Court of Appeal for Saskatchewan
Docket: CACV4054

Citation: *Saskatchewan Indian Gaming Authority Inc. v Pasap*, 2025 SKCA 15
Date: 2025-02-12

Between:

Saskatchewan Indian Gaming Authority Inc.

Appellant
(Defendant)

And

Chadwick Pasap

Respondent
(Plaintiff)

Before:	Barrington-Foote, Tholl and McCreary JJ.A.
Disposition:	Appeal allowed in part
Written reasons by:	The Honourable Justice Meghan R. McCreary
In concurrence:	The Honourable Justice Jerome A. Tholl
In dissent:	The Honourable Justice Brian A. Barrington-Foote
On appeal from:	2022 SKQB 200, Regina
Appeal heard:	January 10, 2024
Counsel:	Robert Frost-Hinz for the Appellant Jeff Grubb, K.C., and Titli Datta for the Respondent

McCreary J.A.

I. INTRODUCTION

[1] This appeal arises from a wrongful dismissal action. It explores the issues that may arise when an employer dismisses an employee without providing reasonable notice of the termination, and that employee then becomes permanently disabled during the notice period, suing for damages for lost disability insurance benefits. As this appeal demonstrates, such facts have the potential to generate a significant damages award.

[2] In this case, Chadwick Pasap was employed as facilities manager at the Bear Claw Casino [Casino], owned and operated by the Saskatchewan Indian Gaming Authority Inc. [SIGA], when he was dismissed from his employment on August 17, 2012, without notice or pay in lieu. On December 14, 2012, Mr. Pasap suffered a serious medical event [Medical Event], which he says left him totally and permanently disabled.

[3] Mr. Pasap sued SIGA for wrongful dismissal and the damages that flow from it, including, *inter alia*, for lost disability insurance benefits. After a trial, a judge of the Court of Queen's Bench [trial judge] found that Mr. Pasap was wrongfully dismissed and then became disabled during what otherwise would have been the notice period of his termination. She found that Mr. Pasap therefore was entitled to damages including for lost long term disability insurance benefits, the right to which vested during the notice period: *Pasap v Saskatchewan Indian Gaming Authority*, 2022 SKQB 200, 82 CCEL (4th) 33 [*Trial Decision*]. The trial judge also awarded moral and punitive damages totalling $50,000.

[4] SIGA now appeals from the *Trial Decision*, arguing that the trial judge erred in many ways. Most significantly, SIGA submits that the judge erred when she found Mr. Pasap was entitled to damages for lost disability insurance benefits pursuant to SIGA's Long Term Disability Income Benefits Plan [Disability Plan].

[5] For the reasons that follow, I would dismiss the appeal, except to correct an error in the trial judge's calculation of damages for lost employment benefits over the notice period.

II. ISSUES

[6] SIGA raises numerous issues on appeal, which I have distilled and reframed by asking whether the trial judge erred in:

(a) her interpretation of the Disability Plan;

(b) determining that Mr. Pasap was totally disabled between April 13, 2013, and April 12, 2015 [own occupation or OwnOcc Period], and/or between April 13, 2015, and October 18, 2021 [any occupation or AnyOcc Period];

(c) her assessment of Mr. Pasap's damages for lost disability insurance benefits;

(d) determining that Mr. Pasap was entitled to $10,084 for other lost employment benefits;

(e) awarding moral and punitive damages, either at all or in the amount awarded; and/or

(f) awarding Mr. Pasap costs under Column III of the Court of Queen's Bench Tariff.

III. THE *TRIAL DECISION*

[7] There were five principal issues at trial: (1) whether Mr. Pasap resigned his employment or was wrongfully dismissed; (2) the appropriate notice period if he was wrongfully dismissed; (3) Mr. Pasap's damages during the notice period; (4) whether, but for Mr. Pasap's wrongful dismissal, he would have been entitled to disability benefits as a result of the Medical Event; and, (5) the quantum of Mr. Pasap's damages.

[8] The trial judge determined that Mr. Pasap did not voluntarily resign from his employment, as SIGA claimed. Rather, she found that Mr. Pasap was dismissed from his employment on August 17, 2012, when the general manager of the Casino advised him that if he did not resign, he would be investigated for alleged misconduct and then dismissed. In making this finding, the trial judge preferred Mr. Pasap's evidence respecting what occurred during the August 17, 2012, meeting, explaining that his version of events was corroborated by written messages between

Mr. Pasap and the general manager, as well as by the first Record of Employment issued to Mr. Pasap, which stated that he had been dismissed. The trial judge further found that by meeting with Mr. Pasap alone on August 17, 2012, the general manager contravened SIGA's Corrective Action Policy, which required two authorized representatives to be present in a meeting in which discipline was being issued to an employee. The Corrective Action Policy also required SIGA to investigate before taking disciplinary action, and its Termination of Employment Policy mandated progressive discipline, with termination as a final resort. The trial judge found that SIGA failed to follow its own employment policies in its dealings with Mr. Pasap at the time of his dismissal.

[9] Finding that Mr. Pasap was wrongfully dismissed, the trial judge concluded that 8 months was the appropriate notice period given Mr. Pasap's age (39), length of service (5 years), position with the Casino (lower management), and the availability of alternative employment. She determined that the notice period ran from the date of dismissal until April 16, 2013.

[10] SIGA argued that Mr. Pasap failed to mitigate his damages by securing other employment, and that the notice period should be reduced accordingly. However, the trial judge rejected this argument, noting that the burden of proof rested with SIGA to demonstrate that Mr. Pasap did not make reasonable efforts to mitigate his damages and that it had failed to do so. Ultimately, the trial judge determined that, based on a notice period from August 17, 2012, to April 16, 2013, Mr. Pasap was entitled to $43,246 in lost salary over 8 months (at $64,869.18 per annum) and $10,084 for other lost employment benefits over that period, for a total of $53,330. This award was tax exempt because Mr. Pasap had Indian status under the *Indian Act*, RSC 1985, c I-5, and had been employed on a First Nation.

[11] The trial judge also awarded Mr. Pasap $25,000 in moral damages, finding that SIGA had engaged in bad faith conduct in the manner of Mr. Pasap's dismissal. She awarded a further $25,000 in punitive damages, concluding that SIGA engaged in reprehensible behaviour by fabricating the reason Mr. Pasap left his employment and by maintaining that fabrication throughout the litigation, which spanned almost ten years.

[12] The more complex question that the trial judge was required to answer was whether Mr. Pasap's entitlement to long term disability benefits during the notice period vested following the Medical Event and, if it did, the quantum of benefits to which he was entitled.

[13] The trial judge found that, on the date of the Medical Event, Mr. Pasap suffered congestive heart failure, among other things, and that this resulted in him being admitted to hospital in intensive care, needing multiple surgeries and requiring further rehabilitation efforts.

[14] The Medical Event occurred four months into the notice period. At trial, the parties agreed that Mr. Pasap was eligible to receive long term disability benefits pursuant to his employment contract and that the long term disability benefits were required to continue to be offered during the notice period. Nevertheless, Mr. Pasap was only entitled to long term disability benefits if he met the definition of being "totally disabled" within the meaning of SIGA's Disability Plan. Both parties agreed that Mr. Pasap was disabled immediately following the Medical Event. However, while Mr. Pasap contended that he never fully recovered from the Medical Event and was "totally disabled" from the date of the Medical Event to the time of trial (and beyond), SIGA took the position that Mr. Pasap ceased being totally disabled before the expiration of the Disability Plan's waiting period, which was 120 days from the date of initial disability.

[15] The trial judge accepted Mr. Pasap's argument. She found that he was "totally disabled" pursuant to that definition under the Disability Plan, and that his total disability arose from the date of the Medical Event to trial, and thereafter to his 65th birthday.

[16] The Disability Plan defined "Total Disability" or "Totally Disabled" as follows:

> **Total Disability and Totally Disabled**
> A condition due to sickness or Accidental Bodily Injury which requires the regular and ongoing care of a legally qualified Physician appropriate to the sickness or injury and as a result of which the Employee is not engaged in any occupation for wage or profit and:
>
> 1. during the period of 24 months following the expiration of the Waiting Period, is prevented from performing the substantial duties of his or her own occupation; and
> 2. after the period during which the Employee cannot perform the substantial duties of his or her own occupation, is prevented from performing any gainful occupation:
>
> a. for which the Employee is or may become reasonably qualified by training, education, or experience, and
>
> b. Status Employees – which will enable the Employee to earn 66.67% or more of his or her Inflation-Indexed, Pre-Disability Earnings;
>
> Non-Status Employees – which will enable the Employee to earn 65% or more of his or her Inflation-Indexed, Pre-Disability Earnings.

[17] Pursuant to the Disability Plan, Mr. Pasap was "totally disabled" if, after the 120-day waiting period, he was unable to perform his own occupation during the OwnOcc Period from

April 13, 2013, to April 12, 2015, and, after that time, during the AnyOcc Period, unable to perform *any* occupation for which he was or could have become reasonably qualified which would have enabled him to earn 66.67% or more of his inflation-indexed, pre-disability earnings.

[18] The trial judge concluded that Mr. Pasap was totally disabled from the date of the Medical Event, through the waiting period to April 12, 2015. She found that after Mr. Pasap was released from hospital on January 7, 2013, he had significantly impaired physical and mental abilities, was unable to work, and did not work in any capacity from December 12, 2012, until after April 12, 2015. The trial judge determined that Mr. Pasap was totally disabled during this OwnOcc Period because he was not capable of performing "the substantial duties of his … own occupation".

[19] The trial judge further determined that the AnyOcc Period began on April 13, 2015. She held that Mr. Pasap was totally disabled at that date and remained so at the time of trial. In making that finding, the trial judge assessed Mr. Pasap's yearly income between 2015–2020, and summarized the work that he performed during that time. The trial judge also assessed evidence respecting Mr. Pasap's medical condition and his fitness to work following the Medical Event, which included the following:

(a) Mr. Pasap's own testimony of the work he performed after the Medical Event to the date of trial, and his own assessment of his ability to do that work;

(b) Evidence that Mr. Pasap obtained his Class 1A Commercial Driver's Licence in 2015 and, for reasons relating to this licence, was assessed by medical doctors on two separate occasions – once in 2015 and then again in 2016. After both medical assessments, Mr. Pasap's vision, senses, cardiovascular condition, central nervous system, respiratory system, musculoskeletal system and psychiatric condition were rated as "normal". His metabolic-endocrine system was assessed as abnormal due to diabetes. Mr. Pasap was further reviewed in a third driving assessment in June of 2019 at the request of Saskatchewan Government Insurance [SGI], due to a neuropsychological report he completed in 2018. At the 2019 assessment, he reported feeling mild but constant dull aches and experiencing minor memory difficulties. He also reported that he did not experience daytime fatigue. The report noted that Mr. Pasap seemed to be minimizing the 2018 neuropsychological report

that had concluded he had areas of severe impairment. The 2019 report also noted that he was able to follow multi-step instructions, but that he said it was difficult for him. The assessor noted that they "[o]bserved slightly slowed response with following verbal multi-step instructions"; had "[m]ild concerns with metacognition"; and that Mr. Pasap "appears to minimize possible areas of difficulty, such as those outlined in the November 2018 Neuropsychological Assessment Report" and "[d]oes not appear to appreciate possible impact of deficits on day to day activities, including driving". The assessor concluded that Mr. Pasap had "demonstrated some difficulties with executive function skills, including organization". Nevertheless, Mr. Pasap did not lose his Class 1A licence following the 2019 SGI assessment;

(c) Evidence that Mr. Pasap saw Dr. Payam Dehghani, a cardiologist, twice after he was released from hospital in 2012. Dr. Dehghani reported on Mr. Pasap's condition in letters of September 13, 2018, and May 2, 2019. In September of 2018, Dr. Dehghani stated that Mr. Pasap "has full function of his heart" but that "the majority of his symptoms are related to his overall state of deconditioning". Dr. Dehghani testified at trial that deconditioning was interfering with Mr. Pasap's fitness. He opined that Mr. Pasap had lost the ability for his skeletal system and cardiovascular system to work together and said that deconditioning problems often occur in diabetes patients, such as Mr. Pasap. He also opined that, in his experience, when a person has suffered a critical illness and been on intubation, his psychological state is affected. Dr. Dehghani concluded that Mr. Pasap's recovery had plateaued. In the letter dated May 2, 2019, Dr. Dehghani wrote to Mr. Pasap's family physician after a further assessment and addressed specific questions put to him by Mr. Pasap's lawyer. He opined that Mr. Pasap's acute recovery from the Medical Event was within three months, but that Mr. Pasap had "not regained his full functional capacity since surgery". He again noted that deconditioning was a problem for Mr. Pasap and concluded: "I do believe that he will unlikely be able to participate in a full labour job. However, he does not have significant limitations to be unable to work in another form". At trial, Dr. Dehghani opined that Mr. Pasap's

future employment should not involve lifting or significant muscular activity, but that he could work in a non-physical job;

(d) Evidence from Dr. Katherine Owens, a registered doctoral psychologist practising in the area of neuropsychology, who was qualified as an expert at trial. She testified that she evaluated Mr. Pasap in a neuropsychological assessment in 2018, concluding that he was suffering from a major neurocognitive disorder due, in part, to the impact of the Medical Event, but also stemming from oxygen deprivation, sleep apnea, fatigue, diabetes, medications (including methadone) and hypertension. Dr. Owens opined that the Medical Event was not the single biggest factor in Mr. Pasap's condition, but without the Medical Event he would not be in the condition he was. She agreed that Mr. Pasap could improve his cognitive abilities slightly if he stopped his methadone use and treated his diabetes and sleep apnea more effectively. However, she concluded that he would not recover enough to return to a management job because such a job was too cognitively demanding;

(e) Evidence from Dr. Perry Sirota, who was qualified as an expert in forensic and clinical psychology. He did not examine Mr. Pasap, but reviewed Dr. Owens' report and challenged her findings, suggesting, among other things, that Mr. Pasap might be malingering. However, Dr. Sirota also agreed that Dr. Owens' diagnosis of neurocognitive disorder was reasonable on Dr. Owens' interpretation of the evidence; and,

(f) Evidence from several members of Mr. Pasap's family that, prior to the Medical Event, Mr. Pasap was active, sharp, a proficient problem-solver and a clear communicator. However, they said that following the Medical Event, he now speaks slowly and less clearly, is "not really all there", is not as able with mechanics, falls easily, cannot lift heavy objects, and is unable to participate in traditional activities like hunting and trapping without assistance.

[20] On the basis of this evidence, as well as Mr. Pasap's own testimony, which I will discuss further, the trial judge concluded that Mr. Pasap was totally disabled during the OwnOcc and AnyOcc Periods. She stated as follows in the *Trial Decision*:

> [152] Mr. Pasap has been employed on and off since 2015. I agree with the friends and family of Mr. Pasap who testified that Mr. Pasap overestimates his abilities and underplays his limitations. Mr. Pasap has a major cognitive disorder which limits his ability to find employment as a manager. On the other hand, Dr. Dehghani testified that Mr. Pasap's future employment should not involve lifting or significant muscular activity. Mr. Pasap found the driving jobs to be difficult because lifting was involved. I note these jobs never last very long. *In sum, Mr. Pasap is severely limited to what he can do to earn an income,* for which he "is or may become reasonably qualified by training, education, or experience"[.]
>
> [153] SIGA argues that Mr. Pasap did not work a full year at any job because of the limited availability of employment, not because of his inability to work. I disagree. The stop/start nature of Mr. Pasap's work history is because of his capacity to work. As indicated in the evidence, Mr. Pasap has sought work, had difficulty and quit, or the job ended so he did not have to leave it.
>
> [154] I am satisfied that, to the date of trial, Mr. Pasap was prevented from any gainful occupation, for which he was reasonably qualified, because of his disability. Moreover, the evidence does not show that further training or education would have enabled him to find employment other than what he did find. Finally, Mr. Pasap was unable to earn 66.67% of his pre-disability earnings, indexed or not.
>
> (Emphasis added)

[21] The trial judge valued Mr. Pasap's damages for wrongful dismissal and for the loss of long term disability benefits at $1,216,764.25. She also awarded moral damages of $25,000 and punitive damages of $25,000, as well as costs under Column III.

IV. STANDARD OF REVIEW

[22] SIGA raises many issues on appeal, the majority of which it seeks to characterize as questions of law, but which Mr. Pasap argues are questions of mixed fact and law, or purely of fact.

[23] Questions of law are assessed on a standard of correctness and questions of fact are assessed on a standard of palpable and overriding error: *Housen v Nikolaisen*, 2002 SCC 33, [2002] 2 SCR 235 [*Housen*]. It is an error of law to make a finding of fact on a material point where the factual finding is based on no evidence, irrelevant evidence, or an irrational inference: *Johannson v Saskatchewan Government Insurance*, 2019 SKCA 52 at paras 24–25, 93 CCLI (5th) 228 [*Johannson*].

[24] Questions of mixed fact and law are assessed on a standard of palpable and overriding error, absent an extricable error of law: *Mosten Investments LP v The Manufacturers Life*

Insurance Company (Manulife Financial), 2021 SKCA 36 at paras 31–35, [2021] 9 WWR 1 [*Mosten*]. See also *Zoerb v Saskatoon Regional Health Authority*, 2022 SKCA 111 at paras 37–38, 86 CCLT (4th) 271; *Klaptchuk v Johnson*, 2023 SKCA 25 at para 63, [2023] 6 WWR 603; and *Canadian Mortgage Servicing Corporation v Korf*, 2024 SKCA 1 at para 37, [2024] 4 WWR 175.

[25] In short, if the question is whether the judge applied the proper legal test, that is a question of law, reviewable for correctness. However, if the question concerns the application of the appropriate legal standard to a set of facts, it is a question of mixed fact and law, reviewable for palpable and overriding error: *Housen* at paras 26–36; and *Ambrozic v Burcevski*, 2008 ABCA 194 at para 17, 433 AR 25.

V. ANALYSIS

A. The trial judge did not err in her interpretation of the Disability Plan

1. Standard Form Contract

[26] SIGA contends that the Disability Plan was a standard form contract, and any alleged error in its interpretation is therefore reviewable on a correctness standard: *Ledcor Construction Ltd. v Northbridge Indemnity Insurance Co.*, 2016 SCC 37 at para 24, [2016] 2 SCR 23 [*Ledcor*].

