CITATION: Jimmy How Tein Fat v. PRGX Canada Corp., 2023 ONSC 6374
COURT FILE NO.: CV-22-00685549-0000
DATE: 20231110

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	
JIMMY HOW TEIN FAT Plaintiff/Moving Party	Daniel A. Lublin and Nasyr Asmi, for the Plaintiff/Moving Party
– and –	
PRGX CANADA CORP. Defendant/Responding Party	Martin A. Smith, for the Defendant/Responding Party
	HEARD: October 17, 2023.

J. CALLAGHAN

REASONS FOR JUDGMENT

[1] On July 28, 2022, after 29 years of employment, Mr. How was terminated from his job with PGRX Canada Corp. (PGRX) as a result of a restructuring. He was provided 34 weeks of severance which was the statutory amount required. Mr. How claims that, among other reasons, as a senior long-time employee who is now 63, he is entitled to 24 months notice and seeks damages in lieu of the difference between what he was paid and the 24 months. PGRX says that Mr. How was not a senior employee and is entitled to only 16 to 18 months severance.

[2] In addition, PGRX asserts that Mr. How failed to take steps to reasonably mitigate his losses because he did not seek out employment within the highly specialized field where he had worked for 29 years. Accordingly, the defendant says that Mr. How is entitled to only eight months of severance when discounted for his lack of mitigation. As it happens, this is an amount slightly more than the statutory severance provided by PGRX.

[3] I have concluded that Mr. How is entitled to a 24 month notice period which need not be reduced for an alleged failure to mitigate. I set out below not only my reasons for the notice period but my rationale for the damage calculation which includes salary, bonus and benefits attributable for the 24 months notice period less amounts already received. Finally, there are amounts alleged to be owed as a result of miscalculations for both past vacation pays and bonus.

Issues

[4] In this decision, the following issues are addressed:

(a) Is this an appropriate case to be resolved by summary judgment?

(b) What is the appropriate notice period for Mr. How?

(c) Over the notice period, what amount of damage is Mr. How entitled to for his i) salary; ii) benefits and iii) bonus?

(d) Did Mr. How take reasonable steps to mitigate his losses by seeking comparable employment?

(e) Is Mr. How entitled to vacation pay and bonus money as a result of miscalculations during his employment?

Summary Judgment

[5] Both parties agree that this is an appropriate case to be resolved by way of summary judgement.

[6] In *Hryniak v. Mauldin, 2014 SCC 7, [2014] S.C.R. 87,* Karakatsanis J. explained, at para. 49, the type of cases suitable for summary judgment:

> There will be no genuine issue requiring a trial when the judge is able to reach a fair and just determination on the merits on a motion for summary judgment. This will be the case when the process (1) allows the judge to make the necessary findings of fact, (2) allows the judge to apply the law to the facts, and (3) is a proportionate, more expeditious and less expensive means to achieve a just result.

[7] Further, in *Arnone v. Best Theratonics Ltd*., 2015 ONCA 63, 329 O.A.C. 284, the Ontario Court of Appeal stated, at para. 12:

> … while the appropriateness of bringing a summary judgment motion must be assessed in the particular circumstances of each case, a straight-forward claim for wrongful dismissal without cause, such as the present one, strikes me as the type of case usually amenable to a Rule 20 summary judgment motion.

[8] I find this case is appropriately resolved by summary judgement. There are no factual issues that would be assisted by a trial and there were no submissions by either counsel that a trial would assist in my fact finding. The parties state that they have called all the evidence they intend to call. As can be seen from the decision below, there were no credibility issues that were required to be resolved. The dispute here is largely how the law is to be applied to the facts and any inferences drawn from those facts. I am satisfied that I am able to apply the facts to the law. As a result, there is no genuine issue that requires a trial and there is no benefit to

requiring the parties to endure the delays and costs of a trial. I am satisfied that I can reach a fair and just resolution of the matters in dispute based on the record before me.

Reasonable Notice

[9] Mr. How, arrived in Canada from England in 1994. He had been an accountant in England. Upon arriving in Canada, he joined PRGX. He was amongst the first handful of employees at PRGX. Over his 29-year tenure, he received several promotions. On June 13, 2019, he was appointed VP of North America Operations and Global Audit Innovation. The defendant was the only company that Mr. How worked for during his entire working career in Canada. He is now 63 years old.

[10] PRGX is described as a "global audit and advisory firm, providing expert advice, data analysis and recovery audits". It has grown since 1994 and now has 20 offices in various parts of the world. PRGX is described by both parties as being in a highly specialized and niche market. It is said that there are "very few, if any, comparable companies" to the defendant.

[11] Reasonable notice is intended to reflect an adequate period of time for the dismissed employee to find other comparable employment. In considering what a reasonable notice period is for an employee, the courts have taken into consideration the employee's age, tenure of employment, character of employment and the ability to find similar employment. In general, long-term employees receive longer notice. Similarly, senior employees receive longer notice on the theory that it would be more difficult for them to find reasonable replacement employment. Older employees also receive a longer notice period because the workforce tends to prefer younger employees. Courts have also held that where the employee earned substantial annual compensation, the ability to find comparable employment at the same rate of remuneration would be more difficult and thus a longer notice period is appropriate. (See *Paquette v TeraGo Networks Inc.* 2015 ONSC 4189 at paras 21-31, *Milwid v IBM Ltd.*, 2023 ONSC 490).

