

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***Moody v. Telus,***
2003 BCSC 471

Date: 20030328
Docket: S025407
Registry: Vancouver

Between:

Earl Robert Moody

Plaintiff

And

Telus Communications Inc.

Defendant

Before: The Honourable Mr. Justice Cullen

Reasons for Judgment

Counsel for the Plaintiff:

R.H. Hamilton, Q.C.

Counsel for the Defendant

T. Sigurdson

Date and Place of Trial:

February 4 & 5, 2003
Vancouver, B.C.

BACKGROUND

[1] The plaintiff, Earl Robert Moody ("Moody"), was employed by the defendant Telus Communications Inc. ("Telus"), until June 21, 2002 when his employment was terminated by a letter dated June 18, 2002. Moody's employment was terminated as a result of reorganization and "downsizing" by Telus. There is no suggestion of dismissal for cause and in lieu of notice he was offered an amount representing 18 months salary and benefits. He was given information concerning his severance conditions and a release which he has not signed. The letter of termination and accompanying offer of severance options read as follows:

...

Dear Bob:

It is with regret that we inform you that your employment with TELUS Corporation is terminated effective June 21, 2002.

We would encourage you to take advantage of the Career Transition program. This program is available to assist you in pursuit of alternate options for the future. Enclosed for your review is a package of information on the Career Transition Centre (CTC) services and facilities. The CTC is open 8 am to 4 pm, Monday through Friday. Please call 604-893-3777 for further information.

Attached is a statement of your severance conditions, benefit options, and Release of All Claims. Please review these carefully over the next few days, sign the forms where indicated, and return them to Sharon Lyder, TELUS, Career Transition Centre, 3 - 1795 Willingdon, Burnaby, BC, V5C 5J2, by July 3, 2002.

We thank you for your past service and wish you the best in the future.

Yours truly,

Andy Brauer
Product Manager

...

Severance Conditions for Earl Moody

All claims arising out of your termination from TELUS Corporation on June 21, 2002 are settled upon the following terms:

1. Compensation in Lieu of Notice

In lieu of statutory and common law termination notice, you will receive a lump sum payment of \$127,900 (see Payment Options below).

2. Payment Options

Your options for receipt of these funds are as follows:

- a. Cash payment; \$127,900 (less Income Tax Deduction @ 30% and any other applicable deductions). For tax reasons, you may wish to split your severance amount into two payments.
- b. It is our understanding that you can transfer up to \$42,000 of your lump sum payment to a Registered Retirement Savings Plan (RRSP). Transferring these funds to an RRSP will defer income tax that would otherwise be assessed on this portion of your severance payment. If you would like to take advantage of this option, please complete and return the attached TD2 Tax Form.

Please complete the enclosed Employment Transition Cash Payment sheet outlining the options you have chosen.

3. Variable Pay

You will be eligible for prorated Variable Pay in accordance with the Variable Pay Plan. This will be determined according to your target award rate and the applicable component factors.

4. Payroll Reconciliation

All amounts owing to you in respect of your employment up to and including June 21, 2002 will be forwarded to you. An amount equivalent to any vacation entitlement accrued to June 21, 2002 will be paid to you less any statutory deductions.

5. Benefits and Pensions

Any coverage under the provincial health plan will cease on September 30, 2002. Any coverage under Dental Plan or Extended Health Plan will cease on September 21, 2002.

You may convert some of your employee life insurance to an individual policy in your name by July 21, 2002 without providing medical evidence of insurability.

Any unused Life Balance Account credits, including personal well-being days, are forfeited effective June 21, 2002.

With respect to your Health Care Spending Account (HCSA), expenses incurred on or prior to June 21, 2002 can be reimbursed with your HCSA credits. Submission deadline for reimbursement is March 31, 2003.

Your coverage under all other benefit plans will end on June 21, 2002. Your concession telephone will continue.

TELUS Corporation retains the right to alter the Benefits Plans from time to time and at any time at its sole discretion. Any such alterations will apply generally to all TELUS employees participating in the plans.

You may call the Pension Department regarding your pension eligibility and entitlements.

6. Stock Options

Any vested Team TELUS Options must be exercised within 90 days of June 21, 2002. Unvested options will immediately expire.

7. Company Property

As is company policy, please make arrangements to return your security pass and other company materials in your possession to your manager by June 21, 2002.

8. Confidentiality of Intellectual Property

All details of TELUS Corporation operations and its employees are proprietary and highly confidential. You agree not to disclose or use any such proprietary or confidential information.

9. Confidentiality Agreement

You agree to keep the terms of this offer confidential and not disclose them to anyone other than your spouse, your legal representative or financial counsellor. Any breach of this condition may result in the offer being withdrawn.

10. Placement Counselling

The services of the Career Transition Centre will be available to you. Please call 604-893-3777 for further information.

11. Release

These arrangements are strictly confidential upon you executing the attached Release of All Claims.

The foregoing arrangements shall be binding upon you and your heirs, executors and administrators, and upon TELUS Corporation and its successors and assigns. These arrangements are open for acceptance by you until 4:00 p.m., July 3, 2002. If the foregoing accurately sets out your understanding of the arrangements between you and TELUS, please indicate your agreement and acceptance by signing below where indicated and return it to Sharon Lyder, TELUS, Career Transition Centre, 3 - 1795 Willingdon, Burnaby, BC, V5C 5J2. Please also enclose the executed Release of All Claims.

Should you have any questions, please direct them to Sharon Lyder at 604-893-3770.

The foregoing is agreed to and accepted this _____ day of _____,
_____,
(month)(year)

Earl Moody

[2] At the time of his termination, Moody was 51 years old and held the position of Product Manager for Telus' 911 emergency program. His base salary was \$68,204 per annum. He had limited spending authority, up to \$25,000, no direct supervisory responsibilities and no hiring or firing responsibilities. He had worked as a regular full-time employee since May 31, 1976.

[3] In the fall before he was terminated, Moody had been diagnosed with bladder cancer. He testified that he successfully completed a course of treatment several weeks before his termination but was told by his doctors that the cancer could recur and he is required to "watch carefully" for the next 10 years. He testified that his supervisors were aware of his cancer and treatments although he only missed seven days of work during the course of his treatments.