[27] Mr. Pasap says that there is no evidence to support that the Disability Plan was a standard form contract and that, in such circumstances, it is inappropriate for this Court to make such a finding.

[28] As I will explain, it is my view that this Court would have difficulty finding that the Disability Plan is a standard form contract, given the evidentiary record in this case. However, such a determination is not necessary.

[29] I begin with a review of the law respecting standard form contracts.

[30] As the Supreme Court of Canada stated in *Corner Brook (City) v Bailey*, 2021 SCC 29, [2021] 2 SCR 540:

> [44] In *Sattva*, this Court … explained that contractual interpretation is a fact specific exercise, and should be treated as a mixed question of fact and law for the purpose of

> appellate review, unless there is an "extricable question of law". The exception is standard form contracts, … see *Ledcor Construction*. …

[31] In *Sattva Capital Corp. v Creston Moly Corp*., 2014 SCC 53, [2014] 2 SCR 633 [*Sattva*], the Supreme Court considered whether the Court of Appeal for British Columbia had erred in granting leave under a statutory right of appeal that was restricted to questions of law. This gave rise to the issue of when a question of contractual interpretation is a question of law. Justice Rothstein, writing for a unanimous Court, acknowledged the historical approach that treated every contractual interpretation question as a question of law (see paras 43–45). He also observed that developments in the case law supported a departure from this approach because: (i) contractual interpretation was increasingly informed by the surrounding circumstances, or factual matrix, within which the contract is entered into; and (ii) *Housen* defined pure questions of law as distinct from questions of mixed fact and law and contractual interpretation fits better into the category of mixed fact and law (see paras 46–49).

[32] *Sattva* thus expressly abandoned the historical approach to contractual interpretation, establishing a new rule: "Contractual interpretation involves issues of mixed fact and law as it is an exercise in which the principles of contractual interpretation are applied to the words of the written contract, considered in light of the factual matrix" (at para 50). However, the Supreme Court found that a lower court's contractual interpretation may still attract a correctness review in "rare" cases involving a question of law that could be "extricated from the interpretation process" (at para 55). Extricable questions of law include "the application of an incorrect principle, the failure to consider a required element of a legal test, … the failure to consider a relevant factor", or an error engaging a substantive rule of contract law (at para 53).

[33] Thereafter, in *Ledcor*, the interpretation of an exclusion clause in a standard form builders' risk insurance policy was at issue, giving rise to a question of the applicable standard of appellate review. Justice Wagner (as he then was), for the majority, acknowledged that the rule from *Sattva* results in a presumptive standard of deference, absent a palpable and overriding error (see para 21). He observed, however, that some appellate decisions had applied the correctness standard to standard form contracts without purporting to extricate a question of law, despite the rule from *Sattva* (see para 22).

[34] *Ledcor* expressly resolved this inconsistency by recognizing an exception to the holding in *Sattva*: "Where an appeal involves the interpretation of a standard form contract, the interpretation at issue is of precedential value, and there is no meaningful factual matrix that is specific to the parties to assist the interpretation process, this interpretation is better characterized as a question of law subject to correctness review" (*Ledcor* at para 24; see also para 46).

[35] This Court further developed the principles articulated in *Sattva* and *Ledcor* in *Temple Insurance Company v Aberdeen Specialty Concrete Services*, 2021 SKCA 94 at para 47. The Court summarized the test it had previously adopted in *Mosten* [*Mosten* test]:

> [47] In [*Mosten*], the Court summarized the *Ledcor* criteria to determine if a contract is a standard form contract:
>
> > (a) "there must be an identical or a substantially identical form of contract language capable of standardized use by multiple, different parties" (at para 52);
> >
> > (b) "there must be no factual matrix that is specific to the parties to the contract and that is probative of the issue of contract interpretation" (at para 53); and
> >
> > (c) "the standard form contract must be one that has been or will be repeatedly entered into" (at para 54).

[36] In *Mosten*, this Court acknowledged academic criticism about inconsistencies in Supreme Court statements, including in *Sattva* and *Ledcor*, and specified that the standard of review should be considered relative to a particular issue of interpretation, rather than relative to a contract as a whole (see paras 32–34). This is because a given standard form contract could, in theory, give rise to a myriad of potential issues of interpretation, and each of these might involve a very particular factual matrix or no factual matrix at all.

[37] The Court also clarified that "the principal factor that indicates whether an issue of contract interpretation gives rise to a question of law is its precedential value" (*Mosten* at para 39). Consequently, an issue of interpretation concerning a standard form contract is always a question of law, because "the law and the facts are the same each time the standard form contract language is interpreted" and thus the answer to that issue has precedential value (at para 55).

[38] The Court explained the meaning, in this context, of precedential value: "On one gauge, the precedential value of an interpretation is related to the repeated use of the contract language in question" (*Mosten* at para 40), which arises from "the potential for multiple, subsequent uses of

the same contract language by different or even the same parties" (at para 41). "On a related measure," the Court continued, "the precedential value of an interpretation lies in its importance as law" in a sense which invokes "principles such as *stare decisis* as it manifests under the objectives of attaining consistency in the application of the law, certainty and predictability of legal results, judicial accountability, and justified decision-making" (at para 42).

[39] Finally, throughout its discussion, the Court referenced the concept of a "spectrum of particularity" described in *Housen* (*Mosten* at para 48). Issues of interpretation involving a standard form contract, based on the *Mosten* test, fall "on the *question of law* side of that spectrum" (at para 49, emphasis in original).

[40] Turning to the case at hand, SIGA argues that the Disability Plan is a standard form contract. It says the evidence demonstrates that the Disability Plan was created by a single insurer, although SIGA also concedes that "there was no evidence provided by the parties about the [Disability Plan] or any specific considerations that went into the [Disability Plan]". Despite the lack of evidence on this point, SIGA contends that the Disability Plan is neither specific to SIGA, nor was it negotiated with SIGA, and that there are no unique requirements in the Disability Plan relating to SIGA. SIGA therefore concludes that there is no factual matrix relevant to the trial judge's interpretation of the Disability Plan.

[41] In turn, Mr. Pasap argues that it is not a foregone conclusion that the Disability Plan is a standard form contract. He says that there was no evidence at trial which confirmed that the Disability Plan was not specific to SIGA, or that its terms were not negotiated with SIGA, or tailored to its requirements vis-à-vis its employees. Further, while SIGA claims there was evidence to support that the Disability Plan is a standard form contract, it has not identified that evidence. Mr. Pasap says that he led evidence at trial to establish that the Disability Plan formed part of the SIGA Group Insurance Plan, and that this evidence demonstrates that the plan was developed for employees of SIGA. Specifically, SIGA's Group Benefit Plan states that "S.I.G.A., your Employer and Great-West Life have worked together to develop a benefit plan that provides protection and security for you and your family". Indeed, the trial judge expressly found that the Disability Plan was part of SIGA's Group Insurance Plan (see *Trial Decision* at para 157).

[42] Mr. Pasap relies on the Ontario Court of Appeal's commentary in *Jakab v Clean Harbors Canada, Inc*., 2023 ONCA 377, 33 CCLI (6th) 174 [*Jakab*], with respect to the standard of review applicable to standard form contracts used exclusively in one organization. There, the court stated:

> [10] The question of whether standard form contracts of adhesion used exclusively within a single organization have a sufficient precedential value to attract correctness review has yet to be settled. In *Matthews v. Ocean Nutrition Canada Ltd*., 2020 SCC 26, 449 D.L.R. (4th) 583, Kasirer J., for the Court, questioned whether correctness review would apply to a standard form employment contract used with a "limited number of executives" but found it was unnecessary on the facts before him to resolve the issue. This court has yet to grapple with this question directly. In my view, it is unnecessary to attempt to do so in this case. Even applying the more demanding correctness standard of review, I would uphold the trial judge's interpretation of the contract.

[43] In my view, the only reasonable conclusion that can be drawn from the record is that the Disability Plan was a contract used by SIGA, a single employer, to provide benefits to its multiple employees, likely on multiple occasions. There is some evidence that demonstrates that the Disability Plan was tailored to SIGA's specific needs and goals, first because SIGA's Group Benefit Plan says so, and also because the definition of "Total Disability" and "Totally Disabled", under the Disability Plan contains separate income caps for "Status Employees" and "Non-Status Employees". This demonstrates an intention to provide an enhanced disability benefit for employees who are Status Indians pursuant to the *Indian Act*, a unique feature of a disability insurance plan which suggests it was tailored to SIGA.

[44] Without deciding that the Disability Plan cannot be a standard form contract because it governs the relationship between SIGA and its employees, there is no evidence to suggest that the Disability Plan was a standard form group insurance policy used by employers other than SIGA. The insurer, Great West Life, is not a party to these proceedings. Great West Life was not called upon to give evidence at trial respecting how the Disability Plan was negotiated, constructed or used, or even to explain how it administered benefits under the Plan. That evidence might have provided some significant clarity in calculating any damages that flowed from Mr. Pasap's loss of entitlement to benefits under the Disability Plan as a result of his wrongful dismissal. But, curiously, somehow that evidence was not tendered.

[45] Remembering that this Court has identified that precedential value is the principal factor which informs whether an issue of contractual interpretation gives rise to a question of law, the relevant question in this case, as in *Jakab*, is whether a contract used by one employer to provide

disability benefits to its employees has sufficient precedential value to attract a correctness standard of review.

[46] Given the paucity of the evidentiary record informing the issue, and the fact that the insurer, itself, is not a party to this litigation, this is not the case in which to answer that question. I also find it is unnecessary to determine whether the Disability Plan is a standard form contract because, as I will explain, the trial judge did not err in interpreting the Disability Plan, even when a correctness standard is applied.

2. The meaning of "totally disabled" under the Disability Plan

[47] SIGA says that the trial judge found that Mr. Pasap was "totally disabled" pursuant to the Disability Plan by assessing whether his annual income was greater than the maximum income threshold set out in the Disability Plan, rather than by assessing his ability to earn income. It argues that by doing so, the trial judge misinterpreted the meaning of "totally disabled" under the Disability Plan.

[48] I am not persuaded that the trial judge interpreted the Disability Plan and the meaning of "total disability" or "totally disabled" in the way SIGA alleges.

[49] To begin, for ease of reference, I again reproduce the definitions of "total disability" and "totally disabled" from the Disability Plan:

> **Total Disability and Totally Disabled**
> A condition due to sickness or Accidental Bodily Injury which requires the regular and ongoing care of a legally qualified Physician appropriate to the sickness or injury and as a result of which the Employee is not engaged in any occupation for wage or profit and:
>
> 1. during the period of 24 months following the expiration of the Waiting Period, is prevented from performing the substantial duties of his or her own occupation; and
> 2. after the period during which the Employee cannot perform the substantial duties of his or her own occupation, is prevented from performing any gainful occupation:
>
> a. for which the Employee is or may become reasonably qualified by training, education, or experience, and
>
> b. Status Employees – which will enable the Employee to earn 66.67% or more of his or her Inflation-Indexed, Pre-Disability Earnings;
>
> Non-Status Employees – which will enable the Employee to earn 65% or more of his or her Inflation-Indexed, Pre-Disability Earnings.

[50] SIGA relies on *Bacon v Saskatchewan* (1990), 88 Sask R 182 (QB) at para 42 [*Bacon*], as the leading authority on the interpretation of disability insurance policies in the employment law context. In the circumstances of this appeal, *Bacon* is primarily useful for the principle that, like any contract of insurance, a contract for disability insurance must interpreted reasonably using the terminology of the plan and, when the terminology is ambiguous, the benefit of interpretation should be given to the insured.

[51] Based on an ordinary reading of the Disability Plan language, the question of Mr. Pasap's entitlement to benefits turns on an assessment of whether Mr. Pasap: (1) was under the regular and ongoing care of an appropriate qualified physician; and (2) was prevented, as a result of his illness or disability, (i) from performing his own occupation during the OwnOcc Period, and/or (ii) during the AnyOcc Period, from performing any reasonable occupation that allowed him to earn 66.67% or more of his prior income from his own occupation, indexed for inflation.

[52] From my review, the trial judge did not conclude that Mr. Pasap was totally disabled merely by considering his actual annual earnings, as SIGA suggests. On the contrary, the trial judge referred to the definitions of "total disability" and "totally disabled" from the text of the Disability Plan (see *Trial Decision* at para 63) and determined that Mr. Pasap was not "capable" of performing the substantial duties of his previous job and was therefore totally disabled during the OwnOcc Period. She stated:

> [76] … I am satisfied that Mr. Pasap's work history after he was released from hospital in January 2013 is indicative of what he could do. Certainly, he was not capable of performing "the substantial duties of his … own occupation" and he was under "the regular and ongoing care of a legally qualified Physician appropriate to the sickness". … Consequently, he was entitled to benefits under the Disability Plan during that time.

[53] Implicit in this stated conclusion is the trial judge's acknowledgment that the meaning of "totally disabled" speaks to the *ability, or the inability, due to illness or disability to perform* a particular type of work. The trial judge clearly understood that the question of whether Mr. Pasap was totally disabled turned on whether (1) he was under a physician's care, and (2) he had the *ability to perform* the substantial duties of the work (either his own occupation or another reasonable occupation) at a certain threshold. The trial judge did not interpret "total disability" or "totally disabled" in the absence of a consideration of ability or fitness to work.

[54] Further, the trial judge did not err when she concluded that it was a misinterpretation of the Disability Plan to determine whether the maximum income threshold is exceeded by considering an insured's monthly earnings, rather than his annual income. The trial judge rejected SIGA's argument that the 66.67% maximum income threshold should be assessed by considering Mr. Pasap's income on a monthly basis. She ruled that the correct approach was to consider Mr. Pasap's income on an annual basis and she expressly adopted the "reasons provided by the plaintiff in [his] reply [trial] brief" for that conclusion (*Trial Decision* at para 88).

[55] At trial, Mr. Pasap had argued that SIGA's interpretation of the Disability Plan (predicated on assessing an insured's monthly income), defeated the Disability Plan's purpose and was contrary to the principle of liberal and reasonable interpretation of disability policies articulated in *Bacon*. Mr. Pasap contended that the policy reasons against assessing income on a monthly basis include supporting certainty, maintaining secure support, and discouraging the unnecessary litigation which would follow in cases when an insured's income fluctuates from month to month. Mr. Pasap also took the position that it is contrary to the purpose of disability insurance – which is intended to promote stability and maintain quality of life – to assess eligibility for insurance on a monthly basis. I agree. Disability insurance plans must be interpreted reasonably. If the words used are ambiguous and open to two interpretations, then the benefit of interpretation should be given to the insured: *Bacon* at para 42(5), citing *MacEachern v Co-Operative Fire and Casualty Co.* (1986), 75 NSR (2d) 271 (SC), affirmed on appeal (1987), 79 NSR (2d) 127 (CA). It is antithetical to that principle to require an insured to meet the definition of "totally disabled" on a monthly basis. The trial judge did not err in coming to that conclusion.

[56] Finally, SIGA argues that the "Recurrent Disability" provision in the Disability Plan was intended to address situations where an insured may earn over the maximum income threshold in one month and, on SIGA's interpretation, therefore not be "totally disabled", but then drop below the maximum income threshold in the next month and become totally disabled. SIGA says that the existence of this provision demonstrates that the drafters of the Disability Plan intended for an insured's eligibility status to be assessed on a monthly basis. Respectfully, I am not persuaded by this argument. The Recurrent Disability provision does not support the proposition that the meaning of "totally disabled" must include an assessment of monthly income. On the contrary, the Recurrent Disability provision is targeted at the 120-day waiting period and speaks to extending,

or alternatively waiving, the waiting period if an employee returns to work for a portion of time during that period, or returns to work after the waiting period expires but for less than 120 days. It is irrelevant to the meaning of "total disability" or "totally disabled".

[57] Thus, even applying a correctness standard of review, the trial judge did not misinterpret the meaning of "totally disabled" or "total disability" under the Disability Plan.

B. The trial judge did not err in finding that Mr. Pasap was totally disabled during the OwnOcc Period

[58] At trial, SIGA asserted that while Mr. Pasap was totally disabled within the meaning of the Disability Plan after his release from hospital on January 7, 2013, he had recovered sufficiently to be able to perform the substantial duties of his prior position with SIGA before April 12, 2013, which was the last day of the Disability Plan's 120-day waiting period. The trial judge rejected this argument and found that Mr. Pasap was totally disabled between April 13, 2013, and April 12, 2015.

[59] SIGA says that the trial judge erred in law in making such a determination. It contends that the trial judge's conclusion was not predicated on the evidence and that she failed to consider relevant evidence adduced at trial. Specifically, SIGA says the trial judge erred by failing to identify or establish a causative connection behind Mr. Pasap's alleged cognitive issues and the Medical Event which, it says, renders "her conclusions regarding Mr. Pasap's initial entitlement to disability benefits unreasonable and incorrect".

[60] I do not agree that the trial judge erred in this manner. First, she did not find that it was Mr. Pasap's cognitive issues which prevented him from being able to work during the OwnOcc Period. On the contrary, the trial judge found that Mr. Pasap's *work history* after his release from hospital, and from April 13, 2013, to April 12, 2015, was demonstrative of his ability or fitness to work, or was "indicative of what he could do" (*Trial Decision* at para 76), concluding that Mr. Pasap was not capable of performing "'the substantial duties of his … own occupation'" (*Trial Decision* at para 81, quoting the Disability Plan). The trial judge did not make any specific finding that it was Mr. Pasap's impaired cognitive ability that prevented him from working following the

Medical Event and until April of 2015. Rather, she found that Mr. Pasap was essentially unable to do *any* work between January 2013 and April 12, 2015.

