

Court of King's Bench of Alberta

Citation: Ross v Newly Institute Inc., 2026 ABKB 538

Date: 20260730
Docket: 2201 09116
Registry: Calgary

Between:

Dr. Marshall Ross

Plaintiff

- and -

Newly Institute Inc.

Defendant

Reasons for Decision of the Honourable Justice P. Banks

Part 1 – Introduction

[1] This case arises from a claim by the plaintiff, Dr. Marshall Ross, who alleges that he was wrongfully dismissed from his role as Chief Scientific Officer of the Newly Institute Inc. in July of 2022.

[2] The Newly Institute disputes that assertion. It maintains that Dr. Ross was not terminated, but was instead temporarily suspended during a period of organizational restructuring, and that he subsequently either resigned or abandoned his employment. At trial, the Newly Institute submitted that in the alternative, if Dr. Ross was dismissed, it was for just cause – the cause being insolence.

Part 2 – The Facts

[3] The company was initially incorporated under the name of Aspen Island Therapeutics Inc., but changed its name to the Newly Institute around December of 2021. In these reasons, I will refer to the Newly Institute and Aspen Island Therapeutics interchangeably.

[4] Dr. Ross was the Newly Institute's Chief Scientific Officer. In this role, Dr. Ross provided clinical leadership, operational guidance, and contributed to program development. Dr. Ross reported to the Newly Institute's CEO, Arthur Kwan.

The Employment Agreements

[5] The parties entered into many agreements over the course of 2021 and 2022. The question of which of these agreements is applicable in this case is a live issue.

[6] The following is a brief overview of the agreements:

- (a) **Advisory Committee Participation Agreement dated January 5, 2021:** this agreement was entered into between Dr. Ross and Aspen Island Therapeutics. It included a Share Grant Agreement that was attached as Schedule B.
- (b) **Executive Employment Agreement dated March 1, 2021 ("Initial Contract"):** this was the initial employment contract between Dr. Ross and the Newly Institute.
- (c) **Executive Employment Agreement dated December 1, 2021 ("December 2021 Contract"):** this is a revised employment contract between Dr. Ross and the Newly Institute. This agreement established Dr. Ross's compensation and contained a termination provision which entitled him to substantial severance in the event of termination of employment. I will address this in more detail later in these reasons.
- (d) **Executive Employment Agreement dated March 1, 2022 ("March 2022 Document"):** the Newly Institute unilaterally presented this agreement to Dr. Ross to sign. It purports to significantly reduce Dr. Ross's severance entitlement upon termination of employment. It is otherwise essentially identical to the December 2021 Contract. There is a question of whether it is enforceable due to issues with respect to a lack of fresh consideration provided by the Newly Institute.
- (e) **Amending Agreement dated May 1, 2022:** this states at paragraph 3 that during the period of May 1, 2022 until July 31, 2022, "any references in the Employment Agreement to Termination Payment shall be based on the Base Salary, and not the salary that the Executive was being paid at the time of termination of employment."

Termination of Employment

Early 2022

[7] In the first half of July 2022, Mr. Kwan made significant changes at the Newly Institute. Some individuals were terminated from their employment and others resigned. The Chief Medical Officer, who had previously been dismissed, was brought back to the company. On this point, I note that the Court does not have evidence of any particulars with respect to the reasons for the earlier termination. I therefore cannot put any weight on the circumstances of his termination and rehiring, other than that his return was identified as raising concerns with other employees.

[8] During this period, the Newly Institute also terminated the employment of its clinic manager, Natasha Bainsley. Jeff Krahn, who was one of the senior clinicians at the Newly Institute's Calgary clinic, resigned.

[9] On July 12, 2022, Dr. Ross was placed on temporary suspension with pay. These three individuals - Ms. Bainsley, Mr. Krahn, and Dr. Ross - had their access to the Newly Institute's system cut; however, Dr. Ross's access was restored later that day.

[10] Dr. Ross was concerned about all the changes that were taking place at the Newly Institute, and the negative impact they had on the company.

Pre-July 14 Meeting

[11] Shortly after these events, Mr. Kwan indicated to Dr. Ross that he might have made a mistake in terminating Ms. Bainsley's employment. He asked Dr. Ross to approach Ms. Bainsley and Mr. Krahn to see if they would consider returning to the company.

[12] Dr. Ross contacted these individuals as requested. Ms. Bainsley indicated to Dr. Ross that she was hesitant to return, and that she did not want to work in a place where decisions would be made on a whim. Dr. Ross discussed the conditions upon which these two individuals would be willing to return to the Newly Institute.

July 14, 2022 - Glencoe Club Meeting ("July 14 Meeting")

[13] After corresponding with the individuals in question, Dr. Ross met with Mr. Kwan on Thursday July 14, 2022, at 4:00 PM at the Glencoe Club in Calgary. This meeting is a central event in this case. At the meeting, Dr. Ross advised Mr. Kwan that staff had lost confidence in him as CEO, and that the only way to restore operations to a functional level was for him to resign from the position of CEO and to instead fill a different role within the Newly Institute.

