SUPREME COURT OF NOVA SCOTIA

Citation: *Welch v. Ricoh Canada Inc.*, 2017 NSSC 174

Date: 2017-06-23
Docket: Ken No 458282
Ken No 458283
Registry: Kentville

Between:

Larry Welch

Applicant

v.

Ricoh Canada Inc.

Respondent

And Between:

Kent Carroll

Applicant

v.

Ricoh Canada Inc.

Respondent

Erratum Date:	June 29, 2017
Judge:	The Honourable Justice Gregory M. Warner
Heard:	June 16, 2017, at Kentville, Nova Scotia
Oral Decision:	June 23, 2017, at Halifax, Nova Scotia (Released June 26, 2017, with edits for grammar only)
Counsel:	Blair Mitchell Q.C., for the applicants
	Michael Murphy, for the respondent

Erratum:

See "By the Court" below.

BY THE COURT:

[1] The decision, but specially the portions "**Quantum of lost wages and benefits**" and "**Costs**" had been reviewed and corrected by Justice Gregory M. Warner prior to the written release on June 26, 2017.

[2] Justice Warner noted on June 27, 2017, when reviewing the posted version that the changes had not been properly saved.

[3] The decision below has been corrected for grammatical errors from the draft prepared for the oral decision to the final written version, as signed by Justice Warner prior to releasing the improperly saved version of the decision.

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By the Court:

The Application

[1] This decision is in respect of two Applications in Court, heard together by agreement of the parties, relating to the common-law entitlement and quantum of pay *in lieu* of notice owing by Ricoh Canada Inc. ("Ricoh") to two long-term employees terminated without notice and without cause on November 30, 2015.

[2] The first issue is the amount owing for pay *in lieu* of reasonable notice. The second issue is whether the respondent has proven on a balance of probabilities that the applicants failed to mitigate.

[3] The direct evidence of the applicants Larry Welch ("Welch") and Kent Carroll ("Carroll") and of the respondent – by its Atlantic Canada Service Manager, Robert Pickrem ("Pickrem") was by affidavit. All three were cross-examined. The parties agreed to the admission of other documents all of which were marked as exhibits.

Background

[4] Ricoh is in the business of supplying and serving Ricoh-made office copiers, printers and scanners in Canada.

[5] The first applicant Larry Welch was hired as a technician serving the clients of a predecessor company to Ricoh (Halifax Office Products) in Nova Scotia beginning in 1989. In the mid-1990s, Halifax Office Products was acquired by Ikon and, in the mid-2000s, Ikon was acquired by Ricoh. It is admitted that Ricoh is the successor employer to Ikon and Halifax Office Products.

[6] With each takeover, Welch's seniority, the nature of his work and the terms and conditions of his employment remained constant.

[7] Welch had just graduated from Radio College of Canada, Toronto with a diploma in Electrical Engineering and was 20 years old at the time he joined Halifax Office Products. He was terminated without notice or cause on November 30, 2015, after 26 years. He is now 47 years old.

[8] Welch's entire working life was with Ricoh and its predecessors. His skills, training and experience were specific to Ricoh products. He first trained to set up, repair and service its equipment, primarily faxes and copiers. With the advance of technology and computer networking, the machinery and equipment he repaired and serviced became less stand-alone mechanical machines and more devices that were programmed and connected to other office devices. For most of Welch's working career he worked as the service technician for Ricoh customers in the Annapolis Valley. He has lived for several years in Annapolis County.

[9] In 2012, Ricoh reorganized and reduced the direct supply and service of its products to customers in Nova Scotia to the Halifax Metropolitan area (HRM), and in New Brunswick to the

Moncton area. It turned over the rest of the Maritime provinces to independent dealers. In the case of Nova Scotia, the dealer was Office Interiors. When Ricoh sold its business in Nova Scotia, outside the Halifax Metropolitan area, to Office Interiors, Welch was initially terminated but almost immediately offered employment as a service technician in the Halifax area. From December 2012 until his termination, Welch worked for Ricoh in the Halifax Metropolitan area.

[10] Throughout his career, Welch was occasionally required to cover other technicians' territories for, for example, illnesses, vacations or short periods during staff changes.