[61] In my view, the trial judge did not err in coming to this determination; there was an abundance of evidence at trial to support her finding. Specifically, the following evidence was available to shore up the conclusion that Mr. Pasap was not fit to work *at all* during the OwnOcc Period:

(a) Mr. Pasap testified that it took him two to three years following the Medical Event to be fit enough to do *any* work, other than some insignificant tasks. He said that, as of 2015, he still had radiating pain in his back and hip, painful joints, chest pains, difficulty breathing and difficulty controlling his diabetes as a result of lack of exercise;

(b) Mr. Pasap did only nominal work in 2013 (earning $1,343 from a training allowance with K-1 Potash), no work in 2014, and only nominal work in 2015 (earning $6,316);

(c) Mr. Pasap and his friends and family testified that, following the Medical Event, he was unable to live independently. These witnesses gave evidence that prior to the Medical Event, Mr. Pasap was sharp, intelligent, active and energetic, but after the Medical Event, he was frequently in pain, unsteady on his feet, had difficulty breathing, was unable to perform heavy labour, and had cognitive impairments. For example, Mr. Pasap's son testified that "he is not really all there" (*Trial Decision* at para 140);

(d) In a letter from July of 2013, Mr. Pasap's family physician, Dr. Maitland McNeil, observed that, following the Medical Event, Mr. Pasap had "a significant decrease in his mental ability and increased difficulty with memory and ability to express his thoughts in a coordinated fashion" (*Trial Decision* at para 74). On June 25, 2015, Dr. McNeil confirmed that Mr. Pasap's condition had not improved; and

(e) Dr. Dehghani testified that, over the years, Mr. Pasap's "ability to kind of get up and go was significantly limited". His conclusion at trial was that Mr. Pasap "cannot perform the duties that he was able to perform easily before".

[62] It was not necessary for the trial judge to conclude that it was Mr. Pasap's cognitive decline that rendered him unable to work in a management-type position during the OwnOcc Period, or that the cognitive decline was tied to the Medical Event. While there was evidence respecting Mr. Pasap's impaired cognitive state during the OwnOcc Period, the trial judge's conclusion was that Mr. Pasap was incapable of doing any type of work during that time. It was therefore not relevant whether that was because of Mr. Pasap's cognitive issues, or his physical limitations, or both.

[63] Returning to the standard of review, although SIGA argues that the trial judge erred in law in finding that Mr. Pasap was disabled during the OwnOcc Period, other than raising the issue of the lack of a finding of a nexus between Mr. Pasap's cognitive issues and the Medical Event during that period of time, which I have found is irrelevant, SIGA does not identify any other evidence that was allegedly ignored and would have otherwise been relevant to the trial judge's considerations. It is an error of law to make a finding of fact on a material point where the factual finding is based on (a) no evidence, (b) irrelevant evidence, or (c) an irrational inference: see *Johannson* at paras 24–25. However, SIGA has not demonstrated that the trial judge did this.

[64] What SIGA really takes issue with is a finding of mixed fact and law – the consideration of Mr. Pasap's capabilities applied to an interpretation of "totally disabled" or "total disability" under the Disability Plan. An issue of mixed fact and law is reviewable on the deferential standard of palpable and overriding error. The test for setting aside a decision for palpable and overriding error is an exacting one. An error is only palpable if it is obvious or plainly seen and only overriding if it affects the result reached: see *Benhaim v St-Germain*, 2016 SCC 48 at paras 38–39, [2016] 2 SCR 352.

[65] As there was sufficient evidence available to support the conclusion that Mr. Pasap was unable to work to the extent that he was totally disabled during the OwnOcc Period, this ground of appeal must fail.

C. The trial judge did not err in concluding that Mr. Pasap was totally disabled during the AnyOcc Period

[66] SIGA argues that the trial judge also erred by concluding that Mr. Pasap was totally disabled during the AnyOcc Period.

[67] First, it says that the trial judge erred in her assessment of the expert evidence concerning Mr. Pasap's cognitive abilities because she failed to consider evidence that Mr. Pasap performed well on several cognitive assessment tests. SIGA contends that the trial judge reached conclusions about Mr. Pasap's cognitive abilities based on no evidence or irrelevant evidence, or based on an irrational inference, so as to constitute an error of law.

[68] SIGA points to the evidence of its expert witness, Dr. Sirota, who observed that two of the cognitive tests used by Dr. Owens to assess Mr. Pasap were repeated by Mr. Pasap months later in a commercial trucking licence assessment prompted by SGI. Mr. Pasap scored "significantly impaired" on Dr. Owens' tests, but in the SGI assessments he scored above average. Dr. Sirota opined that the only reasonable explanation for this improvement was that Mr. Pasap had not applied his best effort when taking Dr. Owens' tests. Dr. Sirota concluded that this evidence undermined Dr. Owens' opinion that Mr. Pasap suffered from a major neurocognitive disorder.

[69] The trial judge expressly dealt with the issue of the two competing cognitive assessments (Dr. Owens' versus SGI's). She stated that she preferred Dr. Owens' explanation of why Mr. Pasap's performance on the SGI assessment did not demonstrate that he was purposely underperforming on Dr. Owens' assessment, or that he was not cognitively impaired. She accepted Dr. Owens' two reasons for concluding that the SGI assessment did not demonstrate that Mr. Pasap was not cognitively impaired. These were: (1) that the purposes of the two tests were different and Mr. Pasap wanted to maintain his commercial licence and therefore downplayed his cognitive issues with SGI; and (2) that on the SGI assessment, Mr. Pasap benefitted from the "retest effect", where participants improve their scores slightly when they take the same test a second time within a limited period of time after the initial test.

[70] SIGA argues that the trial judge "disregarded Dr. Sirota's concerns" by concluding that the SGI test did not demonstrate conclusively that Mr. Pasap did not have a major neurocognitive disorder. It contends that the trial judge erred in law by preferring the evidence of Dr. Owens

because Mr. Pasap could not "fake good" performance on the second test (implying, conversely, that one could allegedly "fake bad"), and because the retest effect could not explain such a significant improvement in test scores given the period of time that had passed between the two tests.

[71] SIGA's argument on this point asks this Court to review how the trial judge resolved conflicts in the opinions of competing experts. I am not persuaded that the trial judge's conclusion that she preferred Dr. Owens' evidence respecting the competing assessments was an error of law.

[72] At its core, SIGA's argument takes issue with the weight that the trial judge placed on the available evidence that she accepted. As noted by Schwann J.A. in *Slater v Pedigree Poultry Ltd*., 2022 SKCA 113 at para 221, [2022] 12 WWR 622, "[t]he weight assigned to the evidence of an expert witness by a trier of fact demands a deferential stance from an appellate court". The nature of a deferential standard of review of findings of fact based on a weighing and assessment of conflicting evidence was recently decided by the Supreme Court in *R v Kruk*, 2024 SCC 7, 433 CCC (3d) 301 [*Kruk*], with an emphasis on credibility assessment, but also with a view to general fact-finding and reasons given for coming to a particular conclusion:

> [83] Trial judges have expertise in assessing and weighing the facts, and their decisions reflect a familiarity that only comes with having sat through the entire case. The reasons for the deference accorded to a trial judge's factual and credibility findings include: (1) limiting the cost, number, and length of appeals; (2) promoting the autonomy and integrity of trial proceedings; and (3) recognizing the expertise and advantageous position of the trial judge (*Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, at paras. 12-18). …

[73] Applying a deferential approach to the trial judge's determination that she preferred Dr. Owens' opinion, I do not identify an error. The trial judge explained why she preferred Dr. Owens' evidence to that of Dr. Sirota and addressed why she rejected Dr. Sirota's opinion that Mr. Pasap was underperforming during Dr. Owens' assessments. The trial judge's decision to prefer Dr. Owens' evidence was not made in a vacuum; it was based on the available and relevant evidence, which the trial judge detailed in her decision.

[74] The trial judge clearly recognized that it was Dr. Sirota's opinion that Dr. Owens' conclusions were flawed or unsubstantiated. As part of that recognition, the trial judge dedicated 12 paragraphs of the *Trial Decision* to the reasons for why she rejected Dr. Sirota's opinion in favour of that of Dr. Owens. These reasons include that:

(a) There was considerable evidence which demonstrated that Mr. Pasap functioned at an average cognitive level before the Medical Event;

(b) SIGA had not shown that Mr. Pasap was not succeeding in his management job (due to any cognitive difficulties) prior to his dismissal;

(c) The trial judge disagreed with Dr. Sirota relying heavily on the SGI assessments to demonstrate that Mr. Pasap possessed normal cognitive function because that conclusion was "contrary to the evidence provided by those who knew Mr. Pasap well" (at para 131);

(d) The assessments were for different purposes (Dr. Owens had testified that the SGI assessment was not as complex as the assessment she undertook);

(e) A major neurocognitive disorder allows for different presentations;

(f) The evidence of several witnesses was that Mr. Pasap was frustrated by his disabilities and trying to overcome them, not malingering as Dr. Sirota opined; and

(g) Dr. Sirota had agreed that the diagnosis of neurocognitive disorder was reasonable on Dr. Owens' interpretation of the evidence.

[75] The trial judge's reasons demonstrate that she reviewed and weighed the competing evidence. When the appropriate standard of review is applied, there is no place for this Court to substitute its view of the evidence and its conclusions for that of the trial judge.

[76] Secondly, SIGA argues that it was an error of law for the trial judge to rely on Dr. Owens' conclusions that Mr. Pasap's cognitive disabilities were linked to hypoxia. SIGA contends that the evidence, taken as a whole, does not support that Mr. Pasap suffered hypoxia during the Medical Event.

[77] Again, I am not persuaded that this ground of appeal has merit. First, there is evidence available from the record that Mr. Pasap experienced a severe lack of oxygen to his brain at the time of the Medical Event. That was noted both in the letters of Dr. McNeil, which were admitted into evidence at trial, and in Dr. Dehghani's testimony. As a result, a conclusion that Mr. Pasap's cognitive disabilities were linked, at least in part, to the Medical Event and to oxygen deprivation

at that time was reasonably possible on the evidence. It follows that there is no error in law embedded in that conclusion. In addition, in my view, the conclusion does not constitute a palpable or overriding error as it is not clearly wrong, nor can it be characterized as unreasonable or entirely unsupported by the evidence: *H.L. v Canada*, 2005 SCC 25 at paras 55–56, [2005] 1 SCR 401.

[78] Further, the trial judge did *not* conclude that Dr. Owens had determined Mr. Pasap suffered from a neurocognitive disorder because she was influenced by Dr. McNeil's comment that Mr. Pasap suffered acute hypoxia. The trial judge expressly stated that she did not accept that Dr. Owens was so influenced (see *Trial Decision* at para 135). Again, this determination resulted from weighing the conflicting evidence – which was well within the trial judge's purview.

[79] Thirdly, SIGA renews its argument that the trial judge erred in law by finding Mr. Pasap to be totally disabled during the AnyOcc Period when she failed to identify a causative element linking the Medical Event to Mr. Pasap's continuing cognitive deficiencies. SIGA argues that this results in an error of law because the trial judge accepted, either with no evidence, irrelevant evidence, or by making an irrational inference, that Mr. Pasap's cognitive deficits were tied, at least in part, to the Medical Event, so as to entitle him to long term disability benefits.

[80] I do not accept that there was no relevant evidence upon which the trial judge could reasonably conclude that Mr. Pasap's cognitive deficiencies were linked to the Medical Event. As I have already reviewed, there was evidence from Mr. Pasap's family and friends that prior to the Medical Event, Mr. Pasap was a proficient thinker and communicator. These witnesses testified that this all changed following the Medical Event, when Mr. Pasap's cognition became impaired. Mr. Pasap's family doctor, Dr. McNeil, observed and recorded similar observations in July of 2013 and June of 2015. Dr. McNeil and Dr. Dehghani both gave evidence that Mr. Pasap may have suffered from a lack of oxygen during the Medical Event. Dr. Owens' opinion was that, as a result of the Medical Event, along with other comorbidities, Mr. Pasap had developed a major cognitive disorder. She opined that while it was likely that an interplay of medical factors was responsible for Mr. Pasap's neuropsychological impairments, the evidence that he was cognitively intact and functioning before the Medical Event suggested that the Medical Event played a significant role in his cognitive impairment diagnosed in 2018. The "causative connection" that SIGA demands the trial judge identify is found in Dr. Owens' expert report, admitted at trial, and cited at

paragraph 115 of the *Trial Decision*. There, the trial judge quoted from Dr. Owens' report, as follows:

> *Mr. Pasap's respiratory arrest that took place on December 14, 2012 is believed to be directly related to these cognitive deficits.* It is believed that Mr. Pasap's cognitive abilities prior to the respiratory arrest were within an average range. Evidence provided by healthcare professionals suggests that no concerns with cognitive deficits were noted prior to the respiratory arrest. He was involved in his community and appeared to function well socially and intellectually. However, it is important to note that other health-related factors (e.g., diabetes, sleep apnea, medications) may also be contributing.
>
> (Emphasis added)

[81] While SIGA takes issue with this conclusion, and points to Dr. Sirota's opinion to the contrary, it is undeniable that there was evidence before the trial judge that she could choose to accept a conclusion that the Medical Event was a contributor to Mr. Pasap's later cognitive deficiencies. As such, I see no error in law, nor any palpable and overriding error of fact, that would allow this Court to intervene.

[82] Finally, SIGA argues that the trial judge erred in law when she concluded that the "stop/start nature of Mr. Pasap's work history is because of his capacity to work" (*Trial Decision* at para 153). SIGA contends that the conclusion is "incorrect" and does not reflect "any evidence adduced at trial", arguing that the trial judge erred by deeming Mr. Pasap to be "totally disabled" despite evidence demonstrating that he had the ability to earn income at or above the maximum income threshold (which, it will be recalled, in Mr. Pasap's case, is 66.67% or more of his inflation-indexed, pre-disability earnings).

[83] SIGA further says that the evidence shows that Mr. Pasap did not work continuously because he chose to work in temporary or seasonal positions, not because of his capacity or fitness to work. SIGA argues that the evidence of Mr. Pasap's work history as a commercial truck driver, the SGI testing, and the evidence of Dr. Sirota, demonstrated that Mr. Pasap was able to work as a commercial truck driver at a capacity that disqualified him from receiving long term disability benefits. It argues that the trial judge ignored evidence showing that there was no causal link between the Medical Event and Mr. Pasap's inability to maintain employment.

[84] There are several difficulties with these arguments. The first is that they presuppose a state of the law respecting how total disability is to be defined under a disability insurance plan that is not accurate.

[85] The fact that an insured has worked following a disabling event does not necessarily demonstrate that they are not "totally disabled" pursuant to a disability insurance policy.

[86] The Supreme Court of Canada's decision in *Paul Revere Life Insurance Co. v Sucharov*, [1983] 2 SCR 541 [*Sucharov*], remains a leading case respecting how the term "totally disabled" should be interpreted in a disability plan. In that case, the Court found that Mr. Sucharov was not able to deal with stress, and so, even though he could complete many of the individual tasks involved with being a manager, he was ineffective in his occupation and, therefore, totally disabled. In coming to that conclusion, the Court quoted with approval George J. Couch & Ronald A. Anderson, *Couch on Insurance*, loose-leaf (Rel 1983), 2d ed (Rochester, New York: Lawyers Co-operative Pub. Co., 1959) at §53:118 [Couch] (*Sucharov* at 546):

> The test of total disability is satisfied when the circumstances are such that *a reasonable man would recognize that he should not engage in certain activity even though he literally is not physically unable to do so. In other words, total disability does not mean absolute physical inability to transact any kind of business pertaining to one's occupation*, but rather that there is a total disability if the insured's injuries are such that common care and prudence requires him to desist from his business or occupation in order to effectuate a cure; hence, if the condition of the insured is such that in order to effect a cure or prolongation of life, common care and prudence will require that he cease work, he is totally disabled within the meaning of health or accident insurance policies.
>
> (Emphasis added)

[87] *Sucharov* was more recently applied by the Court of Appeal for British Columbia in *Asselstine v Manufacturers Life Insurance Co.*, 2005 BCCA 292, 254 DLR (4th) 464 [*Asselstine*]. In that case, a registered nurse was diagnosed with multiple sclerosis, took six weeks of sick leave, and upon her return was assigned to sedentary tasks only. Shortly thereafter, her position was abolished for unrelated reasons, and she received paid leave in lieu of working notice. A few weeks later, she took a position as a medical receptionist until her health deteriorated to the point that she was unable to work at all. The insurer denied her claim for long term disability benefits on grounds that she was not totally disabled during the requisite time period.

[88] The Court in that case noted that there were conflicting medical opinions concerning Ms. Asselstine's ability to work: the neurologist who had diagnosed her maintained that she was still able to work, but at a greatly reduced level of activity; another neurologist who treated her felt that she did not have the ability to work at all from the diagnosis onwards (see *Asselstine* at para 5). In upholding the trial judge's finding of eligibility for total disability benefits, despite the fact that

Ms. Asselstine had been working as a receptionist, Lowry J.A., dissenting in part but writing unanimously for the Court on this point, cited *Sucharov* to affirm that "[t]otal disability does not mean that a person cannot physically perform an employment function, but only that he or she should not be performing the function when a physical condition renders it unreasonable that it be undertaken" (at para 13).

[89] Thus, in determining whether an insured is totally disabled, there is an important distinction to be made respecting whether it is reasonable that an insured *should* perform an employment function, given the circumstances of their health, as opposed to whether they *can* perform it.

[90] SIGA's main complaint is with how the trial judge dealt with evidence that Mr. Pasap worked intermittently during the AnyOcc Period. It argues that the trial judge failed to address the evidence of Mr. Pasap's work history during the AnyOcc Period, and that this evidence demonstrated that Mr. Pasap had the ability to work. SIGA invites this Court to conclude that the only reasonable inference that could be drawn from the fact that Mr. Pasap *did* work at a variety of jobs during the AnyOcc Period is that he had the ability to work at or beyond the 66.67% maximum income threshold defined in the Disability Plan and, therefore, was not totally disabled.

[91] I am not persuaded that the trial judge erred in any material way in respect of the inference she drew about the intermittent nature of Mr. Pasap's work during the AnyOcc Period. Nor am I convinced that she erred in rejecting SIGA's assertion that Mr. Pasap's work history demonstrated that he was able to work as a commercial truck driver at a sufficient capacity to disqualify him from any entitlement to long term disability benefits.

