

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Hedrick v. Toews*,
2026 BCSC 1250

Date: 20260706
Docket: S231930
Registry: Vancouver

Between:

Amber Hedrick

Plaintiff

And

Johnston Meier Insurance Agencies Ltd.

Defendants

Before: The Honourable Justice L. Bennett

Reasons for Judgment

Counsel for the Plaintiff:

P.G. Wynne

Counsel for the Defendants:

S. Payne

Place and Date of Trial:

Vancouver, B.C.
December 8–12, 2025

Place and Date of Judgment:

Vancouver, B.C.
July 6, 2026

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Overview & Background

[1] The plaintiff, Amber Hedrick, is a former employee of the defendant insurance brokerage firm, Johnston Meier Insurance Agencies Ltd. (“JMI”).

[2] Ms. Hedrick was hired as an insurance producer by JMI’s manager, David Ebner, in 2014. Mr. Ebner remained Ms. Hedrick’s manager for approximately seven and a half years until she was terminated on September 16, 2022.

[3] The circumstances leading to Ms. Hedrick’s termination are unfortunate and pre-empted by the fact that for years prior to her termination Ms. Hedrick was stalked and harassed by a representative of one of her clients (the “Stalker”). Ms.

Hedrick brought the situation to Mr. Ebner's attention shortly after the stalking started. She followed up by establishing office safeguards in the event the Stalker showed up at her work unnecessarily. She did this with the support of Mr. Ebner and other office staff and with the intent to establish clear, personal boundaries.

[4] By the summer of 2021, the stalking intensified and became more frequent. Ms. Hedrick would find the Stalker waiting for her in the work parking lot. She discovered him loitering in the strata development where she lived. On multiple occasions, Ms. Hedrick confronted the Stalker and told him that his behaviour was inappropriate but to no avail. She eventually purchased security cameras for her home and contacted the police for guidance. She understood from her conversations with the police that there was little they could do for her unless the Stalker trespassed onto her property.

[5] On August 12, 2021, Ms. Hedrick noticed the Stalker's truck following her at a distance on the highway as she drove from work in Mission through Matsqui and into Abbotsford. This was the tipping point for her. On August 13, 2021, she emailed Mr. Ebner to fully apprise him of the elevated circumstances and to seek his guidance. As a single mother of a young child, Ms. Hedrick understandably felt uncomfortable and unsafe.

[6] In her email to Mr. Ebner, Ms. Hedrick acknowledged that the Stalker was her point of contact with one of the firm's biggest clients. She acknowledged that, from a financial standpoint, she neither wanted the firm to lose this client, nor did she want to lose the income associated with the account. She expressed concern that, even if she gave up the account, the situation could worsen given the Stalker's obvious obsession with her.

[7] Ms. Hedrick also suggested to Mr. Ebner that she may need to make further changes to her work routine as her attempts to more frequently work from home had not solved the problem.

[8] Mr. Ebner promptly responded by email and was appropriately sympathetic. He was forthright that Ms. Hedrick did not need to put up with such behaviour. He indicated that he was not exactly sure what to do but would come up with a plan. He suggested that they may need to escalate the situation to the Stalker's employer. In a text message to Ms. Hedrick, he also asked for permission to run the situation by his wife, Mrs. Colleen Ebner, writing in a text message: "...she's very good at this kind of thing and I trust what she has to say". Ms. Hedrick agreed that Mr. Ebner could consult Mrs. Ebner, and he responded that he would get back to Ms. Hedrick after he had done so.

[9] The facts to this point are not in dispute. However, the parties disagree about the events that followed.

[10] Ms. Hedrick claims that Mr. Ebner did not follow up with her after he consulted with Mrs. Ebner, or at all. She alleges that, despite his initial response to "come up with a plan", he did not take any measures whatsoever to help. Meanwhile, the stalking continued and Ms. Hedrick's mental health worsened to the point where she began having suicidal ideations.

[11] According to Ms. Hedrick, her next encounter with Mr. Ebner was a few weeks later when she unexpectedly ran into him and Mrs. Ebner in the office and just as they were about to head out on vacation. Ms. Hedrick testified that it was apparent to her that Mr. Ebner had not yet spoken to Mrs. Ebner, nor did he raise the topic of her stalking concerns. She took the initiative, raised the topic, and asked Mr. Ebner if it would be a good time to speak with Mrs. Ebner. He said sure. Ms. Hedrick testified that Mrs. Ebner's response to her situation was rather abrupt, and she offered only victim-shaming advice in their short discussion.

[12] Ms. Hedrick had no further communications with Mr. Ebner until after his return from vacation, and not until September 9, 2021, when he texted her to meet him in his office.

[13] When Ms. Hedrick attended Mr. Ebner's office, and to her surprise, the focus of that meeting was on her pay. She said Mr. Ebner discussed that ICBC commission rates were going down, he was throwing out numbers that did not make sense, and suggested that she take a lesser monthly draw. Ms. Hedrick disagreed that there was any need to reduce her monthly draw. Mr. Ebner pressed on unnecessarily, and so Ms. Hedrick reluctantly agreed to revisit the numbers on January 1, 2022.

[14] Ms. Hedrick then used the balance of the meeting as an opportunity to revisit her stalking concerns, and also told Mr. Ebner that she did not appreciate Mrs. Ebner's advice. At that point, he became defensive at her remarks. Her evidence is that he acted like he was "very mad" at her. Ms. Hedrick testified that she did not understand where his anger was coming from. She testified that she expressed to Mr. Ebner that she was still experiencing mental health problems because of the Stalker and confided to him that the situation had become so bad that she had to call a helpline. She asked if she could temporarily work remotely from her rental property in 100 Mile House, British Columbia. She alleges that Mr. Ebner unequivocally answered "no", and then threatened to take her assistant away if she resorted to working remotely.

[15] A week later, on pay day and without any notice, Ms. Hedrick noticed a significant reduction to her pay. Mr. Ebner reduced her monthly draws from \$10,000 per month to \$7,000 per month (an annual reduction of \$36,000 per year).

[16] On September 15, 2021, Ms. Hedrick emailed Mr. Ebner questioning the claw back. She expressed confusion with the pay reduction given that she had not agreed to one. She also questioned the math as, as of that date, she was only about \$7,000 behind her annual target, and she had six months of 2021 commissions still to account for.

[17] On September 16, 2021, Ms. Hedrick emailed Mr. Ebner again, this time asking for copies of her first and second quarter earnings so she could do a routine reconciliation of her commissions. Mr. Ebner replied that he did not have the first

quarter documents and only had documents from the second quarter. Ms. Hedrick asked him to send whatever he had. He never responded.

[18] Ms. Hedrick confronted Mr. Ebner in his office about the claw back. She asserted that she never agreed to a pay reduction and further insisted that it was not warranted. She alleges that Mr. Ebner had no answer for her as to why he changed her pay and said he would put the money back. He then walked out of the meeting.

[19] On September 20, 2021, Mr. Ebner sent a text message to Ms. Hedrick informing her that he advised payroll to amend her monthly draw to \$8,300. Ms. Hedrick did not understand where the \$8,300 figure came from, as the revised amount was still \$1,700 per month less than her regular monthly draw of \$10,000.

[20] By this point in time, and as a result of these additional work-related challenges, Ms. Hedrick's mental health fell to an all time low. She emailed Mr. Ebner on October 4, 2021, to advise that she needed a week of vacation time due to her declining mental health. She made this request knowing that she had not left the office for more than a week in her seven-and-a-half-year history of employment and knowing that she had not yet taken any of her accrued vacation time that year. Mr. Ebner responded that Ms. Hedrick needed to contact human resources to go on leave through benefits. Ms. Hedrick clarified that she was going on "vacation", not "leave". Mr. Ebner sent an email in reply suggesting that Ms. Hedrick drop her "attitude."