[14] Dr. Ross told Mr. Kwan that he brought a lot of positive attributes to the company; he said that Mr. Kwan was great at raising money, and that he had done a great job. However, Dr. Ross also said that he thought the decisions Mr. Kwan had made that week were very harmful for the Newly Institute. He used a nautical metaphor and stated that it felt like Mr. Kwan had "torpedoed his own ship".

[15] Dr. Ross discussed Ms. Bainsley's and Mr. Krahn's conditions for coming back to the Newly Institute. These conditions reflected general concerns about terminations and similar decisions being made unilaterally at the Newly Institute. The conditions were as follows:

- (a) Mr. Kwan was to step down as CEO. Dr. Ross proposed that Mr. Kwan instead take on the role of president or a similar position;
- (b) A token of founders' shares were to be transferred from Mr. Kwan to Ms. Bainsley, Mr. Krahn, and Dr. Ross; and
- (c) The individual who had previously been terminated as Chief Medical Officer, and had later been reinstated, was to be removed.

[16] According to Dr. Ross, Mr. Kwan appeared to be upset by these requests.

[17] With respect to the condition that Mr. Kwan step down from the role of CEO, Dr. Ross pointed out in his evidence that Mr. Kwan had previously told him he did not want to be the CEO forever. Accordingly, Dr. Ross suggested that it might now be time for Mr. Kwan to transition to a different role within the company and that they should hire an executive search company to find an experienced CEO to take over the role as soon as possible. Dr. Ross also said that, if Mr. Kwan agreed and it was necessary, he would be willing to stand in as CEO temporarily while they looked for a new candidate.

[18] Mr. Kwan testified that his interpretation of the meeting was that Dr. Ross had intimated his intention to resign from his role as Chief Scientific Officer if these demands were not met; he acknowledged, however, that Dr. Ross did not expressly say this.

[19] The meeting ended with Mr. Kwan saying he would respond at the end of the day.

[20] At the end of the day on July 14 at 7:41 PM, Mr. Kwan wrote to Dr. Ross, saying:

I promised to get back to you tonight. After much thought and debate, unfortunately, I / we cannot live with the demands for you, Natasha, and Jeff to come back.

We wish the three of you all the best in your future endeavours.

[21] I note that this was sent to Dr. Ross's gmail account rather than his account on the Newly Institute's system. Dr. Ross's access to his Newly Institute email account had been unilaterally cut a second time.

[22] Dr. Ross, on his gmail account, wrote back to Mr. Kwan on July 14 at 9:40 PM and said he needed access to his Newly Institute account to work as the Chief Scientific Officer as well for two important meetings he had the next day. Dr. Ross wrote:

thanks for getting back to me Arthur amd [sic] thank you for your consideration.

I will require access to me [sic] email reinstated in order to continue to support the newly in my role as chief scientific officer.

notably [sic], i [sic] have two important meetings tomorrow morning that will be unable to access without my account. please advise.

[Emphasis added]

[23] Dr. Ross's access to his Newly Institute account was not restored as requested.

Post-July 14 Meeting

[24] Mr. Kwan wrote to Dr. Ross on Friday, July 15 at 10:11 PM, saying:

Thank you for the note. It's been a long week for all of us.

Let's plan to speak on Monday

[25] Despite this statement, neither Mr. Kwan nor anyone else from the Newly Institute followed up with Dr. Ross on Monday.

[26] Instead, Dr. Ross received no further explanation of the Newly Institute's position. Dr. Ross's access to the Newly Institute system remained blocked and he continued to be locked out of his Newly Institute email account.

[27] In addition, a townhall meeting at the Newly Institute took place earlier on the Friday, which Dr. Ross was not invited to or advised of.

Correspondence Between the Parties

[28] Mr. Kwan did not follow up with Dr. Ross on the Monday as promised. Dr. Ross thus understood that his employment had been terminated based on all of the circumstances, including Mr. Kwan's statement that he wished him the best of luck in the future, the termination of his computer access, his being prevented from doing his work, Mr. Kwan's failure to follow up on Monday as promised, the communication going to Dr. Ross's gmail account instead of his work account, and other treatment by the Newly Institute which excluded him from the company.

[29] On July 18, 2022, counsel for Dr. Ross wrote to the Newly Institute and stated that Dr. Ross was entitled to the Termination Payment under the Employment Agreement as he had been terminated. Dr. Ross's lawyers wrote:

We write in response to your email dated July 14, 2022, and the actions taken by the Newly thereafter to remove Dr. Ross's access to the business, including his emails. The termination of Dr. Ross's employment is without cause and triggers contractual obligations on Newly within two business days (i.e., by Tuesday, July 19, 2022).

[30] The letter set out the remedies under the Employment Agreement for termination without cause, and it concluded by requesting confirmation from the Newly Institute that the severance entitlement would be paid to Dr. Ross in accordance with the contract.

[31] On July 20, 2022, Mr. Kwan sent an email to Dr. Ross, stating:

We received a letter from your lawyers yesterday. We were surprised by its contents. We confirm that at no time did we terminate your employment. You remain a valuable and respected member of the team and we hope and expect that you will continue with us.