[92] First, the trial judge clearly understood that Mr. Pasap had worked on and off since 2015. She summarized Mr. Pasap's earnings between 2015 and 2020, which demonstrated that he earned money each year, although less money than the annual maximum income threshold amount which would disentitle him to disability benefits. Further, the trial judge did consider Mr. Pasap's work history in her assessment of whether he was totally disabled under the Disability Plan. In her conclusion respecting Mr. Pasap's fitness to work, she stated (repeated here for ease of reference):

> [151] Mr. Pasap currently cares for his wife and brother's livestock and maintains the farm equipment belonging to members of his family. He does not do hard labour, but he believes he can still operate a semi-truck safely.

> [152] Mr. Pasap has been employed on and off since 2015. I agree with the friends and family of Mr. Pasap who testified that Mr. Pasap overestimates his abilities and underplays his limitations. Mr. Pasap has a major cognitive disorder which limits his ability to find employment as a manager. On the other hand, Dr. Dehghani testified that Mr. Pasap's future employment should not involve lifting or significant muscular activity. Mr. Pasap found the driving jobs to be difficult because lifting was involved. I note these jobs never last very long. In sum, Mr. Pasap is severely limited to what he can do to earn an income, for which he "is or may become reasonably qualified by training, education, or experience": Exhibit PD-1, tab 3, p 156.
>
> [153] SIGA argues that Mr. Pasap did not work a full year at any job because of the limited availability of employment, not because of his inability to work. I disagree. The stop/start nature of Mr. Pasap's work history is because of his capacity to work. As indicated in the evidence, Mr. Pasap has sought work, had difficulty and quit, or the job ended so he did not have to leave it.
>
> [154] I am satisfied that, to the date of trial, Mr. Pasap was prevented from any gainful occupation, for which he was reasonably qualified, because of his disability. Moreover, the evidence does not show that further training or education would have enabled him to find employment other than what he did find. Finally, Mr. Pasap was unable to earn 66.67% of his pre-disability earnings, indexed or not.

[93] SIGA contends that the evidence cannot support the trial judge's conclusion that the intermittent nature of Mr. Pasap's work since the Medical Event was demonstrative of his *ability to work.* However, as I will explain, it is my view that Mr. Pasap's own evidence reasonably bore that conclusion.

[94] Mr. Pasap testified that he made many attempts to work because he had to; he was determined not to be a burden on his family. While SIGA's theory, supported by Dr. Sirota, is that Mr. Pasap's work history reflected that he was malingering because he worked intermittently in seasonal or temporary jobs, the trial judge did not accept that argument. Instead, she expressly preferred the evidence from Mr. Pasap and his family and friends that indicated that Mr. Pasap was a hard worker, was distressed by his physical and cognitive limitations, and thus made many attempts to try to work.

[95] SIGA says that there was no evidence to support the inference that the intermittent nature of Mr. Pasap's work during the AnyOcc Period was linked to his ability – or lack of ability – to work. Respectfully, this argument is without merit. There was clearly evidence at trial to buttress such an inference. In addition to the evidence given by medical professionals about Mr. Pasap's overall medical condition, Mr. Pasap's testimony, read carefully and completely, reasonably

supports the inference that he found the seasonal and/or temporary work too difficult and that he should not maintain it, given his health.

[96] For example, Mr. Pasap testified that in 2013, he secured a position with a potash company as a trainee, but the job ended because he missed too much time from work for medical appointments. Thereafter, in 2016, he was asked to leave Vaderstad Industries Inc. because he was again missing too much work. He testified that he found the work, which required bending, "very hard". His work at Red Apple Stores Inc. in 2016 and 2018 was casual. His work for Moose Mountain Meats Co-operative Ltd. in 2016 dressing animals was casual, but he also found that work too difficult because the animals were heavy to lift. He testified that he "couldn't do it" and worked there for just a short time. He said he worked for KF Kambeitz Farms Inc. in 2016 for "maybe two, three months" but he found it was difficult to pull himself up and down the equipment. He said he no longer had the strength to do it when that temporary job ended. Mr. Pasap testified that because he was unsteady on his feet, he was tripping a lot. He testified that his work for First Choice Trucking Ltd. [First Choice] in 2016 (driving a gravel tandem truck) was seasonal and lasted four to five months. However, he also said that he found the job very difficult because the truck was not air conditioned, which aggravated his physical ailments, that he had difficulty managing his diabetes, and that his legs hurt while driving the long distances required for the job.

[97] Mr. Pasap further testified that in 2017, he worked for Three Star Trucking Ltd. [Three Star], but because he could not feel his feet, he fell off his truck and was injured, requiring him to make a Saskatchewan Workers' Compensation Board claim. He later went back to work for First Choice but said that he hurt himself, again, climbing up and down the truck, and that climbing was too difficult for him, testifying:

> Yeah. Yeah. It was, you know, just tripping lots out in the field because I had to work in the wintertime and, again, I can't -- I can't feel my feet like I used to be able to. And that was a progressive problem for me all the time and I was falling all the time and hurting myself and my arms and wrists when I landed, and getting bruised quite a bit.

[98] He said that he worked in that job for six months until he was injured and forced to quit. He then worked for JJ Trucking Ltd., a gravel company, but he quit that job because, he testified, he could not understand the mapping and had significant trouble finding the locations he was sent to. He said he found the job too "confusing". Following that, Mr. Pasap also worked in 2017 for Element Technical Services Inc. but said that he was forced to quit because he could not do the

job: “I knew right away that I wouldn’t be able to do this job because of the labour -- intense -- that they wanted. I just -- I couldn’t do it. … I remember having pains in my chest right away the first day”.

[99] Thereafter, Mr. Pasap worked for Regina Asphalt & Paving in 2017. He testified that he found the job too difficult, particularly the “roller machine”. He commented: “I would play out so much trying to roll it”. He stated that he found the long hours of driving too difficult as his legs would become numb and it was hard to control his diabetes. He quit that job, he said, because the truck broke down.

[100] Mr. Pasap testified that in 2018, he again worked for Three Star driving a truck but found it “almost impossible” because the truck had no steps and he was not agile enough to climb into it. Thereafter, he began working for Bannister Pipelines Constructors Corp. [Bannister Pipelines] in 2018. This was an oiler position in which he maintained equipment. He was required to climb up machines to grease them. He testified that he often fell off the machine because it was too “cumbersome” to climb. The job also involved standing, which was trying for him. Mr. Pasap gave evidence that the job impacted his health and it “was hard” but he “hid it” because he “needed [the] work”. He testified that he tried to let other workers do the work for him. He also said he found it very difficult to work in the cold because of his poor circulation, leading him to get frostbite. The job ultimately ended because it was seasonal.

[101] Mr. Pasap testified that in 2019, he went back to Bannister Pipelines for a few months, but again found the work very difficult: it was “very hard” to work in the cold because of his circulation. His extremities “hurt lots”, he had difficulty exerting himself in heavy clothing, and he had found it hard to climb the machines. He testified that it was “a very trying time because of the cold situation and the conditions overall”. He then worked for Marwood Trucking Ltd. at the end of 2019 and in 2020, for about five and a half months, driving a tank truck. He testified he was forced to quit the job because of “my health concerns at the time” and his fears about contracting COVID due to the lack of COVID protections in the workplace.

[102] Finally, he went back to Bannister Pipelines for three months, in June through August of 2020, on the same job. He testified his pain and issues with his physical health had “been progressively worse”.

[103] Given this evidence, I am not persuaded that the trial judge erred in law, or made a palpable and overriding error of fact, by inferring that the intermittent or "stop/start nature" of Mr. Pasap's work history was indicative of his capacity to work. On the contrary, there was an abundance of evidence upon which to draw the inference that Mr. Pasap was not capable of working at a sufficient threshold so as to disqualify him from disability benefits. While Mr. Pasap did not have an "absolute physical inability to transact any kind of business pertaining to" his occupation (*Sucharov* at 546, quoting Couch at §53:118), he gave detailed evidence respecting how difficult he found the work that he did perform due to his physical and, in one case, cognitive, limitations. Mr. Pasap's evidence, which the trial judge accepted, demonstrated that the work he was performing was too demanding for him, given his health restrictions. It is reasonable for an insured to desist from work when working will interfere unreasonably with their health: see *Sucharov* at 546. It was open to the trial judge to accept Mr. Pasap's evidence respecting how hard he found working and to draw the inference that his considerable struggle to perform in these positions meant that it was unreasonable that he should work and that, therefore, he was incapable of working at or above the 66.67% maximum income threshold.

[104] In closing on this point, SIGA has not demonstrated that the trial judge erred in her consideration of the evidence, her essential findings of fact, or in her ultimate conclusion that Mr. Pasap was "totally disabled" during the AnyOcc Period pursuant to the Disability Plan.

D. The trial judge did not err in awarding damages for lost insurance benefits or in her valuation of those benefits

[105] SIGA argues that the trial judge erred in law or mixed fact and law when she awarded damages for lost insurance benefits in the amount claimed by Mr. Pasap without providing "any basis or explanation" for doing so.

[106] I do not agree that the trial judge did not provide a basis for awarding damages. The basis for the damages award arose from her findings that: (1) long term disability insurance was a benefit provided to employees of SIGA, including Mr. Pasap; (2) Mr. Pasap was entitled to long term disability coverage during the notice period; (3) Mr. Pasap suffered a Medical Event during the notice period, rendering him disabled; and (4) Mr. Pasap continued to be "totally disabled"

pursuant to the Disability Plan following the Medical Event. In my view, the basis for the award of damages is clear from the trial judge's reasons.

[107] On the issue of the trial judge's explanation of the quantum of damages she awarded, SIGA argues that the trial judge's reasons are insufficient. However, I am not persuaded that the trial judge's reasons are so insufficient that they constitute an error of law.

[108] As recently noted by the Ontario Court of Appeal in *R v J.L.*, 2024 ONCA 36, 94 CR (7th) 198: "Poor reasons on their own do not justify judicial intervention. Judicial intervention is only warranted where the reasons amount to an error of law because they foreclose meaningful appellate review" (at para 24, citing *R v Sheppard*, 2002 SCC 26 at paras 25 and 28, [2002] 1 SCR 869). Where insufficiency of reasons is raised as a ground of appeal, the task of the appellate court is to "assess whether the reasons, read in context and as a whole, in light of the live issues at trial, explain what the trial judge decided and why they decided that way in a manner that permits effective appellate review" (*R v Singharath*, 2023 SKCA 6 at para 67, 422 CCC (3d) 112, quoting *R v G.F.*, 2021 SCC 20 at para 69, [2021] 1 SCR 801 [*G.F.*]). When reviewing the reasons given by a trial judge, appellate courts must take an approach that is "functional and contextual", and not "finely parse [them] in a search for error" (*G.F.* at para 69; see also *R v Chung*, 2020 SCC 8 at para 13, [2020] 1 SCR 405). While this jurisprudence was decided in the context of criminal proceedings, the principles are applicable to the matter at hand as well: *Gebert v Wilson*, 2015 SKCA 139 at paras 16–18, 467 Sask R 315; and *Scobie v Thiesen*, 2021 SKCA 47 at paras 32–33, 54 RFL (8th) 256.

[109] As *G.F.* instructs, there are two aspects of the sufficiency of reasons that must be considered when this ground of appeal is raised: factual and legal. Factual sufficiency is "concerned with what the trial judge decided and why", and generally represents a "very low bar" that can be cleared even if the trial judge expresses themselves poorly, so long as the "what" and "why" of the factual basis of the judge's findings can be ascertained from the record (at para 71). Legal sufficiency "requires that the aggrieved party be able to meaningfully exercise their right of appeal", which means that "[l]awyers must be able to discern the viability of an appeal and appellate courts must be able to determine whether an error has occurred" (at para 74).

[110] The trial judge's reasons in respect of the quantum of damages are scant. However, when the trial record is considered as a whole, and in particular, the parties' arguments from the trial respecting damages, the trial judge's reasons on this issue clear the bar for sufficiency.

[111] First, the trial judge expressly accepted Mr. Pasap's submissions respecting what damages were payable for lost salary and other employment benefits arising from the wrongful dismissal when, in the *Trial Decision*, she stated:

> [55] On his termination date, Mr. Pasap earned $64,869.18 yearly. He argued that this salary is the equivalent of $89,996 in taxable income. Mr. Pasap was exempted from the payment of income tax, and payment into the Canada Pension Plan, as explained in the SIGA Employee Handbook (Exhibit PD-1, tab 1, at p 29).
>
> [56] At termination, Mr. Pasap was entitled to the following employment benefits: life insurance; long term disability benefits; a dental plan; medical coverage for prescription drugs, vision care, and ambulatory services; employee and family assistance program and a pension plan (Exhibit PD-1, tab 1, pp 42-43).
>
> [57] I accept Mr. Pasap's calculation of his salary and benefit loss, except that it must be calculated to April 16, 2013.

[112] Second, Mr. Pasap argued, and the trial judge accepted, that he was entitled to receive long term disability benefits until he turns 65 years old in May of 2039. In his trial brief, Mr. Pasap provided his calculation of the value of the lost long term disability benefits and the basis for the valuation, as follows:

Type and Rate of Disability Benefit and Applicable Dates	**Basis of Calculation**	**Amount**
Long term disability benefits for the "own occupation period", from April 13, 2013 to April 12, 2015 (the 2-year period commencing from the date after the 120-day "waiting period" described in the Disability Policy [Disability Plan] …	66.67% of [Mr. Pasap's] net earnings during the own occupation period (No all-source income deductions)	$88,528.00
Long term disability benefits during the "any occupation period", from April 13, 2015 to October 18, 2021 (start date of trial)	66.67% of [Mr. Pasap's] net earnings during the any occupation period (Subject to all-source income deductions)	$308,695.00
Discounted long term disability benefits during the	For the any occupation period from October 19, 2021 to the	$886,090.25

"any occupation period:, from October 19, 2021 (date after the start date of trial) to May 19, 2039 ([Mr. Pasap's] 65th birthday) (rounded off to 17 years and 7 months), and subject to a discounted rate pursuant to Rule 2-91 of *The Queen's Bench Rules*)	15-year period thereafter, i.e. October 18, 2036, the pre-discounted amount is $763,920. The discount being 0%, the discounted amount will also be $763,920. For the 2.5 year period from October 19, 2036 to May 19, 2039 (rounded off to 3 years), the pre-discounted amount is $131,564 and the discounted amount is $122,170.25 (discount rate to be applied is 2.5% per year).	
Total [long term disability] benefits		$1,283,313.25
Less income from 2016 to 2020 to be deducted		$66,549.00
Claimable long term disability benefits		**$1,216,764.25**

[113] The trial judge accepted Mr. Pasap's valuation (see *Trial Decision* at para 159). Given that Mr. Pasap provided a basis to support the valuation, it is implicit that, by accepting his valuation, the trial judge also accepted and adopted his reasons for valuation. The quantification and the reasons for it are reviewable on a standard of palpable and overriding error. On appeal, SIGA has not identified what aspect of Mr. Pasap's valuation of lost benefits is in error, with the exception of contending that the damages for lost long term disability benefits should not be indexed for inflation because the Disability Plan did not contain "any language" linking the quantum of monthly insurance benefits to inflation or to the consumer price index, despite linking other terms to those concepts. SIGA directs this Court to its trial briefs and asks the Court to "substitute a quantum it deems appropriate" by considering the parties' trial arguments and the supporting documents from trial.

[114] At trial, SIGA did not provide any oral or written argument of significance respecting whether the damages for lost disability benefits should be indexed for inflation; it took the position they should not be indexed for inflation because the language of the Disability Plan did not support such indexing, and submitted damages calculations that did not include indexing. In contrast, in oral argument and in a reply brief to SIGA's addendum to its trial brief, Mr. Pasap set out a detailed explanation of why his pre-disability income earnings were to be inflation-indexed for each year

following his disability to arrive at the correct entitlement amounts. He argued that the Disability Plan's wording of "monthly Earnings" in the calculation of the amount of insurance payable was ambiguous, but that the threshold for disqualification from total disability clearly stated that it turned on the ability of the insured to earn 66.67% or more of his inflation-indexed, pre-disability earnings. In addition, the "All Source Maximum" was defined as 85% of an employee's "Inflation indexed, Pre-Disability Earnings". Mr. Pasap contended that since both these concepts, which are closely related and interlinked with the concept of the insured's benefit entitlement, referred to inflation-indexed, pre-disability earnings, the benefit entitlement of the insured must also be based on inflation-indexed, pre-disability earnings. Finally, Mr. Pasap argued that any ambiguity or vagueness in the wording of the Disability Plan was to be resolved in his favour, citing *Brissette Estate v Westbury Life Insurance Co.; Brissette Estate v Crown Life Insurance Co.*, [1992] 3 SCR 87, and he calculated his loss by indexing his pre-disability earnings for inflation.

[115] Given the arguments at trial, and SIGA's lack of explanation on this point, it is evident that the trial judge accepted Mr. Pasap's argument that the calculation of lost disability benefits should include inflation indexing, for the reasons Mr. Pasap had given. Further, because there is some ambiguity in the Disability Plan respecting whether benefits should be inflation-indexed, I do not identify any error in the trial judge's valuation of damages using inflation indexing to calculate the amount of the lost insurance benefit. As such, I am not persuaded that the trial judge's lack of express reasons on this point constitutes an error of law, and I would dismiss this ground of appeal.

E. The trial judge erred in her calculations of the value of other lost employment benefits during the notice period

[116] SIGA similarly argues that the trial judge erred in law by failing to provide sufficient reasons for her determination that Mr. Pasap was entitled to $10,084 for other benefits lost over the notice period.

[117] The trial judge determined that an 8-month period was reasonable notice of Mr. Pasap's dismissal and quantified his lost salary over those 8 months as $43,246. She then awarded $10,084 for employment benefits lost over the notice period, which was approximately 23% of Mr. Pasap's salary.

[118] Mr. Pasap concedes that the trial judge's valuation for lost employment benefits is an estimate but argues that it is not outlandish or unreasonable. At trial, Mr. Pasap argued that his lost employment benefits over the notice period included, among other things, lost pension benefits, life insurance coverage, clothing allowance, dental and medical coverage, loss of use of a company vehicle and fitness expenses, calculated at a value of 15% of his salary, which he quantified as $9,730.38 over a 12-month notice period. Mr. Pasap argues that considering the lack of evidence called by SIGA on this issue, it is implicit that the trial judge accepted his valuation and his reasons for them, and there is no reviewable error upon which this Court can intervene.