[12] However, each case must be decided on its facts. The Ontario Court of Appeal in *Love v. Acuity Investment Management Inc.,* 2011 ONCA 130 (CanLII), at para 14, cited the oft-quoted case of *Badal v. The Globe & Mail Ltd.* (1960), 1960 CanLII 294 (ON SC), 24 D.L.R. (2d) 140 (O.H.C.) at p.145 where Chief Justice McRuer observed:

> 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.

[13] While there may be several factors to be considered, no one factor is to be given disproportionate weight over the other factors (see *Arnone v. Best Theratronics Ltd., para 11*). In order to arrive at an appropriate notice period, all of the above factors must be considered in relation to Mr. How's personal circumstances, so as to ascertain an appropriate period of time that Mr. How would need to find comparable employment.

[14] There is some debate as to the level of seniority of Mr. How. Mr. How says that he is amongst the highest level of employees at the company. PRGX points out that Mr. How did not report directly to the defendant's Chief Executive Office and therefor was not at the highest level within PGRX. However, PGRX states that Mr. How had "an important geography – specific operations role". Mr. How oversaw the retail operations of Canada and the United States which accounted for approximately 45% of PGRX 's total revenue.

[15] While seniority of employment is a factor to be considered in assessing the length of notice, it is not intended to overwhelm the other factors. As a factor, the character of employment has had a declining importance in recent years (see *Arnone v Best Theratronics*, para 11). Having said that, I do not believe that there is a serious doubt that Mr. How was a senior employee and was treated as such. While he might not be the "most senior" employee as he does not report to the CEO, his responsibilities and compensation establish that he is amongst the highest level of executive employees and that finding comparable employment would take more time. This is echoed in Ms. Howard's affidavit when discussing merit salary increases. She testified that, in 2022, merit salary increases were not provided "to anyone in a senior executive role, which included the plaintiff". Clearly, Mr. How felt the burden of his seniority in 2022 when he did not get a merit increase. When discussing restrictions on buying and selling securities of PGRX due to NASDAQ requirements, Ms. Howard testified, "the plaintiff was among some key employees who periodically received discretionary grants of various types of equity". Clearly these admissions demonstrate that Mr. How was both a senior executive and a key employee for the defendant. I find that Mr. How was a senior executive and is entitled to consideration as a senior executive when calculating notice. Of course, this is but one factor.

[16] The plaintiff's compensation package was commensurate with his senior and key position with the defendant. He had an annual base salary of $413,753.60. He was entitled to a substantial nondiscretionary annual incentive bonus, and he participated in a deferred compensation plan for senior executives. In 2021, his T4 income compensation was $1,284,496.63 which included his salary, bonus, deferred equity, and taxable benefits. Clearly, replacing this type of compensation would not be easy. This compensation package, in my view, reflects not just his value as a senior executive but his years of service at a high level. As noted by the Court of Appeal in *Love*, an employee who receives a significant salary, bonus and equity will presumably have a harder time finding similar employment opportunities. As stated by Goudge, JA, these factors are relevant as they suggest "that obtaining similar employment would be harder rather than easier". This factor "clearly points to a longer period of reasonable notice" (at 22).

[17] It has been recognized that a person's age and length of service are factors to be considered when arriving at an appropriate notice period. An older employee will have a harder time seeking new employment. Similarly, an employee who works at one company for a long time will have developed specialized skills that undoubtedly served that company well but may not translate elsewhere in the workforce (see *Hussain v Suzuki Canada* (2011) OJ No. 6355 at paras 14-16). These factors like those above are to be considered in setting an appropriate notice period. In this case, Mr. How is now 63, having spent 29 years in a specialized and niche industry. Along with his level of remuneration and seniority within PGRX, these factors all weigh heavily toward a longer notice period.

[18] The plaintiff submits that he is entitled to 24 months notice. He supports his claim with an extensive list of 31 cases which he asserts are comparable. As noted, each case must be considered on its own facts, but cases of similar circumstances ought to be considered similarly when it comes to notice. This promotes consistency in the law, in that it provides not only credibility, as like cases are dealt with in a like fashion but allows for some level of predictability so that parties can resolve these issues without resorting to the courts. The plaintiff says that these 31 cases involve employees who had an average of 22 years of employment and were on average 55 years of age. The average notice was 24 months. A second chart of 23 cases was provided that lists cases of employees who earned $275,000 or more. A review of those cases demonstrate that the courts consider a higher level of remuneration is a factor that increases notice.

