

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***Smith v. Centra Windows Ltd.***,
2009 BCSC 606

Date: 20090504
Docket: S054805
Registry: Vancouver

Between:

Sydney Harold Smith and Coquitlam Contracting Ltd.

Plaintiffs

And

Centra Windows Ltd. and D.P. Management Ltd.

Defendants

Before: The Honourable Mr. Justice Masuhara

Reasons for Judgment

Counsel for Plaintiffs

D. M. Tevlin
J. Chesko

Counsel for Defendants

D. C. Creighton
J. T. Rohrick

Date and Place of Trial/Hearing:

September 15-19, 23-26, 29,
October 1, 23, November 10, 2008

Written Submission:

November 13, 2008
Vancouver, B.C.

INTRODUCTION

[1] This is a wrongful dismissal action. The plaintiff, Mr. Smith, was Vice President of Marketing and Development with Centra Windows Ltd. (“Centra”) and was dismissed without notice on July 20, 2005, after working close to fourteen years in commission sales for Centra. He was 50 years of age at the time of dismissal.

[2] Mr. Smith argues that he was entitled to reasonable notice. He further alleges that his treatment by Centra in the course of his dismissal caused him mental distress and as a result, he is entitled to an additional award of compensatory damages. Mr. Smith also seeks punitive damages.

[3] Centra says that Mr. Smith was an independent contractor and as such was not entitled to reasonable notice of dismissal. Alternatively, it argues that it had cause to fire Mr. Smith.

[4] The key issues are:

- whether Mr. Smith was an employee of Centra or an independent contractor;
- if he was in an employment relationship, whether Centra had just cause to dismiss Mr. Smith summarily;
- if Centra did not have just cause to dismiss Mr. Smith summarily, then what are the damages that Mr. Smith is entitled to in respect to Centra’s failure to provide a reasonable period of notice, and Centra’s redemption of shares held by Mr. Smith;
- whether Mr. Smith failed to take reasonable measures to mitigate his damages;

- whether the conduct of Centra in the process of dismissing Mr. Smith was unfair or amounted to bad faith; if so, what damages flow from such conduct; and
- whether Mr. Smith is entitled to punitive damages.

[5] A significant aspect to this action relates to 67,200 common shares that Mr. Smith held in Centra, which were issued to him under Centra's Employee Share Ownership Plan ("ESOP") created pursuant to the **Employee Investment Act**, R.S.B.C. 1996, c. 112. Upon his termination, Centra redeemed his shares at \$5.84 per share. The latest value of each share as determined by the company's annual valuation formula is \$14.21.

[6] Mr. Smith seeks the return of his shares. Alternatively, he seeks the value of the shares to the end of the period of reasonable notice to which he was entitled. He also seeks bonuses that were paid out on each share during the period of reasonable notice. In the event that Centra breached its duty of good faith, the plaintiff seeks the current value of the shares.

[7] For the purposes of this trial, the defendants advise that there exists no substantive distinction between the two defendant entities. D.P. Management Ltd. was described as a "flow through" vehicle to avoid or lower Workers' Compensation Board assessments. Accordingly, in these reasons I refer to the two entities collectively as Centra or the defendant, unless I specifically indicate otherwise.

OVERVIEW OF EVIDENCE

[8] Mr. Smith is 53 years old. In 1973 he found employment with BC Hydro as a clerk. As such he was a member of the union representing his bargaining unit at BC Hydro. He married, had three children, and then separated from his wife in 1977. He has co-habited with his current spouse for the past twenty years. While working with BC Hydro he completed a business administration program at Vancouver Community College and completed most of a marketing program at BC Institute of Technology. He also worked part-time jobs in the evenings to supplement his income to support his family. One of these jobs was selling insulation for a company called Heat Control during the 1980s under the Canadian Home Insulation Program (“CHIP”). He met Mr. Tilstra, who was working there full-time installing insulation. Mr. Smith also ran a construction company on the side and contracted with Mr. Tilstra to do installations under contracts Mr. Smith had obtained. Mr. Smith operated under the name of Coquitlam Contracting, which was, at the time, unincorporated. The relationship between Mr. Tilstra and Mr. Smith evolved from business to that of friendship. Mr. Tilstra at trial stated that Mr. Smith was a “buddy of mine.”

[9] CHIP ended in 1983 and Mr. Tilstra started to sell and install siding through a company he incorporated called Centra Siding Ltd. (a predecessor to Centra). Mr. Smith began to sell vinyl siding for Mr. Tilstra’s company after hours.

[10] Mr. Smith continued with his regular day job at BC Hydro. In the early 1990s he was moved into its Power Smart group. The objective of this group was to deliver

energy conservation measures to residential, commercial and industrial customers through various programs including low cost financing for energy efficient installations. Mr. Smith's responsibilities included communicating with contractors to inform them of the benefits of the Power Smart program and getting them to participate in the program.

[11] Mr. Smith introduced Mr. Tilstra to this program and the opportunities it held for his business. Centra Siding was qualified as a registered contractor under the Power Smart program, and shortly thereafter, Mr. Smith began to sell Power Smart contracts for Centra Siding after hours. In 1991, Mr. Smith took advantage of a sabbatical entitlement from BC Hydro to further explore and develop his work for Centra Siding. In February 1992, Mr. Tilstra invited Mr. Smith to join his company on a full-time basis. Discussions ensued between the two. The concept of profit sharing was discussed. A written proposal was provided by Mr. Tilstra to Mr. Smith to work for Centra Home Improvements ("C.H.I."), a division of Centra Siding Ltd.

[12] Mr. Smith concluded that the proposal exceeded what he had at BC Hydro, and he resigned from BC Hydro to join Centra Siding on a full-time basis as an Energy Advisor in 1992. His job was to secure residential and commercial contracts for the sale and installation of windows. The relationship is evidenced in a written agreement between C.H.I. and Mr. Smith dated February 21, 1992 and included the following provisions:

- Territory: your territory will be Coquitlam, Burnaby, Port Moody and New Westminister.
- this territory will be yours exclusively for one year

- after one year, the territory may be increased or decreased after some discussion and mutual agreement between yourself and C.H.I.

Earnings; 10% commission paid on net sales amount (pre G.S.T. total)

- a draw will be issued on the 15th of each month against commissions (amount of draw to be determined)
- balance of commissions paid on last day of month for jobs completed that month.
- a line of credit of \$4,000.00 will be available to supplement wages in case of failing sales, to be deducted from future commissions.

Pricing; all job pricing to be determined and set by C.H.I. in consultation with yourself, and a view to maximizing the potential of each private home or strata title complex.

- all pricing will be held at current levels for 6 months, with any changes subject to your input.

Supplies; C.H.I. will supply at no cost to you

- letterhead
- PSHI brochures
- business cards

Benefits; our company medical and dental plan is available to you and your family on a 50 - 50 cost sharing basis with C.H.I.

- W.C.B. will be paid by C.H.I.

You will be required to report into the office a minimum of twice a week i.e.; Monday and Wednesday at 8:30 a.m. We will of course expect that you act exclusively as an agent for C.H.I. Any additional work outside the PSHI program must be approved by C.H.I.

We hope this will be a lasting and mutually profitable relationship. We will do all we can to help you and encourage your success.

[13] Mr. Smith enrolled in the company's group health benefits plan underwritten by Zurich Life Insurance Company of Canada, effective May 1992. Eligibility under the plan was started as follows:

ELIGIBLE EMPLOYEES

All full-time employees who are actively working at least 20 hours per week on the day the plan commences are eligible.

If you are hired after the plan commences you are eligible after completing the required waiting period.

[Emphasis added]

[14] As a commissioned salesperson, Mr. Smith hired his own lead generators to assist him. The function of lead generators was to contact prospective customers and set up appointments for Mr. Smith to attend their homes to make sales presentations. If a sale was completed, the lead generator would be entitled to a share of the commission Mr. Smith earned. A component of the commission structure at C.H.I. was specifically designed to provide commissions for lead generators, and commissions were calculated and paid directly by Centra to the lead generator as well as the sales representative.

[15] Other means Mr. Smith employed to obtain “prospects” were to attend trade shows, arrange prize draws at supermarkets where customers would fill out forms and place them in a ballot box, and simply to knock on doors.

[16] Prior to Mr. Smith joining C.H.I., the company had sales of \$300,000 per year. One year after he joined, this figure jumped to \$1 million. Presently the company has annual sales in excess of \$30 million.

[17] In 1995, Mr. Tilstra, as part of his vision to grow and develop the business, began to consider the building of a window manufacturing plant. The corporate vehicle would be through Centra. He was introduced to Mr. Anderson, a chartered accountant in public practice, who shortly thereafter became the company’s external accountant. In consultation with Mr. Anderson, Mr. Tilstra adopted the idea of an

employee share ownership plan to assist in the financing of this project and, perhaps more importantly, to enhance employee retention and motivation through ownership in the company for which they worked. Mr. Anderson was assigned the task of developing and implementing the share ownership plan pursuant to the **Employee Investment Act**. Before introducing the plan to the organization generally, Mr. Tilstra requested that his “inner circle” (as described by defence counsel), comprised of Mr. Smith, Mr. Dennis Peterson, Mr. Ed Vandermeer, and Ms. Betty Peterson, loan the company funds to cover Centra’s start up costs, as a demonstration of the “inner circle’s” support for the new company. All of the “inner circle” extended significant funds as requested. Mr. Smith advanced \$25,000 and was later repaid in full.

[18] Subsequently the ESOP was developed and implemented in 1996.

[19] The ESOP allowed employees and dedicated contractors of Centra to purchase shares in the company.

[20] Section 1 of the ESOP states that its purpose is to:

- a) give the employees of the Corporation an opportunity to participate in the ownership of the Corporation; and
- b) provide the Corporation with additional equity capital to be used to expand the business.