[4] Before becoming a regular full-time employee Moody had worked in temporary positions with Telus, formerly BC Tel, as follows:

1. April 27, 1970 - August 28, 1970 as a summer student.
2. April 21, 1971 - August 27, 1971 as a summer student.
3. April 26, 1972 - September 1, 1972 as a summer student;
4. May 2, 1973 - September 7, 1973 as a summer student.
5. September 12, 1973 - December 14, 1974 as a temporary apprentice.

The periods of summer employment were during Moody's attendance at the University of British Columbia where he received a Bachelor of Commerce degree in 1973.

[5] As mentioned, after leaving what was then BC Tel in December of 1974 for a period during which he tried his hand at accounting, Moody returned to the employ of the defendant on May 31, 1976 and remained with the company from then until his termination.

[6] In his case, the plaintiff put in evidence as Exhibit 6 a report from Telus dated 2001 and entitled "Corporate Social Responsibility Report". The plaintiff also put in evidence in advertisement placed in the Vancouver Sun newspaper in 1977 by the predecessor of the defendant, BC Tel Ltd.

[7] The Corporate Social Responsibility Report evidently endorsed by Telus' President and CEO included some statements attesting to the value which the defendant placed on its employees and expressing a view of their importance in the corporate enterprise and, as well, identifying the conditions which drew acclaim to Telus for creating a working environment hospitable to its employees.

[8] The 1977 newspaper advertisement was directed at the defendant's bargaining unit employees and constituted a promise of job security in the context of concerns about technological change. The advertisement named all the bargaining unit employees which it addressed its assurances to. The named employees included the plaintiff.

[9] The issues which arise in this case relate to the sufficiency of the length of notice given to the plaintiff, whether he is entitled to vacation accruing during whatever notice period is reasonable, and whether his three periods of summer student employment in the summers of 1970, 1971 and 1972 count as part of his Term of Employment used to determine if he will meet his service requirement for pension entitlement purposes during the currency of his notice period.

[10] Following his termination, Moody determined that he was able to receive whatever amount was owing to him in lieu of notice as a "salary continuance". The effect of receiving a salary continuance rather than a lump sum settlement in lieu of notice permitted Moody to maintain his benefits, which included membership in and accrual of benefits under the BC Tel Pension Plan for Management and Exempt Employees (the "plan"). It was and is Moody's position that by remaining a member of the plan during the period of salary continuance he would achieve a 30 year "milestone" in terms of his years of service with Telus which would entitle him to unreduced pension benefits. A determination whether his previous periods of

temporary employment with Telus in 1970, 1971 and 1972 can be used in calculating his length of service for purposes of the plan is integral to that position, which he advances on this law suit.

[11] Moody had discussions with Telus representatives throughout the summer of 2002 concerning his claimed entitlement to have his previous periods of summer employment included as part of his Term of Employment for purposes of calculating his pension entitlement. By letter dated August 2, 2002, Moody was informed by Telus that his period of service from May 2, 1973 to September 7, 1973 was eligible for inclusion in his Term of Employment, but the earlier periods in 1970, 1971 and 1972 were not. Thus, in conjunction with his service as a temporary apprentice from September 12, 1973 to December 14, 1974 which had earlier been credited to his Term of Employment, Moody's seniority date was adjusted to October 23, 1974, giving him 27 years, 8 months of service as of his termination. With the 18 months salary continuance, but absent the previous temporary employment in 1970, 1971 and 1972 Moody's term of employment would amount to 29 years 2 months, 10 months short of his 30 year milestone.

[12] The proposed severance conditions provided to Moody with the letter of termination dated June 18, 2002 were not accepted by him and as a result Telus wrote Moody on August 26, 2002 setting out the terms of its offer of salary continuance. The letter reads as follows:

Dear Bob:

As acceptance of the proposed severance conditions dated June 18, 2002 has expired and it appears that this matter will likely not be resolved for some time, we advise that commencing June 22, 2002 you will receive salary continuance until December 21, 2003:

The terms of our offer of salary continuance are as follows:

1. Compensation in Lieu of Notice

In lieu of statutory and common law notice, you will receive salary continuance starting on June 22, 2002 and continuing until December 21, 2003. During this period you will not be required to report to work, but will continue to receive your current salary and benefits, and pension accrual. You will receive a retroactive payment for the period from June 22, 2002 to date. You will not be eligible for vacation accrual, Life Balance Account, and short and long term disability. You will be expected to make reasonable efforts to find alternate employment. If you find new employment or self employment prior to December 21, 2003; the salary continuance, benefits and pension accrual will cease and you will have the option of accepting either a payout of 50% of the balance of the salary owing at that time or, receiving a lumpsum amount equal to the difference between the compensation in your new employment or self-employment and your TELUS salary for the balance of the 18 month period.

2. Variable Pay

Variable Pay to June 21, 2002 has been reconciled in accordance with the Variable Pay Plan. Salary continuance will not include an amount for variable pay.

3. Payroll Reconciliation

As you are not attending work, your entitlement to vacation accrual ended June 21, 2002. Vacation and personal well-being entitlements up to June 21, 2002 have been reconciled.

4. Benefits and Pensions

Unless terminated earlier, any coverage under the Provincial Health Plan, Dental Plan or Extended Health Plan will cease on December 31, 2003.

You may convert some of your employee life insurance to an individual policy in your name without providing medical evidence of insurability and must do so within 30 days of the date the benefits coverage ceases.

With respect to your Health Care Spending Account (HCSA), expenses incurred during the salary continuance period can be reimbursed with your HCSA credits. Submission deadline for reimbursement is March 31, of the year following the year in which the expense occurred.

Your concession telephone will continue.

As with other employees, entitlements to benefits will be determined by the terms and conditions of the plan in place, which TELUS retains the right to alter from time to time and at any time at its sole discretion. Any such alterations will apply generally to all TELUS employees participating in the plans.

As indicated above, pension contributions and accrual will continue. You may call the Pension Department regarding your pension eligibility and entitlements.

5. Stock Options

Team TELUS Options granted to date will vest if and as scheduled during your continuance, and the exercise period will expire 90 days after the end of your continuance.

