COURT FILE NO.: SC-22-00162197-0000

DATE: September 25, 2024

ONTARIO

SUPERIOR COURT OF JUSTICE

SMALL CLAIMS COURT

BETWEEN:

LESLEY BYRD	)	
Plaintiff	)	Cole Boucher
	)	
– and –	)	
WELCOME HOME CHILDREN'S RESIDENCE INC.	)	
	)	
Defendant	)	Puneet Tiwari

HEARD July 22 and August 27, 2024

REASONS FOR JUDGMENT

Deputy Judge C. Kelly

OVERVIEW

[1] The trial of the plaintiff's claim was heard over two non-consecutive days on July 22 and August 27, 2024. My judgment was reserved.

[2] The plaintiff alleges she was constructively dismissed from her employment with the defendant and seeks damages of $25,287.18.

[3] The defendant submits that the plaintiff received notice of the change of the terms of her employment in October of 2021, condoned the changes and thereafter abandoned her employment. In the alternative, the defendant submits that, if the plaintiff was

constructively dismissed, she was able to immediately mitigate any damages she may have suffered and there are no sums owed to her.

CHRONOLOGY OF UNDISPUTED FACTS

[4] The facts below are not in dispute.

[5] The defendant corporation operates a care home. The principals of the defendant corporation are Lisa Pelletier ("Lisa") and her brother, Robert Pelletier ("Bob"). Lisa and Bob took over ownership and management of the company roughly 10 years ago from their parents. Lisa is also a primary school French teacher.

[6] Lesley Byrd ("Lesley" or "the plaintiff") began working for the defendant in April 2018. There was no written employment contract and her starting wage was $19 per hour. Lesley was not a salaried employee – she was paid for the hours she worked and her hours varied. In Lesley's words, she typically worked full-time hours "and then some".

[7] Lesley received numerous promotions and pay increases. In 2019 she was promoted to the title of manager of clinic support and services and her pay increased to $26 per hour.

[8] Lesley was a valued employee. She reported directly to Lisa. In Lisa's words, Lesley was "her right-hand person" and "excellent at her job".

[9] In May of 2020 Lesley told Lisa that her husband was being posted by the Canadian Forces to Europe. The details of the posting were not yet known. Lisa used the word "devastated" to describe her reaction to Lesley's news. Lesley and Lisa thereafter discussed how Lesley might continue to work for the company while abroad. Nothing discussed was reduced to writing.[1]

[10] Mr. Byrd, Lesley, and their four children all moved to Belgium in the summer of 2020. Mr. Byrd's posting officially commenced on September 1, 2020 and ended on July 23, 2023.

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[1] Some of what was said during those conversations is disputed and is therefore addressed below under the heading "Analysis".

[11] Lesley continued to work for the defendant remotely from Belgium. Her pay remained the same. Her hours continued to vary from week to week. It is common ground that, for at least a year, there were no issues on either party's part with Lesley's remote work arrangements or the number of hours worked.

[12] On August 9, 2021 (approximately one year after the family's relocation), Lesley started working at a second job in a school on the Canadian Forces Base. Lesley said nothing about this additional employment to Lisa or Bob. Lesley's work on Base was clerical. She started at roughly 7:30 a.m. local time in Belgium. Her work for the defendant started around 3:30 p.m. local time in Belgium (9:30 a.m. EST in Canada).

[13] On October 14, 2021, Lesley and Lisa had a virtual meeting. They disagree on many details of that conversation, however, they agree that Lisa told Lesley:

a. a new on-site manager would be hired;
b. Lesley's position would change but that the details of the changes were not yet worked out; and
c. things would remain status quo until sometime in the New Year.

[14] On October 17, 2021, as part of her responsibilities, Lesley posted the job opening for the position for an on-site residential program manager.

[15] In November of 2021, an undated letter was sent by Lisa to staff advising of coming changes at Welcome Home. That letter includes the following text:

"I wish to take this opportunity to update you on some upcoming changes. As many of you are aware, a job ad was posted on Indeed in search of a Residential Program Manager. First and foremost, nobody is leaving. Truth of the matter is Bob, and I are tired and need help! The new hire will in in addition to the existing management team.

…

As we transition, management will be redefining our roles and responsibilities. Once these roles are determined and clearly outlined, it will be shared with all of you.