[21] Section 2.1(f) defines “eligible employee” to include a:

- (ii) Dedicated Contractor Employee

[22] A Dedicated Contractor Employee is defined in the ESOP to mean:

a proprietorship, partnership or corporation which:

- (i) at the commencement of the Offering Period, has been providing services to the Corporation or the predecessor or any affiliate thereof under a contract; and
- (ii) receives not less than 90% of its total annual revenue from the contract with the Corporation or a predecessor or an affiliate thereof;

[23] Centra considered Mr. Smith to be a Dedicated Contractor Employee.

[24] The ESOP contains share redemption provisions which permit a shareholder under the plan to sell to third parties or seek redemption of shares from Centra. The method for determining the redemption price is set out in Appendix C of the ESOP. The price is called the "Share Value" and is determined once each year "as of the Company's fiscal year end of December 31. Each Share Value so determined shall remain in effect until a new Share Value is calculated as of the next fiscal year end." In the event that a shareholder under the ESOP seeks redemption, the company will redeem the shares at the Share Value in effect at that time. The ESOP sets out conditions in which the company may decline to redeem.

[25] There is no provision under the ESOP that specifically requires a shareholder to tender shares to the company in the event of termination. However, section 28.2(f) of the Articles of Centra, to which the ESOP is subject, states that a holder of Class B shares issued under the ESOP is:

...entitled to retain and hold the same so long as such holder remains an employee of the Company; and, if as a consequence of death, resignation, withdrawal, dismissal or otherwise such shareholder

ceases to be an employee of the Company or if such shareholder gives notice to directors that he or she is desirous of transferring the same, the shareholder.... shall be bound, upon the request in writing of the directors, to transfer such share at the Share Value as last determined and established in accordance with the provisions of the employee's share ownership plan pursuant to which the share was allotted and issued....

As well, the evidence of Centra, which I accept, was that Mr. Tilstra, in the presentation of the ESOP to employees, advised that shares issued under the ESOP were to be redeemed by the company in the event that the worker was no longer an employee with Centra.

[26] Up to Mr. Smith's termination, the Articles, however, did not similarly address Class A shares. This was not recognized until November 2005 concurrent with Mr. Smith's termination and Centra's redemption of his shares. The company and shareholders then took the required steps to amend its Articles to reflect the same terms for Class A shares as set out above for Class B shares.

[27] The Class A shares were originally contemplated to be issued only to Centra Siding Ltd., a company owned entirely by Mr. Tilstra and his wife, as consideration for the goodwill sold to Centra. Class B shares were allocated to the ESOP. When the ESOP was first offered, several people including Mr. Smith wished to subscribe for shares through their Registered Retirement Savings Plans ("RRSPs"). Their resulting subscription exceeded the 10% limit for holding shares under the RRSP rules. Mr. Anderson determined that the solution to avoid this constraint was to also issue Class A shares through the ESOP to enable subscribers to maximize their purchase through their RRSP. As a result, Class A shares were issued to persons

including Mr. Smith in addition to Class B shares to meet their subscriptions and maximize their provincial income tax credits. In allotting Class A shares to the ESOP, neither Mr. Anderson, nor Mr. David, Centra's solicitor, put their mind to the redemption provisions applicable to such shares. Mr. Anderson's focus was on finding a way to meet subscribers' requests.

[28] Mr. Smith's purchases of shares under the ESOP were as follows:

July 1996	20,000 Class A shares
July 1996	12,500 Class B shares
January 9, 1997	10,200 Class A shares
January 9, 1997	9,000 Class B shares
January 6, 1998	1,500 Class B shares
November 2, 2000	10,000 Class B shares
January 2, 2001	2,333 Class B shares
January 2, 2001	1,667 Class B shares

[29] During his time with Centra, Mr. Smith came to own in total 67,200 shares in Centra: 30,200 Class A shares and 37,000 Class B shares.

[30] Share Value grew as follows:

June 30, 1996	\$1.00
December 31, 1996	\$1.32
December 31, 1997	\$2.04
December 31, 1998	\$2.44
December 31, 1999	\$2.81
December 31, 2000	\$2.70
December 31, 2001	\$3.10

December 31, 2002	\$3.78
December 31, 2003	\$4.89
December 31, 2004	\$5.84
December 31, 2005	\$7.64
December 31, 2006	\$10.39
December 31, 2007	\$14.21

[31] In addition to the steady growth in Share Value, Centra consistently paid out a “bonus” to its employees who held shares. The ESOP refers to the payment of dividends as the method for distributing Centra’s profit. However, the distribution via bonuses was preferred by participants, as such payments would be available immediately unlike dividends which would be paid into an RRSP. Further, the payment of bonuses was more favourable to Centra from a tax perspective. Mr. Anderson described the bonus as salary. Centra has consistently declared and paid out a bonus on a per share basis. This method has remained in place to the current date.

[32] In 1996, Mr. Smith was appointed Vice President of Marketing and Development and held the position until his termination in July 2005. No additional remuneration was provided under his new title. For most of that period, he was part of the “inner circle” of Centra. His duties, however, remained essentially those of a salesperson.

[33] In 1998, Mr. Smith was appointed a director of Centra. He remained a director until 2003 and was then replaced by Mr. Larche.

[34] In early 1998, Centra terminated paying Workers' Compensation Board assessments for its sales force. Mr. Tilstra required his sales agents to create entities through which they provided services in order to reduce Workers' Compensation premiums. As a result, most sales agents incorporated companies. Mr. Smith incorporated a company under the name of Coquitlam Contracting Ltd. Mr. Smith had, several years earlier, operated a proprietorship under this name.

[35] In 1999, Centra obtained a group benefit program through Manulife Financial in which Mr. Smith enrolled. The eligibility provisions stated:

Eligibility

You are eligible for Group Benefits if you:

- are a member of an eligible class,
- are younger than the Termination Age,
- are residing in Canada, and
- have completed the Waiting Period.

The termination Age and Waiting Period may vary from benefit to benefit. For this information, please refer to each benefit in the section entitled Your Group Benefits.

Your dependents are eligible for insurance on the date you become eligible or the date you first acquire a dependent, whichever is later. You must apply for insurance for yourself in order for your dependents to be eligible.

Required Number of Hours

Full-time employee - 30 hour(s) per week

[Emphasis added]

[36] In 2000, Mr. Smith met Ms. Graham, a sales manager at Homeworks Inc., a subsidiary of BC Gas Inc. The focus of Homeworks was to sell energy products and services at the consumer level, much like the BC Hydro Power Smart program. Ms. Graham sought to develop a business relationship with Centra to expand the business of Homeworks. She was aware that Mr. Smith was a top seller of Homeworks packages. She had many meetings with the Centra sales representatives to establish a working relationship. Her task included expanding the business geographically to other contractors. Because of Mr. Smith's success with selling Homeworks packages, Ms. Graham asked Mr. Smith in 2001 to provide training to sales representatives for a large hardware company in the interior of the province called Central Hardware. He agreed and prepared and presented one seminar. For his work he received remuneration through his company Coquitlam Contracting. Mr. Smith promoted Centra Windows to this hardware company and made sales. He was reimbursed for his expenses by Homeworks in the amount of \$1,322, although it appears that certain expenses were reimbursed by D.P. Management as approved by Mr. Tilstra.

[37] In 2003, a company called KMS Windows started up as a window dealer. Mr. Smith assisted KMS in getting started, as Centra would be a supplier of windows to KMS. Mr. Smith wrote up Homework's contracts through KMS which sold windows supplied by Centra.

[38] In 2003, Mr. Smith assisted Mr. Ferrone, one of his former lead generators, in setting up a franchised dealership of Centra in Edmonton, Alberta. The business objective was to sell Centra windows in Alberta. The business did not succeed.

When Mr. Tilstra became aware of the problems encountered with this operation he ordered Mr. Smith to have it closed down. Mr. Smith was required to cover all the costs of Centra's expenses related to this failure, which amounted to approximately \$1,200.

[39] Mr. Smith was considered a top sales representative at Centra and was consistently in the top three prior to 2004. The available sales records show in terms of total sales he was ranked first of twelve in 2001 and 2002, second of eleven in 2003, and third of ten in 2004. In 2005 he worked only for half a year and ranked seventh of nine.

[40] The breakdown of his sales revenues was as follows:

	<u>2001</u> \$	<u>2002</u> \$	<u>2003</u> \$	<u>2004</u> \$	<u>2005 (1/2 year)</u> \$
Supply & Install	412,532	564,415	465,338	471,7883	206,058
Supply only	691,322	612,302	706,613	414,005	267,564
Total	1,103,854	1,176,717	1,171,951	885,788	473,622

[41] Commissions and bonuses earned by Mr. Smith over the last five years of his employment were as follows:

<u>Year</u>	<u>\$ Commissions</u>	<u>\$ Bonus</u>
2005 (1/2 year)	12,500	nil
2004	71,489	127,680
2003	92,625	131,040
2002	94,975	76,608
2001	78,409	70,560

[42] In March 2003, Mr. Larche was hired by Centra as general manager. He was formerly a manager of a renovation company that sold and installed Centra manufactured windows under a different label. Mr. Smith was the Centra sales representative to that company and derived substantial supply only commissions from sales to it. Mr. Larche's responsibilities at Centra included marketing, planning, and supply and install sales. He replaced Mr. Smith on the board of Centra. Mr. Smith's activities fell under Mr. Larche's responsibilities, however, it appears that Mr. Smith had a direct line to Mr. Tilstra as well.

