerning the appropriateness of a notice of termination at pages 8-9:

> The general rule is that notice of termination must be specific, unequivocal and clearly communicated to the employee.[Emphasis Added]

…[26] It is not enough for the employer to communicate to the employee that it is possible, or even probable, that the employment relationship will terminate. In *Woodward, supra,* at paragraph 19, Justice MacDonald of this Court accepted this proposition as set forth in the text, *Wrongful Dismissal* by D. Harris.

> Despite Mr. Buchanan's persuasive arguments, a warning of possible dismissal or even probable dismissal does not constitute notice of dismissal.

Also, the learned author in Levitt, *supra*, relying on several Canadian cases stated this proposition at pages 8-9:

> A warning of probable dismissal does not constitute notice of termination. 'There should be no doubt as to whether the relationship is being severed and when.'

[27] The issue of a certain date of termination referred to in the Levitt, *supra,* passage in the preceding paragraph, was stated directly by Justice MacFarlane of the British Columbia Court of Appeal in *Kalaman, supra,* at paragraph 38:

> ...A notice must be specific and unequivocal such that a reasonable person will be led to the clear understanding that his or her employment is at an end as of some date certain in the future...

[28] The employer must make it clear to the employee that he or she is being terminated from the employer and not simply from the employee's current duties. The learned author in Levitt, *supra,* states this proposition at pages 8-9, relying on *Reynolds v. First City Trust Co.,* [1989] B.C.J. No. 1684 (S.C.) [QL]:

> If an employee is told that his or her employment will end as of a certain date, but it is not clear that the employee will be terminated entirely from the company, there is no notice of termination."
>
> (case citations eliminated; underlining mine)

Finally, the learned authors in England, Wood and Christie, *Employment Law in Canada (supra*) list a number of cases where effective notice has not been found. That includes:

"notifying the that the company had decided to eliminate her job and she would be advised of the effective date of her termination of employment "over the next few weeks" (p. 14-71)

In support of this statement, the authors cite *Prinzo v. Baycrest Centre for Geriatric Care,* (2002) 60 OR (3d) 474 (CA); 215 DLR (4th) 31. In that case, Weiler, J.A. stated the following:

"Notice of termination need not use the words "you are hereby dismissed effective . . ." or some such equivalent. Notice of termination must, however, lead a reasonable person to conclude that his or her employment is at an end as of some date certain in the future.... The fact that no effective date of termination is to be found in a letter indicating that employment is shortly to end is a circumstance that may support an inference that the requirement of specific notice has not been met. All of the circumstances must, however, be considered... Notice cannot be assumed to have been given if an employee is simply warned that his or her job will probably be eliminated "within six months to a year"; notice must be clear and unambiguous ...(case citations eliminated; underlining mine)."

After reviewing the law above, she made the following finding of fact:

"While the letter of January 29 confirmed the layoff as being permanent, it too indicated that the effective date of termination was to be arranged, and therefore did not contain a date certain for termination of employment. No one at Baycrest ever gave Prinzo a date certain for termination of her employment until she was given the March 11 letter stating that her last day of employment would be March 31, 1998."

In reviewing the evidence in this case and applying the law, I make the following findings:

- A meeting to discuss the work share arrangement was held on September 13, 2013. It included a proposal for a job share. Both Marc Joudrey and Richard Joudrey indicated to Mr. Costa there was a lack of work. No specific discussions of termination or lay off were held. However, the work share proposal was not intended to be permanent. At that point, it was reasonable to assume things could go either way for the parties, business would pick up and Mr. Costa would be rehired or it would continue to go down or remain stagnant and Mr. Costa could be laid off.

