

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Hoem v. Macquarie Energy Canada Ltd.*,
2025 BCSC 446

Date: 20250313
Docket: S230966
Registry: Vancouver

Between:

Bradley Allan Hoem

Plaintiff

And

Macquarie Energy Canada Ltd.

Defendant

Before: The Honourable Justice Layton

Reasons for Judgment

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Table of Contents

INTRODUCTION 4

BACKGROUND AND CHRONOLOGY 5

 The Parties 6

 Relevant Macquarie Teams..... 6

 Process of Generating a Leasing Sale 9

 Mr. Hoem’s Remuneration under Employment Agreement 9

 Relevant Events between 2020 and 2024 10

AFTER-ACQUIRED CAUSE 16

 Legal Principles 16

 Dishonesty during Air B&B Investigation 17

 Ingestion of Cannabis Gummies 22

ENFORCEABILITY OF TERMINATION CLAUSE 24

 Legal Principles 25

 Analysis 26

REASONABLE NOTICE 29

 Legal Principles 29

 Analysis 31

 Damages in Lieu of Reasonable Notice 38

MITIGATION 42

 Legal Principles 43

 Analysis 44

SET-OFF 51

 Review of Evidence Regarding Richmond Steel Transaction 51

 Analysis of Set-Off Claim regarding Richmond Steel Transaction..... 54

VACATION ENTITLEMENT 55

AGGRAVATED DAMAGES 65

 Legal Principles 65

 Macquarie’s LinkedIn Posting..... 66

 Macquarie’s Handling of Relationship between Mr. Hoem and Ms. Mitchell 69

 Allegations in Amended RCC 72

 Compensable Damages 81

PUNITIVE DAMAGES 83

Legal Principles 83
Analysis 84
CONCLUSION..... 85

Introduction

[1] The plaintiff, Bradley Hoem, seeks damages from the defendant, his former employer Macquarie Energy Canada Ltd. (“Macquarie”), arising from the November 29, 2022 without cause termination of his employment as a salesperson for Macquarie's equipment finance business.

[2] Mr. Hoem seeks damages for pay in lieu of reasonable notice and entitlement to accrued vacation pay. He also seeks aggravated and punitive damages arising from Macquarie’s conduct relating to the circumstances of his dismissal and the allegations it has made against him in this litigation.

[3] Macquarie says it should not be liable for any damages, or alternatively not for the amount of damages sought by Mr. Hoem.

[4] The parties’ disagreements in this litigation raise the following issues:

- (a) Did Macquarie have after-acquired cause to terminate Mr. Hoem?
- (b) If not, are Mr. Hoem’s entitlements on termination without cause limited by his employment contract?
- (c) If not, what is the period of reasonable notice?
- (d) How should the court assess the compensation Mr. Hoem would have received during the notice period, given that his remuneration came mostly from commissions, which varied from year to year?
- (e) Did Mr. Hoem fail to take reasonable steps to find alternative employment so as to mitigate his damages, thereby justifying a reduction in the notice period?
- (f) Should Macquarie receive a set-off against damages based on a loss alleged to have arisen from Mr. Hoem intentionally providing unapproved pricing numbers to a client?

- (g) Is Mr. Hoem's claim for accrued vacation pay based solely on his statutory entitlements under the *Employment Standards Act*, R.S.B.C. 1996, c. 113 [ESA], thereby requiring that he advance that claim through the *ESA* enforcement mechanism and preventing him from doing so through an action for breach of contract?
- (h) Did Macquarie breach its duty of good faith and fair dealing owed to Mr. Hoem, and if so, did Mr. Hoem suffer compensable damages so as to justify aggravated damages?
- (i) Did Macquarie treat Mr. Hoem in a highhanded, malicious, arbitrary or highly reprehensible manner so as to warrant punitive damages?

[5] In addition to testifying himself, Mr. Hoem's called evidence from three witnesses:

- (a) Gabrielle Danwich, his girlfriend;
- (b) Guy Poirier, Vice President of Sales for CHG-Meridian, one of Macquarie's competitors in the equipment finance business; and
- (c) Edmond Wong, who works for Richmond Steel, the Macquarie client that received the pricing numbers related to the set-off claim.

[6] The sole witness for Macquarie was Troy Richardson, an executive director within Macquarie's Commodity and Global Markets Group.

Background and Chronology

[7] This section of my reasons provides an overview regarding the parties, their relationship, Mr. Hoem's termination and some of the allegations made in this litigation. Most of the facts in this overview are not contested. The bulk of my findings on the contested facts will be made later in these reasons, in determining the issues in dispute.

The Parties

[8] Macquarie is part of the Macquarie group of companies that operates as a global financial services organization headquartered in Sydney, Australia. The group's Canadian operations include selling financial products such as equipment leases to commercial enterprises and governmental organizations.

[9] Mr. Hoem worked in Macquarie's equipment leasing business as a salesperson for over 17 years, from September 2005 until November 29, 2022.

[10] Mr. Hoem and Macquarie executed a written employment agreement in 2005 and updated that agreement in 2009.

[11] The 2009 agreement enabled Mr. Hoem to join a new commission plan for sales employees ("Commission Plan"). This agreement also had a clause that addressed his entitlements on termination ("Termination Clause").

[12] Mr. Hoem did not manage other Macquarie employees. For most of his time with Macquarie, he reported to a senior manager named Douglas Johnson. When Mr. Johnson left Macquarie, Mr. Hoem initially reported to Mr. Richardson, and after that to JD Christman.

[13] Prior to joining Macquarie, Mr. Hoem completed a Bachelor of Commerce from the University of British Columbia ("UBC") in 2001, followed by an MBA at Simon Fraser University. He also became licensed as a Chartered Professional Accountant.

Relevant Macquarie Teams

[14] At the time of his termination, Mr. Hoem was one of five National Account Managers for Macquarie's equipment finance business. His duties included generating sales of equipment leases in Western Canada. The other National Account Managers were based in Toronto.

[15] Macquarie's salespersons were supported by client managers, who generated the lease documentation and managed day-to-day operations of the actual leasing facility.

[16] The salespersons were also supported by a portfolio manager, Kip Watts, who looked after the portfolio of leases already on Macquarie's balance sheet and assisted with activities at the end of the lease. These end-of-lease activities are described below.

[17] Two other Macquarie teams were involved in the leasing process: the Credit Approval Team and the Pricing Approval Team.

[18] The Credit Approval Team, led by Zoe Mitchell, comprised about five people. It was responsible for reviewing the creditworthiness of prospective customers and serviced about 14 salespersons in the United States and Canada, including Mr. Hoem.

[19] When a salesperson presented a new customer, the Credit Approval Team assembled and provided to the Pricing Approval Team that customer's indicative credit rating and credit profile. The Credit Approval Team sometimes also worked with the Pricing Approval Team to help assess the historical behaviour of the same or similar customers to inform Macquarie's assessment of the risk of contracting with the customer. This information and analysis drove aspects of the Pricing Approval Team's quotes, as well as certain credit precautions Macquarie was required to take pursuant to Australian banking regulations. The Credit Approval Team also reviewed the credit rating of existing customers before approving further financing.

[20] The length of time it took Ms. Mitchell's team to approve a transaction depended on several factors, including the urgency of competing requests across the sales teams Ms. Mitchell assisted.

[21] The Pricing Approval Team comprised three people and was led by Mr. Watts. It serviced five salespeople in Canada and was responsible for generating and approving the pricing of customer quotes.

[22] Among other factors, pricing was based on information received from the salesperson (e.g., customer's desired financing or leasing terms, type of equipment) and Macquarie's Credit Approval Team (e.g., customer's indicative credit rating and credit profile). Mr. Watts also factored into any pricing quote the applicable interest rate, and the residual and fair market values of the equipment.

[23] To cover overhead and generate an initial profit, Mr. Watts and his team applied a margin to the interest rate Macquarie was charged by any external funding partners for the transaction. Mr. Watts was required to apply a minimum 1.5% margin to any transaction for this purpose, although the number would often be higher. To quote below the minimum, Mr. Watts needed approval from Mr. Richardson and, depending on how far below, sometimes also from Andrew Gee in Australia. Mr. Gee was Division Head of Specialized and Asset Finance and the person to whom Mr. Richardson reported.

[24] The stronger a customer's credit rating, the lower the interest rate margin Macquarie would need to charge above its cost of funds to achieve a return during the minimum term of the contract.

[25] Mr. Watts' team also set the residual value risk taken on a transaction. Residual value was calculated with reference to the equipment's estimated value at the end of the lease. The estimated value was based on customer behaviour and proprietary knowledge held by Mr. Watts and Macquarie regarding the resale value and life cycles of various types of equipment. The residual value risk, expressed by a percentage, was the risk Macquarie was comfortable taking having regard to the amount owing at the end of the minimum term of the lease (and for which the customer would have no responsibility).

[26] If the proposed residual value risk was outside of Mr. Watts's delegated authority, he would need approval from Mr. Richardson, Mr. Gee, or the Central Risk Management Group in Sydney, depending on the percentage at issue.

[27] The customer had the option to purchase the equipment at fair market value at the end of the lease term. The Pricing and Approval Teams determined this amount, which was sometimes included in the customer quote.

Process of Generating a Leasing Sale

[28] Mr. Hoem and Macquarie's other salespersons were responsible for generating leads for new leases from potential and existing customers. After a customer expressed interest in financing equipment from Macquarie, the salesperson would gather basic client information, details pertaining to the customer's desired leasing term, and specifics as to the equipment to be financed. This information was relayed to the Pricing Approval Team, which generated an initial quote using the process described above.

[29] The salesperson also gathered the information needed by the Credit Approval Team for its review, including the customer's financial statements.

[30] In the interim, Macquarie's legal team, the portfolio manager and in some instances the salesperson would work to finalize the terms of a master lease, while the client manager assigned to the customer would typically generate the lease schedules. The lease schedules specified the term and equipment details, as well as the frequency and amounts of payments (typically monthly).

[31] A salesperson like Mr. Hoem might also have a role at the end of the lease term. At that point, the customer could either: (i) extend the lease term; (ii) purchase the equipment; or (iii) return the equipment to Macquarie, who would hire a third party to sell it if possible. These interactions were often primarily managed by the client manager assigned to the customer file.

Mr. Hoem's Remuneration under Employment Agreement

[32] Mr. Hoem's remuneration under his 2009 employment agreement included: (i) a \$100,000 base salary; (ii) benefits such as extended health care and dental coverage; and (iii) any commissions earned under the Commission Plan.

[33] Remuneration under the Commission Plan included “front-end” and “back-end” payments.

[34] Front-end commission payments were generated based on the amount of new equipment leases, often referred to as “originations”.

[35] Commissions for the first \$8 million in originations were 0.4% of the total value. Once originations exceeded \$8 million, the rate increased to 1.5%, which was then applied retroactively to all originations for that fiscal year. There were also conditions for receiving these commission payments (e.g., a minimum transaction size of \$250,000).

[36] Back-end commission payments, called “net secondary income”, were generated at the end of a lease, which is when Macquarie sought to profit from the residual value of the equipment by either extending the lease, selling the equipment to the customer, or hiring a third-party to sell the equipment. These commissions were only payable if Macquarie recovered the residual value of the equipment. A salesperson’s net secondary income was thus not guaranteed, as it depended on Macquarie earning back the equipment’s residual value.

[37] Net secondary income commissions were 4% of the back-end profits, unless and until the salesperson exceeded \$8 million of originations for the fiscal year. Once originations exceeded \$8 million, the rate increased to 12%, which was then applied retroactively to all commission events for that fiscal year.

[38] Mr. Hoem was a particularly strong income performer among Macquarie salespersons. His calendar year income from 2013 until 2022 was often well above \$500,000 and averaged \$657,652.

Relevant Events between 2020 and 2024

[39] In November 2020, Macquarie terminated Mr. Hoem’s manager, Mr. Johnson. Mr. Hoem temporarily reported to Mr. Richardson. But in May 2021, he began reporting to Mr. Christman, who until then was a National Account Manager based in

Toronto. In his managerial capacity, Mr. Christman reported to Mr. Richardson, as had Mr. Johnson.

[40] On April 1, 2021, Mr. Hoem breached Macquarie's Acceptable Use of Technology policy, which resulted in Mr. Gee issuing him a formal conduct notice warning on September 4. The breach involved Mr. Hoem forwarding an internal document containing client data and marked confidential to his then common-law spouse's computer, so that he could access a program needed to format the document prior to sending it to the recipient.

[41] In June 2021, Mr. Hoem saw a LinkedIn posting for a position he believed was his job at Macquarie. He discussed the posting with Mr. Christman. Because Mr. Hoem was concerned about his employment, he researched compensation and job opportunities with Macquarie's major competitors. Mr. Hoem discussed the information he thereby obtained with Mr. Christman in an effort to instigate changes at Macquarie, including to his compensation structure.

[42] Over the course of the 2021 and 2022 fiscal years, Mr. Hoem's relationship with the Credit Approval Team, and in particular Ms. Mitchell, became strained. Messrs. Richardson and Christman were involved in attempts to resolve matters. In March 2022, Mr. Richardson told Mr. Hoem that he needed to improve his relationships with internal staff and responsiveness to customer requirements.

[43] In the fall of 2022, Macquarie learned of a lawsuit Mr. Hoem had brought against Dr. Alex Moore for defamation and interference with economic interests. The background to this lawsuit and Macquarie's resulting investigation are integral to Macquarie's claim of after-acquired cause.

[44] Dr. Moore had stayed at Mr. Hoem's vacation rental suite, following which she posted a negative Air B&B review of her check-in experience. After fruitless attempts to have Dr. Moore revise her review, Mr. Hoem texted Dr. Moore from a phone belonging to his then spouse. The text stated:

I have your picture, your name and your number. You have 48 hours to remove your review, or I'm hiring a private investigator to obtain your address and then the fun begins.

[45] Among other things, Dr. Moore's reaction to this text led to Mr. Hoem being banned from Air B&B and another vacation rental website. Dr. Moore also posted Tweets drawing attention to his text, which were retweeted by other Twitter users. However, these tweets did not identify Mr. Hoem or his address.

[46] Mr. Hoem's notice of civil claim against Dr. Moore falsely stated that the text was sent by his then spouse without his knowledge. In reality, Mr. Hoem had sent it using his spouse's phone.

[47] Mr. Hoem's lawsuit was the subject of an article on a website called *Business in Vancouver*. Macquarie was alerted to this article by a third party whose identity was not revealed in the trial evidence. The lawsuit and article caused Macquarie concern, mostly (but not entirely) because of a perceived potential to damage its reputation, given the nature of the text and because Dr. Moore had since obtained a teaching job at UBC, which was a Macquarie client, albeit a dormant one.

[48] On October 26, 2022, a lawyer on Macquarie's employee relations team, Gregory Green, interviewed Mr. Hoem to find out more about the lawsuit. Mr. Hoem lied to Mr. Green by repeating the false information about the text contained in his notice of civil claim. Mr. Hoem repeated the lie in a phone call and then an email with Mr. Green's superior, Luke Glisan. Mr. Hoem did not correct the lie he told during this "Air B&B investigation" with anyone at Macquarie before his termination.

[49] Mr. Hoem's lawsuit against Dr. Moore settled prior to discoveries. At this trial, Mr. Hoem testified that he settled because he knew he could not be dishonest during an examination for discovery ("EFD") or when testifying in court.

[50] In mid-November 2022, Mr. Richardson learned of a complaint that Mr. Hoem had not been responsive to requests from the Royal Bank of Canada ("RBC"), which Mr. Richardson testified was a significant referral source for Macquarie.

[51] Mr. Richardson testified that the possibility of terminating Mr. Hoem was first considered two or three weeks before the end of November 2022, when he raised specific concerns with Mr. Gee. Mr. Richardson also discussed this possibility with Mr. Christman, who supported the decision. The final decision had to be, and was, approved by Mr. Gee and the Macquarie group's head of commodities and global markets, Nicholas O'Kane. No one else was involved in making or approving the decision apart from Mr. Green, who provided information from his investigation.

[52] Macquarie terminated Mr. Hoem without cause on November 29, 2022. Messrs. Hoem, Richardson and Glisan attended the termination meeting. The meeting was held on Zoom, because Mr. Hoem was in Vancouver, Mr. Richardson was in Sydney (renewing his VISA), and Mr. Glisan was in New York City (where he was based).

[53] Mr. Richardson testified that the termination decision was premised on the same concerns he discussed with Mr. Gee, each of which was disclosed to Mr. Hoem at the meeting. These concerns were:

- (a) Mr. Hoem's interactions with internal staff, in particular Ms. Mitchell;
- (b) RBC's complaint about Mr. Hoem's responsiveness;
- (c) the conduct notice issued to Mr. Hoem on September 4, 2021; and
- (d) potential reputational damage flowing from Mr. Hoem's lawsuit against Dr. Moore.

[54] The gist of Mr. Richardson's testimony was that the RBC complaint and the conduct notice were not primary factors in deciding to terminate Mr. Hoem.

[55] Mr. Richardson testified that his personal belief was that Mr. Hoem lied to Mr. Green about who sent the text, and that this belief was based on the tone Mr. Hoem sometimes used in his communications. But Mr. Richardson also testified that he did not rely on this belief as a reason for supporting Mr. Hoem's termination.

[56] Mr. Richardson further testified that he did not recall discussing this belief with Mr. Gee or Mr. O’Kane in the lead-up to Mr. Hoem’s termination. In my view, his evidence in this regard is supported by emails exchanged between these men and Mr. Green when discussing whether the termination should occur, none of which states that Mr. Hoem may have lied during the Air B&B investigation.

