

# IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Mackie v. West Coast Engineering Group Ltd.*,  
2009 BCSC 1775

Date: 20091223  
Docket: S094719  
Registry: Vancouver

Between:

**Larry Mackie**

Plaintiff

And

**West Coast Engineering Group Ltd.**

Defendant

Before: The Honourable Madam Justice Loo

## **Reasons for Judgment**

Counsel for Plaintiff: R. S. Fleming

Counsel for Defendant: K. Kandola

Place and Date of Trial: Vancouver, B.C.  
October 27, 28, and 30, 2009

Place and Date of Judgment: Vancouver, B.C.  
December 23, 2009

[1] The plaintiff Larry Mackie was employed by the defendant West Coast Engineering Group Ltd. (“West Coast”) as Production Manager for 21 months until he was terminated without cause on March 25, 2009. He was wrongfully dismissed when he was provided with two weeks pay in lieu of notice.

[2] The primary issue for determination is the period of reasonable notice.

[3] Mr. Mackie contends that the period of reasonable notice ranges from six to nine months and in the circumstances of his case, falls at the higher end of the range. West Coast contends that reasonable notice is between two to three months.

[4] The primary factors that should be considered when determining the period of reasonable notice are outlined in the leading case *Bardal v. The Globe & Mail Ltd.* (1960), 24 D.L.R. (2d) 140 (Ont. H.C.J.) at 145:

There can be no catalogue laid down as to what is reasonable notice in particular classes of cases. The reasonableness of the notice must be decided with reference to each particular case, having regard to the character of the employment, the length of service of the servant, the age of the servant and the availability of similar employment, having regard to the experience, training and qualifications of the servant.

[5] The four *Bardal* factors, as they have been called, were adopted by the Supreme Court of Canada in *Machtiger v. HOJ Industries Ltd.*, [1992] 1 S.C.R. 986, 91 D.L.R. (4th) 491, and more recently in *Honda Canada Inc. v. Keays*, 2008 SCC 39, [2008] 2 S.C.R. 362 at paras. 28 to 32. The factors must be weighed in the particular circumstances of each case and no one factor should be given disproportionate weight. At times there are other factors that creep in, but they do not seem to be given much weight.

[6] Mr. Mackie is a 48 year old mechanical engineering technologist. He graduated from high school in Victoria in 1979. In 1981 he joined the Canadian Armed Forces and trained as a heavy duty mechanic. In 1986 he was posted to Lahr, Germany where he met his wife Britta Dombovari. Their son was born in Germany in 1989. In 1990 Mr. Mackie and his family returned to Victoria and he

was discharged for medical reasons. In 1994 they returned to Germany where Mr. Mackie worked at his father-in-law's machine shop, and then came back to Canada in 1996. Their daughter was born in 1998. Over the years, Mr. Mackie worked for several manufacturing companies and became a mechanical engineering technologist proficient at computerized numerical control or CNC programming.

[7] In 2005 Ms. Dombari's father died and she inherited his business. In 2006 she returned to Germany to supervise the business and to find employment. Mr. Mackie planned to return to Germany but remained in Canada with the two children and in the meantime, found employment with West Coast and started work on June 27, 2007.

[8] West Coast designs and manufactures steel poles used for lighting, traffic and highway, and communication. Its main plant is in Delta, B.C.; its other plant sites are in Winnipeg, Manitoba; Barrie, Ontario; and Ferndale, Washington. At the time of Mr. Mackie's hire, West Coast's shareholders were Ted Brockman and Raini Habgood-Bailey. Mr. Brockman is the president of West Coast.

[9] In February 2008, Valmont Industries Inc. ("Valmont") of Omaha, Nebraska acquired a 70 percent interest in West Coast.

### **The Terms of Employment**

[10] The terms of Mr. Mackie's employment with West Coast are set out in a series of e-mails between Mr. Mackie (using Ms. Dombovari's e-mail address) and Mr. Brockman:

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**From:** Larry [[mailto:larry\\_mackie@telus.net](mailto:larry_mackie@telus.net)]  
**Sent:** Wednesday, June 06, 2007 3:28 PM  
**To:** [tbrockman@wceng.com](mailto:tbrockman@wceng.com)  
**Subject:** RE: Larry Mackie

Hi Ted

Good to meet with you people again today. Can you let me know what in terms of benefits the company offers (I.E. Medical, RRSP matching, Dental - what does it cover if you have it)?