[119] While I agree that the only evidence from trial respecting the value of lost employment benefits came from Mr. Pasap, and that the trial judge expressly accepted this evidence (see *Trial Decision* at paras 55–57), I have identified an error in the trial judge's calculations on this issue. As noted, the trial judge determined that the appropriate notice period was 8 months. There is, therefore, an error – perhaps just mathematical – of an award of damages of over $10,000 for lost benefits over an 8-month period. Calculated at 15%, which was Mr. Pasap's evidence of the value of lost employment benefits, the amount should have been $6,486.90. I therefore adjust the award accordingly to correct this calculation error.

F. The trial judge did not err in awarding extraordinary damages

[120] Moral/aggravated damages and punitive damages awarded in the employment law context are often classified together as "extraordinary damages". Succinctly put, extraordinary events justify the award of extraordinary damages.

[121] SIGA says that the trial judge erred in law when she awarded Mr. Pasap moral/aggravated damages and punitive damages. It argues that there was no evidence to support an award of moral damages and, in the alternative, that the amount of the moral damages award was unreasonably high because any egregious conduct at issue was less serious than the facts found in *Coppola v Capital Pontiac Buick Cadillac GMC Ltd.*, 2011 SKQB 318, 382 Sask R 125, appeal allowed in part 2013 SKCA 80, 417 Sask R 213 [*Coppola CA*], in which $20,000 in moral/aggravated damages was awarded.

[122] In *Honda Canada Inc. v Keays*, 2008 SCC 39 at para 59, [2008] 2 SCR 362 [*Honda*], the Supreme Court of Canada used the term "moral damages" to refer to the type of damages which are claimed when an employer has acted in bad faith in connection with the termination of an employee's employment. The availability of these types of damages had previously been identified in *Wallace v United Grain Growers Ltd.*, [1997] 3 SCR 701 [*Wallace*], and, following that case, were awarded by increasing the notice period to account for bad faith conduct in the manner of an employee's dismissal. In *Honda*, the Supreme Court clarified what had been intended in *Wallace*, recognizing the duty of good faith and fair dealing owed by an employer to an employee in the context of dismissal. It held that moral damages were justified where it is reasonably foreseeable that the employer's breach of the duty of good faith and fair dealing in the manner of dismissal caused the employee to suffer mental distress, but the former *Wallace* bump on the period of reasonable notice was removed by the Court in favour of a more restrictive approach.

[123] Aggravated damages have merged conceptually with moral damages following the Supreme Court's decision in *Honda*. Aggravated damages are an award of compensation for mental distress taking into account damages suffered as well as intangible injuries. The Court in *Honda expressly* removed the distinction between moral and aggravated damages:

> [59] … There is no reason to retain the distinction between "true aggravated damages" resulting from a separate cause of action and moral damages resulting from conduct in the manner of termination. Damages attributable to conduct in the manner of dismissal are always to be awarded under the [*Hadley v Baxendale* (1854) 9 Ex 341, 156 ER 145] principle. Moreover, in cases where damages are awarded, no extension of the notice period is to be used to determine the proper amount to be paid. The amount is to be fixed according to the same principles and in the same way as in all other cases dealing with moral damages. …

[124] While there is sometimes confusion over the term "moral damages" as opposed to "aggravated damages", the two are interchangeable in the employment law context. Notably, the Ontario Court of Appeal used the term "aggravated damages" rather than "moral damages" in *Boucher v Wal-Mart Canada Corp.*, 2014 ONCA 419, 374 DLR (4th) 293, and in *Humphrey v Mene Inc.*, 2022 ONCA 531, 475 DLR (4th) 68 [*Humphrey*], among other cases.

[125] The Supreme Court made it clear in *Honda* that moral damages require more than the usual mental distress caused by hurt feelings, which are anticipated and expected to result from the fact of termination of employment. Where the manner of dismissal causes mental distress, moral

damages can be awarded: the damages to be awarded are linked, primarily, to the actionable conduct of the employer.

[126] While *Honda* clarified how moral damages may be awarded, the grounds for an award of moral damages remained the same as those previously awarded for *Wallace* damages. These include, but are not limited to:

(a) allegations of just cause not proven and not reasonably held, or where allegations included fraud, theft or serious misconduct and, with respect to the latter, when humiliation was caused to the employee;

(b) misrepresentation as to the reason for a termination;

(c) timing of a termination with the intention to deprive the employee of a benefit which would otherwise imminently vest (such as a bonus or a pension entitlement);

(d) conduct by the employer which caused harm to the employee's reputation and therefore resulted in a longer period of unemployment;

(e) failing to conduct a proper workplace investigation; and

(f) failing to pay employment standards minimums.

See Natalie C. MacDonald, *Extraordinary Damages in Canadian Employment Law* (Toronto: Carswell, 2010) at 72–150.

[127] In *Coppola CA*, this Court also further explained when moral damages may be awarded in a wrongful dismissal claim:

> [27] In the employment context then, moral damages are available whenever the employer breaches the duty of good faith and fair dealing it owes to its employee in the dismissal of its employee (see *Wallace*, at para. 95). The duty requires employers to be "[c]andid, reasonable, honest, and forthright…" and further requires employers to "[r]efrain from engaging in conduct that is unfair or is in bad faith by being, for example, untruthful, misleading, or unduly insensitive" when dismissing an employee (*Wallace*, at para. 98). If an employer should run afoul of these requirements, moral damages will likely follow.
>
> (Footnotes omitted)

[128] Across Canada, moral damages awards in or around the $25,000 range for conduct that might be viewed as broadly similar to that here have not been uncommon since *Honda*: see, for example, *Coppola CA* at para 32; *Porcupine Opportunities Program Inc. v Cooper*, 2020 SKCA 33 at paras 35–37, 62 CCEL (4th) 1; *Café La Foret Ltd. v Cho*, 2023 BCCA 354 at paras 62–63 and 65–67 [*Café La Foret*]; *Elmsdale Landscaping Ltd. v Hiltz*, 2023 NSCA 56; *McLean v Dynacast Ltd.*, 2019 ONSC 7146; *Bailey v Service Corporation International (Canada) ULC*, 2018 BCSC 235 at paras 210–214, 45 CCEL (4th) 54; *Ensign v Price's Alarm Systems (2009) Ltd.*, 2017 BCSC 2137 at para 68; *Ram v The Michael Lacombe Group Inc.*, 2017 BCSC 212 at para 130; and, *Dhatt v Kal Tire Ltd.*, 2015 BCSC 1177 at paras 171–173.

[129] In the instant case, the trial judge determined that moral damages should be awarded to Mr. Pasap for SIGA's bad faith conduct, which included: SIGA's arbitrary disregard for its own human resource policies; SIGA's accusation that Mr. Pasap had lied when he said he had not resigned; SIGA's adherence to the position for nearly ten years that Mr. Pasap had not been presented with an ultimatum to resign or be fired; and SIGA's accusation throughout the litigation that Mr. Pasap had engaged in fraudulent behaviour – using a SIGA vehicle and credit card improperly – where the allegation was not substantiated on the evidence. The trial judge found that this bad faith conduct caused Mr. Pasap exceptional stress as a leader and well-known member of his small community.

[130] SIGA contends that whether an employer has engaged in bad faith conduct can only be an issue when just cause is alleged in a wrongful dismissal action. It says that its conduct does not have the same reputational consequences for Mr. Pasap, because it never alleged just cause, and that therefore it was an error to conclude that it could engage in bad faith conduct in a manner which triggered moral damages. With respect, this novel argument misses the mark. As a concept, moral damages exist to recognize that there is a power imbalance in any employment relationship. Moral damages are triggered by the powerful employer's wrongful conduct at the time of the vulnerable employee's dismissal. Moral damages are tied to dishonest or misleading conduct in the manner in which the party with the greater authority dismisses the less powerful party. Such damages are not dependent upon the reason for the termination; rather, they exist to recognize that at the time of an employee's dismissal they are at their most vulnerable and the employer, as the party with authority, has a duty to deal with the vulnerable party in the utmost good faith.

[131] The trial judge found that SIGA had engaged in bad faith conduct by misrepresenting the reason for Mr. Pasap's termination, and by failing to follow its own human resource policies, including but not limited to by failing to conduct a proper workplace investigation. Further, she found that SIGA wrongfully and continuously alleged that Mr. Pasap had engaged in fraud when the evidence did not support such an allegation. Given those findings, I see no error in the trial judge's decision to award moral damages of $25,000. The quantum of such an award is reasonably within the range of awards that have been granted in the 14 years between the issuance of *Honda* and the trial of this matter.

[132] SIGA has also taken issue with the trial judge's award of punitive damages, although it has not identified how the trial judge allegedly erred. Nevertheless, for the sake of completeness, I turn to consider the award of punitive damages in this case.

[133] In contrast to moral damages, the purpose of an award of punitive damages is punishment and deterrence, as Richards C.J.S. succinctly stated in *Ross v Canada (Attorney General)*, 2018 SKCA 12, [2018] 5 WWR 669:

> [86] I begin the discussion of this aspect of the appellants' argument with a clarification. "Punitive" damages, sometimes called "exemplary" damages, are made for the purpose of punishing a defendant rather than for the purpose of compensating the plaintiff for harm suffered. The expression "aggravated" damages has sometimes been used interchangeably with punitive or exemplary damages but it is now generally understood to refer to an award aimed at compensation that takes account of intangible injuries. See: Jamie Cassels and Elizabeth Adjin-Tettey, *Remedies: The Law of Damages*, 3d ed (Toronto: Irwin Law, 2014) at 240–242 and 320– 321; S.M. Waddams, *The Law of Damages*, loose-leaf (Rel 25, Nov 2016) (Toronto: Thomson Reuters, 2016) at 11-1.

[134] Punitive damages are non-compensatory and are awarded when other types of damages are insufficient to achieve the objectives of punishment and deterrence. A judge must first determine compensatory damages, including moral damages, and then turn to the question of whether punitive damages are necessary because the total of the compensatory awards is not sufficient to achieve denunciation, deterrence and retribution: *Café La Foret*. While the purpose of an award of punitive damages is distinct from the purpose of moral damages, the same conduct which generates a moral damages award may also give rise to a punitive damages award: see, for example, *Fidler v Sun Life Assurance Co. of Canada*, 2004 BCCA 273, 239 DLR (4th) 547; *Plester v Wawanesa Mutual Insurance Co*mpany (2006), 269 DLR (4th) 624 (Ont CA), and its addendum (2006), 275 DLR (4th) 552 (Ont CA); and *Humphrey*.

[135] Punitive damages are to be imposed only if there has been high-handed, malicious, arbitrary or highly reprehensible misconduct that departs to a marked degree from ordinary standards of decent behaviour. When awarded, they should be assessed in an amount reasonably proportionate to the harm caused, the degree of the misconduct, the relative vulnerability of the plaintiff and any advantage or profit gained by the defendant: *Whiten v Pilot Insurance Co.*, 2002 SCC 18, [2002] 1 SCR 595.

[136] In this case, the trial judge awarded punitive damages against SIGA because she found that it had "engaged in reprehensible behaviour by fabricating the reason Mr. Pasap left his employment and then by maintaining that position for close to ten years" (at para 168). As with any award of damages, an award of punitive damage is discretionary: *Slater v Pedigree Poultry Ltd.*, 2022 SKCA 113 at para 277, [2022] 12 WWR 622. Applying a discretionary standard of review, I see no error in the trial judge's award of damages here (see *Kot v Kot*, 2021 SKCA 4, 63 ETR (4th) 161). The trial judge was clearly aware of the principles which govern an award of punitive damages, as she cited *Hill v Church of Scientology of Toronto*, [1995] 2 SCR 1130. While the punitive damages were awarded for a portion of the same conduct for which moral damages were awarded, that was not an error. Practically, the punitive damages award did result in a payment to Mr. Pasap, but implicit in the trial judge's statement that such damages were appropriate in response to SIGA's "reprehensible behaviour" was her understanding that such damages are directed at punishment, deterrence and retribution when compensatory moral damages do not adequately achieve those goals (*Trial Decision* at para 168). Thus, I accept that the award served a different purpose than the one for moral damages. Finally, the quantum of the award was not excessive. In all these circumstances, I see no reason to interfere with the trial judge's considerable discretion to make such an award.

G. The trial judge did not err when she awarded costs under Column III

[137] In its final argument, SIGA says that the trial judge erred when she awarded costs under Column III, contending that Mr. Pasap's claim was not sufficiently complex to warrant such costs. Again, I find that this ground of appeal is without merit.

[138] As recently noted in *Liao v Saskatchewan (Economy)*, 2022 SKCA 137, 6 Admin LR (7th) 163 [*Liao*], Rule 11-1(1) of *The King's Bench Rules* affirms the "expansive discretion" given to trial courts over the matter of costs:

> **Discretion of Court**
>
> **11-1**(1) Subject to the express provisions of any enactment and notwithstanding any other rule, the Court has discretion respecting the costs of and incidental to a proceeding or a step in a proceeding, and may make any direction or order respecting costs that it considers appropriate.

[139] In *Liao*, Leurer, J.A. (as he then was) summarized how this Court approaches a review of that expansive discretion:

> [34] Because of the discretionary nature of a costs award, this Court must look to see if the Chambers judge misapplied some governing principle or rule, or disregarded some critical fact or other consideration, or whether the costs award is itself so obviously unjust as to invite intervention. I see no such error here.

[140] This Court's deferential approach to reviewing costs awards is also demonstrated in the following cases, all of which were affirmed by *Tysseland v Tysseland*, 2022 SKCA 39 at para 14: *Benson v Benson* (1994), 120 Sask R 17 (CA) at paras 89–90 and 97; *Wongstedt v Wongstedt*, 2017 SKCA 100 at para 41, [2018] 4 WWR 82; and *McNabb v Cyr*, 2018 SKCA 51 at para 31. See also *Suderman v Yakubowski-Suderman*, 2022 SKCA 87 at para 206, 82 RFL (8th) 1; and *Economical Mutual Insurance Company v Brock Stock Farm Ltd.*, 2024 SKCA 62 at para 81, 42 CCLI (6th) 32.

[141] I do not accept SIGA's argument that the matters canvassed at trial were simple. There were numerous issues raised at trial, including: whether Mr. Pasap was dismissed or had resigned; the length of the reasonable notice period and whether he had failed to mitigate his damages; his entitlement to disability benefits and whether that entitlement was extinguished; the proper interpretation of the Disability Plan; the quantum of damages for lost disability benefits; the quantum of damages for other lost employment benefits; moral and punitive damages; and costs. Two competing experts testified, and the trial took place over seven days, with two additional days of argument. It appears that SIGA challenged almost every aspect of Mr. Pasap's claim. As such, and given the deference this Court must pay to a trial judge's discretion in respect of an award of costs, I see no error in the trial judge's decision to award costs under Column III. I confirm that award, even despite the minor calculation error I identified in the award for other lost employment benefits.

VI. CONCLUSION

[142] In the result, the appeal is dismissed, except to correct the calculation of the award for other lost employment benefits. Given Mr. Pasap's success in this appeal, he is entitled to his costs, calculated in the usual manner.

"McCreary J.A."
McCreary J.A.

I concur.

"Tholl J.A."
Tholl J.A.

Barrington-Foote J.A. (in dissent)

I. INTRODUCTION

[143] My colleagues have concluded this appeal should be allowed only as to a minor mathematical error in calculating damages for lost employment benefits, as they have found the trial judge did not otherwise err. With respect, I am unable to agree. It is my opinion that the trial judge committed errors of law and palpable and overriding errors of fact, and that the appeal must be allowed on a wider basis.

[144] My reasons for these conclusions follow. I will deal first with the standard of review that applies to the interpretation of the Disability Plan. In my view, the correctness standard applies, not the palpable and overriding standard. I will then address errors in the trial judge's conclusions that Mr. Pasap was totally disabled during the AnyOcc Period and that the damages for lost long term disability benefits should be indexed for inflation.

II. STANDARD OF REVIEW: THE DISABILITY PLAN

[145] The alleged errors identified by SIGA include issues as to the interpretation of the Disability Plan. In *Sattva Capital Corp. v Creston Moly Corp*., 2014 SCC 53, [2014] 2 SCR 633 [*Sattva*], the Supreme Court of Canada held that "[c]ontractual interpretation involves issues of mixed fact and law as it is an exercise in which the principles of contractual interpretation are applied to the words of the written contract, considered in light of the factual matrix" (at para 50). For that reason, appellate review of alleged errors of contractual interpretation, in the absence of an extricable error of law, are reviewed on the palpable and overriding standard of review: *Sattva* at paras 50 and 53; and *Earthco Soil Mixtures Inc. v Pine Valley Enterprises Inc.*, 2024 SCC 20, 492 DLR (4th) 389 at paras 27–28.

[146] However, the palpable and overriding error standard does not apply case in relation to issues of standard form contract interpretation. In *Ledcor Construction Ltd. v Northbridge Indemnity Insurance Co.*, 2016 SCC 37, [2016] 2 SCR 23 [*Ledcor*], Wagner C.J.C., writing for the majority, resolved the question as to the standard of review to be applied to the interpretation of a standard form contract, finding as follows:

> [24] I would recognize an exception to this Court's holding in *Sattva* that contractual interpretation is a question of mixed fact and law subject to deferential review on appeal. In my view, where an appeal involves the interpretation of a standard form contract, the interpretation at issue is of precedential value, and there is no meaningful factual matrix that is specific to the parties to assist the interpretation process, this interpretation is better characterized as a question of law subject to correctness review.