[19] PGRX submits that Mr. How is entitled to no more than 16 to 18 months notice. To support its position, PGRX referred to three cases. Each of those cases can be distinguished. For example, in *Dubet v CDA Industries Inc.*, 2004 CarswellOnt 1127, [2004] O.J. No. 1174 (ONSC), the employee was a 58-year-old foreman. His salary was $58,300 with no bonus or equity. Neither his position nor compensation would match Mr. How's circumstances. In *Fewer v Toromont Industries Ltd.*, 2009 CanLII 42592 (ONSC), the plaintiff worked for the employer for 22.5 years. During that period, he advanced from a heavy equipment dealer in the company's London location to the General Manager of the company's Newfoundland and Labrador operations. He was 47 years old when he was terminated and was earning $110,000.00 with no bonus or equity. He was given 16 months. Again, these circumstances differ from Mr. How. In *Debenham v CSI-Maximus* 2001 CarswellOnt 5585, [2001] O.J. No. 6274 (ONSC), the employee was a Customer Service Manager and Office Manager who was terminated at the age of 46 after 26 years of service. Her salary was nowhere near comparable to Mr. How. She received 15 months. Like the other cases, this case is distinguishable when all the factors are considered. Indeed, in my view, extrapolating these cases to Mr. How's circumstances would yield a notice period consistent with the notice period claimed by the plaintiff to find a comparable job with comparable compensation.

[20] Based on the factors above and having reviewed the multitude of case law that has been presented to me, I find that a 24 month notice period is warranted. Mr. How was a loyal employee for 29 years. He is (as one judge referred to it) "in the twilight of his career" at the age of 63 which makes finding replacement employment harder. He was a senior executive in a niche industry who was paid a significant sum. At his age, his prospects of obtaining another employment opportunity commensurate with the seniority and remuneration with what he had at PGRX is understandably dim. As articulated to by Chief Justice McRuer, setting any notice period is inherently a fact driven exercise. Nonetheless the bulk of the case law presented to me, particularly in the appended charts filed with the plaintiff's factum, support my conclusion of a 24 months notice period.

Damages Under the Notice Period

[21] In *Matthews v. Ocean Nutrition Canada Ltd.*, 2020 SCC 26, [2020] 3 S.C.R. 64, the Supreme Court of Canada confirmed that the damages for a failure to provide reasonable notice are those damages that reflect what the employee would have earned during the notice period (see para 53). This includes salary, benefits, and bonuses. It may be that, in the case of bonuses, the plan granting the bonus unambiguously alters or removes the employee's common law rights to

continue to participate in the company bonus plan during the notice period. This requires a contractual review of the plan documents.

[22] It is agreed that Mr. How is entitled to his salary and benefits for the notice period which is now set at 24 months. There is some debate as to the proper calculation of the salary. In addition, PGRX states that due to the wording of the bonus plan Mr. How is not entitled to his bonus during the 24 months notice period. It is agreed that any monetary award must take into consideration that Mr. How has already received severance of $270, 531.20.

i) Salary

[23] The plaintiff's salary for 2021 was $413,753.60. This amount is not disputed and is stipulated in the notice of merit increase for 2021. Mr. How states that the 2021 salary ought to be used to calculate the damages for his lost salary over the notice period of 24 months. This amounts to $827,507.20.

[24] In contrast, PRGX asserts that the court ought to calculate damages based on a four-year average of Mr. How's "cash compensation" of both his salary and bonus. This approach requires the court to look at the total income listed on Mr. How's T4 slips and deduct the "non-cash compensation and compensation related to being employed by a public company." The evidence of Ms. Howard ,the Chief Human Resources Officer of PGRX, is that the T4 slip would significantly inflate the plaintiff's stated income due to the inclusion of "taxable benefits and non-cash compensation specifically the taxable cash and non-cash income related to the vesting of stock that the plaintiff had been granted in previous years." In her affidavit, she sets out the vested stock in prior years. For example, in 2019 the plaintiff was said to have received $217,285.99 as a result of vested stock in the previous year. There were also non-cash taxable benefits of $2,690.50. In 2021, he received $9,625.84 a result of vested stock granted in the previous year and non-cash taxable benefits of $2,732.16, although an exact list of the non-cash taxable benefits being deducted has not been provided. The defendant's proposal asserts that the average of the salary and bonus over the proposed four years is $585,469. There was no calculation that disaggregated the bonus, which is within this average number and which, as noted below, PGRX says Mr. How is not entitled to during the notice period. As such, it is difficult to reconcile the defendant's remuneration calculation as it relates to either the salary or bonus components of the damages.

[25] The approach of PGRX combines salary and bonus together. It is my view that the preferred approach is to address each head of damages separately. They each have different considerations. In this case, as noted, the defendant disputes the plaintiff's entitlement to a bonus. As seen below, this requires a separate contractual analysis. The calculation proposed by PRGX would presumably need to be recalculated depending on the resolution of the bonus issue, although as presented in its factum it is not clear how this would be done. Frankly, the defendant's approach is unnecessarily complex. An approach that addresses each head of damages separately is more transparent and allows the court to address the individual issues separately. For reasons of both clarity and simplicity, I reject PGRX's approach.

