

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Tymko v. 4-D Warner Enterprises Ltd.*,
2018 BCSC 372

Date: 20180309
Docket: S1649077
Registry: Prince George

Between:

Richard Tymko

Plaintiff

And

4-D Warner Enterprises Ltd.

Defendant

Before: The Honourable Madam Justice Burke

Reasons for Judgment

Counsel for the Plaintiff:

E. Brandt

Counsel for the Defendant:

K. Pavao

Place and Date of Trial:

Prince George, B.C.
June 12-16, 2017
November 6-10, 2017

Place and Date of Judgment:

Prince George, B.C.
March 9, 2018

INTRODUCTION

[1] Mr. Richard Tymko seeks damages for breach of contract as a result of his dismissal from employment with the defendant 4-D Warner Enterprises Ltd. At the time of his dismissal, Mr. Tymko was employed by 4-D Warner as a switchman and trackmobile operator moving rail cars at the MacKenzie Pulp Mill. Following a derailment at the MacKenzie Pulp Mill on December 28, 2015, Mr. Tymko's employment was terminated.

[2] Mr. Tymko claims damages for wrongful dismissal based on six years of employment. In addition, he seeks punitive damages based on 4-D Warner's conduct.

[3] 4-D Warner alleges that it had just cause for the dismissal of Mr. Tymko.

OVERVIEW

[4] 4-D Warner has contracts with the MacKenzie Pulp Mill to move rail cars along the internal rail lines of the MacKenzie Pulp Mill. 4-D Warner says in the last year of his employment Mr. Tymko was disciplined for deficiencies and disregard of the company's safety standards and procedures. 4-D Warner maintains his misconduct to the time of the December 28, 2015 incident amounts to just cause for his dismissal.

[5] Mr. Tymko says 4-D Warner did not have just cause to dismiss him following the December 2015 incident. 4-D Warner did not establish clear standards or provide suitable instruction for the trackmobile operator and the switchman and did not adhere to a consistent discipline policy.

ISSUES

- (1) Did 4-D Warner have just cause to dismiss Mr. Tymko?

- (2) If 4-D Warner did not have just cause to dismiss Mr. Tymko, what is the notice period and damages to which he is entitled? As part of that question:
 - i. How long was Mr. Tymko's length of service with 4-D Warner?
 - ii. Were 4-D Warner and Little Prairie Cabs common employers of Mr. Tymko?
- (3) Did Mr. Tymko fail to mitigate his damages?
- (4) Is Mr. Tymko entitled to additional damages because of 4-D Warner's conduct?

1. Did 4-D Warner have just cause to dismiss Mr. Tymko?

Legal Principles

[6] An employer must establish just cause to terminate an employee without notice.

[7] The test for just cause is whether the employee's misconduct gives rise to a breakdown in the employment relationship: *McKinley v. BC Tel*, 2001 SCC 38 at para. 48. This is an objective test, seen from the perspective of a reasonable employer taking into account all relevant circumstances. The severity of the sanction must be balanced against the misconduct, having regard to the fundamental nature of employment in individuals' lives. The employer bears the burden of proving just cause on the balance of probabilities: *McKinley* at para. 36; *Cottrill v. Utopia Day Spas*, 2017 BCSC 704 at para. 58.

[8] As summarized in *Dowling v. Ontario (Workplace Safety and Insurance Board)* (2004), 246 D.L.R. (4th) 65 (Ont. C.A.) at para. 50, the analysis requires:

- 1. determining the nature and extent of the misconduct;
- 2. considering the surrounding circumstances; and,

3. deciding whether dismissal is warranted (i.e. whether dismissal is a proportional response).

[9] At para. 52, the Court in *Dowling* helpfully summarized a number of relevant surrounding circumstances:

[52] The second step, in my view, is intended to be a consideration of the employee within the employment relationship. Thus, the particular circumstances of both the employee and the employer must be considered. In relation to the employee, one would consider factors such as age, employment history, seniority, role and responsibilities. In relation to the employer, one would consider such things as the type of business or activity in which the employer is engaged, any relevant employer policies or practices, the employee's position within the organization, and the degree of trust reposed in the employee.

[10] Here, the nature of the alleged misconduct is key in guiding the analysis. While counsel for Mr. Tymko refers to *Cottrill* as setting out the test of alleged failure to meet performance standards, this case ultimately focuses on an alleged failure to observe safety standards. This makes the case relied of *Balzer v. Federated Co-operatives*, 2014 SKQB 32, as relied on by 4-D Warner particularly pertinent.

[11] Safety is viewed through a special lens. This is due to the potentially serious consequences of such a breach. Employers may legitimately require extra care from employees in complying with safety rules and may respond to violations more firmly. As stated in *Plester v. PolyOne Canada Inc.*, 2013 ONCA 47 at para. 10, "an employer's ability to respond strongly and swiftly to violations of rules designed to ensure workplace safety reinforces the importance of such rules, and promotes a culture of workplace safety." This is particularly important when, as with Mr. Tymko, an employee performs safety sensitive tasks where even a moment's inattention can have extremely serious results.

[12] It is, however, equally important that employers adequately train their employees in safety procedures. In both *Balzer* and *Plester*, the seriousness of the misconduct was heightened by the fact that the employees had acted contrary to their training.