[32] The email concluded by stating that Dr. Ross was either to report for work or, if his intention was not to return to the company, he was to provide a written form of resignation by the end of the day. The email states:

We now understand that your intention may be not to return to the company. If that is the case, please provide us with your written form of resignation no later than 4:00 p.m. (Calgary time) today so that we can process the end of your employment with The Newly on that basis.

If we do not receive a written resignation from you by 4:00 p.m. (Calgary time) today, and if you do not attend at work tomorrow morning at 9:00 a.m. in the normal course, we will understand that you have abandoned your employment and conclude the employment relationship on that basis.

[33] I note that the Newly Institute, at this point, had still not re-activated Dr. Ross's computer access.

[34] Dr. Ross did not return to work as requested by the Newly Institute. Instead, Dr. Ross saw this as an attempt by the Newly Institute to course correct. Counsel for Dr. Ross wrote a letter to Mr. Kwan dated July 20, pointing this out:

Your email is a poor attempt to reverse course from a brash decision to terminate Dr. Ross. As you well know, Dr. Ross has not resigned and will not be providing notice of resignation. He also has not abandoned his employment. The fact of the matter is that you terminated him on Thursday, July 14, 2022, wished him the best of luck in his future endeavours, immediately cut off his access to his emails and excluded him from attending important business meetings on Friday, July 15, 2022. He remains locked out of his accounts so he can hardly be expected to return to work. Newly then refused to respond to our letter or rectify the situation before the contractual obligations for severance were due.

We have instructions to seek a claim for wrongful dismissal [...] for the contractual obligations due to Dr. Ross

[35] On August 10, 2022, Mr. Kwan wrote to Dr. Ross stating:

Hi Marshall,

Are you back from vacation on Monday? If so, I think we should all sit down and talk.

You have not been terminated. There is a place and role for you here.

You are valued and I'm sure we can come to a solution that works for everyone.

Thanks,

Arthur

[36] On August 11, 2022, Dr. Ross filed a statement of claim starting this action.

[37] The Newly Institute sent a letter dated August 17, 2022, to Dr. Ross notifying him that his employment was effectively terminated due to abandonment. It stated that because "your absence has not been approved, and we have not heard from you, we have determined that you have abandoned your position."

[38] In this action, Dr. Ross claims that he was summarily dismissed from his employment on or around July 14, 2022, and that he is entitled to the Termination Payment in the amount of \$300,000.

[39] The Newly Institute disagrees and submits that Dr. Ross had either resigned or abandoned his position, and that Dr. Ross had seized upon the confusion as a transparent ploy to trigger termination entitlements under the contract.

Part 3 - Issues

[40] The issues which arise in this case are:

- (1) Did the Newly Institute terminate Dr. Ross's employment, or did he resign and/or abandon it?
- (2) If Dr. Ross's employment was terminated by the Newly Institute, was that termination for just cause?
- (3) Which employment agreement is applicable to this case?

Part 4 – Analysis

(1) Did the Newly Institute terminate Dr. Ross's employment, or did he resign and/or abandon it?

[41] Dr. Ross claims that the Newly Institute terminated his employment. The Newly Institute disagrees, stating that Dr. Ross either resigned or abandoned his employment.

i. Test for Termination

[42] The test for dismissal is an objective test. The Court must look at all of the unique facts and circumstances of the case. In *Bohnet v Rebel Energy Services Ltd*, 2018 ABPC 131, the Court succinctly summarized the test at para 30, stating:

The applicable test to determine whether an employee is terminated has been stated by many courts in a variety of ways but it amounts to the following: given all of the surrounding circumstances, would a reasonable person have understood the defendant's statements to mean that the Plaintiff was dismissed. The test is an objective one and the burden lies upon the Plaintiff to prove on a balance of probabilities that he was dismissed.

See also: *O'Donoghue v Fluid Energy Group Ltd*, 2026 ABKB 428 at paras 93 – 94 [*O'Donoghue*]; *Stonham v Recycling Worx Inc*, 2023 ABKB 629 at para 92 [*Stonham*]; *Beggs v Westport Foods Ltd*, 2011 BCCA 76 at para 36 [*Beggs*].

[43] This is an objective test. Whether the employer subjectively intended to dismiss the employee is not relevant. Instead, it is the employer's actions and the totality of the surrounding circumstances, viewed objectively, that matter. The test is whether, based on all of the surrounding circumstances, a reasonable person would have understood that the employee was dismissed.

[44] The burden of proof for establishing that an employee was dismissed from his or her employment is on the employee.

ii. Test for Resignation

[45] The test for resignation is a subjective and objective test. It asks whether, subjectively, the employee intended to resign, and whether objectively, looking at all of the circumstances, a reasonable employer would have understood that the employee had resigned.

[46] In *Stonham* at para 77, Marion J. summarized the test as follows:

[...] in determining whether an employee has resigned, the Court applies a subjective and objective test: subjectively, did the employee intend to resign; and objectively, viewing all the circumstances, would a reasonable employer have understood that the employee had resigned? Ordinarily, there must be a clear and unequivocal act in the form of a statement of an intention to resign or positive conduct from which that intention would clearly appear: *Palme* at paras 37-44; *Geddes* at paras 58-60; *Zoehner* at para 56; *Beggs* at paras 36, 41.