- On December 4, 2013, Marc Joudrey and Perry Costa met. The evidence differs as to what exact words were used. I find it immaterial to my findings whether Mr. Joudrey used the phrase that Mr. Costa should "find work" or "find other work". I find that it was Mr. Joudrey's intent to convey to Mr. Costa that his position was to be eliminated in due course. I accept Mr. Joudrey's evidence and find Mr. Costa received that message as he advised Mr. MacDougall that Marc told him to "find another job". I also find, based on the unrefuted testimony of both Mr. Joudrey and Mr. Costa, that a date for termination was not discussed. Indeed, given Mr. Bona's evidence that he was surprised that Mr. Costa would look for work at all, I find the issue of when his termination would take place was not discussed by the owners of Electec. It is even possible that a firm decision by both owners on his termination may not have been made at that point.

In applying the law, I have no hesitation in finding the September meeting did not meet the requirements of notice. Mr. Costa was not terminated. He was given a temporary option to remain working. Indeed, I find the actions of the Defendant inconsistent with an intention to terminate Mr. Costa. Given the significantly reduced level of compensation, there would be little advantage to Mr. Costa to remain in Electec's employ. He may well have suspected his employer was experiencing serious financial difficulties, however at most, there was little grounds for anything other than suspicion.

With respect to the December meeting, I find the circumstances above do not meet the requirement for notice of termination to be "specific, unequivocal...and clearly communicated to the employee that his employment will end on a certain date". The communication lacked a date certain as stipulated in several cases cited above. At most, the December meeting, which was more definitive on Electec's part, constituted nothing more than a "warning of possible or probable dismissal" discussed by Chief Justice Kennedy. There was nothing definitive that could constitute notice as defined above until, January 21, 2014, when Mr. Costa was given the termination letter.

Like Madam Justice Weiler found in the *Prinzo* case cited above, I find actual notice was served upon Mr. Costa on January 21, 2014. As a result, I find there was no working notice. The calculation of his notice should begin on that date.

Wages

In reviewing the evidence, several witnesses have testified that Mr. Costa's salary prior to the work share was $43,060.79. This is based on the front page of the Record of Employment entered into evidence. That document also shows he has worked a total of 2010 hours in the previous year. I accept these figures and find he earned $21.42 per hour. I also accept Mr. Costa's evidence that he worked an average of 37.5 hours per week, or $803.25. I assume, this includes annual bonuses and I do not make allowance for that below.

Accordingly, I find Mr. Costa is entitled to lost wages for 25 weeks at $803.25 or $20,081.25.

Mitigation

Mr. Costa tendered into evidence a log showing his efforts to secure employment. He has also taken on-line training. I find his efforts were significant and that he has adequately mitigated his losses.

Effect of Employment Insurance

At the conclusion of the hearing, I asked both counsel for their views on the impact of Mr. Costa's receipt of Employment Insurance benefits. I thank both counsel for their very able submissions.

Reference is made to the decision of the Supreme Court of Canada in *Jack Cewe Ltd. v. Jorgenson*, [1980] 1 S.C.R. 812. In that decision, Pigeon, J. stated the following:

"The payment of unemployment insurance contributions by the employer was an obligation incurred by reason of respondent's employment, therefore, to the extent that the payment of those contributions resulted in the provision of unemployment benefits, these are a consequence of the contract of employment and, consequently, cannot be deducted from damages for wrongful dismissal."

This decision was applied by the Supreme Court of Nova Scotia in *Mayhew v. Canron Inc.* (1982) 50 N.S.R. (2d) 349 and subsequent decisions.

The *Jack Cewe* case was considered more recently in *IBM Canada Limited v. Waterman, [2013] 3 SCR 985*, where Cromwell J., stated the following:

"Similarly, in *Jack Cewe*, the Court did not deduct a dismissed employee's unemployment insurance benefits from his wrongful dismissal damages. The benefits, wrote Pigeon J., for the Court, were a consequence of the contract of employment making them similar to contributory pension benefits: p. 818. (The collateral benefit issue that arose in *Jack Cewe* is now addressed by s. 45 of the *Employment Insurance Act*, S.C. 1996, c. 23, which states that a claimant who receives benefits and is subsequently awarded damages for the same period, "shall pay to the Receiver General as repayment of an overpayment of benefits an amount equal to the benefits that would not have been paid if the earnings had been paid or payable at the time the benefits were paid".)"