[21] As a result of the events to that point, Ms. Hedrick reached out to the human resources ("H.R.") department. She dealt with the H.R. manager, Nicole (Nikki) Wood, who put Ms. Hedrick in touch with the Workers' Compensation Board of British Columbia ("WorkSafeBC"). Ms. Hedrick ended up going on sick leave. Her last day of work was October 4, 2021.

[22] Despite being on leave, the stalking continued, and by November 2021, it escalated further when the Stalker showed up at the front door of Ms. Hedrick's residence. Ms. Hedrick again contacted the police.

[23] As Ms. Hedrick's mental health continued to worsen and her concerns for her and her son's safety peaked, so did her suicidal ideations. She qualified for short term disability benefits and ultimately became eligible for long term disability benefits. She remained off work for the balance of 2021 and through most of 2022.

[24] On August 24, 2022, WorkSafeBC wrote to the parties advising of its decision that Ms. Hedrick had suffered permanent injuries, including post-traumatic stress disorder ("PTSD") and major depressive disorder due, in part, to both the actions of the Stalker and of her manager, Mr. Ebner. WorkSafeBC's determination letter stated that Ms. Hedrick's workplace injuries stabilized into permanent conditions as of August 29, 2022. It further concluded that Ms. Hedrick would have difficulty returning to work with her pre-injury employer, and indicated her entitlement to a referral to its vocational rehabilitation services. Moreover, it included the following restriction:

- Worker is permanently restricted from working with her pre-injury employer
- Johnston Meier Insurance Agency. This restriction is inclusive of the worker being restricted from working with the male client who stalked her, working with her former manager, and working at her pre-injury work location in Mission.

[25] On September 16, 2022, JMI formally terminated Ms. Hedrick's employment alleging frustration of contract. In doing so, it relied on WorkSafeBC's August 24, 2022 determination.

Positions of the Parties

Plaintiff

[26] Ms. Hedrick's position is that she is entitled to damages for wrongful dismissal. She argues that Mr. Ebner's lack of support in relation to the Stalker's conduct was a significant contributing factor to her inability to continue working in the fall of 2021, and an ongoing contributing factor to her inability to return to her employment by September 16, 2022. She asserts that because JMI was partially responsible for her disability, it cannot avail itself of the frustration defence.

[27] Ms. Hedrick argues that JMI failed to facilitate a safe work environment. Further, she argues that JMI made it impossible for her to return to work from medical leave by enabling an unsafe work environment through its continued (and subsequent renewals) of business dealings with the Stalker and with the company he represented. Ms. Hedrick alleges that JMI chose continued profits over a loyal and dedicated long-standing employee.

Defendant

[28] JMI's position is that it did not wrongfully terminate Ms. Hedrick. Rather, it submits that the termination was justified on the basis of frustration of contract.

[29] JMI argues that it had reasonable basis to believe that Ms. Hedrick could not return to work because (1) all of the various communications it had with WorkSafeBC confirmed that her injuries had stabilized into permanent conditions as of August 29, 2022, and (2) the WorkSafeBC communications confirmed that she was permanently restricted from working with JMI. Moreover, JMI relies on a subsequent WorkSafeBC communication dated September 20, 2022, containing further comments and restrictions, namely that Ms. Hedrick may experience elevated reactivity and exacerbation of symptoms working in an insurance-based workplace/environment where there is high likelihood of triggers for her medical condition. The restriction was, therefore, amended to include that Ms. Hedrick would not be able to return to work as an insurance broker, at all.

[30] JMI argues that it took all reasonable steps to support and shield Ms. Hedrick from the Stalker and submits it cannot be held responsible for the supervening stalking events which negatively affected her health.

Issues

[31] The issues I must decide are:

1. Can JMI rely on the doctrine of frustration of contract? If yes, then Ms. Hedrick is not entitled to damages for wrongful dismissal. If no, then wrongful dismissal is made out.

2. If wrongful dismissal is made out, what is the appropriate quantum of damages?
3. Is Ms. Hedrick entitled to aggravated or punitive damages?
4. Should any damages be reduced by the amount of the WorkSafeBC benefits and/or as a result of Ms. Hedrick's alleged failure to mitigate?

Issue #1 – Was the Contract Frustrated?

[32] The legal test for frustration is stated in *Aldergrove Duty Free Shop Ltd v MacCallum*, 2024 BCCA 28 [*Aldergrove*] at paras. 36–37:

[36] In light of the above-cited authorities, this Court has held that to prove frustration, a party must establish each of the following elements:

- a) a qualifying supervening event that was not contemplated by the parties when they entered into the contract;
- b) the supervening event is not the fault of either party; and,
- c) the supervening event rendered performance of the contract something radically different from that which was undertaken.

See, for example, *Blackmore Management Inc.* at para. 59; *Interfor Corporation v. Mackenzie Sawmill Ltd.*, 2022 BCCA 228 at paras. 65–66; *Rickards (Estate of) v. Diebold Election Systems Inc.*, 2007 BCCA 246 at paras. 37–38; and *Wightman Estate* at paras. 21–26.

[37] The party that asserts frustration bears the onus of proof: *Perkins* at para. 17. Determining whether the defence has been made out is fact dependent and requires an individualized assessment: *Blackmore Management Inc.* at para. 65.

[33] *Aldergrove* also sets out that the defence of frustration has a stringent standard, particularly in the employment context at paras. 72–73:

[72] This is not a proper application of the frustration defence, which, for good reason, entails a stringent standard. This is especially so in the employment context. The Supreme Court of Canada has recognized that:

... [w]ork is one of the most fundamental aspects in a person's life, providing the individual with a means of financial support and, as importantly, a contributory role in society. A person's employment is an essential component of [their] sense of identity, self-worth and emotional well-being.

[Reference re *Public Service Employee Relations Act (Alberta)*, 1987 CanLII 88 (SCC), [1987] 1 S.C.R. 313 at 368.]

[73] A generous application of the frustration defence in the employment context has significant implications for employees, potentially depriving them of critical entitlements through no fault of their own.

[34] *Aldergrove*, therefore, establishes that the employer must satisfy the three-part test, that the test must be applied stringently in the employment context, and that frustration goes beyond mere inconvenience, expense, or lowered economic value.

[35] Ms. Hedrick concedes that JMI has established the first part of the test. Neither party contemplated the supervening event.

[36] However, she submits that the test for frustration must fail at the second step because the evidence establishes on a balance of probabilities that JMI was at fault for the supervening event. She relies on *Wightman Estate v 2774046 Canada Inc.*, 2006 BCCA 424 at paras. 50–52, which in turn cites *Yeager v. R.J. Hastings Ltd.*, [1984] B.C.J. No. 2722 [*Yeager*] to show that, while frustration may result from an injury to an employee, there is no frustration when that injury arises through the course of the employment:

[50] Here, the trial judge found that Mr. Wightman’s “disability, at the time of his dismissal, was likely to continue for such a period that performance of his obligations in the future would either be impossible or would be a thing radically different from that undertaken by him and agreed to be accepted by the employer under the agreed terms of his employment.” Subject to the appellant’s second ground of appeal, no basis has been suggested on which we could properly interfere with this finding of fact or with the trial judge’s conclusion that Mr. Wightman’s disability frustrated the contract.

[51] The appellant submits, on another level, that such a result is unacceptable in modern society. She refers to the following remarks of Wood J. in *Yeager v. R.J. Hastings Ltd.*, *supra*, at 245:

In this case the plaintiff’s illness was caused, in part, by stress associated with his employment. When a person has devoted 30 years of faithful service to the benefit of an employer’s business, only to suffer an illness that is partially attributable to that employment, the employer in such circumstances is not entitled to discard the employee whose usefulness has been thus destroyed, unless, of course, the terms of the contract of employment provide for such determination. The fact that the parties to a contract of employment would not be likely to agree to such a provision merely serves to illustrate that such a course of conduct would not be acceptable in today’s society.