[57] To the contrary, following his October 26, 2022 meeting with Mr. Hoem, Mr. Green sent a reporting email to Messrs. Richardson and Christman, and to Human Resources head Laura Beer, stating that Mr. Hoem was “open in his dialogue and told me more than I had anticipated”. Granted, on November 1, 2022, Mr. Green emailed Mr. Christman to say he would be considering whether any of the alleged threatening conduct towards Dr. Moore violated Macquarie’s Appropriate Workplace Behaviour policy, which arguably suggests at least some doubt as to whether Mr. Hoem had been truthful in denying sending the text. But in a subsequent email to Messrs. Gee, Richardson and Christman, setting out the reasons for recommending termination, Mr. Green did not raise the possibility that Mr. Hoem lied.

[58] In accordance with the Termination Clause, Macquarie paid Mr. Hoem a severance package of 52 weeks’ base salary in lieu of notice, which totalled \$100,000. This money was paid on a biweekly basis. Macquarie also paid Mr. Hoem \$27,986.77 for 582.08 accrued hours of vacation pay, calculated by reference only to his base salary.

[59] At the termination meeting, and the next day in an email, Mr. Hoem asked Macquarie to provide him with notes he had saved in the Outlook account on his workplace computer and to then delete them. Mr. Richardson testified that, as was customary, Macquarie reviewed the notes prior to releasing them to ensure they did not contain proprietary or confidential information.

[60] On January 11, 2023, Macquarie informed Mr. Hoem that it was waiving the non-solicitation covenants in his employment agreement to ensure there was no potential impediment to his ability to accept an offer of employment from one of Macquarie’s competitors.

[61] On February 8, 2023, Mr. Hoem filed a notice of civil claim (“NCC”) commencing this lawsuit against Macquarie.

[62] On March 10, 2023, Macquarie filed its response to civil claim (“RCC”), which alleged after-acquired cause for terminating Mr. Hoem based on information discovered in Mr. Hoem’s Outlook notes.

[63] The claim of after-acquired cause comprised four allegations:

- (a) that Mr. Hoem regularly ingested cannabis gummies during business hours;
- (b) that he was dishonest during the Air B&B investigation by claiming the text to Dr. Moore was sent by his ex-spouse without his knowledge;
- (c) that he had violated duties owed to Macquarie by releasing confidential information to Mr. Johnson, who by then was working at a Macquarie competitor called Insight Equipment Finance (“Insight”); and
- (d) that he had worked remotely in the United States without authorization during two one-week periods in 2022.

[64] In July 2023, Macquarie discovered that Mr. Hoem had provided a client, Richmond Steel, with quotes for equipment containing prices below those approved by Mr. Watts and the Pricing Approval Team.

[65] On November 21, 2023, Mr. Hoem filed an amended NCC, in which, among other things, he added the allegation that Macquarie breached its statutory obligations by failing to provide him with his entitlement to accrued vacation pay pursuant to the *ESA*.

[66] On November 27, 2023, Macquarie filed its amended RCC, which added as a fifth basis for after-acquired cause the allegation that Mr. Hoem intentionally provided reduced pricing to Richmond Steel without authorization, resulting in losses as high as \$890,000 and not lower than \$100,000.

[67] The amended RCC also denied that Mr. Hoem was entitled to accrued vacation pay in respect of any alleged statutory violations.

[68] Following discoveries and answers to requests, in August 2024 Macquarie informed Mr. Hoem that, in seeking to establish after-acquired cause at trial, it would not rely on the allegations of unauthorized remote working or an improper disclosure of confidential information to Mr. Johnson.

[69] In closing arguments at trial, Macquarie indicated that it would not seek to justify after-acquired cause based on the allegations regarding Richmond Steel. Macquarie did, however, continue to advance those allegations in seeking a set-off against any damages awarded to Mr. Hoem.

[70] Having provided an overview of the events that frame the issues arising in this case, I will now address each issue in turn.

After-Acquired Cause

[71] Macquarie relies on two allegations in support of its claim of after-acquired cause: first, that Mr. Hoem lied during the Air B&B investigation; and second, that he ingested cannabis gummies during work hours.

[72] Before addressing these allegations, I will set out the legal principles relevant to determining whether an employer has after-acquired cause to terminate an employee.

Legal Principles

[73] An employer who shows just cause for termination can dismiss an employee without notice or pay in lieu of notice: *Panton v. Everywoman's Health Centre Society* (1988), 2000 BCCA 621 at para. 24.

[74] Just cause is proven by conduct seriously incompatible with the employee's duties, which goes to the root of the contract and fundamentally strikes at the employment relationship: *Panton* at para. 28. Put another way, just cause will be established where the employee's conduct gives rise to a breakdown in the

employment relationship; for instance, where it violates an essential condition of the employment contract, breaches the faith inherent to the relationship, or is fundamentally at odds with the employee's obligations to the employer: *McKinley v. BC Tel*, 2001 SCC 38 at para. 48.

[75] The test for just cause is objective. It also requires a contextual approach, which involves considering the nature and seriousness of misconduct, the surrounding circumstances in which it occurred, the nature of the particular employment contract, and the position of the employee. The question is whether the misconduct is something a reasonable employer could not be expected to overlook, having regard to the nature and circumstances of the employment. See *McKinley* at paras. 39, 48, 56–57; *Van den Boogaard v. Vancouver Pile Driving Ltd.*, 2014 BCCA 168 at para. 32; *Roe v. British Columbia Ferry Services Ltd.*, 2015 BCCA 1 at para. 27.

[76] This objective, contextual approach reflects the principle of proportionality, thus striking an effective balance between the severity of the misconduct and the sanction imposed. The importance of this balance can be better understood by considering the sense of identity and self-worth individuals frequently derive from their employment. See *McKinley* at para. 53.

[77] After-acquired cause concerns misconduct that, although occurring during the employment relationship, is discovered by the employer only after termination. An employer can subsequently rely on the misconduct as a basis for upholding the right to dismiss the employee for cause. Accordingly, to establish after-acquired cause the employer must show that, at the time of termination, there was just cause so as to warrant the employee's dismissal. See *Blomgren v. Jingle Pot Pub*, 1999 BCCA 9 at para. 8; *Van den Boogaard* at paras. 33–34.

Dishonesty during Air B&B Investigation

[78] Macquarie's primary submission in support of after-acquired cause relies on Mr. Hoem's dishonesty during the Air B&B investigation.

[79] Macquarie contends it had a legitimate basis to investigate Mr. Hoem's lawsuit against Dr. Moore because of the online publicity in the form of the *Business in Vancouver* website article and Twitter posts. Macquarie says that, because a Google search would reveal that Mr. Hoem worked for Macquarie, the publicity could negatively impact its reputation. Macquarie points out that its Code of Conduct mandates that employees be honest and their actions inside and outside the workplace reflect positively on Macquarie's reputation. This Code also states that a breach of these provisions will be investigated and could result in consequences including dismissal. And Mr. Hoem clearly knew about the Code – in his preceding performance review he said he had read and followed it.

[80] In these circumstances, Macquarie argues that Mr. Hoem's intentional decision to lie to Messrs. Green and Glisan during the Air B&B investigation, and his failure to correct those lies, is conduct seriously incompatible with his duties to Macquarie and fundamentally inconsistent with the continuation of the employment relationship.

[81] I am unable to accept this argument for the following reasons.

[82] Most importantly, while Macquarie was justified in investigating the lawsuit, Mr. Hoem's dishonesty did not relate to a workplace matter. And while the matter to which it related did carry a potential to damage Macquarie's reputation, I find that this potential was quite minimal.

[83] For instance, there is no evidence to suggest any of the online publicity about Mr. Hoem's lawsuit mentioned Macquarie, or that anyone outside of Macquarie ever made the connection between it on the one hand, and Mr. Hoem and his lawsuit on the other. While someone brought the online article to Mr. Christman's attention, the evidence is at least equally consistent with this person being a Macquarie employee.

[84] It is true that Dr. Moore worked for UBC, which was notionally a Macquarie client. But UBC stopped leasing equipment through Macquarie several years before, and its account was dormant. Moreover, Dr. Moore was but one of many thousands

of employees at UBC and had no connection to Macquarie's UBC account when active. Indeed, she was not at that time a UBC employee.

[85] The context in which Mr. Hoem's lie was made therefore distinguishes this case from those relied upon by Macquarie, in which the dishonesty concerned matters directly connected to the workplace, and in some instances involved two incidents of misconduct (e.g., sexual harassment of a subordinate at a work social event, or hurtful and malicious targeting of a co-worker, or defrauding the employer, and *then* lying about it to the employer afterwards).

[86] See, for example, *Di Vito v. MacDonald Dettwiler & Associates Ltd.*, 1996 CanLII 3165 (B.C.S.C.) at paras. 24–43; *van Woerkens v. Marriott Hotels of Canada Ltd.*, 2009 BCSC 73 at paras. 177–197; *Obeng v. Canada Safeway Limited*, 2009 BCSC 8; *Mechalchuk v. Galaxy Motors (1990) Ltd.*, 2023 BCSC 635 at paras. 59–65, *aff'd* 2023 BCCA 482; *Roe* at paras. 33–38.

[87] I also note that *Di Vito* appears to accept that dishonesty *always* provides cause for dismissal: para. 36. That position has been overtaken by subsequent authorities, including *McKinley* at paras. 48–57. Regardless, *Di Vito* involved an incident of significant workplace misconduct by two employees, followed by dishonesty through repeated denials in a series of meetings with the employer.

[88] To be clear, I do not suggest that an employee's dishonesty during an employer's legitimate investigation into conduct outside the workplace can never provide just cause for termination. As in any case, the assessment must be made based on an objective and contextual analysis of all the circumstances.

[89] Indeed, one of the cases relied on by Macquarie—in which the employer's defence of just cause was accepted—concerns dishonesty not directly related to the employee's workplace duties: *Marshall v. Pacific Coast Savings Credit Union*, 1995 CanLII 2432 (B.C.S.C.). However, the circumstances in *Marshall* are distinguishable from those in Mr. Hoem's case.

[90] In *Marshall*, the employee was a branch manager for the employer credit union. He obtained a loan from his employer on the written condition that he use over half of it to pay off credit card debts. But he breached that condition, and when confronted by the employer falsely denied the breach at two meetings. While the lies did not relate to misconduct in the employee's role as a branch manager, they *did* involve an attempt to hide a failure to abide by a condition of the loan his employer provided. The employee thus breached two different obligations owed to the employer. Furthermore, given the "chaotic" financial circumstances in which the employee found himself after not paying down his credit card and racking up further debt (paras. 8–10), the impugned conduct directly and negatively impacted the employer's business interests. The same cannot be said regarding the circumstances in Mr. Hoem's case.

[91] The contextual assessment of Mr. Hoem's dishonesty must also account for his lengthy service to Macquarie, during which he helped the company earn substantial profits, and his lack of a disciplinary record apart from the unrelated formal notice for breaching Macquarie's technology policy. These factors deserve weight in assessing whether dismissal would have been a proportionate response to the seriousness of his misconduct: *van Woerkens* at para. 191.

[92] I have also considered that Mr. Hoem did not occupy a managerial role at Macquarie, and on the evidence before me appears not to have served as a role model or mentor for other staff. Nor was he involved in handling or reconciling money. The presence or absence of such factors is relevant in assessing whether cause has been established: see, e.g., *Roe* at para. 34; *Mechalchuk* at para. 65; *Obeng* at paras. 35, 37, 39. I recognize, of course, that dishonesty by employees who do not hold management positions or handle money can nonetheless provide sufficient basis for just cause: see, e.g., *Di Vito*.

[93] In sum, while Mr. Hoem's dishonesty during the Air B&B investigation would have warranted disciplinary action, in particular because the lie was repeated and not thereafter corrected, I conclude it did not go to the core of the employment

relationship and was not irreconcilable with sustaining that relationship by imposing a more proportionate disciplinary response: *McKinley* at para. 57; *Roe* at para. 27. The dishonesty therefore does not establish after-acquired cause for Mr. Hoem's termination.

[94] Mr. Hoem makes the alternative argument that, even if his dishonesty constituted a fundamental breach of the employment contract, Macquarie knew about it prior to termination but did not act to dismiss him for just cause on that basis at that time. If true, this condonation would preclude Macquarie from relying on the dishonesty to support a claim of after-acquired cause. See *Poirier v. Wal-Mart Canada Corp.*, 2006 BCSC 1138 at paras. 48–50.

[95] While I need not address this issue in light of my finding that there was no fundamental breach of the employment contract, in my view the circumstances here do not constitute condonation.

[96] As already discussed, Mr. Richardson believed Mr. Hoem had lied about sending the text. But the belief was based solely on Mr. Richardson's view that the tone of the text was similar to that sometimes used by Mr. Hoem in his communications with others at Macquarie. Standing alone, this similarity would have been insufficient to establish on a balance of probabilities that Mr. Hoem was dishonest during the Air B&B investigation.

[97] I have also considered the email communications exchanged amongst those at Macquarie involved in the decision to terminate Mr. Hoem. These emails do not include any statements to the effect that the senders or others at Macquarie believed Mr. Hoem lied, and more importantly do not suggest that Macquarie had evidence sufficient to support this claim were it to be relied on to assert termination for cause.

[98] Macquarie's failure to terminate Mr. Hoem for just cause based on the information then available to it cannot therefore be viewed as condonation.

[99] In coming to this conclusion, I reject Mr. Hoem's argument that knowledge of evidence sufficient to prove he was lying should be imputed to Macquarie because

the company could have accessed his Outlook notes on its server, and thus discovered the one revealing his lies. A failure to investigate potential misconduct may help to justify a finding of condonation: *Poirier* at para. 49. But Macquarie had no reasonable basis to believe this particular note or any other relevant evidence might be located in Mr. Hoem's Outlook notes. Macquarie's failure to search the notes prior to termination therefore does not constitute condonation.

Ingestion of Cannabis Gummies

[100] One of the Outlook notes Mr. Green discovered after Mr. Hoem was terminated is entitled "Gummies" and contains a log of slightly under 50 entries for specific dates and times. The entry for each date and time includes a number expressed in milligrams: e.g., "Feb 3: 2.5mg at 2pm". The numbers range from 1.75 mg to 5 mg.

[101] Mr. Richardson testified he understood this note to refer to cannabis gummies because a reference to "gummies" typically means cannabis. Mr. Richardson said his view was bolstered by another Outlook note discovered by Macquarie, in which Mr. Hoem wrote: "I took a weed gummy ... because I'm extremely smart and need to dumb myself down for certain meetings". I will say more about the context of this second note below.

[102] On cross referencing the dates and times in the "gummies" log with emails sent by Mr. Hoem while working, Macquarie concluded he was impaired by or taking intoxicating cannabis gummies during work hours. If true, this conduct would violate Macquarie's "Local Alcohol & Drugs Policy".

[103] However, the evidence leads me to conclude that, while Mr. Hoem sometimes ingested cannabis products during or around the times he was working, those products contained cannabidiol, or CBD, and not delta-9-tetrahydrocannabinol, or THC. The ingestion of CBD cannot establish after-acquired cause, including because there is no proper basis upon which I can find that taking CBD products breached Macquarie's Local Alcohol & Drugs Policy.

[104] I come to this conclusion for the following reasons.

[105] First, Mr. Hoem testified that he was ingesting CBD gummies and pills for health reasons, and that CBD products did not impair him in any way. He stated that he never purchased THC gummies nor ingested them during the time he worked for Macquarie. On two *subsequent* occasions when he took THC gummies, with his girlfriend Ms. Danwich, he found the experience unpleasant because he had trouble sleeping.

[106] Mr. Hoem's testimony is somewhat supported by two receipts for the purchase of CBD gummies during the time period in question. It is also supported by the evidence of Ms. Danwich, who testified to observing Mr. Hoem taking CBD on a daily basis. She saw no signs of him being impaired on these occasions. Ms. Danwich further testified she sometimes takes a THC gummy on the weekend, and on two occasions Mr. Hoem joined her. Both times she observed that he appeared to have trouble sleeping, and since then he has declined any offer to ingest THC.

[107] Mr. Hoem's testimony is further supported by a letter from his nurse practitioner, advising he took CBD gummies in an effort to alleviate certain health issues, and the use of CBD is indicated for the treatment of such issues. Macquarie did not argue this letter was inadmissible hearsay. To the contrary, in her oral closing submissions counsel for Macquarie agreed there is no dispute that it was recommended that Mr. Hoem take CBD.

[108] Second, the Outlook note that included the comment about taking a "weed gummy" to "dumb myself down for certain meetings" had a heading entitled "Movie Script". As Mr. Richardson readily agreed in cross-examination, most if not all the other entries on this note are obviously fictional. For example, many contain dialogue between well known movie stars. Mr. Hoem testified that the comment in question was based on something a friend had said while socializing after a sports event. Given the note's entire contents, I accept his evidence in this regard.

[109] Third, after the above-mentioned notes were discovered, Mr. Richardson asked Mr. Christman and Ms. Mitchell whether they had any recollection of interactions with Mr. Hoem during which he showed signs of ingesting cannabis gummies. Neither recalled any incident when Mr. Hoem appeared to be impaired. This evidence further supports Mr. Hoem’s testimony that he only ingested CBD gummies.

[110] Fourth, Macquarie has adduced no expert or other reliable evidence to suggest that ingesting CBD in the amounts indicated in the “gummies” log could cause impairment. Although not addressed by the parties in their closing arguments, applying the test in *R. v. Kruk*, 2024 SCC 7 at para. 144, it is likely open to me to take judicial notice that CBD (unlike THC) does not cause impairment. In any event, in her closing oral submissions counsel for Macquarie expressly stated that CBD does not cause impairment.

[111] Fifth, counsel for Macquarie conceded that a fair reading of her client’s Local Alcohol & Drugs Policy was that the “zero tolerance” position taken regarding “recreational cannabis” applied only to THC products and not to products containing only CBD. I agree with this interpretation. But even were this not the case, a breach of this policy occasioned by taking gummies containing only CBD would come nowhere near to supporting a claim of just cause for dismissal. Nor would it be sufficient to establish just cause if taken in conjunction with the dishonesty exhibited by Mr. Hoem during the Air B&B investigation.

