

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:)
)
GEORGE KIRCHMAIR)
)
Plaintiff)
) Kevin L. MacDonald and Jason R.
– and –) Allingham, for the Plaintiff
)
EXP GLOBAL INC. formerly TROW)
GLOBAL HOLDINGS INC., EXP)
SERVICES INC. formerly TROW)
ASSOCIATES INC. and EXP ENERGY)
SERVICES LTD.)
)
Defendants)
) Todd Weisberg and Nicole Jakobek, for the
) Defendants
)
) **HEARD:** January 13 – 17 and 20, 2025

REASONS FOR JUDGMENT

HEALEY J.

BACKGROUND

- [1] The Defendants, EXP Global Inc., EXP Services Inc., and EXP Energy Services Ltd. (collectively “EXP”), were the Plaintiff’s former employer. It has been conceded that the Defendants were a common employer.
- [2] The Plaintiff seeks remedies arising from an alleged termination or constructive termination of that employment relationship. He claims:
- a) A declaration that he was terminated or constructively terminated by EXP;
 - b) Payment of unpaid bonuses (wages) of \$148,670.23;
 - c) Payment of a debt in the amount of \$382,000 arising as a contractual obligation from the termination provisions of his employment agreement;

- d) Moral damages of \$200,000;
 - e) Punitive damages in the amount of \$100,000;
 - f) Prejudgment and post-judgment interest, and costs.
- [3] The Plaintiff seeks this relief due to EXP's failure to pay bonuses due to him under his employment agreement, which remain unpaid up to and including the trial. The bonus terms were an essential term of the Plaintiff's compensation. The Plaintiff's theory of the case is that EXP deliberately misled him regarding bonus payments, which it unlawfully delayed or failed to pay for a prolonged time. By withholding the bonuses that were owed to him, EXP was trying to pressure him into accepting a revised bonus system under a new contract.
- [4] The Plaintiff also alleges bad faith conduct on the part of EXP following his termination, due to them levelling accusations that he breached terms of his employment relating to confidentiality and proprietary information.
- [5] EXP's theory of the case is that the Plaintiff resigned, orchestrating the events leading up to his resignation because of a long-standing intention to leave EXP to pursue his own more lucrative business ventures. EXP asserts that throughout his employment the Plaintiff acquiesced in receiving late payments of his bonuses. There is no dispute that EXP was trying to engage the Plaintiff in a negotiation with respect to a new bonus structure. However, EXP maintains that it always intended to pay the bonuses once the amount was agreed upon.
- [6] EXP's Statement of Defence does not allege that the Plaintiff was dismissed for cause, but only that he resigned or abandoned his employment. Its allegations of employment misconduct were not alleged to be a basis for cause. Evidence led by EXP related to such allegations goes only to rebutting the Plaintiff's allegation of bad faith, in accordance with a mid-trial ruling made by this court.

ISSUES

- [7] The pleadings and evidence require the court to decide the following issues:
1. Whether an adverse inference should be drawn from the failure of EXP to provide evidence of key witnesses;
 2. The effect of the entire agreement clause in the Plaintiff's employment contract;
 3. Whether EXP failed to pay the Plaintiff's bonuses;
 4. Whether EXP owes the Plaintiff \$148,670.23 for unpaid bonuses plus 10% vacation pay;
 5. Whether the Plaintiff was terminated or constructively terminated by EXP;

6. Whether EXP owes the Plaintiff liquidated or contractual damages of \$382,000, being 21 months' base salary;
7. Whether EXP acted in bad faith;
8. Whether the Plaintiff is entitled to moral damages; and
9. Whether EXP is liable for punitive damages.