[52] Although Mr. Wightman had served the Employer faithfully and well for some twenty-eight years, the circumstances of this case distinguish it from those described in this passage. First, Mr. Wightman's illness was not attributable in any way to his job. His illness was not the fault of the Employer – rather, it was an event that occurred without the fault of either party. Moreover, in this contract the parties expressly acknowledged that Mr. Wightman's employment might end by reason of his long-term disability and they provided that, if that event should occur, he would continue to receive disability benefits under the plan purchased by the Employer as a term of the employment contract. It cannot be said, as it could be said in *Yeager*, that parties to a contract of employment would not likely agree to such a clause. Rather, the provision made in this case might well be seen by reasonable persons as an equitable adjustment of the risk and the burden of Mr. Wightman's debilitating illness.

[37] JMI argues that the facts in *Yeager* are distinguishable from the facts at issue in this case. In particular, JMI argues that *Yeager* involved a long-standing employee who suffered significant stress in the workplace due, in part, to being told that he would be dismissed, only to be left "in limbo" for 17 months before an abrupt firing. Further, the employee in *Yeager* relied upon the expert testimony of a psychiatric counsellor to establish that his mental illness was caused by the employer. JMI points out that Ms. Hedrick did not provide any expert evidence to establish that her injury was caused or contributed to by the actions of JMI. Regardless, it agrees that Ms. Hedrick should never have experienced stalking or harassment from the Stalker, but submits that the Stalker's misconduct and Ms. Hedrick's resulting inability to return to work for JMI was not the fault of either party. The defendant argues that WorkSafeBC simply accepted Ms. Hedrick's narrative as to what happened.

[38] I agree with JMI on this latter point. That is, although the parties agreed that the WorkSafeBC reports could be admitted into evidence, both sides also agreed that the reports would not be relied on for the truth of their contents, but only for context to explain why JMI took the steps that it did. As such, and to assess the factual narrative of this case, I must do my own assessment. That assessment requires me to consider any issues that have arisen with respect to the credibility and reliability of the various witnesses.

Credibility and Reliability Assessment

[39] Ms. Hedrick was the only plaintiff witness. JMI called three witnesses: Mr. Ebner, Ms. Wood, and Zack Fraser, the WorkSafeBC representative who handled Ms. Hedrick's file.

Amber Hedrick

[40] Ms. Hedrick did not shy away from the fact that she neither asked nor insisted of JMI that it get rid of the Stalker's employer's account. She acknowledged the ongoing working relationship that JMI had with that company and her own reliance on the ongoing insurance commissions from that client. She expressed a legitimate concern that the Stalker's behaviour could worsen if she ended the business relationship given his obsession with her. She recognized the possibility that such a result could leave her with much less income while still being stalked.

[41] With reference to her income, JMI challenged Ms. Hedrick about Mr. Ebner's decision to claw back her wages and suggested that Ms. Hedrick was not on track to meet her commission targets in 2020 or 2021. Ms. Hedrick clarified, with precision, that she was on track and explained why. She acknowledged that ICBC had anticipated changes to reduce commission rates in 2021, but explained that those changes had not affected her earnings because of how hard she was working. She testified about her requests to Mr. Ebner for commission breakdowns and relied on the objective evidence to confirm both her asks and the unanswered requests.

[42] Despite further suggestions in cross-examination that her 2021 record of employment predicted a lower annual income, Ms. Hedrick carefully took the court, again, through that timeframe to explain why she would have been on track to earn as much as or more than previous years had she continued to work for JMI.

[43] Overall, Ms. Hedrick's evidence was detailed and consistent throughout both her direct and cross-examination. Her testimony on all issues in dispute survived multiple interruptions and objections by both counsel during both her direct and cross-examinations. Not once was she thrown off, and she was unshaken when

challenged. All of her evidence aligned with the numerous exhibits that were put to her. I found her to be both credible and reliable.

Zack Fraser

[44] Mr. Fraser is a case manager for WorkSafeBC. His role involves managing benefits for mental health claims, and he was the assigned case manager to Ms. Hedrick. His role also included managing Ms. Hedrick's temporary wage loss benefits, her treatments, and her return-to-work initiatives.

[45] Mr. Fraser testified about his involvement with Ms. Hedrick and explained how he reached his August 2022 determination that Ms. Hedrick was permanently restricted from working at JMI. He also testified about how Ms. Hedrick's benefits were characterized and how they were calculated.

[46] In terms of the determination letter, Mr. Fraser explained that he relied upon the information he received from Ms. Hedrick's doctors and medical professionals, all of whom concluded that Mr. Ebner's overall treatment of Ms. Hedrick contributed to her injuries.

[47] Neither party raised any issues with Mr. Fraser's credibility or reliability, nor did I find any issues with his overall testimony.

Nicole (Nikki) Wood

[48] Ms. Wood has served as JMI's HR manager for over five years. Her role includes overseeing HR and employee relationships, benefits and payroll. She explained that JMI managers, like Mr. Ebner, are empowered to handle whatever they can, and that if a matter needs to be escalated it comes to her. If a matter needs to be further escalated, it goes to JMI's chief executive officer ("CEO").

[49] Ms. Wood testified that she first became aware of the Stalker in September or October 2021 through an email that she received from Ms. Hedrick. She explained that it was her understanding that the situation interfered with Ms. Hedrick's mental health and ability to cope at work, and she acknowledged that Ms. Hedrick

expressed discomfort with her ongoing ability to discuss the issue with Mr. Ebner. Ms. Wood followed up to the email from Ms. Hedrick with a phone call on October 15, 2021. She said she made notes about their telephone discussion and referred to a scratch pad note which she claimed to have written on the day of the phone call. The note says, in part:

Rec'vd email from Amber re: Dave not understanding mental H. Spoke with Amber. Spoke Dave – relayed the setiment [sic] Amber felt bullied not supported. Directed Dave to support employees we have Mental Health Strategies for WorkPlace & EAP through Benefits to Support Mental Health.

[50] Ms. Wood testified that she advised Ms. Hedrick that she did not need to deal with Mr. Ebner anymore, and told Ms. Hedrick that she could instead deal with her. She explained that Ms. Hedrick did, in fact, communicate through her after that discussion. Ms. Wood also stated that when Ms. Hedrick requested to go on medical leave, that she gave her the forms and helped her with them.

[51] Their subsequent communications included an email from Ms. Hedrick to Ms. Wood on November 1, 2021, wherein Ms. Hedrick advised that the Stalker had shown up at Ms. Hedrick's door. In response, Ms. Wood phoned both Mr. Ebner and the other branch manager and advised that office staff were to let her know if the Stalker came to the branch or was otherwise looking for Ms. Hedrick so that she could report back to Ms. Hedrick.

[52] Ms. Wood testified that it was not her understanding, nor did anyone ever tell her, that the Stalker could not attend JMI offices.

[53] As the HR manager, Ms. Wood received the two WorkSafeBC letters. Her understanding of the August 24, 2022 letter was that Ms. Hedrick would not be returning to work at JMI any time soon, or at all. She discussed the letter with the company's CEO and owner, they consulted with legal counsel, and considered the contract frustrated. Ms. Wood then authored and signed the termination letter to Ms. Hedrick dated September 16, 2022. She also acknowledged receipt of the September 20, 2022 letter from WorkSafeBC which added the further restriction discussed above.

[54] Ms. Wood said she never heard from Ms. Hedrick after either of those letters, nor did she hear from anyone else on Ms. Hedrick's behalf expressing concern or alleging inaccuracy regarding determinations that WorkSafeBC had made. As such, they took the determinations at face value.