[11] Kent Carroll was employed by Yould's of Truro in 1990. Halifax Office Products acquired Youlds in the 1990s and shortly thereafter Halifax Office Products was acquired by Ikon and finally by Ricoh in the mid-2000s. It is admitted that Ricoh is the successor employer for all companies that Carroll started working for in 1990.

[12] He was a graduate of Nova Scotia Community College in Truro in 1990. He is now 59 years of age. He worked with Ricoh and its predecessors for 25 years.

[13] He, like Welch, says he was trained by Ricoh and its predecessors first to repair and service its equipment, primarily faxes and photocopiers. By the time of his termination, the products were photocopiers and printers.

[14] On cross-examination, despite some suggestions that he may have represented himself to have skills in the networking and IT field, he downplayed the extent of his knowledge with respect to software and IT connectivity.

[15] For his employment Carroll moved to Stewiacke, Nova Scotia, a community between Halifax and Truro. The territory he serviced extended from Stewiacke into the Halifax Metropolitan area.

[16] He was not terminated, nor was his job made redundant, when in 2012 Ricoh transferred the supply and service of its equipment in rural Nova Scotia and New Brunswick to Office Interiors.

[17] A significant factual issue in these proceedings involved the skills acquired by Welch and Carroll and the extent to which they were transferrable to employment with an employer other than Ricoh or other than Ricoh's competitors - suppliers of faxes, copiers and printers. Welch and Carroll said their entire careers (26 for Welch; 25 for Carroll) were spent servicing Ricoh equipment – faxes, copiers and printers, and that their skills were not broad enough to be transferrable to employment in other computer IT, connectivity and networking fields.

[18] The respondent pointed to job applications made by Welch in which he represented himself as "specializing in the servicing and repair of a core set of highly complex office products; … demonstrating required digital competencies associated with assigned products" (Welch resume). In addition, counsel made reference to Ricoh's transcripts of Welch's and Carroll's on-line and in person training in respect of office equipment and computer competency during their employment with Ricoh.

[19] Welch and Carroll described their skills as limited to the equipment that they set up, plugged in, instructed customers how to use, and repaired, and some technology issues with the assistance of Ricoh's IT specialists via telephone apps or direct communication with Ricoh's technology department.

[20] On a balance of probabilities, the court concludes that Welch, who worked for Ricoh and its predecessors for 26 years, and Carroll, who worked for Ricoh and its predecessors for 25 years, were familiar with all aspects of the supplying, setting up and servicing of photocopiers, printers and fax machines of Ricoh, a skill set likely transferrable to employment of direct competitors of Ricoh in the supply and servicing of photocopiers, printers and fax machines, but not likely transferrable, without considerable training, to other IT and computer networking, hardware and software business products and services. I was unable to conclude, one way or the other, whether either applicant had the capacity to complete such training successfully. As a result, the court is not satisfied on a balance of probabilities that the skill sets of either Welch or Carroll were transferrable to employment opportunities beyond those connected with supply and servicing of photocopiers and printers. That is, I am not satisfied that, after the length of their employment with a single employer with a few focussed products, they had the IT and computer software or hardware skills to learn or be trained and successfully pursue employment as service technicians in the IT industry in general.

[21] Robert Pickrem ("Pickrem") testified that in 2015 Ricoh lost a contract for the supply and service of 400 pieces of equipment. At the time, it appears that Ricoh had seven service technicians in the Halifax Metropolitan area. Ricoh determined that it had to terminate two, and Pickrem determined it would be Welch and Carroll.

[22] On November 30, 2015, Pickrem, together with his supervisor and, by telephone, the HR person from Toronto, met separately with Welch and Carroll. Carroll says that Pickrem was not in the room throughout the interview. Pickrem handed a five-page letter advising each of the applicants that their employment was terminated immediately. They were advised that they would be paid for eight-weeks statutory pay *in lieu* of notice, based on their bi-weekly pay: - for Welch, $1,811.02 less statutory deductions for a two-week period; for Carroll $1,823.24 less statutory deductions for a two-week period.

[23] Each was offered two alternative payment options in exchange for a full and final release. One option was payment of salary continuation for a number of weeks (46 for Carroll and 44 for Welch), which salary continuation would be reduced by 50% immediately that they obtained alternate employment. The other option was payment of a lump sum payment: to Welch, $26,561.63; to Carroll, $27,956.28, both less statutory deductions.