THE EVIDENCE

- [8] Four witnesses testified at the trial, including the Plaintiff. The three witnesses called by EXP were: Sarah Skinner, who worked for EXP until July 2023, holding the position of VP of Human Resources; Greg Henderson, the former Chief Financial Officer of EXP, who held that position until his retirement in June 2016; and Deborah Walters, EXP's current Chief Financial Officer and Executive Vice President, who was hired in May 2016.
- [9] There were several EXP executives who were key to the events that led to the dissolution of the employment relationship but were absent from this trial. The Plaintiff asks that an adverse inference be drawn from their failure to testify. These individuals are: Ivan Dvorak, Chairman and CEO, Mark Dvorak, President and COO, John McKee, Executive Vice President, and Vlad Stritesky, a Co-CEO.
- [10] It was Skinner's understanding that Ivan Dvorak still works out of the Chicago office, although he spends time at his home in Florida. To her knowledge, there was no reason why he could not attend the trial. Walters did not know where he was during the week of the trial. Mark Dvorak still works out of the Chicago office. Walters testified that he was travelling on business at the time of the trial.
- [11] McKee left EXP in August 2017, taking the position that he was constructively dismissed, and later starting a claim against EXP. This court was advised that that claim has settled and is subject to a confidentiality agreement.
- [12] Skinner has no knowledge about Stritesky's whereabouts; Walters said that he has not been involved in the company for over five years and she does not know his personal details.
- [13] During this trial, both parties relied on email correspondence created during the relevant period, some of which was authored by those senior executives. By agreement between counsel, all email correspondence was agreed to have been prepared, sent, and received on or about the dates indicated. However, the truth of the contents of each email was not admitted and was required to be established by the evidence.

Acquisition of Barenco

- [14] The Plaintiff is a chemical and environmental engineer. He was formerly a partner of Barenco, a boutique engineering firm focusing on environmental issues. His partner was a hydrogeologist, Jim Phimister. Barenco's biggest customer was Imperial Oil.

- [15] In 2010, Barenco's shares were purchased by Trow Global Holdings ("Trow"), an engineering consulting firm.
- [16] As part of the share purchase agreement, the Plaintiff received Trow shares valued at \$550,000. The Plaintiff's evidence was that McKee and Stritesky, with whom most of his negotiations were held, were determined that he receive shares so that he would remain with Trow long-term.
- [17] The Plaintiff's primary responsibility when he joined Trow was to be a "rainmaker" by growing the business relationship that Barenco had with Imperial Oil, using the technical resources of Trow. The Plaintiff held the position of Vice President of Barenco, a Trow Global Company. Henderson, who was Trow's CFO when Barenco was acquired, confirmed this by describing the Plaintiff as the individual in charge of running the whole operation, who was to work with other companies within EXP to grow the business.
- [18] Skinner testified that retaining the knowledge of the main shareholders at Barenco was a key part of its acquisition. As part of any acquisition, Trow would try to enmesh key individuals through an employment contract to ensure that they stayed for a certain period.
- [19] As part of the share purchase agreement, the Plaintiff negotiated a three-year employment contract (the "2010 Agreement"), through McKee. The 2010 Agreement governed the parties' relationship for the next three years.
- [20] Trow and a related company, Trow Associates Inc., were eventually rebranded to EXP in 2011. Barenco became company no. 37 within EXP Energy Services Ltd., focused on providing engineering advice and services to clean up petroleum or hydrocarbon pollution. Imperial Oil became one of the biggest clients for EXP in the environmental sector.

2010 Employment Agreement

- [21] Under the 2010 Agreement, the Plaintiff's annual salary was \$165,000, plus bonus. The uncontested evidence of the Plaintiff is that it was important to him, which he expressed to McKee at the time of their negotiations, that his bonuses not be discretionary.
- [22] The bonus was to be calculated in accordance with Schedule "A" of the 2010 Agreement. The Plaintiff's bonuses were calculated on the basis of "EBITDA", an acronym for earnings before interest, taxes, depreciation, and amortization. EBITDA is one way to measure a company's overall financial performance. The Plaintiff was told that the bonus structure was typical for the company's principals.
- [23] The Agreement provided that the bonus amount would be calculated based on actual financial data as reflected in the financial statements for the applicable fiscal period and would be paid in the normal course of business of Trow, in accordance with Trow's past practice. EBITDA was tracked by Trow, and the Plaintiff's bonuses calculated accordingly.
- [24] Following the three-year term of the contract, Schedule "A" was no longer to be applicable. The contract provided that the Plaintiff would then be eligible to receive additional amounts of compensation from time to time under Trow's Incentive Compensation Program. These

bonuses were related to individual, team, and company performance and were therefore discretionary.