Again I am very interested in the position and believe I have [a lot] to offer.

regards

Larry

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**From:** Ted Brockman [[tbrockman@wceng.com](mailto:tbrockman@wceng.com)]  
**Sent:** Wednesday, June 06, 2007 10:50 PM  
**To:** 'Larry'  
**Subject:** RE: Larry Mackie

Hi Larry,

We are also interested in having you join our team. I'll put together a summary of our benefits package and send it to you tomorrow.

Best regards,

**Ted Brockman, P. Eng.**  
West Coast Engineering Group Ltd.  
Ph: 604-946-1256  
Fax:604-946-1203  
email: [tbrockman@wceng.com](mailto:tbrockman@wceng.com)  
[www.wceng.com](http://www.wceng.com)

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**From:** Ted Brockman [<mailto:tbrockman@wceng.com>]  
**Sent:** Thursday, June 07, 2007 9:33 AM  
**To:** 'Larry'  
**Subject:** FW: Benefits package for office staff

Hi Larry,

A summary of our benefits package for employees and their dependants is outlined below. Dental coverage is limited to \$1,500 per person per year.

Best regards,

**Ted Brockman, P. Eng.**

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**From:** Jackie Strukoff [<mailto:jstrukoff@wceng.com>]  
**Sent:** Thursday, June 07, 2007 9:02 AM  
**To:** 'Ted Brockman'  
**Subject:** RE: Benefits package for office staff

Hi Ted, benefits are as follows:

MSP (BC Medical) is fully paid for by the company

Extended Health thru Sun Life is fully paid for by the company which includes dental, extended health, emergency travel assistance, long term disability, accidental death & dismemberment, life coverage (\$25K).

Would you like a copy of the benefits booklet?

Then vacation time based on number years of service and sick days; 3 sick days max paid in one month and a maximum of 10 per calendar year.

JJ

-----Original Message-----

**From:** Ted Brockman [<mailto:tbrockman@wceng.com>]  
**Sent:** Wednesday, June 06, 2007 10:51 PM  
**To:** Jackie Strukoff  
**Subject:** Benefits package for office staff

Hi Jackie,

Can you put together a summary of the benefits package we have for office staff? Thanks.

Best regards,

**Ted Brockman, P. Eng.**

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**From:** Britta Dombovari [<mailto:bdombovari@telus.net>]  
**Sent:** Thursday, June 07, 2007 12:49 PM  
**To:** Ted Brockman  
**Subject:** RE: Benefits package for office staff

Hi Ted

Thanks the benefits are very good as I expected they would be. Please make me an offer based on three or 4 weeks holidays per year.

Regards

Larry

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**From:** Britta Dombovari [<mailto:bdombovari@telus.net>]  
**Sent:** Monday, June 11, 2007 9:09 AM  
**To:** Ted Brockman  
**Subject:** RE: Benefits package for office staff

Hi Ted

Can you provide me with a brief job description along with the title and is there any room for negotiations with respect to the pay? Is there a probation period and how long and when do the benefits start?

Thanks

-----Original Message-----

**From:** Ted Brockman [<mailto:tbrockman@wceng.com>]  
**Sent:** Sunday, June 10, 2007 10:59 PM  
**To:** 'Britta Dombovari'  
**Cc:** Larry Mackie  
**Subject:** RE: Benefits package for office staff

Hi Larry,

Confirming our offer of employment, your starting salary with 4 weeks vacation would be \$55,000 and \$57,500 with 3 weeks of vacation.

Best regards,

**Ted Brockman, P. Eng.**

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**From:** Ted Brockman [<mailto:tbrockman@wceng.com>]  
**Sent:** Monday, June 11, 2007 10:07 AM  
**To:** 'Britta Dombovari'  
**Subject:** RE: Benefits package for office staff

Hi Larry,

The position is Production Manager. You will be responsible for creating shop Work Orders from Customer Orders, purchasing and expediting materials based on drawings provided and scheduling production. You will be expected to provide information to Sales staff to help them respond to customer inquiries on order status.