Enforceability of Termination Clause

[112] The Termination Clause in Mr. Hoem’s employment agreement provides that, on being terminated without cause, he is entitled to four weeks’ notice for his first year of employment, and another three weeks’ notice for each additional year of employment, to a maximum of 52 weeks. This clause further provides that, in lieu of notice, he is entitled to receive his base salary, paid out every two weeks, for the same period.

[113] The Termination Clause makes clear that payments in lieu of notice cannot, however, include amounts in respect of commission. Rather, the clause expressly restricts commission payments to amounts already earned at the time of termination.

[114] As already noted, following Mr. Hoem's termination Macquarie continued to pay his base salary every two weeks for the maximum period allowed under the Termination Clause – in his case, 52 weeks. Macquarie says these payments, totalling \$100,000, exceeded the amount to which he was entitled under the *ESA*. In its written closing submissions, Macquarie argues that “*in all cases*” and “*in all circumstances*” Mr. Hoem's employment agreement provides for a greater benefit than the statutory minimum requirements and is therefore valid and enforceable.

[115] Mr. Hoem disagrees, arguing that Macquarie's payments under the Termination Clause did not meet his minimum entitlement under the *ESA*. But he further argues that, in any event, and more importantly given the applicable legal principles, there is no reading of the Termination Clause that unambiguously provides him with at least his minimum statutory entitlements *in all cases*. He says the Termination Clause is thus void and unenforceable, and on termination he was entitled to payment in respect of both base salary and commission during the notice period provided for at common law.

[116] As explained below, I agree with Mr. Hoem that the Termination Clause always carried the reasonable potential of not meeting minimum statutory standards, and was thus void and unenforceable from the beginning.

Legal Principles

[117] The common law presumes an employer cannot terminate an employee without reasonable notice. This presumption is rebuttable if the employment agreement clearly and unambiguously specifies some other period of notice, whether expressly or impliedly. However, any such agreement must comply with the minimum notice periods in the *ESA*, otherwise it will be void and unenforceable, and the employee will be entitled to their common law notice or pay in lieu of notice. See

Machtinger v. HOJ Industries, [1992] 1 S.C.R. 986 at 1004–1005; *Egan v. Harbour Air Seaplanes LLP*, 2024 BCCA 222, at paras. 24, 31, 34, 60; *ESA*, s. 4.

[118] A termination clause that has the *potential* of not meeting statutory minimum standards is void from the beginning, and not only if it falls below the statutory minimum during the hiring, employment or termination of an employee. See *Forbes v. Glenmore Printing Ltd.*, 2023 BCSC 25 at paras. 18, 20(d), citing *Shore v. Ladner Downs*, 1998 CanLII 5755 (B.C.C.A.) at para. 16; *Waddell v. Cintas Corp.*, 2001 BCCA 717 at para. 11; *Egan* at para. 36.

Analysis

[119] The following excerpts from the Termination Clause are sufficient to show why an application of the relevant legal principles renders it void and unenforceable from the beginning:

Termination with Notice

[...]

If you have been continuously employed for one year or more, the Employer may terminate your employment without cause by providing you with notice of termination calculated as follows:

- Four (4) weeks' notice in respect of your first year of continuous employment; plus
- Three (3) weeks' notice for each additional continuous year of employment (completed or partial) beyond the first year, provided that the total notice does not exceed fifty-two (52) weeks.

The Employer reserves the right, at its sole discretion, to pay you an amount equivalent to base salary in lieu of some or all of this notice above to a maximum of fifty-two (52) weeks' notice or base salary (the "payment period") in lieu of providing working notice. If the Employer exercises this right, the payments will commence on the next regular pay day following the termination date and will be made in equal instalments equivalent to your base salary on the Employer's regular pay days until the earlier of i) the expiry of the payment period or ii) the date upon which you commence alternative employment (or otherwise mitigate the effects of the termination of your employment). *Commissions and other payments earned under the Commission Plan will be paid to the day immediately preceding the termination date, subject to the terms of the Commission Plan.*

[...]

Under no circumstances will you be entitled to payments in lieu of notice of greater than 52 weeks' base salary. The treatment of equity awards, if

applicable to your employment, or commission and other payments will be governed by the applicable equity plan and/or Commission Plan. Where there is a reference to "termination date" or such similar reference in this Agreement or in the equity plan or Commission Plan, that date refers to the date on which you cease to provide services, and does not include any subsequent period during which you receive (or are eligible for) base salary payments in lieu of notice as described above.

[...]

On the termination of your employment, the Employer will have no further liability to you other than for a) base salary, commission, allowances and benefits that have accrued prior to the effective date of termination of employment and b) as set out in this provision, if applicable.

[Emphasis added]

[120] A similar restriction is imposed in the clause in Mr. Hoem's employment agreement pertaining to the Commission Pay Plan, which states in part:

Commission Pay Plan

In addition to your base salary, upon executing this Agreement, you will be eligible to participate in the Macquarie Equipment Leasing Commission Sales Plan ("Commission Plan"), in accordance with the governing terms of the Commission Plan. *Commissions and other payments under the Commission Plan do not form part of your base salary and amounts in lieu of commission and other payments under the Commission Plan will not be included in the calculation of any termination payments including payments in lieu of notice and payments in lieu of accrued but untaken leave.*

[...]

[Emphasis added]

[121] The above excerpts show that Mr. Hoem's entitlement to pay in lieu of notice was contractually restricted to a maximum of 52 weeks of his base salary and excluded any payments in respect to commission he would have earned during the notice period.

[122] The restriction to payment of base salary is relevant because s. 63 of the *ESA* entitled Mr. Hoem to a statutory minimum of eight weeks "regular wages" in lieu of notice. The *ESA* defines both "wages" and "regular wage" to include commission payments, and further provides that regular wages for each week of notice to which the employee is entitled are calculated based on the employee's earnings in the

eight weeks prior to termination divided by eight. See the definitions of “regular wage”, “wages”, and “termination pay” in s. 1(1) of the *ESA*.

[123] As already noted, the parties disagree as to whether the exclusion of commission payments in calculating pay in lieu of notice under the Termination Clause resulted in a payment less than that to which Mr. Hoem was at that time entitled pursuant to s. 63 of the *ESA*.

[124] Mr. Hoem argues that his entitlement under the *ESA* was \$101,336.62. He obtains this number by adding together: (i) his earned commissions of \$85,952 for October and November 2022; and (ii) his base salary of \$15,384.62 over the eight weeks prior to his termination. If I accept that these are the calculations required by the *ESA*, the Termination Clause has denied Mr. Hoem his minimum statutory entitlement, because he was entitled to \$101,336.62 but received only \$100,000.

[125] However, Macquarie argues that Mr. Hoem’s minimum entitlement under the *ESA* amounts to \$96,952.35, which if true would mean the \$100,000 he received exceeded the minimum entitlement. Macquarie’s minimum entitlement number is about \$4,400 lower than Mr. Hoem’s number because Macquarie has prorated the commissions he earned in October and November over the eight weeks prior to his termination (i.e., these two months span more than eight weeks).

[126] It is unnecessary to decide which party’s number is correct, because in closing written and oral submissions Macquarie agreed that the law in this province provides that a termination clause that has the *potential* to not meet the minimum statutory standards is void and unenforceable from the beginning. And in closing oral submissions, Macquarie further agreed that from the beginning there was a realistic potential for the Termination Clause to result in a payment falling below the minimum statutory standards, especially if Mr. Hoem had particularly strong commission earnings in the eight weeks prior to termination without cause.

[127] In this respect, see *Waddell* at paras. 7 and 11, holding that nullification may be achieved by demonstrating the possibility that the termination clause could fail to

meet *ESA* requirements due to a high sales volume in the eight weeks preceding termination of an employee whose compensation includes commissions in addition to a base salary. While neither party referenced *Waddell*, the case simply affirms the concession made by Macquarie in closing oral submissions and is consistent with the case law they agree applies to this issue.

[128] Macquarie also accepted in closing oral submissions that the severability clause in Mr. Hoem's 2009 employment agreement could not operate to excise the problematic parts of the Termination Clause discussed above. In other words, unenforceability cannot be avoided by using the sort of analysis undertaken in *Miller v. Convergys CMG Canada Limited Partnership*, 2014 BCCA 311 at paras. 36–47. I agree with Macquarie's concession in this respect.

[129] Mr. Hoem argued that the Termination Clause was also unenforceable due to other provisions that failed to meet minimum *ESA* requirements. It is unnecessary to consider those arguments given my resolution of this issue as described above.

Reasonable Notice

[130] Because the Termination Clause is void and unenforceable, it cannot displace the presumption that Mr. Hoem's employment contract includes an implied term of reasonable notice or payment in lieu thereof at common law. The question thus arises as to what period of time constitutes reasonable notice in this case.

[131] Mr. Hoem submits that the appropriate reasonable notice period is between 20 and 24 months, while Macquarie contends that the notice period should not exceed 15 months.

[132] Before addressing the appropriate notice period, I will set out the legal principles that have guided my assessment.

Legal Principles

[133] Absent an enforceable contract providing otherwise, at common law an employment contract of indefinite duration is only terminable on reasonable notice.

The purpose of notice is to bridge the gap between dismissal and new employment. See *Ansari v. B.C. Hydro & Power Auth.*, 1986 CanLII 1023 (B.C.S.C.) at para. 11, aff'd 55 B.C.L.R. (2d) xxxiii (C.A.); *Moore v. Instow Enterprises Ltd.*, 2021 BCSC 930 at para. 16.

[134] In determining the length of reasonable notice, courts generally apply the following factors from *Bardal v. Globe & Mail Ltd.*, 1960 CanLII 294 (O.N.S.C.): (i) the character of employment; (ii) the employee's length of service; (iii) the age of the employee; and (iv) the availability of similar employment having regard to the employee's experience, training and qualifications. While not exhaustive, these factors generally hold the most importance in determining what constitutes reasonable notice in the circumstances of each case. No one factor should be given disproportionate weight. See *Honda Canada Inc. v. Keays*, 2008 SCC 39 at paras. 25–32 [*Honda*]; *Ansari* at paras. 15–16, 41–43; *Zheng v. China Southern Airlines Company Limited*, 2023 BCSC 1763 at para. 51.

[135] Appropriate notice is determined on a case-by-case basis. There is no set formula, but courts may consider one month of notice per year of service as a guide or "rule of thumb". Absent exceptional circumstances, the rough upper limit is 18-24 months. See *Moore* at para. 16; *Zheng* at para 51; *Hawes v Dell Canada Inc.*, 2021 BCSC 1149 at para. 5; *Ansari* at para. 39.

[136] Recent cases addressing similar situations may also provide guidance as to the appropriate range of reasonable notice: *Saalfeld v. Absolute Software Corporation*, 2009 BCCA 18 at para. 14.

[137] The case law recognizes that experienced salespeople often develop skills that are readily transferrable to sales positions in other industries, which may enable them to secure new employment with greater ease. If so, the notice period tends to be less than would otherwise be the case, although as already noted the assessment is not formulaic. For instance, a salesperson may over time acquire knowledge that is highly specialized and thus less easily transferable, making appropriate a longer notice period. Ultimately, assessing the availability of similar

employment will be case specific. See *Nicholls v. Columbia Taping Tools Ltd.*, 2013 BCSC 2201 at para. 261; *Goetz v. Instow Enterprises Ltd.*, 2021 BCSC 709 at paras. 65–67; *Graham v. Galaxie Signs Ltd.*, 2010 BCSC 609 at paras. 41–44, aff'd 2013 BCCA 266, leave to appeal to SCC ref'd, 2014 CanLII 5831 (S.C.C.); *Husband v. Labatt Brewing Company Ltd.*, 1998 CanLII 3990 (B.C.S.C.) at paras. 10, 18; *Moore* at para. 26; *Spalti v. MDA Systems Ltd.*, 2018 BCSC 2296 at para. 27; *Hill v. Johnson Controls L.P.*, 2006 BCSC 826 at paras. 46–48.

Analysis

[138] Beginning with the character of Mr. Hoem's employment, he held a senior sales position at Macquarie, being one of five or six National Account Managers in Canada. His territory was broad, covering Western Canada. By 2011, he was often bringing in more than \$15 million in originating leases annually, earning end-of-lease profit for Macquarie that exceeded \$1 million per year and was frequently in the vicinity of \$2-3 million. His portfolio of active leases amounted to tens of millions; \$60 million at the time of termination, although in some preceding years over \$90 million. These factors help demonstrate that Mr. Hoem's employment involved significant responsibility: *Krieser v. Active Chemicals Ltd.*, 2005 BCSC 1370 at para. 74; *Renwick v. MacMillan Bloedel Ltd.*, 1995 CanLII 1487 (B.C.S.C.) at para. 32; *Husband* at paras. 14–15. This conclusion is reflected in the compensation Mr. Hoem received: over the decade prior to his termination, it averaged more than \$600,000 annually.

[139] While Mr. Hoem was not in a managerial position, this does not automatically mean he is entitled to a shorter notice period: *Moore* at paras. 21–26. As will be seen below, in several cases courts have held that senior salespersons with significant responsibility, but not in management positions, were entitled to reasonable notice in the vicinity of one month per each year of service. While I have given some weight to the fact that no other employees reported to Mr. Hoem, this factor must not take on disproportionate significance.

[140] I also appreciate that Mr. Hoem did not acquire expertise in the equipment leased to Macquarie’s customers. As he agreed in cross-examination, cursory knowledge was enough to enable him to discuss the equipment with customers and vendors. Mr. Hoem did, however, testify that he would sometimes give feedback to customers regarding which vendors were good, indicating that what knowledge he did acquire regarding equipment could be used to a customer’s benefit, and hence to the benefit of Macquarie.

[141] More importantly, over the years Mr. Hoem acquired expertise in the financial products he sold for Macquarie. As Mr. Richardson testified, a salesperson who did not already have such knowledge would need to be trained in this regard. While I accept that Macquarie’s pricing and credit approval teams’ expertise and access to proprietary information was central to its leasing business, Mr. Hoem’s job required a good working knowledge as to how credit approval and pricing decisions could impact a customer.

[142] Accordingly, this is not a case like *Graham*, which is relied on by Macquarie. There, the plaintiff’s compensation was mostly salary based and under \$80,000 per year, thus significantly lower than Mr. Hoem’s. More importantly, the evidence established that the plaintiff’s sales skills and knowledge were not limited to any particular field, and he gave evidence that he was a “salesman” who could “sell anything”. The evidence in *Graham* further established that the plaintiff’s years of experience made him more attractive to potential employers in the field in question (mostly selling signs) because customers often moved with salespersons with whom they had a relationship. Indeed, the plaintiff was offered a job by a company in the same field less than a month after his dismissal (paras. 41–48). Similar evidence was not elicited here respecting Mr. Hoem or the operating leasing business in which he worked while at Macquarie.

[143] Rather, the facts in Mr. Hoem’s case more closely resemble those in *Krieser* at para. 74, where the plaintiff’s position required that he develop expertise in the defendant’s chemical products. The same can be said to at least some material

extent regarding Mr. Hoem's knowledge about the sale of equipment operating leases. As testified to by Guy Poirier, who worked for Macquarie's competitor CHG-Meridian, this was a "very specific niche business of asset finance".

[144] I also note that Mr. Hoem appears to have had minimal sales experience with any other employer prior to starting with Macquarie – before that, he was mostly an executive trainee in the bottled water industry. He therefore does not have a history of experience selling products other than Macquarie's operating leases.

[145] Turning next to Mr. Hoem's age and length of service, he was 43 years old when terminated and had been at Macquarie for over 17 years. Most of his working career to that point had thus been spent at the company. But he had not yet reached the age at which employees dismissed from positions of significant responsibility may begin to encounter increased difficulty in finding new employment. Mr. Hoem does not argue otherwise, and appropriately refers to his age as a "neutral" factor in the analysis.

[146] Regarding the availability of similar employment, given Mr. Hoem's long tenure at Macquarie, it made sense for him to seek new employment with one of the company's three main competitors: CSI Leasing ("CSI"), CHG-Meridian and Insight. I accept Mr. Hoem's evidence, supported by the testimony of Mr. Poirier from CHG-Meridian, that these competitors expressed interest in hiring him prior to his termination. As will be explained further in addressing aggravated damages, Mr. Hoem reached out to them, or vice versa, in the year or so before that point.

[147] However, when Mr. Hoem contacted these three companies about finding a new job following his termination, they did not offer him a position, either because none was then available, or because the companies preferred to wait until the litigation between Macquarie and Mr. Hoem was resolved.

[148] For example, Mr. Poirier testified that the rumours he had heard about Macquarie suspecting Mr. Hoem dealt with clients while under the influence of marihuana was a concern, and that while none of the other allegations made by

Macquarie in the lawsuit raised a problem in terms of hiring Mr. Hoem, the fact of an ongoing lawsuit with Macquarie was itself a concern.

[149] Similarly, texts sent to Mr. Hoem by Mr. Johnson, from Insight, suggest Mr. Johnson was extremely concerned about Macquarie's allegation that Mr. Hoem had passed confidential information on to Mr. Johnson.

[150] In the same vein, Mr. Richardson agreed in cross-examination that Macquarie's allegations about Mr. Hoem regarding drug use while at work and releasing confidential information could give an employer pause before hiring Mr. Hoem, because Macquarie would itself pause before deciding to make a hire in similar circumstances.

[151] I do not accept that Mr. Hoem was the author of his own misfortune insofar as he shared information about Macquarie's allegations with these prospective employers. For one thing, because of rumors circulating in this niche industry, Mr. Poirier already knew about the marijuana allegations and a possible lawsuit. For another, it was reasonable for Mr. Hoem to be candid about the litigation in discussing prospective employment, especially since he previously worked with both Mr. Poirier and Mr. Johnson, and had reported to Mr. Johnson at Macquarie for several years. In these circumstances, I find that Macquarie's competitors were likely to ask or find out about Macquarie's allegations anyway, prior to deciding whether to make a formal job offer.