[147] As this Court explained in *Mosten Investments LP v The Manufacturers Life Insurance Company (Manulife Financial*), 2021 SKCA 36, [2021] 9 WWR 1 [*Mosten*], a contract need not be entirely in a standard form for this exception to apply. That is so because, as always, "[t]he question is the applicability of a standard of review to the *issue* or *issues* of interpretation put before the appellate court" (at para 34). For that reason, the Court instructed as follows:

> [56] … In our view, it is both preferable and more accurate to use the term "standard form contracts" in reference only to those contracts that, in their entirety, meet all three conditions described above. More specifically, it is preferable and more accurate to address contract interpretation on an issue-by-issue basis to determine whether each issue is an *issue of standard form contract interpretation*. Approached in this manner, a contract or contractual provision that has been modified or that is subject to interpretation based on a meaningful factual matrix specific to the parties to it is not a standard form contract at all and does not involve an issue of standard form contract interpretation.
>
> (Emphasis in original)

[148] *Mosten* summarized the conditions that must be met before the correctness standard is engaged on this basis, as follows:

> [52] … First, there must be an identical or a substantially identical form of contract language capable of standardised use by multiple, different parties. …
>
> [53] Second, there must be no factual matrix that is specific to the parties to the contract and that is probative of the issue of contract interpretation. …
>
> [54] Third, the standard form contract must be one that has been or will be repeatedly entered into.

This test has been applied in *Temple Insurance Company v Aberdeen Specialty Concrete Services*, 2021 SKCA 94, and *Ter Keurs Bros. Inc. v Last Mountain Valley (Rural Municipality)*, 2021 SKCA 55, [2021] 6 WWR 429.

[149] As noted in the majority judgment, *Mosten* also affirmed that "the principal factor that indicates whether an issue of contract interpretation gives rise to a question of law is its precedential value" (*Mosten* at para 39). As the Court explained, "[o]n one gauge, the precedential value of an interpretation is related to the repeated use of the contract language in question" (at para 40), which arises from "the potential for multiple, subsequent uses of the same contract language by different *or even the same parties*" (at para 41, emphasis added). "On a related measure," the Court continued, "the precedential value of an interpretation lies in its importance as law" in a sense which invokes "principles such as *stare decisis* as it manifests under the objectives of attaining consistency in the application of the law, certainty and predictability of legal results, judicial accountability, and justified decision-making" (at para 42).

[150] The contract at issue here is the Disability Plan. SIGA contends that the Disability Plan was a standard form contract, and any error in its interpretation is therefore reviewable on a correctness standard. Mr. Pasap says that there is no evidence to support the conclusion that the Disability Plan was a standard form contract. For the reasons that follow, I agree with SIGA.

[151] The evidence confirms, and the trial judge found, that the Disability Plan was part of SIGA's Group Insurance Plan [Group Benefit Plan] (see *Pasap v Saskatchewan Indian Gaming Authority*, 2022 SKQB 200 at para 157, 82 CCEL (4th) 33 [*Trial Decision*]). The evidence did not include a complete copy of the insurance contract at issue – Group Policy No. 335683 – which was underwritten by Great-West Life. However, both parties proceeded on the basis that the terms of the Group Benefit Plan that were relevant to Mr. Pasap's action were evidenced by two

documents. The document titled “Benefits, Employee Long Term Disability Benefit” [Disability Terms] is a portion of the policy and begins with the following statement:

> If an Employee becomes Totally Disabled while insured for this benefit, Great-West Life will pay the benefits for which that Employee is eligible in accordance with the **BENEFIT SUMMARY** and all the provisions of this policy.
>
> (Emphasis in original)

[152] The Disability Terms includes a section titled “Benefit Summary” that contains the terms that deal with entitlement to and the calculation of long term disability benefits.

[153] The other document that discloses relevant terms of the Disability Plan is the Group Benefit Plan booklet [Booklet] provided to SIGA employees. The Booklet explains that “S.I.G.A., your Employer and Great-West Life have worked together to develop a benefit plan that provides protection and security for you and your family”. It contains a definition of certain terms that are used but not defined in the Disability Terms.

[154] The SIGA Corporate Policy Manual is also relevant here. It contains the following statement as to Employee Group Benefits:

> 1.1 This policy is an overview of the group benefits that SIGA provides to employees, and stipulates the cost sharing for these benefits. Hereafter, the Group Insurance Plan and the SIGA Pension Plan are referred to as Group Benefits.
>
> …
>
> 4.2 Benefits coverage for employees is on a cost-shared basis. The group benefits plan includes the following benefits:
>
> …
>
> • Long-term disability;
>
> …
>
> 4.3 An insurance carrier provides the group benefits to SIGA. The details of the terms and coverage of benefits are governed by the insurance policy and may be subject to change by the carrier. The procedural requirements below are guidelines; the Insurance Carrier’s policy document takes precedence.
>
> …
>
> 5.2 All full-time and part-time employees eligible for benefits on the day immediately following the date they have worked 390 hours in a consecutive 26-week period. No employee will be eligible for benefits prior to three months.
>
> …
>
> 7.1 All Full-time are required to participate in the Group Benefits Plan.
>
> …

[155] Mr. Pasap's letter of appointment as a security officer confirms that he became a member of the Group Benefits Plan in 2007, when he completed his probationary period.

[156] On this appeal, the issues of contract interpretation relate to the meaning of the terms "Total Disability" or "Totally Disabled", as well as the terms "Earnings", "monthly Earnings", "Monthly Integrated Benefit", and "Benefit Amount", that are used in the Disability Plan. The question is whether their interpretation raises issues of standard form contract interpretation. Each of these terms is used in the contract that is part of the benefit package for every full-time SIGA employee or, at a minimum, to those at or below the level of Mr. Pasap. That is a substantial cohort, as SIGA operates casinos. The Bear Claw Casino, where Mr. Pasap was employed, and which was the smallest of SIGA's casinos, had a staff complement that ranged between 90 and 130 employees. In his capacity as a supervisor, Mr. Pasap alone supervised 15 to 20 people.

[157] In these circumstances, all of the three conditions specified in *Mosten* are satisfied. There is uncontested evidence that the terms at issue constitute identical contract language that is not only capable of but has been used in a standardized fashion in the agreement that applies to each of the SIGA employees that is or was a participant in the Disability Plan. There is no evidence of any factual matrix relating to the enrollment of Mr. Pasap that is probative of the issues of contract interpretation. That is so as a result of the nature of the Group Benefit Plan as a whole and the Disability Plan in particular. The right or, in the case of full-time employees, the obligation to participate in the Plan on the usual terms is a standard part of the terms of employment.

[158] To be clear, it is my view that the question is not whether the Disability Plan may have terms, such as the provisions that relate to employees with Indian status, that differ from the terms of other Great-West Life disability plans. It is whether the terms are the same for each employee of SIGA. The Disability Plan is an insurance contract. "Insured" is a defined term and includes Mr. Pasap. Just as the potential for multiple uses of the same language by the same parties may constitute the repeated use that creates the necessary precedential value, the same can be true of the multiple different uses of the same language by one employer and many of its employees in this way.

[159] I have, in reaching this conclusion, considered the question identified in *Jakab v Clean Harbors Canada, Inc*., 2023 ONCA 377, 33 CCLI (6th) 174, as to whether standard form contracts of adhesion used exclusively within a single organization have a sufficient precedential value to attract a correctness review. I note the reasoning in *MacIvor v Pitney Bowes*, 2018 ONCA 381 at para 14, 422 DLR (4th) 232, on this point, which appears to conflict with the comment in *Jakab*. I am also aware that in *Matthews v Ocean Nutrition Canada Ltd*., 2020 SCC 26, [2020] 3 SCR 64, Kasirer J. found it was unnecessary to decide whether a correctness review would apply to a standard form employment contract used with a "limited number of executives" (at para 62). This is not such a contract. The Disability Plan does not apply to a limited number of employees. I am satisfied that the exception that applies to issues of standard form contract interpretation properly applies to these issues arising under the contract with this single employer.

III. ANALYSIS

A. The trial judge erred in finding that Mr. Pasap was totally disabled throughout the AnyOcc Period

[160] SIGA submits that the trial judge committed both errors of law and palpable and overriding errors of fact in finding that Mr. Pasap was totally disabled during the OwnOcc and the AnyOcc Periods. Like my colleague, I find no basis to intervene in her finding that Mr. Pasap was totally disabled during the OwnOcc Period and, more generally, in her conclusion that the Medical Event contributed to the cognitive difficulties that prevented Mr. Pasap from returning to a management position during that period.

[161] However, I am of a different mind as to her decision that he was "prevented from any gainful occupation, for which he was reasonably qualified, because of his disability" (*Trial Decision* at para 45). With respect, it is my opinion that the trial judge erred in interpreting the provisions of the Disability Plan bearing on this issue, by disregarding or misapprehending relevant evidence, and by making palpable and overriding errors of fact. I will deal with each of these in order.

1. The trial judge erred in her interpretation of the Disability Plan

[162] This ground of appeal relates to an aspect of the following provisions in the Disability Plan:

> **Total Disability and Totally Disabled**
> A condition due to sickness or Accidental Bodily Injury which requires the regular and ongoing care of a legally qualified Physician appropriate to the sickness or injury and as a result of which the Employee is not engaged in any occupation for wage or profit and:
>
> 1. during the period of 24 months following the expiration of the Waiting Period, is prevented from performing the substantial duties of his or her own occupation; and
> 2. after the period during which the Employee cannot perform the substantial duties of his or her own occupation, is prevented from performing any gainful occupation:
>
> a. for which the Employee is or may become reasonably qualified by training, education, or experience, and
>
> b. Status Employees – which will enable the Employee to earn 66.67% or more of his or her Inflation-Indexed, Pre-Disability Earnings;
>
> Non-Status Employees – which will enable the Employee to earn 65% or more of his or her Inflation-Indexed, Pre-Disability Earnings.

[163] In particular, SIGA has challenged the trial judge's interpretation of the phrase "prevented from performing" any gainful occupation. That is the issue of standard form contract interpretation. This language must be interpreted in accordance with the principles of interpretation described in *Mosten*, as follows:

> [138] … Where, reading the contract as a whole, the language of the contract is unambiguous, then the court should give effect to its clear language. See: [*Sabean v Portage La Prairie Mutual Insurance Co.*, 2017 SCC 7, [2017] 1 SCR 121] at para 12; *Ledcor* at para 49; [*Progressive Homes Ltd. v Lombard General Insurance Co. of Canada*, 2010 SCC 33, [2010] 2 SCR 245] at para 22; [*Co-operators Life Insurance Co. v Gibbens*, 2009 SCC 59, [2009] 3 SCR 605] at paras 20–28; *Non-Marine Underwriters, Lloyd's of London v Scalera*, 2000 SCC 24 at para 71, [2000] 1 SCR 551 [*Scalera*]; *Brissette Estate v Westbury Life Insurance Co.*, [1992] 3 SCR 87 at 92; and *Parsons v The Standard Fire Insurance Co.* (1880), 5 SCR 233. In *Sabean* and *Ledcor*, both of which were concerned with commercial fortuity insurance contracts, the Supreme Court identified a three-stage analytical framework, drawn from *Progressive Homes*, with the primary interpretive principle being employed at stage one:
>
> > (a) Stage One – Where the language of the contract is unambiguous, the court should give effect to that clear language, reading the contract as a whole (*Progressive Homes* at para 22; and *Scalera* at para 71).
> >
> > (b) Stage Two – Where the language of the contract is ambiguous, the court should employ the general rules of contract construction to resolve the ambiguity (*Progressive Homes* at para 23; *Scalera* at para 71; *Gibbens* at paras 26–27; and [*Consolidated-Bathurst Export Ltd. v Mutual Boiler and Machinery Insurance Co.* (1979), [1980] 1 SCR 888] at 900–902).
> >
> > (c) Stage Three – Where the language of the contract remains ambiguous after Stage Two, the court should apply the *contra proferentem* rule and construe the

> contract against its drafter (*Progressive Homes* at para 24; *Scalera* at para 70; *Gibbens* at para 25; and *Consolidated-Bathurst* at 899–901).

[164] In *Progressive Homes Ltd. v Lombard General Insurance Co. of Canada*, 2010 SCC 33, [2010] 2 SCR 245, Rothstein J. emphasized the following principles in relation to the second stage of this process:

> [23] Where the language of the insurance policy is ambiguous, the courts rely on general rules of contract construction (*Consolidated-Bathurst*, at pp. 900-902). For example, courts should prefer interpretations that are consistent with the reasonable expectations of the parties (*Gibbens*, at para. 26; *Scalera*, at para. 71; *Consolidated-Bathurst*, at p. 901), so long as such an interpretation can be supported by the text of the policy. Courts should avoid interpretations that would give rise to an unrealistic result or that would not have been in the contemplation of the parties at the time the policy was concluded (*Scalera*, at para. 71; *Consolidated-Bathurst*, at p. 901). Courts should also strive to ensure that similar insurance policies are construed consistently (*Gibbens*, at para. 27). <u>These rules of construction are applied to resolve ambiguity. They do not operate to create ambiguity where there is none in the first place.</u>
>
> (Emphasis added)

[165] Accordingly, the first question that arises is whether the language at issue is ambiguous, when read in the context of the contract as a whole, without considering the general principles of contract interpretation. This reflects the cardinal principle of contract interpretation, which was summarized in *Mosten* in this way:

> [72] In every case, contract interpretation begins with the words of the contract, whether reduced to writing or not. To give meaningful effect to *consensus ad idem*, the interpretive process must remain firmly grounded in the language chosen by the parties to govern their relationship. Contextual factors are used to assist with achieving an accurate interpretation of the contract. Contextual assistance is gleaned from the contract itself and from the circumstances surrounding its formation, i.e., the factual matrix ….
>
> [73] The first principle of contract interpretation is that the parties to a contract are presumed to have intended what the text of the contract actually says […]. This is the cardinal presumption of contract interpretation and it places the written agreement of the parties at the core of the interpretive process.

[166] Here, an insured such as Mr. Pasap is totally disabled during the OwnOcc Period if they are "prevented from performing the substantial duties of [their] own occupation". During the AnyOcc Period, on the other hand, an insured is totally disabled if they are "prevented from performing any gainful occupation … for which [they are] or may become reasonably qualified by training, education, or experience". There is no reference to the ability to perform "the substantial duties" of a gainful occupation.

[167] The trial judge did not identify the three-stage analytical framework and, accordingly, did not address the threshold ambiguity question. Rather, she reproduced a list from *Bacon v Saskatchewan* (1990), 88 Sask R 182 (QB) [*Bacon*], of what the judge in *Bacon* characterized as basic principles relating to the interpretation of disability policies. Although some of the items on that list do relate to the *interpretation* of disability policies, others relate to matters such as the onus of proof and the award of punitive damages. I would also emphasize that some of the items are overly broad, such as the following (*Bacon* at para 42(5); see also *Trial Decision* at para 60):

> The wording of disability policies and plans must be interpreted not literally but reasonably. The benefit of interpretation is most often given to the insured. …
>
> (Emphasis added)

[168] As I have explained above, the *contra proferentum* rule applies only at the third stage of the analytical process. Similarly, it is an overstatement to say that disability policies "protect an insured against potential income loss if the insured is incapable of performing reasonable employment" (*Bacon* at para 42(9); see also *Trial Decision* at para 60). Disability policies protect an insured only to the extent provided by the particular policy at issue.

[169] Further, despite having quoted this list, the trial judge did not discuss how she applied it to the interpretation of the definition of total disability. Indeed, she did not directly address the meaning of "totally disabled" or "total disability" in the Disability Plan at all. Rather, after quoting *Bacon*, the trial judge outlined the circumstances of the Medical Event, briefly reviewed evidence as to Mr. Pasap's initial treatment and his cognitive condition during the OwnOcc Period and simply concluded that "he was not capable of performing 'the substantial duties of his … own occupation'" up to April 12, 2015 (*Trial Decision* at para 76).

[170] The trial judge then turned to the AnyOcc Period. She listed the jobs Mr. Pasap had held and his earnings from those jobs from 2016 to 2020. She reviewed some of the evidence that was relevant to his capacity during this period. A good deal of this analysis was concerned with the conflicting evidence as to Mr. Pasap's cognitive condition in the two driving assessments, and in the reports and testimony of Dr. Payam Dehghani, the treating cardiologist, of Dr. Katherine Owens, the neuropsychologist who had assessed Mr. Pasap in November of 2018 (approximately three years before trial), and of Dr. Perry Sirota, the clinical and forensic psychologist that

reviewed Dr. Owens' report. Notably, her analysis of the impact of the other ailments that contributed to his cognitive disorder was limited to this statement:

> [116] In sum, Dr. Owens diagnosed Mr. Pasap with a major neurocognitive disorder due to another medical condition (Exhibit PD-1, p 386). She described the other factors contributing to Mr. Pasap's symptoms as, "oxygen deprivation, sleep apnea, fatigue, diabetes mellitus, medications, and hypertension. …" (Exhibit PD-1, p 389).
>
> [117] At trial, Dr. Owens testified that the 2012 Medical event was not the single biggest factor in Mr. Pasap's condition. However, without the Medical Event, Mr. Pasap would not be in the condition he was in when she assessed him.

[171] In the result, the trial judge concluded that Mr. Pasap had a major neurocognitive disorder to the following limited extent:

> [138] Dr. Owens agreed that Mr. Pasap could improve his cognitive abilities slightly if he stopped his methadone use and treated his diabetes and sleep apnea more effectively. However, she said he would not recover enough to return to a management job because it is too cognitively demanding. I accept Dr. Owens' conclusion that Mr. Pasap has a major neurocognitive disorder.