[13] *Balzer* sets out at para. 61 a number of factors for the failure to abide by company rules. These I would paraphrase for this context as follows:

- The employee knew, or ought reasonably to have known, what conduct was required in order to work safely;
- The rule was reasonably necessary to ensure safe work;
- The employee knew, or ought reasonably to have known, that discipline up to and including termination could result from a failure to follow the rule;
- The employee wilfully or negligently, and without a reasonable excuse, did not follow the rule; and
- The breach, seen in the context of the employment relationship as a whole, is sufficiently serious to justify termination.

[14] While I consider this to be a helpful analytical structure, these factors do not constitute a strict test. At the end of the day, the only question is whether the employee engaged in misconduct which caused a breakdown in the employment relationship.

[15] I turn to the pertinent facts.

Applicable Safety Rules and Disciplinary Policy

[16] Before setting out the relevant rules, it is necessary to describe the pertinent work.

[17] A trackmobile is a small locomotive that powers the movement of railway cars in a railway yard essentially moving commodities in and out of the yard. The switchman and trackmobile operator are responsible for moving railway cars in the MacKenzie Pulp Mill rail system. While the trackmobile operator sits in the trackmobile in a switch seat in a cab, the switchman is located at the rear of the

train. The trackmobile operator is responsible for the forward and reverse movement of the train and applying air to the brake system to stop the train's movement. The trackmobile operator also keeps the trackmobile in good condition and monitors the speed of the trackmobile.

[18] The duties of a switchman include ensuring the crossings are clear; working in a safe manner; ensuring brakes are on the train cars; and the movement of rail cars. The switchman monitors crossings and ensures it is safe to continue movement and direction of the train.

[19] Both the switchman and the trackmobile operator are responsible for stopping the trackmobile. The trackmobile operator is in control of the brakes and the switchman advises him when it is time to stop the trackmobile. Mr. Dave Warner, the owner of 4-D Warner, described the switchman as the eyes of the trackmobile operator. The trackmobile operator cannot move without the switchman advising the track is clear and where to go.

[20] A switch is a mechanical device that allows railway cars to move from one track to another. The switchman operates these switches.

[21] When the train is moving backwards, the switchman positions himself towards the back of the train and notifies the trackmobile operator by radio how far until the trackmobile operator must to stop the train. The procedure for measuring distance by radio is for the switchman to count car lengths at regular intervals, which the trackmobile operator parrots back to confirm safe movement.

[22] If the speed of the trackmobile is not safe for the track conditions, the switchman will tell the trackmobile operator to slow down. The switchman starts calling the car lengths at 3 cars to signal the stopping time for the trackmobile operator. He calls 3 cars; 2 cars; 1 car and half a car to the point of spotting, i.e. stopping.

[23] In the event the trackmobile operator does not hear the switchman counting car lengths over the radio as anticipated, the trackmobile operator is required to

immediately stop the train. Safety training documents including MacKenzie Canadian Rail Operation Rules (“CROR”) and the MacKenzie General Operating Instructions (“GOI”) etc. describe this obligation.

[24] Mr. Warner said 4-D Warner hired RTC, an independent company in British Columbia, to design the CROR and GOI, which govern the safety and operations of 4-D Warner while working at the MacKenzie Pulp Mill site. Mr. Warner said the manuals were therefore specifically designed for these operations, which do not operate on a public railway. The employees were required to be familiar with them in order to perform their jobs safely and efficiently. Mr. Warner advised Railsafe reviews and approves of these manuals on an annual basis.

[25] Policies relating to signalling procedures and safety protocols in the event of a communication failure are set out in the CROR and GOI. The protocol requires certain procedures to be utilized when radio is used to control switching. Included in those required procedures as set out in the CROR was the requirement that:

123.2 (iii) when the movement has travelled one half the distance required by the last instruction and no further communication is received, the movement must stop at once[.]

[26] There is no suggestion in this case that this rule or any other safety protocol related to a communication failure is unreasonable.

Mr. Tymko’s Training

[27] A key factual issue in this case is whether Mr. Tymko engaged in any misconduct by failing to comply with safety rules. Accordingly, his training on the safety procedures relevant to the incident must be placed in the context of his employment background, disciplinary history, and safety training in general.

[28] Mr. Tymko is 54 years old with a Grade 12 education and resides in MacKenzie, British Columbia. He has a class 1 driver’s license and has taken a number of occupational safety courses on fall protection and safe work.

[29] Since completing high school, Mr. Tymko has worked as a deckhand, construction worker, logging truck driver, and camp maintenance worker. He also worked at the Slocan and Canfor lumber mills.

[30] Mr. Tymko worked for Little Prairie Cabs from 2009 to 2012 with a break in that employment in 2012. The nature of this employment and break is relevant if it is determined that 4-D Warner did not have just cause to dismiss Mr. Tymko. I will accordingly deal with the details of that later.

[31] On November 4, 2012 Mr. Tymko commenced his employment with 4-D Warner working 6:00 a.m. to 4:00 p.m. shifts on a 4-days-on, 4-days-off schedule. There is some dispute as to whether he commenced his employment as a switchman or a labourer at this time.

[32] While Mr. Tymko says he occasionally had other duties such as running a loader or a dump truck, he was adamant he commenced his employment with 4-D Warner in November 2012 as a switchman, not a labourer. He said he obtained the position as another employee, Rick Johnson, went for an extended time to the Philippines.

[33] There is also a significant dispute as to the amount of training provided by the company to Mr. Tymko. Mr. Tymko maintains he received limited training to perform the duties of a switchman and trackmobile operator before he started working as a switchman.

[34] On this and other areas, Mr. Tymko maintains his evidence ought to be preferred in instances where there are contradictions between it and those of 4-D Warner's witnesses. He points to inconsistencies in evidence of both Mr. Sexton and Mr. Warner and notes discrepancies in the company's record-keeping.