[152] In sum, the unavailability of a position in the companies with which Mr. Hoem was most likely to obtain similar employment, including at comparable compensation levels, is an important factor that I have considered in assessing the reasonable notice period.

[153] So too is the compensation structure used by Macquarie and these other companies, in particular the inevitable significant drop in income that would occur if an employee in Mr. Hoem's position and with his lengthy tenure switched companies. While Mr. Hoem received a base annual salary of \$100,000 at

Macquarie, the substantial bulk of his remuneration came from commissions at the front and back ends of the leasing relationship. Given that most leases in this industry run for several years, a switch to a new employer would likely result in Mr. Hoem receiving much less from back-end commissions until that period of time had passed.

[154] Macquarie concedes that the commission payment structure in the industry is a legitimate factor to consider in assessing reasonable notice but urges me not to give it too much weight, for two reasons.

[155] First, Macquarie argues that Mr. Hoem could nonetheless start earning front-end commissions at a new employer right away. This is true, but front-end commissions made up a significantly smaller part of Mr. Hoem's income than did back-end commissions.

[156] Moreover, on starting with one of Macquarie's three main competitors Mr. Hoem would have no solid stable of clients from whom additional leases could be obtained. This would negatively impact the volume of originating leases he could generate in those early years, and thus his front-end commissions.

[157] Granted, Macquarie released Mr. Hoem from the non-solicitation clause in his employment agreement in January 2023, which would have allowed him to try to sell new leases to his old Macquarie clients on behalf of a new employer. But there is no evidence before me as to the probability that his clients at Macquarie would follow him to the new employer. This contrasts with *Graham* at para. 47, where the evidence established that clients in the industry in question most often followed experienced salespeople to their new employers.

[158] Second, Macquarie points out that so-called "captive" leasing companies—i.e., those that, unlike Macquarie and others mentioned, only or mostly lease their own products—might provide a greater opportunity to earn commissions early on in a new employee's tenure with the company. However, Macquarie concedes that

there is no evidence upon which I can make this finding regarding captive leasing companies.

[159] I have also considered the cases relied on by the parties to support their respective positions regarding the appropriate notice period based on an application of the *Bardal* factors. Given the purpose of my review of these cases, I have not accounted for any reductions in the notice period flowing from a failure to mitigate or a contingency that the employee might be able to mitigate prior to expiry of the notice period.

[160] Mr. Hoem relies on the following cases:

- (a) *Moore*: 53-year-old senior salesperson of tires to corporate clients, 26 years' employment, 20 months' notice;
- (b) *Klyn v. Pentax Canada Inc.*, 2024 BCSC 372: no age given, territory sales manager for medical equipment, 15 years' employment, 18 months' notice;
- (c) *Ng v. Canadian Imperial Bank of Commerce*, 2003 CanLII 21054 (O.N.S.C.): 47-year-old financial advisor, 22 years' employment, 18 months' notice;
- (d) *Denhamer v. RBC Dominion Securities*, 2000 ABQB 651: no age given, investment advisor, 18 years' employment, 18 months' notice;
- (e) *Cole v. Merrill Lynch Canada Inc.*, 2005 CanLII 56201 (O.N.S.C.): 41-year-old financial advisor, 18 years' employment, 18 months' notice;
- (f) *Watson v. Schlumberger Canada Limited*, 2022 ABKB 646: 43-year-old account manager selling software to oil and gas companies, 20 years' employment, 20 months' notice;
- (g) *Inskip v. Jacobson Ford Mercury Sales Ltd.*, 1999 CanLII 5485 (B.C.S.C.): 51-year-old sales manager, 28 years' employment, 22 months' notice.

[161] I note that *Inskip* involved an employee who was not only working in a managerial role, but also effectively co-managed the business with its owners. *Inskip, Ng, Moore*, and to a lesser extent *Watson*, deal with employees with more seniority than Mr. Hoem, and in *Moore* the employee was also somewhat older when terminated.

[162] Macquarie relies on the following cases:

- (a) *Graham*: 60-year-old senior salesperson of signs, 14.5 years' employment, 10 months' notice;
- (b) *Krieser*: 43-year-old salesperson of chemical products, 16.5 years' employment, 13 months' notice;
- (c) *Brode v. Fitzwright Co. Ltd.*, 1992 CanLII 534 (B.C.S.C.): 40-year-old sales manager of neoprene garments worldwide, 12 years' employment, 15 months' notice;
- (d) *Earl v. Canada Bread Company, Limited*, 2007 BCSC 1574: 49-year-old territory manager engaging with franchisees who delivered baked goods to retail stores and occasionally with those stores directly, 19 years' employment, 17 months' notice;
- (e) *Renwick v. MacMillan Bloedel Ltd.*, 1995 CanLII 1487 (B.C.S.C.): 40-year-old senior sales representative, 15.5 years' employment, 15 months' notice;
- (f) *Goetz*: 53-year-old senior salesperson of tires to commercial clients, 31 years' employment, 18 months' notice.

[163] Most if not all of Macquarie's cases involve employees receiving much less remuneration than Mr. Hoem, which potentially impacts the character of the employment, but more particularly tends to increase the likelihood that similar employment will be available upon termination: *Hawes* at para. 6. And, apart from *Renwick*, in which the notice period for a 40-year-old employee with 15 years'

employment was held to be 15 months, none engage the problem, faced by Mr. Hoem, of trying to obtain a job in the same industry following allegations of misconduct made by the employer at or soon after termination. Nor do any of Macquarie's cases reference the situation, also faced by Mr. Hoem, where an industry's compensation structure makes it difficult for a terminated employee to approach their former level of compensation until they have worked for several years in their new job.

[164] Having considered the relevant factors, including Mr. Hoem's age, the character of his work at Macquarie, his length of service, and the availability of similar employment, and having also taken into account the cases referenced by the parties, I conclude that on termination Mr. Hoem was entitled to a notice period of 19 months.

Damages in Lieu of Reasonable Notice

[165] Damages for pay in lieu of notice should strive to put a plaintiff in the position they would have been in had reasonable notice been given: *Hawes* at para 19.

[166] Evidence of past earnings is often an important guide, especially where the employee's compensation comes solely in the form of a set salary. But where compensation is variable, for instance due to commission payments, greater flexibility is needed. In such cases, the proper approach is set out in *Hawes*:

[27] It is clear from the authorities that, where an employee's earnings are variable, there is no set formula. The court must award what is fair in the circumstances to approximate what the employee would have earned during the notice period. Sometimes courts have used the average of the past five years of commission earnings: *Veach v. Diversey Inc.*, [1993] B.C.J. No. 2420. Where an employee's commission earnings have been on an increasing or declining trend in the years prior to dismissal, it may be preferable to use only the last year's earnings: *O'Reilly*, at para 43. Where the past is not a reliable indicator, the court has made an estimate based on the whole evidentiary record: *TCF Ventures* at para 43.

[167] As noted, Mr. Hoem's remuneration comprised a base salary of \$100,000 and commissions, the latter component representing the significant bulk of his compensation. His calendar year income from 2013 until 2022 was as follows:

Calendar Year	Income
2022	\$1,084,114
2021	\$343,506
2020	\$403,227
2019	\$438,745
2018	\$683,351
2017	\$774,089
2016	\$901,303
2015	\$559,598
2014	\$688,395
2013	\$700,190

[168] The parties agree that *Hawes* describes the proper approach in calculating the commission component of damages over a notice period, but disagree as to how that approach should apply here.

[169] Macquarie argues that Mr. Hoem's 2022 earnings are not representative of what he would have earned during the notice period. In that year, Mr. Hoem earned \$629,201 in back-end commission from an unprecedented early leave buy out by BC Emergency Health Services. No buy out on this scale had ever before happened within Macquarie, and I accept that there is no reasonable prospect it would have been repeated during the notice period. This transaction put Mr. Hoem's yearly income for 2022 at almost \$1.1 million – his three next best years were \$901,303 in 2016, \$774,089 in 2017, and \$700,190 in 2013. Macquarie says that 2022 should therefore be removed from consideration in calculating damages, or alternatively that this extraordinary back-end commission should be excised from his 2022 earnings, leaving earnings of \$457,913 for the year.

[170] Macquarie's argument has some merit and is supported by *Hawes*. There, the employee's commission earnings were roughly \$165,000 for the previous seven years but for two exceptions: \$346,000 in commissions two years prior to termination, and \$66,000 in commissions five years prior. It was not appropriate to take the average over the last three years, as argued for by the plaintiff, because the \$346,000 commission was an outlier and unlikely to occur again. As the evidence showed the plaintiff's annual commissions were usually \$162,000 to \$167,000, the

court concluded the best estimate of his annual commission during the notice period was \$165,000.

[171] On the other hand, Mr. Hoem argues that the COVID-19 pandemic negatively impacted his commission income, and notes that his lowest-earning calendar years in the previous decade were during the first and second years of the pandemic: 2020 (\$403,227) and 2021 (\$343,506). Mr. Hoem testified that, because of the pandemic, customers waited to see whether employees would return to the office before ordering equipment, and also had trouble sourcing equipment they wanted to order.

[172] Mr. Hoem's testimony in this respect accords with common sense. It is also reflected in his 2020-2021 performance evaluation, where Mr. Richardson wrote that it had been a difficult year for any sales-based role, but Mr. Hoem performed at a "decent level", and while new business volumes were down Mr. Hoem's portfolio profitability remained sound. In his own testimony, Mr. Richardson stated that because of COVID-19 Macquarie's lease originations dropped from \$79 million for fiscal year 2020, which ended on March 31, 2020, and thus just after the pandemic hit in full force, to \$55 million for fiscal year 2021.

[173] But the evidence also suggests the downturn in originations caused by COVID-19 was greatest in fiscal year 2021. Mr. Richardson testified that Macquarie's lease originations increased to \$82 million for fiscal year 2022 and increased still further to \$93 million for fiscal year 2023. In his own evidence, Mr. Hoem agreed that Macquarie's originations started to increase again after fiscal year 2021. In fact, his own originations went from \$13,026,611 in fiscal 2021 to \$17,457,403 in fiscal 2022.

[174] Based on this evidence, it is difficult to assess with much precision the correlation between originations and Mr. Hoem's commission income during calendar years 2020 and 2021, or for that matter fiscal years 2021 and 2022. For example, there is no evidence regarding the trends during these years, if any, in Macquarie's profit from equipment leasing or the earnings of other Macquarie National Account Managers. The evidence available nonetheless supports the

conclusion that COVID-19 negatively impacted Mr. Hoem's income in 2020 and 2021.

[175] However, Macquarie also argues that Mr. Hoem's income started to decrease pre-COVID-19, in particular in 2019, when he earned \$438,745 after having exceeded \$600,000 for most of the previous six years. Macquarie suggests that none of the years before 2019 should therefore be used in calculating damages for the notice period.

[176] I agree that going too far back in time may lead to a skewed average for assessing future commission income. But I also accept Mr. Hoem's evidence that the dip in his income in 2019 was at least in part the result of BC Emergency Health Services deciding to pause or stop leasing. As he testified, originations as reflected in his performance evaluation for that period were lower for this very reason, but the evidence shows his origination numbers started to climb back up afterwards. Plus, the change in direction taken by BC Emergency Health Services in 2019, while negatively impacting commissions that year, would positively impact them in 2022.

[177] The circumstances in *Klyn* are somewhat like those in Mr. Hoem's case, in terms of the number of factors at play and the challenge of discerning future trends. The plaintiff was terminated in April 2022. In fiscal year 2019, he made an exceptionally large sale resulting in commission earnings of double or even triple his annual commissions in the previous decade. This outlier year was not reflective of the amount the plaintiff would have earned over the notice period. On the other hand, the defendant's proposal of taking the average income from fiscal years 2021 and 2022 risked giving undue weight to a period during which a problem with the defendant's products occupied much of the plaintiff's time and energy. While it was unclear whether this problem was resolved in the months following the plaintiff's termination, or the marketing environment in the province had substantially improved in that period, the court concluded that calculating income for the notice period based on the average from the previous two calendar years would be fair to both parties.

[178] As was the case in *Klyn*, looking to the past to assess Mr. Hoem's income during the notice period is not a straightforward exercise. It is nonetheless necessary to make an estimate based on the whole evidentiary record. To that end, I have decided to take an average of Mr. Hoem's income over the five calendar years from 2018 to 2022.

[179] I agree with Macquarie that some adjustment must be made to account for the extraordinary back-end commission Mr. Hoem earned in 2022. But I would not excise that entire amount. Rather, I would discount one-half of this commission.

[180] Doing so helps make up for the negative impact of COVID-19 on Mr. Hoem's earnings. It also brings his income for 2022 into a range more commensurate with his income in many past years. And it avoids the unfairness that would arise from accounting for the negative impact of BC Emergency Health Services' decision to stop leasing equipment on Mr. Hoem's income in 2019, while totally ignoring the positive impact of that decision on his income in 2022.

[181] This adjustment results in an income of \$772,513 for 2022.

[182] Using this figure for the calendar year 2022, Mr. Hoem's average income from 2018 to 2022 is \$528,268. For the 19-month period that I have found constitutes reasonable notice, his damages are therefore \$836,424.

Mitigation

[183] Macquarie's main argument regarding mitigation is that Mr. Hoem's notice period should be reduced by two months because he failed to take reasonable steps to mitigate his damages by finding alternative employment following his termination.

[184] Mr. Hoem disagrees, submitting the steps he took to mitigate his losses were reasonable. Alternatively, Mr. Hoem argues that, even if he failed to take reasonable steps, Macquarie has not established that doing so would likely have led to him finding a comparable position.

[185] Macquarie also argues Mr. Hoem’s damages should be reduced by the revenue he received for running a vacation rental property during the notice period. Mr. Hoem says this income is cancelled out by the associated operating expenses taken together with significant capital amounts expended to make his property more attractive to vacation renters.

Legal Principles

[186] An employee who has been wrongfully dismissed has a duty to mitigate their damages by taking reasonable steps to seek and, if available, accept equivalent employment elsewhere: *Coutts v Brian Jessel Autosports Inc.*, 2005 BCCA 224 at paras. 22, 25.

[187] The duty to mitigate involves a “constant and assiduous application for alternative employment, an exploration of what is available through all means”: *Goetz* at para 79, quoting *Smith v. Aker Kvaerner Canada Inc. and Kvaerner Power Inc.*, 2005 BCSC 117 at para. 31. However, the standard is reasonableness, not perfection: *MacBride v. ICG Liquid Gas Ltd.*, 1992 CanLII 1975 (B.C.S.C.).

[188] The employer bears the onus of establishing a failure to mitigate. To meet this onus, the employer must show that: (i) the employee failed to take reasonable steps; and (ii) but for this failure the employee would likely have found equivalent or comparable alternative employment. See *Hawes* at para. 13; *McLeod v. Lifelabs BC LP*, 2015 BCSC 1857 at para. 57; *Nardulli v. C-W Agencies Inc.*, 2012 BCSC 1686 at para. 449; *James v. The Hollypark Organization Inc.*, 2016 BCSC 495 at para. 55, aff’d 2018 BCCA 217.

[189] To meet the second arm of this test, the employer need not prove that a specific comparable job was available, along with the length of its term, and its nature and rate of pay. Even absent this level of detail, the employer will have met its onus if the evidence shows that, had reasonable steps been taken, comparable alternative employment would likely have been achieved. It may thus be open to the court to infer, without direct evidence, that comparable jobs were available, and the employee would likely have obtained such a job had reasonable efforts been made.

See *Carlyle-Smith v. Dennison Dodge Chrysler Ltd.*, 1997 CanLII 972 (B.C.S.C.) at paras. 27–40; *Dodge v. Signature Automotive Group Ltd.*, 2014 BCSC 1452 at para. 14; *Cimpan v. Kolumbia Inn Daycare Society*, 2006 BCSC 1828 at para. 108.

Analysis

[190] I will begin my analysis by reviewing Mr. Hoem’s evidence regarding the steps he took to mitigate his losses in the wake of his termination.

[191] As already discussed, following termination Mr. Hoem sought employment with Macquarie’s main competitors—CSI, CHG-Meridian and Insight—but was unsuccessful in obtaining a position because none was available and/or the prospective employer wanted to wait until Mr. Hoem’s litigation with Macquarie ended.

[192] Beginning in April or May 2023, Mr. Hoem took steps to start his own equipment leasing company. This company was to act as an independent broker to find the best leasing deals for equipment purchasers. Mr. Hoem spent a lot of time developing and promoting this business, it appears into the summer and fall of 2023. But his efforts yielded no income because prospective clients viewed brokers as simply adding another layer of cost to the transaction.

[193] In June of 2023, Mr. Hoem contacted about 10 recruiting companies in an attempt to secure comparable employment. He received a few calls in response, and told these recruiters about his specialty and the compensation he sought. Emails sent to the recruiters were made trial exhibits, and in them Mr. Hoem expressed a willingness to take a sales job in a new industry; i.e. not only in the field of equipment leasing. But he did not get any interviews through the recruiters.

[194] Mr. Hoem testified that he also applied unsuccessfully for jobs as an executive operations manager for Legal Aid BC and a leasing manager at Siemens. Mr. Hoem further testified that he, “went to a few other direct jobs”, which I take to mean that he applied for a few other jobs directly.

[195] Mr. Hoem then pivoted to several non-sales endeavours. Most significantly, he upgraded his home substantially (e.g., installing an outdoor pool and shower; removing a concrete pad; adding new drainage, lighting, electrical outlets, speaker system, landscaping, linens, towels, locks), and began to rent it out on a short-term basis. Mr. Hoem devoted significant time and energy to this vacation rental endeavour. Projecting to 24 months after his termination, Mr. Hoem estimated income of \$72,548 against costs of \$287,529.

[196] Mr. Hoem also obtained a Class 4 license so he could drive for Uber and Lyft, although at the time of trial he had not yet started to do so. In addition, he incorporated an electric skateboard company, which was close to starting operations but had not yet generated any income.