[55] In cross-examination, Ms. Wood's evidence differed at times from her evidence in direct. She acknowledged that she did not learn about the Stalker through Ms. Hedrick's email and that she was already aware of the issue as a result of an email forwarded to her from another employee on October 8, 2021. Ms. Wood acknowledged that she took no steps to reach out to Ms. Hedrick upon receiving information about the Stalker on October 8, 2021.

[56] As for the nature of the communications she had with Ms. Hedrick on October 15, 2021, Ms. Wood conceded that Ms. Hedrick's email did not reference the Stalker at all, but rather focused on Ms. Hedrick's concern that she was being bullied by Mr. Ebner. Ms. Wood then acknowledged that bullying allegation as the real reason she directed Ms. Hedrick to communicate through her, and not through Mr. Ebner, from that point onward. She also acknowledged that she used language with Ms. Hedrick that would have suggested that her WorkSafeBC complaint was akin to "suing" Mr. Ebner.

[57] Ms. Wood was challenged as to whether she took steps to investigate Mr. Ebner for the bullying complaint. She said she responded by getting Mr. Ebner's side of the story, and that Mr. Ebner did not agree with Ms. Hedrick's version of events. When pressed on this issue, Ms. Wood hesitated and appeared flustered. She could not provide further details. However, she said she was sure that she did respond to the bullying concern.

[58] In response to the two WorkSafeBC letters of August 24, 2022 and September 20, 2022, Ms. Wood's evidence in direct suggested that JMI relied on the conclusions of both letters in determining whether to terminate Ms. Hedrick's employment. However, she clarified in cross-examination that the trigger to terminating Ms. Hedrick was a WorkSafeBC letter dated September 13, 2022, which

concluded that JMI was “unable to accommodate Amber Hedrick in suitable, modified, or alternate employment on a permanent basis due to a permanent restriction on the claim”. Ms. Wood acknowledged that she did not reach out to Ms. Hedrick or have any communication with her at all in response to that letter and prior to terminating her employment.

[59] In considering all of Ms. Wood’s evidence, I conclude that it was internally inconsistent and, at times, inconsistent with the objective evidence. For instance, despite her initial defensive response to Mr. Ebner’s handling of the situation, Ms. Wood’s evidence in cross-examination confirmed she did very little, if anything, to address with Mr. Ebner the bullying issue that Ms. Hedrick brought to her attention. She acknowledged that Mr. Ebner should have handled the circumstances differently, she acknowledged that Mr. Ebner’s acts contributed to the end of Ms. Hedrick’s employment, and she acknowledged that at no time prior to terminating Ms. Hedrick did she reach out to explore if there was any way to modify or otherwise accommodate a return to work.

David Ebner

[60] Mr. Ebner was JMI’s branch manager for Mission and Chilliwack. He oversaw all office duties including hiring and payroll, and was responsible for bringing in commercial accounts. Mr. Ebner recalled hiring Ms. Hedrick as a commercial ICBC auto producer. He recalled that she was responsible for bringing the Stalker’s employer’s account, to JMI. He recalled that Ms. Hedrick routinely reconciled her commissions, and that she did so quarterly with him with information that he routinely provided to her. He acknowledged that when Ms. Hedrick completed her reconciliation, she brought all of the information back to him for his review and approval. He acknowledged that she was a valued employee of seven and a half years who showed consistent growth.

[61] Mr. Ebner testified that in Ms. Hedrick’s history with the company her income only ever decreased once, and he said that occurrence was in September or

October 2021. He believed that reduction to be solely a result of ICBC reducing their commissions.

[62] He explained that in September 2021, it became clear to him that, for the first time, Ms. Hedrick's draws were going to exceed what she brought in from commissions. He testified that he had a discussion with Ms. Hedrick about reducing her draws but could not recall the particulars of the conversation, nor could he remember how Ms. Hedrick responded. He acknowledged making a reduction to Ms. Hedrick's monthly draw but was unable to remember the exact amount of the reduction. He recalled Ms. Hedrick coming to him, after the fact, to say that she was not getting paid enough. He said he agreed to increase her pay back up to the number *she suggested*, but could not remember the exact figure. He did not recall Ms. Hedrick's email wherein she suggested to him that she was only \$7,000 behind for the year with further commissions still to be accounted for, and he claimed to have no recollection of what she earned in 2019 or 2020.

[63] When asked in direct if Ms. Hedrick ever spoke to Mr. Ebner about the Stalker, Mr. Ebner responded that she did, possibly in 2020. When asked if Mr. Ebner offered suggestions to Ms. Hedrick during that first conversation, he responded that he "would have" told her to go to the police, that they "should probably" talk to the company as well, and "thinks he asked" if she would like him to talk to the owners.

[64] Mr. Ebner acknowledged that he received the August 2021 email from Ms. Hedrick detailing what was happening with the Stalker. He testified that the email changed his perception of the seriousness of the Stalker's conduct. He recalled suggesting that they should take the concerns to the Stalker's employer and recalled asking Ms. Hedrick if she would mind him speaking to Mrs. Ebner about the situation.

[65] He testified that transferring the file to another office would have been a viable option, and that he was willing to do that if it was what Ms. Hedrick wanted.

[66] When Ms. Hedrick emailed Mr. Ebner asking for “vacation time”, he claimed that it was his understanding she was asking for “time off”.

[67] Regarding the conversation about Ms. Hedrick working remotely, Mr. Ebner explained that Ms. Hedrick would not be able to continue in her employment role if she was residing in 100 Mile House. He maintained that to be the case despite his acknowledgment that she had performed various tasks remotely, including from 100 Mile House, since 2020 and throughout the COVID-19 pandemic.

[68] Overall and throughout his direct examination, Mr. Ebner recalled very little detail of his interactions with Ms. Hedrick. He recalled even less in cross-examination. His answers were consistently of the same theme - “could have been”, “may have been”, “I don’t remember”, or “I don’t recall”.

[69] With respect to the discussions involving Mrs. Ebner and Ms. Hedrick, Mr. Ebner recalled being present during the conversation yet claimed not to remember any details of that conversation. He also recalled going on holidays with Mrs. Ebner after that conversation yet could not recall any details of the holiday including where the couple may have went or for how long.

[70] Of significance, Mr. Ebner denied several facts that are readily confirmed by objective evidence. For instance, he denied the suggestion that he called Ms. Hedrick into his office to discuss a pay cut *after* he had already instructed payroll to reduce her draws. Yet, the objective evidence on this point speaks for itself. Mr. Ebner clearly directed payroll to reduce the draw on September 8, 2021, being one day before he called Ms. Hedrick into his office to discuss her pay on September 9, 2021.

[71] When Mr. Ebner was challenged as to whether he ever notified Ms. Hedrick that he reduced her pay, he responded that he could not recall. However, his response contradicted the objective evidence which corroborates Ms. Hedrick’s evidence that she discovered her pay reduction only when she received her September 15 paycheque.

[72] Likewise, Mr. Ebner claimed that he could not recall the details of the discussion he had with Ms. Hedrick on September 9. However, I did not believe him given the level of detail that Ms. Hedrick provided about that discussion, and also given the level of detail Ms. Wood described during Mr. Ebner's discussions with her about the September 9 pay cut meeting.

[73] Next, and despite any concerns that he may have had about ICBC commission reductions, Mr. Ebner could not explain why he unilaterally reduced Ms. Hedrick's pay by almost one third of her annual salary. He also provided no response as to why he did not provide Ms. Hedrick with the first and second quarterly reconciliation statements despite her requests and despite that the information would have been readily available to him.

[74] Mr. Ebner conceded that he did not explore other working arrangements with Ms. Hedrick when she had asked about working remotely, and acknowledged that he gave a snap decision ("no") when she asked about working remotely from 100 Mile House. He did not deny the suggestion that he proposed removing her assistant if she chose to work remotely.