[24] Their group benefits were to continue to the end of the statutory notice period of January 25, 2016. They were directed on how to confirm their interest in the defined benefit pension plan which had changed in 2012 to a defined contribution plan, and how to contact Sun Life Financial with respect to their defined contribution retirement account, which had commenced when the defined benefit pension plan was terminated. The terms and conditions for acceptance of Ricoh's termination offer included that for six months they not, directly or indirectly, work in a similar

capacity or in association with any person or company that competes with Ricoh for any market areas that they had been assigned to in the course of their employment with Ricoh.

[25] They were given seven days to accept the termination offer, failing which the offer could be unilaterally revoked by Ricoh.

[26] Pickrem testified that they were each advised to consult a lawyer. Both Welch and Carroll vigorously denied they were advised to get advice from a lawyer but acknowledged they were given the letter to take home and review.

[27] Both were paid the eight-week statutory notice in accordance with the Termination Letter, and in January, after complaining to Ricoh, they were paid accrued vacation.

[28] Neither Welch nor Carroll signed the termination letter.

[29] Welch obtained employment in April 2017 as a 'collection driver and procurator of used cooking oil' from restaurants for BioFuel Oils. His income is $20.00 an hour for a 40-hour week. He gets none of the ancillary benefits, bonuses or pension contributions that he received when with Ricoh.

[30] In February 2016, Office Interiors offered Welch temporary employment to fill in for their field-service technician in Annapolis Valley (who was off on sick leave), doing the same work he had done for Ricoh until 2012. The offer was for three months, with a possible extension on a monthly basis, but with either party able to terminate the contract on seven days' notice. Office Interior's offer was at a lower rate of pay ($38,000.00 per year), without benefits, and with a formula whereby it would cost Welch more for personal use of a company vehicle. Welch turned down the employment opportunity.

[31] In August 2016, Office Interiors offered employment to Carroll at Miramichi, New Brunswick. Carroll discussed it with his wife, who was a full-time employee at Sobeys in Truro, and determined that they did not want to move from their home in Stewiacke. He declined the employment.

[32] Carroll was made aware of a job opening at Office Interiors in Bridgwater, Nova Scotia, posted in February 2017. He did not apply.

The Law

[33] Counsel for the applicants and respondent agree that there is no "rule of thumb" approach to reasonable notice. Both refer the court to *Bardal v Globe & Mail Limited*, 1960 CarswellOnt 144, ("*Bardal")* an Ontario High Court decision, where the court set out a non-exclusive list of factors to be considered by the court when determining reasonable notice. They included: the character of the employment, the length of service of the employee; the age of the employee at the time of termination, and the availability of similar employment. This court has reviewed and applied that law in two decisions cited by counsel: *Burns v Sobeys Group Inc.*, 2007 NSSC 363,

beginning at para. 89 and *MacKinnon v Acadia University*, 2009 NSSC 269, beginning at para. 108. The *Bardal* factors are universally referred in calculating reasonable notice.

[34] With respect to reasonable notice, this court also relies upon Chapter 14, and with respect to an employee's duty of mitigation - Chapter 16, of **Employment Law in Canada, Fourth Edition**, by Peter Barnacle (Toronto: LexisNexis, loose leaf release to Release 61, December 2015).

Pay *in lieu* of reasonable notice

[35] The four enumerated *Bardal* factors are not mutually exclusive, especially the first and fourth, nor are they equally important in every termination matrix. What constitutes reasonable notice is case specific and fact driven.

[36] The first factor is described as: characteristics of the job. As Chief Justice McRuer stated in *Bardal*, in every case of wrongful dismissal, the measure of damages must be considered in light of the terms of the employment and the character of the services to be rendered.

[37] There were no stipulated terms for the employment of the applicants in this case. I infer, based upon their long service, that the employment was considered to be of a full-time permanent nature.