[43] Due to his previous work experience, Mr. Larche had considerable insight into the added value of combining window sales with installation. Supply and install contracts generated much higher margins than supply only contracts. Shortly after joining Centra, Mr. Larche shifted Centra's business focus to an emphasis on "supply and install sales". This business model shift was communicated throughout the organization and obviously emphasized to the sales representatives. Mr. Smith continued to focus considerable time on supply only sales. During this time, Mr. Smith's largest "supply only" contracts which had been in place for many years, came to an end and his sales fell significantly.

[44] In 2004, the agreements Centra had with Homeworks and another large supply only contract were terminated. This was a significant change for sales representatives in their sales strategies.

[45] In 2004, Mr. Tilstra would have short encounters with Mr. Smith, meetings that Mr. Tilstra described as "on the fly", in which he told Mr. Smith that he had to

“get going” on making sales and not spend as much time on supply only contracts, as they were “time suckers.”

[46] On July 27, 2004, Mr. Tilstra wrote to Mr. Smith noting that his performance was below expectations by 50% and that his commission draws would be terminated October 1, 2004 if his performance did not improve. Mr. Tilstra further noted that the “Board of Directors reserves the right to determine how share dividends are distributed in relations to performance levels.”

[47] Upon reading this letter, Mr. Smith said he did not understand why he had received it and called Mr. Tilstra immediately. Mr. Tilstra told Mr. Smith that he was required to make supply and install sales of \$1 million for the year. Mr. Smith testified that he had set a personal goal of \$1 million in sales, but not strictly supply and install sales. He had never achieved supply and install sales at this level. At the time of this letter, Mr. Smith had achieved \$500,000 in total sales, of which \$250,000 was supply and install. The sales revenues tendered by Mr. Smith indicate that his overall sales had fallen in 2004 by approximately \$300,000 from his previous level of \$1.1 million.

[48] Mr. Smith met with Mr. Petersen around the time that he received the letter from Mr. Tilstra. Mr. Petersen had by then moved to Centra Exteriors, a division of Centra that focussed on selling windows, siding and cladding to “leaky condo” projects. The two had worked at Centra since the early days. Mr. Petersen had gone through a nine month “dry spell” in sales during this time and had received a similar message from Mr. Tilstra, though not in writing. Mr. Smith related his

concerns that his profit shares would be reduced as indicated in the letter, as well as his view that he was not being afforded enough respect from Mr. Tilstra. Knowing that Mr. Smith's sales had been dropping off, Mr. Peterson advised Mr. Smith to bring his sales up and "get back on track" and that if he got his sales back up his problems would "go away".

[49] Mr. Petersen also provided Mr. Smith some assistance with his initiative in obtaining large supply only contracts for customers such as apartment buildings by providing written materials developed by Centra Exteriors.

[50] Soon after this conversation, Mr. Petersen's sales improved through obtaining large renovation contracts.

[51] By letter dated January 31, 2005, Mr. Tilstra wrote to Mr. Smith and stated:

The minimum agreed sales targets for 2005 will be \$700,000 of *Contract Home Improvement Sales*, at book pricing. We look forward to your improved details on contracts submitted to our installation department.

Commencing February 1, 2005, there will be no draw against sales.

As noted in July/04, the board of directors reserves the right of share distribution amount, for each shareholder of Centra Windows Ltd.

[52] The draws were not terminated as stated in the letter but were terminated in May or June 2005.

[53] By letter dated March 22, 2005, Mr. Smith wrote to Mr. Tilstra stating:

As per our discussion of January 28, 2005 I'd like to think \$60000.00 [sic] per month sales is possible at Centra, however I also told you that in order to do this I'd need 5-10 booked appointments a week from

Centra. I have not been getting anywhere near this number therefore my sales are down.

I confirm that if Centra does provide these appointments I could achieve the sales I hoped to make. Perhaps we could sit down and devise a lead generation campaign as I outlined for you late last year.

[54] The “sit down” appears not to have occurred between Mr. Smith and Mr. Tilstra, though Mr. Tilstra testified that he had had numerous discussions in the past with Mr. Smith.

[55] Mr. Smith wrote a letter dated June 7, 2005 to Mr. Tilstra referencing his efforts to obtain sales and noting his work in preparing two bids that had been submitted at Centra’s “book pricing”, as per Mr. Tilstra’s recommendation. The letter also complained of the poor quality leads he had been provided by Centra, and expressed his concern that he may not have been receiving a fair allocation of leads in terms of quality and number. Mr. Tilstra testified that he could not recall this letter but agreed that he could have received it. However, Mr. Tilstra stated that efforts had been made to provide Mr. Smith leads. A tally of leads to sales agents showed that the quantity of leads had generally been distributed equally from January and that Mr. Smith had not made any sales on these leads.

[56] Around June 8, 2005, Mr. Larche circulated to sales agents a “contractor agreement” and requested that it be signed and returned to him. Mr. Smith received the agreement. After reading the document, he phoned Mr. Tilstra and left a message stating that he had some questions about it. When Mr. Smith got home, Mr. Tilstra had left a message in reply stating that Mr. Smith did not have to sign the document as he was already incorporated. Mr. Tilstra stated that he had been

working on this agreement with Mr. Larche and the company's lawyer for eight to nine months prior to the circulation of the document to sales agents.

[57] In the latter part of June 2005, Mr. Tilstra requested that Mr. Smith attend his office. In the meeting, Mr. Tilstra asked Mr. Smith to resign. Mr. Smith asked for the reason. No reason was given. The discussion turned to a consideration of Mr. Smith continuing to work for Centra but holding only 15,000 shares (he held 67,200 shares). Mr. Tilstra told Mr. Smith that he would consider the idea. Later that same day, he advised Mr. Smith that he could not accept the idea.

[58] The next day, a meeting was set for Mr. Smith to meet with Mr. Tilstra and Mr. Larche at a restaurant. Over a period of approximately 40 to 45 minutes, Mr. Smith's departure from Centra was discussed, including a timeline to complete his work, a bonus, and the idea that an agreement would be provided setting out the terms of Mr. Smith's departure from Centra for review by his counsel. The discussion was uneventful. Mr. Smith advised Mr. Tilstra after the meeting that his counsel would be away on the long weekend and that Mr. Smith's vacation schedule had him away to July 15. An agreement dated June 21, 2005 setting out the terms was provided to Mr. Smith. He received it on June 28, 2005.

[59] Mr. Smith was ultimately terminated by Centra by a letter dated July 20, 2005, delivered to Mr. Smith's home by Mr. Tilstra on July 30, 2005. This letter was written and signed by the solicitor for Centra. No grounds for termination were cited.

Centra sought to redeem all of the shares held by Mr. Smith in Centra. It cited the

Articles of Centra relating to the redemption of Class B shares as authority for its ability to redeem all of Mr. Smith's shares.

[60] Mr. Smith had not been paid any of his commissions due to him to that date. Payment occurred only some three years later, during the course of his direct examination on the second day of trial. A cheque dated July 2008 was apparently forwarded to Centra's counsel by Centra when Mr. Tilstra learned that Mr. Smith's last commission payment had not been made. The cheque, however, was left in defence counsel's file. Defence counsel thought the cheque was a document to be listed in its document list. Though Mr. Smith claimed that he was owed some \$4,000 in commissions, Centra paid Mr. Smith some \$600 after adjustments. An explanation for the adjustments was provided by Centra at trial. Though invited, the plaintiff elected not to rebut the calculations provided by Centra regarding this final cheque.

[61] On August 29, 2005, Mr. Smith commenced this action which included a claim for mental distress. Centra's statement of defence was filed August 2, 2006.

[62] Communications between counsel ensued regarding the Centra shares held by Mr. Smith. The correspondence indicates that neither counsel recognized the difference in redemption rights under the Articles of Centra between Class A and Class B shares.

[63] On November 9, 2005, the directors of Centra determined that Mr. Smith was in default of his obligations under the Articles of Centra by his declining to cause his 67,200 shares to be delivered to the company for redemption; that Mr. Tilstra was

appointed to transfer on behalf of Mr. Smith and the RRSP Trustee the shares; and that in the event that Mr. Smith and the RRSP Trustee did not deliver the share certificates, then Centra would deposit the redemption price for the shares to a special account at a chartered bank or trust company, to be paid upon presentation and surrender to the bank or trust company of the share certificates.

[64] On November 15, 2005, Mr. Mackie, counsel for Mr. Smith, wrote to Mr. Mogan and Mr. Creighton, counsel for Centra, stating the following:

We write in response to your letter dated November 10, 2005 wherein you indicate your client's intent to deposit funds and effect the redemption of the Class B shares of Syd Smith (the "Subject Shares") on November 21, 2005.

While we disagree with the position taken by your client and maintain that an employee of Centra Windows Ltd. (the "Company") who holds shares under the ESOP is entitled to retain their shares in the company until the end of the period of reasonable notice of dismissal required at common law. Mr. Smith asks that you forward two cheques to the Trustee of his RRSP Plans as follows... in the amount equal to the share price times shares in each account. The following are the shares held in Mr. Smith's RSP and Locked-in RSP:

Locked-in RSP #	
Centra Windows A	20,000 shares
Centra Windows B	19,300 shares
RSP #	
Centra Windows A	10,200 shares
Centra Windows B	14,533 shares

Our client informs us that our requested transfer and redemption will avoid significant tax consequences to him.

[65] On November 23, 2005, Mr. Creighton wrote to Mr. Mackie noting the timing for the transfer of shares and redemptions of certain of the shares and stated:

We are committed to ensuring the funds are transferred to your client's RSP accounts, but request that your client provide the required instructions to the trustee regarding the signing of the share certificates. We will provide you with an undertaking not to rely on the certificates until the funds are transferred into the designated accounts.

[66] On November 25, 2005, Mr. Mackie delivered certain Centra share certificates held by Mr. Smith to counsel for Centra.