[26] Mr. How received merit increases most years. In his 2021 notice, he was advised that his base salary was $413,753.60. This salary number does not require any deductions, in contrast to

the method proposed by the defendant. I am satisfied that in calculating the salary over the 24 months, that $413,753.60 per annum is the correct amount.

[27] In addition, I disagree with the defendant's calculation of a four-year average. Historically, in most years, Mr. How's base salary increased. There is no evidence to suggest that his salary would go down during the notice period. In such circumstances, taking a four-year average would unnecessarily reduce the salary component of his damages for the notice period. As a result, I accept that the proper calculation of damages for Mr. How's loss of salary over the 24 months is $827,507.20.

ii) Benefits

[28] Mr. How claims damages for various benefits including group healthcare, phone, and professional fees during the notice period. As it happened, Mr. How was never removed from the PGRX's group healthcare plan. It was agreed that the benefits would continue throughout the notice period determined by the court. As such, Mr. How will continue on PGRX's group healthcare plan for the remainder of the 24 months, concluding on July 29, 2024. Mr. How will also be entitled to damages in the amount of $3,000 for his cell phone plan and $3,200 for his professional accounting fees.

iii) Bonus

[29] Mr. How claims damages for the bonus he would have received during the notice period. A dismissed employee is entitled to any bonuses that the employee otherwise would have earned during the reasonable notice period (see *Matthews v. Ocean Nutrition Canada Ltd.*, 2020 SCC 26 (CanLII), [2020] 3 SCR 64, at para 53). This common law entitlement may be modified by contract but any plan that awards bonuses must unambiguously remove that entitlement for it to be effective. Accordingly, whether an employee's entitlement to a bonus ceases, is a matter of contractual interpretation. The Supreme Court of Canada in *Matthews* described the contractual interpretation process as follows:

> The question is not whether these terms are ambiguous but whether the wording of the plan unambiguously limits or removes the employee's common law rights (*Paquette*, at para. 31, citing *Taggart*, at paras. 12 and 19-22). Importantly, given that the LTIP is a "unilateral contract", in the sense that the parties did not negotiate its terms, the principle of contractual interpretation that clauses excluding or limiting liability will be strictly construed "applies with particular force" (*Taggart*, at para. 18, citing *Hunter Engineering Co. v. Syncrude Canada Ltd.*, 1989 CanLII 129 (SCC), [1989] 1 S.C.R. 426, at p. 459). As this Court recognized in *Tercon Contractors Ltd. v. British Columbia (Transportation and Highways)*, 2010 SCC 4, [2010] 1 S.C.R. 69, at para. 73, albeit in the commercial context, and cited here to underscore just this point, sophisticated parties are able to draft clear and comprehensive exclusion clauses when they are minded to do so.
>
> To this end, the provisions of the agreement must be absolutely clear and unambiguous. So, language requiring an employee to be "full-time" or "active",

> such as clause 2.03, will not suffice to remove an employee's common law right to damages. After all, had Mr. Matthews been given proper notice, he would have been "full-time" or "actively employed" throughout the reasonable notice period (*Paquette*, at para. 33, citing *Schumacher v. Toronto-Dominion Bank* (1997), 1997 CanLII 12329 (ON SC), 147 D.L.R. (4th) 128 (Ont. C.J. (Gen. Div.)), at p. 184; see also para. 47; Lin, at para. 89). Indeed, the trial judge and the majority of the Court of Appeal agreed that an "active employment" requirement is not sufficient to limit an employee's damages (trial reasons, at para. 398; C.A. reasons, at para. 66).

[30] In or around March 2016, Mr. How became eligible to participate in the Management Variable Plan ("MVP"), which became known as the Group Leader Incentive Plan in 2022 which provided senior employees with incentive bonuses. Bonuses were triggered by the company meeting various financial targets at a company level and below. In this case, the plaintiff was entitled to receive an objectively calculated bonus payment, targeted at 50% of his base salary but which could pay him up to 100% of his base salary, based upon the attainment of performance targets for both the entire organization and his own business unit.

[31] PGRX asserts that the plans only applied if the employee was actively employed on the date of distribution of the plan proceeds. As asserted in its statement of defence, "… the terms of the company's bonus plans were clear that the plaintiff must have been actively employed at the time that the bonus entitlements were payable" and "as the plaintiff was not employed as of the date that the bonus entitlements become payable, ……, he would not be eligible to receive such payments." While PGRX also asserted that the plan provided a discretionary bonus, the evidence established that there was no discretion exercised to deny the bonus in the years leading up to Mr. How's dismissal. As such, I do not find that the bonus was discretionary.

[32] Given that the bonuses were tied to the economic performance of the company and business units, Mr. How's bonus for the 2022 fiscal year is calculable. In cross-examination Ms. Howard, on behalf of the defendant, testified that had Mr. How been employed with the defendant at the time the bonus was awarded, he would have been entitled to $260,133. In this regard, Ms. Howard testified as follows:

> Q. Thank you. So, is it accurate to say, based on the financial performance metrics in the 2022 plan document, the defendant has calculated that the plaintiff's bonus would have been $260,133 but for his termination?
>
> A. Correct. Based on actual results of the company at the end of the year, correct.
>
> Q. Thank you. And is it fair to say that if the plaintiff were still employed, this is the bonus he would have been paid?
>
> A. Correct

[33] I was directed to several documents by PGRX that it submits disentitled the plaintiff to a bonus as he was no longer a current active employee of the defendant.