While the starting salary offered may seem modest, we have an employee bonus program that last year paid out \$200,000 to 20 staff members. The bonus is divided with consideration for attitude, dedication, years of service and the employee's contribution to the overall success of the company. We anticipate it will take you some time to get up to speed in your new position. We will review your salary after 3 months, again on April 1st, 2008 and annually after that. We can start your benefits immediately.

If you have any further questions or concerns, give me a call.

Best regards,

**Ted Brockman, P. Eng.**

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**From:** Britta Dombovari [<mailto:bdombovari@telus.net>]  
**Sent:** Tuesday, June 12, 2007 8:12 AM  
**To:** Ted Brockman  
**Subject:** RE: Benefits package for office staff

Hi Ted

I will give you a call later today to discuss.

Larry

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**From:** Britta Dombovari [<mailto:bdombovari@telus.net>]  
**Sent:** Wednesday, June 13, 2007 4:52 PM  
**To:** [tbrockman@wceng.com](mailto:tbrockman@wceng.com)  
**Subject:** FW: Benefits package for office staff

Hi Ted

Not sure if you got this anyways I will give you a call tomorrow if I don't hear from you before then.

Regards Larry

-----Original Message-----

**From:** Britta Dombovari [<mailto:bdombovari@telus.net>]  
**Sent:** Wednesday, June 13, 2007 11:07 AM  
**To:** [tbrockman@wceng.com](mailto:tbrockman@wceng.com)

**Subject:** FW: Benefits package for office staff

Hi Ted

It was nice talking to you yesterday. I am really looking forward working with you and [your] team soon.

I understand [your] concerns about the learning curve of a new employee which might result in [not] being very productive for the first little while, but given my background and my ability to learn things quickly, I believe I would be a valuable asset in a much shorter time frame then you may anticipate.

You have offered me 57,500 for 3 weeks holidays or 55,000 for 4 weeks holidays along with a very attractive bonus plan. As I had mentioned during our conversation, I would like the wages to be a slightly higher as this is a managerial position (average \$60,000 - 65,000 starting wage). I have taken into consideration your comments regarding a salary review after three months with a possibility of a 5000,00 pay increase after this time frame and I would like to propose the following:

1) As I mentioned before, I would need some time off at the end of August as I have trip booked to Europe (this can be changed if required). The time frame is from August 20-Sept 1 (two weeks if possible with unpaid if need be). Or if this doesn't work for you I could have a later start date and go to Europe first? I had the trip booked last year so I would like to go if possible.

2) The wage of \$57,500 with 4 weeks vacation and a salary review after three months and again in April 1st, 2008 or as another option, the 57,500 as you had proposed with 3 weeks vacation but with some guarantee on the raise/bonus after three month along with 4 weeks holidays after one year.

Please let me know what your thoughts are. Thank you.

Regards,

Larry

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**From:** Ted Brockman [tbrockman@wceng.com]  
**Sent:** Thursday, June 14, 2007 8:59 AM  
**To:** 'Britta Dombovari'  
**Subject:** RE: Benefits package for office staff  
**Attachments:** image001.jpg; image002.jpg

Hi Larry,

You obviously have good negotiating skills. They will be put to good use in the Production Manager position. OK, \$ 57,500 with 4 weeks vacation and a salary review after three months and again in April 1st, 2008 it is. Vacation time is accumulated in the first 12 months and taken in the following 12 months so you won't have vacation time to take the 2 weeks in August. That can be unpaid leave or we could probably let you borrow a week from next year.

Are you able to start next Tuesday?

Best regards,

**Ted Brockman, P. Eng.**

...

[11] Mr. Mackie testified that during his interview with Mr. Brockman, he was told that all of West Coast's employees were long-term employees, and that a \$200,000 bonus was shared by the employees based on each employee's position in the company, commitment to the company, and years of service. Mr. Brockman also told him there was room for advancement and that the company was growing.

[12] Mr. Brockman does not deny what Mr. Mackie says occurred during the interview, but did not state what he claims took place during the interview. Instead, he only stated what he generally told all prospective employees: West Coast is a good company to work for; the company is strong, growing, and has good prospects; it treats its employees with dignity and respect; and there are long-term employees.