6. Confidentiality of Intellectual Property

All details of TELUS Corporation operations and its employees are proprietary and highly confidential. You agree not to disclose or use any such proprietary or confidential information.

7. Non-Competition Covenant

Because you will be receiving active employee benefits during the salary continuance period, you agree that you will not, for the salary continuance period, without our prior written consent, in any capacity, either individually, in partnership or in conjunction with any persons, firms, association, syndicate or corporation as principal, agent, major shareholder, advisor, employee or in any other manner whatsoever, carry on or be engaged in any telecommunications related business that is competitive with a business carried on by TELUS Corporation or by any of its affiliates within Western Canada.

8. Confidentiality Agreement

You agree to keep the terms of this offer confidential and not disclose them to anyone other than your spouse, your legal representative or financial counsellor.

9. Placement Counselling

The services of the Career Transition Centre will continue to be available to you. Please call 604-893-3777 for further information.

Should you have any questions, please direct them to me at 604-893-3770.

Yours truly,

Sharon Lyder
Transition Centre Consultant

THE NOTICE PERIOD

[13] It is the plaintiff's position that in all the prevailing circumstances the appropriate period of notice serving as the measure of his damages, or the length of his salary continuance, is "24 months, or such greater period as is required to take (him) to the unreduced pension at 30 years' service".

[14] The plaintiff relies on the factors established in *Bardal v. Globe and Mail Ltd.* (1960), 24 D.L.R. 140 (Ont. H.C.) to be significant in assessing "what is reasonable in particular classes of cases"; in particular "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 qualification of the servant" (p. 145, per McRuer C.J.H.C.).

[15] Counsel for the plaintiff referred to *Ansari v. B.C. Hydro and Power Authority* (1986) 2 B.C.L.R. (2d) 33 (B.C.S.C.) in which McEachern, C.J.S.C. (as he then was) identified a rough upper limit of 18-24 months, subject to exceptional cases "where the degree of responsibility, age and years of service (are) very extensive" (p. 42). In *Ansari*, McEachern C.J.S.C. explained the rationale for a cap in the following terms at p. 42:

In other words, the law seems to place a cap of reasonableness upon the notice period and does not compensate a discharged employee to retirement age, whatever that may be, even if there is no likelihood of alternative equivalent employment. I believe this is because:

- a) such a law would amount to a guarantee of lifetime income;
- b) it would fix the employer with all responsibility for the lack of employment opportunities; and
- c) the law presumes that no employer would accept such an onerous responsibility at the time of engagement.

[16] The plaintiff relied upon a number of reported decisions in which damages in lieu of 24 months' notice had been awarded. The decisions include:

1. ***Bauer v. Unitel Communications Inc.***,
[1994] B.C.J. No. 1230 (B.C.S.C.);
2. ***Bell v. Izaak Walton Killam Hospital for Children***,
[1986] N.S.J. No. 504 (N.S.S.C.-T.D.);
3. ***Bishop v. Carleton Co-Operative Ltd.***,
[1996] N.B.J. No. 171 (N.B.C.A.);
4. ***Blackburn v. Victory Credit Union Ltd.***,
[1997] N.S.J. No. 297 (N.S.S.C.);
5. ***Chorny v. Freightliner of Canada Ltd.***,
[1995] B.C.J. No. 51 (B.C.S.C.);
6. ***Dunbar v. Port Coquitlam (City)***
[1992] B.C.J. No. 3050 (B.C.S.C.);
7. ***Halliday v. Hanover Kitchens (Canada) Inc.***
[1997] O.J. No. 4575 (O.C.J.-G.D.);
8. ***Mitchell v. Westburne Supply Alberta, a division of Westburne Industrial Enterprises Ltd.***, [2000] A.J. No. 246 (A.B.Q.B.);
9. ***Paitich v. Clarke Institute of Psychiatry***,
[1988] O.J. No. 198 (Ont. H.C.J.); affirmed,
[1990] O.J. No. 994 (Ont. C.A.);
10. ***Petit v. Insurance Corp. of British Columbia***,
[1995] B.C.J. No. 1521 (B.C.S.C.).

[17] The plaintiff also relied on ***Singh v. B.C. Hydro and Power Authority***, [2001] B.C.J. No. 2538 (C.A.) in support of his contention that in the present case there are factors additional to those identified in ***Bardal***, *supra*, which weigh in favour of a longer period of notice than that established by the rough upper limit in ***Ansari*** of 18-24 months.

[18] In particular, the plaintiff relies upon the evidence that Telus in various publications over the years represented that its employees could expect stability and job security. As well, the plaintiff relies on the evidence that he was afflicted with cancer and although in recovery

when terminated, he nevertheless faces uncertain prospects which can only impair his ability to find and maintain similar employment.

[19] The defendant's position as to the amount of notice appropriate to the circumstances rests on *Bardal*, *supra*, and *Ansari*. Ms. Sigurdson submits the governing considerations are the character of the employment, the length of service, the plaintiff's age and the availability of similar employment having regard to the plaintiff's experience, training and qualifications. The defendant acknowledges that the plaintiff was a long term employee of from 26 to 28 years, 8 months depending on what prior service is included in the term of employment for notice purposes. The defendant submits, nevertheless, that the plaintiff's position was not one of senior management, but rather was low to mid-management and that in all the circumstances, the 18 period of notice was adequate given the rough upper limit established in *Ansari* of 18-24 months. Counsel for the defendant relied on a number of decisions involving circumstances similar to the plaintiffs where the employees were awarded notice periods of between 15 and 18 months. The decisions included:

1. ***Cooper v. MacMillan Bloedel Ltd.***
(1991), 37 C.C.E.L. 205 (B.C.S.C.);
2. ***Kennedy v. MTD Products Limited***
(1991), 34 C.C.E.L. 31 (O.C.J. - G.D.);
3. ***Allen v. Con-Force Structures Ltd.***
(1992), 44 C.C.E.L. 289 (Sask. G.D.);
4. ***Rivers v. Gulf Canada Ltd.,***
(1986), 13 C.C.E.L. 131 (Ont. H.C.J.);
5. ***Dixon v. Sears Canada Inc.***
(1995), 10 C.C.E.L. (2d) 119 (B.C.S.C.);
6. ***Cooper v. Sears Canada Inc.***
(1991), 40 C.C.E.L. 225 (N.S.S.C. - T.D.);
7. ***Johnstone v. Harlequin Enterprises Ltd.***
(1991), 36 C.C.E.L. 30 (O.C.J. - G.D.);
8. ***Bystrom v. Gescan Ltd.***
(1991), 38 C.C.E.L. 228, (B.C.S.C.);
9. ***Lacouvee v. McGavin Foods Ltd.***
(1993), 47 C.C.E.L. 131 (B.C.S.C.);
10. ***Girling v. Crown Cork & Seal Canada Inc.***
(1994), 2 C.C.E.L. (2d) 115 (B.C.S.C.); affirmed,
(1995), 13 C.C.E.L. (2d) 261 (B.C.C.A.);
11. ***Monk v. Coca-Cola Bottling Ltd.***
(1996), 20 C.C.E.L. (2d) 280 (N.S.S.C.);
12. ***Gauvin v. Coca-Cola Bottling Ltd.,***

(1985), 35 C.C.E.L. (2d) 23 (Man. Q.B.);

13. **Zimmermann v. Calgary District Hospital Group**
(1994), 9 C.C.E.L. (2d) 106, (A.B.Q.B.);

14. **Peet v. Babcock & Wilcox Industries Ltd.**
(2001), 12 C.C.E.L. (3d) 5 (Ont. C.A.);

15. **Dumont v. The Corporation of the City of Vernon,**
(2002) B.C.S.C. 1692.

[20] I have read the cases cited by the plaintiff and the defendant. It seems to me, generally speaking, when faced with assessing the circumstances of an employee similar to those of the plaintiff in light of the **Bardal** factors, the authorities gravitate towards a notice period of roughly 18 months. In that general context it could not be said the "notice" given to the plaintiff was unreasonable.

[21] In the cases cited by the plaintiff in which 24 months' notice was deemed reasonable and in **Singh v. B.C. Hydro**, *supra*, where 27 months was considered appropriate by the Court of Appeal, some distinctive feature or features emerge as justification for the longer period of notice. Thus in **Bauer**, *supra*, the plaintiff's length of service (24 years) and degree of responsibility (managing a staff of 63 and a budget of 8 million dollars) when coupled with his limited education and the specialized nature of his skills and his age (54), justified 24 months.

[22] In **Bell**, *supra*, the 54 year old plaintiff was discharged for reasons that were "neither fair nor morally right" from a position that carried significant responsibilities, and in a context where her ability to acquire similar employment was compromised.

[23] In **Bishop**, *supra*, the plaintiff was discharged while on sick leave, suffering from stress and depression. The trial judge found his disability would "normally have an effect on the possibility of future employment in a full-time position". In the result, 24 months was considered appropriate.

[24] In **Blackburn**, *supra*, the plaintiff was discharged while on long term disability. He was ostensibly discharged for cause as a result of "financial irregularities" which occurred while he was suffering from a "severe clinical depression" The court awarded 24 months, finding no justification for his discharge.

[25] In **Chorny**, *supra*, the plaintiff occupied a position of significant responsibility, was 56 years old, was "unlikely to find comparable work and income" and was solicited to return to the employ of the defendant from an earlier hiatus in circumstances which "created an atmosphere of expected longevity". The court awarded 24 months.

[26] In **Dunbar**, *supra*, among the factors considered by the court was the fact that the employer's representative made adverse comments concerning the plaintiff to the press which the court concluded "were certainly detrimental to (the plaintiff's) attempts to obtain similar employment ...".

[27] In **Halliday**, *supra*, the combination of the plaintiff's age (55), length of service (28 years) and "inability to find employment in a field he had devoted his entire working life to", justified 24 months.

[28] In *Mitchell, supra*, the conduct of the employer impugning the plaintiff's ability to "adjust to changes" to people with whom the plaintiff did business thereby compromising his job prospects, was a factor considered by the court in awarding 24 months.

[29] In *Petit, supra*, factors conditioning the trial judge's award of 24 months' notice included the plaintiff's age (56 years) a "groundless accusation of dishonesty" made by the employer and the fact that the plaintiff's entire working experience was in the insurance industry which the employer, ICBC, monopolized, making the plaintiff's future job prospects in the industry in which he had all of his experience, dim.

[30] In *Singh, supra*, the two factors which dominated the Court of Appeal's consideration on the question of the appropriate length of notice against a background of 18 years service during which the plaintiff went from a janitor to the "lower management position of mailroom supervisor", were fairly specific representations made by the employer promising job security to its employees and the fact that the plaintiff was terminated on his return to work after a two month absence for medical reasons.

[31] In concluding that the circumstances justified a notice period of 27 months, the court made the following observations at ¶51-53:

In this case B.C. Hydro knew that Mr. Singh had been ill but was making an effort to fulfill his duties to the company by returning to work on a gradual basis. It was during that time of struggle for Mr. Singh that the company chose to let him go.

I am of the view that these factors are significant in this case. The respondent, through the memoranda I have outlined, fostered a climate of job security in its workplace. By allaying the employees' fears that they would lose their employment in troubled times, B.C. Hydro could expect a happier and more productive workforce. It was only just before the appellant's position was terminated that the company memoranda ceased promising job security. For his part, knowing that the company had a stated policy of relocating its long-time employees in times of re-organization, Mr. Singh would have had little motivation to find other employment. The company provided an inducement to stay and weather the storm. Further, the termination of Mr. Singh's position at a time when, having suffered medical problems, he was attempting to return to work, was obviously injurious to him.

In my view the circumstances of this case are exceptional. Mr. Singh was repeatedly assured that his employment with B.C. Hydro was secure. After a difficult illness he was making an effort to fulfill his responsibilities to the company by returning to work on a gradual basis when his position was abruptly terminated. In my view these factors, along with those referred to by the trial judge, entitle Mr. Singh to a notice period of 27 months.