[34] In 2019, Mr. How was provided with a new "offer of employment" letter tied to his most recent promotion. The letter sets out his continued entitlement to participate in the PGRX bonus plan:

> **MVP Bonus Plan**
>
> You will remain eligible to participate in the PRGX MVP bonus plan relating to your area of responsibility. Your pay-out potential at target is 50% of your base salary for achievement of annual performance goals and may go as high as a maximum 100% of your base salary if you achieve or exceed the annual maximum performance goals, all in accordance with the PRGX bonus plan document, as may be amended from time to time by the company.

[35] The plan for the 2022 year, renamed the Group Leader Incentive Plan, described an "Eligible Participant" as follows:

> Eligible Participant: An employee in an Eligible Position who meets the following criteria:
>
> 1) is not eligible to participate in any other incentive plan or program of the Company (unless the written terms of that plan expressly permit participation in both),
>
> 2) is in a regular full-time position (unless otherwise required by law),
>
> 3) is in an eligible position on or before September 30 of the Plan Year,
>
> 4) is not on a Performance Improvement Plan or other written warning, and
>
> 5) is employed when the bonus is scheduled to be paid.

[36] It defines "Earned Bonus" as follows:

> Earned Bonus: Amount due upon achievement of certain goals and the Eligible Participant is employed when the bonus is scheduled to be paid.

[37] A section entitled "Status Changes & Termination" reads as follows:

> Changes in employment status or position during the Plan Year may impact eligibility to participate in the Plan or to receive any bonus payment.
>
> ……..
>
> The Plan rewards Eligible Employees for past work and is an incentive for continued employment and future service. Only Earned Bonuses are paid. If your employment ends for any reason during the Plan Year or prior bonuses being paid, whether with or without cause, you will not be eligible to receive a bonus payment

> except as otherwise required by applicable law or separate written agreement with the Company.

[38] In looking at the entitlement of a bonus, *Matthews* requires me to answer two questions: (1) would the employee have been entitled to the bonus or benefit as part of their compensation during the reasonable notice period? and (2) if so, do the terms of the employment contract or bonus plan unambiguously take away or limit that common law right?

[39] As to the first question, as answered by Ms. Howard, but for his termination, Mr. How was entitled to a bonus in 2022 and there is no evidence that he would not be similarly entitled to a bonus in 2023. These bonuses are calculable and paid based on the company and division performance, rather than the individual's performance. As to the second question, I do not read the plan documents as unambiguously removing the entitlement to a bonus during the notice period. The limiting language of the plan refers to a requirement that the plaintiff be employed. For example, in Status Change & Termination, it refers to circumstances where "**your employment ends** for any reason, whether with or without cause" (emphasis added) and in the definitions of Earned Bonus and Eligible Participants the limiting language refers to an employee who "is employed". In my view, this language does not deny the plaintiff his entitlement to a bonus. During the notice period, the employee is treated as employed for purposes of compensation. He is not treated as if the "employment ends". This is very much like the argument in *Matthews* which was rejected. In *Matthews*, the particular provision at issue stated as follows:

> 2.03 CONDITIONS PRECEDENT: ONC shall have no obligation under this Agreement to the Employee unless on the date of a Realization Event the Employee is a full-time employee of ONC. For greater certainty, this Agreement shall be of no force and effect if the employee ceases to be an employee of ONC, regardless of whether the Employee resigns or is terminated, with or without cause.

[40] The Supreme Court held that this provision was not sufficient to oust the common law right to damages. Phrases requiring an employee to be "full-time" or "active" were also not sufficient to remove an employee's common law right to damages. The reason for this was stated by Justice Kaiser as follows:

> Yet, it bears repeating that, for the purpose of calculating wrongful dismissal damages, the employment contract is not treated as "terminated" until after the reasonable notice period expires. So, even if the clause had expressly referred to an unlawful termination, in my view, this too would not unambiguously alter the employee's common law entitlement.

[41] The terms of the PGRX's plan do not, in my view, exclude Mr. How's entitlement to a bonus during the notice period. For purposes of compensation in lieu of notice he "is employed" and his employment is not at an "end". Rather, he is to be treated as an employee during the notice period and that includes payment of the bonus.

[42] There is no dispute as to what the bonus would have been for 2022. He would have received $260,133. For the remainder of the notice period, I accept the plaintiff's approach to calculating

the bonus, being a three-year average. This approach was accepted as being reasonable by the Court of Appeal in *Celestini v. Shoplogix Inc*., 2023 ONCA 131 (CanLII), at para 59. Unlike his salary which could be expected to be the same over the notice period, the bonus fluctuated. An average acknowledges this fluctuation. The average annual bonus between 2020 – 2022 was $228,773.60. I find this to be a reasonable proxy for the annual bonus for the remainder of the notice period, as such, for the remaining 19 months of the notice period commencing in January 2023, the bonus award is $362,224.87.