### **The Character of Mr. Mackie's Employment**

[13] Mr. Mackie was employed as the Production Manager. He obtained orders from sales or through the engineering group. He created work orders using the computerized visual scheduler manufacturing system based on the applicable drawings. He negotiated with suppliers for the necessary materials or equipment, and then handed the work order packages and drawings to Inderjit Dosanjh, the shop supervisor who supervised the unionized welders and machine operators. Mr. Mackie also had a role in scheduling the work.

[14] The organization at the time of Mr. Mackie's hire was in Mr. Brockman's words, "very loose". There were no formal lines of reporting or job descriptions. After the Valmont merger, an organization chart was prepared based on what Mr. Brockman said was "the flow of materials".

[15] Much evidence was led by both parties on the actual work Mr. Mackie performed and the extent to which he had supervisory duties. There was no set limit on his authority to negotiate contracts, and he regularly negotiated purchases in excess of \$150,000, and in excess of \$2 million annually. He

reported to both Greg Balsdon, the Operations Manager who was responsible for production at all four plants and reported directly to Mr. Brockman.

[16] I do not find the fact that Mr. Mackie did not directly supervise the unionized workers to be of any great significance.

[17] West Coast argues that at best, Mr. Mackie was a middle management employee with administrative duties. However, I do not consider negotiating supply contracts and purchases to be an administrative function. Mr. Mackie does not argue that he was a senior management employee. I conclude that it is fair to describe Mr. Mackie as a middle management employee.

[18] In June 2008 Mr. Mackie's salary was increased to \$60,375.

### **The Termination of Mr. Mackie's Employment**

[19] On March 25, 2009 Mr. Mackie was called into Ms. Habgood-Bailey's office. Mr. Brockman was also present. Mr. Mackie was handed an envelope and told he was being terminated. When he asked why, he was told that it was Valmont's company policy that they could not tell him why. He was told to leave the premises and was escorted out by Mr. Balsdon. He was unable to collect any of his personal belongings.

[20] The dismissal and the manner of his dismissal had a devastating impact on Mr. Mackie.

[21] Before his abrupt dismissal, Mr. Mackie and his wife had decided that he had a good future at West Coast. Instead of Mr. Mackie moving to Germany with the children, they decided that Ms. Dombovari would quit her job in Germany and return to Canada. At the time of Mr. Mackie's dismissal, Ms. Dombovari had recently moved back from Germany and was in Ottawa taking a course so that she could qualify in her field of work in Canada.

[22] Mr. Mackie has contemplated suicide and is currently under medical treatment for depression. He has started smoking and drinking heavily and is no longer motivated to go to the gym. He has done whatever he reasonably can to find alternate employment but remains unemployed after more than seven

months. He and Ms. Dombovari have decided to return to Germany and have recently sold their home in Delta.

[23] The law is clear that a terminated employee cannot be compensated in damages for the loss of his job or for pain or distress that follows as a result of the dismissal: *Honda Canada Inc. v. Keays* at para. 50.

[24] Mr. Mackie asked West Coast to provide him with a reference letter but the letter has been no use to him because it inaccurately describes his position with West Coast as “Mfg/Purchasing Agent”. Mr. Mackie has never worked as a Purchasing Agent. However, the letter describes his duties as “managing and directing of the organization’s supply chain activities including production planning, material procurement, and inventory control”. This description reinforces my view that he was a middle management employee with more than just administrative duties.

### **What is the Period of Reasonable Notice?**

[25] Mr. Mackie relies on the following authorities in support of his contention that he is entitled to the higher end of the range of six to nine months:

[26] In *Bavaro v. North American Tea*, 2000 BCSC 419, [2000] B.C.J. No. 536, and 2001 BCCA 149, 86 B.C.L.R. (3d) 249, the 35 year old plaintiff was initially a purchasing manager and then a production manager. His annual salary was \$60,000. His employment was terminated after 13 months. After 11 months of unemployment, he found work in New York City and relocated. He was awarded six months, which was upheld on appeal.