[47] Likewise, in *Caroll v Purcee Industrial Controls Ltd*, 2017 ABQB 211 [*Caroll*], Pentelechuk J. (as she then was) stated at para 25:

In determining whether an employee has resigned, the Court applies a subjective and objective test: subjectively, did the employee intend to resign; and objectively, viewing all the circumstances, would a reasonable employer have understood that the employee had resigned: *Geddes v Silvestri Holdings Inc*, 2014 ABQB 416, [2014] A.J. No 733 (QL) at para 58, citing *Beggs v Westport Foods Ltd*, 2011 BCCA 76, 14 BCLR (5th) 1; see also *Robinson v Teamcooper Heat-MQS Canada Inc*, 2008 ABQB 409, 95 Alta LR (4th) 249 at paras 38-42 [Robinson]; *Evans v Avalon Ford Sales (1996) Ltd*, 2017 NLCA 9, [2017] NJ No 41 (QL) at paras 23-24 [Evans].

[48] Similarly, in *Beggs* the British Columbia Court of Appeal stated at para. 36:

It is common ground that both a dismissal by an employer and a voluntary resignation by an employee require a clear and unequivocal act by the party seeking to end the employment relationship. There is a distinction, however, in the tests to be met in order to establish each of these methods for ending the employment relationship. A finding of dismissal must be based on an objective test: whether the acts of the employer, objectively viewed, amount to a dismissal. A finding of resignation requires the application of both a subjective and objective test: whether the employee intended to resign and whether the employee's words and acts, objectively viewed, support a finding that she resigned.

[49] The burden of proof for establishing resignation is on the employer.

iii. Test for Abandonment

[50] The test for abandonment was recently summarized by this Court in *Stonham* at para 84. In that case, Marion J. stated the test as follows:

Abandonment occurs when the employee unequivocally, through their words or actions and viewing the circumstances objectively, abandons the contract of employment: *Carroll* at para 58; *Fitzgibbons v Westpres Publications Ltd* (1983), 1983 CanLII 645 (BCSC), 50 BCLR 219, 3 DLR (4th) 366 (SC) at paras 26-27; *Mistras* at para 33; *Pereira v Business Depot Ltd*, 2011 BCCA 361 at para 47.

[51] He added at para 85:

Whether there has been abandonment will depend on all the circumstances. The test is whether, viewing the circumstances objectively, a reasonable person would have understood from the employee's words and actions, that she or he had abandoned the contract of employment: *Mistras* at para 33; *Pereira* at para 47; *Danroth v Farrow Holdings Ltd*, 2005 BCCA 593 at paras 7-8. The test may be met where an employee fails to attend work for an extended period without reasonable excuse or explanation: *Carroll* at para 58; *Deakin v Northern Telecom Canada*, 1992 CarswellAlta 633, 129 AR 28 at para 68.

[52] Marion J. also pointed out that each case turns on its own specific and unique facts, but some guidance may still be taken from similar cases.

[53] Likewise, in *Carroll*, Pentelechuk J. explained at para 58:

Abandonment occurs when the employee unequivocally, through their words or actions and viewing the circumstances objectively, abandons the contract of employment: *Fitzgibbons v Westpres Publications Ltd* (1983), 50 BCLR 219, 3 DLR (4th) 366 (SC) at paras 26-27; *Smith v Mistras Canada Inc*, 2015 ABQB 673, 28 Alta LR (6th) 137 at para 33; *Pereira v Business Depot Inc (cob Staples Business Depot)*, 2011 BCCA 361, 93 CCEL (3d) 74 at para 47. For example, it is an implied term of every employment contract that the employee attend work, so an employer may take the position that the employee has abandoned their employment if they fail to attend work for an extended period without reasonable excuse or explanation.

[Emphasis added]

[54] Likewise, in *Zoehner v Algo Communication Products Ltd*, 2023 BCSC 224 the Court stated at para 52:

The test is objective: whether, viewing the circumstances objectively, would a reasonable person have understood from the employee's words and actions, that he or she had abandoned the contract? See *Pereira v. The Business Depot Ltd.*, 2011 BCCA 361, at para. 47.

[55] The employer has the burden of proof for establishing abandonment.

Application of Tests to Facts

i. Did Dr. Ross resign from his Employment?

[56] I will start with the events of July 14, 2022, and the meeting between Dr. Ross and Mr. Kwan. In order to support a finding that Dr. Ross resigned from his employment, the Newly

Institute must establish that (1) subjectively, Dr. Ross intended to resign, and (2) objectively, viewing all the circumstances, a reasonable employer would have understood that Dr. Ross had resigned.

[57] I do not find, on these facts, that either limb of the test is established. Objectively, at the July 14 meeting, Dr. Ross was relaying the issues with respect to the departed employees – as he was requested to do. Dr. Ross might have agreed with the concerns about the direction the Newly Institute was going, but this does not rise to the level of saying that he objectively intended to resign.

[58] Nor would a reasonable employer, in my view, have understood that Dr. Ross had resigned. He was carrying out the specific task he was given and reporting back to Mr. Kwan. Mr. Kwan might not have liked what he heard from Dr. Ross, but that is not the test.