[43] The total bonus compensation is $260,133.00 for 2022 and $362,224.00 for the remaining 19 months of the notice period for a total $622,357.00.

Mitigation

[44] While a dismissed employee is entitled to damages in lieu of reasonable notice, the dismissed employee is not entitled to damages where the defendant can establish that the dismissed employee did not take reasonable steps to mitigate such losses by seeking alternate comparable employment. As a matter of damage theory, it is said that "[l]osses that could reasonably have been avoided are, in effect, caused by the plaintiff's inaction, rather than the defendant's wrong." (see *British Columbia v. Canadian Forest Products Ltd*., 2004 SCC 38, [2004] 2 S.C.R. 74, at para. 17).

[45] However, the onus is on the defendant to establish that the dismissed employee both failed i) to take reasonable steps to search for a job and ii) that a job comparable to the job lost by the employee could have been found. As stated by the Supreme Court of Canada in *Evans v. Teamsters* Local *Union No. 31*, 2008 SCC 20 (CanLII), [2008] 1 SCR 661, at para 30:

> This Court has held that the employer bears the onus of demonstrating both that an employee has failed to make reasonable efforts to find work and that work could have been found (*Red Deer College v. Michaels*, 1975 CanLII 15 (SCC), [1976] 2 S.C.R. 324).

[46] In *Lake v. La Presse*, 2022 ONCA 742 (CanLII), Justice Van Rensburg reiterated that the onus is on the defendant to not only establish the failure of the plaintiff to look for reasonable comparable employment but also to establish that reasonable comparable employment was available. Justice Van Rensburg articulated the general principle at para 12 as follows:

> While a terminated employee has a duty to take reasonable steps to mitigate, the onus is on the defendant to demonstrate that the plaintiff could reasonably have avoided a loss or that she acted unreasonably in failing to do so: Gryba v. Moneta Porcupine Mines Ltd. (2000), 2000 CanLII 16997 (ON CA), 5 C.C.E.L. (3d) 43 (Ont. C.A.), at para. 57. The defendant must prove: (1) that the plaintiff failed to take reasonable steps to mitigate her damages; and (2) that if she had done so she would have been expected to secure a comparable position reasonably adapted to her abilities: Link v. Venture Steel Inc., 2010 ONCA 144, 79 C.C.E.L. (3d) 201, at para. 73.

[47] This onus is not ousted or reversed simply because the employee did not take the mitigating steps. The onus remains with the employer. In *Southcott Estates Inc. v. Toronto Catholic District School Board*, 2012 SCC 51 (CanLII), [2012] 2 SCR 675, the Supreme Court considered a case where the plaintiff erroneously believed it had no obligation to mitigate and as such made no effort to do so. This did not alter the onus on the defendant. The court explained as follows:

> As noted above, where it is alleged that a plaintiff has failed to mitigate damages, the onus of proof on a balance of probabilities lies with the defendant, who must establish not only that the plaintiff failed to take reasonable efforts to find a substitute, but also that a reasonable profitable substitute could be found. Thus, it would be an error to suggest that the defendant did not have the burden of showing that mitigation was possible even where the plaintiff made no attempt to do so. (Para 45/46)

[48] In this case, the onus is clearly on PGRX to establish that Mr. How did not make reasonable efforts to find work and that comparable work could have been found had he conducted a reasonable search. Because there has been a finding of a breach of contract and thus an entitlement to damages, the onus on the defendant "is by no means a light one", as the defendant seeks to impose responsibility for the loss on the plaintiff who was terminated innocently without cause (see *Michaels v Red Deer College*, [1976] 2 SCR 324, at p 331-2).

[49] PGRX asserts that Mr. How was in a very niche business market, yet he did not look to PGRX's competitors for employment opportunities. In his affidavit, Mr. How described PRGX as being "in a highly specialized and niche business of performing recovery audits for some of the largest corporate retailers in the world". The next closest competitor generated 30% of PGRX's revenue. PRGX concurs with this assessment. Mr. How further testified "for the most part there are no available positions at other companies that operate in my specialized field". Given the "specialized and niche" nature of the market, PGRX argues it was unreasonable for Mr. How not to have made a targeted search of the defendant's competitors.

[50] Before continuing with the analysis on mitigation, I need to address an issue that arose during the course of argument as to the admissibility of an answer to undertaking given by Mr. How. This dispute arose as follows. As part of his affidavit, Mr. How provided a detailed chart setting out his mitigation efforts, including a listing of those whom he spoke to in search of employment. During the cross-examination of Mr. How, defendant's counsel examined Mr. How on his mitigation efforts. In doing so, it was put to Mr. How that he failed to contact a host of individuals and companies who were competitors of PRGX. The defendant's counsel then asked Mr. How for an undertaking to update his job search chart. The specific question was as follows:

> MR. SMITH [counsel to PGRX]: All right. Counsel, can I get an updated mitigation journal in advance of the motion? Let's say up until 17 the end of September 2023.
>
> MR. LUBLIN [counsel to Mr. How]: Yes.