[197] As explained in more detail later in these reasons, Mr. Hoem testified that he encountered mental health challenges arising from his termination, including depression and suicidal ideation. I have taken these challenges into account in assessing whether he took reasonable steps in looking for comparable employment following termination: *Systad v. Ray-Mont Logistics Canada Inc.*, 2011 BCSC 1202 at para. 31.

[198] I will now turn to Macquarie's arguments in support of its claim that Mr. Hoem failed to take reasonable steps to mitigate his damages.

[199] For starters, Macquarie asserts that Mr. Hoem sabotaged his chances of finding employment with CSI, CHG-Meridian and Insight by advising them of his litigation with Macquarie and/or Macquarie's allegations about disclosing confidential information and consuming cannabis at work. I have already explained why this argument is unpersuasive.

[200] For similar reasons, I reject Macquarie's contention that Mr. Hoem undermined his prospects of obtaining new employment because, in July and mid-September of 2024, he made two LinkedIn posts in which he discussed his lawsuit

with Macquarie. Macquarie's argument is in any event moot because these posts were made after what I have found to be the end of the notice period.

[201] I also reject Macquarie's argument that Mr. Hoem acted unreasonably in waiting until July 2023 to tell CSI that Macquarie had waived his non-solicitation covenants in January 2023. The evidence establishes that CSI was not going to hire him during the notice period regardless.

[202] Macquarie also says Mr. Hoem failed to take reasonable steps to seek employment in the equipment leasing industry apart from contacting CSI, CHG-Meridian and Insight. It mostly relies on three pieces of evidence in this regard.

[203] First, in his testimony Edmond Wong mentioned several other leasing companies with which his employer Richmond Steel sometimes did business, and there is no evidence Mr. Hoem contacted any of them. Macquarie makes the same point regarding several captive leasing companies mentioned by Messrs. Hoem, Richardson and/or Poirier in their evidence, including but not limited to Dell Financial Services and HP Financial Services. However, Mr. Hoem was not cross-examined on this point, which denied him a chance to explain why he appears not to have reached out to any of these companies.

[204] Second, Macquarie led evidence from Mr. Richardson that neither he nor, to his knowledge anyone else at the company, was contacted to be a reference for Mr. Hoem. In fairness to Mr. Hoem, this is not surprising given the allegations Macquarie made against him in this lawsuit. I therefore do not accept this evidence as materially supporting the contention that Mr. Hoem failed to take reasonable steps to obtain comparable employment.

[205] Third, Mr. Richardson testified that Macquarie's HR department sent him about 50 LinkedIn "equipment financing" alerts for recruitment postings from various companies at various times in 2023 and 2024. However, these job postings were mere summaries that disclosed no details. On receiving them, Mr. Richardson did not click on the links to obtain such details. In cross-examination, he conceded to

knowing nothing about the timing of the jobs, the compensation offered, or whether the companies were even actively hiring. Moreover, none of the postings were put to Mr. Hoem in cross-examination, thus depriving him of any opportunity to comment on them.

[206] Macquarie further asserts that Mr. Hoem failed to take reasonable steps to seek employment in any *other* industries to which his marketing and sales skills might apply. Rather, he opted to change course and invest considerable time and energy in entirely new entrepreneurial ventures, none of which generated any earnings apart from his short-term rental property. This submission overstates the evidence somewhat, because as already noted Mr. Hoem told the recruiters with whom he communicated that he was open to taking a sales job in a new industry.

[207] I nonetheless agree with Macquarie that Mr. Hoem did not take reasonable steps to explore the possibility of obtaining comparable work outside of Macquarie's main competitors: CSI, CHG-Meridian and Insight. It is true that he made some efforts to find other positions; for example, by contacting recruiters and sending applications to Legal Aid BC, Siemens and a few other companies. But these efforts to look further afield were not "constant and assiduous". A reasonable person in the same circumstances, attempting to maintain their income and their position in the sales industry, would have conducted a more persistent and comprehensive search for comparable employment.

[208] In this regard, the following comments from *Moore* apply with necessary modification to Mr. Hoem:

[41] Mr. Moore has an obligation to mitigate his damages and to actively search for alternative employment. He has not done so. His obligation is not limited to searching for exactly the same, or a nearly identical, job that he has been terminated from. I find Mr. Moore limiting his search to solely commercial sales in the tire sector to be unreasonable in the circumstances. A reasonable job search requires a willingness to explore how one's experience and skills may be portable to other industries or areas. Reasonably similar employment could encompass senior sales jobs in other industries, another job in the same industry, or a job with a different title or in a different industry that makes use of similar skill sets, aptitude, and experience. In determining what employment is reasonably similar, some flexibility is required.

[209] It is not enough, however, for Macquarie to show that Mr. Hoem failed to take reasonable steps in seeking out comparable employment. It must also show that, had Mr. Hoem done so, he likely would have obtained a comparable position. See *Maguire v. Sutton*, 1998 CanLII 6771 (B.C.S.C.) at paras. 76–77; *Hawes* at paras. 13–17; and *Dibble v. Creative Music Therapy Solutions Inc.*, 2024 BCSC 1066 at paras. 83–87.

[210] In my view, Macquarie has not met its onus in this regard.

[211] In particular, Macquarie has provided no information, not even of a generic sort, as to how other potentially available sales jobs might have compared to Mr. Hoem’s position at the time of termination, including with respect to remuneration.

[212] To stick with the remuneration example, we do not know whether the captive leasing companies, or those companies mentioned by Mr. Wong in passing in his testimony, had available sales jobs with roughly comparable compensation. The same applies for the LinkedIn recruitment postings referenced in Mr. Richardson’s testimony.

[213] This absence of evidence matters because Mr. Hoem was earning a very substantial income each year and would have continued to do so throughout the notice period. I am therefore not prepared to conclude that Mr. Hoem had an obligation to take another job for some unspecified and potentially much lower compensation as part of his duty to mitigate. See *O.W.L. (Orphaned Wildlife) Rehabilitation Society v. Day*, 2018 BCSC 1724 at para. 264; *Krieser* at paras. 82–88; *McLeod* at para. 58.

[214] I find some support for this conclusion in the following comments from the still-leading case of *Forshaw v. Aluminex Extrusions Ltd.*, 1989 CanLII 234 (B.C.C.A.) at 6–7:

The duty to "act reasonably", in seeking and accepting alternate employment, cannot be a duty to take such steps as will reduce the claim against the defaulting former employer, but must be a duty to take such steps as a reasonable person in the dismissed employee's position would take in his own interests – to maintain his income and his position in his industry, trade

or profession. The question whether or not the employee has acted reasonably must be judged in relation to his own position, and not in relation to that of the employer who has wrongfully dismissed him. The former employer cannot have any right to expect that the former employee will accept lower-paying alternate employment with doubtful prospects, and then sue for the difference between what he makes in that work and what he would have made had he received the notice to which he was entitled.

The learned trial judge was, in my view, entitled to find the plaintiff justified in rejecting the offer of employment in question. He plainly regarded the position in question, while similar in terms of the level of managerial responsibility and the nature of the business involved to that which he held with the defendant, as not similar in terms of the scope of business to be done and the opportunity for achieving the income which he previously enjoyed.

[215] I acknowledge that many factors may be relevant to determining whether other jobs are equivalent or comparable to that from which the employee has been terminated. Compensation will often be an important factor in determining whether a job likely to have been available is similar to the employee's former position. But precise equivalency in terms of compensation is not required, and the job's other attributes must also be considered: see, e.g., *Leclair v. Patel Pharma Inc.*, 2021 BCSC 1904 at paras. 73–82. As noted in the quotation above from *Moore*, some flexibility is required in determining what employment is reasonably similar. I am not, therefore, suggesting that an employee will never have a duty to mitigate their losses by accepting a position that offers lower pay.

[216] For example, the evidence of Mr. Poirier from CHG-Meridian indicates that a new salesperson with relevant experience would receive a guaranteed package totalling about \$200,000 for each of the first three years. After that, their remuneration would rise as the salesperson developed a stable of customers from whom front-end commissions on originations could be earned, and full earning potential would be realized on leases starting to expire so as to allow for commissions on the back end.

[217] Mr. Poirier testified that, given Mr. Hoem's experience and performance for Macquarie, CHG-Meridian would have been prepared to make a more generous starting offer. But even were this not the case, no one is suggesting that a job at CHG-Meridian would not constitute similar or comparable employment simply

because Mr. Hoem would be starting out earning less, probably much less, than he had at Macquarie. As noted in *Goetz* at para. 87, fulfilling the duty to mitigate sometimes requires accepting a position that pays less in the short run.

[218] It follows from the discussion above that I also reject Macquarie's alternative argument that, even if it has not established that reasonable steps would likely have resulted in Mr. Hoem obtaining comparable employment, he was obligated to find work at a lower salary and thereby reduce his damages on termination.

[219] Macquarie further argues that Mr. Hoem's income of \$72,548 earned from vacation rentals on his home should be deducted from his damages. This position is justified in law, although Mr. Hoem can set-off business expenses against his gross income, provided he proves them with adequate and reliable evidence: *Strauss v. Albrico Services (1982)*, 2007 BCSC 197 at para. 68, aff'd 2008 BCCA 173.

[220] However, this vacation rental income referenced by Macquarie covers the 24-month period following Mr. Hoem's termination, whereas I have found the proper notice period is 19 months, which runs only to the end of June 2024. On my calculation, the evidence indicates that \$25,790 of the rental income was earned after June 2024, and therefore should not be deducted as a mitigation set-off: *Chu v. China Southern Airlines Company Limited*, 2023 BCSC 21 at para. 143. This deduction leaves earnings of \$46,758.

[221] From this amount should be deducted Mr. Hoem's associated expenses, including the amortization of his capital outlay over the 19 months in question. Although Mr. Hoem filed a thick sheaf of receipts related to his vacation rental expenses, the parties provided no guidance regarding how to calculate which expenses are referable to the income earned during this specific period. In these circumstances, I leave it to the parties to use their best efforts to agree on the applicable expenses and thus the final amount which is to be deducted from the damages otherwise payable to reflect Mr. Hoem's net income from the vacation rental property.

Set-Off

[222] The parties agree the \$100,000 Macquarie paid Mr. Hoem following his termination should be set-off against the damages he receives as payment in lieu of reasonable notice.

[223] However, Mr. Hoem submits that, because this amount was paid over 52 weeks, on a bi-weekly basis, and not in a lump sum on termination, the timing of the payments should be accounted for in calculating pre-judgment interest on his award. Macquarie did not oppose this submission, and I therefore conclude the timing of the payments should be accounted for as requested by Mr. Hoem.

[224] Macquarie also argues for a set-off of damages it claims to have suffered by virtue of Mr. Hoem intentionally providing one of its clients, Richmond Steel, with quotes for various pieces of equipment that contained prices below those approved by Mr. Watts and the Pricing Approval Team. In its written closing submissions, Macquarie says Mr. Hoem thus misconducted himself in breach of the employment contract, and this breach directly resulted in a \$45,000 loss.

[225] However, in closing oral submissions Macquarie conceded it had no expert evidence on the issue of how to calculate any damages occasioned by the lower pricing, and such damages may not have crystalized. For these reasons, Macquarie conceded it faces a challenge in establishing the claimed set-off.

[226] I agree, and conclude the claimed set-off has not been made out. In explaining why, I will begin by reviewing the salient evidence.

Review of Evidence Regarding Richmond Steel Transaction

[227] Richmond Steel employee Edmond Wong testified as Mr. Hoem's witness. However, he was not cross-examined by Macquarie. I agree with the parties' submission that Mr. Wong's evidence was reliable and can be accepted in deciding this set-off issue.

[228] Mr. Wong testified that Richmond Steel was one of Mr. Hoem's customers for several years. In the spring and summer of 2022, Richmond Steel was interested in obtaining operating leases for around 20 pieces of material-handling equipment worth \$8,893,557. Richmond Steel followed its usual practice of seeking quotes on all the pieces of equipment from several leasing companies, in an effort to get the best price possible. But Richmond Steel also intended to lease the pieces of equipment in groups, and to split its business amongst multiple companies to diversify risk. It was never going to lease all the pieces from a single company.

[229] Mr. Wong described the negotiating process with Mr. Hoem, who was his sole conduit with Macquarie and provided him with Macquarie's quotes. The rates on Macquarie's first quote were higher than the other leasing companies' quotes. Macquarie came back with a new quote, which was better but still high relative to the others. A third Macquarie quote was more in the range, so Richmond Steel decided to lease four items from Macquarie. Most of the other items were leased from other companies. Mr. Wong testified that Richmond Steel would probably not have leased any of the equipment from Macquarie based on the first or second quotes.

[230] Richmond Steel signed the contract for the first piece of equipment without noticing that the pricing was higher than the third and final quote received from Mr. Hoem. The contracts for the other pieces of equipment contained the same higher pricing, which led Mr. Wong to contact Macquarie. Further negotiation took place with Macquarie, but the pricing ended up higher. Richmond Steel was not happy with the outcome but had little choice because of time constraints – they needed the equipment, it was near delivery time, and the vendors were pressing to get paid.

[231] Mr. Hoem also testified about the incident with Richmond Steel. Like Mr. Wong, he recounted more than one round of quotes from Macquarie. Mr. Hoem explained that, in each instance, Kip Watts from Macquarie's Pricing Approval Team provided him with pricing information. Mr. Hoem transferred Mr. Watt's information to a different, "customer friendly" document, which he then provided to Mr. Wong. This transfer would not have involved mere copying and pasting.

[232] Mr. Hoem acknowledged the pricing numbers in the final “customer friendly” document he provided to Mr. Wong were all lower than those provided on Mr. Watt’s spreadsheets. He offered two explanations for his lower numbers: either he made a mistake, or Mr. Watt or Mr. Christman had provided oral approval for the lower numbers.

[233] Mr. Hoem could not recall transcribing the numbers or receiving oral approval for them, so he was unsure as to which explanation was correct. But he testified that he was certain he did not knowingly provide unapproved numbers to Richmond Steel. Doing so would have made no sense, he explained, because the discrepancy was sure to be discovered on the lease documents delivered to Richmond Steel by Macquarie, with adverse fallout for him.

[234] Mr. Richardson also testified about the incident with Richmond Steel and confirmed the pricing numbers Mr. Hoem provided to Mr. Wong were lower than the numbers in the final quote Mr. Watt provided to Mr. Hoem. This discrepancy was not discovered until July 2023, well after Mr. Hoem was terminated.

[235] Mr. Richardson testified that, on discovering the discrepancy, Mr. Watt was unable to locate any documents approving Mr. Hoem’s numbers. Further negotiations with Richmond Steel ensued, which resulted in pricing that Mr. Richardson testified was less advantageous to Macquarie.

[236] Much of Mr. Richardson’s evidence on this issue addressed the lease schedules ultimately entered into with Richmond Steel regarding the equipment in question. He testified that all the rates ultimately charged to Richmond Steel were actually higher than those quoted by Mr. Watts. This was because the cost of borrowing had gone up in the interlude. Mr. Richardson testified that Macquarie’s margin was nonetheless lower than it would have been had Mr. Hoem provided Richmond Steel with Mr. Watt’s pricing. He was unable to say how much lower or whether Macquarie would be losing or making money on the margin.

[237] Mr. Richardson further testified that Macquarie ended up with exposure to an additional \$45,000 in residual value risk on one asset, but he conceded that any profit or loss on that residual value would only be known in the future – i.e., at the end of the lease.

Analysis of Set-Off Claim regarding Richmond Steel Transaction

[238] As demonstrated by Mr. Richardson’s evidence, Macquarie has not established any loss arising from Mr. Hoem’s conduct in providing the lower pricing to Richmond Steel. It is even possible that Macquarie will profit from the transaction. If so, Mr. Wong’s evidence demonstrates that such profit would likely have been foreclosed had Mr. Watt’s final pricing numbers been provided to Richmond Steel. For these reasons alone, Macquarie’s set-off claim for a loss of \$45,000 cannot succeed.

[239] Though unnecessary to my conclusion on this issue, I also find that Macquarie has failed to prove that Mr. Hoem provided the lower pricing to Richmond Steel knowing his numbers had not been approved by Mr. Watts or Mr. Christman.

[240] The lack of any documentation suggesting these numbers were approved probably means no approval was given. But for the reasons Mr. Hoem gave in his testimony, Macquarie has not proven he intentionally provided Richmond Steel with the unapproved numbers. I agree that the likelihood of exposure was too high for him to knowingly take this risk.

[241] In my view, Mr. Hoem’s conduct was therefore at worst the result of mere error or negligence *simpliciter* and was not a breach of a fundamental term of the employment contract justifying summary dismissal. His conduct is thus insufficient at law to justify Macquarie in recovering damages, even were a loss established: *Kirby v. Amalgamated Income Limited Partnership*, 2009 BCSC 1044 at paras. 376, 379–380; *Movassaghi v. Steels Industrial Products Ltd.*, 2012 BCSC 1663 at paras. 193–195, 201.

Vacation Entitlement

[242] At the time of termination, Mr. Hoem had 582.08 hours, or about 73 days, of accrued vacation. In lieu of Mr. Hoem taking this vacation, Macquarie paid him for the accrued hours, but only in relation to his base pay, and not with respect to his commission earnings. The amount Macquarie paid in lieu of vacation was \$27,986.77.

[243] Mr. Hoem seeks further payment for those accrued vacation hours to reflect his commission earnings as well, on the basis that he is entitled to this further payment under his employment contract. In his written closing submissions, he expressly relies on “a contractual entitlement” in this regard and says nothing about reliance on an entitlement originating solely from the *ESA*. In additional written submissions, provided at my request after completion of the trial, Mr. Hoem refers to two documents he says together set out this contractual entitlement.

[244] More specifically, in claiming this further payment for accrued vacation pay Mr. Hoem argues his vacation payout on termination should comprise the same elements it comprised when he took vacation while still employed, namely: (i) his base pay, pro-rated over the period of vacation; and (ii) any commissions that became payable to him while on vacation, based on work performed prior to going on vacation.