[75] Mr. Ebner gave circular answers as to whether he continued to do business with the Stalker and his employer after Ms. Hedrick went on leave. He acknowledged that it was "business as usual", and that JMI renewed their business contracts with the Stalker and his employer in July 2022. He also acknowledged that he took over Ms. Hedrick's commissions from the Stalker's employer during her absence.

[76] When I consider Mr. Ebner's evidence as a whole, I find it to lack both credibility and reliability. Mr. Ebner had a detailed recollection of events when it favoured him. Otherwise, his answers lacked substance and were inconsistent.

Analysis

[77] It is within the context of my findings on credibility that I have done my own factual assessment of the events that took place.

[78] I accept that Ms. Hedrick was at a complete loss about what to do about the Stalker and his conduct. This is precisely why she went to her employer. By that point in her insurance career, Ms. Hedrick considered Mr. Ebner to be not only her employer but also a trusted friend. She felt that if anyone could assist her in her situation, it would be Mr. Ebner. Aside from the police (who would not intervene unless the Stalker appeared on Ms. Hedrick's property), Mr. Ebner was the only other individual who could have taken charge of the situation and/or offered reasonable assistance. He had the authority and responsibility to assist his employee, Ms. Hedrick, with a work-related situation that caused her to feel unsafe and insecure both at home and at work. He had the authority and ability to, if necessary, communicate a clear message either to the Stalker or to the Stalker's employer about the unwanted and inappropriate behaviour. He also had the authority and managerial expertise to further explore any inclination that Ms. Hedrick may have had to keep the Stalker's employer as a client, and/or to try to dissuade her from retaining the client. He did nothing aside from seeking Ms. Hedrick's consent to seek Mrs. Ebner's guidance. Even then, he did not follow through, and it was up to Ms. Hedrick, again, to initiate the discussion, none of which was of any assistance to her.

[79] I pause here to note that this duty that Mr. Ebner had to Ms. Hedrick was not only a moral duty but also a legal duty. Under the *Workers Compensation Act*, R.S.B.C. 2019, c. 1, s. 23, Mr. Ebner was obligated at all times, as Ms. Hedrick's supervisor, to ensure her health and safety. Under this section, Mr. Ebner also had a positive duty to remedy workplace conditions that were hazardous to the health of his workers. Mr. Ebner was well aware of the Stalker and of the impact on her mental and physical health, and did not take positive steps to protect Ms. Hedrick.

[80] Next, when Mr. Ebner unilaterally and without notice clawed back Ms. Hedrick's pay, and when he responded to her subsequent request for vacation time in a demeaning tone, Ms. Hedrick understandably felt undermined. It was within the context of Mr. Ebner's changed demeanor that Ms. Hedrick felt bullied. This was the impetus that led her to reach out to Ms. Wood.

[81] Ms. Wood, as the H.R. manager, responded with limited support. Aside from directing Ms. Hedrick to WorkSafeBC, she provided little to no other employment/H.R. support. Instead, she made Ms. Hedrick feel worse by suggesting to her that a WorkSafeBC claim would equate to suing Mr. Ebner.

[82] For these reasons, and separate and apart from any similar finding made by WorkSafeBC, I conclude that JMI's conduct directly contributed to Ms. Hedrick's illnesses and inability to return to work. As such, the defence of frustration must fail at the second stage of the test from *Aldergrove*.

Issue #2 – What is the Appropriate Quantum of Damages?

[83] JMI concedes that if it has not proven frustration, and if liability is established, that any damages are to be assessed using a common law calculation of payment in lieu of notice.

[84] Both parties rely on caselaw supporting a notice period of seven to ten months for employees of Ms. Hedrick's age, position and responsibilities with Ms. Hedrick arguing the higher end of that range and JMI arguing the lower end.

[85] Ms. Hedrick submits that the circumstances of this case justify a longer notice period, and also argues that this court should average her earnings over the last three years of her employment, just as the court did with a commission-based employee in the wrongful dismissal case of *Johnson v. IBM Canada Ltd.*, 2019 BCSC 592 at para. 33.

[86] JMI relies on *Pakozdi v. B & B Heavy Civil Construction Ltd.*, 2018 BCCA 23, for the proposition that a medical condition should not lead to an increased notice period. JMI relies on *Hawes v Dell Canada Inc.*, 2021 BCSC 1149 for the further proposition that there is no fixed formula to calculate earnings for an employee whose earnings, like Ms. Hedrick's, are variable. JMI submits that only Ms. Hedrick's last year of earnings should be used to calculate the payment in lieu of common law notice. I reject this argument because Ms. Hedrick's earnings dropped in the last year, at least in part, because of the events leading up to her dismissal.

[87] It is undisputed that Ms. Hedrick was a valued and hard-working employee. She worked for JMI for approximately seven and a half years. In that time, she rarely took time off that she was otherwise entitled to. Her earnings continually increased over the years. All of the foregoing reflects her effort and dedication toward her employer. Further, I find that but for the events that occurred, Ms. Hedrick would likely have at least met, if not surpassed, her prior earnings in 2021. I conclude that Mr. Ebner was well aware of that fact as well, given his unwillingness to provide reconciliation figures for the relevant period of time and despite that such information was readily available to him.

[88] In calculating an appropriate notice period, I have considered Ms. Hedrick's seven-and-a-half-year history with the company, her history of growth, her history of recruiting and retaining clients, and the loyalty that Ms. Hedrick continued to demonstrate to JMI by not wanting her concerns to cost them a client (despite the problems caused by the Stalker). In the circumstances, I find that an appropriate quantum of damages is nine months notice calculated as an average of her past three years salary.

[89] Ms. Hedrick submitted tax documents showing her employment income over the last three years of her employment at JMI. They establish the following incomes:

- \$171,237 in the year 2019 for an average monthly income of \$14,270;
- \$160,780 in the year 2020 for an average monthly income of \$13,398; and
- \$99,412 through the first nine months of the year 2021 for an average monthly income of \$11,045.

[90] Ms. Hedrick submitted a figure of \$12,904 per month as her average monthly income over the above period and based on the above figures. I agree with this calculation. Therefore, Ms. Hedrick is entitled to \$116,136 (\$12,904 per month multiplied by nine months) in wrongful dismissal damages.

Issue #3 – Is Ms. Hedrick Entitled to Aggravated or Punitive Damages?

[91] Ms. Hedrick claims that because of JMI's conduct leading up to her dismissal and the manner of her dismissal, JMI breached its contractual obligation of good faith, and she is entitled to aggravated or punitive damages.

[92] In wrongful dismissal cases, aggravated or punitive damages arise out of the manner of dismissal. In *Boucher v. Wal-Mart Canada Corp*, 2014 ONCA 419 [Boucher] where punitive damages were awarded, the employee's manager was physically and verbally abusive of the dismissed employee in front of other staff. In those circumstances, the Court made the following comments about punitive damages in wrongful dismissal at paras. 79–80:

[79] To obtain an award of punitive damages, a plaintiff must meet two basic requirements. First, the plaintiff must show that the defendant's conduct is reprehensible: in the words of Binnie J. in *Whiten*, "malicious, oppressive and high-handed" and "a marked departure from ordinary standards of decent behaviour": see *Whiten*, at para. 36. Second, the plaintiff must show that a punitive damages award, when added to any compensatory award, is rationally required to punish the defendant and to meet the objectives of retribution, deterrence and denunciation.

[80] When the claim against the defendant is for breach of contract, as is Boucher's claim against Wal-Mart, the plaintiff must meet a third requirement. The plaintiff must show that the defendant committed an actionable wrong independent of the [page499] underlying claim for damages for breach of contract. In Canada, this requirement originated in the Supreme Court of Canada's judgment in *Vorvis*, itself a case about a breach of an employment contract, and was later affirmed in *Whiten*, at paras. 78-83.