[25] The 2010 Agreement contained a termination provision that provided for 21 months' pay in lieu of notice in the event of termination without cause.

[26] The 2010 Agreement also contained terms with respect to outside activities. It required that if the Plaintiff wished to participate in any other business requiring his attention during business hours, or which may conflict with Barenco or Trow interests, he must first advise of his involvement and receive prior written approval. There is no evidence that the Plaintiff ever took steps to pursue such a business under the outside activities clause in the 2010 Agreement.

[27] It also contained an entire agreement clause, which provided:

This Agreement constitutes the entire agreement between the parties and any or all previous agreements, written or oral, between the parties are terminated and cancelled, save except those contracts or agreements explicitly recognized herein.

[28] It is the Plaintiff's uncontested evidence that bonuses were paid to him under the 2010 Agreement, without issue.

Negotiation of the 2013 Amendment

[29] As the three years of this contract came to an end, the Plaintiff discovered that Phimister had negotiated a new contract with EXP that paid him \$150 per hour. The Plaintiff believed that he was doing more work for EXP than Phimister, so he told McKee that they would need to negotiate a new agreement with higher compensation that would again include non-discretionary bonuses, with due dates.

[30] The Plaintiff also informed McKee that he had been approached by other engineering firms, which all knew that EXP was doing very well on the Imperial Oil contracts that the Plaintiff was securing. He candidly told McKee that if EXP could not offer a new contract with higher compensation, he would be moving on. However, he also told McKee that he would like to work at EXP long-term.

[31] It is at this point that a dispute in the evidence arises as to the Plaintiff's intentions for his continued employment with EXP.

[32] Skinner recalled attending a lunch meeting with the Plaintiff and McKee in the spring of 2013, during which the Plaintiff expressed his desire to grow his role and compensation. According to Skinner, if those goals could not be met by EXP, the Plaintiff intended to start his own business. Her recollection was that the new business would not be in direct competition, but could be a partnering business that purchased, decontaminated, and sold land.

- [33] The Plaintiff does not deny that he had been considering setting up a company for the purpose of purchasing environmentally contaminated land (“brownfield sites”) and decontaminating for resale. This type of real estate investment company would not have competed with EXP’s consulting work.
- [34] According to Skinner, the Plaintiff expressed at the meeting that he would leave EXP after his company was set up. Skinner was under the impression that this transition would take approximately a year. Her recollection from that meeting, which occurred nine years before the trial, is the primary evidence that EXP relies on to establish that the parties’ intentions were that any renegotiated contract would not be long-term.
- [35] The evidence is clear that EXP was incentivized to retain the Plaintiff, and to reach a deal that would be attractive enough to prevent him from leaving. Skinner stated that EXP viewed the Plaintiff as being very valuable at that time, as there was no other person in his group who could take the lead with Imperial Oil. Henderson confirmed that there was no other employee who could take over the Plaintiff’s role, and the Imperial Oil contract was an important one. Henderson said that if the Plaintiff left, the benefit derived from EXP’s \$7.5 million purchase of Barenco would have evaporated.
- [36] In the result, an amended employment agreement was made in 2013 (the “2013 Amendment”), which went into effect on September 23, 2013. The 2013 Amendment was drafted by McKee and Henderson, with input from legal counsel. In particular, Henderson confirmed that the language for the bonus structure came from EXP’s lawyers.
- [37] Skinner testified that her understanding was that the 2013 Amendment was not meant to be a long-term arrangement, but a bridge to the Plaintiff’s inevitable departure after he opened his own business.
- [38] The Plaintiff denies that he was contemplating leaving EXP to start his own company and disagrees with the allegation that the 2013 Amendment was meant to be short-term.
- [39] The Plaintiff testified that it was imperative to him when he negotiated the 2013 Amendment that the bonuses be paid on time, with defined due dates. He had an expectation that his annual bonuses would bring him close to the compensation that he was receiving at Barenco before it was sold, which was about \$450,000 per year.