…

I am pleased to announce that Don Petitpas has accepted the position.

…

Don will not be fully in his position until the new year. Effective Monday Nov. 8, he will be starting a gradual transition and spending a few hours a week at Welcome 'learning the ropes' so to speak"...

[16] Lesley was paid for the following hours in the fall of 2021:

September 12th to September 25th - 94 hours
September 26 to October 9th – 89 hours;
October 10th to October 23rd – 56 hours;
October 24th to November 6th – 59 hours;
November 7th to November 20th – 58 hours;
November 21st to December 4th – 63 hours;
December 5th to December 18th – 70 hours; and
December 19th to January 1, 2022- 84.5 hours.[2]

[17] Effective January 2022 Mr. Petitpas started working full-time hours.

[18] At a meeting on January 7, 2022 Lesley was told she was approved to work not more than 15 hours per week, absent special permission. Lesley was asked to provide a proposed work schedule. It is common ground that Lesley was upset by these changes and immediately took two weeks of unplanned vacation. Lisa approved Lesley's last-minute vacation time request. During Lesley's vacation period she retained a lawyer.

[19] Lesley returned to work. There was a further meeting on January 26, 2022, where the majority of Lesley's responsibilities were assigned to Don Petitpas or Amanda. It is common ground that the meeting was contentious and that Lesley was frustrated.

[20] According to the documentary evidence, Lesley's last day worked was on February 15, 2022. Direct communication between Lesley and Lisa ended around February 18, 2022. Thereafter communication was through lawyers.

[21] There is disagreement over the options that were then available to Lesley. The documents filed confirm:

a. In a letter dated March 2, 2022, counsel for the defendant stated, "It is an expectation of Ms. Byrd's employment that she supervises employees in-person". The letter concludes with "The Company appreciates Ms. Byrd's work and looks forward to her physical return to the workplace to continue performing her supervisor role".

b. On March 10, 2022, defendant's counsel emailed Lesley's counsel again and offered two options - to reattend physically at the workplace or resign.

[2] This last entry included 22.5 hours of statutory holiday pay.

[22] On April 28, 2022, Lesley submitted a written letter of resignation to the defendant.

THE PARTIES' POSITIONS

[23] The plaintiff alleges that she was constructively dismissed from her employment and that the defendants are liable to pay damages of $25,287.18. She asserts the proper notice period is 6.5 months. She calculated the damages owed to her based on her 2021 T4 from the defendant, divided by 12, and multiplied by 6.5 months, for a total of $25,287.18. She denies there should be any deductions from this amount.

[24] The defendants' position is that the plaintiff:

a. Was not a credible witness and her evidence should not be accepted by the Court;,
b. was given notice of the changes in her employment contract in October 2021;
c. condoned the changes and then later abandoned her employment; and
d. in the alternative, if the plaintiff was constructively dismissed, she is not owed any damages given the notice of her dismissal and her damages were mitigated by her continuation in her job with the Government of Canada that paid more than her employment with the defendant.

[25] In response to a request by the Court to file legal authorities addressing an employee's duty to disclose supplementary employment, the defendant asserted it had after-acquired cause for the plaintiff's dismissal.

ISSUES:

[26] The issues to be adjudicated are:

a. Was the plaintiff constructively dismissed?
b. Does the doctrine of after-acquired cause apply to the case at bar?
c. If there was a dismissal what was the reasonable notice period?
d. How should the principles of mitigation be applied in circumstances where the plaintiff had two jobs?
e. Prejudgment interest.
f. Costs.

ANALYSIS

General Comments on Credibility

[27] There were two witnesses at trial: the plaintiff and Lisa Pelletier.

[28] Both witnesses were credible and reliable in certain aspects of their evidence. At times, each showed candor by making admissions against their own interests. On other occasions, their testimony appeared to be informed by bias in favour of self-interest.

[29] I am not required to believe or disbelieve a witness's testimony in its entirety. I may accept some, part, or all of a witness's evidence. I may also attach a different weight to different parts of a witness's evidence. In the circumstances of this case, I have considered each witness's credibility on an issue-by-issue basis.

Was the Plaintiff Constructively Dismissed?