[59] Dr. Ross did not state that he was resigning, nor did he imply it. There is no evidence that Dr. Ross objectively or subjectively intended to resign.

[60] Further, after Dr. Ross's computer access had been unilaterally blocked by the Newly Institute, Dr. Ross wrote to Mr. Kwan on his gmail account to expressly ask for his Newly Institute account to be reinstated, given the important upcoming meetings he had. This objectively indicates that Dr. Ross wanted to keep working at the Newly Institute.

[61] This is confirmed as Dr. Ross specifically emailed to ask for computer access:

I will require access to me [sic] email reinstated in order to continue to support the newly in my role as chief scientific officer.

notably [sic], i [sic] have two important meetings tomorrow morning that will be unable to access without my account.

[62] Applying the legal test for resignation of an employee, as is set out in the authorities, I find that Dr. Ross did not resign at or after the July 14 meeting. The evidence is clear. Neither the objective nor the subjective elements of the test have been established.

ii. Did the Newly Institute terminate Dr. Ross's employment?

[63] The next question is whether the Newly Institute terminated Dr. Ross's employment at or after the July 14 meeting. This is an objective test and, in order to succeed, Dr. Ross must establish on a balance of probabilities that a reasonable person in all the circumstances would have understood that they were dismissed.

[64] In this case, the Newly Institute's conduct on July 14 and thereafter supports the conclusion that Dr. Ross's employment had been terminated:

- (a) Dr. Ross's computer access was unilaterally blocked by the Newly Institute after the July 14 meeting;
- (b) Mr. Kwan sent an email to Dr. Ross stating that "We wish the three of you all the best in your future endeavours";

- (c) Dr. Ross wrote using his gmail account, to indicate that he required access to his Newly Institute email to be reinstated in order to continue to support the company in his role as Chief Scientific Officer. The Newly Institute ignored this;
- (d) Despite Dr. Ross's clear indication that he wanted to stay with the Newly Institute, he was not given a positive reply or any positive reassurance. Instead, he was told "Thank you for the note. It's been a long week for all of us. Let's plan to speak on Monday". That did not happen. The Newly Institute did not follow up on Monday.
- (e) Dr. Ross was not invited to the townhall on July 15;
- (f) Dr. Ross was effectively excluded from the Newly Institute – with no updates or any positive assurances.

[65] It was not until Dr. Ross's lawyers wrote to the Newly Institute, demanding his Termination Payment per the Employment Agreement, that he even got a response.

[66] The Newly Institute's response suggested that this was a misunderstanding and that there was still a spot for Dr. Ross at The Newly Institute. Dr. Ross did not see this as a genuine statement, but instead interpreted it as a late attempt by the Newly Institute to course correct, especially given the legal position it put itself in with Dr. Ross's termination. I agree with Dr. Ross.

[67] The Newly Institute submits that at no time did it communicate that Dr. Ross was terminated, nor did it provide notice of termination, issue a Record of Employment indicating a dismissal, or end payroll for Dr. Ross until his resignation and / or the abandonment of his employment at the Newly Institute. But, it is the substance that matters. Despite not doing these formal steps, the substance of what transpired was clear – Dr. Ross's employment had been terminated.

[68] The Newly Institute also points to an earlier text dated July 12 that was sent from Sat Parhar, who was the President of the Newly Institute, to Dr. Ross when he was first put on the temporary suspension. In this text from July 12, Mr. Parhar stated:

No one has planned any termination. It is not how I think or work.

Thus having Natasha over to visit me.

You are a part of this and have been from the start.

I am not sure why you are thinking that was the plan. There has been no anterior [sic] plan regarding you except being a valued member of our leadership team.

[69] But, on July 14 at 7:01 AM he further texted that:

Good Morning Marshall. I hope you are doing as well as possible. I know you have lots of thoughts and feelings going on right now.

I really hope that you will reflect and think about why this has all happened.

I honestly have nothing but respect for you. Before you make any decisions I hope we can talk.

I will do nothing but support you and I know that it is hard to see with all the anxiety and things happening.

Take care. And I am really sorry this all happened on your son's 5th birthday.

[70] Dr. Ross points out that the July 12 text was prior to the events with Mr. Kwan where matters escalated rapidly.

[71] The totality of the conduct of the Newly Institute clearly indicates that it had terminated Dr. Ross's employment, when considered objectively and in light of all of the circumstances. Further, even if Mr. Kwan did not subjectively intend to terminate the employment of Dr. Ross, objectively that was the effect of the totality of the Newly Institute's actions.

[72] While each case must be determined on its own facts, I find that this case is similar to other cases in which an employee is directed to turn in his or her laptop, computer password, or key cards. Examples include *O'Donoghue* and the cases cited therein, such as *Thompson v Cardel Homes Limited Partnership*, 2014 ABCA 242.

[73] The Newly Institute argues that it was entitled to put Dr. Ross on administrative suspension. Even if that is the case, the circumstances of this case and the way in which the events unfolded clearly indicate that the Newly Institute ultimately terminated Dr. Ross's employment when all of the facts are considered objectively.

[74] I conclude that in the totality of the circumstances, a reasonable person in Dr. Ross's position would have clearly understood that he or she was dismissed from the Newly Institute on July 14, 2022, and the days that followed.