Terms of the 2013 Amendment

- [40] The 2013 Amendment provided that the Plaintiff would hold the title of Vice President, EXP Energy Services Ltd., and would continue to report to McKee. His duties were to provide expert business and technical advice on projects or opportunities, and continue to be the primary client contact, contract manager, and principal engineer for work provided by EXP to Imperial Oil.

[41] Compensation under the 2013 Amendment was set out as follows:

Remuneration

Your annual salary is \$218,400, based on a 28 hour work week and payable bi-weekly subject to applicable withholdings. Bonus will be paid on the basis of Labour Margin, defined as net revenue (Gross Revenue less Direct and Reimbursable costs) less total labour cost (Direct and Indirect Labour). The total eligible annual bonus award will be at 6.5% of the labour margin achieved by the EXP Energy Services Ltd. group. You will be paid two types of bonus: 1) a **Success Bonus**, paid for obtaining an extension or award of a Contract from Imperial Oil for the provision of Environmental Assessment and Remediation Consultant Services and/or Contractor Services, and 2) an **Annual Bonus** for the Labour Margin performance of the EXP Energy Services Ltd. group. If multiple extensions or awards of new contracts with Imperial Oil are awarded to EXP, then multiple Success Bonuses will be paid to you, so long as you have not resigned or otherwise been terminated at the time of the contract award/extension. The Success Bonus will be calculated using the following assumptions to determine estimated Labour Margin of the contract award/extension. Gross fees will be assumed to be the gross value of the contract. If the gross value of the contract is not stipulated by Imperial Oil, it will be assumed to be the gross revenue billed to Imperial Oil in the preceding year multiplied times the number of years of the contract award/extension. For calculation purposes net fees will be estimated at 75% of gross fees. Labour margin will be estimated at a DLM of 2.60, and unadjusted utilization at 85%. The Annual Bonus will be based on actual values for the calculation of Labour Margin for each fiscal year.

Success Bonus

Upon successful renewal of the contract, or for any period of extension, you shall be paid a lump sum bonus equal to half (50%) of 6.5% multiplied times the estimated labour margin for the total contract extension. The Success Bonus is considered earned by you on the date a contract extension is signed. The Success Bonus will be paid to you 30 days after the date a Contract renewal/extension is signed. No Success Bonus will be paid for the contract extension signed on January 25, 2013 which became effective April 1, 2013. Success Bonuses will be paid for any new contract extensions that come into effect during the term of this agreement.

Annual Bonus

The Annual Bonus will be equal to 6.5% of the actual labour margin for the fiscal year less the success bonus divided by the number of years awarded on the contract. The Annual Bonus will be paid to you on May 31 of each year. The first annual bonus under this agreement will be paid for the fiscal period ending March 31, 2014, and therefore, will be paid on May 31, 2014.

Subject to Section [7] below, payment of the Success Bonus or the Annual Bonus shall not be made in whole or in part unless you are an employee of EXP at the time such payments become due pursuant to this section. For greater certainty, there shall be no accrual of bonus where your employment is voluntarily terminated.

- [42] Accordingly, instead of receiving a bonus that was tied to company profitability through EBITDA like other employees at EXP, the Plaintiff received a unique bonus structure. The Plaintiff said that it was tailored on an employment agreement used in one of EXP's U.S. companies, EXP Energy Services Inc. Skinner denied this to be true, although there is no evidence that she was involved in drafting either the template or the 2013 Amendment.
- [43] The Plaintiff testified that the success bonus was driven by obtaining new contracts or extensions of contracts with Imperial Oil. He explained that "labour margin" is gross revenue, less direct costs of the project, less direct and indirect labour costs related to the project. The date that the contract or contract extensions were won dictated which fiscal year attached to it. The company's fiscal year-end was March 31. For example, a contract won after March 31, 2014, would be calculated as a 2015 success bonus, but was to be paid in 2014.
- [44] Accordingly, the success was paid as an advance, on anticipated profit. The success bonus was due 30 days after signing the contract or its extension.
- [45] The annual bonus was due for all the work done by company no. 37 under the Plaintiff's leadership. This was a straightforward calculation for which all that was needed was the fiscal year-end numbers from EXP. It could not be finalized until EXP closed its books after doing various adjustments for accruals and intercompany revenue at year-end, information that was not available to the Plaintiff unless provided by the finance department. The amount received from a success bonus was deducted from the annual bonus, prorated for the number of years of the contract extension. The annual bonus was always due on May 31.
- [46] Skinner and Walters both agreed that under the 2013 Amendment, a success bonus was to be paid within 30 days of the contract and the annual bonus by May 31. The timing of those payments was not discretionary. They each acknowledged that the bonuses were as much a part of the Plaintiff's compensation as salary.