[35] Resolving the differences between the witnesses in this case is challenging. Certain contradictions can normally be resolved by documentary evidence. Mistakes in those documents have, however, been pointed out. These cast some doubt on the reliability of some of the documents. I have, however, been able to

reconcile some of those doubts/differences which will become apparent in my analysis. I note also Mr. Sexton, Mr. Nicol and Mr. Warner testified in a clear manner including providing testimony adverse in interest. While minor contradictions were present, their testimony appeared reliable and they acknowledged inconsistencies.

[36] There is a very different perspective between the parties on matters pertinent to resolving the issues in this case.

[37] Turning back to the matter of training, Mr. Tymko said when he started in November 2012, he had one or two days with another employee, Paul Perrault, showing him duties in the back of the train as a switchman. He testified he was not provided with training materials. He also testified no one told him to read training materials. Rather, he discovered safety and training materials in the desk of the trailer where the crew has coffee, in August/September 2015. He decided to review them on his own initiative as he thought it would be beneficial to him in his job.

[38] Mr. Tymko, however, had no training as a trackmobile operator and did not work in that capacity until he received his ticket in a one-day seminar on April 28, 2014.

[39] Mr. Sexton, currently a trackmobile operator working for 4-D Warner, was hired in May 2013, initially as a general labourer. He was in this position for one year, and then started training as a switchman. He began training as a trackmobile operator nine months after being trained as a switchman. He said he was provided on the job training as a switchman along with a “couple of booklets”. These were identified as the CROR and the GOI. In addition, he completed a three-hour course along with four or five others, including Mr. Tymko.

[40] While Mr. Sexton agreed safety was a core value, he could only speak to his own training.

[41] Mr. Warner said employees were trained on the switchman and trackmobile operator positions through a buddy system. They were also given manuals to read. When hired or trained into that position, they would work with a switchman until the

switchman advised the supervisor that the new employee could do the job safely. This could occur anywhere from five to six days i.e. 40-60 hours, to a month and a half. Once advised, the supervisor would review the employee by watching the employee from a distance to see if he could do the job safely and properly.

[42] While 4-D Warner is responsible for both the training on safety and the PPD (personal protection devices), MacKenzie Pulp Mill is responsible for the radio that the switchman and trackmobile operator use.

[43] There is a discrepancy in the records as to the amount of time Mr. Tymko was training. There are two printouts of the 4-D Warner bi-weekly time sheets for the period of time while Mr. Tymko was employed. The first simply lists the hours worked and the second included notations such as “switching” or “switch training”. Ms. Dalena Warner, who is also an owner of 4-D Warner and does the bookkeeping, testified the information on the Excel printouts is derived from the time sheets filled out manually by Mr. Tymko.

[44] There is no doubt and the parties agreed that the wording used by Mr. Tymko to describe the work he completed on his time sheet is not identical to the wording used in these records. As an example, Mr. Tymko on November 5, 2012 noted 10 hours of train switching. Ms. Warner’s records reflect 10 hours of switch training. Ms. Warner said as it was his first day of work, she knew he was not trained to switch so this would be part of his switch training.

[45] Mr. Warner also said Mr. Tymko would not be switching in those early days, but rather working with a switchman while he trained. He would never be left alone working as a switchman after one or two days of work. This is what the records reflect. They were filled out by a new employee and while he may have said switching, I find that Mr. Tymko was likely working with a switchman at the same time.

[46] There is also a dispute about the safety training provided by 4-D Warner to Mr. Tymko during his employment. Mr. Tymko indicated he likely attended four or

five health and safety meetings. The company time records and the records of the health and safety meetings establish however that Mr. Tymko likely attended eight health and safety meetings in the course of his employment with 4-D Warner. It is, however, somewhat troubling that Mr. Tymko is recorded in attendance in at least six or seven meetings and the time records indicate he was not at work that day. This again casts some doubt on the method of recording and the record-keeping of the company.

[47] There was much made of the terms of the safety and training manuals and their applicability to Mr. Tymko. 4-D Warner says it provided these to Mr. Tymko at the commencement of his employment and instructed him to read and review them. It also advised him these were applicable while he performed his duties for 4-D Warner.

[48] Ultimately, on this point, I conclude much of the discrepancy between the parties on training relates to the extent of the initial training provided to Mr. Tymko. This, I do not need to resolve as the disputed event that ultimately led to termination of Mr. Tymko took place in December 2015. The question therefore is whether Mr. Tymko was properly trained on the duties of a switchman/trackmobile operator prior to this event.

[49] While no doubt more robust training could have been undertaken, I conclude overall that Mr. Tymko was adequately trained on the duties of switchman and trackmobile operator by December 2015. While there is a discrepancy as to whether he attended four or five safety meetings or eight safety meetings as the employer recorded, Mr. Tymko did attend a minimum of five company safety meetings and likely more. Furthermore, while he denied participating in any proficiency testing or formal testing after April 2014, Mr. Warner noted this testing was undertaken by observation of the employee at work and noting proficiencies or deficiencies. The company records support this. There is no reason to doubt these particular records nor were any mistakes on these records pointed out.