[93] Courts in British Columbia have followed a similar analysis when awarding aggravated damages in wrongful dismissal cases where an employer's conduct is similarly egregious. For example, in *Zheng v. China Southern Airlines Company Limited*, 2023 BCSC 1763 [Zheng], the court awarded aggravated damages where the employer took steps to "blacklist" Ms. Zheng, the employee from the Chinese aviation industry and actively sought to intimidate and humiliate Ms. Zheng during her termination making it impossible for her to work in the industry moving forward.

[94] Notwithstanding that Mr. Ebner should have handled the employment matters differently and my finding that he did contribute to Ms. Hedrick's ongoing injury, I find

his conduct fell below the “high-handed” or “malicious” conduct described in *Boucher* or *Zheng*. I say this because the written record shows that Mr. Ebner initially responded with sympathy and expressions of care toward Ms. Hedrick. The evidence supports that he was prepared to give up the problematic client had Ms. Hedrick requested he do so. If Ms. Hedrick agreed to follow through with that action, it is quite possible that much of the subsequent events could have been avoided, and if not, perhaps they could have been limited. In any event, Ms. Hedrick acknowledged the practical dilemma she was experiencing regarding the Stalker. She recognized that, unless she supported the company terminating its working relationship with the Stalker’s employer, JMI was limited in terms of what else it could do to assist her. Despite JMI not further supporting Ms. Hedrick, the evidence does not support that JMI acted in a malicious, oppressive and high-handed manner. At worst, I would describe JMI’s response as insensitive, unprofessional, or improper and that finding is insufficient to attract punitive or aggravated damages. In reaching this conclusion, I did consider how Mr. Ebner unilaterally reduced Ms. Hedrick’s draw and therefore her pay leading up to her termination. Again, while that conduct is less than desirable, I find it does not reach the level of professional humiliation or reputational damage that occurred in *Boucher* or *Zheng*.

Issue #4 – Set-Off

[95] Against any damages, JMI claims set-offs for the WorkSafeBC benefits received by Ms. Hedrick, and for Ms. Hedrick’s alleged failure to make sufficient efforts to find new work. Ms. Hedrick denies that either of these set-offs are appropriate.

WorkSafeBC benefits – are they deductible?

[96] Both parties referred me to an array of cases on this point, all of which confirm that there is divided appellate authority on this issue across Canada.

[97] JMI submits that not deducting Ms. Hedrick’s disability benefits creates a double-dipping scenario, and cites caselaw that says there are policy reasons for not letting an injured employee “double dip”. JMI submits it would be a puzzling result if

a wrongfully terminated employee who found a new job had the funds from that job deducted from common law damages while an injured employee who received benefits in lieu of pay was able to retain their funds.

[98] Ms. Hedrick argues this area of the law is unsettled, and submits that although there are decisions of this court which do deduct these benefits from an award of payment in lieu of notice, there are no decisions of the Supreme Court of Canada or the British Columbia Court of Appeal that decide whether the category of workers' compensation benefits paid specifically for injury compensation are, in fact, deductible. Ms. Hedrick argues that previous decisions of this court which have deducted benefits are of no assistance given the absence of any analysis or because the plaintiff in those cases agreed that the benefits should be deducted. She therefore urges the court to consider the distinct purpose of the compensation and the intention of the legislature in enacting the statutory framework in deciding this issue.

[99] More specifically, Ms. Hedrick argues that the purpose of the legislation was designed to compensate people who were injured at work for those injuries, and that WorkSafeBC benefits represent a separate and distinct head of compensation that stands apart from damages owed for wrongful termination.

[100] JMI relies on *IBM Canada Limited v. Waterman*, 2013 SCC 70 [*Waterman*]. On its face, *Waterman* appears decisive of this issue. At para. 29, the Court confirmed that disability benefits must be deducted from an award of damages if there is a "compensating advantage problem". That advantage arises if (a) the plaintiff would not have received the benefit "but for" the defendant's breach, or (b) the benefit is intended to be an indemnity for the sort of loss resulting from the defendant's breach. If neither of these conditions exist, there is no issue about the deduction. If either of these conditions exist, there is.

[101] The Court in *Waterman* discusses the situation where there is a causal link between the defendant's negligence and the plaintiff's receipt of benefits resulting in

a “compensating advantage problem”. At para. 30, the Court refers to *Sylvester v. British Columbia*, [1997] 2 S.C.R. 315 [*Sylvester*] and states:

Even if there is no “but for” causal link between a benefit and the breach, there may still be a problem about whether a benefit should be deducted. This will occur where the benefit and the breach are connected in the sense that the benefit is intended to indemnify the type of loss caused by the breach — *Sylvester* is an example. Mr. Sylvester was unable to work and receiving disability payments under his employment contract when he was wrongfully dismissed. There was clearly no causal link between the employer’s failure to give reasonable notice of termination (or payment in lieu of notice) and the receipt of the disability benefits. Nonetheless, the Court found that there was a compensating advantages problem. As Major J. pointed out, the disability benefits were intended to be a substitute for Mr. Sylvester’s regular salary: para. 14. In other words, the benefit was intended to be an indemnity for the loss of the regular salary, precisely the sort of loss that resulted from the defendant’s breach of the employment contract.

[102] At paras. 75–76, the Court elaborates on policy considerations, and factors to consider:

[75] *Sylvester* provides an example of grounding policy considerations in the facts of the case. The result in that case was supported by the fact that deducting the disability benefits from wrongful dismissal damages ensured that all affected employees would receive equal damages: if the benefits were not deducted, a dismissed employee collecting disability benefits would receive more compensation than would the employee who is dismissed while working (para. 21). In the same paragraph, the Court considered the incentives created by the deduction or non-deduction of the disability benefits: failing to deduct the disability benefits could be an undesirable deterrent to employers establishing disability benefit plans. These concerns are directly related to the benefits in question and have a reasonable basis in fact.

[76] From this review of the authorities, I reach these conclusions:

- (a) There is no single marker to sort which benefits fall within the private insurance exception.
- (b) One widely accepted factor relates to the nature and purpose of the benefit. The more closely the benefit is, in nature and purpose, an indemnity against the type of loss caused by the defendant’s breach, the stronger the case for deduction. The converse is also true.
- (c) Whether the plaintiff has contributed to the benefit remains a relevant consideration, although the basis for this is debatable.
- (d) In general, a benefit will not be deducted if it is *not an indemnity* for the loss caused by the breach and the plaintiff *has contributed* in order to obtain entitlement to it.

(e) There is room in the analysis of the deduction issue for broader policy considerations such as the desirability of equal treatment of those in similar situations, the possibility of providing incentives for socially desirable conduct, and the need for clear rules that are easy to apply.

[103] Other authority on this issue is found in *Royster v. 3584747 Canada dba Kmart et al.*, 2001 BCSC 153 [*Royster*] at para. 41, wherein Justice Kirkpatrick, in adopting the reasons of the Alberta Court of Appeal in *Salmi v. Greyfriar Developments Ltd.*, 1985 ABCA 59 [*Salmi*] says:

[41] In my view, the decision in *Salmi v. Greyfriar Developments Ltd.*, 1985 ABCA 59 (CanLII), [1985] 17 D.L.R. (4th) 186 (Alta. C.A.) is determinative of this issue. The Court held that the amount of compensation received from the Workers' Compensation Board should be considered in mitigation of the damages awarded based on the policy that the employer is the only contributor under the statutory scheme. The Court thus held, at 189:

If the money came from earnings from a complete stranger the appellant would have the advantage of it in mitigation of the loss. As a matter of policy I am quite unable to see why it ought not to be deducted where it is paid from a fund contributed to by the employer by force of law particularly where the payment is in lieu of earnings and to compensate for their loss while unable to work because of injury sustained during the course of the respondent's employment.