Section 45 of the *Employment Insurance Act* states in full:

"If a claimant receives benefits for a period and, under a labour arbitration award or court judgment, or for any other reason, an employer, a trustee in bankruptcy or any other person subsequently becomes liable to pay earnings, including damages for wrongful dismissal or proceeds realized from the property of a bankrupt, to the claimant for the same period and pays the earnings, the claimant shall pay to the Receiver General as repayment of an overpayment of benefits an amount equal to the benefits that would not have been paid if the earnings had been paid or payable at the time the benefits were paid."

Meanwhile, section 46 of that Act states:

"**46.** (1) If under a labour arbitration award or court judgment, or for any other reason, an employer, a trustee in

bankruptcy or any other person becomes liable to pay earnings, including damages for wrongful dismissal or proceeds realized from the property of a bankrupt, to a claimant for a period and has reason to believe that benefits have been paid to the claimant for that period, the employer or other person shall ascertain whether an amount would be repayable under section 45 if the earnings were paid to the claimant and if so shall deduct the amount from the earnings payable to the claimant and remit it to the Receiver General as repayment of an overpayment of benefits.

Return of benefits by employer

(2) If a claimant receives benefits for a period and under a labour arbitration award or court judgment, or for any other reason, the liability of an employer to pay the claimant earnings, including damages for wrongful dismissal, for the same period is or was reduced by the amount of the benefits or by a portion of them, the employer shall remit the amount or portion to the Receiver General as repayment of an overpayment of benefits."

Mr. MacDonald has submitted that this ought to be treated the same as collateral benefits in an insurance case. With respect, I disagree. I find I do not have any basis to deduct the EI benefits from the Claimant's damage award. I apply this to the benefits received during Mr. Costa's period of unemployment as well as during the work share. Mr. Costa and Electec can notify Service Canada and Canada Revenue Agency to make any necessary EI repayments and assess liability for income tax.

Provisional Assessment of Allowance for Working Notice

If I am wrong in my finding above regarding the timing of working notice, I would not be prepared to deduct all of Mr. Costa's earnings between December 4 – January 21. Rather, Electec would be entitled to those wages actually paid by them.

Using the formula above:

7.5 hours x $21.42 x 2 days per week x 7 weeks = $2249.10.

As noted, I do not find this appropriate where I have found notice to have taken place effective January 21, 2014.

Benefits

Mr. Costa testified that he received health insurance, a gym membership, vacation and bonus. Rather than calculating a separate bonus, I have included that amount in the wages above. There was no dispute that Mr. Costa received a full bonus of $1000 annually.

Mr. Costa testified to having unused vacation time.

Counsel agrees that Mr. Costa is entitled to $2395.00 in vacation pay. In the absence of any quantifiable amount, I assign a value of $500.00 to the gym membership and health insurance.

Summary of Damages

In summary, I find the Claimant has proven the following on the balance of probabilities:

Wages:	$20,081.25
Vacation:	$ 2,395.00
Benefits:	$ 500.00
Total Damages:	$22,976.25

Prejudgment Interest

Prejudgment interest in Small Claims Court is set by regulation at a maximum rate of 4% per annum. A total of 280 days passed between the date of termination and the date of the hearing of this matter on its merits. In the circumstances, the full 4% is not appropriate. I fix prejudgment interest at $500.

Costs

Counsel have agreed that costs in this case shall be $193.55 for the filing fee and $50.00 for any additional disbursements. I accept their recommendation.

Summary

In summary, I find the Claimant has proven its claim on the balance of probabilities and shall have judgment as follows:

Total Damages:	$22,976.25
Prejudgment Interest	$ 500.00
Costs	$ 243.55
Total Judgment	**$23,719.80**

The order will not contain any reference to Employment Insurance or Income Tax obligations. I shall leave that to the parties to resolve as the obligation is statutorily mandated.

Order accordingly.

Dated at Halifax, NS,
on January 5, 2015.

Gregg W. Knudsen, Adjudicator

Original: Court File
Copy: Claimant(s)
Copy: Defendant(s)