[50] While Mr. Tymko says he found the pertinent safety operating manuals and took it upon himself to read these, this is not consistent with other documentary evidence. Mr. Warner assessed Mr. Tymko's proficiency at least twice a year in 2014 and 2015. The observations appear detailed and include safety and operational checks on Mr. Tymko, which took place on January 23, 2014; July 19, 2014; January 10, 2015 and July 21, 2015. In addition, Mr. Warner as "instructor" noted 340 hours "on-the-job" training from November 4, 2012 to August 15, 2013 for Mr. Tymko as part of noting that his qualifications for switchman were complete. According to 4-D Warner documents, the "on-the-job training" instructors were Greg Blackburn, Rick Johnson and Dave Warner.

[51] This, however, is not determinative of the matter. There remains one pertinent area of concern; whether 4-D Warner provided Mr. Tymko with adequate safety training for procedures in the event of a radio failure between the switchman and trackmobile operator.

[52] Before addressing this question, it is necessary to set out the evidence on 4-D Warner's disciplinary policy and Mr. Tymko's disciplinary history. This provides important context for assessing Mr. Tymko's awareness of the importance placed on safety rules.

Disciplinary Policy

[53] 4-D Warner says it has a progressive discipline policy in place as follows:

1. First infraction - verbal warning
2. Second infraction - written warning
3. Third infraction - termination

[54] It maintains in any event 4-D Warner was entitled to terminate Mr. Tymko's employment without notice or pay in lieu for just cause at any time.

[55] Mr. Tymko testified his understanding of the progressive discipline policy was:

1. A verbal warning
2. A written warning
3. A three-day suspension
4. A 90-day probationary period

Mr. Tymko also said, once the latter was complete, the policy would start again.

[56] Mr. Sexton described the discipline policy as a “3 strike you are out” policy. An employee is given three chances of making a mistake deemed worthy of a strike. On the third strike the employee is terminated. This policy he said was provided as part of a new employee orientation. Mr. Sexton noted however certain infractions could result in immediate termination such as being AWOL; drugs; or alcohol. Safety infractions could result in suspension and up to 90-days probation depending on the severity of the infraction.

[57] Mr. Carl Nicol, the Operations Manager for 4-D Warner described the discipline policy as a three-stage process. The first stage was a written warning; the second a suspension and then termination. This, he said, was in the employee’s agreement. When shown the policy and questioned as to how a suspension fit in, he noted this would depend on the severity of the incident. Certain actions would lead to immediate termination such as theft, theft of time, purposely damaging equipment and safety infractions resulting in property destruction depending on the severity of the infraction.

[58] I conclude the company utilized what can be considered a flexible “three strike” policy with the use of a “probationary period” to emphasize the significance of certain infractions. It also retained the ability for immediate termination for certain serious infractions. Whether or not this policy was part of an employee’s contract is not ultimately material. There is no signed employee contract and while it may go to inform the contextual approach articulated in *McKinley*, it is not determinative in this particular matter.

[59] Regardless of the exact nature of the policy, the company identified some concerns throughout Mr. Tymko's employment. Mr. Nicol reviewed a series of his notes identifying what he considered problems with Mr. Tymko from June 2017 to October 2017. He identified a persistent problem with Mr. Tymko not clearing the crossings, which he considered a safety issue and other matters such as long coffee breaks. While he said his conversations with Mr. Tymko were to outline expectations rather than discipline; he also characterized their conversations as discipline.

[60] While Mr. Tymko disputed whether track clearing was his task alone, he agreed it was part of his duties as switchman. Mr. Sexton was specific that the clearing of the rails was the switchman's job although the trackmobile operator may assist.

[61] While not formal warnings, I conclude the verbal discussions on these matters can be considered as part of the contextual approach outlined in *McKinley*.

[62] Mr. Tymko also received two formal warnings related to safety from his supervisor Mr. Nicol. On December 17, 2014, he received written confirmation of a verbal warning in which Mr. Nicol warned Mr. Tymko that he was required to put pins in switches and that a failure to do so was a safety violation.

[63] On April 23, 2015, Mr. Tymko received a written warning from Mr. Nicol saying Mr. Tymko had failed to set brakes on cars in a storage line and therefore placed on 90-days probation. Mr. Tymko disputed this, pointing out to Mr. Nicol he was not on the worksite on the day in question and asking for details of the infraction. Despite this, Mr. Tymko served his 90-day probation without incident. The records submitted as evidence confirm that Mr. Tymko was not present at the worksite on the day in question. Mr. Nicol said however he checked the brakes on the cars at 4:45 a.m. These would have been set the day before and Mr. Tymko may well have been on shift that day.

[64] In any event, the reality of the record is that Mr. Tymko was disciplined for two safety-related infractions prior to the December 2015 incident that led to his termination.

[65] I conclude it was clear to Mr. Tymko that 4-D Warner took safety seriously.

[66] I now turn to the key question of whether Mr. Tymko was trained on proper safety procedures in the event of a radio failure between the switchman and trackmobile operator.

[67] Despite the fact this is referenced in the CROR and other documents, it appears the practice and training did not specifically include this procedure. While that may have been because 4-D Warner had not previously encountered a radio failure, training pertinent to the events of December 2015 has since changed.

[68] Employees previously received limited or no training on signalling procedures and safety protocols in the event of a radio failure between the switchman and the trackmobile operator. Mr. Sexton confirmed he had not received any instruction or training about what a trackmobile operator should do if during a movement he stopped receiving instructions from the switchman, let alone on the specific requirement to stop when the movement has travelled one-half distance required by the last instruction. The evidence was also clear however, that in some circumstances it can be somewhat difficult to gauge “when the movement has travelled one half distance required by the last instruction.”

The December 28, 2015 Incident and Subsequent Events

[69] On December 28, 2015 Mr. Tymko and Mr. Sexton were undertaking their normal duties of moving rail cars within the railyard. Mr. Tymko was working as the switchman. Mr. Sexton operated the trackmobile.