Test for constructive dismissal

[30] The Supreme Court defined the concept of constructive dismissal in *Farber v Royal Trust Co*., [1997] 1 S.C.R. 846 at para. 34:

> A constructive dismissal occurs when an employer makes a unilateral and fundamental change to a term or condition of an employment contract without providing reasonable notice of that change to the employee. Such action amounts to a repudiation of the contract of employment by the employer whether or not he intended to continue the employment relationship. Therefore, the employee can treat the contract as wrongfully terminated and resigned which, in turn, gives rise to an obligation on the employer's part to provide damages in lieu of reasonable notice.

[31] In *Potter v New Brunswick Legal Service Commission*, 2015 SCC 10, the Supreme Court articulated a 2-prong test to determine if constructive dismissal has occurred. Satisfaction of either branch of the test is sufficient and the Court is called on to apply an objective analysis in determining whether there was a breach of the employment contract. The first branch of the test requires the Court to review the specific terms of the employment contract and determine whether there has been a substantial alternation to an essential term of the contract. The second branch allows for constructive dismissal to be established when, viewed in light of all the

circumstances, a reasonable person would believe that the employer no longer intended to be bound by the contract. The focus on the second branch is on a cumulative effect of past acts by the employer, rather than a single act.

[32] The burden of proof rests on the employee to establish that they have been constructively dismissed.

Terms of Lesley's Employment

[33] Before I can determine the issue of constructive dismissal, I must address the terms of Lesley's oral employment contract. Specifically, the parties disagree over:

a. The terms under which Lesley began to work remotely; and
b. whether Lesley's employment contract required her to work exclusively for the defendant.

[34] Lesley's evidence was that military spouses and families are expected to go with members on postings abroad, "unless there is an act of war".

[35] Both parties knew that Mr. Byrd's posting message was for a fixed period and that any changes to Lesley's employment would therefore be for a fixed period of time and not permanent.

[36] Lesley's evidence was that, before she left for Europe, she and Lisa agreed:

a. She would work remotely from Europe during her husband's posting; and
b. her rate of pay would remain unchanged.

[37] Lesley denied discussions with Lisa of a change to the number of hours she would work from Europe or that the defendant would have the right to recall her to Canada if they did not believe the remote work arrangement was effective.

[38] Lisa's evidence was that when she got word of the Byrd family's posting to Europe her staffing situation was "critical" and she was desperate to keep Lesley and make a virtual arrangement work. Lisa testified she had a really good working relationship with Lesley and considered her a friend. She testified that her words to Lesley were, "Let's try this until this doesn't work anymore". In cross-examination Lisa candidly admitted that she did not say to Lesley that she could be recalled to Canada if the new arrangement was not working to the employer's satisfaction.

[39] There was no documentary evidence filed by either party relating to their discussions before Lesley left Canada. Both parties' oral evidence confirmed that Lesley worked remotely, without complaint, for a significant period of time (at least 13.5 months) from Europe. Both parties acknowledge Lesley's hours varied between September 2020 and the fall of 2021 but there were no disputes over these fluctuations.

[40] Based on the testimony heard, I find that remote work from Europe became an accepted part of Lesley's job.

[41] Lesley testified that she was never told of a requirement that her work for the defendant was exclusive and precluded other employment. She further testified other employees of the defendant had second jobs.

[42] Lisa's evidence on this issue was less consistent and credible than Lesley's. At one point in her evidence Lisa said her staff need to be available 24/7. At another point she testified the Lesley was permitted to set her own hours and had a lot of flexibility. Lesley's pay stubs confirm variance in her hours worked.

[43] A letter of recommendation Lisa prepared for Lesley in January of 2021 was entered into evidence. Clearly Lisa knew that Lesley was seeking, at a minimum, some form of volunteer work outside of her employment. The defendant now complains of Lesley taking a French course and, in a written submission delivered after closing arguments, referred to this as "time theft". Yet, in the defendant's own documents Lisa acknowledges that Lesley is taking a French course and commends her saying, "Très bien".

[44] On the evidence before me I find that Lesley's employment contract with the defendant did not contain a term that she work exclusively for the defendant. In the circumstances of this case, I find that Lesley did not have a duty to inform the defendant of her additional employment. Further, the evidence at trial was insufficient to establish that Lesley breached her duty of good faith performance of the employment contact. To quote from the Supreme Court's decision in *Bhasin v Hrynew*[3], "A duty of honest performance is not to be equated with a positive obligation of disclosure".