[27] In *Kreager v. Davidson* (1992), 74 B.C.L.R. (2d) 205, 19 B.C.A.C. 188 (C.A.), the Court of Appeal upheld an award of six months for a 30 year old grocery store manager who was terminated after 11 months employment.

[28] In *Larsen v. A & B Sound* (1996), 22 B.C.L.R. (3d) 237, 18 C.C.E.L. (2d) 237 (S.C.), a 47 year old salesman, who had no “reports” and was not in a management position, was terminated after approximately two and a half years. He was awarded six months.

[29] In *Longshaw v. Monarch Beauty Supply Co.* (1995), 14 B.C.L.R. (3d) 88, 15 C.C.E.L. (2d) 232 (S.C.), a 45 year old sales and marketing manager who was employed for three months was awarded six months.

[30] In *MacLean v. Newnes*, 2001 BCSC 1515, [2001] B.C.J. No. 2314, a 48 year old library record systems coordinator who had no management or supervisory duties was terminated after 29 months. She was awarded six months pay in lieu of notice. During the six months she was able to find some, but much less remunerative work.

[31] In *Mitchell v. Paxton*, 2001 BCSC 1802, [2001] B.C.J. No. 2759, a 53 year old mill manager/sales manager could not commit the company to purchase in excess of \$1,000. He reported to the general manager on the site. He was employed for 23 months before termination. He was awarded nine months salary.

[32] In *Paradis v. Skyreach Equipment Ltd.*, 2002 BCSC 32, [2002] B.C.J. No. 28, a 44 year old salesperson who was employed for eight and one-half months was awarded six months.

[33] In *Saalfeld v. Absolute Software*, 2009 BCCA 18, 88 B.C.L.R. (4th) 244, the Court of Appeal upheld an award of five months to a 35 year old salesperson who was employed for eight months.

[34] In *Shin v. TBC Teletheatre B.C.*, 2001 BCCA 83, 85 B.C.L.R. (3d) 75, a 44 year old marketing manager was employed for one and one-half years before termination. At trial he received ten months pay in lieu of notice, which was reduced on appeal to six months.

[35] West Coast contends that reasonable notice in Mr. Mackie's circumstances is two to three months. It relies on *Baxter v. Hallmark Ford Sales Ltd.* (1995), 17 C.C.E.L. (2d) 71 (B.C.S.C.). Ms. Baxter was an experienced business manager in the auto sales industry. She earned \$5,000 per month and was employed for 18 months before her termination on September 14, 1994. She was awarded two months pay in lieu of notice. However, she found work at another dealership in the same month she was terminated, and earned \$2,100

that month from other employment. I also note that the primary issue in that case was whether Ms. Baxter's employer had cause for termination, and there was no argument on the issue of reasonable notice.

[36] West Coast also relies on *McCulloch v. IPlatform Inc.* (2004), 46 C.C.E.L. (3d) 257. However, I do not see how that case assists. The plaintiff was employed for three months and 12 days before his termination and was awarded three months notice.

[37] West Coast argues that this Court has adopted a rough rule of thumb of one month for each year of service: *Roney v. Knowlton Realty Ltd.* (1995), 11 C.C.E.L. (2d) 205 (B.C.S.C.); *Zaitsoff v. Zellstoff Celgar Limited Partnership*, 2009 BCSC 346, [2009] B.C.J. No. 496; and *Simoës v. Metaldyne Machining and Assembly Manufacturing Co.*, [2006] O.J. No. 5060 (Ont. S.C.J.). West Coast also contends that some cases suggest a plaintiff in a production manager or comparable position is entitled to less than one month per year of service: *Martellacci v. CFC/INX Ltd.* (1997), 28 C.C.E.L. (2d) 75 (Ont. C.J. (Gen. Div.)); *Richardson v. Davis Wire Industries Ltd.* (1997), 33 B.C.L.R. (3d) 224, 28 C.C.E.L. (2d) 101 (S.C.); and *Koskinen v. Foremost Foods Ltd.* (1997), 33 C.C.E.L. (2d) 127 (B.C.S.C.).