[245] Before considering the merits of this contract-based argument, I will address a jurisdictional objection Macquarie makes to Mr. Hoem’s claim for a further payment in respect of his accrued vacation. While this objection might at first glance appear to be rendered moot by Mr. Hoem’s additional written submissions, it retains relevance if I reject the arguments he makes in those additional written submissions.

[246] Macquarie says this Court has no jurisdiction to order the requested relief because, despite Mr. Hoem’s purported reliance on a contractual entitlement, he is “in form and substance” seeking to enforce his statutory entitlement to vacation pay under the *ESA*. This contention is grounded in Mr. Hoem’s amended NCC, which arguably relies solely on the *ESA*—as opposed to his contract—as the justification for

additional payment for accrued vacation. Macquarie says Mr. Hoem can only enforce a statutory right to vacation pay through the administrative scheme in the *ESA*, which involves making a complaint to the Director of Employment Standards under s. 74.

[247] The centrepiece of Macquarie’s jurisdictional argument is *Macaraeg v. E Care Contact Centers Ltd.*, 2008 BCCA 182, leave to appeal to SCC ref’d, 2008 CanLII 53790 (S.C.C.). There, the plaintiff brought a civil action for breach of contract seeking payment of overtime hours. Her written employment contract did not provide for overtime hours, and it was common ground that, absent such a provision, compensation for overtime was not payable at common law. However, the chambers judge held that payment for overtime as a matter of law became an implied term of, or was incorporated into, the plaintiff’s employment contract by virtue of the mandatory overtime provisions in the *ESA*.

[248] The Court of Appeal disagreed, and rejected the broad proposition that rights granted by the *ESA* are implied terms of employment contracts. Rather, it is only where legislation allows the pursuance of a statutorily-conferred right in a civil action that the right will be enforceable through a recognized common law action. The *ESA* did not expressly or by necessary implication provide a right of civil enforcement for employee rights. Determining whether the *ESA* nonetheless allowed pursuance of a statutory entitlement via a recognized common law action, such as breach of contract, thus depended on whether the *ESA* provided an effective mechanism to enforce the statutory right in question.

[249] The Court held the *ESA* did, in fact, provide an effective enforcement mechanism to enforce the statutory right for overtime hours, in the form of a comprehensive administrative scheme for granting and enforcing employee rights. Accordingly, the plaintiff could not seek payment of the overtime mandated by the *ESA* in an action for breach of contract – the exclusive jurisdiction to determine the claim lay with the Director. See *Macaraeg* at paras. 73–104.

[250] Macquarie relies on two other cases for the same proposition: *Giza v. Sechelt School Bus Service Ltd. and Gould*, 2011 BCSC 669, aff'd 2012 BCCA 18, and *Belanger v. Tsetsaut Ventures Ltd.*, 2019 BCSC 560.

[251] In *Giza*, the employee sued for wrongful dismissal and sought damages for unpaid statutory holiday pay. He had not been employed under a written contract, and the employer never paid him for holidays as required by the *ESA*. The trial judge followed *Macaraeg* and held the employee was not entitled to enforce his statutory claim for holiday pay by way of civil action: *Giza* (BCSC) at paras. 71–77. This holding was affirmed on appeal: *Giza* (BCCA) at paras. 1, 52.

[252] In *Belanger*, the employees brought a civil action for severance pay allegedly owing under s. 63 of the *ESA*. The chambers judge followed *Macaraeg* and *Giza*, and held that a civil action cannot be brought to advance a statutory claim for severance pay. Rather, the exclusive jurisdiction to determine that claim was through the *ESA* complaint process: *Belanger* at paras. 14–17, 25, 27–33.

[253] Mr. Hoem urges me to reject Macquarie's argument that these cases preclude him from seeking to enforce a statutory right to vacation pay through a civil action. He references several cases where vacation pay under the *ESA* has been awarded in a civil action, although he acknowledges none involves the court addressing the issue of jurisdiction. See *Naidu v. Hare Motors Ltd.*, 2013 BCPC 165 at para. 13; *Price v. 481530 B.C. Ltd. (c.o.b. Micron Laboratories)*, 2017 BCSC 309 at paras. 4–13, 21–30, 36; *Liebreich v. Farmers of North America*, 2019 BCSC 1074 at paras. 34–36, 114–119, 165; *Reotech Construction Ltd. v. Snider*, 2022 BCSC 317 at paras. 21, 61–62.

[254] I note that *Reotech* deals with the issue of accrued vacation pay only briefly and does not mention the *ESA* in this regard. It is thus unclear whether the plaintiff's entitlement to vacation pay was part of the employment contract, or if instead it arose solely by reason of the *ESA* entitlement. In *Liebreich*, it is similarly unclear whether the court was dealing with a vacation benefit provided in the signed contract and addendum, as opposed to a benefit derived only from the *ESA*.

[255] Regardless, to the extent the decisions cited by Mr. Hoem purport to address claims for entitlements owed only under the *ESA*, they do not appear to consider the jurisdictional issue raised by Macquarie and thus cannot be relied on to derogate from the approach taken in *Macaraeg*, which remains binding in this Court.

[256] I therefore disagree with Mr. Hoem's argument that he can seek to enforce a statutory right to vacation pay in this Court, whether as a stand-alone right or based on the conceit, rejected in *Macaraeg*, that payment for accrued vacation referable to both base salary and commissions *as a matter of law* became an implied term of, or was incorporated into, his employment contract simply by virtue of provisions found in the *ESA*.

[257] *Macaraeg* does not, however, prevent Mr. Hoem from relying on his employment contract to ground a common law claim for accrued vacation pay. Section 118 of the *ESA* provides that nothing in the *ESA* or its regulations affects a person's right to bring an action that, but for the *ESA*, the person would have a right to bring. As explained in *Macaraeg* at paras. 96–97, s. 118 pertains to rights that exist apart from the *ESA*, and which can be enforced regardless of the *ESA*. In my view, s. 118 thus applies to a right to vacation pay found in an employment contract, as opposed to a statutory entitlement to such pay derived solely from the *ESA*.

[258] For example, in *Liboiron v. IBM Canada Ltd.*, 2015 BCSC 1523 at paras. 45–46, the terms of the employee's employment contract entitled him to five weeks of vacation annually. The trial judge held that on termination the employee was entitled to pay for any vacation that accrued prior to that date. *Liboiron* was followed in *Valle Torres v. Vancouver Native Health Society*, 2019 BCSC 523 at paras. 6–7, 79–80, in which the employee was contractually entitled to six weeks of annual vacation at the time of termination.

[259] I will next consider Mr. Hoem's argument that his contract entitles him to payment of accrued vacation based on both base salary and commission earnings.

[260] As noted, Mr. Hoem relies on two documents for his asserted contractual entitlement.

[261] First, Mr. Hoem's 2009 employment agreement provides for annual vacation of 20 days during his initial 14 years of employment, and 25 days during each year of employment thereafter.

[262] Second, Macquarie's Annual & Vacation Leave policy, last updated April 2019 ("2019 Vacation Policy"), states that employees are eligible for this same amount of vacation, "without interruption of pay", and adds that, "[f]or the duration of an employee's vacation, an amount equal to the employee's *earnings* will continue to be paid to the employee as vacation pay" (emphasis added).

[263] Mr. Hoem argues that this reference to "earnings" should be read as reflecting the parties' intention to include both base pay and commissions in vacation pay, otherwise employees would be faced with the absurdity of needing to schedule their vacation for periods during which no commissions would be paid, to avoid disentitling themselves to such payments. For example, on Mr. Hoem's interpretation, if a backend deal for one of his clients concluded when he was on vacation, he would still be paid any associated commission.

[264] In this respect, Mr. Hoem points out that the 2019 Vacation Policy expressly incorporates provisions of the *ESA* pertaining to vacation pay where those provisions operate to exceed the benefits the employment contract would otherwise provide. The clause in question states:

This policy is meant to be read in conjunction with an employee's rights and entitlements under local employment standards legislation in the applicable province of employment. Where a provincial employment standard varies from this policy, Macquarie will apply the more generous of this policy and the applicable employment standard. Similarly, as Macquarie generally offers policies that exceed employment standards, certain paid or unpaid days offered by Macquarie may satisfy a similar purpose as a paid or unpaid leave day under applicable employment standards legislation. Where this is the case, such days shall count towards (and will not be in addition) to the employee's statutory entitlements. At no time, will an employee be offered less than what they are entitled to under local employment standards laws.

[emphasis added]

[265] Of further relevance to my analysis, Mr. Hoem's accrued vacation was accumulated as "Grandfathered Vacation" under the 2019 Vacation Policy or its predecessors. I will explain what this means.

[266] The 2019 Vacation Policy provides that unused vacation exceeding the *ESA* minimum can be carried over only until June 30 of the next year. But unused vacation days either falling within the *ESA* minimum or otherwise existing as at December 31, 2012, defined as "Grandfathered Vacation", are not forfeited and instead carry forward from year-to-year until depleted. The 2019 Vacation Policy stipulates that, "the balance of an employee's Grandfathered Vacation time will be paid out on termination of employment."

[267] I agree with Mr. Hoem that the 2019 Vacation Policy forms part of his employment contract and requires that payment for accrued or "grandfathered" vacation on termination include amounts referable to commission earnings. In particular, I agree with Mr. Hoem's interpretation of the word "earnings", and his contention that the 2019 Vacation Policy incorporates into the contract entitlements provided by the *ESA* to the extent those entitlements exceed the benefits otherwise expressly provided for by the policy.

[268] This latter point is relevant because s. 58(2) and (3) of the *ESA* provide that vacation pay must be made based on a percentage of the employee's "total wages", and that vacation pay to which an employee is entitled when terminated must be paid at the time set by s. 18 "for paying wages". Section 18 states that an employer must pay all "wages" owing to an employee within 48 hours after the employer terminates the employment. The definition of "wages" in s. 1(1) of the *ESA* "includes (a) salaries, *commissions* or money, paid or payable by an employer to an employee for work" (emphasis added).

[269] Macquarie nonetheless argues that the 2019 Vacation Policy cannot provide Mr. Hoem with a contractual entitlement to vacation pay that includes amounts referable to commission earnings because the 2009 employment agreement: (i) expressly states that the payout for accrued but untaken vacation hours is restricted

to base pay; and (ii) includes an entire agreement clause under which the 2009 employment agreement must prevail over the 2019 Vacation Policy.

[270] These arguments rely on the following provisions in the 2009 employment agreement (emphasis added):

Commission Pay Plan

[...]

Commissions and other payments under the Commission Plan do not form part of your base salary and *amounts in lieu of commission* and other payments under the Commission Plan *will not be included in the calculation of any termination payments including payments in lieu of notice and payments in lieu of accrued but untaken leave.*

Entire Agreement

This Agreement and the Sales Commission Plan (and the Employment Offer letter and all the documents referred to in that Employment Offer Letter) constitute the entire agreement between you and the Employer in relation to its subject matter and supersedes any previous written and oral agreements, understandings, commitments and representations between you and the Employer in relation to that subject matter. *Should there be a conflict between any terms in this agreement and any other applicable document, this Agreement prevails.*

[emphasis added]

[271] I do not agree that these provisions prevent Mr. Hoem from relying on the 2019 Vacation Policy to argue for a contractual entitlement to a payout for accrued vacation that includes amounts referable to commission earnings.

[272] Starting with Macquarie's reliance on the Commission Pay Plan provision, I have already held that those portions of the 2009 employment agreement excluding commissions from Mr. Hoem's pay in lieu of reasonable notice are unenforceable. But in addition, the Commission Pay Plan provision excludes amounts referable to commissions from payments for accrued but untaken vacation on termination. This exclusion fails to comply with the minimum requirements of the *ESA* as described at paragraph 267 above. It is thus unenforceable for all purposes: *A-Teck Appraisals Ltd. v. Constandinou*, 2020 BCSC 135 at para. 33; *ESA*, s. 4.

[273] The Entire Agreement Provision also fails to assist Macquarie. The portion relied on by Macquarie states: “Should there be a *conflict* between any terms in this Agreement and any other applicable document, this Agreement prevails” (emphasis added). But the part of the Commission Pay Plan provision relied on by Macquarie to establish a conflict with the 2009 employment agreement is unenforceable. It therefore does not “conflict” with the 2009 employment agreement, which renders the Entire Agreement Provision inapplicable.

[274] I also reject Macquarie’s suggestion that an implied term in Mr. Hoem’s contract, grounded in past practice, restricts payment for accrued vacation on termination to base pay. For one thing, Mr. Hoem had never before been terminated, so there could have been no past practice in this regard. Furthermore, as submitted by Mr. Hoem, it would be an absurdity to suppose that, during his time at Macquarie, he was denied any commissions that happened to be earned while on vacation. In any event, as already explained an implied term of this sort would breach the *ESA* and thus be unenforceable.

[275] A final issue is whether Mr. Hoem’s amended NCC claim need or should be further amended to permit him to advance a contractual claim for an additional payout in respect of accrued vacation pay.

[276] In my view, this amendment is required if Mr. Hoem is to rely on a contractual entitlement for such a payout, because as presently pleaded his amended NCC at paragraphs 30 and 36 appears to rely solely on a statutory entitlement. The question thus becomes whether a post-trial amendment is justified on application of the principles in *Macdonald v. Macdonald Estate*, 1996 CanLII 1360 (B.C.S.C.).

[277] In resolving this question, I prefer Mr. Hoem’s arguments over those made by Macquarie.

[278] The proposed amendment is not inconsistent with the pleadings already filed or the evidence already tendered by Mr. Hoem. Rather, it adds a claim based on

contractual entitlement, which in turn is derived from evidence led as part of Mr. Hoem's case. Allowing the amendment is necessary to determine this claim.

[279] Nor is the proposed amendment prejudicial to Macquarie.

[280] The central feature of Mr. Hoem's argument—the claim for amounts referable to commission earnings—was provided to Macquarie in the form of pre-trial particulars. Granted, he did not at that point particularize reliance on a contractual entitlement, but the legal argument on this more specific issue has been fully canvassed in the parties' additional written submissions.

[281] Moreover, I do not believe the evidence would have been materially different, or the proceeding would have taken a materially different course, had the amendment been made before trial. The disputed issue relates to the scope of the contractual entitlement for accrued vacation on termination of Mr. Hoem's employment, which as noted is a topic on which there would have been no past practice. Indeed, evidence of past practice could not oust Macquarie's own 2019 Vacation Policy, because as already explained the alleged implied contractual term would breach and thus be unenforceable under the *ESA*.

[282] I therefore conclude that the proposed amendment of Mr. Hoem's pleadings should be made because it would not prejudice Macquarie or the interests of justice more generally.

[283] I would have come to this conclusion regardless but wish to add that Macquarie's pleadings themselves fail to identify with sufficient specificity the jurisdictional argument based on *Macaraeg*. The amended RCC merely states that Mr. Hoem is not entitled to "accrued vacation pay, in respect of any alleged statutory violations" and is not "entitled to any damages for loss of vacation or pay on lieu of vacation".

[284] Given this paucity of information regarding a central point of law relied on by Macquarie, I accept counsel for Mr. Hoem's oral submission in closing that he was taken by surprise on first hearing about the jurisdictional argument in Macquarie's

opening. To the extent there might be a lingering concern about prejudice to Macquarie flowing from the proposed amendment to Mr. Hoem's pleadings, which I reject, that concern is therefore arguably erased by the fact that Macquarie itself failed to adequately plead the jurisdictional defence in the amended RCC.

[285] It remains to calculate the further payment required to meet Macquarie's contractual obligation to compensate Mr. Hoem for accrued vacation referable not only to his base salary but also to his commission earnings.

[286] Mr. Hoem says this further payment should be determined by multiplying the 73 days of accrued vacation by his daily income (\$1,447.31) as derived from the annual income I use to calculate damages in lieu of reasonable notice (\$528,268), minus the amount already paid by Macquarie in respect of accrued vacation (\$27,986.77). On my calculations, this approach results in Macquarie owing Mr. Hoem \$77,668.83 for accrued vacation pay referable to commission earnings.

[287] When asked during oral closing submissions, counsel for Macquarie suggested that a successful *ESA*-based claim would require the commission-based component of pay for accrued vacation to be calculated based on Mr. Hoem's commission earnings in the eight weeks of employment preceding termination. As calculated by Macquarie, Mr. Hoem earned commissions of \$81,567.73 over this period. Pro-rated over the 73 days of accrued vacation, this number results in Macquarie owing Mr. Hoem \$106,329 for accrued vacation pay referable to commission earnings.

[288] As I have concluded that Mr. Hoem's contract provides that he is entitled to a payout for accrued vacation no less generous than that required under the *ESA*, I adopt Macquarie's a manner of calculation. Mr. Hoem's damages for Macquarie's failure to compensate him for accrued vacation hours to reflect his commission earnings thus amount to \$106,329.

Aggravated Damages

[289] Mr. Hoem argues that Macquarie breached its duty of good faith and fair dealing owed to him in three respects, each of which is discussed below. He says aggravated damages of \$50,000 should be awarded because these breaches caused him serious and prolonged mental distress transcending the emotional upset or distress that ordinarily accompanies a loss of employment. He submits this amount is in line with that awarded in *Chu and Acumen Law Corporation v. Ojanen*, 2019 BCSC 1352 [*Acumen BCSC*], aff'd on other grounds, 2021 BCCA 189 [*Acumen BCCA*].

[290] Macquarie disagrees, arguing that Mr. Hoem has not established a breach of the duty of good faith and fair dealing, and in any event, he has not proven the degree of mental distress required for a damages award.