[42] Accordingly, I find the amount of compensation paid to Ms. Royster by the Workers' Compensation Board should be included in the mitigation of her damages.

[Emphasis added.]

[104] Our Court of Appeal, in *Birch v London Drugs Ltd*, 2004 BCCA 618 affirms a trial court decision that positively references *Royster*. In the trial decision, indexed as 2003 BCSC 1253, the Court says:

The law with respect to this issue is straight forward. The amount of compensation received by a plaintiff during the term of notice should be considered in mitigation of the damages awarded. This principle was considered by Kirkpatrick, J. in *Royster v. 3584747 Canada Inc.*, [2001] B.C.J. No. 136 (B.C. S.C. [In Chambers]). She examined the authorities relating to the issue and concluded that W.C.B. compensation should be included in mitigation of damages.

[105] Additionally, *Salmi* was recently followed by the Alberta Court of Appeal in *Way-Patenaude v Alberta (Human Rights Tribunal)*, 2023 ABCA 109 at para. 16:

[16] ...the appellant received full compensation through Workers' Compensation benefits. To the extent any claim for loss of income could exist, that claim has been fully mitigated by the receipt of WCB benefits since October 8, 2014 when the appellant stopped working: *Salmi v. Greyfriar Developments Ltd.*, 1985 ABCA 59 at para 1.

[106] There is also a relevant appellate decision out of Newfoundland that considers *Salmi* and ultimately finds that workers compensation benefits should be deductible. In *White v. F.W. Woolworth Co*, 1996 CarswellNfld 205 (N.L.A.D.), Justice Marshall opines that not deducting workers compensation benefits would go against the entire *raison d'être* of workers' compensation schemes. Justice Marshall reached this conclusion on a review of the history of workers compensation. He reviewed many similar authorities and treatises similar to the ones cited by Ms. Hedrick in this case when he said:

[95] It is this immunity from action for compensable injury sustained at the workplace which places workers' compensation benefits on a singular plane and distinguishes them from other collateral benefits, including unemployment insurance, insofar as their deductibility from damage awards is concerned. The unique shield that it provides includes immunity from liability for damages due to loss of income. Where a disabled employee is in receipt of workers' compensation as a result of a work related injury, like Mr. White, to allow recovery against the employer of both salary and benefits would disregard the bargain, sanctioned by statute, which provides the latter is in lieu of the former. This is so whether the double recovery was sought in an action in tort or for wrongful dismissal. The legislation may not be circumvented by arguing the action was for wrongful dismissal rather than "because of injury" as a litigant cannot claim indirectly what may not be claimed directly. The intent to preclude double recovery against an employer is clear and allowing it in wrongful dismissal claims would render inoperative a basic principle of the enactment.

[96] For the foregoing reasons, workers' compensation payments do not come within the exceptions to the rule against double recovery of damages for wrongful dismissal. To allow an individual to recover full salary whilst in receipt of such benefits would violate the whole purpose of the workers' compensation plan. It should be noted that this preclusion against recovery of both applies to actions involving employers and employees. It does not extend to actions against third parties who are not parties to the "historic trade-off" (see s. 45(1)).

[107] Notwithstanding these case authorities, Ms. Hedrick submits that there is no Supreme Court of Canada or British Columbia Court of Appeal authority which decides that workers' compensation benefits are deductible from termination pay

and points out that there was no analysis of the statutory nature of the benefits in *Royster*, and the plaintiff agreed that those benefits should be deducted in *Birch*. As such, Ms. Hedrick submits that those decisions are not good law.

[108] Ms. Hedrick submits that the legislative intention of workers' compensation leads to an obvious conclusion that it is separate and apart from wrongful dismissal damages and ought not to be deducted from those damages. She submits that the words of Cory J. in dissent in *Ratych v. Bloomer*, [1990] 1 S.C.R. 940 at p. 954 should further guide this analysis:

The arbitrators' conclusion on this point is based on the fact that sick benefits are regarded as insurance rather than wages. According to both texts, the majority view is expressed in the arbitral decision of *Re U.E.W., Local 523 and Welland Forge Ltd.* (1970), 21 L.A.C. 1, at p.5 (Christie), where the Board stated:

Workmen's Compensation and sick benefit are not wages; they are compensation in the nature of insurance payments, flowing from injury or sickness as the case may be. The purpose of such payments is to make up for loss of wages to some extent, but they are not themselves wages.

I am in complete agreement with this statement...

[109] This distinguishing factor is in line with what the Supreme Court of Canada said in *Sylvester* at paras. 10–12:

[10] The issue on appeal was restricted to whether the disability benefits received by the respondent during the notice period should be deducted from the \$102,100 awarded as damages for wrongful dismissal. This question has produced conflicting appellate authority in Canada. Disability benefits received during the notice period were held to be deductible from damages for wrongful dismissal in *Bursey v. Acadia Motors Ltd.* (1980), 1980 CanLII 3198 (NB CA), 35 N.B.R. (2d) 587 (C.A.), but not deductible in *Datardina v. Royal Trust Corp. of Canada* (1995), 1995 CanLII 1538 (BC CA), 6 B.C.L.R. (3d) 1 (C.A.), and *McKay v. Camco, Inc.* (1986), 1986 CanLII 2544 (ON CA), 53 O.R. (2d) 257 (C.A.).

[11] Analogous issues have been considered with unemployment insurance benefits, which were held not to be deductible in *Jack Cewe Ltd. v. Jorgenson*, 1980 CanLII 177 (SCC), [1980] 1 S.C.R. 812, and *Peck v. Levesque Plywood Ltd.* (1979), 1979 CanLII 2055 (ON CA), 27 O.R. (2d) 108 (C.A.), and workers' compensation benefits, which were held to be deductible in *Salmi v. Greyfriar Developments Ltd.*, 1985 ABCA 59 (CanLII), [1985] 4 W.W.R. 463 (Alta. C.A.), and *White v. F.W. Woolworth Co.* (1996), 22 C.C.E.L. (2d) 110 (Nfld. C.A.), but not deductible in *Industries de Caoutchouc*

Mondo (Canada) Ltée v. Leblanc (1987), 1987 CanLII 518 (QC CA), 17 C.C.E.L. 219 (Que. C.A.).

[12] These decisions involving unemployment insurance benefits and workers' compensation benefits are not helpful in deciding the issue in this appeal because those benefits are statutory, and distinguishable. Disability benefits, on the other hand, are contractual. The question of deductibility therefore turns on the terms of the employment contract and the intention of the parties.

[Emphasis added]

[110] The British Columbia Court of Appeal very recently explained how WorkSafeBC benefits can have different purposes, albeit in a completely different context in *Simms v. Alzawad*, 2025 BCCA 346. In this case, Justice Riley in considering which WorkSafeBC benefits constituted “health care” and which did not in the context of a subrogated personal injury claim, stated at para. 39:

... The question is not how WorkSafeBC bills the expenditure, but whether, based on the evidence adduced at trial, the plaintiff can show that the expenditure qualifies as “health care” within the meaning of the WCA. Although, in practice, there may be some overlap between what might qualify as “health care” and what might constitute “vocational rehabilitation”, it is apparent from the scope of s. 155 of the WCA that not all WorkSafeBC expenditures made under this provision fit within the scope of “health care” within the meaning of ss. 1 and 133(1)(a). ...

[111] To be clear, I am citing this authority only for the proposition that not every WorkSafeBC benefit is paid for the same reason or out of the same pocket.