[38] In *Roney* at para. 18, Mr. Justice Trainor referred to "the conventional approach of one-month notice per year of service", but I do not agree that he was referring to a principle of law. A rough rule of thumb for determining the period of notice is inconsistent with *Bardal*, which says that there is "no catalogue laid down" for determining reasonable notice in "particular classes of cases", including in this case the notice period for a middle management employee or production manager.

### **Other Factors**

[39] There remains the issue of what can be called the "uniqueness" factor relating to the impact of the dismissal on family.

[40] In June 2008 Ms. Dombovari picked her husband up from work and he gave her an informal tour of the workplace. During the course of the tour,

Mr. Mackie introduced her to Mr. Brockman and there was a brief exchange between them. Mr. Mackie said that his wife asked Mr. Brockman how her husband was doing, and he replied to the effect that he was doing a good job, had a long-term career at the company, and that she should come back to live and be with her family.

[41] Mr. Mackie said that he and his wife were trying to “get a feel” for whether she should return from Germany.

[42] Ms. Dombovari does not recall any discussion with Mr. Brockman about her returning to Canada from Germany. She said that Mr. Brockman had explained that her husband was doing a wonderful job and had a bright future with the company. Ms. Dombovari testified that although Mr. Mackie did not usually show much emotion, he was very emotional and enthusiastic about his work at West Coast. After hearing all the wonderful things he said were taking place at work and after meeting Mr. Brockman, Ms. Dombovari decided it was time for the family to choose whether to live in Canada or Germany. In August 2008 Mr. Mackie and Ms. Dombovari decided that she would give up her job in Germany and return to Canada.

[43] Mr. Brockman only recalls meeting Ms. Dombovari very briefly. He does not deny what either Mr. Mackie or Ms. Dombovari said about their interactions with him.

[44] Ms. Dombovari worked as a regulatory affairs specialist for a Swedish company based in Rastatt, Germany. Her work involved certifying and approving the use and sale of various medical devices or product lines. She gave up a well paying job, incurred significant costs, and was unable to work during the six months’ training she had to complete in Ottawa in order to obtain similar but lower paying work independently certifying medical devices. Her training costs and loss of income are close to \$150,000.

[45] In *Ansari v. British Columbia Hydro and Power Authority* (1986), 2 B.C.L.R. (2d) 33 (S.C.), aff’d 55 B.C.L.R. (2d) xxxiii (C.A.), Chief Justice McEachern reviewed the four *Bardal* factors and then stated at 40-41:

To the above, however, must be added some further matters not often mentioned in the authorities which are stated at p. 271 of *Hunter [v. Northwood Pulp and Timber Ltd.* (1985), 62 B.C.L.R. 367] as follows:

In addition to all other factors requiring consideration in this case, it will be observed that Hunter came to "Upper Fraser" from Langley, British Columbia and, as a result, his wife gave up her position with the Insurance Corporation of British Columbia, including her seniority rights. The learned trial Judge probably gave some weight to this factor in addition to other factors, including the "uniqueness" and "economic factors".

I understand "uniqueness" to refer to the particular circumstances of the employee being discharged in the special environment of his employment. As I have suggested, I do not think this should be given much weight.

[46] While Mr. Mackie and Ms. Dombovari are understandably upset by the impact of the termination on their family, it is not a factor I give much weight in determining the length of the notice period.

[47] I conclude that the appropriate period of notice in this case is nine months.

### **The Bonus**

[48] Mr. Mackie claims that a bonus is part of his regular remuneration and that he is entitled to a bonus in addition to his regular salary. West Coast claims that the bonus is discretionary.

[49] In the course of negotiating Mr. Mackie's employment contract, Mr. Brockman wrote in his e-mail of June 11, 2007:

While the starting salary offered may seem modest, we have an employee bonus program that last year paid out \$200,000 to 20 staff members. The bonus is divided with consideration for attitude, dedication, years of service and the employee's contribution to the overall success of the company.

[50] At the company Christmas party in December 2007 Mr. Mackie received a bonus cheque for \$3,000. It represented his employment from when he started in June 2007 until the company year ending September 30, 2007.