Legal Principles

[291] Employers owe employees a duty of good faith and fair dealing regarding the manner of dismissal. Breaching this duty may result in foreseeable, compensable damages for mental distress. Aggravated damages will thus be awarded if the employee can establish: (i) breach of the duty of good faith and fair dealing; and (ii) resulting compensable damages. See *Wallace v. United Grain Growers Ltd.*, 1997 CanLII 332 (S.C.C.) at paras. 91–95; *Honda* at paras. 58–59; *Lau v. Royal Bank of Canada*, 2017 BCCA 253 at para. 17; *Hrynkiw v. Central City Brewers & Distillers Ltd.*, 2020 BCSC 1640 at para. 190.

[292] At a minimum, the duty of good faith and fair dealing requires employers to be candid, reasonable, honest and forthright with their employees. Conduct potentially amounting to breach of the duty includes being untruthful, misleading or unduly insensitive at the time of dismissal, or attacking the employee's reputation by unfounded declarations made at that time. It may also include conduct in litigating the employee's wrongful dismissal claim, provided the conduct relates to the dismissal. See *Wallace* at paras. 98–100; *Honda* at para. 59; *Lau* at paras. 30–31; *Acumen BCSC* at para. 126; *Hrynkiw* at para. 192.

[293] To establish compensable damages, more is required than the normal distress, upset or bad feelings that often accompany dismissal. There must be evidence of serious and prolonged disruption rising above these ordinary psychological impacts. Medical or other expert evidence is not required, but the requisite level of mental distress cannot be evidenced simply by the plaintiff's demeanor in the witness stand. See *Wallace* at paras. 103–104; *Honda* at para. 56; *Lau* at paras. 28, 45–50; *Cottrill v. Utopia Day Spas and Salons Ltd.*, 2018 BCCA 383 at paras. 14–19, leave to appeal to SCC ref'd, 2018 CanLII 29769 (S.C.C.); *Hrynkiw* at para. 193.

Macquarie's LinkedIn Posting

[294] The first of the three arguments Mr. Hoem advances in support of his aggravated damages claim relates to a LinkedIn job posting made by Macquarie in June 2023. Mr. Hoem submits Macquarie breached its duty to treat him with good faith and fairly by not being forthright and honest with him regarding this posting.

[295] For the following reasons, I find this alleged breach has not been made out.

[296] In June 2021, Mr. Hoem saw a Macquarie LinkedIn posting for a national account manager position in Vancouver, Calgary or Toronto. He believed this posting was for the job he then held at Macquarie, and as a result he was frustrated and taken aback. Mr. Hoem testified he confronted his manager, Mr. Christman, who told him the posting was supposed to be only for Toronto but had “auto added” the other two cities, and said he would get back to Mr. Hoem.

[297] A text Mr. Hoem sent to Mr. Christman at the time contains a screen shot of the LinkedIn posting. Along with this screen shot, Mr. Hoem tells Mr. Christman he had not been informed Macquarie was considering “adding sales in Vancouver and Calgary and reducing my territory”, and he only learned about this on LinkedIn. This exhibit did not include any reply by Mr. Christman.

[298] Mr. Hoem testified he thereafter contacted Macquarie's three main competitors—CSI, CGH-Meridian and Insight—because he feared Macquarie

planned to replace him. He advised Mr. Christman that all three companies had made him offers of employment. Mr. Christman told Mr. Hoem to email the details regarding the offers, because maybe Macquarie could improve his compensation. Mr. Hoem testified that Mr. Christman also said he would look into taking down the LinkedIn posting.

[299] Mr. Hoem subsequently sent an email to Mr. Christman concerning the offers and providing some details, including the compensation structure at these companies. Mr. Hoem testified that Macquarie took down the LinkedIn posting in July.

[300] In cross-examination, Mr. Hoem denied the LinkedIn posting, which included a reference to “Technology Media and Telecom”, was for a different position for which Macquarie hired someone named Chris Ewart at the end of 2021. He said Macquarie’s operating group name was in fact “Technology Media and Telecom”, and the job resulting in Mr. Ewart’s Toronto-based hire to handle telecom was not posted until that fall or winter. Mr. Hoem asked, rhetorically, why he would have responded to the posting by approaching Macquarie’s competitors for employment if it had not been for his job.

[301] As part of the same exchange, Mr. Hoem added that Mr. Christman never told him the LinkedIn posting was for telecom and not for his job. He then testified, inconsistently with his evidence in chief, that Mr. Christman told him regarding the posting that Macquarie was looking to hire in his role but had decided none of the applicants were sufficiently qualified.

[302] During cross-examination the next day, Mr. Hoem said he had found additional evidence. His counsel elicited this evidence in re-examination. It took the form of Mr. Christman’s reply to Mr. Hoem’s initial text regarding the LinkedIn posting (i.e., the text with the LinkedIn screenshot). As already noted, in that text Mr. Hoem told Mr. Christman he had not been informed Macquarie was adding sales in Vancouver and Calgary so as to reduce his territory. Mr. Christman’s response as indicated by this new evidence was as follows:

Fair enough, on the Wednesday bi-weekly Canada call – I indicated that we we [sic] had placed 2 postings on LinkedIn in an effort to grow our sales team. The posting you highlight as well as the Telco sales role. To be clear this about [sic] growing the team nationally – it is not focused on a particular region or territory. I’m looking to see where any talent may be across Canada.

[303] In further cross-examination, Mr. Hoem agreed he had no discussions with Mr. Christman inconsistent with Mr. Christman’s text but added that the text “proves” Macquarie had indeed posted “an ad for my job”.

[304] Mr. Richardson also testified about the LinkedIn posting. He said it related to a sales-based role for which Macquarie hired an individual named Taylor Brodie in late June or early July 2021. Mr. Brodie was based in Toronto and replaced a sales team member named Michael Schaad who resigned in late May 2021.

[305] Mr. Richardson further testified that around the same time Macquarie was advertising for someone with a specialty in telecommunications accounts, and ultimately hired Mr. Ewart. Mr. Ewart was based in Toronto and started in November or December 2021. Mr. Richardson testified that he did not discuss this posting, or the one that led to Mr. Brodie’s hire, with Mr. Hoem.

[306] Having assessed the evidence regarding the LinkedIn posting, I find that Macquarie was not posting for Mr. Hoem’s position. Thus, the evidence does not support a holding that Macquarie breached the duty of good faith and fair dealing owed to Mr. Hoem.

[307] I accept that Mr. Hoem believed the LinkedIn posting threatened his sales territory, because he said so in his text to Mr. Christman, and shortly thereafter he approached three of Macquarie’s competitors to inquire about a possible sales position.

[308] But the evidence of Mr. Richardson, on which he was not challenged in cross-examination, was that this LinkedIn posting, and another one made around the same time, were to replace a Toronto-based salesperson who had resigned and add a salesperson with a speciality in telecom accounts. I accept this evidence from Mr.

Richardson, as I would expect him to have knowledge about such job postings, and I thus find the LinkedIn posting was not for Mr. Hoem's job.

[309] By contrast, the reliability of Mr. Hoem's evidence that Mr. Christman told him the LinkedIn posting was for his job is significantly weakened by the inconsistency I have already identified. That is, in chief he said Mr. Christman told him the posting was supposed to be only for Toronto but "auto added" the other two cities. Yet in cross-examination, Mr. Hoem claimed Mr. Christman told him Macquarie was looking to hire in his role but decided none of the applicants were qualified.

[310] Furthermore, I do not accept that Mr. Christman's text reply to Mr. Hoem on being sent the LinkedIn screenshot proves Macquarie was advertising for Mr. Hoem's job. Mr. Hoem's testimony to the contrary constitutes overreaching. In any event, Mr. Richardson's evidence adds context that militates against drawing the inference contended for by Mr. Hoem. Even without this context, the reply seems inconsistent with Mr. Hoem's claim that Mr. Christman expressly admitted the posting was for his job.

[311] For these reasons, I reject Mr. Hoem's contention that Macquarie was not forthright and honest regarding the LinkedIn posting. Regardless, the posting and related communications occurred in the summer of 2021, well over a year before Mr. Hoem was terminated. It is therefore difficult to understand how any dishonesty regarding the posting, had such occurred, could have grounded a breach of Macquarie's duty to treat Mr. Hoem in good faith and fairly in relation to his dismissal.

Macquarie's Handling of Relationship between Mr. Hoem and Ms. Mitchell

[312] Mr. Hoem's second alleged breach is said to arise because Macquarie "made his job more difficult" by, on the one hand blaming him for not being patient and polite enough with Ms. Mitchell, but on the other hand citing a lack of responsiveness to clients as a reason for termination.

[313] As explained below, I find that Mr. Hoem has not established this alleged breach.

[314] Ms. Mitchell and her Credit Approval Team serviced 14 salespeople in the United States and Canada. It was thus reasonable for Macquarie to give her some latitude in managing competing priorities. Mr. Hoem was clearly frustrated by delays in getting credit approval, as reflected in emails he exchanged with Ms. Mitchell and others. And he responded by at least once going over her head, which as the emails indicate upset Ms. Mitchell. Mr. Hoem then proposed to Mr. Christman a different approach to obtaining credit approval for his transactions.

[315] Mr. Richardson testified that he discussed Mr. Hoem's proposed approach with Mr. Christman. They decided it was unworkable to have one of Macquarie's 14 salespeople dealt with differently from all the others, especially because Mr. Hoem was proposing to involve in the process someone who had no responsibility for the credit function. In my view, this decision was reasonable in the circumstances.

[316] In March of 2022, Mr. Richardson spoke to Mr. Hoem, Ms. Mitchell and Mr. Christman, and reviewed some of the relevant documentation. He concluded Mr. Hoem was not being treated differently than anyone else in terms of the time it took to approve credit. He attempted to resolve the issue by asking Mr. Hoem, as a long-tenured and senior employee, to work on building his internal relationships at Macquarie, which was especially critical in relation to Ms. Mitchell as head of the Credit Approval Team. Mr. Richardson further advised Mr. Hoem that he and other employees should treat each other with respect, and to let Mr. Richardson or Mr. Christman know if Mr. Hoem felt this was not occurring.

[317] Arising out of the same circumstances, Mr. Richardson was concerned that, regarding one matter where Mr. Hoem complained about delay in obtaining credit approval, he should have followed up with the Credit Approval Team earlier after not receiving a response. In his evidence, Mr. Richardson acknowledged a tension between Mr. Hoem following up on approval requests and not pushing too hard so as to make Ms. Mitchell angry. However, he testified that Mr. Hoem exhibited a

pattern where he would often leave things to the last minute and then be aggressive in asking to have things done quickly.

[318] I do not agree with Mr. Hoem's submission that Mr. Richardson's approach constitutes bad faith or unfair dealing in relation to Mr. Hoem.

[319] Mr. Hoem and Ms. Mitchell obviously had a strained relationship. But the evidentiary record does not permit me to determine who, if anyone, was more at fault for this state of affairs, or to what degree. In such circumstances, I cannot find that Mr. Richardson's handling of the issue was unreasonable. Nor can I find that Macquarie breached its duty to treat Mr. Hoem in good faith and fairly in relying on the strained relationship as one factor in deciding to terminate Mr. Hoem without cause.

[320] Furthermore, I do not agree that Macquarie breached its duty because, as Mr. Hoem asserts in his closing written submissions, it "made Mr. Hoem's job more difficult by blaming him, on the one [hand], for not being patient and polite enough with Ms. Mitchell and the credit department *and, on the other hand, citing unresponsiveness to clients as a reason for termination*" (my emphasis).

[321] The lack of responsiveness as a reason for termination without cause related solely to Mr. Hoem's failure to respond to calls made by RBC in mid-November 2022. RBC was a debt financier and thus an important referral source, but not a Macquarie client. Plus, the failure to respond to RBC was not a significant factor in the decision to terminate Mr. Hoem without cause. Most importantly, there is no indication that Mr. Hoem's failure to respond to RBC, on one occasion roughly two weeks before his dismissal, had anything to do with his relationship with Ms. Mitchell. I therefore reject the existence of the inconsistency as framed in Mr. Hoem's written argument.

[322] In coming to this conclusion, I have considered an email sent by Mr. Green to Messrs. Richardson, Gee and O'Kane shortly before Mr. Hoem's termination, which suggests that "several clients" had complained about a lack of responsiveness. I find

this suggestion by Mr. Green to be incorrect, and altogether apart from any hearsay concerns prefer the evidence of Mr. Richardson, who testified that Mr. Green's suggestion was inaccurate. Mr. Richardson would know, because he had first-hand dealings with Mr. Hoem and was also in contact with Mr. Christman regarding such issues. By contrast, Mr. Green never dealt with Mr. Hoem prior to the Air B&B investigation.

Allegations in Amended RCC

[323] Mr. Hoem also seeks aggravated damages based on a number of allegations made in Macquarie's amended RCC in support of the claim of after-acquired cause, some of which he says in his closing written argument "appear designed simply to embarrass [him] and lack any reasonable evidentiary foundation".

[324] A court's finding that an employer has failed to establish just cause for dismissal does not, on its own, constitute a breach of the duty of good faith and fair dealing owed to the employee: *Smith v. Pacific Coast Terminals Co. Ltd.*, 2016 BCSC 1876 at para. 293, aff'd 2017 BCCA 197; *Manak v. Workers' Compensation Board of BC*, 2018 BCSC 182 at paras. 120–121.

[325] In line with this approach, Mr. Hoem does not rely on Macquarie's allegation that he was dishonest during the Air B&B investigation as a basis for aggravated damages. This is no surprise. Macquarie's allegation was made in good faith and fairly. Mr. Hoem engaged in misconduct by lying during the Air B&B investigation, and Macquarie did not act unreasonably in alleging this misconduct constituted after-acquired cause.

[326] Mr. Hoem does, however, contend the other allegations in Macquarie's pleadings made in support of after-acquired cause justify awarding aggravated damages. The allegations on which he focuses are:

- (a) the assertion that he worked remotely from the United States without authorization;

- (b) the contention that he ingested cannabis gummies while working;
- (c) the claimed losses regarding Richmond Steel; and
- (d) the assertion that he disclosed confidential information to Mr. Johnson.

[327] I will address each allegation in turn, starting with the one regarding remote working.

[328] The claim of after-acquired cause in the RCC and amended RCC includes the assertion that Mr. Hoem engaged in unauthorized remote working in the United States for two one-week periods in October 2022, in breach of Macquarie's Travel and Expense Policy and Remote Working Standard. The pleadings claim this conduct constituted a breach of trust and put the company at risk of regulatory implications.

[329] Mr. Hoem concedes Macquarie had a reasonable basis to believe he worked in the United States without authorization, based on information showing he made hotel bookings in that country. Macquarie only learned Mr. Hoem was not in the United States at those times during his EFD. In fact, Mr. Hoem made the bookings as part of a plan to earn points with a hotel loyalty program, without any intention of ever staying at the hotels.

[330] In August 2024, Macquarie informed Mr. Hoem it was abandoning this aspect of the claim for after-acquired cause. The abandonment was late in the day, given that EFDs ended in January 2024. But I accept that there were still answers to requests to be exchanged. And there is no suggestion any resources were expended by Mr. Hoem to defend this allegation in the interlude.

[331] Mr. Hoem's main complaint regarding the remote-working allegation is that Macquarie was unable to articulate in any concrete way why doing so would be an issue for the company. In cross-examination, Mr. Richardson had some difficulty in explaining precisely how working remotely from the United States might clash with Macquarie's regulatory obligations. He made very general references to tax

regulations and Canadian banking rules, and said he had been briefed on the latter in the past, but he admitted he could not be more specific in pointing to any applicable regulations.

[332] I am not, however, satisfied this absence of specificity constitutes a lack of candidness, reasonableness, honesty or forthrightness by Macquarie. Moreover, there is no evidentiary basis to find that Macquarie's remote working allegation materially contributed to serious and prolonged distress on the part of Mr. Hoem. I therefore conclude that, by making this allegation in its pleadings, Macquarie did not breach its duty of good faith and fair dealing to Mr. Hoem so as to justify him receiving any compensable damages.

[333] I will next address Macquarie's allegation that Mr. Hoem ingested cannabis gummies during work hours.

[334] Mr. Hoem's Outlook note referencing milligram dosages, dates and times for "gummies", cross-referenced with emails he sent while working, raised a legitimate concern that he was taking THC during work hours. While Mr. Hoem's reference to taking "a weed gummy ... to dumb myself down" was made in a note referencing many obviously fictional events, it provided some further context that supported this concern, albeit only slightly. And while the inquiries Mr. Richardson made with Ms. Mitchell and Mr. Christman did not provide evidence suggesting Mr. Hoem was impaired at work, these two employees were based in different cities from Mr. Hoem, who worked remotely.

[335] That said, by the time EFDs ended in January 2024, and any associated answers to requests were provided, it should have been clear to Macquarie that this allegation had no prospect of success. Based on the available evidence, proving Mr. Hoem took THC during work hours was highly unlikely. And establishing only that he had taken CBD, even if viewed as a breach of Macquarie's Local Alcohol & Drugs Policy, could not have helped prove after-acquired cause for dismissal.

[336] I therefore conclude that continuing with this allegation at trial breached Macquarie’s duty to deal with Mr. Hoem fairly, in particular because an allegation of work-place use of intoxicating drugs carried a real potential to harm Mr. Hoem’s search for a new job. The allegation should have been withdrawn once it became clear there was no reasonable chance of proving it at trial.

[337] I will next turn to Mr. Hoem’s argument that the allegations regarding his dealings with Richmond Steel made in Macquarie’s pleadings breached the duty of good faith and fair dealing owed to him by Macquarie.

[338] As already noted, in July 2023 Macquarie learned that Mr. Hoem had submitted pricing numbers to Richmond Steel lower than those sent to him by Mr. Watts. The absence of documentation to suggest Mr. Watts or one of Mr. Hoem’s superiors had approved these lower numbers caused Macquarie real difficulties with its client. Macquarie did not act in bad faith or unfairly in suspecting or believing the lower numbers were submitted intentionally, presumably in an attempt to win the work, including because every number was lower than that approved by Mr. Watts.