[67] On December 7, 2005, Centra held a special general meeting of Class A shareholders and passed a resolution to alter the Articles of Centra to permit the company to redeem Class A shares held by an employee upon that employee ceasing to be an employee "as a consequence of death, resignation, withdrawal, dismissal or otherwise."

[68] On December 9, 2005, Centra, through counsel, delivered cheques totalling \$216,080, representing the redemption of Mr. Smith's Class B shares. In the covering letter, Mr. Mogan indicated that upon confirmation by Mr. Smith of the total number of Class A shares that he held, Centra would make payment for the redemption of those shares.

[69] On December 16, 2005, Mr. Mackie confirmed to Mr. Mogan the number of Class A shares held by Mr. Smith.

[70] During December 2005, the 20,000 shares redeemed from Mr. Smith were reissued under the ESOP to Mr. Garrett Wall, who had recently been hired as the Chief Financial Officer of Centra.

[71] On January 6, 2006, Mr. Mackie delivered share certificates representing 33,833 Class B shares held by Mr. Smith.

[72] On January 6, 2006, Mr. Mogan delivered cheques totalling \$176,368 to Mr. Mackie representing payment for the redemption of the Class A shares.

[73] In total, Centra paid Mr. Smith approximately \$392,450 for his shares.

[74] Mr. Smith stated he was shocked by his termination, though others in the organization stated that they sensed that Mr. Smith's employment was at risk. He described his condition as being scared, angry, and helpless. He did not sleep well. He would wake up in the middle of the night three to four times every two weeks. He sought out medical care at a walk-in clinic and was advised to seek counselling. He was able to obtain it through his spouse's employment benefits package. As the allotted six to seven counselling sessions came to a close, he was advised by his counsellor to seek medical advice.

[75] As a result of the advice he attended the office of a family physician, Dr. Rath, on September 7, 2006, over a year after his termination. After a ten-minute session, Mr. Smith was diagnosed as having mild to moderate depression and was prescribed the antidepressant Effexor. Around this time he was also prescribed Lipidor for elevated cholesterol. Over the course of a year, his medication was increased. By July 2008, his medication had been reduced and his depression was considered by Dr. Rath to be under control. He was seen by Dr. Rath in April 2008 and was found to be "much improved." He was last seen by Dr. Rath on August 12,

2008. Dr. Rath stated that Mr. Smith was “doing quite well” and that the focus of that visit was on medical issues not related to depression.

[76] In his report of July 20, 2008, Dr. Rath stated:

In summary, Mr. Smith is under treatment for depression which I feel was related to his loss of work one year prior to the initial visit, which was particularly troubling for him because of a dispute over termination benefits and the subsequent law suit. When last seen he had improved a great deal and had found new employment.

[77] Dr. Rath stated that this was the first situation where he had treated someone with job loss combined with litigation.

[78] Though Mr. Smith testified to being shocked by his termination, he took several actions to find work by contacting friends, family, and business contacts. He investigated a business investment opportunity in a business over several months almost immediately after his termination. He attended at this business three times a week to analyze it, to the point of preparing a proposal for the purchase of the business and obtaining financing from the Business Development Bank. He also testified that he spent the first year after termination preparing for litigation.

[79] In January 2007, Mr. Smith found employment as a sales representative for a company called Acrylco. He earned some \$30,000 to October 2007 prior to being terminated as a result of employees returning to work after being on leave.

[80] In January 2008, he found employment as a business development manager for residential home improvement. His remuneration was \$4,000 per month plus 10% of profits. From June 2008 to the time of the trial, he did not seek remuneration

from his employer as he felt this litigation would not allow him to give 110% to his work.

ANALYSIS

Was Mr. Smith entitled to reasonable notice?

[81] As an initial issue, the defence argued that Mr. Smith was an independent contractor. As a result, Centra had no obligation to provide a reasonable period of notice.

[82] The fact that a person provides services via a corporate vehicle is not dispositive of whether reasonable notice of termination is required. As well, a written agreement stating that a person is an independent contractor is not necessarily determinative. The true nature of the relationship is a question that depends on the facts of each case.

[83] The question of whether a person is entitled to notice is not decided strictly by a finding of whether the person is either an employee or an independent contractor. The authorities note that there is a continuum of arrangements that can exist between a seller and buyer of labour. At the opposite ends of the continuum are these two mentioned states. An intermediate category has been recognized, and the authorities state that in such relationships there is an implied requirement for notice.

[84] Key factors to consider in addressing the nature of the relationship were set out by Wood J. (as he then was) in ***Doyle v. London Life Insurance Co.*** (1985), 23

D.L.R. (4th) 443, 68 B.C.L.R. 285 (C.A.), leave to appeal to S.C.C. refused, as follows:

1. Whether or not the agent was limited exclusively to the service of the principal;
2. Whether or not the agent is subject to the control of the principal, not only as to the product sold, but also as to when, where and how it is sold;
3. Whether or not the agent has an investment or interest in what are characterized as the "tools" relating to his service;
4. Whether or not the agent has undertaken any risk in the business sense or, alternatively, has any expectation of profit associated with the delivery of his service as distinct from a fixed commission;
5. Whether or not the activity of the agent is part of the business organization of the principal for which he works. In other words, whose business is it?

[85] In **Marbry v. Avreca International Inc.**, 1999 BCCA 172, 67 B.C.L.R. (3d) 102 at para. 38, Braidwood J.A., writing for the majority, recognizing that there are increasingly complex employment and business relationships, identified the following non-exhaustive factors, (noting that none is conclusive and not every factor must be present) to consider in determining where a particular relationship sits on the continuum between an employer/employee relationship and independent contractor/strict agency:

- i) **Duration/Permanency of the Relationship.** The longer the duration of the relationship or the more permanent it is militates in favour of a reasonable notice requirement. Amongst other evidence, the purchase and maintenance of inventory, which contains a permanency aspect, should be considered.
- ii) **Degree of Reliance/Closeness of the Relationship.** As these two interrelated sub-factors are increased the more likely it is that the

relationship falls on the employer/employee side of the continuum. Included in this factor is whether the sale of the defendant's products amounted to a significant percentage of the plaintiff's revenues; and

- iii) Degree of Exclusivity. An exclusive relationship favours the master/servant classification.

[86] Centra submits that Mr. Smith was highly independent, quite free to conduct his affairs in the way that he wished, able to pursue opportunities as he wished, and was not bound exclusively to Centra. The factors identified by Centra in support of a finding against a relationship requiring notice of termination included the following:

- He operated through a separate legal entity, Coquitlam Contracting Ltd.
- He declined an offer of a line of credit from Centra when he joined Centra full-time.
- He hired his team of lead generators who were compensated out of sales he generated and did not rely on leads generated by Centra until late in the day.
- He could sell leads to other sales representatives.
- He developed and paid for his own sales brochures and conducted some of his own "shows" and "promotions" in addition to Centra's.
- He had to pay out from his commissions for any errors in filling out contracts such as inaccurate measurements for windows in contracts.
- He signed Centra documentation indicating he was a self – employed sales person.
- He told Ms. Graham that he could sell windows and products other than Centra's.
- He or Coquitlam Contracting was hired to provide a training seminar for the Homeworks program to Central Hardware and was paid directly.

- He helped the former sales manager for Central Hardware set up a company in Vernon called KMS Windows, from which Centra windows could be sold in conjunction with the Homeworks program and made some sales for KMS.
- He was not required to get approval of his vacation schedule, he could take it whenever he wanted.
- He was free to help set up a dealership in Edmonton, Alberta for Mr. Ferrone, where Centra “supply only” windows would be sold.

[87] However, when the factors relied upon by the defence are compared to the factors set out below, it is clear that Mr. Smith was closer on the continuum to a relationship in which reasonable notice was required, and I so find. What follows are those factors.

[88] The written agreement between the two parties of 1992 made no reference to Mr. Smith being an independent contractor. It contained no termination date and was conceded by Mr. Tilstra to have been for an indefinite term. It offered a medical and dental plan of which Centra paid 50% of the cost and required Mr. Smith to work exclusively for Centra. He was one of only two sales people working for Centra at the start. To the extent other documents indicate otherwise, they can be characterized for financial/tax planning documents and not as employment defining documents.

[89] It is clear that from the outset, Centra sought the personal services of Mr. Smith and not those of a corporate entity. Mr. Tilstra considered Mr. Smith to be a key person in the Centra organization and a member of the inner management team of Centra until early 2003.

[90] Mr. Smith was appointed a Vice President of Marketing and Development in 1996. Though he did not receive greater remuneration or a change in responsibilities, it demonstrates the stature Mr. Smith had within Centra and his close and strong relationship with Centra. He was perceived within the organization as a leader and senior member of the organization. He participated in regular senior management meetings that discussed key management issues for the organization.

[91] Mr. Smith was appointed a director of Centra. Although a director is not an employee, the position demonstrates in this case the integral nature of Mr. Smith's role at Centra. It also reinforces the high degree of fidelity required of Mr. Smith to Centra in regard to all of his activities.

[92] Mr. Smith was contractually bound to exclusively sell Centra windows. Mr. Tilstra admits Mr. Smith was working at least 80-90% of his time for Centra. Mr. Tilstra further admitted that he wanted him to work 100% as a sales agent for Centra with respect to the sale of windows. Mr. Tilstra estimated that he had told Mr. Smith of the need for this commitment some fifty times. Further, my finding is that Mr. Smith, in all of his sales activities, was engaged in selling or furthering sales for Centra. The proposition by Centra that Mr. Smith was free to engage in other business activities is not particularly compelling in light of the demands made of Mr. Smith to focus exclusively on window sales for Centra and the ESOP requirements to receive not less than 90% of total annual revenue from Centra.