[51] Mr. Brockman testified that prior to West Coast's merger with Valmont,

West Coast distributed ten percent of the company's net earnings to the employees based on length of service, dedication, and overall contribution to the success of the company. Following the merger with Valmont there was a "transition period" because West Coast's bonus program was "quite a bit more lucrative" than Valmont's gain sharing program which is based on the company meeting performance criteria. In addition, West Coast's bonus was always paid out at the annual Christmas party, whereas Valmont's bonus was based on the calendar year and paid out in late March.

[52] West Coast had no written company policy relating to payment of the bonus. Valmont has a written company policy relating to its gain sharing program.

[53] At the Christmas party in 2008 Mr. Brockman announced to the employees that his pockets were empty but that they would be getting their bonus a day or two later.

[54] On December 22, 2008 Mr. Mackie received a \$5,000 cheque with the following letter:

December 22, 2008

To Our Valued Employees

Due to the Public Company's yearend audit regulations, the Company portion of our bonus will be delayed until March 2009.

The enclosed bonus is personally from Jim Parisian, Ted Brockman and Raini Habgood-Bailey and we hereby wish you a very Merry Christmas and Happy New Year.

Thank you for your hard work and dedication on behalf of the company.

Merry Christmas,

"Raini, Ted & Jim"

[55] Mr. Brockman testified that in December 2008 the three active shareholders each personally put in \$100,000 for the employees' Christmas bonus because that was when West Coast always paid the employees' bonus. In late March or early April 2009 West Coast paid out a further \$70,000 based on the new Valmont gain sharing policy to approximately 22 or 23 employees at the Delta plant.

[56] Mr. Brockman testified there were approximately 25 employees in the production department of the Delta plant in 2007. Mr. Mackie testified that the senior accountant and controller were terminated at the same time that he was terminated. There is no evidence that there were employees who received no bonus, and I conclude that all the employees received a bonus although the amount of the bonus varied between the employees.

[57] Prior to the merger, Mr. Brockman used a spreadsheet to evaluate the employees for determining the amount of their bonus based on the number of points between one and five assigned to various criteria. Mr. Brockman has the spreadsheets for the 2007 and 2008 bonuses, and Valmont's gain sharing policy, but did not produce any of those documents because he says that no one asked him to produce them.

[58] Mr. Mackie's bonus entitlement has been in issue since the commencement of his action. I also pause to note that Mr. Mackie was acting in person until Mr. Fleming was retained to act on his behalf just one week before trial.

[59] West Coast relies on *Sandelson v. International Vintners Ltd.* (1987), 18 B.C.L.R. (2d) 86 (S.C.), for the well-known proposition that whether a dismissed employee is entitled to damages for loss of a bonus that would have been paid during the notice period depends on whether the bonus was an integral part of the compensation structure or an *ex gratia* (discretionary) payment by the employer.

[60] Each year Mr. Mackie worked, he received a bonus. I conclude based on the evidence that the bonus was an integral part of his compensation.

[61] Mr. Mackie received a \$3,000 bonus in December 2007 for three months work, which is equivalent to an annual bonus of \$12,000. He received a \$5,000 bonus cheque in December 2008 with a promise that "the company portion" would follow in March 2009. Mr. Mackie was terminated on March 25, 2009, and the company bonus was paid to the employees in late March or early April 2009. I conclude that if Mr. Mackie had remained employed during the period of reasonable notice, he would have received a bonus. It was promised to him by

the letter of December 22, 2009.

[62] Doing the best I can, I conclude that Mr. Mackie is entitled to pay in lieu of an annual bonus of \$12,000 which is equivalent to \$1,000 a month. He is therefore entitled to a bonus of \$9,000 equivalent to nine months notice.

### **Vacation**

[63] The parties are agreed that Mr. Mackie is entitled to lost vacation equivalent to eight percent of his base salary (see *Bavaro* at paras. 16 to 21) or \$4,830.

### **Summary**

[64] Mr. Mackie is entitled to the following:

Nine months salary in lieu of notice	\$45,281.25
Bonus	\$9,000.00
Loss of vacation	<u>\$4,830.00</u>
	\$59,111.25
Less severance paid	-\$2,322.00
<b>Total:</b>	<b>\$56,789.25</b>

[65] The parties are agreed that Mr. Mackie is entitled to various medical and dental expenses.

[66] Mr. Mackie is also entitled to costs and court order interest.

“Loo J.”