[38] Traditionally, the period of reasonable notice increased with the status of the position of the employee in the business. This was the position the Ontario Court of Appeal took in *Cronk v Canadian General Insurance*, [1995] OJ No. 2751 (*"Cronk"),* when it overturned the 1994 trial decision, [1994] OJ No. 1564 (*"Cronk appeal"*), in which case then Justice MacPherson challenged the traditional rules that 'higher status means longer notice' and lower status employees were limited to twelve-months' reasonable notice. Contrary to the Ontario Court of Appeal decision in the *Cronk* appeal, the New Brunswick Court of Appeal in *Medis Health v Bramble*, [1999] NBJ No. 307, ("*Bramble*") concluded that the validity of the notion that less skilled employees deserved shorter notice cannot be taken for granted.

[39] In a decision of the Ontario Court of Appeal in *DiTomaso v Crown Metal*, 2011 ONCA 469, ("*DiTomaso*") then Court of Appeal Justice MacPherson, writing for the court, adopted the *Bramble* analysis and his own trial analysis in *Cronk*. Since then the determination of the length of notice was less on the status of the employee in the business than on the likelihood that the nature of the employee's employment and skills might require a bigger "cushion" while seeking other employment.

[40] Whereas traditionally there was an upper limit for lower status or non-management employees of 12-months' notice, since *Bramble* and *DiTomaso* most courts have ignored the 12-month ceiling. They have based reasonable notice on whether the type of employment, combined with the length of that employment, would make it difficult for the employee to find replacement employment. The presumption or inference that lower-level employment could easily be replaced no longer exists. One might conclude as a matter of common sense and common knowledge, that

machines and computers are displacing lower status jobs and workers with less than a current post-secondary education.

[41] In respect of the first *Bardal* factor, I accept the evidence of Welch and Carroll that when they started their employment, fax machines copiers and printers were mechanical equipment, not IT equipment, and that while, over time, these business tools became "connected" to computers in the office, their role as customer service representatives and technicians was to set up the machine, educate the user on its proper use, and plug the machine into a network. Their involvement down the network pipeline was very limited and did not qualify them as computer or networking or connectivity experts. As the nature and use of copiers and printers has changed, and because the 'cloud' been reduced the use of paper and therefore copiers and printers, their work has become less relevant in the current business office environment. The opportunities for employment as service technicians for photocopiers and printers has not grown. Neither Ricoh, nor from Carroll's evidence, its competitors, have sought out more technicians (as opposed to simply replacing some of them).

[42] The characteristic of their work, as it evolved over the last 25 or 26 years, suggests that they need a bigger cushion than those employed in expanding types of office technology, or employees with higher education and/or IT skills.

[43] I reject the submission that the range of what is reasonable notice for employees with these applicants' skill sets and type of employment is, at the high end, twelve months. The case law does not support that proposition in the current business office climate.

[44] The second *Bardal* factor is length of service. In my view, 25 and 26 years respectively are very long periods of employment with one employer.

[45] Counsel for the employer suggests that only when one exceeds 30 years in terms of length of service do periods of reasonable notice get to the high end of the current range.

[46] In *Employment Law in Canada*, the writers suggest that length of service is one of the strongest predictors of reasonable notice. Welch and Carroll were Ricoh employees with 25 and 26 years' experience working with Ricoh equipment.

[47] For many today, 25 years constitutes a full life's career. Of the *Bardal* factors, this factor is one of the more weighty in the circumstances of these parties.

[48] The third *Bardal* factor is the age of the employee. Welch is now about 47 years old; Carroll is 59 years old.

[49] In the current work environment, it is a matter of common sense that an employer will be less likely to hire an older new employee, especially one in need of significant training or retraining.

[50] It is an important factor that both applicants, and especially Carroll, find it increasingly more difficult to find replacement employment than younger workers. Younger workers, when

trained, have a much longer work-life expectancy with their employer and often start at a lower salary.

[51] The experience that Welch and Carroll have with Ricoh is not easily transferable. They would be subject to the significant retraining, with a shorter period from which a prospective employer may expect to get a reasonable benefit. The age of these employees is one of the more prominent *Bardal* factors in this case.

[52] The fourth *Bardal* factor is the availability of similar employment. I have already dealt with this factor to some degree in the analysis of the character of the applicants' employment with Ricoh. I do not accept the respondent's submission that Welch and Carroll, without the necessity for extensive retraining, have similar employment readily available to them. Carroll testified that he spoke with technicians working with three of the ten companies listed by the respondent as their competitors. His evidence is that they advised that there were no jobs available.