[93] Mr. Smith was provided the opportunity to have an ownership position in Centra through the ESOP. Mr. Tilstra made his initial presentation of the idea to his

inner circle, which included Mr. Smith. Mr. Smith and the rest of the inner circle were requested to advance funds to Centra to show, among other things, their belief in Centra to the rest of the organization. Under the ESOP Mr. Smith was required to be either an employee or dependant contractor. Under the latter category, annual revenues received from Centra had to be not less then 90% of total annual revenues. Mr. Smith met these conditions and received shares and distributions under this plan.

[94] An important branding feature of Centra was its proclamation that it was a 100% employee owned company.

[95] Virtually all of Mr. Smith's income came via his work at Centra, i.e., the sale of Centra products and services. Mr. Smith did not seek employment or income from sources unrelated to Centra business. Though Mr. Smith did make a relatively small amount of money on an assignment for Homeworks, by conducting a sales seminar for an interior hardware business, as well as by assisting in making sales for KMS Windows for a short period, he did so with Centra's knowledge. His actions in this regard were aligned with Centra's, i.e., furthering Centra window sales. Though Ms. Graham's evidence is that she heard Mr. Smith say he could sell any window product that he wanted, there is no evidence that Mr. Smith ever did. Overall, Ms. Graham's evidence must be viewed as that of a person who provides some consulting work for Centra Windows and one who, in her position with Homeworks, was not focussed on the nature of the relationship between Mr. Smith and Centra, but primarily on getting sales from Mr. Smith for her program. Knowing that she recognized Mr. Smith as a leading sales person for Homeworks and had sought his

assistance in conducting a sales seminar for Homeworks, I found her comment that she thought Mr. Smith's appointment as Vice President of Marketing for Centra was a joke not helpful to her testimony.

[96] Mr. Smith was enrolled under the Centra Group Benefits plan that required that he be a full-time employee of Centra which Centra confirmed to the benefit provider.

[97] Mr. Smith was provided Workers' Compensation Board coverage by Centra prior to February 6, 1998.

[98] Mr. Smith was provided the following office supplies: business cards, letterhead, displays, brochures, Centra identity cards with Mr. Smith's photograph as a Centra Home Energy Advisor, Centra pens to provide to clients and to use in his work, coats, hats and shirts with the Centra logo, note pads, Centra presentation binders and Power Smart brochures, without charge.

[99] Mr. Smith's expenses were reimbursed from time to time. No express policy was in place; rather, the testimony of Ms. Peterson was that there was an ad hoc system of expense reimbursements.

[100] Mr. Smith was provided administrative, secretarial and office support. He was provided a desk, phone, direct phone line, voicemail, mail address, and computer terminal to conduct his business. His correspondence and documents were prepared by Centra secretarial staff. He received his mail and faxes at Centra. He was given the keys to and the use of the office at anytime.

[101] Mr. Smith was paid a regular bi-weekly paycheque by Centra. Similarly, remuneration for his lead generators and himself was also administered through Centra. Mr. Smith was also provided a monthly draw of \$4,000.

[102] Centra paid for Mr. Smith's training as a mechanical ventilation installer.

[103] In terms of Centra's control over Mr. Smith, he was given explicit directions on how to conduct his work, including the following requirements:

- to wear a Centra shirt or other apparel showing Centra identification and to carry a Centra identity card at all times when working;
- to attend any home shows and other similar exhibitions related to the sales territory of Mr. Smith;
- to provide timely reports on his sales activities, using the reporting format required by Centra;
- to assist in the resolution of customer complaints and problems;
- to respond to sales leads provided by Centra in a prompt and efficient manner;
- to keep his vehicle and equipment in good care;
- to shut down his own website that displayed Centra products and images of another company's products;
- to shut down a window sales distribution franchise that he had assisted Mr. Ferrone in setting up in Edmonton, Alberta; and
- to get approval over all sales contracts. He was also required to obtain authorization for work outside of Centra.

[104] Mr. Smith, along with other sales representatives, was subject to fines and was assessed such fines for not providing adequate measurements in sales contracts.

[105] He wrote promotional materials for Centra.

[106] Mr. Smith developed and had designed the original website for Centra.

[107] There was an annual Christmas party for all staff including Mr. Smith.

[108] Mr. Smith organized the annual golf tournament for Centra.

[109] My conclusion is that the factors that support the finding of a relationship very close to one of employee/employer are numerous and substantial and override those put forth in denial of such a relationship. Mr. Smith was highly integrated into Centra, he was bound by exclusivity to Centra, his activities were under close control of Centra, his remuneration was essentially all from Centra, his relationship with Centra extends back to the company's early years, he was involved in the company's leadership group, and he was closely involved in other activities in the life of the organization such as developing its first website and organizing its annual golf tournaments. Mr. Smith kept Mr. Tilstra advised of his various activities with Central Hardware, KMS, and Mr. Ferrone. I am satisfied that Mr. Smith was in a relationship with Centra that entitled him to a reasonable period of notice.

Was there cause to terminate Mr. Smith?

[110] Centra submits that it had cause to terminate Mr. Smith summarily. The grounds alleged in the statement of defence are that Mr. Smith/Coquitlam Contracting Ltd.:

- a) acted with negligence and neglect in pursuing sales on behalf of the defendants, resulting in a severe and steady decline in sales production relative to historical performance;

- b) failed to devote adequate time to the marketing and selling of the products of Centra, with Smith playing in excess of 100 rounds of golf in the last year;
- c) used copyrighted and trademarked intellectual property of the defendants in their web site without the proper knowledge or consent of the defendants.

[111] In the defence's opening, it advised that it was not pursuing cause based on "playing in excess of 100 rounds of golf" as alleged in (b). A further ground specified in the defence but withdrawn at the end of the trial was that the plaintiffs:

- d) failed to dedicate themselves exclusively to the work of the defendants, and instead, without the knowledge or consent of the defendants, engaged in two or more business ventures adverse in interest to the defendants.

[112] The employer has the onus of proving cause for dismissal, on a balance of probabilities. What constitutes just cause depends on the nature and circumstances of the alleged misconduct.

[113] A determination of just cause requires a contextual approach to the alleged failure of the employee: **McKinley v. BC Tel**, 2001 SCC 38, [2001] 2 S.C.R. 161. The question is whether the conduct of the employee was of a "nature and degree" that warranted dismissal.

[114] I find that Centra has not established that it had just cause to dismiss Mr. Smith. A review of the evidence, particularly that of Mr. Tilstra from his examination for discovery, reveals that the deficiencies relied upon by Centra do not amount to sufficient cause for summary dismissal.

[115] The evidence, however, reveals that Centra had concluded that Mr. Smith's performance was not up to the level expected of a person earning what he had been awarded each year. An employer is entitled to hold such views. Such things happen often in the business world. However, a requirement of summarily terminating such an employee, in the absence of cause or a contractual term specifying otherwise, is to provide reasonable notice or payment in lieu.

[116] The primary deficiency relied upon by Centra relates to a decline in Mr. Smith's sales. In its statement of defence Centra says Mr. Smith was negligent and neglected pursuing sales. Centra alleged that Mr. Smith did not devote enough time to sales and marketing. I am not persuaded the evidence establishes that Mr. Smith was not devoting his time generally to sales for Centra; the evidence suggests that Mr. Smith was focussing considerable effort but without the results he and Centra hoped for.

[117] His sales achievements over the years laid the foundation for the success that Centra has achieved. These sales included large supply contracts with companies which provided a steady sizable cash flow and profit for Centra and reliable commissions to Mr. Smith, as well as sales through his knowledge of the Power Smart programs of BC Hydro and BC Gas, which was a cornerstone of the business success of Centra for many years.

[118] The drop in sales was, in part, due to Centra's shift in focus towards supply and install sales. Centra's reliance on Mr. Smith's failure to reach a sales target as a justification for summarily dismissing him does not, in my view, hold up. Ms. Laxton

testified that no sales goals were set by Centra in 2003 and 2004 for its sales representatives, though she stated that there were expectations that everyone would work and bring in business. Though there was a significant drop in his sales in 2004, the drop related to the end of Mr. Smith's large supply only contracts. This was precipitated in part by Centra's shift in business focus away from supply only as discussed earlier. As well, Centra terminated its involvement in the Homeworks program. I am not persuaded that Mr. Smith's focus on seeking large supply only contracts in the condominium/apartment market was a form of insubordination, as implied in the evidence of Centra. Mr. Tilstra knew of Mr. Smith's efforts and did not tell him to stop seeking such sales as he did with some of Mr. Smith's other activities. Though he cautioned Mr. Smith that pursuing the large supply only contracts was not time efficient, Mr. Tilstra reviewed proposals by Mr. Smith prior to presentation to customers and approved the pricing and other terms of the proposal. Had Mr. Smith closed a significant supply only contracts I do not think Centra would have turned it away. This would have gone to his sales target. Though in Centra's view, Mr. Smith's sales may not have justified the profit share/bonus amount that he would be entitled to by virtue of the shares he held from the ESOP, there existed no standard of performance previously agreed between the parties from which summary termination would occur, and it appears insufficient time or resources were provided for Mr. Smith to get his sales figures up. Mr. Smith had never reached supply and install sales of \$700,000 in a year, let alone \$1 million. Centra expected from Mr. Smith close to a 50% increase in sales over his previous four year average. I note that Mr. Tilstra's relative Mr. Petersen, though in a different division of the

company, was permitted to go for nine months without a sale with no negative repercussions. While Centra was entitled to terminate Mr. Smith, it was not entitled to do so summarily without payment in lieu of notice.

[119] In terms of the unauthorized use of Centra's copyrighted and other intellectual property in Mr. Smith's website, the only infringement of interest that Centra can complain of is Mr. Smith's use of Centra's logo or images on the website. Mr. Smith had Centra's implied licence to use its logo on the various written sales materials he published without complaint from Centra. His use of the logo and images on the website would seem reasonable given he had been permitted to use them in other materials he had developed. In any event, upon being told to shut down the site, Mr. Smith immediately did so. Again, given the implied licence to use Centra images in written promotional materials developed and used by Mr. Smith or latitude given to him and other sales representatives in their promotions over the years, I do not find that the alleged infraction would constitute grounds for summary termination in the circumstances.