[172] Having made this finding, the trial judge very briefly reviewed evidence relating to Mr. Pasap's "Current Circumstances" (at para 139 *et seq*). She noted testimony from friends and family of Mr. Pasap that after the Medical Event, he was falling easily, could not lift heavy objects and was forgetful. She observed that Mr. Pasap had testified that "[h]e does not do hard labour, but he believes he can still operate a semi-truck safely" (at para 151). She then reached the following conclusions, which I will repeat for ease of reference:

> [152] Mr. Pasap has been employed on and off since 2015. I agree with the friends and family of Mr. Pasap who testified that Mr. Pasap overestimates his abilities and underplays his limitations. Mr. Pasap has a major cognitive disorder which limits his ability to find employment as a manager. On the other hand, Dr. Dehghani testified that Mr. Pasap's future employment should not involve lifting or significant muscular activity. Mr. Pasap found the driving jobs to be difficult because lifting was involved. I note these jobs never last very long. In sum, Mr. Pasap is severely limited to what he can do to earn an income, for which he "is or may become reasonably qualified by training, education, or experience": Exhibit PD-1, tab 3, p 156.
>
> [153] SIGA argues that Mr. Pasap did not work a full year at any job because of the limited availability of employment, not because of his inability to work. I disagree. The stop/start nature of Mr. Pasap's work history is because of his capacity to work. As indicated in the evidence, Mr. Pasap has sought work, had difficulty and quit, or the job ended so he did not have to leave it.
>
> [154] I am satisfied that, to the date of trial, Mr. Pasap was prevented from any gainful occupation, for which he was reasonably qualified, because of his disability. Moreover, the evidence does not show that further training or education would have enabled him to find

> employment other than what he did find. Finally, Mr. Pasap was unable to earn 66.67% of his pre-disability earnings, indexed or not.
>
> (Emphasis added)

[173] Although this reasoning does not expressly state how the trial judge interpreted the language of the Disability Plan, it does make certain things clear. It is apparent that she concluded that "*prevented* from performing any gainful occupation" (emphasis added) was concerned with a loss of the cognitive and physical *capacity* of the insured to perform any gainful occupation and not the availability of work in such an occupation. It is also clear that she found that having "difficulty" with a job – as opposed to being completely unable to do it – could demonstrate that an insured was prevented from performing that occupation. The question is whether this interpretation of the Disability Plan, which disposes of the issue of standard form contract interpretation, was correct.

[174] To make that decision, I must apply the three-part analytical framework described above. The first question is whether the phrase "prevented from performing" any gainful occupation, read in the context of the Disability Plan as a whole, is ambiguous. As the Alberta Court of Appeal observed in *IFP Technologies (Canada) Inc. v EnCana Midstream and Marketing*, 2017 ABCA 157, [2017] 12 WWR 261, "difficulty in interpreting a contract is not the same as ambiguity …. A contract is ambiguous when the words are 'reasonably susceptible of more than one meaning'" (at para 87). Similarly, in *Sabean v Portage La Prairie Mutual Insurance Co.*, 2017 SCC 7, [2007] 1 SCR 121, Karakatsanis J. concluded that there was no ambiguity as there were "no 'two reasonable but differing interpretations of the policy'" (at para 42, quoting Barbara Billingsley, *General Principles of Canadian Insurance Law*, 2d ed (Markham, Ont: LexisNexis, 2014) at 147, and citing *Chilton v Co-operators General Insurance Co.* (1997), 32 OR (3d) 161 (CA) at 169). As she also observed, "[t]he mere articulation of a differing interpretation does not always establish the reasonableness of that interpretation and does not necessarily create ambiguity" (*Sabean* at para 42).

[175] It is my view, based on these principles, that the phrase "prevented from performing any gainful occupation", while it may sometimes involve close calls in its application to particular facts, is not ambiguous as it relates to the issue in this case. A person is able to carry on an occupation if they have the physical and mental capacity to do the job and are or could reasonably

become qualified to do so by training, education or experience. They are prevented from carrying on that occupation if they do not have that capacity or are not and cannot become qualified. An insured need not demonstrate that they are totally incapable, at all times, from carrying out every task that may be asked of a person in that occupation. Rather, they need only prove that they are unable to adequately perform tasks that are *required* of those carrying on that occupation.

[176] Further, the word "prevented" demonstrates that it is not enough for an insured to prove that they merely have "difficulty" in carrying out necessary tasks, whether as a result of the limits of their physical or cognitive capacity, the pain that it would cause them to do the job, or a consequential risk to their life or health. Most occupations have difficult or uncomfortable elements, and many involve risks to the employee's health or well-being. Self-evidently, some people have more difficulty than others in performing certain tasks, whether as a result of differing sensitivities to heat or cold, different physical or mental capacities, or otherwise – including as the result of changes in physical ability due to aging or health issues. That does not, however, necessarily mean that they lack the capacity to carry on an occupation that sometimes calls for them to perform that task.

[177] Whether difficulties of this kind that have been caused by an insured event are sufficient to *prevent* an insured from carrying on an occupation within the meaning of the Disability Plan depends on the circumstances, including but not limited to the nature of the occupation, what falls within the range of adequate performance, and the nature and extent of the pain, risk to health, or other difficulty they face. Further, if the insured's problems result from conditions or demands that are not a necessary aspect of the occupation – for example, if they result from a lack of air conditioning in circumstances where air conditioning would often be a feature of the equipment or building where the work is carried out, or from an exceptionally demanding employer or project – the issue would properly be seen as relating to the availability of work, rather than the insured's capacity to perform that occupation.

[178] In my view, an insured would be *prevented* from performing an occupation in the AnyOcc Period only if adequately doing so would negatively impact their physical or mental health, or present a risk of doing so, that a reasonable person would not be expected to accept, or would result in pain or suffering that a reasonable person would not be expected to bear. Whether they

met that standard would depend on the circumstances. Further, they would be *totally* disabled within the meaning of the Disability Plan only if they were prevented from performing *all* relevant occupations in this sense. It would not be sufficient for an insured to prove that they are "severely limited" as to the number of occupations that they could perform. If they are not prevented from carrying on *any* relevant occupation, they are not totally disabled. I note that in this case, it is not necessary to address the issue of what occupations fall within this category.

[179] For these reasons, while the trial judge was correct in concluding that total disability is concerned with capacity, it is my respectful opinion that she erred in law by failing to determine what that meant. When are the challenges or risks faced by an insured in performing a gainful occupation as a result of an insured event sufficient to prevent them from doing so within the meaning of the Disability Plan? Is the insured prevented from performing all relevant occupations? The trial judge did not identify or address these questions. She reasoned as if the fact that an insured faces challenges or has difficulties in carrying on an occupation is sufficient to *prevent* them from doing so, and as if an insured need only prove they are prevented from carrying on most relevant occupations. These were material errors that resulted from her incorrect interpretation of the meaning of Totally Disabled during the AnyOcc Period.

[180] This conclusion accords with the reasoning in *Paul Revere Life Insurance Co. v Sucharov*, [1983] 2 SCR 541 [*Sucharov*]. *Sucharov* does not say that "totally disabled" means "has difficulty" in performing some aspect of an occupation.

[181] In *Sucharov*, the undisputed medical evidence clearly demonstrated that Mr. Sucharov's attempts to carry on his occupation as an owner-manager "brought on attacks of stress and nervousness bordering on hysteria" (at 546). There was also evidence that he was able to undertake some of the duties of that position, including renewing policies, selling new policies and handling certain administrative duties. The question was whether, as the insurer alleged, this meant he did not meet the strictly worded definition of totally disabled in the insurance policy in relation to his own occupation, which was as follows (at 542):

> Total disability means …
>
> > that, as a result of such injury or sickness, the Insured is completely unable to engage in his regular occupation; …

[182] Chief Justice Laskin rejected the insurer's argument, finding as follows (at 546):

> To put the matter another way, an owner-manager is totally disabled from performing his work as such when he is unable to perform substantially all of the duties of that position.
>
> In *Couch on Insurance* (1983), 2d (Rev. ed.) § 53:118, there is the following relevant paragraph:
>
> > The test of total disability is satisfied when the circumstances are such that a reasonable man would recognize that he should not engage in certain activity even though he literally is not physically unable to do so. In other words, total disability does not mean absolute physical inability to transact any kind of business pertaining to one's occupation, but rather that there is a total disability if the insured's injuries are such that common care and prudence require him to desist from his business or occupation in order to effectuate a cure; hence, if the condition of the insured is such that in order to effect a cure or prolongation of life, common care and prudence will require that he cease work, he is totally disabled within the meaning of health or accident insurance policies.

[183] These paragraphs make two points. The first is that being "unable" to perform "substantially all of the duties" of the position was sufficient to constitute being "completely unable to engage in his regular occupation" (at 546 and 542, respectively). The fact that the insured could carry out some tasks associated with the position did not mean he was not disabled. The second is that "completely unable" did not mean "absolute physical inability to transact any kind of business pertaining to one's occupation, but rather that there is a total disability if the insured's injuries are such that common care and prudence require him to desist from his business or occupation … in order to effect a cure or prolongation of life" (at 542 and 546, respectively). The phrase "completely disabled" was interpreted to mean as to "substantially" all of the duties of the position, and to include being *required* to stop to effect a cure or prolong life.

[184] I do not suggest that *Sucharov* means that in order to prove that an insured is totally disabled from carrying on an occupation, they must demonstrate that they are required to stop working to effect a cure or prolong their life. Nor do I suggest that Mr. Pasap had to meet that standard. The issue here, as always, is the proper interpretation of the insurance policy. It is my opinion that the correct interpretation of the phrase "is prevented from performing any gainful occupation" – being the language of the Disability Plan that is at issue – has the meaning I have described above. *Sucharov* reflects the same approach – that is, the Court interpreted the language of the policy at issue.

[185] For these reasons, I find that the trial judge committed a material error in deciding the issue of interpretation that arose in this case as to the meaning of "Total Disability and Totally Disabled" in the Disability Plan.

2. The trial judge erred in law by disregarding or mischaracterizing relevant evidence and by making an unfounded inference of fact

[186] It is possible that the trial judge's error in interpreting the Disability Plan explains, at least in part, why she failed to consider evidence that was relevant to the question of whether the difficulties that Mr. Pasap would face in relation to some occupations were such as to *prevent* him from performing them. Regardless, I agree with SIGA that the trial judge also erred in this fashion, thereby committing an error of law of the kind described by Cameron J.A. in *P.S.S. Professional Salon Services Inc. v Saskatchewan (Human Rights Commission)*, 2007 SKCA 149, [2008] 5 WWR 440:

> [68] …[A] tribunal cannot reasonably make a valid finding of fact on the basis of *no evidence* or *irrelevant evidence*. Nor can it reasonably make a valid finding of fact in *disregard* of relevant evidence or upon a *mischaracterization* of relevant evidence. To do so is to err in principle or, in other words, to commit an error of law. […] Nor can a tribunal reasonably make a valid finding of fact based on an unfounded or irrational inference of fact.
>
> (Emphasis in original; footnotes omitted)

[187] The fact that the trial judge erred in this way is demonstrated by several key findings of fact that were the foundation for her conclusion that Mr. Pasap was "prevented from [performing] any gainful occupation for which he was reasonably qualified, because of his disability" (at para 154). Those findings were as follows.

[188] First, the trial judge found as follows:

> [152] … Dr. Dehghani testified that Mr. Pasap's future employment should not involve lifting or significant muscular activity. Mr. Pasap found the driving jobs to be difficult because lifting was involved. …

[189] Dr. Dehghani did not testify that Mr. Pasap's employment "should not involve" lifting or significant muscular activity. Rather, he testified only as follows:

> I -- you know, I think a guy who is -- I think he would have been in his 40s now, right, early 40s, coming to you saying I can't do much, I can't walk, I -- I could not imagine him getting back to any activity where he's doing, you know, lifting or any kind of significant thing requiring, you know -- muscular activity. I just could not see any real realistic [*sic*] that he'd be able to return to that kind of work is -- is what I'm trying to say.

[190] More importantly, the evidence does not support the conclusion that "Mr. Pasap found the driving jobs to be difficult because lifting was involved" (*Trial Decision* at para 152). That is an important overstatement. Mr. Pasap had several "driving jobs" during the AnyOcc Period. There was no evidence that he found the following jobs to be difficult because lifting was involved:

(a) Mr. Pasap testified that he worked for First Choice Trucking Ltd. in 2016 driving a "very old truck, [a] really old" tandem gravel truck. It was his evidence that this was a seasonal position that lasted from July 18, 2016, and ended on October 22, 2016. He said he was in the truck all day and that it was very hot as there was no air conditioning, and complained of pain in his back and legs, sweating and issues with his blood sugar as a result of his diabetes. Mr. Pasap was laid off when the job ended in the fall. He gave no evidence that there was lifting involved or that he found the job difficult for that reason.

(b) In 2017, Mr. Pasap worked for Three Star Trucking Limited driving an oil tank truck. He was required to climb up and down on the truck to check hatches and said that was not easy for him. He said he also had to carry hoses to transfer oil. He left the job after approximately 6 months, as he fell off the truck while attempting to sweep off snow following a snowstorm and injured himself.

(c) Mr. Pasap gave evidence that he had worked on a casual basis for a friend that owned Carlyle Contracting Services Limited, including in 2017, driving semi-trucks to haul gravel or to move waste from oil field spills. There was no evidence that these jobs involved lifting or, for that matter, caused him physical discomfort of any kind.

(d) Mr. Pasap drove a tank truck hauling crude oil for Marwood Trucking Ltd. from December of 2019 to May of 2020. He said that he quit because he was concerned about COVID, as he and other employees believed the company was not doing enough to deal with this health risk, such as by providing hand sanitizer and masks. There was no evidence that the job involved lifting or that Mr. Pasap had any physical difficulties at all as a result of this employment.

[191] It is clear from the *Trial Decision* as a whole that the trial judge did not reject Mr. Pasap's evidence as to the nature and extent of his "difficulties" in these four driving jobs. To the contrary, evidence of this kind was a pillar of Mr. Pasap's claim that he was disabled. There is, accordingly, no reasonable conclusion other than that she ignored this evidence, mischaracterized it, or both, thereby committing an error of law. It is notable that while the trial judge listed the jobs held by Mr. Pasap and what he earned, she did not review the evidence as to the nature, source and extent of the difficulties that he claimed to have faced on a job by job basis or, for that matter, the reasons that the jobs ended.

[192] Second, the trial judge also made the following findings of fact that were central to her conclusion that Mr. Pasap was disabled:

> [153] SIGA argues that Mr. Pasap did not work a full year at any job because of the limited availability of employment, not because of his inability to work. I disagree. The stop/start nature of Mr. Pasap's work history is because of his capacity to work. As indicated in the evidence, Mr. Pasap has sought work, had difficulty and quit, or the job ended so he did not have to leave it.

[193] Respectfully, this statement also demonstrates that the trial judge disregarded or mischaracterized relevant evidence. I note the following issues on this account:

(a) As I have explained above, Mr. Pasap was laid off by First Choice Trucking Ltd. in October of 2016. He testified as follows:

> It was a -- a seasonal position. Brian told me that he wouldn't be able to keep me on, like, permanently because it was just a, like, a temporary job that he was lucky enough to get the contract --

Further, Mr. Pasap did not claim that he would have left this job because it was too difficult for him if it had not ended.

(b) Mr. Pasap left Marwood Trucking Ltd. because he was concerned that he might contract COVID. The trial judge did not refer to this clear and uncontradicted evidence at all. Additionally, and as I have noted above, there was no evidence that Mr. Pasap was incapable of doing his job with Marwood, or that it resulted in pain, risks to his physical health, or other difficulties that caused or would have caused him to quit. Nor was there any evidence that this was a temporary or seasonal job.

(c) Mr. Pasap was employed by Seed Hawk Inc. for three months in 2016. This was not a driving job. He testified that he was able to do the work he was assigned, including using an impact gun and wrenches. There was no evidence that he had any difficulties with his health as result of that job. He was terminated because he was driving a "beater" that had no snow tires and was late for work "a couple times" due to car trouble.

(d) Mr. Pasap was employed by Banister Pipeline Constructors Corp. for three months in 2018 on a pipeline project. He testified that there was a part of the job at the end of each day that was hard and that impacted his health, but that he hid that fact because he needed the work and was able to hang back and let others do that part of the work. He described having suffered because of the cold and his poor circulation. He also testified that this was temporary, seasonal work that ended when the project shut down in the spring.

Mr. Pasap was once again hired by Banister in 2019, to maintain a track hoe and to ensure that rocks were not in or near the pipeline when they were backfilling. He noted that climbing in and out of the trench was hard and "not easy" and clearing the tracks on the track hoe was hard. Mr. Pasap testified that this, too, was a seasonal job.

Finally, Mr. Pasap was once again hired by Banister to do the same work in the summer of 2020, which he found to be much easier because it was warm outside. He testified that the work ended because the project was done and that it was just cleanup.

[194] This evidence undeniably demonstrates that the stop-start nature of Mr. Pasap's work resulted, in significant part, from his decision to take temporary and seasonal positions, rather than from any incapacity. While he quit some of his many jobs because of the physical difficulties that resulted from his various health problems – including circulatory issues resulting from his poorly managed diabetes rather than from the Medical Event – he was more often laid off because the job ended. On one occasion, he was fired for repeatedly being late because his personal vehicle was unreliable.

[195] The trial judge's findings of fact in paragraph 153 of the *Trial Decision* ignore this evidence. That was an error of law. Further, the conclusion that Mr. Pasap would have been forced to leave the jobs that did not end was an unfounded inference that relied on the erroneous findings that preceded it. It was inconsistent with Mr. Pasap's evidence. Importantly, Mr. Pasap himself did not claim that any lack of capacity had impacted his ability to do some of these jobs at all – including the jobs at Seed Hawk Inc. and at Marwood Trucking Ltd. that may or may not have been permanent. Nor was there any evidence that he had "difficulty" doing those two jobs to the extent that it might constitute incapacity, or at all.

3. The trial judge made palpable and overriding errors of fact in finding that Mr. Pasap was totally disabled during the AnyOcc Period

[196] With respect, I have also concluded that the trial judge, having erred in law in these ways, also made palpable and overriding errors of fact associated with the evidence that was ignored or mischaracterized. In effect, this is the other side of the error-of-law coin. The evidence does not support the trial judge's broad generalization as to the reasons for Mr. Pasap's start-stop work history. Nor does it support the overstatement that he found his driving jobs difficult because they required lifting that was beyond his capacity and thus would have left the jobs that did not end before he was forced to do so.

[197] Indeed, Mr. Pasap himself did not claim he was prevented from carrying on any occupation for which he was or might become qualified. That is very clear in relation to the occupation of a truck driver, which the evidence demonstrates would have enabled him to earn 66.67% or more of his inflation-indexed, pre-disability earnings. As the trial judge noted, Mr. Pasap testified that he could drive a semi-truck safely. He had long held a Class 1A licence, was trained to drive commercial vehicles and had frequently done so. His work record was consistent with his self-assessment, as were the results of his 2019 Comprehensive Functional Driving Assessment. A senior occupational therapist and certified driver rehabilitation specialist carried out both the in-clinic pre-drive assessment and the on-road assessment. Their report of the in-clinic assessment identified certain issues, but ended with the following:

> **PLAN**
> • Reviewed findings with client. Indicated that testing identified mild concerns with respect to medical fitness for driving.
>
> • Proceed with on-road evaluation as scheduled on June 19, 2019.