[32] It seems to me that the common theme which runs through those cases relied on by the plaintiff as establishing the reasonableness of a notice period of 24 months or more where the *Bardal* factors of character of employment, age, length of service, and availability of similar employment otherwise augur in favour of the rough upper limit, encompasses circumstances where the employee is put in a particularly vulnerable position by the termination. That vulnerability may be established where an employee has gone from a role of great responsibility

and recompense to none and will be hard-pressed to find comparable employment because of the inherent scarcity of such positions, or where an employee has gone from a lesser position to none and because of circumstances affecting him or her uniquely is put at a disadvantage beyond the norm in seeking comparable employment.

[33] While it appears from *Ansari, supra*, that economic considerations such as reduced business activities or opportunities are not factors influencing the length of notice, other factors limiting an employee's ability to right himself or herself after termination such as age, illness, damage to reputation, over-specialization, inducements to forego other job possibilities at more opportune times, and the absence of comparable opportunities outside of the terminating employer's business are appropriate considerations in lengthening the notice period.

[34] In my opinion, when those factors are taken into account with regard to the plaintiff, a notice period of 24 months is appropriate. While the plaintiff does have a Bachelor of Commerce degree and has acquired marketing experience with the defendant, it appears that his technical expertise is with a product unique to the defendant. Thus, both his specialization and the lack of comparable opportunities outside the employ of the defendant work against him.

[35] In the case at bar, I am not satisfied that the publications of the defendant relating to its employee relations ascend to the level, as in *Singh, supra*, of being promises of job security which would reasonably induce the plaintiff or others to forego other opportunities in favour of remaining with the defendant. The 1977 newspaper advertisement was directed at a very specific issue not applicable to the plaintiff at the time of his termination. The other publications are more general statements of the value which the defendant places on its employees and could not be taken as representations of job security into the future.

[36] In my opinion, the most significant factor bearing on the amount of notice which the plaintiff is entitled to, is the issue of his health. It is clear that he was terminated at a time when he just completed treatments for cancer which despite his current state of recovery remains an ongoing uncertainty not unlikely to affect his future employment prospects. Unlike the plaintiff in *Singh, supra*, the plaintiff in the present case was not returning to work on a gradual basis. He was fully back at work having missed only seven days, apparently against the advice of his doctors. It is clear that the defendant's representatives were aware of the plaintiff's health issue, but they did not appear to take it into account in computing his notice period.

[37] According to the evidence of Carol Craig who is the Director of Pension Plan and Design for the defendant and was the Director of the Employee Service Centre, and who testified for the defendant, the maximum notice given, except to Vice-Presidents of Telus, was 18 months. Vern Enright, who testified on behalf of the plaintiff, indicated that he received 18 months salary continuance on the basis of factors similar to the plaintiffs except, of course, that he did not have the same health related issue.

[38] In my view, the notice given by the defendant fails to adequately account for the particular position of vulnerability the plaintiff was left in by the termination, given the uncertain state of his health, and its effect on his ability to attract and maintain comparable employment. While I do not find there was the same assurance given to the plaintiff as to his job security here as there was to the plaintiff in *Singh, supra*, I find resonance in the words of Ryan J.A. in that case where she said at ¶53:

After a difficult illness he was making an effort to fulfill his responsibilities to the company ... when his particular position was abruptly terminated.

[39] In my view, that factor taken in conjunction with the more conventional **Bardal** factors establishes the plaintiff's situation as exceptional, justifying notice at the higher end of the rough upper limit, that is, 24 months.

THE PLAINTIFF'S ENTITLEMENT TO HOLIDAY TIME

[40] The plaintiff submits he is entitled to use the holiday time that he accrued up to the time of his termination as bank time to add to his term of employment for purposes of calculating his pension entitlement, and as well, to vacation time which will be accrued during the period of his salary continuance for the same purposes.

[41] Insofar as the holiday time accrued to the date of termination is concerned, that arises as an issue because the defendant has paid to the plaintiff an amount representing his salary for the 6 weeks of vacation time which he was entitled to and had banked. During the course of his discussions with the defendant over the course of the summer of 2002, the plaintiff had asked on a number of different occasions if he could reverse the payment for his banked holiday time in order to use that holiday time as part of his term of employment so as to increase his advance towards reaching the service requirement for his pension benefits. No resolution of that issue had been reached by the time of the trial.

[42] It seems to me that the plaintiff is entitled to treat the vacation period he accrued at the time of termination as an extension of his term of employment. It is clear that he has not accepted the defendant's offer of severance terms and that although he received payment in lieu of his banked vacation time, he did so before considering the implications or having an opportunity to seek the defendant's agreement to use his accrued vacation time to extend his term of employment for pension plan purposes.

[43] With regard to the 12 weeks of vacation time which the plaintiff submits accrues during the period of 24 months' salary continuance and to which he asserts entitlement, the question is whether there is evidence the plaintiff has paid out or lost money or otherwise suffered by reason of the absence of the benefit. The principle that the plaintiff must demonstrate some loss to justify an award of damages for lost vacation time in circumstances where he or she is being paid an amount in lieu of notice without a corresponding obligation to show up and perform services for the employer emerges from **Scott v. Lillooet School District No. 29** (1991), 60 B.C.L.R. (2d) 273 (C.A.).

[44] In that case the court sat as a five member panel to consider the correctness of **Stauder v. B.C. Hydro and Power Authority** (1987), 25 B.C.L.R. (2d) 40 (B.C.C.A.) which ruled (Esson J.A. dissenting) that a terminated employee is entitled to damages for lost vacation even where he or she is under no obligation to show up and perform services for the employer during the appropriate notice period.

[45] In **Scott, supra**, the five member panel overruled **Stauder, supra**, following the reasoning of Esson J.A. in dissent. The court in **Scott** summarized the ensuing state of the law at p. 280, as follows:

Vacation pay arises as a result of the contract of employment providing for a period of time during the employment year when the employee is not required to "work" but yet is entitled to pay.

During the 15-month notice period awarded to the respondent, he was free from any obligations to the appellant, either to go to work or to expend any effort on its behalf.

In the case at bar, the respondent led no evidence of loss or expense associated with lost vacation benefits nor did he lead any evidence that he had suffered in any way as a result of his not being able to take a meaningful holiday.