[120] A further allegation pursued against Mr. Smith, though not pleaded by Centra, related to the poor manner in which he filled out sales contracts. While there is evidence of this to which Centra witnesses testified, the fact is that this has been an observation of Mr. Smith from the early years. In any event, Centra many years ago, like other companies in the business, implemented a quality control process change which had installers attend all customer homes to take measurements for installation after a sale has been made, thereby eliminating reliance on sales representative measurements in the installation process. Further, Centra also took steps to

address poor measurements by its sales representatives by instituting fines upon offending sales representative for poor specification, not termination.

Was there bad faith in Centra's dismissal of Mr. Smith?

[121] Bad faith or unfair dealing in the course of the dismissal of an employee has been described as an employer engaging in conduct that is "untruthful, misleading or unduly insensitive": **Wallace v. United Grain Growers (c.o.b. Public Press)**, [1997] 3 S.C.R. 701, 152 D.L.R. (4th) 1 at para. 98. The following examples of such conduct were provided in para. 59 of **Honda v. Keays**, 2008 SCC 39, [2008] 2 S.C.R. 362:

...attacking the employee's reputation by declarations made at the time of dismissal, misrepresentation regarding the reason for the decision, or dismissal meant to deprive the employee of a pension benefit or other right, permanent status for instance.

If such conduct is found to have occurred and caused the mental distress then the employee is entitled to an additional award of compensatory damages that reflects actual damages and not through an extension of the otherwise reasonable period of notice. As explained in **Honda** at para. 58, this has been so since at least the **Wallace** decision, where it was held that "there has been expectation by both parties to the contract that employers will act in good faith in the manner of dismissal. Failure to do so can lead to foreseeable, compensable damages."

[122] The focus of the alleged bad faith is the plaintiff's theory that Centra dismissed Mr. Smith to deprive him of the 67,200 shares he held in Centra and enable it to redistribute the shares to another employee at the 2004 Share Value.

[123] The conduct alleged by the plaintiff includes:

- representation that there was no distinction between Class A and Class B shares. More particularly, that all of Mr. Smith's shares could be redeemable by the company upon termination;
- the alteration of the company's Articles to permit the redemption of Mr. Smith's shares;
- having a lawyer write the termination letter to Mr. Smith, which the plaintiff alleges was a form of intimidation;
- the allegation of cause for dismissal;
- the threat to cut Mr. Smith's entitlement to profit sharing;
- the withholding of Mr. Smith's final commission payment;
- the attempt to have Mr. Smith sign a letter agreement that provided Centra the right to terminate him on 15 days notice; and
- the company wide distribution of an email of Centra announcing that Mr. Smith had been terminated and that "Centra Windows has elected to terminate any further discussions, and considers the matter closed."

[124] It is natural for an individual who has experienced summary involuntary termination to conclude that his employer has engaged in bad faith or unfair conduct in the course of dismissal. The authorities recognize that a person's work is "an essential component of a [person's] sense of identity, self-worth and emotional well being": **Reference Re Public Service Employee Relations Act (Alta.)**, [1987] 1 S.C.R. 313 at 368, 38 D.L.R. (4th) 161. The authorities also recognize the vulnerability of employees at the time of dismissal: **Wallace**.

[125] Mr. Smith was with Centra from its early stages; contributed to the success of the business over many years; brought productive people such as Ms. Laxton into

the organization, adopted the “ownership” mentality promoted by Mr. Tilstra and evidenced by the ESOP; and developed friendships with key principals in the business, including its founder. It is understandable that the steps by the business to cut its ties with him would cause a range of unhappy emotions and would lead to negative views of the business in that regard.

[126] Though the human resources field has developed effective processes for terminating workers, including support for such workers following termination, the end of a relationship is difficult even where organizations have adopted best practices for terminating workers, particularly in circumstances where a worker has been with the organization for an extended period, contributed to the success of the organization and formed good relationships within the organization. Involuntary termination for an employee is rarely a positive experience.

[127] That said, the conduct identified by the plaintiff in the circumstances of this case does not lead me to conclude there was bad faith or unfair dealings in the course of Mr. Smith’s dismissal.

[128] In regard to the distinction between Class A and Class B shares and Centra’s right to redeem them, neither Centra’s nor Mr. Smith’s expectations included Mr. Smith continuing to hold any of his shares in Centra, regardless of their class.

[129] The context in which Class A shares came into existence and their integration into the ESOP is an important consideration when assessing Centra’s conduct in respect to the Class A shares held by Mr. Smith. As discussed earlier, the allocation of such shares to Mr. Smith came as a result of the desire of certain employees who

wished to participate in the ESOP through their RRSP funds. The distinction between the Class A and Class B shares regarding redemption was not recognized until the fall of 2005 coincident with the termination of Mr. Smith. In 1996, Mr. Anderson was focussed on meeting the subscription requests of applicants through their RRSPs. Though it was known that two classes of shares had been provided to Mr. Smith, the company, its advisors, nor Mr. Smith had put their mind to the fact that there were different redemption rights. The allocation of Class A shares was a late adjustment to the ESOP by Mr. Anderson as a result of the desire of certain workers seeking to participate from their RRSP fund. Mr. Smith wished to participate in the ESOP in order to reap the benefits of profit sharing, growth in the value of the company, and to enjoy the tax benefits that came with investing through the ESOP. In fact, though the idea of the ESOP was Mr. Tilstra's, Mr. Smith at trial also took credit for having introduced it to Mr. Tilstra.

[130] I accept that Centra believed that the shares held by Mr. Smith were subject to the redemption provisions under the ESOP. This was the operating assumption for Centra, its management, and its employees. This was communicated by Mr. Tilstra during the presentation of the ESOP to employees. Mr. Smith's only question to the company regarding the issuance of Class A shares related to whether such shares would participate equally in the payout of profits. Mr. Smith's application for shares in the ESOP made no distinction in share class. The application simply was for shares under the ESOP.

[131] The redemption of shares by the company under the ESOP has been the practise exercised by the company for departing employees. The evidence supports

the view that Mr. Smith also would have understood this, given that he was a member of the inner circle of Centra and was for many years a director of the company, where redemptions occurred when employees left the company. I also accept Mr. Tilstra's evidence that he had discussions with Mr. Smith to this effect and that Mr. Smith had reflected the same understanding to him. I am also furthered in my view by Mr. Smith's reaction when the initial termination discussions that he had with Mr. Tilstra moved to the issue of shares. In those discussions, Mr. Smith did not assert his entitlement to keep his Class A shares. Rather, he indicated to Mr. Tilstra that there were other ways of getting shares other than through his termination, such as a share split. A discussion then ensued about the possibility of Mr. Smith retaining only 15,000 shares and continuing to work at Centra. I also factor in the evidence that Mr. Smith was represented by counsel during the period leading up to his termination, starting around the time when the initial settlement document was provided to him. There is no evidence on the part of Mr. Smith that during his employment with Centra his Class A shares were to be treated any differently than his Class B share. The only issue raised by his counsel was the appropriate time to establish the value of his shares, which was asserted to be at the end of the period of notice to which Mr. Smith was entitled. This view is reflected in the plaintiff's original writ of August 29, 2005 and in the statement of claim filed June 16, 2006.

[132] Notwithstanding that the Articles of the company did not provide for redemption of Class A shares upon an employee leaving the company, evidence supports the view that the operating assumption was to treat Class A similarly to

Class B shares when an employee left the company. I accept that the difference was not noticed until it came to terminating Mr. Smith. Upon recognizing the difference, the company took the required corporate steps to amend its articles to so that the Class A shares would conform to its understanding. I find that Mr. Smith had the same understanding when he subscribed for shares in the ESOP. I do not find that there was bad faith on the part of Centra in taking the position that the shares were redeemable by the company upon Mr. Smith's termination. Further, upon being provided the required notice to shareholders to amend its articles Mr. Smith did not take any steps as a shareholder to seek a remedy from the courts to oppose the amendment. Based on all of the circumstances, the company had a reasonable basis for maintaining this operating assumption.

[133] Similarly, based on the above, Centra's alterations of its articles cannot be said to be bad faith, as the amendment was simply to align the Articles to the original understanding of how the shares issued under the ESOP were to be dealt with in regard to redemption. The company had a valid business reason for seeking the alteration.

[134] Further, I do not find that the key reason for Mr. Smith's termination was the desire to obtain his shares; rather, it was the company's belief that Mr. Smith's performance was not up to the level expected of a senior member of the company and as a result his profit share was not justified. To effect this, Mr. Smith's termination was initiated and his shares redeemed by the company. I do not find this motivation improper; it was a valid business reason. However, reasonable notice or payment in lieu was required.

[135] As well, I accept the evidence of Mr. Tilstra and Mr. Anderson that Mr. Smith's shares were not required for the purpose of providing them to another employee, Mr. Wall, who had recently joined Centra, and that shares could have been provided from the company's treasury without material dilutive effect.

[136] The conversation between Mr. Smith and Mr. Tilstra, which included the idea of withholding the annual bonus in this case, is not, in my view, a sign of unfair conduct or bad faith. It is apparent that Mr. Tilstra was attempting to motivate Mr. Smith to a higher level of performance. I find that it was an honest attempt on the part of Mr. Tilstra to focus Mr. Smith on increasing his sales results.