[198] The June 19, 2019, on-road assessment was conducted by the same assessor, who reached the following conclusion in their report:

> **Recommendations to SGI**
> • Demonstrated medical fitness to drive.
> • No further retraining or restrictions are suggested.
> • Regular medical review is suggested, due to potential deterioration in medical conditions.

[199] We are, accordingly, left with the curious result that Mr. Pasap believes he can drive a semi-truck, is licensed to do so, has been recently assessed as being able to do so, but has nonetheless been found by the trial judge to be unable to do so. Once again, the trial judge did not grapple with this key issue.

[200] Before concluding, I will again emphasize the questions that arise under this ground of appeal. The first is whether the trial judge erred based on the applicable standard of review. I have found that she did, in a variety of ways. The second is whether the errors of law and the palpable errors of fact I have identified call for intervention by this Court. The answer to this second question does not turn on whether there was sufficient evidence to have enabled the trial judge to have reached the conclusion that she did as a result of material errors. That is a result-driven approach that is not consistent with the appellate function in this context. An appellate court will intervene if there has been a material error of law or a palpable error of fact that is overriding. Whether an error of law is material, or a palpable error of fact is overriding, turns on how that error impacted the trial judge's decision.

[201] Here, the errors of law committed by the trial judge in concluding that Mr. Pasap was totally disabled throughout the AnyOcc Period were material errors. With respect, she ignored or mischaracterized key evidence relating to findings of fact that were foundational to her conclusion. That error may be traceable, at least in part, to her erroneous interpretation of the Disability Plan, but it is an error regardless of whether that is so. The appeal on this ground must be allowed for that reason alone.

[202] Further, the trial judge made palpable and overriding errors of fact as to Mr. Pasap's employment history, and the reasons he left some jobs. This, in turn, led her to draw the unfounded inference that he would have been forced to quit any job he had or might get by his incapacity. As

I have noted, these erroneous findings of fact were foundational to her conclusion that Mr. Pasap was totally disabled. As such, they were overriding.

4. Conclusion regarding the AnyOcc Period

[203] For the foregoing reasons, I would grant SIGA's appeal of the trial judge's conclusion that Mr. Pasap was totally disabled during the AnyOcc Period.

B. The trial judge erred in finding that Mr. Pasap's damages for lost long term disability benefits should be indexed for inflation

[204] SIGA submits that the trial judge erred in awarding Mr. Pasap damages calculated on the basis that the Disability Plan provided for long term disability benefits to be indexed for inflation. In SIGA's view, the trial judge failed to comply with her duty to provide reasons in relation to this issue. It also asserts that she erred in her interpretation of the Disability Plan, as the language of the relevant provisions does not provide for indexing. Both of these constitute allegations that the trial judge erred in law and are accordingly reviewable on the correctness standard of review.

1. The trial judge erred by failing to provide sufficient reasons for the award of damages

[205] The duty of a trial judge to provide adequate reasons was summarized by Rothstein J. in *F.H. v McDougall*, 2008 SCC 53, [2008] 3 SCR 41, as follows:

> [98] The meaning of adequacy of reasons is explained in *R. v. Sheppard*, [2002] 1 S.C.R. 869, 2002 SCC 26. In *R. v. Walker*, [2008] 2 S.C.R. 245, 2008 SCC 34, Binnie J. summarized the duty to give adequate reasons:
>
> (1) To justify and explain the result;
>
> (2) To tell the losing party why he or she lost;
>
> (3) To provide for informed consideration of the grounds of appeal; and
>
> (4) To satisfy the public that justice has been done.

[206] As Binnie J. confirmed in *R v Walker*, 2008 SCC 34, [2008] 2 SCR 245, quoting *R v Sheppard*, 2002 SCC 26, [2002] 1 SCR 869, the sufficiency of reasons is analyzed on a functional basis. As he put the matter:

> [20] … Reasons are sufficient if they are responsive to the case's live issues and the parties' key arguments. Their sufficiency should be measured not in the abstract, but as they respond to the substance of what was in issue. The "trial judge's duty is satisfied by reasons which are sufficient to serve the purpose for which the duty is imposed, i.e., a

> decision which, having regard to the particular circumstances of the case, is reasonably intelligible to the parties and provides the basis for meaningful appellate review of the correctness of the trial judge's decision" (para. 55(8)). …

[207] Additionally, as McLachlin C.J.C. observed in *R v R.E.M.*, 2008 SCC 51, [2008] 2 SCR 3, "reasons help ensure fair and accurate decision making; the task of articulating the reasons directs the judge's attention to the salient issues and lessens the possibility of overlooking or under-emphasizing important points of fact or law" (at para 12).

[208] Does the *Trial Decision* measure up to this standard? The question of indexing was very much a live issue that called for a response. It had been raised by SIGA at trial and was dealt with at some length in the "Reply to the (Addendum) Trial Brief" filed by Mr. Pasap. Further, the answer to the indexing question was highly significant, as it would radically impact the award of damages. The trial judge nonetheless provided no reasons for her decision to adopt the entirety of Mr. Pasap's damages calculation, which had been prepared on an inflation-indexed basis. Indeed, she did not *refer* to the issue of indexing at all.

[209] My colleague suggests that the trial judge's failure to provide reasons mean that we should conclude that she adopted Mr. Pasap's argument. I cannot agree. While it is appropriate to review the record in an attempt to determine whether a finding is intelligible, that does not mean that the factual findings and legal analysis that underpin a party's argument on the matter at issue can be taken to have been adopted. The trial judge may have overlooked the issue of indexing entirely. I am inclined to conclude that is what occurred here, given that she not only failed to provide reasons to explain why she adopted Mr. Pasap's calculation without amendment but also failed to identify other issues that had been raised by SIGA as to indexing and otherwise. That included the question as to whether there was evidence of loss that could have justified the award of $10,084.00 in damages for the loss of benefits during the eight-month notice period.

[210] Further, even if the trial judge did not entirely overlook the indexing issue, she may well have failed to advert to the issues that had to be addressed to decide it. Some of those issues arose from the characterization of the facts and law in Mr. Pasap's reply brief. I note, for example, the assertion in that brief that any "vagueness in the wording of an insurance policy is to be resolved in favour of the insured in order to satisfy his or her reasonable expectation". That is an incorrect statement of the law in relation to a key aspect of Mr. Pasap's argument on this point. If, as my

colleague suggests, the trial judge adopted this approach, she would have proceeded on the basis that it was sufficient to conclude that the Disability Plan was merely "vague" at first impression and, as a result, applied the *contra proferentum* rule. That would constitute error, as that rule is properly applied only if the language at issue is truly ambiguous, despite the application of the general rules of contract construction.

[211] In the result, it is my opinion that the trial judge erred by failing to provide sufficient reasons for the award of damages, including as to the issue of indexing for inflation.

2. The trial judge erred by interpreting the Disability Plan as providing for long-term disability benefits to be indexed

[212] In any event, even if we were to assume that the trial judge did grapple with this issue and decided that the Disability Plan provided for inflation-indexed benefits, I must respectfully disagree with her interpretation. Once again, the first question that must be answered is whether the relevant provisions of the Disability Plan language are ambiguous. Those provisions are as follows.

[213] The Booklet provides the following definitions of terms used in the Disability Plan:

> **Benefit Amounts**
>
> Benefit amounts are based on Earnings or they are:
>
> - limited by a Maximum Amount
> - reduced by a Deductible Amount
> - multiplied by a Reimbursement Percentage
>
> The resulting amount is payable by Great-West Life, subject to all the provisions of the policy.
>
> …
>
> **Definitions**
>
> …
>
> **Earnings** – Regular income from your Employer, excluding commission, bonus, shift differential, or payment for overtime. If you are not a salaried employee, Earnings will be based on the average weekly income received from your Employer during the 12-week period immediately prior to the date of your death or disability.

[214] The Booklet, in turn, deals with the "Benefit Amount" in the section titled "LONG TERM DISABILITY INCOME". That definition confirms that the benefit is calculated on the basis of Earnings, being the average of the 12-weeks *before* the insured became disabled. There is no reference to indexing or inflation in the definition, which is as follows:

> **Benefit Amount**
>
> This benefit is subject to a Maximum Amount of $7,500.

If you are a Status Employee, your non-taxable benefit is 66 2/3% of your net monthly Earnings.

If you are a Non-Status Employee. your taxable benefit is 65% of the first $2,500 of your monthly Earnings plus 50% of the next $2,500. Plus 35% of any monthly Earnings in excess of $5,000.

…

[215] The Disability Terms provide that the Benefit Summary determines the amount payable, as follows:

GENERAL

If an Employee becomes Totally Disabled while insured for this benefit, Great-West Life will pay the benefits for which that Employee is eligible in accordance with the **BENEFIT SUMMARY** and all the provisions of this policy.

…

Amount of Total Disability Benefit

The **TOTAL DISABILITY BENEFIT** amount will be the **Monthly Integrated Benefit** shown in the **BENEFIT SUMMARY.**

Monthly Integrated Benefit

The **Monthly Integrated Benefit** will be the **Amount of Insurance** shown in the **BENEFIT SUMMARY** reduced by:

1. an amount equal to the sum of any disability or retirement benefits for which the Employee is eligible under.

a. i) the Canada Pension Plan or Quebec Pension Plan shown in **Government Pension Plan Income Integration** in the **BENEFIT SUMMARY,** and

ii) any workers' compensation legislation in Canada, and

b. any government disability or retirement benefit plans in any other jurisdiction; and an amount equal to the amount by which the Employee's **Income from All Sources** exceeds the **All Source Maximum** shown in the **BENEFIT SUMMARY**.

In no event, however, will the **Monthly Integrated Benefit** be less than the **Minimum Monthly Benefit** shown in the **BENEFIT SUMMARY**.

…

[216] Mr. Pasap is a Status Employee. The Benefit Summary in relation to the long term disability benefit payable to such an employee is as follows:

BENEFIT SUMMARY - STATUS EMPLOYEES

EMPLOYEE LONG TERM DISABILITY INCOME BENEFIT

GENERAL

Benefit Description	**Benefit Option**
Total Disability Benefit	Included

Amount of Insurance	**Maximum Amount**	**All Source Maximum**	**Tax Status**
66.67% of the Employee's monthly Earnings	$7,500	85% of Employee Inflation Indexed, Pre-Disability Earnings*	Non-Taxable

* except 100% if disability benefits from a professional association plan are included in the Employee's Income from All Sources.

[217] The Disability Terms define "Inflation-Indexed, Pre-Disability Net Earnings" as "Net (After-Tax) Earnings at commencement of Disability multiplied by the CPI Factor". The CPI factor is calculated on the basis of the Consumer Price Index.

[218] The question, accordingly, is whether these provisions, read in the context of the contract as a whole, are ambiguous in relation to the issue of standard form contract interpretation with which we are concerned – that is, are the total disability benefits payable to Mr. Pasap to be indexed for inflation. In my opinion, there is no ambiguity. My reasons for that conclusion are as follows.

[219] The Disability Plan expressly states that benefits are *based on* "Earnings" – a term that is defined in plain and readily understandable language. To paraphrase, it is the average of what is, essentially, the insured's regular pay during a specific period of time, in the past – the 12-week period before the date of disability. An insured that is totally disabled is entitled to be paid a "Monthly Integrated Benefit" that is, as the Booklet provides, based on their Earnings. The Monthly Integrated Benefit is the "Amount of Insurance" specified in the "Benefit Summary" – that is, 66.67% of the employee's monthly *Earnings* in the case of a status employee like Mr. Pasap – less certain pension, disability and compensation benefits, and also less the amount by which the

insured's "Income from All Sources" exceeds the "All Source Maximum", which is 85% of "Employee Inflation Indexed, Pre-Disability Earnings".

[220] Although the word "monthly" is not defined in the Disability Plan, there is nothing to suggest that it is used to mean anything other than in its usual sense as an adjective – that is, as something that occurs once a month. It appears, for example, in the following provisions:

> **Limitations**
>
> …
>
> However, if the Employee is under active treatment and is participating in a medically supervised Rehabilitation Programme, Great-West Life will *pay* the Disability benefit for up to 12 months and, with the prior written consent of Great-West Life, the cost to the Employee of the programme. If, after 12 monthly payments have been made , the Disability is due to a related organic **disease**, benefits will be continued.
>
> …
>
> • The Consumer Price Index is published monthly for a period several months in the past. For calculations based on the Consumer Price Index, the index used will be that published for the month four months prior to the date used for calculation. For example, for any date in January, the index used will be that published for the preceding September.
>
> (All emphasis added)

[221] In any event, the issue of contract interpretation does not relate to the meaning of "monthly" in this context, or even to the meaning of "Earnings". It relates to whether monthly earnings are to be indexed for inflation.

[222] Further, the Disability Plan is not silent on the issue of indexing. It provides that inflation-indexed, pre-disability net earnings are to be calculated in a manner that takes account of changes in the Consumer Price Index. This inflation-sensitive measure, in turn, is used in several contexts. The Booklet provides for a "Rehabilitation Reduction", which is defined as follows:

> **Rehabilitation Reduction**
>
> 1. 50% of the Employee's monthly Net Earnings under an approved Rehabilitation Programme; and
> 2. a. the amount equal to the Employee's Income from All Sources, plus
>
> b. 100% of the Employee's monthly Net Earnings under the Rehabilitation Programme which exceeds 100% of the Employee's monthly Inflation-Indexed, Pre-Disability Net Earnings.

[223] As indicated above, the term "Inflation-Indexed, Pre-Disability Net Earnings" is also used to calculate the "All Source Maximum". Income that exceeds that All Source Maximum is

deducted from the Amount of Insurance when determining the Monthly Integrated Benefit. Further, the definition of Total Disability and Totally Disabled in the AnyOcc Period includes a calculation based on the ability to earn "more than 66 2/3% of Inflation-Indexed Pre-Disability Earnings".

[224] In each of these situations, the use of this inflation-indexed measure of pre-disability earnings operates to the benefit of the insured. That is so because it increases the amount they can earn before they suffer a reduction in their disability benefit or entirely lose the right to receive it. The Disability Plan demonstrates that the parties agreed to limit the impact of inflation on the long term disability income benefit *in this way and to this extent*.

[225] There is, however, no provision to index the *Earnings* used to calculate the Amount of Insurance, and thus the Monthly Integrated Benefit. Indeed, that is so despite the fact that in the Benefit Summary, the provision that specifies the amount of insurance, as well as the maximum benefit, are located directly adjacent to the explicit provision for indexing the All Source Maximum.

[226] In my opinion, these provisions, reading the contract as a whole, are clear and unambiguous. My reasons for reaching that conclusion accord entirely with the substantive argument advanced by SIGA. My colleagues state that SIGA made no such argument at trial. Mr. Pasap did not take that position. Further, I must respectfully disagree. As I have noted above, this was very much a live issue. In his closing at trial, counsel for SIGA clearly explained how the Disability Plan dealt with the calculation of the amount payable as a disability benefit, including the provisions that addressed indexing for inflation. He also explicitly made this point:

> The all source maximum is also identified in this -- on this sheet to be 85 percent of the employee inflation-indexed pre-disability earnings, which, obviously, we would submit, are not the same as the employee's monthly earnings, or that's what it would say. *And I pause there because one of the -- one of the -- the areas that myself and my learned friend differ on the interpretation of what the benefits would be is my friend has taken the position that the amount of benefits is linked to inflation-indexing, and there is clear language in this LTD policy that provides for a procedure to take account of inflation. But what we don't see is that procedure linked to the value of benefits provided under the policy to an insured.*
>
> Now, my friend might -- my learned friend might say, well, that doesn't make any sense, he should get that, Mr. Pasap should be entitled to that, it's what he should have gotten. But *when you look at the language of the policy, which is what we are here to interpret when we're looking at what the benefits would be under this policy, the concept of index*

> *into inflation is not linked to what the benefits would be given to the insured under the policy. It's linked to other things that I'll talk about but not to that concept.*
>
> (Emphasis added)

[227] As the Court said in *Mosten*, "[t]he first principle of contract interpretation is that the parties to a contract are presumed to have intended what the text of the contract actually says […]. This is the cardinal presumption of contract interpretation and it places the written agreement of the parties at the core of the interpretive process" (at para 73). That principle governs here. There was no basis to conclude that the Disability Plan provided for Mr. Pasap's long term disability benefits to be indexed.

[228] Mr. Pasap submits that because the entitlement to and amount of an insured's benefits are determined by their inflation-indexed, pre-disability earnings, the benefit must also be based on inflation-indexed, pre-disability earnings. With respect, this reasoning is fundamentally flawed. For the reasons I have explained, it simply cannot be squared with the language of the agreement. Further, interpreting the Disability Plan in the manner I have described does not create any inconsistency or conflict. As I have noted above, the use of an inflation-indexed factor – Inflation-Indexed, Pre-Disability Earnings – provides a measure of inflation protection to an insured. The fact that the amount of the benefit that is payable to Mr. Pasap is not inflation-indexed does not undermine that protection.

3. Conclusion regarding indexing for inflation

[229] In the result, it is my respectful view that the trial judge erred in finding that Mr. Pasap's damages for lost long term disability benefits should be indexed for inflation. She failed to provide sufficient reasons not only in relation to the issue of indexing, but in relation to other issues concerning the calculation of damages identified by SIGA. She also erred in her interpretation of the Disability Plan in finding that Mr. Pasap's benefits should be indexed for inflation, and that damages should accordingly be calculated on that basis.

IV. CONCLUSION

[230] For the reasons explained above, I have concluded that the trial judge erred in finding that Mr. Pasap was totally disabled during the AnyOcc Period, and in awarding damages. I would

accordingly remit the matter to the Court of King's Bench for a new trial in relation to those aspects of his claim. As a result, I would set aside the award of costs by the trial judge, and award costs on this appeal to SIGA on Column II of the Tariff.

"Barrington-Foote J.A."

Barrington-Foote J.A.