[70] Mr. Tymko arrived at 5:40 a.m. to review the tasks and develop a plan of operation. As part of the day’s tasks, he and Mr. Sexton planned to move four

railway cars to the Viking line and once clear of the switch, spot them (stop them) at a distance of six to eight boxcar lengths from the warehouse.

[71] This task required a reverse manoeuvre towards the warehouse in which a series of railway cars moved backwards towards the warehouse. As part of this manoeuvre, Mr. Sexton was in control of the speed and brakes of the train and Mr. Tymko was responsible for notifying Mr. Sexton when to stop.

[72] As noted previously, the procedure for measuring distance by radio is for the switchman to count car lengths at regular intervals which the trackmobile operator parrots back to confirm safe movement. As part of that required process and safety protocol, Mr. Tymko recalls “parrot” radio communication with Mr. Sexton at the commencement of the task to ensure radio communication was operating between the two. Mr. Tymko’s task was to communicate “4-3-2-1” at a consistent tempo while the train was moving. He recalls Mr. Sexton parroting 4-3 and maybe 2 but after that no radio communication. Mr. Tymko says he panicked as the train passed the agreed stop. He called frantically on the radio “Blast”; “Slow down”; “Stop”; “Blast the air”. The train did not slow down. When the cars were 3-2 car lengths from the warehouse Mr. Tymko jumped off the trackmobile. The train then hit the warehouse door causing another railway car within the warehouse to derail.

[73] After picking himself up, Mr. Tymko immediately went into the warehouse to check for injuries. There were none. He told Mr. Sexton to get hold of Mr. Nicol.

[74] Mr. Tymko said he believed the handheld radios they were using had failed as Mr. Sexton failed to acknowledge his verbal signals.

[75] Mr. Sexton called Mr. Nicol to report the incident. Mr. Nicol immediately went to the site with two pulp mill managers to assess the situation. He met with Mr. Tymko and Mr. Sexton to discuss what had happened. Mr. Nicol did not remember who said what when he was advised that “they were moving the rail cars on the Viking line to spot them in front of the crossing”, and “they completely slid through the crossing into the cars in the warehouse”.

[76] Mr. Tymko said he asked Mr. Nicol why there was no “hard wired radio” in the trackmobile as it seemed to him he had lost communication with Mr. Sexton. He could not recall Mr. Nicol’s reply. Mr. Tymko also approached the acting manager of the mill to advise a hard wired radio was necessary in the trackmobile. That was installed by the end of the day or the next day.

[77] In Mr. Tymko’s view, either operator error by the trackmobile operator or lack of radio communication caused the accident. The safety protocol for both employees was to immediately stop the movement of the train if communication was lost between the switchman and the trackmobile operator.

[78] Mr. Sexton had a different recollection of some of the specifics. He was of the view the accident occurred between 8:00-8:30 a.m.; and the first time he heard the radio did not work was just after the accident or while the two advised Mr. Nicol of the accident. Mr. Nicol does not remember being advised about the radio.

[79] Mr. Nicol filled out an accident report that noted there were light flurries at the time. He also noted a buildup of snow between the tracks; his own observation at the time. At some point, Mr. Tymko told Mr. Nicol that he had called “3 car lengths, 2 car lengths” and “dynamite the brakes.” Mr. Sexton said he only heard “dynamite the brakes” over the radio.

[80] Mr. Nicol discussed the matter with Mr. Warner. In view of the severity of the accident and the past employment history of Mr. Tymko, 4-D Warner decided to terminate Mr. Tymko. Mr. Nicol said he no longer trusted Mr. Tymko to do his job safely. While both employees shared responsibility for the accident, Mr. Nicol attributed more of the fault to Mr. Tymko. Mr. Tymko was directing the trackmobile operator, including advising him of the distance left to travel. Mr. Tymko’s previous incidents and safety infractions along with the severity of a derailment led to a more serious level of discipline.

[81] Mr. Warner said Mr. Tymko’s infractions were getting more serious. Concerned an accident would happen, 4-D Warner had started the three-step

process. The safety issues were significant. Injuries or death could have resulted if an employee was on the crossing at the time the rail cars slid through or working in the warehouse when the rail car derailed. Mr. Warner said he “didn’t consider anything but to fire him; [he] would have fired his mother for that”. He was concerned about safety and “had to stop him”. The seriousness of the infraction also affected 4-D Warner’s ability to continue working at the MacKenzie Pulp Mill.

[82] In view of all these considerations, 4-D Warner terminated Mr. Tymko by a termination letter on December 30, 2015.

[83] Mr. Tymko did not speak with either Mr. or Ms. Warner about the incident and had no knowledge of any investigation.

[84] With respect to the discipline imposed on Mr. Sexton, Mr. Warner noted Mr. Sexton had no previous discipline on safety infractions. Mr. Warner allocated 95% of the blame to the switchman. He said the trackmobile operator makes no move unless told to do so by the switchman. The switchman is the “boss” and the trackmobile operator does nothing unless he is told to do so by the switchman.

[85] 4-D Warner suspended Mr. Sexton for four days. In addition, 4-D Warner imposed a 90-day probation period on Mr. Sexton. This no doubt reflected the seriousness of the incident. 4-D Warner continues to employ Mr. Sexton.