To award the respondent damages for vacation pay, on top of an award of full salary for the period of notice to which he was entitled, (which necessarily includes payment of his salary for any vacation he may have taken had he worked during that notice period), is to provide double indemnity, or put another way, to provide compensation for loss that he has not suffered.

[46] In a subsequent decision, ***Bavaro v. North American Tea, Coffee & Herb Trading Co. Inc.*** (2001), 86 B.C.L.R. (3d) 249 (C.A.) Donald J.A., after repeating the summary of the law respecting vacation pay as set forth in ***Scott*** as above, addressed the issue of the evidentiary burden of proving the loss. In so doing he stated as follows, at pp. 255-256:

This different perspective does not contradict the *ratio* in ***Scott***, but it should have an effect on the evidentiary burden of proving the loss. In my respectful view, the employee should not have to overcome a presumption that the notice period contains a vacation within it because, as I have said, the usual circumstances faced by the terminated employee in the time between jobs do not support such a presumption. ***Scott*** does not establish a complete bar to recovery but, rather, bars recovery unless the employee can demonstrate the lost opportunity to take a vacation.

Furthermore, it should be borne in mind that the notice period is only a legal fiction used to measure damages. It does not purport to replicate actual employment where the employee would be able to take a vacation secure in the knowledge that he will return to his job and continue earning income. During the notice period estimated by the court in fixing damages there is no ongoing relationship with the mutual contractual obligations of providing service for pay and hence it seems, with respect, artificial to speak in terms of not having to work during the notice period.

Finally, I think that the evidentiary burden on the employee in proving the loss should reflect that the question arises in the context of a termination without cause and in breach of an implied term of a contract to give reasonable notice. On balance, the innocent party should not be lumbered with a presumption against recovery of vacation pay.

[47] In my view, the issue in the case at bar is somewhat different from what was being dealt with in ***Scott***, *supra*, and ***Bavaro***, *supra*. In those cases the plaintiffs were seeking monetary damages for the absence of a benefit and the issue was whether there was any ascertainable loss to engage the right to damages. In both cases the focus of the court was on whether the loss of a holiday while being paid but under no corresponding obligation to perform services for the employer, in context, amounted to the loss of a benefit justifying compensation.

[48] In the present case, the loss being asserted is not the loss of a carefree holiday, rather it is the loss of the plaintiff's entitlement to work through vacation time so as to "bank" or accrue the time to extend his term of employment and thereby engage or seek to engage pension entitlement or to lengthen the service by which the amount of the benefit is determined.

[49] That such a course of action would have been open to the plaintiff is evident from the interrogatories arising out of the examination for discovery of the defendant's representative, Claude Kisteman on December 19, 2002:

Q7. Are there situations where people were kept on or used their vacation or other such device to get them to a pension milestone, prior to termination?

A7. If using accrued vacation would bring a member to a pension milestone, that option was commonly followed or offered.

[50] In the circumstances, it seems to me the defendant's failure to give the plaintiff notice deprives him of the opportunity of extending his Term of Employment by using vacation which would accrue during that notice period. It is clear from the plaintiff's evidence he would have accepted that option if he had been given it. In my view, that loss is both real and ascertainable and engages the right to a remedy whether under the authority of the principle in **Scott**, *supra*, or **Bavaro**, *supra*.

OTHER BENEFITS

[51] While an employee of Telus, the plaintiff was entitled to a number of benefits which included variable pay, a bonus system expressed as a percentage of his salary which amounted in practical terms to 12% or \$682 per month, a "plan it" payment of \$100 per month, a life balance account of \$500 per annum plus three day's salary, health care spending of \$300 per annum, an employee stock purchase plan in which Telus' contribution was \$136 per month (or 2.4% of the base salary) plus an additional \$16 per month representing 2.4% of the plaintiff's variable pay. In addition, the plaintiff claimed damages for loss of a retirement gift valued at the rate of \$20 per year of service.

[52] In my opinion, the absence of these benefits represents an ascertainable loss to the defendant during his notice period and are not contingent on events which may or may not occur and as such are recoverable. See **Wood v. BBC Brown Boveri Canada Inc.** (1986), 15 C.C.E.L. 178 (B.C.C.A.); **Young v. BC Hydro**, 2002 B.C.S.C. 510.

[53] The amounts recoverable under the head of lost benefits are as follows:

BOB MOODY'S LOSS CALCULATION					
Benefit	Monthly Amount	Amount Unpaid at Termination	Amount Claimed for June 21/02 to Feb 21/03 (8 months)	Amount Claimed for 24 Months (16 additional months)	TOTALS
Variable Pay (12%)	\$ 682	\$ 683 (2% for Jan 1-June 21/02)	\$5,456	\$10,912	\$17,051.00

"Plan It" Payment	\$ 100		Paid	\$1,600	\$ 1,600.00
Life Balance Account \$500 per year + 3 days' pay)	\$ 143		Paid to Dec 31/02 \$286 for Jan/Feb/03	\$2,288	\$ 2,574.00
Health Care Spending (\$300 per year)	\$ 25		Paid to Dec 31/02 \$50 for Jan/Feb/03	\$400	\$ 450.00
Employee Stock Purchase Plan (Telus Contributions)	\$ 136 (2.4% of base salary)	\$248 (not paid on vacation pay at termination)	\$434	\$2,176	\$ 2,858.00
	\$16 (2.4% of variable pay)	\$98 (amount not paid on variable pay at termination)	\$128	\$256	\$ 482.00
Retirement Gift	\$20 per year of service	\$600	\$600	\$600	\$ 600.00
TOTAL: \$25,615.00					

THE PENSION ISSUE

[54] I now turn to the issue of whether the plaintiff's prior three periods of temporary employment in 1970, 1971 and 1972 count as part of his term of employment to determine his length of service for pension entitlement purposes.

[55] The sections of the plan that are relevant to a consideration of this issue are found in s. VI - Term of Employment, and s. VII - Retirement Age and Service Requirements. Section VIII of the plan deals with the amount and duration of the pension but none of its specific provisions are relevant to a determination of the status of the plaintiff's prior three periods of employment under the plan. It is clear however from s. VIII that an employee's Term of Employment is used in calculating his or her benefit amounts.