[53] The fact of the reduction in the work force for service technicians by Ricoh in 2012 and 2015 suggests a reduced availability for employment for persons trained in copiers, faxes and printers. As a matter of common sense, the cloud is replacing the need for many copiers and printers. Records are kept on computers and in the cloud, and transferred electronically from computer to computer. Offices are becoming almost paperless. I conclude that the need for technicians to service copiers and printers is declining.

[54] Welch wrote some letters seeking employment with an attached resume. He received no responses or job offers. The letters seeking employment were to Bell Aliant, to an automotive company, to a power corporation, to an alarm company and to other technology related companies. Welch described in his resume that he was seeking full-time employment in the technical-office equipment field. He identified his long service with Ricoh as a customer-service technician since 1989. He further testified that he used the website "Indeed", which he described as a site which collects all or most employment opportunity sites, and Service Canada's job bank, as his primary resources in his search. He was unsuccessful in obtaining employment even close to the type of work he had performed for Ricoh.

[55] Pickrem acknowledged that other than a recent position in Newfoundland and a replacement position he was aware of in February of this year in Bridgewater, he was unaware of employment opportunities for technicians in the copier/printer field.

[56] The present case law suggests that, save exceptional circumstances, application of the *Bardal* factors leads to reasonable notice periods in the range of about 6 months to 24 months.

[57] Analysis of the *Bardal* factors in this case leads me to conclude that reasonable notice, in terms of the range of reasonable notice periods, reflecting the many cases cited by counsel, should be at the higher end of the spectrum.

[58] Counsel for the applicants submits that reasonable notice in this case is in the 24-month range. I disagree. While their length of service and ages (especially Carroll's age) and their limited skill sets tailored to Ricoh products are significant hindrances to finding employment at a similar

salary (inclusive of the Ricoh benefits), their skills in customer service and their work ethic give them options for employment. Their situations are not of the kind for which the highest award is made.

[59] Counsel for the respondent submits that the range is 10 to 12 months. The submission is based primarily on Ricoh's submission that the applicants' skill sets are easily transferable - which I reject, and that they should, at this stage of their working careers and based on their level of compensation, be expected to seek and accept employment several hours' daily drive from their respective homes and communities (or presumably should move), which I also find unreasonable.

[60] To the same extent as that the court rejects the submission that these employees should receive 24-months' pay *in lieu* of notice less any failure to mitigate setoff, the court rejects the submission that reasonable notice is between 10 and 12 months less any failure to mitigate setoff.

[61] The length of service and age of these employees with the limited availability of work of the type that they were trained for and had carried out for Ricoh for the excess of 25 years, merits notice between the parties' extreme positions.

[62] I conclude that for Carroll, reasonable notice is 18 months. I conclude that for Welch, who is 11 or 12 years younger than Carroll, reasonable notice is 16 months.

Reduction for failure to mitigate

[63] The onus is on the respondent to establish, on a balance of probabilities, that the applicants have failed to mitigate.

[64] The respondent has failed to show the availability of similar employment and I reject its submission that either of the applicants have skill sets that are easily transferable to other networking, connectivity or IT support occupations.

[65] With respect to Carroll, the only concrete evidence of an offer, which he declined, was the Office Interiors offer of employment at Miramichi, New Brunswick. I understand it is over 300 km each way from his family's long standing home at Stewiacke, Nova Scotia, and his wife's workplace.

[66] The respondent submits that declining that offer was unreasonable and proves his failure to mitigate.

[67] The job was geographically very far from his home. His reason for declining the job; that is, his wife's full-time employment in Nova Scotia and their long-standing home in Stewiacke, combined with the fact that he would likely have to move and was getting close to the end of his employment, leads me to conclude that it was not unreasonable for him to decline the offer.

[68] There was no evidence of other similar employment available to him (or declined by him) that would have allowed him to be home at night and earn a reasonable income in the employment that he had carried out for all of his working life.

[69] With regards to Welch, he found employment unrelated to his prior employment which provides him less income and financial benefits than he received at Ricoh. He commenced that employment in March 2017. Ricoh is entitled to reduce the pay *in lieu* of notice (which includes all the lost collateral benefits) by the sum of $1,600.00 every two weeks (less statutory deductions), equivalent to $41,600.00 per year or $3,466.66 per month, that Welch has earned since March 1, 2017.