[86] With respect to the question of whether the trackmobile operator should have continued if he had not heard from the switchman, Mr. Sexton said the company now applied the policy set out in the safety materials. The trackmobile operator must stop if he has not heard from the switchman by the time he has travelled half the planned distance. Universal Training provided a two-day training session after January 2016 in which the employees were trained in this policy. Mr. Sexton said at the time if he had not heard from the switchman he “had no idea what to do”. He continued going down the line until he heard from Mr. Tymko.

Analysis

[87] There are essentially two primary allegations of cause. The first allegation is that Mr. Tymko failed to follow safety procedures in the event of a radio failure. The second allegation is that Mr. Tymko is fabricating the radio failure to cover up for a serious neglect of his duties.

[88] I conclude 4-D Warner has failed to establish either allegation on a balance of probabilities. Accordingly, it has failed to establish just cause to terminate Mr. Tymko.

[89] The evidence shows that while generally 4-D Warner provided its employees with adequate safety training, it failed to train Mr. Tymko or Mr. Sexton on what to do in this particular situation. Mr. Tymko therefore cannot be held responsible for the December 2015 incident.

[90] This instruction is actually contained in the two manuals given to employees when they commence their employment. Mr. Tymko relies on this to say therefore the accident was not his fault. The trackmobile operator should have stopped, as he had not heard from the switchman by the time he had travelled half the planned distance. This did not, however, appear to be taught or utilized in the operation at the time of the incident, and in any case, based on the evidence here, it would appear that the trackmobile operator would not have been able to see the half-way point at the time in question in order to stop.

[91] Neither employee involved in the critical incident was aware of the safety protocol when loss of communication occurs between the switchman and the trackmobile operator. While this was outlined in the manuals, neither received instruction or training about what a trackmobile operator should do if, during a movement, he stops receiving instructions from the switchman. The evidence established that the training was changed following the incident to provide a more comprehensive training course that included this policy instruction.

[92] In this instance, therefore, it cannot be said that Mr. Tymko had a neglectful or wilful disregard of 4-D Warner's safety standards and procedures.

[93] There is also a fundamental debate as to whether the radio was malfunctioning. 4-D Warner argues the problem with the radio was fabricated by Mr. Tymko in order to deflect blame for the incident.

[94] I conclude, however, that while the evidence is somewhat concerning, 4-D Warner has failed to establish that the radio was in fact working. This is largely due to its failure to investigate the situation despite being immediately advised of the issue.

[95] The evidence established Mr. Sexton heard Mr. Tymko on the radio two minutes before he heard "dynamite brakes" from Mr. Tymko. The radio would have failed in very short order during the specific time in which the incident occurred. While Mr. Tymko says a radio was later hardwired into the trackmobile by the MacKenzie Pulp Mill and this suggests there was a problem with the radio, subsequent to the incident that day both Mr. Tymko and Mr. Sexton completed further tasks using the same radio and trackmobile without incident.

[96] The company however did not investigate Mr. Tymko's claim that the radio was not working. While Mr. Nicol does not remember this, both Mr. Tymko and Mr. Sexton were clear this claim was mentioned to Mr. Nicol when he came to the worksite shortly after the incident occurred.

[97] Mr. Warner relied on Mr. Nicol's investigation and report of the incident. Mr. Nicol did not mention Mr. Tymko's claim of a radio malfunction or breakdown in communication. 4-D Warner did not investigate this important claim and Mr. Tymko must accordingly be given the benefit of the doubt. In these circumstances, I conclude, not without some reservation, that just cause has not been established for the dismissal of Mr. Tymko.

2. Reasonable Notice

[98] If 4-D Warner did not have just cause to dismiss Mr. Tymko, what is the notice period and damages to which he is entitled?

Mr. Tymko's Employment Status with 4-D Warner

[99] Mr. Tymko says he was a full-time employee with only two breaks of employment with 4-D Warner. His understanding was "he was an employee of 4-D Warner as long as Mr. Warner held the contract with MacKenzie Pulp Mill to move the rail commodities." His first break was February 2012 to August 2012 and his second break was February 2013 to June 2013.

[100] 4-D Warner says however, Mr. Tymko was a seasonal worker. 4-D Warner says Mr. Tymko was hired at this time as a seasonal worker to complete snow removal and site cleanup at the MacKenzie Pulp Mill.

[101] 4-D Warner laid off Mr. Tymko from his employment in February 2013 due to a shortage of work. 4-D Warner issued a Record of Employment ("ROE") which described the layoff as a shortage of work/end of contract or season. His return date was listed as unknown. Mr. Tymko characterized this as a break. He said he was laid off as he had replaced an employee who had gone to the Philippines and had now returned. He noted the ROE was issued so he could collect unemployment benefits.

[102] Ms. Warner said Mr. Tymko was a seasonal casual employee when 4-D Warner hired him and was laid off due to shortage of work. She noted when such an employee is laid off, she indicates that as opposed to terminated as "they may be coming back". This would depend upon the employee being available, work being available and their ability to work in an efficient and productive manner.

[103] Mr. Tymko was off work from February 2013 to June 2013 while he waited for the work to materialize. He said he did not look for work as Mr. Warner verbally

assured him one or two employees would be retiring “soon” and he would be able to return to work.

[104] Mr. Tymko returned to work in June 2013.

[105] The final ROE issued for Mr. Tymko indicated he was dismissed in December 2015 and he would not be returning.