[56] In s. VI dealing with the Term of Employment, the particular provisions relevant to the issue in the present case are found in paras. 1, 3, and 5 which read as follows:

1. "Term of Employment" means a period of continuous employment as an Employee of the Company, which is deemed to include all service with the Telecommunications Workers Union provided such Employee was granted an approved leave of absence therefor by the Company, all approved leaves of absence, all periods of disability absence, and all

temporary lay-offs of less than six months. Service with other companies with which reciprocal agreements have been made for the interchange of benefit obligations may also be included subject to the terms of such reciprocal agreements.

3. When the Company has re-employed a former Employee such re-employed Employee shall be considered a new Employee for all purposes of the Plan unless the effect of subsection 1 above is such that the termination of employment does not break the continuous employment of the Employee. Vested benefits, if any, earned during a prior period of employment will not be affected in any way by the subsequent period of employment and the Term of Employment during the period of re-employment will not include any prior employment except that for purposes of Section VII prior periods of prior employment shall be included in the Term of Employment.
5. Notwithstanding subsection 3 above, if the Company re-employed a former Employee before 1988 and such Employee's Term of Employment calculated from such last re-employment, has amounted to five years, all previous periods of employment (with the exception of any short periods of employment prior to 1 January 1973 which were prior to the completion by the Employee of six months of continuous employment with the Company) shall be added thereto and the aggregate shall be deemed to be continuous employment, in accordance with the Company's policy to bridge an Employee's previous periods of employment.

[57] In s. VII which deals with retirement age and service requirements, the provisions relevant to the issue in the present case are found in paras. 1, 4, and 6. They read as follows:

1. The normal retirement date for a Member or Former Member is his sixty-fifth birthday. A member may retire upon or after the normal retirement date and receive a pension regardless of the length of his Term of Employment. A Former Member who has not retired and who is not an Employee will be retired upon his normal retirement date and his pension will commence.
4. A Member or Former Member who has attained the age of fifty-five years and whose Term of Employment is twenty-five years or more, may retire and will receive a pension.
6. A Member or Former Member whose Term of Employment is thirty years or more, may, with the consent of the Company, retire and be granted a pension.

[58] It is the contention of the plaintiff that the salient effect of the relevant provisions in ss. VI and VII of the plan is to create two methods of determining the plaintiff's Term of Employment depending on whether it is used for the purposes of s. VII in determining if the plaintiff has met the service requirements entitling him to unreduced pension, or for the purposes of s. VIII of calculating the amount of pension benefits due to him. It is the plaintiff's contention that for purposes of s. VII, all prior periods of employment regardless of their duration or when they occurred are applicable in assessing the Term of Employment, whereas for the purposes of s.

VIII, there is a limitation on the use of prior periods of employment in determining the Term of Employment depending on the length of the prior period of employment and when it occurred.

[59] It is the defendant's contention on the other hand that there is no distinction to be drawn in determining the Term of Employment whether for purposes of s. VII or s. VIII and that the relevant provisions in, particularly, s. VI do not justify any such distinction.

[60] The fulcrum of the debate can be found in para. 3 of s. VI. According to the plaintiff, the words "for purposes of s. VII prior periods of prior employment shall be included in the Term of Employment" means that in establishing whether an employee has met the service requirement for pension entitlement, prior employment with the employer need not be continuous, within the meaning of s. VI, para. 1, or meet any other criteria.

[61] It is the defendant's contention, on the other hand, that the words relied on by the plaintiff when read in their full context do not deal with any and all periods of prior employment, but only those periods in which the employee obtained a vested benefit. Counsel for the defendant put it thus in her written argument:

Section VI, para. 3 makes it clear that in circumstances of re-employment, prior time is not included in the Term of Employment unless re-hiring does not break continuous service. The periods of summer service did not constitute continuous service. Section VI,3 provides a further exception. If an employee had a vested benefit from a prior period of employment, that benefit would not be affected by reemployment, except that the additional service would be included in the Term of Employment. That exception does not apply here, as the Plaintiff had not acquired any vested benefits from prior periods of employment.

[62] It is the defendant's submission that the provision which governs prior periods of employment in which no vested benefits were acquired, and hence applies to the plaintiff's circumstances, is found in s. VI, para. 5. According to the defendant, the effect of that provision is to make prior periods of employment of six months or longer and shorter subsequent periods, if any, occurring before January 1, 1973 and any prior periods of employment occurring after January 1, 1973, part of an employee's Term of Employment for all purposes of the plan. The only prior periods of employment not included in an employee's Term of Employment for all purposes of the plan by s. VI, para. 5 are those less than six months if not preceded by a six month period of prior employment occurring prior to January 1, 1973. That is why, according to the defendant's submissions, the plaintiff's periods of summer employment in 1970, 1971 and 1972, each being four months in duration, more or less, and not preceded by any other period of employment, do not qualify for inclusion in the plaintiff's Term of Employment.

[63] In my opinion, the defendant's position cannot be sustained on a careful reading of s. VI, para. 3 and para. 5 and on consideration of the context they create. As I understand it, the defendant's submission is, in effect, that s. VI, para. 3 creates an exception to the general rule that a re-employed former employee is to be considered a new employee for all purposes of the plan, but the exception is contingent on the employee having earned vested benefits during his or her prior period of employment. (Under s. XIII, para. 1 the requirement for vesting is established when a member has been a member of the plan or bargaining unit plan "continuously during the 24 month period ending upon the date his membership in the plan ceases").

[64] In the defendant's submission, therefore, s. VI, para. 3 does not apply to the plaintiff's situation because the prior periods of employment he is seeking to have included in his Term of Employment are not ones in which he earned any vested benefits.