[339] Nonetheless, in its amended RCC filed four months after the problem was discovered, Macquarie alleged “significant losses on the contract” due to Mr. Hoem’s conduct, and claimed that, although the extent of the damages remained to be determined, they could be as high as \$890,000 and no lower than \$100,000.

[340] This assertion was unreasonable regarding both ends of the range, given the information then in Macquarie’s possession or easily available through inquiries with Richmond Steel.

[341] With respect to the upper end—\$890,000—Macquarie’s bid for Richmond Steel’s business succeeded on only a few pieces of equipment listed on the pricing sheet submitted by Mr. Hoem. Thus, Macquarie had no reasonable basis to believe it would be asked (let alone required) by Richmond Steel to enter into further operating leases at similarly reduced prices.

[342] Nor was Macquarie's claim of \$100,000 losses at the lower end of the range reasonable. In his testimony, Mr. Richardson did not suggest that his analysis of the potential for losses was ever any higher than \$45,000, other than to say Macquarie did not initially know how many leases would be impacted or whether Richmond Steel might accept a price increase on some of the leases. But, as stated in the previous paragraph, any legitimate uncertainty in this regard could easily have been cleared up by inquiring of Richmond Steel.

[343] For these reasons, I conclude that, while Macquarie did not act in bad faith in pursuing the Richmond Steel allegation, the company breached its duty of fair dealing by unreasonably alleging losses no lower than \$100,000 and as high as \$890,000.

[344] The final allegation in support of after-acquired cause relied on by Mr. Hoem to establish a breach of the duty of good faith and fair dealing concerns Macquarie's claim in its pleadings that he violated his duty of confidentiality by disclosing confidential information to Mr. Johnson. The pleadings identify Mr. Johnson as a former Macquarie employee engaged in litigation with the company at that time, but provide no further detail regarding the allegation.

[345] As previously mentioned, Mr. Johnson was Mr. Hoem's manager at Macquarie before being terminated as redundant, after which he ran Insight, one of Macquarie's main competitors in the operating leases business.

[346] In cross-examination, Mr. Richardson testified that the allegation Mr. Hoem gave confidential information to Mr. Johnson was based on a single, specific Outlook note indicating that Mr. Hoem discussed with Mr. Johnson about becoming an Insight employee and the nature of Insight's business and operating model. Mr. Richardson explained that, even though this note contained the same sort of information regarding Mr. Hoem's conversations with representatives at CHG-Meridian and CSI, the concern about confidential information being disclosed to Mr. Johnson at Insight arose because Mr. Johnson was an ex-employee who had known Mr. Hoem for many years.

[347] Mr. Richardson was invited to review the other Outlook notes filed as exhibits, and having done so testified that he did not recall any additional notes that caused him concern regarding the disclosure of confidential information. In re-examination, he confirmed that this allegation was discontinued because the discovery process provided no “further evidence” to support the claim.

[348] In my view, the note identified by Mr. Richardson did not provide a reasonable basis for Macquarie to allege that Mr. Hoem disclosed confidential information to Mr. Johnson.

[349] The portion of the note Mr. Richardson suggested might be problematic indicated that information was flowing from Mr. Johnson to Mr. Hoem. But nothing in it suggests Mr. Hoem provided confidential information to Mr. Johnson. I do not accept that such an inference was reasonably justified merely because Mr. Johnson had been Mr. Hoem’s supervisor in the past.

[350] My conclusion is supported by the surrounding context.

[351] The note relied on by Mr. Richardson was a draft of a July 17, 2021 email sent by Mr. Hoem to his supervisor, Mr. Christman, under the subject heading “Competitive Offers”. The note and related email were part of Mr. Hoem’s attempt to have Macquarie change its compensation, pricing and platform after Mr. Hoem saw the LinkedIn job posting. As Mr. Hoem testified in cross-examination, he sent the email because he told Mr. Christman about receiving offers from Macquarie’s main competitors, and Mr. Christman asked that he send Mr. Christman the information he had gathered.

[352] Mr. Hoem’s email to Mr. Christman meant that Macquarie now had potentially useful information about its competitors. Far from expressing any concern that Mr. Hoem might have provided confidential information in the opposite direction, in a reply email the next day Mr. Christman thanked Mr. Hoem for the “thoughtful review” and said he would discuss it with Mr. Richardson directly. This reply email strongly militates against the conclusion that the Outlook note referenced by Mr. Richardson

at trial provided a reasonable basis to believe Mr. Hoem had disclosed confidential information to Mr. Johnson.

[353] Macquarie nonetheless argues that another Outlook note made by Mr. Hoem around the same time reasonably supported including in its pleadings the allegation that Mr. Hoem disclosed confidential information to Mr. Johnson. The subject line for this other note is “Call with JD” (i.e., Mr. Christman). Mr. Hoem testified that the note contains speaking points for calls he had with Mr. Christman around the time of the LinkedIn posting, and that while he could not recall what he did or did not say to Mr. Christman he would have conveyed the gist of the note during those conversations.

[354] The speaking points include the nature of the discussions Mr. Hoem had been having with Macquarie’s three main competitors, albeit with less detail than in the Outlook note referred to by Mr. Richardson in his testimony. However, the speaking points add that Mr. Johnson had been calling Mr. Hoem to try to get him to run Insight’s Western Canada business. They also include comments clearly meant to convey Mr. Johnson’s desires if Mr. Hoem were to take up that position, namely, that Mr. Johnson wanted Mr. Hoem to cause “pain” to Mr. Richardson by bringing about the demise of Macquarie.

[355] Mr. Hoem’s speaking points for the call with Mr. Christman go on to address the LinkedIn posting and ask whether Macquarie is trying to advertise Mr. Hoem’s job and turn him into another Macquarie competitor. They state that as a competitor he would be a hugely disruptive force because:

- (a) he would know how to market against Macquarie;
- (b) most of his time would be spent prospecting Macquarie clients;
- (c) he would know the lease expirations and could contact Macquarie clients six months in advance and give them lease rates to help win deals; and
- (d) he would be the last person Macquarie would want to turn against “our business”.

[356] Mr. Hoem testified that he believes he said all the things in the previous paragraph to Mr. Christman. Macquarie did not challenge him on this point, and I find that he did so. For one thing, the note was made to provide speaking points for the conversation with Mr. Christman. In addition, having watched Mr. Hoem testify for several days, I find it more probable than not that he would be very candid with Mr. Christman about his views on these matters. Whether rightly or wrongly, Mr. Hoem believed he was fighting to keep his job or at least control of his sales territory, and his strategy for doing so was to convince Mr. Christman not only that he could continue to benefit Macquarie in his current role, but that taking steps that might drive him away would not be good for the company.

[357] The contents of this Outlook note were thus known to the Macquarie through Mr. Christman well over a year prior to Mr. Hoem's termination. Yet there is no evidence that during this time Macquarie did anything to investigate the possibility that Mr. Hoem might have provided confidential information to Mr. Johnson.

[358] Macquarie's apparent failure to investigate or take further action is unsurprising, because nothing in what Mr. Hoem would have told Mr. Christman reasonably supports the conclusion that he may have provided confidential information to Mr. Johnson prior to his termination. My finding in this regard is further supported by the fact that Mr. Richardson did not rely on this note in setting out the basis for Macquarie alleging the disclosure of confidential information to Mr. Johnson in its pleadings.

[359] I also find that Macquarie's failure to raise with Mr. Hoem any concerns regarding the two notes discussed above, or to carry out any related investigations or inquiries, constitutes condonation of Mr. Hoem's conduct as reflected in the notes. This condonation would constitute a significant if not insurmountable obstacle to Macquarie relying on the notes to establish after-acquired cause.

[360] Macquarie relies on one final Outlook note to argue that the allegation that Mr. Hoem disclosed confidential information to Mr. Johnson was reasonably made. The note, created in June 2022, sets out Mr. Hoem's "To Do" list if he were to leave

Macquarie based on constructive dismissal. The list includes: (i) obtaining emails exchanged with Ms. Mitchell, Mr. Watt, Mr. Richardson and Mr. Christman; and (ii) obtaining information such as “client volumes”, “assets by client”, “portfolio by client”, “profit by client”, “total assets”, and “business plan”. Finally, the note states: “Call all clients before I leave”.

[361] Macquarie argues that this note, combined with the one previously discussed, provided a reasonable basis to allege that Mr. Hoem gave Mr. Johnson confidential information prior to his termination.

[362] I disagree. This note relates to Mr. Hoem’s fear that he was being or might be constructively dismissed. But he did not leave Macquarie on this basis. Rather, he was terminated without cause. Mr. Richardson’s failure to mention this note as a basis for Macquarie’s allegation provides additional support for my conclusion. Plus, the note does not say anything about giving the listed materials to Mr. Johnson, or any other Macquarie competitor for that matter. Given its contents, I accept as reliable Mr. Hoem’s testimony that he was simply planning for the possibility of providing the materials to his lawyer.

[363] For the reasons set out above, I conclude that Macquarie did not have a reasonable basis to allege in its pleadings that Mr. Hoem disclosed confidential information to Mr. Johnson prior to his termination. It is true that Macquarie abandoned this allegation, but not until August 2024, a mere month before the trial started. The allegation was originally made in the RCC filed on March 10, 2023, and then again in the amended RCC filed on November 27, 2023.

[364] This allegation was especially problematic for Mr. Hoem when it came to obtaining new employment from Macquarie’s three main competitors. He testified that the allegation scuppered any chance of working for Insight. Text messages sent to Mr. Hoem by Mr. Johnson even *after* being told the allegation was withdrawn strongly support his testimony in this respect. This allegation also caused concern for Mr. Poirier at CHG-Meridian, because his company had become embroiled in a

lawsuit between Macquarie and Mr. Johnson in which the former alleged the latter gave confidential information to CHG-Meridian.

[365] Waiting until a month before the trial to withdraw the allegation was thus too little, too late: it should not have been made in the first place.

Compensable Damages

[366] Having found that Macquarie breached the duty of good faith and fair dealing owed to Mr. Hoem by making unreasonable allegations in its pleadings, the issue becomes whether this breach caused Mr. Hoem compensable harm in the form of serious and prolonged disruption transcending the ordinary upset or distress that comes with termination. I find it did.

[367] Mr. Hoem described 2023 as “probably the most depressed year” of his life, in particular because of the allegations made against him by a company for whom he had worked and obtained substantial profits for over 17 years. He takes anti-depressant and anti-psychotic medications to address his depression and associated symptoms. Mr. Hoem testified that his depression reached a point where he experienced suicidal ideation. He described speaking to “a number of people about my mental health problems”, by which he clearly meant mental health professionals such as counsellors.

[368] Ms. Danwich testified that, following Mr. Hoem’s termination, he began to struggle, and the struggles became worse “as the trial took shape”. He seemed consumed with the trial and was often unable to get together for planned dates because he was feeling so down. He spoke about not wanting to go on, which she took to mean not wanting to live.

[369] In March 2023, and at the encouragement of his Nurse Practitioner, Mr. Hoem contacted a counsellor at Vancouver General Hospital (“VGH”) about his suicidal thoughts. Based on what he disclosed, the police and VGH later reached out to Mr. Hoem to check on his welfare.

[370] In late May 2024, Mr. Hoem connected with a counsellor at Vancouver Coastal Health's Access and Assessment Centre seeking help for his suicidal thoughts, which had become so severe that he wrote a suicide note. This resulted in Mr. Hoem being contacted by the police in early June. He was brought to VGH by police and detained in the VGH emergency department due to concerns about his suicidality. Mr. Hoem testified that he was not intending to take his own life, but rather was doing everything he could to hang on in the hope that things would get better after his trial.

[371] I accept Mr. Hoem's evidence regarding the emotional impact of the termination and Macquarie's unfounded allegations of wrongdoing, including because that evidence is supported by the testimony of Ms. Danwich and documentation regarding his contact with health care providers and police.

[372] Macquarie does not appear to take real issue with the emotional distress Mr. Hoem says he experienced during the period in question. Rather, Macquarie argues that in the year or so prior to his termination Mr. Hoem faced other stressors, including but not limited to a separation from his former common-law spouse and negative fallout from the incident involving Air B&B and Dr. Moore. That may be, but I find the unreasonable nature of the allegations made by Macquarie, as described above, played a substantial role in creating serious and prolonged emotional distress exceeding that typically associated with termination.

[373] I therefore conclude that these unreasonable allegations caused Mr. Hoem compensable damages as that term is understood in the case law. The question becomes, what amount of damages should be awarded?

[374] Mr. Hoem seeks \$50,000 in damages, and in support relies on *Chu* and *Acumen BCSC*, where aggravated damages in this amount were awarded to the plaintiffs. However, the evidence about the harm caused in those cases appears more detailed and expansive. By making this observation, I do not downplay Mr. Hoem's distress and in particular the suicidal ideation that led him to being confined in a hospital in 2024. I simply note that in *Chu* and *Acumen BCSC* the evidence

presented a more comprehensive picture regarding the persistence, depth and symptoms of the emotional stress suffered.

[375] I have also considered other wrongful dismissal cases where aggravated damages have been awarded, including *Hrynkiw* (\$35,000), *Zheng* (\$35,000), *Café La Foret Ltd. v. Cho*, 2023 BCCA 354 (\$25,000); *Ram v. The Michael Lacombe Group Inc.*, 2017 BCSC 212 (\$25,000); *Fobert v. MCRCI Medicinal Cannabis Resource Centre Inc.*, 2020 BCSC 2043 (\$25,000); *Bailey v. Service Corporation International (Canada) ULC*, 2018 BCSC 235 (\$25,000).

[376] In the circumstances, I conclude that the award for aggravated damages should be \$35,000.

Punitive Damages

[377] Mr. Hoem seeks punitive damages on the basis that Macquarie made serious allegations in the RCC and amended RCC that it must have known could not be supported and would damage his chances of obtaining reasonable alternative employment. In his closing written argument, Mr. Hoem seeks \$100,000 in damages, because this same amount was awarded in *Chu*. In closing oral submissions, however, he conceded the misconduct in *Chu* could be viewed as more egregious.

[378] Macquarie counters by arguing that the test for awarding punitive damages is not met, including because it had reason to believe the allegations in its pleadings were true and those allegations were discontinued where, following discoveries, they were determined not to be grounded in the evidence.

Legal Principles

[379] Punitive damages are awarded in exceptional cases for highhanded, malicious, arbitrary or highly reprehensible misconduct that constitutes a marked departure from ordinary standards of decent behaviour. The objectives of punitive damages are retribution, deterrence and denunciation, rather than compensating the victim. The focus is on the defendant's conduct, not on the plaintiff's loss. See

Whiten v. Pilot Insurance Co., 2002 SCC 18 at paras. 36, 62, 68, 73, 92, 94;
Acumen BCCA at paras. 76–77.

[380] Punitive damages are awarded only where compensatory damages are insufficient to accomplish these objectives. Accordingly, while the same underlying conduct can properly ground both aggravated and punitive damages without being duplicative, courts must avoid awarding punitive damages to condemn behaviour that has already been adequately rebuked by compensatory damage awards: *Whiten* at para. 94; *Acumen BCCA* at paras. 73–75, 77–78; *Café La Foret Ltd.* at paras. 61–62.

[381] While punitive damages are generally recoverable only when the misconduct gives rise to an independent actionable wrong, this can include an employer’s breach of the duty of good faith and fair dealing owed an employee: *Whiten* at paras. 78–79; *Zheng* at para. 79.

[382] Reprehensible conduct during litigation is generally addressed by way of special costs, whereas punitive damages relate to an employer’s conduct at the time of termination. Conduct during litigation may nonetheless be relied on in awarding punitive damages where the employer’s bad faith conduct at termination continues in an unbroken course throughout the legal proceeding. See *Hrynkiw* at paras. 213–214, citing *Kelly v. Norsemont Mining Inc.*, 2013 BCSC 147 at para. 128; *Chu* at para. 168; *Fobert* at para. 118.

[383] Where awarded, punitive damages should be assessed in an amount reasonably proportionate to the harm caused, the degree of misconduct, the plaintiff’s relative vulnerability and any advantage or profit gained by the defendant, having regard to any other fines or penalties suffered by the defendant: *Whiten* at para. 94; *Acumen BCCA* at para. 78.

Analysis

[384] In addressing Mr. Hoem’s claim for aggravated damages, I have considered his arguments regarding the allegations Macquarie made in its pleadings. These

same arguments form the basis of his claim for punitive damages, and I already concluded that some of Macquarie's allegations were advanced, or continued to be advanced, absent a reasonable basis to do so.

[385] However, unreasonableness without more does not meet the high threshold for awarding punitive damages. And I am unable to conclude that Macquarie also acted in bad faith in conducting the litigation the way it did, nor do I find the impugned litigation strategies amount to arbitrary conduct constituting a marked departure from ordinary standards of decent behaviour. This is therefore not one of those exceptional cases where punitive damages are justified.

Conclusion

[386] Macquarie terminated Mr. Hoem's employment without cause. Mr. Hoem's action is therefore allowed and, subject to the set-offs outlined in the next paragraph, he is entitled to the following damages:

- (a) \$836,424 as compensation in lieu of 19 months' reasonable notice;
- (b) \$106,329 for Macquarie's failure to compensate him for accrued vacation hours owed at the time of termination to reflect his commission earnings;
and
- (c) \$35,000 in aggravated damages.

[387] From these damages should be set-off: (i) the \$100,000 Macquarie paid Mr. Hoem following his termination; and (ii) the net income earned by Mr. Hoem from his vacation rental property over the 19-month notice period, to be calculated by the parties as described at paragraph 221 above.

[388] The calculation of pre-judgment interest should account for the fact that the \$100,000 Mr. Hoem received from Macquarie was paid not in a lump sum but rather over a 52-week period.

[389] In the ordinary course, as the successful party Mr. Hoem is entitled to his costs at Scale B. However, if the parties wish to make submissions on costs, they may submit a request to do so to Supreme Court Scheduling within 30 days of the date of this judgment. If both parties agree, then subject to any direction from me that further hearing may be by way of written materials.

“D. Layton J.”