[112] WorkSafeBC provides benefits to cover both the wages lost by reason of an injury and also compensation for the injury itself. In deciding whether each kind of benefit should be deducted from wrongful dismissal damages, I turn to the “historic bargain” referenced in the caselaw. Workers generally do not have the right to sue their employers for injuries suffered at work. Instead, they must turn to WorkSafeBC for compensation. Therefore, it makes sense why the compensation for lost wages must be deducted from a wrongful dismissal award. If it was not deducted, then there would be an obvious double compensation issue where an employee would be essentially compensated twice for their wages, once from WorkSafeBC and once at common law. On the other hand, the compensation for the injury itself is *not* compensation for lost wages. An employee should be able to recover for their injury

through the statutory scheme (or “historic bargain”) and still recover their common law entitlement to payment in lieu of notice through a wrongful dismissal action.

[113] If there was no workers compensation legislation in this province, an injured employee who successfully sued their employer after being injured at work would be entitled to damages not only for lost wages, but also for damages arising out of their injury such as medical costs, and cost of future care.

[114] JMI submits that there would be a “puzzling result” if a non-injured, dismissed employee had to deduct their earnings from a new job from common law notice damages, but an injured employee would not have to deduct their WorkSafeBC benefits. I reject that submission and find that the result is not at all puzzling. If two employees were wrongfully dismissed from the exact same job, in the exact same way, but one employee was injured and one was not, of course the injured employee should be entitled to more compensation – they have been injured and they have legal injury arising from the fact that they are injured.

[115] I have considered the extensive authority provided by counsel and applied it to the circumstances arising from the evidence in this case. *Sylvester* supports Ms. Hedrick’s position that the intention of the statute is the operative consideration. That said, and in my consideration of the statutory intention of the payments in Ms. Hedrick’s case, I find the disability benefits paid to Ms. Hedrick from August 29, 2022, are not deductible given that their purpose changed at that time. More specifically, the evidence confirms:

1. Ms. Hedrick’s mental health injuries arose from both the Stalker and from Mr. Ebner’s handling of the situation. These injuries necessitated her request for medical leave;
2. Ms. Wood directed Ms. Hedrick to WorkSafeBC. Ms. Hedrick applied for and became eligible for disability benefits;
3. The evidence of Mr. Fraser supports that, at least up until August 29, 2022, the disability payments served a dual function of compensating Ms. Hedrick

- for her injuries and for the income that she was no longer able to earn while she was off work. Specifically, he testified that up until August 29, 2022, approximately 90% of the short-term disability benefits received by Ms. Hedrick were intended to cover her wage loss;
4. Ms. Hedrick, through her testimony, acknowledged her own understanding that the benefits she received through short-term disability before August 29, 2022, were calculated with reference to her lost earnings;
 5. Up until August 29, 2022, Ms. Hedrick was still in receipt of those disability benefits that were available to her under her employment contract. Although there was no causal link between the disability benefits and the wrongful termination of her employment contract which happened well after she started collecting benefits, a compensating advantages problem would exist prior to that time if those same benefits had been paid through the September 16, 2022 termination date because they would have unequivocally been a substitute for the salary and commission which she was no longer able to earn;
 6. The evidence from Mr. Fraser, however, confirms that Ms. Hedrick's condition stabilized as of August 29, 2022. He explained that as of August 29, 2022, she was no longer receiving temporary wage loss benefits because by that point they determined that Ms. Hedrick's injuries were no longer temporary. He stated that once they "...determine that her injuries are permanent then vocational rehab starts paying". His evidence further confirms that they are bound by these policies, that the payments are two separate entities, that any payments Ms. Hedrick received as of August 31, 2022, were not related to severance pay but instead were for "vocational rehabilitation benefits", and then "permanent disability payments" based on a loss of function calculation;
 7. Mr. Fraser testified that Ms. Hedrick would not have known the difference because the amounts paid to her did not change; and

8. Mr. Fraser testified that he routinely needs to explain the difference to parties not familiar with WorkSafeBC's policies. His evidence was that the payee often does not know the difference because the amounts do not change, nor does the "payment type" on a WorkSafeBC payment summary necessarily reflect as different or accurate but, in fact, the payments start being paid out from a different pocket of money and for a different purpose.

[116] In summary, the evidence satisfies me that the WorkSafeBC benefits paid to Ms. Hedrick after she initially went on medical leave were primarily indemnity for lost wages. Likewise, I am equally satisfied on the evidence, and in particular on the evidence of Zack Fraser, that any payments made to Ms. Hedrick after August 29, 2022 were no longer in lieu of wages, were not for severance, but rather intended to compensate Ms. Hedrick for her injuries, for loss of function, for recovery, for return to work purposes, and to compensate her for the permanent injuries that WorkSafeBC unequivocally determined she had. Accordingly, I find they are not deductible from the damages awarded to her for wrongful termination.

Set-off for failure to mitigate with new employment?

[117] JMI bears the onus of proving failure to mitigate, and in order to meet that onus it must prove that Ms. Hedrick did not make sufficient efforts to find work and that similar employment was available.

[118] JMI submits that Ms. Hedrick failed to mitigate her damages, for example, by failing to pursue an employment opportunity as a property manager. Additionally, JMI asserts that Ms. Hedrick did not make reasonable efforts to apply for any employment position in the spa industry despite that she had the background and experience to do so. They submit that such employment would have been in line with her WorkSafeBC retraining, and that it was not reasonable for Ms. Hedrick to fail to make those efforts.

[119] In reviewing the evidence on this point, I find JMI has mischaracterized the "property management" opportunity. Ms. Hedrick's evidence on that point was that she took a position in property management for a week. It was an informal job

opportunity that was offered to her by a friend who was trying to help her out financially. With regard to employment in the spa industry, she acknowledged having some experience as an esthetician, but said her experience was limited to a couple of years of work in the industry and her training was dated.

[120] Moreover, Ms. Hedrick clarified her work effort limitations. She emphasized that from 2021 until the end of 2022 she was not medically fit to return to work. She explained that she did not pursue further work with her friend, nor did she make any job applications because at all times following her employment with JMI she was suffering from severe PTSD and major depressive disorder. She did, however, participate in the vocational rehabilitation programs provided by WorkSafeBC and through those programs identified the option of starting a MedSpa business as a way to generate income while she went to school, but it was not a plan that was viable without financing and further logistics.

[121] Having considered all of the evidence on this point, as well as the circumstances that led Ms. Hedrick to be off work, I find that it was not reasonable for JMI to have expected Ms. Hedrick to undertake additional job search efforts. As such, I decline to deduct any amount from the damages award for failure to mitigate.

Conclusion

[122] To conclude, I find that Ms. Hedrick was wrongfully dismissed by JMI and I award damages equivalent to nine months of payment in lieu of notice. I have calculated the damages based on an average of her previous three years of employment, and they amount to \$116,136.

[123] I find that Ms. Hedrick has not made out an award of punitive or aggravated damages, so I decline to award any. There will not be any deductions for WorkSafeBC benefits as I have found that the benefits were not intended to be indemnity for lost wages after Ms. Hedrick was dismissed. Similarly, I decline to make any deductions for a failure to mitigate as I find that Ms. Hedrick made reasonable efforts to find employment when I consider the medical conditions she was found to be living with at the time.

Costs

[124] Ms. Hedrick is the successful party and is presumptively entitled to her costs at Scale B. If either party wishes to dislodge this presumption, they must advise the other side and Supreme Court Scheduling within 14 days of these reasons and are at liberty to schedule a date before me as soon as reasonably practicable to argue the matter. Prior to the hearing, each side will provide a brief (no more than two pages) written argument to the other side and to the court at least seven days before the hearing date.

[125] Finally, I extend my sincere gratitude to counsel for their very capable advocacy and thorough written submissions.

“L. Bennett J.”

L. BENNETT J.