[65] As I read s. VI, para. 3, however, it applies to all prior periods of employment, not just ones where vested benefits were earned. In asserting that "vested benefits, if any, earned during a prior period of employment will not be affected by the subsequent period of employment ..." (emphasis added), the provision does not confine itself as submitted by the defendant. If the scope of s. VI, para. 3 were to be constricted to prior periods of employment during which vested interests were earned, the words "if any" would be pointless. In my opinion, the words "if any" only have meaning if the "prior employment" or "prior periods of employment" encompassed by the provision relate to any periods, including ones in which vested benefits are earned, and ones in which they are not. That interpretation is supported by the balance of the provision which reads "... and the Term of Employment during a period of re-employment will not include any prior employment except that for purposes of s. VII prior periods of prior employment shall be included in the Term of Employment" (emphasis added).

[66] In my opinion the reference to "any prior employment" means just that, and emphasizes that prior employment in which vested benefits were earned is but one subset of the prior periods of employment with which the section is concerned.

[67] It follows, therefore, that one of the effects of s. VI, para. 3 is to expand the definition of Term of Employment for the purposes of determining service requirements under s. VII to include any prior periods of prior employment.

[68] The next issue is whether the effect of s. VI, para. 3 is modified by the provisions of s. VI, para. 5 which address how the company's policy to "bridge" an employee's previous periods of employment affects re-employed former employees.

[69] It is the plaintiff's submission that s. VI, para. 5 does not apply to a determination of whether he will meet the service requirements during his period of salary continuance - that issue is resolved by s. VI, para. 3. In the plaintiff's submission, s. VI, para. 5 governs the effect of previous periods of employment on the Term of Employment insofar as it is used in calculating the amount of pension payable under s. VIII of the plan.

[70] The defendant's position, as earlier noted, is that s. VI, para. 5 is the provision that specifically applies to the plaintiff insofar as his periods of employment prior to January 1, 1973 are concerned and hence governs whether the periods of temporary employment in 1970, 1971 and 1972 can be used as part of his Term of Employment in calculating when his service requirements for pension benefits are met.

[71] As I see it, the question is whether the specific provision in s. VI, para. 3 excluding any periods of prior employment from the Term of Employment except for purposes of s. VII (i.e. in calculating the service requirement), is subject in its entirety to s. VI, para. 5 or whether only that portion of it that excludes periods of prior employment from the Term of Employment for all other purposes is affected. In other words, does s. VI, para. 5 modify only the general rule in s. VI, para. 3 - that the Term of Employment during re-employment will not include any prior employment, or does it, as well, modify the exception to the general rule - that any prior period of employment will be included in the Term of Employment only for purposes of determining the service requirement under s. VII.

[72] In my opinion, s. VI, para. 5 must be construed as modifying only the general rule in s. VI, para. 3 because any other construction would render the limited exception created in s. VI, para. 3 nugatory. If the effect of s. VI, para. 5 was to define exhaustively all categories of prior employment to be included in the Term of Employment for all purposes of the plan, then there is no point in having a provision which identifies a limited purpose for which any prior employment is included in the Term of Employment. Section VI, para. 3 only makes sense if the exception it creates - any prior employment included in the Term of Employment only for purposes of s. VII - refers to those periods not so included by virtue of s. VI, para. 5; in particular, the pre-January 1, 1973 periods of employments under six months in duration, not preceded by a prior period of employment of six months or more in duration.

[73] It is clear from reading the plan as a whole that in different contexts and for different purposes the phrase "Term of Employment" has different meanings. In s. XIV, for example, the Term of Employment for an employee transferring to the bargaining unit is determined differently depending on whether the objective is to establish if the vesting requirements of s. XIII, para. 1 or the service requirements of s. VII have been satisfied, on the one hand, or for calculating benefit amounts in s. VIII, on the other.

[74] Similarly, in s. IV, para. 7 a period of employment while the employee is a member of the Defined Contribution Plan can be included in his or her Term of Employment under this plan, but only for limited purposes. In that context the period of membership in the Defined Contribution Plan is excluded from his or her Term of Employment for purposes of calculating benefit amounts pursuant to s. VIII, but not for other purposes.

[75] In my view, those distinctions drawn between the different purposes for which discrete periods of employment can be included in an employee's Term of Employment are harmonious with the distinction drawn in s. VI, para. 3 and VI, para. 5. Thus, I conclude that for purposes of determining under s. VII whether the plaintiff's service requirements for pension benefits have been or will be met during his period of salary continuance, his previous periods of employment, specifically April 27, 1970 -August 28, 1970, April 21, 1971 - August 27, 1971, and April 26, 1972 - September 1, 1972, must be included in his Term of Employment.

[76] The final issue to be dealt with relates to the nature of the order, if any, to be made in connection with the plaintiff's entitlement to pension benefits.

[77] According to s. VII, para. 6, the plaintiff upon achieving a 30 year Term of Employment can retire and be granted a pension. Entitlement to the pension benefits is, however, contingent on the consent of Telus. There is evidence before me that the other employees who were terminated by Telus and who reached a pension "milestone" during the course of their salary continuance were granted entitlement to pension benefits with the consent of the company. It appears that in those cases the company's consent was granted prospectively.

[78] As I understand it, it is on that basis that the plaintiff submits that his damages ought to include the present value of his pension benefits on the footing that he, like others terminated from Telus, would receive the company's consent when, having reached the 30 year milestone he, elects to retire and take his pension.

[79] In my opinion, despite the contingent nature of the plaintiff's entitlement to his pension benefits in reaching his "pension milestone" of 30 years, it is open for the court to make an award of damages for the present value of those benefits as of his 30 year term of employment. The evidence before me is that other terminated employees who reached a pension milestone

during a period of salary continuance were granted the necessary consent prospectively. There was no evidence that the defendant withheld its consent from any terminated employee in those circumstances, and although Ms. Craig in her evidence emphasized that each case would be reviewed according to the extant circumstances, I am satisfied it is more probable than not that had the defendant known the plaintiff would reach his 30 year milestone during the period of salary continuance it would have, prospectively, granted him its consent to take his pension benefits.

[80] As I understand it the parties have agreed that it is unnecessary to quantify the amount owing to the plaintiff under this head as, by consent, the amount will be determined by an actuary, or, alternatively, it will be paid in the form of pension benefits.

[81] Should there be any difficulty the parties have liberty to apply.

[82] The plaintiff is entitled to his costs.

“A.F. Cullen, J.”
The Honourable Mr. Justice A.F. Cullen