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[3] 2014 SCR 71

Disputed Events Between October 2021 and April 2022

[45] I accept Lisa's evidence that on October 14, 2021 that she told Lesley that she needed more help on the ground in Ottawa. Lisa's own notes of that conversation confirm that she told Lesley, "This is not a performance issue – just a location issue".

[46] In cross-examination Lisa admitted that she did not have concrete answers for Lesley at the October meeting because she did not yet fully how know how the coming changes would impact Lesley.

[47] Lesley's pay stubs between October, 2021 and January 1, 2022 confirm that there was a wide variance in hours worked. Viewed as a whole, they show that the defendant did not unilaterally change Lesley's hours between October 2021 and January 1, 2022.

[48] I find that on January 7, 2022, Lisa told Lesley not to work more than 15 hours unless first obtaining approval from her and thereafter on January 26, 2022, Lesley was stripped of the majority of her responsibilities.

Events from January 26 to April 28, 2022

[49] Lesley testified that Lisa removed her from the message chain with Don and Amanda and that by mid-February she received no further tasks or direction. The documentary evidence confirms the last day Lesley logged hours working for the defendant was February 15, 2022. It is common ground that direct communication broke down between the parties by approximately February 17th and communication then moved into the hands of lawyers.

[50] Lisa testified that she wanted Lesley to continue to work 15 hours per week, that there was work for Lesley to do but that Lesley refused to do that work and abandoned her job.

[51] The documentary communication between lawyers leads to the conclusion that, if there was an option for Lesley to work 15 hours on an ongoing basis, it quickly evaporated. The letter dated March 2, 2022 from the defendant's counsel, says:

'Ms. Byrd's remote working arrangement was not permanent. As the Ontario government continues to lift Covid-19 restrictions on businesses, it is crucial that Ms. Byrd supervises the Company's employees at the workplace…It is an expectation of Ms. Byrd's employment that she supervises employees in-person;…Her supervisor role remains open and available to her, should Ms. Byrd agree to continue working…The Company appreciates Ms. Byrd's work and looks forward to her physical return to their workplace to continue performing her supervisor role".

[52] That three- page letter makes no reference to an option to work remotely fifteen hours per week.

[53] Lisa further testified that Lesley was given the option to continue to work her 2021 hours for a period of 6 more months, following which she would have the option to work 15 hours per week or resign. This proposition was not put to Lesley during her cross-examination (thereby violating the rule in *Browne v Dunn*). Lesley's counsel denied such an option had been received and asked that the defendant produce documentary proof of the proposal. No such document was tendered. While I accept that Lisa may have intended for such an offer to be made, I find that no such proposal ever was communicated to Lesley.

[54] The evidence taken as a whole supports the finding that the defendant made unilateral and fundamental changes to terms of Lesley's employment contract. A reasonable person would conclude that all of the above constitutes constructive dismissal.

[55] The defendant submits that the discussions between Lisa and Lesley on October 14, 2021 constitute notice of termination. Section 54 of *the Employment Standards Act*[4] requires written notice of termination. Where an employer is alleging oral notice, the onus is on the employer to show, *inter alia*, that the employee received and understood the oral notice, and that the notice was specific as to the date of termination (*Fanaken v Bell, Temple*, 1984 CanLII 1856 ONSC).

[56] I find that the meeting between Lisa and Lesley on October 14, 2021 did not constitute notice of termination. There was a paucity of evidence that Lisa told Lesley on October 14th what her new hours would be or when those hours would be effective. I find the discussions on that date were a well-meaning gesture on Lisa's

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[4] 2000, S.O. 2000, c. 41

part to inform Lesley that changes would be coming. They do not however constitute notice of termination.

[57] The defendant further submits that Lesley's actions in October through December 2021 condoned the employer's changes to her employment contract. Giving my findings that Lesley was only told in clear terms of the changes to her hours and responsibilities in January 2022, none of her actions prior to January can be found to amount to condonation.

[58] The defendant asserts that Lesley abandoned her employment in 2022. I find that the defendant created a situation of uncertainty with its haphazard notice to Lesley of unilateral changes to her employment contract. I find Lesley's communication of her decision to treat the defendant's breach as constructive dismissal was made within a reasonable period of time and that she did not abandon her job.