[51] Not surprisingly, Mr. How then called the people who the defendant had alleged he ought to have called if he was serious about obtaining a job in the same industry. Mr. How then provided an answer to the undertaking that he had not only attempted to contact the competitors and those in the industry but that where contact was made there were no jobs offered as a result of those inquiries. PGRX then objected when Mr. How attempted to file by way of affidavit the answer to the undertaking question. The defendant's counsel objected saying that his purpose in putting the questions to the plaintiff was to establish his lack of mitigation efforts and that Mr. How ought not to be able to file an affidavit with the answer to the undertaking as it undermines the cross-examination and unfairly bolsters the plaintiff's case. PGRX therefor submits that the answer to the undertaking ought not to be admissible in this proceeding.

[52] I disagree. The concept of undertakings generally arises in respect of examinations for discovery. In an examination for discovery, parties are permitted to give an undertaking and provide an answer at a later date. If questions on an examination for discovery include , as is the case here, a relevant undertaking, the answer to the undertaking may be either read into evidence by the opposing party, used by the opposing party to impeach the witness or may be cited by the party being examined to explain an answer relied upon by the opposing party. The undertaking and the answer form part of the transcript and may be used in the same way as the rest of the transcript. In a cross-examination on a summary judgment, there is no specific rule that permits for a question to be answered by undertaking. However, the practice of providing undertakings on a cross-examination has become more common. The wisdom of asking for any undertaking on a cross-examination is always questionable. An admissible and relevant answer to an undertaking on an examination of discovery forms part of the transcript of the examination and I see no reason that an answer to an undertaking on a cross-examination ought not to be treated the same.

[53] In this case there was a request for an undertaking by the defendant for the very information that the plaintiff provided. The reality is that PGRX does not like the answer as it purports to address a perceived deficiency in Mr. How's case. There was no obligation on the defendant to ask for the undertaking and undoubtedly it was asked for some strategic reason. Whatever the reason, given that the defendant asked for the undertaking, I see no reason why the answer ought not to be admitted, particularly as PGRX seeks to use the very questions giving rise to the requested undertaking. As the defendant relies on these excerpts, I admit the undertaking answer into evidence to be read with the questions and answers of Mr. How filed by the defendant.

[54] As a practical matter, there is no need for an affidavit by the plaintiff attaching the answer to the undertaking, rather the undertaking can be filed with the transcript excerpts. I should add that the entire transcript of the defendant's cross-examination of the plaintiff has not been uploaded to CaseLines. Rather, the relevant excerpts are contained in the defendant's compendium. Although a compendium is a compilation of what is in the record of proceeding and is not itself the record, the matter was argued by both sides as if the excerpts of Mr. How's examination were filed as part of the formal record. Based on the arguments, I have proceeded on the basis that the transcripts in the defendant's compendium form part of the record and to the extent of any appeal those excerpts shall be considered part of the record.

[55] Returning to the PGRX's argument, PGRX asserts that even if the updated mitigation chart is admitted, that Mr. How still did not seek out employment in the "specialized and niche industry"

in a timely manner. I agree with PGRX that it would have been wise for Mr. How to begin his search within the industry in which he worked much earlier. However, the test is not one of perfection and the failure to make these enquiries earlier does not mean that the Mr. How's efforts were unreasonable. Mr. How submitted a detailed log of his efforts both of upgrading his skills and seeking out employment. The logs demonstrated a sustained effort to seek senior level employment, albeit in various industries. Mr. How further submits that PGRX ought not to criticize Mr. How for acting unreasonable when PGRX made no effort to assist Mr. How to find employment, either in or outside the defendant's industry. For example, notwithstanding an offer to provide a reference letter when he was first terminated, no reference letter was ultimately forthcoming by PGRX, even though Mr. How was not dismissed for cause. Similarly, notwithstanding the criticism that Mr. How did not begin his search within this niche industry in a timely fashion, PGRX took no steps to facilitate him contacting others in the industry (or elsewhere). In my view, PGRX was not interested in genuinely helping Mr. How avoid any losses due to his termination. Rather, PGRX was prepared to use what it saw as a gap in Mr. How's mitigation effort as a means to limit his damage claim. As stated by Taylor J. in *Maxwell v. United Rentals of Canada Inc.*, 2015 ONSC 2580 (CanLII) at para. 40 "... if an employer intends to argue the failure to mitigate on the part of the former employee, it would be well advised to present evidence of assistance that was offered to the terminated employee during his or her job search".

[56] Ultimately, mitigation is a two-part test. The second part of the test requires PGRX to establish that Mr. How could have found comparable employment. As stated in *Lake* the issue is "whether the [the employer] had proven that, if reasonable steps in mitigation had been taken by the [employee], she would have found a comparable position during the reasonable notice period" (at para 34). PGRX has led no evidence that a comparable job was available with any of the competitors at any time since Mr. How's termination. PGRX clearly knows the players in the industry and, if comparable jobs were available in the industry, that evidence could have been called. Moreover, there was no evidence adduced by PGRX of any comparable jobs suitable for Mr. How since his termination. The onus was on PGRX to establish both prongs of the test. Regardless of whether Mr. How acted reasonably or not at the outset of his search, the defendant has failed to establish that he could have obtained a comparable job had he conducted the search as proposed by PGRX.