[70] Furthermore, Ricoh has established, on a balance of probabilities, that when Office Interiors offered temporary employment to Welch for a three-month period in the Annapolis Valley as a service technician on Ricoh equipment that he should have accepted that temporary employment.

[71] His reason for declining - that it may interfere with his ability to get other permanent work, makes no sense in the context of Office Interiors' offer, which entitled him to quit on seven days' notice.

[72] I deduct from the pay *in lieu* of notice, in respect of Welch, the salary (less statutory deductions) he would have received for three months from Office Interiors.

Quantum of lost wages and benefits

[73] I have attempted to quantify the entitlement of each of the applicants, subject to any correction of my arithmetic.

[74] First, Mr. Welch. I do not think that most of these figures were contested.

[75] First, Welch's base salary at the time of termination was $43,185.98 per year or $3,598.97 per month.

[76] Second, Exhibit 4 shows the employer's contributions to the employer's share of his lost medical and life benefits as $192.00 per month.

[77] Thirdly, Exhibit 1, Tab 2H, shows that Welch was always paid a bonus of slightly over $2,000.00 per year. In 2013, it was $2,029.00; 2014, $2,081.00; and, 2015, $2,051.00. He is entitled to his bonus during the notice period, which I calculated at $171.00 per month.

[78] Fourth, Welch had the use of a company vehicle; I believe a Ford Escape, for both personal and business usage. The personal use was a taxable benefit.

[79] Exhibit 3 shows the taxable benefit. In 2015, for 11 months, that taxable benefit was $2,952.96; in 2014, for the entire year, it was $4,446.91. Welch acknowledges that the majority of that personal use benefit involved his obligation to drive from his home in Annapolis County to Windsor, the edge of his territory, each day to service the HRM area.

[80] Effectively, without having to travel to HRM to work for Ricoh, the post-termination lost portion of that personal-use benefit is less than 50%. No precise evidence was given except that

less than half of the personal-use kilometres was not related to his work for Ricoh. In the year 2015, the personal-use kilometres were $25,172.00; in 2014, $27,022.00. In 2015, it was for the 11 months.

[81] I therefore estimate 40% of the net taxable benefit was a true benefit lost by Welch, unrelated to his employment. For the 11 months in 2015, that was $1,180.00; for the 12 months in 2014, it was $1,778.78. When I take an average of the 23 months, I get $125.00 per month as the lost personal-use benefit.

[82] These four items I constitute losses incurred by Welch by reason of his termination and count towards pay *in lieu* of notice.

[83] There is a fifth item contested by Ricoh. In 2012, when the defined pension plan benefit terminated and was replaced by a company defined contribution plan, the employer matched the employee contribution to the new plan to the extent of $1.00 for every $1.50 the employee contributed from his salary. Welch in fact contributed a fixed percentage of his salary in each of the years for which the court has employment records. In 2015, he contributed $2,095.00; in 2014, he contributed $2,074.00. In each of those years, Ricoh contributed $1,404.00 in 2015 and $1,386.00 in 2014. Effectively, the employer contributed $117.00 per month.

[84] Counsel for Ricoh submits that because Welch has not proven that he contributed or continued to contribute to a retirement plan, presumably an RRSP, after his termination and therefore has not proven the loss of Ricoh's matching contribution. Counsel refers to a trial decision from another jurisdiction for its analysis.

[85] I am somewhat troubled by that submission. It is a matter of logic, principle and common sense. As a matter of fact, the employee, during his employment with Ricoh, did make regular contributions, fairly consistent contributions, towards his retirement. Upon his termination, he could not contribute to Ricoh's RPP and had no income or ability to contribute to a personal RRSP or other pension plan, by reason of the failure of his employer to continue to pay for the period of reasonable notice (on the basis that he did not accept their termination letter, which required him to give a full release in exchange for pay *in lieu* of notice).

[86] To my mind, it is illogical that the reason he should lose the benefit of the matching contribution in circumstances where the employer wrongfully withheld his pay. I find it illogical that the employer should benefit from that circumstance.