[75] I find that Dr. Ross was dismissed from his employment.

iii. Did Dr. Ross abandon his employment?

[76] The Newly Institute submits that Dr. Ross abandoned his employment at the Newly Institute after the July 14 meeting. I respectfully disagree. Dr. Ross did not abandon his employment, as the Newly Institute had already terminated it. The test for abandonment is not met. There were no words or conduct of the employee nor circumstances which, viewed objectively, indicate that Dr. Ross had abandoned his employment. To the contrary, Dr Ross indicated:

I will require access to me [sic] email reinstated in order to continue to support the newly in my role as chief scientific officer.

notably [sic], i [sic] have two important meetings tomorrow morning that will [sic] be unable to access without my account.

[77] The record is clear that Dr. Ross had not abandoned his employment, but rather wanted to work despite being excluded and unilaterally locked out.

[78] In my respectful view, the events which followed, including the Newly Institute's communications which stated that if Dr. Ross did not attend at work he would be taken to have abandoned his employment, appear to be the Newly Institute setting up a position. There is an air of artificiality to them. These demands were only sent after the Newly Institute had received the letter from Dr. Ross's lawyers seeking the Termination Payment per the contract.

[79] I find that Dr. Ross did not abandon his employment at the Newly Institute.

(2) If Dr. Ross's employment was terminated by the Newly Institute, was that termination for just cause?

[80] The Newly Institute submits, as an alternative position, that if Dr. Ross's employment was terminated, it was for just cause. In particular, the Newly Institute claims that Dr. Ross was insolent and that his conduct, particularly in the July 14 meeting and the events surrounding it, justified his dismissal in the circumstances.

[81] In *McDonald v Sproule Management GP Ltd*, 2023 ABKB 587, Marion J. stated at paras 63 - 64:

63 [...] Terminating an employee for just cause has been referenced as the "capital punishment" of employment of law: *Ross v IBM Canada Limited*, 2015 ABQB 563 at para 30. The onus is on the employer to prove just cause: *Haack* at para 110; *Whitford v Agrium Inc*, 2006 ABQB 726 *Whitford* at para 30.

64 A finding of misconduct does not, in and of itself, give rise to just cause for termination of employment - the employee's behaviour must be such that gave rise to the breakdown of the employment relationship so that the employment relationship could no longer viably subsist: *Baker* at para 28, citing *McKinley v BC Tel*, 2001 SCC 38 (CanLII), [2001] 2 SCR 161 at paras 29, 48-49. The core question is whether the employee has engaged in sufficiently serious misconduct that is incompatible with the fundamental terms of, that strikes at the heart of, or is a repudiatory breach of, the employment relationship: *Baker* at para 28, citing *Dowling v Ontario (Workplace Safety and Insurance Board)* (2004), 2004 CanLII 43692 (ON CA), 192 OAC 126; *Haack* at para 409; *Smith v Vauxhall Co-op Petroleum Limited*, 2017 ABQB 525 at para 12 [*Vauxhall*].

[82] Marion J. also summarized the leading case authorities and legal principles that are applicable to a claim of insolence at para 78:

Insolence towards the employer is treated similarly to insubordination, although it engages slightly different considerations: *Motta* at para 54; *Henry* at para 34. Insolence has been defined as the use of "insulting, abusive, threatening or unreasonably violent words": *Partridge v Botony Dental Corporation*, 2015 ONSC 343 at para 32 affirmed 2015 ONCA 836; as "haughty and contemptuous or brutal behaviour or language": *Mellquist v Lake of the Rivers (Rural Municipality)*, 1987 CanLII 4951, 62 Sask R 165 (QB) at para 21; or as "derisive, contemptuous or abusive language or conduct directed by an employer at his/her employer": *Bennett v Cunningham*, 2011 ONSC 28 at para 15. In this case, Sproule pleads that McDonald was belligerent ("inclined to or exhibiting assertiveness, hostility, or combativeness"; "waging war": *Merriam-Webster Dictionary*, online: Merriam-Webster.com <https://www.merriam-webster.com/dictionary/belligerent>) and bellicose ("favoured or inclined to start quarrels or wars": *Merriam-Webster Dictionary*, online: Merriam-Webster.com <https://www.merriam-webster.com/dictionary/bellicose>). In my view those allegations involve similar considerations as insolence.

[83] Marion J. added at para 79:

Insolence can justify summary dismissal of an employee if: (1) the employee and superior are no longer capable of maintaining a working relationship; (2) the incident undermined the supervisor's credibility in the workplace and, relatively, their ability to supervise effectively; or (3) that because of the incident, the employer suffered a material financial loss, a loss of reputation or its business interests were seriously prejudiced: *Motta* at para 53; *Henry* at para 111. Context and proportionality govern, including where strong exchanges have been a tolerable part of the culture of the workplace: *Motta* at para 54; *Dawson v Bridge Brand Food Services Ltd*, 2007 ABQB 15 at para 39.

[84] In this case, the Newly Institute submits that it was entitled to terminate Dr. Ross's employment for the cause of insolence. The Newly Institute characterizes the events of July 2022 as being akin to a hostile takeover attempt whereby Dr. Ross sought to oust Mr. Kwan as the CEO of the Newly Institute and to take over that position for himself.