[59] In making these findings I reject the defendant's submission that the facts of this case are identical to *Staley v Squirrel Systems of Canada Ltd.*, 2013 BCCA 201 and that the defendant had the right to recall the plaintiff to work in Ottawa.

[60] The facts of the case at bar can be distinguished from *Staley*. Mr. Staley's move from Vancouver to Montreal was permanent. The defendant employer told Mr. Staley he could start working remotely from Montreal while the company president considered his request to do so permanently. Within a month of Mr. Staley working from Montreal the employer confirmed, in writing, his permission to work remotely was temporary. Within 3 months the employer presented Mr. Staley with a new employment contract which provided the employer could recall him to Vancouver at any time, with a termination provision of 3 months. Mr. Staley refused to sign the contract and was ordered back to Vancouver within 3 months. When he did not return, he was terminated without further notice or payment in lieu. The British Columbia Court of Appeal found that, on those facts, there was no constructive dismissal.

[61] Here, there was no credible evidence that the defendant communicated a specific right to recall the employee until March 2022 (approximately 20 months after the employee's move). A fundamental term such as a right to recall an employee from Europe to work in- person in Ottawa calls out for clear and timely notice to the employee. Here there was none.

After-Acquired Cause

[62] After-acquired cause was not pleaded by the defendant nor was an amendment sought at trial. It was not argued in the defendant's closing submissions.

[63] The defendant first raised this issue in a post-trial submission and asserted that the defendant had after-acquired cause to terminate the plaintiff for time theft.[5]

[64] Even setting aside the numerous procedural problems with the defendant's late-breaking claim, I find the evidence tendered does not support that the defendant after-acquired cause for the plaintiff's dismissal.

Quantifying Damages: Principles, the Reasonable Notice Period and Mitigation

Principles

[65] Once an employee has established they were constructively dismissed, they are then entitled to damages in lieu of reasonable notice of termination.

[66] The general rule is that damages should place the plaintiff in the economic position that they would have been in had the defendant performed the contract".[6]

Reasonable Notice

[67] "The determination of reasonable notice is a principled art and not a mathematical science as each case turns on its own particular facts".[7]

[68] In assessing the reasonable notice, I must consider:

a. The character of Lesley's employment;
b. her years of service;
c. her remuneration;
d. her age at dismissal; and
e. the availability of similar employment having regards to her experience, training and education.

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[5] The Court requested legal authorities and not further written submissions.
[6] IBM Canada Limited v Waterman, [2013] SCR 985 at para 2
[7] *Betts v IBM Canada Ltd.*, 2015 ONSC 5298

[69] Lesley was employed for the defendant for 4 years. She was 43 years old when she was dismissed. In Lisa's words, Lesley was "responsible for managing 40 employees". Lesley's position was relatively low paying for a manager.

[70] I find the most helpful precedent submitted to be *Cassidy v 277033 Ontario Ltd*.[8] In the circumstances of this case, I find a notice period of 6.5 months to be reasonable, inclusive of the statutory notice period.

Mitigation

[71] The defendant bears the burden of proof on a balance of probabilities to demonstrate that the plaintiff failed to take steps to mitigate her damages and that, if she had done so, she would have been expected to secure comparable employment. [9]

[72] Lesley asserts that, in her circumstances, she did all she could to mitigate her damages. She was in Europe as the spouse of an Armed Forces member, with extremely limited opportunities to find new employment during her notice period. She asserts that, but for her wrongful termination, she would have continued to work two jobs and there should be no deduction for monies earned during the notice period from her employment on Base. In making this submission she relies on the decision of the Court of Appeal in *Brake v PJ-M2R Restaurant Inc*.[10].

[73] Lisa candidly admitted in her evidence that there were no jobs for remote managers in spring 2022. I further accept Lesley's evidence that there were limited jobs for military spouses in Belgium and that returning to Canada to seek employment was not an option in the winter/ spring of 2022.

[74] The real issue is that Lesley had a second job when she was constructively dismissed and that job was paying her more than she was earning from the defendant. The defendant asserts bad faith and a failure on Lesley's part to make full disclosure. The defendant asserts that all of Lesley's earnings from the Government of Canada should be deducted and no damages are owing.