[87] There is no case law before me that tells me that Welch is not entitled to a matching contribution because he could not pay into a retirement plan from money he did not receive from his employer. Logic says, and I infer, that if he had received income, pay *in lieu* of notice, that he would have contributed to his retirement in the same manner that he had before he was terminated. Despite counsel's able argument, I therefore include the employer's contribution to the amount that Welch lost. The reason Welch did not have income was the conduct of the respondent.

[88] I therefore include $117.00 in the amount per month that he would have received.

[89] With regards to the claim for vacation pay, counsel for Ricoh argues that there is no right of an employee to claim vacation pay as opposed to taking the time off. I agree and I therefore decline to award any lost vacation pay.

[90] In the result, I find that, on a monthly basis, the starting point for pay *in lieu* of notice is:

Salary	3,598.97
Benefits	192.00
Bonus	171.00
Personal usage of vehicle	125.00
Employer's contribution to RPP	117.00
Total:	4,203.97

[91] The $4,203.97 is the starting point – the amount of pay *in lieu* of notice per month that Welch should have received. From that, I deduct for the three-month period in 2016, when he should have accepted employment with Office Interiors with a salary of $3,166.66 per month.

[92] I awarded 16-month's notice to Welch. On March 1, 2017, he started working with Bio Fuels Oils, so I deduct his salary of $41,666.00 per year, or $3,466.66 per month, for the month of March 2017.

[93] I have not added the total loss including the set off for failure to mitigation, I leave that to counsel.

[94] My math, without accounting for the statutory deductions required by law, is:

Total per month owed to Welch		4,203.97
For 16 months		67,263.52
LESS:	Three months for Office Interiors	9,499.98
LESS:	One month for BioFuels	3,466.66
	Total payable to Welch:	$ 54,296.88

[95] For Mr. Carroll, I have followed the same exercise. Counsel, in their oral submissions, had no significant disputes about the monthly calculations; their disagreement was entitlement.

[96] First, Carroll's annual base salary, as of the May 22, 2015 letter, was $42,389.88 (Tab 11, Exhibit 1), which works out to $3,532.49 per month.

[97] Exhibit 5 set out the medical / dental / life benefits lost in the amount of $208.13 per month.

[98] To calculate his lost bonus, I looked at his 2013, 2014 and 2015 bonuses. They were all very close to each other. I used the 2015 figure of $2,069.38, or $172.44 per month.

[99] I averaged the personal use of the employer's vehicle over the last three years of his employment. It seemed to vary greatly from year to year; I was looking for an average. Exhibit 6 showed the Carroll's taxable personal-use benefit from use of a company vehicle for the years 2013, 2014 and 2015, totalled $1,838.00, which, divided by three, is $612.66 per year or $51.00 per month. Carroll is entitled to this lost benefit.

[100] His contribution to the defined contribution plan was $2,072.00 in 2015; Ricoh's was $1,386.00. Carroll's loss is $115.00 per month.

[101] For the same reason, I rejected Welch's claim for vacation pay, I reject Carroll's claim for vacation pay.

[102] Carroll's total lost monthly pay *in lieu* of notice is $4,080.06 per month (without accounting for statutory deductions, which are required by law). For 18 months, without any mitigating set off, I calculate his loss as:

Salary per month	3,532.49
Benefits	208.13
Bonus	172.44
Personal use of vehicle	51.00
Defined contributions to pension	115.00
Total per month	**4,079.06**
For 18 months	$ 73,423.08

[103] The case law suggests that there are some other claims that can be made for losses suffered during the pay *in lieu* of notice period. These mainly come from the *Employment Law of Canada*, but there was no case made at trial of the particulars of other claims.

Costs

[104] I have not dealt with costs. I have no idea if there were negotiations or discussion. I am prepared to receive submissions on costs.

[105] If there was a formal offer, my preference would be that whoever made an offer, if they believe they received a favourable judgment that party files the first brief.

[106] But, absent a *Rule 10* formal offer, I would ask Mr. Mitchell to file his costs submissions within two weeks. I have not done the complete arithmetic, but based on the offer in the employer's November 30, 2015, letters, I am assuming your clients are more successful, even if they did not get what they were looking for.

[107] I would like Mr. Mitchel to write first, give you two weeks, then give Mr. Murphy a week to reply.

Warner, J.