[85] Dr. Ross argues that the July 14 meeting was to address the issues raised by Mr. Kwan and it was not a strategic takeover as the Newly Institute paints it to be.

[86] I find on the totality of the evidence that the Newly Institute has not established that Dr. Ross was insolent or that it was entitled to terminate Dr. Ross for any cause. To the contrary, at the July 14 meeting, Dr. Ross was relaying the information he collected from the other two employees, as he was instructed to do. Further, in my view, the Newly Institute overstates the suggestions Dr. Ross presented. For example, the proposed condition to get the other employees back was not to entirely exclude Mr. Kwan; rather, it was to put him in another important position, such as the office of president.

[87] Further, Dr. Ross was not seeking to take the position of CEO for himself, as the Newly Institute submits. Rather, the evidence is clear that this was only to be a temporary measure; Dr. Ross suggested engaging an executive search firm to identify a competent candidate as being the proper course of action.

[88] While Mr. Kwan's reaction, as described in the evidence, was one of surprise and visible frustration, the evidence does not suggest that Dr. Ross framed any of this as a personal attack on Mr. Kwan. It was not a takeover attempt. Nor could it be described as "insulting, abusive, threatening or unreasonably violent words"; "haughty and contemptuous or brutal behaviour or language"; or "derisive, contemptuous or abusive language or conduct directed by an employee at his/her employer".

[89] Context is extremely important for claims of insolence. In the context of this case, the Newly Institute asked Dr. Ross to assist with identifying how it could get key employees to return to work. Dr. Ross made these requested inquiries and was simply reporting back on the issue he was tasked with. I accept that Dr. Ross presented this information to Mr. Kwan in a polite and respectful manner.

[90] While the views were difficult for Mr. Kwan to hear, it was a candid report of the views given to Dr. Ross and it was clearly not rude or insolent. I conclude that Dr. Ross was not insolent, as it is described in the case law. This is not a legitimate cause for the Newly Institute to terminate Dr. Ross's employment.

[91] I conclude that the Newly Institute did not have cause to terminate Dr. Ross's employment.

(3) Which employment agreement is applicable to this case?

[92] The final issue is which contract sets out the applicable Termination Payment. Dr. Ross submits that he is entitled to the Termination Payment set out under the December 2021 Contract. The Newly Institute submits that the March 2022 Document applies instead; the March 2022 Document significantly limits the Termination Payment. Dr. Ross disagrees and states that the March 2022 Document fails for lack of fresh consideration.

i. December 2021 Contract

[93] The December 2021 Contract provides for 18 months termination pay.

[94] The "Termination Payment" is set as:

a lump sum payment equal to eighteen (18) months of the Executive's monthly base salary at the Termination Date. For clarity, the maximum Termination Payment will be a lump sum payment of one point five times (1.5x) the Executive's annual base salary at the time of termination of employment.

[95] The base salary was \$200,000 and the Termination Payment is \$300,000.

ii. March 2022 Document

[96] The March 2022 Document is pretty much identical to the December 2021 Contract, except it purports to effect a sharp reduction in termination pay.

[97] Section 1 of the March 1, 2022 Document states:

"Termination Payment" means a lump sum payment equal to one (1) month of the Executive's base salary at the Termination Date, plus one (1) month of the Executive's base salary for each full year of service from the Effective Date, up to a maximum of eighteen (18) total months base salary. For clarity, the maximum Termination Payment will be a lump sum payment of eighteen (18) months of the Executive's base salary at the time of termination of employment.

[98] Again, the December 2021 Contract and the March 2022 Document are essentially identical – with the exception of the termination payment amount. The evidence is that the Newly Institute thought the December 2021 Contract was too employee-friendly and it wanted to reduce its employee's entitlement by changing to the March 2022 Document. It is otherwise identical to the December 2021 Contract and there is no benefit given to the employee. It was simply presented for signature.

[99] There is a dispute about the March 2022 Document and whether the March 2022 Document is enforceable given the lack of fresh consideration.

iii. Law of Fresh Consideration

[100] It is well established that an employer must give fresh consideration in order for a change to a significant part of an employment contract to be binding on the employee. Continued employment alone is not fresh consideration to support a significant contractual change. Instead,

there must be some other benefit that flows to the employee. The requirement for fresh consideration is particularly important where the employer seeks to modify the contract with respect to termination, because these can be significant modifications. For example, see: *Stonham* at paras 63 – 65; *Globex Foreign Exchange Corp v Kelcher*, 2011 ABCA 240 at paras 87 and 91; *Francis v CIBC*, [1994] OJ No 2657 (CA) at paras. 19 - 30; *Hobbs v TDI Canada Ltd*, [2004] OJ No 4876 (CA) at paras 32 – 44; *Braiden v La-Z-Boy Canada Limited*, 2008 ONCA 464 at paras 51 – 64; *Singh v Empire Life Ins Co*, 2002 BCCA 452 at paras 11 – 17; *Theberge-Lindsay v 3395022 Canada Inc*, 2018 ONSC 3222 at paras 32 – 39, var'd on other grounds 2019 ONCA 469; *Goberdhan v Knights of Columbus*, 2022 ONSC 3788 at paras 15 – 22; aff'd 2023 ONCA 327; *Holland v Hostopia Inc*, 2015 ONCA 762 at paras 47 – 55; *Krieser v Active Chemicals Ltd*, 2005 BCSC 1370 at paras 15 – 36.

iv. Application

[101] The key issue is whether the March 2022 Document is enforceable. The December 2021 Contract provided for a Termination Payment of 18 months' salary. The effect of the March 2022 Document is drastic as it purports to significantly reduce the size of the Termination Payment.