Legal Principles

[106] *Dobbs v. The Cambie Malone’s Corporation*, 2011 BCSC 1830 at paras. 48, 38, and *George v. Cowichan Tribes*, 2015 BCSC 513 at para. 215 set out the principles to be utilized in determining an individual’s employment status when there is a hiatus in employment. They are:

- i. the court has the discretion to disregard interruptions in service when determining the reasonable notice period, and will examine the break in the context of the full period of employment (*George* at para. 215);
- ii. in the absence of an express contract term dealing with a hiatus in an employee’s term of employment, the question is whether the employee and employer have conducted themselves at the point of rehire in a manner consistent with the employee being given credit for the entire employment (*Dobbs* at para. 48); and
- iii. this is a question of fact to be determined on all the evidence, and each case is fact specific (*Dobbs* at paras. 48, 38).

[107] I conclude that Mr. Tymko was an employee of 4-D Warner from November 2012 to December 2015, with two hiatuses in employment. Mr. Tymko’s initial termination was a layoff due to lack of work and he was rehired when work materialized. I conclude he had a reasonable expectation of being rehired based on Mr. Warner’s comments concerning the soon to be retiring employees with its consequent work. Indeed Mr. Tymko said he remained in MacKenzie to be able to avail himself of this opportunity and due to his family commitments in MacKenzie. I

therefore disregard the interruption in his employment at 4-D Warner in determining reasonable notice.

3. Were 4-D Warner and Little Prairie Cabs common employers for the purpose of calculating reasonable notice?

[108] I conclude, however, Mr. Tymko's employment with Little Prairie Cabs is not pertinent to calculating reasonable notice.

[109] While Mr. Tymko argues the two companies are "common employers" for this purpose, that has not been established. The common employer doctrine exists to ensure "permissible complexity in corporate arrangements does not work an injustice in the realm of employment law": *Downtown Eatery (1993) Ltd. v. Ontario* (2001), 54 O.R. (3d) 161 (C.A.) at para. 36. The question is where "effective control over the employee resides": para. 33. Control may be found to reside with multiple entities, once all relevant factors are considered:

As long as there exists a sufficient degree of relationship between the different legal entities who apparently compete for the role of employer, there is no reason in law or in equity why they ought not all to be regarded as one for the purpose of determining liability for obligations owed to those employees who, in effect, have served all without regard for any precise notion of to whom they were bound in contract. What will constitute a sufficient degree of relationship will depend, in each case, on the details of such relationship, including such factors as individual shareholdings, corporate shareholdings and interlocking directorships. The essence of that relationship will be the element of common control. [*Sinclair v. Dover Engineering Services Ltd.* (1987), 11 B.C.L.R. (2d) 176 (S.C.), aff'd (1988), 49 D.L.R. (4th) 297 (B.C.C.A.) at 181.]

[110] Mr. Tymko commenced his employment on October 21, 2009 with Cars-Sen Holding Ltd. d.b.a. Little Prairie Cabs. Mr. and Ms. Warner were directors of Cars-Sen Holding Ltd. They were responsible for supervising and directing employees of Little Prairie Cabs. The business operated a taxi and crew hauling service.

[111] Mr. Tymko had no formal interview and never signed an employment contract. Mr. Tymko's duties included operating a taxi that transported crews from CN Rail. These driving duties included locations such as Chetwynd, Fort Nelson,

Dawson Creek, Fort St John, Stewart, MacKenzie, Tumbler Ridge, Prince George and all points in between.

[112] Mr. Tymko would be called directly by CN or by the Warners to transport the switching crews. He chose what trips he would undertake and was paid based on a percentage of the amount billed by the Warners to CN. He compiled the data on the trips which he provided to the Warners, who then provided him with a pay cheque. Mr. Tymko worked in this capacity from October 21, 2009 to mid-February 2012.

[113] Mr. Warner said he had no input into any of Mr. Tymko's shifts, work or pay at Little Prairie Cabs. He is a "hands on" person and the taxi/crew hauling business of Little Prairie Cabs and MacKenzie Taxi was more a "numbers kind of operation" that Ms. Warner handled. While he could have hired or fired at Little Prairie Cabs he did not do so.

[114] Ms. Warner ran the Little Prairie Cabs operations. She hired, fired and paid the employees. She was responsible for the payroll and paid the employees with cheques from Whiteside Enterprises, doing business as Little Prairie Cabs. The legal name of Little Prairie Cabs is a combination of Whiteside Enterprises and Cars-Sen Enterprises. Cars-Sen holds the shares of Whiteside with the Warners as directors. Cars-Sen shares are held by 4-D Warner with the Warners being directors of all three companies. Ms. Warner, however, said Mr. Tymko would know he was working for Little Prairie Cabs as he would have to answer the phone as Little Prairie Cabs when being called to transport crews.

[115] Ms. Warner said she prepared two separate T4 slips for Mr. Tymko in 2012 as Little Prairie Cabs and 4-D Warner were two separate companies.

[116] The owners and directors of 4-D Warner are Mr. and Ms. Warner. Mr. Warner was responsible for supervising and directing the employees of 4-D Warner. Ms. Warner says while she is an owner of 4-D Warner along with her husband, she had no input into the work and employees at 4-D Warner other than bookkeeping. While she had the ability to hire and fire employees, she never exercised that ability.

Mr. Tymko did not re-interview for this job; nor did he sign an employment contract. Mr. Warner said he did not seek out Mr. Tymko to work as an employee of 4-D Warner.

[117] In my view, there is not a sufficient connection or degree of relationship between these different legal entities in the circumstances. The two companies are distinct legal entities that operate in different geographic locations, doing different types of business with different structures with respect to management and pay. The only similar factor is ownership. This is not sufficient to find the employers to be connected: *Coupe v. Malone's Restaurant Ltd.*, 2006 BCSC 1350; *Paul Amaral v. Verona Floors Inc.*, 2016 ONSC 5763.