[57] I do not find that PGRX has met the onus of establishing that Mr. How failed to mitigate his losses.

Vacation Pay and Unpaid Bonus

[58] There were two issues related to vacation pay raised by Mr. How. First, he asserts that he is entitled to vacation pay calculated at 12% on the amount of any bonus awarded during the notice period. This was not contested and, as such, I find that the plaintiff is entitled to vacation pay on the bonus of 12%.

[59] There was a second issue with respect to vacation pay that was allegedly not paid and owing from prior years. The issue first arose when Mr. How advised PGRX that he thought the company had neglected to pay vacation pay on bonuses for the years 2017 and 2018. PGRX investigated and concluded that Mr. How was correct, and that vacation pay was owing on bonuses

for those years. Accordingly, vacation pay was retroactively paid on those amounts. While preparing her affidavit for this matter, Ms. Howard discovered a further error in the calculation of the vacation pay for 2018 and 2019. She testified as follows:

> In preparing this affidavit, it came to my attention, for the first time, that there was an **inadvertent error** in the calculation of the plaintiff's vacation pay for 2018 and 2019, such that he did not receive his full entitlements.

[60] As a result of this admission, the plaintiff amended his claim for his past vacation pay which Ms. Howard identified as being miscalculated. PGRX responds by saying that the plaintiff's claim is out of time and beyond the limitation period. I disagree. A claim must be discoverable before a plaintiff has an obligation to commence an action. In this case, the error was only disclosed by the defendant while preparing for this proceeding. Accordingly, I do not see how Mr. How's claim is statute barred by virtue of a limitation period and I therefore reject this defence.

[61] There is a debate as to the amount of this error. Mr. How says the amount owing is $86,065. PGRX states the amount owing is $63,186.

[62] I accept the calculation of the defendant. Ms. Howard in her affidavit set out the amounts owing for both the 2018 and 2019 vacation pay and the amounts actually remitted at that time. In 2018, the amount owing for vacation pay was $43,767.33. The amount actually remitted to the plaintiff for 2018 was $13,871.20. This left a shortfall owing to Mr. How of $29,896.13. Similarly in 2019, the amount owing was $63,560. The amount remitted was $30,270. This left a shortfall owing to the plaintiff of $33,290. The total of the two amounts owing is $63,186. Mr. How is therefore entitled to $63,186 for unpaid vacation pay.

[63] The last issue raised is an alleged miscalculation of the 2021 bonus. He claims $12,249 in additional bonus. The plan for 2021 provides the bonus was to be calculated using the company's "adjusted revised EBITDA." Mr. How's calculation does not use the "adjusted revised EBITDA" but rather the unrevised and unadjusted EBITDA. I am satisfied that the defendant has used the correct adjusted revised EBITDA to arrive at the 2021 bonus. Accordingly, I find that there is no further money owing for the 2021 bonus.

Disposition

[64] The plaintiff is awarded.:

Salary-$827,507.20

Bonus + vacation pay (12%) -$622,357.00+ 74,682.84=$697,039.86

Benefits-$6,200 (plus group health coverage for the remainder of the notice period)

Past Vacation pay-$63,186.00.

Total Money Award for 24 months notice plus past vacation pay-$1,593,933.06.

Less amounts paid for 34 weeks of severance already provided-$270,531.20.

[65] Based on the above, the plaintiff is awarded $1,323,401.86 plus group health benefits up to July 29, 2024.

[66] The plaintiff is entitled to the applicable pre- and post-judgment interest in accordance with the *Courts of Justice Act*, RSO 1990, c C.43.

Costs

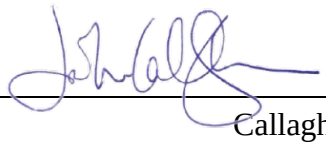
[67] I encourage the parties to agree on costs. If they cannot, I will receive costs submissions as follows:

a. Any party claiming costs shall file written submissions of no more than four pages, plus a bill of costs and any offers to settle, within ten days of the release of these reasons.

b. Any responding submissions shall be limited to three pages, plus a bill of costs and any written offers to settle and shall be delivered within one week of receipt of the other party's costs submissions.

c. Any reply to submissions shall be delivered within two business days of receipt of responding submissions and shall be no more than one page in length.

d. All submissions shall be uploaded to CaseLines delivered to me by way of email to my assistant from whom you received this decision.



Callaghan, J.

Released: 20231110

CITATION: Jimmy How Tein Fat v. PRGX Canada Corp., 2023 ONSC 6374
COURT FILE NO.: CV-22-00685549-0000
DATE: 20231110

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

JIMMY HOW TEIN FAT

Plaintiff/Moving Party

– and –

PRGX CANADA CORP.

Defendant/Responding Party

REASONS FOR JUDGMENT

CALLAGHAN, J.

Released: 20231110