[137] The termination letter written by Centra's solicitor was unusual. However, I do not find that it was meant to intimidate Mr. Smith, as alleged. Mr. Tilstra had already told Mr. Smith face-to-face that he was terminating him. Discussion between the two ensued. In addition, there was a second meeting the next day with Mr. Tilstra and Mr. Larche to discuss further issues regarding Mr. Smith's departure. I do not see how the letter could be seen as intimidating given the previous meetings on termination. Further, Mr. Smith had legal representation at the time. It is also worthy of note that Mr. Tilstra personally delivered the letter to Mr. Smith's home.

[138] The defence of cause as set out in the statement of defence is not, in my view, sufficient to constitute bad faith or unfair conduct in the course of dismissal. The allegation of cause was raised over a year after termination in the statement of defence and cannot be said to have been in the course of dismissal. Centra did not allege cause during the dismissal of Mr. Smith. The defence of cause arose long

after termination had been effected and was in response to a claim against the company. There is no allegation or facts to support an argument that Centra communicated internally that Mr. Smith had been terminated for cause. It was not a tool to denigrate or humiliate a worker in the course of termination. Similarly, I do not find that the email distributed throughout the organization relating to Mr. Smith's departure constitutes bad faith or unfair conduct.

[139] In regard to Centra's failure to provide Mr. Smith his final cheque, the delay raises concerns over the company's conduct. Further, defence counsel's involvement in the delay can be described as unacceptably inept. In the circumstances, however, I am not of the view that the delay, insofar as the company is concerned, amounts to misconduct or bad faith when consideration is given to the fact that Centra paid to Mr. Smith in a fairly prompt manner the much larger sum related to his shares, which was sizable even though a dispute existed relative to the applicable Share Value. If the company was seeking to aggravate, humiliate or embarrass Mr. Smith, it would seem that these larger payments would have been the way to do so, particularly as it appears that Centra either knew that an action had been started or about to be started by Mr. Smith. The delay in issuing the bonus cheque appears to have resulted from Mr. Smith's rejection of a settlement proposal and the need of the company to include its final adjustments that had accumulated for past jobs, given that it would be Mr. Smith's final payment. The final payment appears to have gotten lost in the issues between the parties. Mr. Smith did not press or demand this final payment after the discussion with Mr. Tilstra. Upon the matter being brought to Mr. Tilstra's attention at his discovery,

it appears that he had a cheque delivered promptly to his counsel's office. I accept that Mr. Tilstra believed that up to that point the final payment had been made. Though the company's and its counsel's actions were inept regarding the last payment, I am not able to find that these constitute misconduct or bad faith in this case when considered in the context of the circumstances.

[140] The request to have Mr. Smith sign a new contract cannot be said to be bad faith. It was provided to all sales representatives. Mr. Smith was not pressed to sign the agreement and the matter was not pursued.

[141] Even if it could be said that there was bad faith or unfair conduct in the process of dismissal, the plaintiff has not established that the mental distress suffered, i.e., mild to moderate depression, arose from the conduct of Centra as opposed to the dismissal itself. It has been well recognized that the involuntary, and for that matter voluntary, loss of one's employment can be traumatic events; however, the normal distress and hurt feelings including depression resulting from such dismissal are not compensable. This is so because an employment contract is, unless otherwise provided for:

... by its very terms, subject to cancellation on notice or subject to payment of damages in lieu of notice without regard to the ordinary psychological impact of that decision. At the time the contract was formed, there would not ordinarily be contemplation of psychological damage resulting from the dismissal since the dismissal is a clear legal possibility.

(***Honda*** at para. 56)

In this vein, the redemption of shares held by Mr. Smith under the ESOP was also a clear legal possibility. As a result, the plaintiff is not entitled to additional damages.

[142] Dr. Rath's medical report states that he felt that Mr. Smith's depression was "related to his loss of work one year prior to the initial visit, which was particularly troubling for him [Mr. Smith] because of a dispute over termination benefits and the subsequent law suit."

[143] Dr. Rath's finding of depression and his prescription of an antidepressant was based on a ten-minute visit. Dr. Rath did not explore in any depth the circumstances regarding the termination. No testing for depression or analysis of the source of the depression was conducted. Dr. Rath's evidence acknowledged the view that depression is common in the general population and can be triggered by many factors, including significant events in a person's life. Respectfully, I am not satisfied that Dr. Rath's opinion can be taken to sufficiently establish that Mr. Smith's depression was the result of the conduct of Centra in the course of his termination as opposed to the termination itself. There was a considerable lapse of time between termination and Mr. Smith's visit to Dr. Rath. Mr. Tevlin stressed the comment of Mr. Tilstra to Mr. Smith that he would make litigation long and expensive. However, my view is that such exchanges between litigants who are unable to resolve their differences are very common. I accept Mr. Tilstra's evidence that both parties expressed comments that litigation would be long and expensive. Further, this discussion took place in October 2004, many months after the termination and the commencement of litigation.

[144] I also note that there is evidence that Mr. Smith had invested himself in the litigation. In the course of his testimony he stated that one of the reasons he did not find employment for some time was because he was preparing his case. He also voluntarily stopped receiving remuneration from his employer at Gemini Marketing from June 2008 until the end of this litigation as it would be too much of a distraction for him. This evidence serves to reduce the strength of Mr. Smith's position regarding the source and extent of his condition. Further, there is evidence that Mr. Smith was suffering from stress and anxiety in late 2004 and early 2005. Mr. Smith knew that his performance was under scrutiny by Centra. These factors do not appear to have been adequately addressed or taken into account by Dr. Rath.

DAMAGES

Reasonable Notice

[145] Mr. Smith's termination was immediate and no compensation related to reasonable notice was provided. He was not paid the commissions he had earned on sales to the date of termination until this trial had commenced. The amount of commission eventually paid was at odds with what Mr. Smith believed he should have been paid; however, though invited to do so at trial, he did not challenge the amount paid.

[146] Having found that Mr. Smith was entitled to reasonable notice and that Centra did not have cause to terminate him without reasonable notice, a determination of the period for reasonable notice is required.

[147] Reasonable notice depends on the facts specific to each case.

[148] The factors to be considered in determining the period of reasonable notice from **Bardal v. Globe & Mail Ltd.** (1960), 24 D.L.R. (2d) 140, [1960] O.W.N. 253 (Ont.H.C.) were recently reiterated in **Honda Canada Inc. v. Keays** at para. 28: length of service, age of the worker, availability of similar employment, success of the worker, inducement of the worker to join the employer. At para. 32, the court reiterated that no one factor is to be given disproportionate weight. See also **Ansari v. British Columbia Hydro and Power Authority** (1986), 2 B.C.L.R. (2d) 33, [1986] 4 W.W.R. 123 (S.C.).

[149] Insofar as the subject relationship falls within the intermediate category as discussed earlier, as one very close to an employment relationship, I am of the view that the period of reasonable notice in this case should not differ in any material sense from that required for an employment relationship.

[150] The position of Mr. Smith is that he is entitled to the high end of the notice period and argues for 20 to 24 months. In support, the plaintiff points to his close to 14 years of service at Centra; his age of 50 years at the time of his dismissal; the lack of availability of similar employment; the secure employment after twenty years of service at BC Hydro that he gave up on the inducement of Mr. Tilstra to join Centra; and his success as a sales representative at Centra, which in turn contributed to the success of Centra.

[151] Cases cited by Mr. Smith for guidance are: **Wallace v. United Grain Growers Ltd.**; **Braiden v. La-Z-Boy Canada Ltd.** 2008 ONCA 464, 294 D.L.R. (4th)

172 (Ont. C.A.); **Lyle v. Alujminex Extrusions Ltd.** (1996), 17 C.C.E.L. (2d) 320; **Albach v. Vortek Industries Ltd.**, 2000 BCSC 1228, 79 B.C.L.R. (3d) 353; **Taylor v. CBHN Information Systems Ltd.** (1996), 25 C.C.E.L. (2d) 36 (B.C.S.C.); **WERAM (1975) Inc. v. EMCO Ltd.** (1999), 2 B.L.R. (3d) 183.

[152] Mr. Smith submits that his annual income for the purposes of establishing damages is \$90,000. This is based on his income for the last three complete years that he worked.

[153] The defendant argues that the period of notice should be less than 12 months and reduced further for the plaintiff's failure to mitigate.

[154] The cases cited upon by Centra for guidance are: **Blondeau v. Holiday Ford Sales (1980) Ltd.** (2005), 39 C.C.E.L. (3d) 165, 196 O.A.C. 373; **Hamer-Jackson v. McCall Pontiac Buick Ltd.**, 2000 BCCA 416, 77 B.C.L.R. (3d) 214; **Mosey v. Lally** (2002), 18 C.C.E.L. (3d) 489, 18 C.C.E.L. (3d) 186; **McPhee v. Torino Motors (1975) Ltd.** (1989), 28 C.C.E.L. 68; **Durand v. Quaker Oats Co. of Canada Ltd.**, (1988), 20 C.C.E.L. 223 (B.C.S.C.), rev'd (1990), 45 B.C.L.R. (2d) 354, 32 C.C.E.L. 63 (C.A.); **Rebitt v. Pacific Motors Sales and Service Ltd.** [1988] 20 C.C.E.L. 239 (B.C.C.A.); **Johnston v. Ecolab Ltd.** (1994), 30 C.P.C. (3d) 347, 6 C.C.E.L. (2d) 293 (B.C.S.C.); **Braiden v. LaZ-Boy; MacLean v. Whistler & Blacomb Mts. Resorts Ltd.**, 2004 BCSC 1814, 150 A.C.W.S. (3d) 1061; **Brown v. Polson-Wylie Investments Ltd.**, December 21, 1998, New Westminster Registry No. S0-36860; **Biccum v. Fanny's Fabrics (Sask) Ltd.** (1996), 149 Sask. R. 243, 24 C.C.E.L. (2d) 286; **Novosel v. Reigl** (1993), 46 C.C.E.L. 245; **Marbry v. Avrican**

International Inc.; and ***Sullivan v. Mack Maritime Ltd.*** (1982), 39 N.B.R. (2d) 298, 103 A.P.R. 298 (N.B.Q.B.).