[118] In any event, I conclude this employment is not pertinent to the calculation of reasonable notice as Mr. Tymko quit his employment with Little Prairie Cabs.

[119] Mr. Tymko said he decided he needed a “break” from this work, characterizing it as “dangerous”. He had concerns about safety having seen a number of traffic fatalities in the course of his duties.

[120] He accordingly found temporary employment at Clearwater Welding for four months – February 24, 2012 to June 7, 2012.

[121] Ms. Warner said her understanding was Mr. Tymko was quitting his employ with Little Prairie Cabs to seek employment in Fort McMurray. She said her bookkeeper did not provide a record of employment due to an administrative error, and Ms. Warner did not follow up on this. Ms. Warner said Mr. Tymko returned to employment on a temporary basis to help cover a casual position from September to October 2012.

[122] While Mr. Tymko said Mr. Warner contacted him while he was working elsewhere to ask when he would be returning to work at Little Prairie Cabs, Mr. Warner denied this. He said he was not aware of the circumstances that led to Mr. Tymko returning to work for Little Prairie Cabs in September 2012 and did not seek him out to return to that position.

[123] Mr. Warner and Mr. Tymko socialized regularly. Mr. Warner said “over a beer” Mr. Tymko told him business was getting slow and there was not enough money in his pay cheque. He wanted to quit and go to Fort McMurray to “make the big bucks”. He was going to seek employment there as he had friends there. He told Mr. Warner he was going to Fort McMurray to make good money and he was not coming back. Mr. Warner thought this was a good idea as the Little Prairie Cabs business was suffering. Mr. Warner said he did not have a conversation about Mr. Tymko returning to work for Little Prairie Cabs.

[124] I find this a far more likely scenario. While no doubt Mr. Warner would assist Mr. Tymko with a job if he wished to return because of their friendship, the reality is there was not a commitment to give him a job should he decide to return. Mr. Tymko had left the area and was not awaiting a call to return to work. This is unlike Mr. Tymko’s later employment with 4-D Warner where he remained in MacKenzie with an expectation of being rehired after his initial lay-off.

4. What is the reasonable notice period Mr. Tymko is entitled to?

[125] Reasonable notice is determined on a case-by-case basis, having regard to four primary factors: the character of the employment, length of service, age, and the availability of similar employment, having regard to the individual’s experience, training and qualifications: *Bardal v. Globe and Mail Ltd.* (1960), 24 D.L.R. (2d) 140 (Ont. H.C.) at 145.

[126] Mr. Tymko was 52 at the time of termination and had worked for three years. He has a Grade 12 education but has extensive work experience in a number of industries, including the mill and rail industry. He found employment in May 2016, some 5 months after his termination.

[127] I conclude based on the *Bardal* factors Mr. Tymko would be entitled to two months notice. While Mr. Tymko’s age would tend to a larger amount, his short term of employment is pertinent to reducing the notice period.

5. Did Mr. Tymko fail to mitigate his damages?

[128] An employee who is terminated must take reasonable steps to limit his or her losses: *Forshaw v. Aluminex Extrusions Ltd.* (1989), 39 B.C.L.R. (2d) 140 (C.A.) at 144. The onus is on the defendant to prove a failure to mitigate: *Whiteman v. Eastern Lift Truck Inc.*, 2009 CarswellOnt 7483 (S.C.J.) at para. 9.

[129] Mr. Tymko was diligent in his search for work and I do not find he failed to mitigate his losses. Mr. Tymko updated his resume, contacted past employers, visited the E.I. office to look at the job board (though there were no jobs there for which he was qualified), and applied to local employers. While 4- Warner says he should have expanded his search beyond MacKenzie, there is no persuasive evidence that he would have been able to find earlier employment had he moved.

6. Is Mr. Tymko entitled to additional damages because of 4-D Warner's conduct?

[130] Conduct that is "harsh, vindictive, reprehensible and malicious" can lead to punitive damages. As noted in *Honda Canada Inc. v. Keays*, 2008 SCC 39 at para. 62, however, such damages are awarded only in cases where the acts are "deserving of punishment on their own". The conduct of 4-D Warner did not meet this standard. There was no evidence of harsh or vindictive conduct. Rather 4-D Warner was in a difficult situation because of the incident and acted with what information it had. A more detailed investigation should likely have taken place. 4-D Warner made a mistake in not doing so. No malice or reprehensible conduct was established.

SUMMARY

[131] 4-D Warner has failed to establish just cause to terminate Mr. Tymko's employment. Mr. Tymko was therefore wrongfully dismissed without reasonable notice or pay in lieu.

[132] I find that 4-D Warner and Little Prairie Cabs were not common employers but also that I ought to disregard the interruptions in Mr. Tymko's employment with 4-D Warner. Accordingly, his length of service was three years.

[133] Taking all relevant factors into account, reasonable notice for Mr. Tymko was two months and he is entitled to two months salary and benefits.

[134] Mr. Tymko did not fail to take reasonable steps to mitigate his losses.

[135] 4-D Warner's conduct does not amount to the type of harsh, vindictive, reprehensible or malicious conduct necessary to ground an award of punitive damages.

[136] The parties have both requested an opportunity to address the matter of costs. Should they be unable to agree on the matter between themselves, they may apply to do so within 30 days of this judgment.

[137] I thank both counsel for their thoughtful and comprehensive submissions in this matter.

The Honourable Madam Justice E. Burke