[75] I have already found that it was not a term of the plaintiff's employment with the defendant that she was required to work exclusively for the defendant. Lesley's work for the school and for the defendant were not mutually exclusive. Had Lesley remained employed by the defendant, she could have continued to supplement her

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[8] 2013 CanLII 40849 SCJ.
[9] Lake v LaPress 2022 ONCA 742 at para 12.
[10] 2017 ONCA 402.

income through work for the school. However, the issue in this case is whether Lesley's income from the school exceeded an amount that could reasonably be considered "supplementary".

[76] In *Brake*, Justice Gillese queries at what point a job might change from supplementary to substitution for work from a former employer? Justice Gillese suggests that this might not be a bright line test but instead, a portion of such income might be considered as a substitute for the amounts that would have been earned under the original contract and treated as deductible mitigation income:

> "Whether Ms. Brake's Sobey's income exceeded an amount that could reasonably be considered as "supplementary" and, therefore, not in substitution for her employment income was not argued. On the facts of this case, the amounts received from Sobey's do not rise to such a level that her work at Sobey's can been seen as a substitute for her work at PJ-M2R. I leave for another day the question as to when supplementary employment income rises to a level that it (or a portion of it) should be considered as a substitute for the amounts that would have been earned under the original contract and, accordingly be treated as deductible mitigation income." para 145

[77] The issue left by the Court of Appeal "for another day" is now before me.

[78] The evidence supports the conclusion that Lesley's position with the defendant was permanent whereas her employment at the school was intended to last only for the duration of her husband's posting.

[79] The evidentiary record of what the plaintiff earned at her employment at the school on Base is less than ideal. While I accord the plaintiff some latitude given there was a month's delay between the start and finish of her cross-examination, I find she was defensive and evasive in answering questions about her earnings at the school. I also find her documentary disclosure on this issue was scant. I have no evidence as to what, if any, other disclosure was requested by the defendant and refused.

[80] In these unique circumstances I will fill the evidentiary gaps with a dose of common sense. The documentary evidence shows that, as early as October 2021, the plaintiff was experiencing some strain as a result of having too many balls in the air – 2 jobs, health issues, and family responsibilities. I find it was unlikely she would have continued to successfully work two full-time jobs indefinitely. Even if she had, I find that fairness dictates that supplementary income beyond 25 additional hours of employment per week rose to a level that a portion of it should be treated as deductible

mitigation income. I therefore find a deduction of 30% of the plaintiff's wages earned from the Government of Canada to be fair and reasonable.

Calculation of Damages

[81] Based on the pay stubs filed, I find that the plaintiff worked, on average, 35 hours for the defendant per week at a rate of $26 per hour. On a monthly basis her earnings from the defendant averaged $3,940.

[82] Based on Lesley's Record of Employment issued by the Government of Canada and her oral evidence, I find that following her termination she earned on average $5,000 per month, working roughly 35 hours per week, with at least a month off in summer during which she was not paid.

[83] I find that during the statutory notice period, any income earned by the plaintiff should not be deducted from her damages.

[84] I therefore calculate the defendant owes damages as follows:

a. Two months' salary[11] of $3,940 per month for a total of $7,880; plus
b. four and a half months' salary of $17,730 less $6,750 (30% of her Government of Canada wages) = $10,980

Total Damages: $18,860.

Prejudgment Interest

[85] I award the plaintiff prejudgment at the rate prescribed by the *Courts of Justice Act*, commencing April 29, 2022.

[86] I want to thank counsel for their assistance.

Costs

[87] I encourage the parties to attempt to settle the issue of costs. If the plaintiff wishes to claim costs, she may serve and file submissions, in writing, for costs not later than October 15, 2024. Any response shall be filed by October 31, 2024. Any reply by the plaintiff shall be filed by November 7, 2024. Submissions shall be limited to 2 pages, excluding any bill of costs, disbursement receipts, or offers to settle.

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[11] Compromised of the statutory notice period and the unpaid summer vacation period, which together total approximately 2 months.

[88] Judgment shall issue accordingly.

Deputy Judge C. Kelly
September 25, 2024
COURT FILE NO: SC-22-00162197-0000