[102] This is a significant change to the employment agreement. Therefore, according to the case authority, this type of change to the employment contract must be supported by fresh consideration.

[103] The question is whether fresh consideration was provided by the Newly Institute. Based on the evidence in this case, I conclude that fresh consideration was not provided.

[104] The recital to the March 2022 Document states that the consideration is a signing bonus of \$500 paid as consideration for entering this Agreement, which it indicates that the Newly Institute has paid and the Executive has received. It reads:

AND WHEREAS the Company has agreed to pay, and the Executive has received, a signing bonus of \$500.00 (the "Signing Bonus") as consideration for entering into this Agreement, which is intended to replace the Previous Agreement.

[105] The recital to the December 2021 Contract also states:

AND WHEREAS the Company has agreed to pay, and the Executive has received, a signing bonus of \$500.00 (the "Signing Bonus") as consideration for entering into this Agreement, which is intended to replace the Previous Agreement.

[106] It is clear in the record (including the pleadings and the read-ins) that the Newly Institute had made only a single payment of \$500 in November of 2021, and it is seeking to use this single earlier payment of \$500 as consideration to support both the December 2021 Contract and the March 2022 Document.

[107] This is clearly not fresh consideration for the March 2022 Document. I find that the March 2022 Document fails to provide any fresh consideration to the employee and it is unenforceable. I find that the March 2022 Document and the December 2021 Contract are

essentially identical – with the exception of the change to the Termination Payment. As set out in the case law above, in order for a change to a significant part of an employment contract to be binding on the employee, there must be fresh consideration. Continued employment on its own is not sufficient. This is not present for the March 2022 Document.

[108] During argument, the Newly Institute submitted that the March 2022 Document was needed due to the high termination payment that was going to be provided to employees under the December 2021 Contract which was too employee friendly; it suggested that the March 2022 Document was for the benefit of the Newly Institute and its shareholders, and that this might qualify as consideration to support it.

[109] With respect, this position has a number of weaknesses. First, in my view, the evidence in this case does not support this conclusion or that this was part of the bargain with Dr. Ross. Second, the March 2022 Document could significantly harm employees, such as Dr. Ross. Third, accepting this position is contrary to the law requiring fresh consideration for significant changes in the employment context. Fourth, it is contrary to the wording of the recital in the March 2022 Document, which itself expressly defines the consideration as the \$500 signing bonus and the read-ins and the Newly Institute's pleadings make it clear that only one \$500 payment was exchanged and that the Newly Institute sought to use this single amount to support both the December 2021 Contract and the March 2022 Document. As indicated earlier, this is not fresh consideration to support the March 2022 Document.

[110] Lastly, the Newly Institute cites the case of *Rosas v Toca*, 2018 BCCA 191, in which a British Columbia Court of Appeal suggested that consideration is no longer required to support all contractual amendments. The Newly Institute has invited this court to change the law in Alberta to align with the approach taken in *Rosas*. However, I would decline to take up this invitation, especially in the employment context and given the significant body case law which clearly sets out the requirement for fresh consideration to make changes of this nature and magnitude to an employment contract.

[111] Further, even in British Columbia, in *Quach v Mitrux Services Ltd*, 2020 BCCA 25 at paras 11 - 22, which is an employment case similar to this one, the British Columbia Court of Appeal held that a second contract will be unenforceable if there is no fresh consideration to support it.

[112] Likewise, later cases in British Columbia have also found that fresh consideration is still required in these types of circumstances. For example, see: *Sui v HungryPanda Tech Ltd*, 2024 BCSC 1856 at paras 47 - 60; *Moffatt v Prospera Credit Union*, 2021 BCSC 2463 at paras 28 - 44; *Matijczak v Homewood Health Inc*, 2021 BCSC 1658 at paras 23 - 37.

[113] I conclude that fresh consideration is a well-established requirement which is needed in order to support unilateral changes to significant terms in employment contracts, and that the March 2022 Document is unenforceable in this case given that it was clearly missing.

Part 5 - Conclusion

[114] For the above reasons, I conclude that Dr. Ross was dismissed without cause in July of 2022, that he did not abandon his employment, and that the December 2021 Contract governs the

parties' relationship at the time of dismissal. Dr. Ross is therefore entitled to the contractual amount of \$300,000, less any applicable statutory deductions, but plus applicable interest.

[115] I would like to thank all counsel for their excellent submissions.

[116] The parties are free to contact me to address costs if they cannot agree within 30 days.

Delivered orally July 10, 2026

Dated at the City of Calgary, Alberta July 30, 2026.

P. Banks
J.C.K.B.A.

Appearances:

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