[155] Mr. Smith was a very experienced and successful sales representative who earned his income from commissions on window sales and installation. His income also arose from profit-sharing with Centra by virtue of holding shares under the ESOP. For much of Mr. Smith's time with Centra, he was in a position of leadership as a founding member, member of the sales and marketing group, and director. His energy, knowledge, skills and results have been an important contribution to the success of Centra.

[156] Mr. Smith had served Centra in the order of thirteen and one-half years.

[157] Mr. Smith was 50 years old at the time of his dismissal. It is recognized that a person at this age faces greater hurdles in finding comparable employment.

[158] Even though at the time of Mr. Smith's termination the province was in the midst of a construction boom, Mr. Smith was unable to find employment. I have outlined his efforts in my discussion of mitigation below. I accept that he made reasonable efforts and that opportunities similar to what he was earning were not readily available though he acknowledged that there were such opportunities if he had installation experience, which he did not.

[159] I am not persuaded by Mr. Smith's inducement argument and am of the view it is not a factor in the consideration of a notice period. Mr. Smith's decision was made long ago after having the benefit of working first on a part-time basis for

Centra, then having the opportunity explore the job on a full-time basis while on sabbatical from BC Hydro, without prejudicing his right to return to his job at BC Hydro should things not go as hoped. There was little evidence adduced by Mr. Smith to demonstrate that Centra pursued him in an active sense; rather, it appears that Mr. Smith had a history of working after hours on the side and was intrigued by the opportunity to work full-time with Centra, particularly given his inside understanding of the Power Smart program which was at the heart of a successful sales program for Centra at the time. In any event, Mr. Smith enjoyed a long term relationship with Centra and in my view any inducement consideration expired long ago.

[160] In the circumstances, I find that the period of reasonable notice Mr. Smith was entitled to was 15 months.

[161] Using an annual income of \$82,000, which is the average of Mr. Smith's commission earnings for 2003 and 2004, I find Mr. Smith is entitled to \$102,500.

[162] In terms of profit sharing, as a result of my finding of reasonable notice, Mr. Smith is entitled to bonuses on a per share basis for 2005 and a pro rata basis for 2006. Centra's argument that the bonus is discretionary has little merit in this circumstance, as the bonus has never varied from the per share distribution, which is consistent with the terms of the distribution set out in the ESOP and which has continued beyond Mr. Smith's termination.

[163] I have not provided explicit amounts on the question of bonus, as I was led to understand that the result of this judgment may affect the calculation of the bonuses as well as the calculation of Share Value for the relevant years.

Share Value and Redemption

[164] Turning to the issue relating to the value and redemption of shares, Mr. Smith has claimed that he is entitled to a higher price for the shares he held in Centra than the price at which his shares were redeemed by Centra. I have set out earlier the relevant provision that governs the treatment of the subject shares under the Centra Articles. The applicable words are a shareholder upon “dismissal or otherwise ... ceases to be an employee” upon request by the company is to deliver up his or her shares to the company in return for the value of the shares as set out in the prescribed manner.

[165] The final submission of the parties did not raise issues as to whether the subject wording limited the value of the shares to the date of termination, July 5, 2005. The term “dismissal” in the subject article was not a focus. Rather, the share value question focussed on the appropriate period of reasonable notice from which the shares should be valued.

[166] The circumstances of this case lead me to conclude that the Articles of Centra should govern how Share Value is to be determined for an employee who has been terminated. Further, the proper interpretation of the subject wording means proper dismissal, i.e., dismissal that is not in breach of the employment contract but rather, at the end of the period of reasonable notice.

[167] A second issue with respect to Share Value was whether it would be the Share Value as determined by the method set out in Appendix C of the ESOP which sets the Share Value at the end of the Centra's fiscal year end (December 31) and remains in effect until the end of the next fiscal year end, or whether it should be set somehow at the end of the period of reasonable notice, regardless of the Share Value method set out in the ESOP. Though Mr. Smith argued for a Share Value that would be determined at the end of the period of reasonable notice, I am not persuaded that a departure from the specified method is warranted, as the existing method reflects the reasonable expectations of the parties and was applied in the past. In my view the appropriate approach is to apply the ESOP terms.

[168] A third issue is whether the Class A shares are subject to redemption. As discussed earlier, it is apparent that these shares were not originally intended to be allocated for the ESOP. It is also clear that because of the desire of some subscribers (including Mr. Smith) to obtain shares in Centra through their RRSP funds, a solution was devised by Mr. Anderson to allot Class A shares to the ESOP. Mr. Anderson did not put his mind to the question of redemption of the shares, but rather was focussed on meeting subscribers' desire to participate through their RRSP fund, which had a 10% limit on the level of share ownership, and to maximize their tax credit.

[169] However, as mentioned earlier, I accept that in the original presentation of the ESOP to workers, including Mr. Smith, it was explained that a shareholder who was no longer an employee of a company would have their shares redeemed by the company. It is also apparent that this procedure was followed when

employee/shareholders left Centra. Mr. Smith would have been aware of this as he was a significant shareholder, part of the inner management team at Centra and a director for many years. The question of share redemption of departing employees was a subject discussed at board meetings, and Mr. Smith was part of those discussions.

[170] Mr. Tilstra testified that Mr. Smith never raised an objection to the Centra's redemption of shares from departing workers. There is also evidence from Mr. Tilstra that Mr. Smith purchased some of his shares in Centra as a result of an employee/shareholder leaving Centra.

[171] My view of Mr. Smith's understanding is reinforced by the meeting between Mr. Smith and Mr. Tilstra in June 2008 where Mr. Smith's resignation was sought. Mr. Smith did not argue that his shares could not be taken from him; rather, he testified that he told Mr. Tilstra that there were ways of getting shares other than through his termination such as through a share split. A discussion ensued about the possibility of Mr. Smith retaining 15,000 shares and continuing to work for Centra. I also note Mr. Mackie's communications to Centra's counsel relating to the share redemption wherein he did not dispute the redemption, but rather only raised the issue that the shares could be retained during the period of notice.

[172] I also note that though Mr. Smith opposed the resolution presumably to protect his rights on share prices, he did not dispute that Centra's steps to amend its articles relative to Class A shares were undertaken properly. I find that Mr. Smith generally understood at the outset that upon leaving Centra the shares he held in

Centra, which were through the ESOP, were subject to redemption by the Centra in the manner set out originally for Class B shares. This understanding is also reflected in Mr. Smith's pleadings. I find that there was no reasonable expectation on the part of Mr. Smith that the Class A shares were any different in terms of redemption than the Class B shares that he held. Mr. Smith received the benefit provided through the ESOP for RRSP purposes.

[173] Having determined that the period of reasonable notice is 15 months and applying the valuation method set out in the ESOP, I find that share price which Mr. Smith was entitled is the Share Value set on December 31, 2005, as adjusted for the impact of this judgment on the Share Value.

Punitive damages

[174] Turning to punitive damages, the court in *Honda* at paras. 62-69 stated:

62 ... [P]unitive damages are restricted to advertent wrongful acts that are so malicious and outrageous that they are deserving of punishment on their own...

68 ... Courts should only resort to punitive damages in exceptional cases....

69 [I]t is worth mentioning that even if the facts had justified an award of punitive damages, the lower courts should have been alert to the fact that compensatory damages were already awarded, and that under the old test, they carried an element of deterrence. This stems from the important principle that courts, when allocating punitive damages, must focus on the defendant's misconduct, not on the plaintiff's loss (*Whiten*, at para. 73).

[175] My view of the circumstances, given my findings on bad faith and unfair conduct, is that the plaintiff has not made the case to justify an award of punitive damages.

Mitigation

[176] The defendant argues that Mr. Smith did not take reasonable steps to mitigate his damages. The onus rests with the defendant to establish this defence. It did not adduce evidence in support of its position but relied upon the actions or lack of action of Mr. Smith. The defendant relies upon the mitigation documents filed by the plaintiff. Though Mr. Smith's binder included over 70 job applications, Centra notes that the applications begin only in June 2006, about one year after his termination.

[177] Mr. Smith testified that shortly after being terminated he contacted former co-workers, his former employer, business associates, his accountant, family members, and friends in various industries such as production of construction equipment, barbecues, communications equipment, furniture and energy, as well as rail track maintenance, and in different geographic locations including Ontario and Texas, to identify opportunities. He also explored opportunities with window companies and went so far as to review the business plan of one. None of these contacts led to employment. Upon following a lead provided by his accountant, he identified a company that he could potentially become involved with and devoted time to attending the business several times a week for several months to analyze it. He

went so far as to put a proposal forward and arrange financing to purchase it. However, in the end the owner was not interested in selling the business.

[178] He also took two courses related to finding employment in April or May 2006. Later he submitted his resume for a vast number of jobs.

[179] I am satisfied that the steps taken by Mr. Smith were reasonable given his circumstances, including his depression.

CONCLUSION

[180] In conclusion, I find that Mr. Smith and Centra were in an employment like relationship and that he was entitled to reasonable notice of termination or payment in lieu of such notice; that the period of reasonable notice was 15 months; that the commissions he would have earned during that period were \$102,500; that Mr. Smith was entitled to a distribution of profit under the ESOP for the year ending December 31, 2005; that Mr. Smith was entitled to a share of the 2006 bonus distribution proportionate to end of the period of reasonable notice; and that Mr. Smith was entitled to a redemption price for his shares being the Share Value determined by the terms of the ESOP as at December 31, 2005.

The Honourable Mr. Justice D. M Masuhara