- [47] The Plaintiff explained that the 28-hour work week on which his salary was based was McKee's solution to paying the Plaintiff \$150 per hour to match Phimister, tailoring the weekly hours to match the annual salary of \$218,400. Objectively, $150 \times 28 \times 52 = 218,400$.
- [48] While Skinner's testimony was that the reduction in working hours was to permit the Plaintiff to have additional time to start his business, she did not dispute that Phimister had just negotiated a new contract at \$150 per hour.
- [49] Henderson first testified that the 28 hours were the result of the Plaintiff's insistence that he wanted to work a reduced work week to allow him to pursue other opportunities that were not competitive with EXP. Under cross-examination, he modified this evidence, stating that he had been told that the Plaintiff only wanted to work 28 hours, which Henderson assumed was because he wanted to pursue outside activities. Henderson said he knew that the Plaintiff had a strong interest in working on brownfield sites, which EXP was not interested in pursuing.
- [50] The 2013 Amendment also provided that the Plaintiff would continue to accrue vacation at a rate of 10% on all earnings for each pay period, along with pay for statutory holidays in accordance with the *Employment Standards Act, 2000*, S.O. 2000, c. 41 ("ESA").
- [51] The 2013 Amendment contained far more extensive terms regarding outside activities¹ than the 2010 Agreement. As the Plaintiff explained, these terms were inserted by EXP because the Plaintiff had explained that he wanted to have the ability to do other work on his own time, not related to engineering consulting services. The Plaintiff wanted the contract to expressly say that he could carry on business activities such as purchasing brownfield real estate as an investment. Any conversations that the Plaintiff held with McKee about doing outside work related to pursuing brownfield sites, which the Plaintiff said was not something that he intended to leave his employment at EXP to pursue.
- [52] While the idea was that the minimum 28-hour work week would allow for time for these pursuits, in reality the Plaintiff made no extra income from outside business activities. He worked far more than 28 hours per week, as necessary to get the job done, which Skinner agreed was the expectation for those holding positions such as the Plaintiff's.
- [53] The termination provision of the 2013 Amendment, in the event of termination without cause, states:

... You will be provided with twenty-one (21) months' pay in lieu of notice, calculated based on your current base annual salary, excluding bonus. Upon termination, you will also be paid any bonus earned up to the date of termination.

¹ The "outside activities" provisions are attached as Schedule A.

- [54] The Plaintiff's evidence that the termination provision was inserted by EXP was not contested.
- [55] The entire agreement clause was also amended to provide that the entire agreement between the parties was constituted by the 2010 Agreement and 2013 Amendment, together with the share purchase agreement. It also states: "Any or all previous agreements, written or oral, between the parties are terminated and cancelled, save and except those contracts or agreements explicitly recognized herein".
- [56] The Plaintiff never agreed to any other amendments to his employment contract after 2013; specifically, he never agreed to vary the bonus provisions. This was confirmed by both Walters and Skinner.

Payment of Bonus After 2013

- [57] There is consensus in the evidence of all witnesses that it was the responsibility of EXP to calculate the bonus payments, specifically, the CFO. This would have fallen to Henderson up until June 2016, and Walters thereafter.
- [58] However, the evidence bears out that beginning in May 2014, the Plaintiff had to calculate his annual and success bonuses, which he sent to McKee for approval and payment. He did so because no one at EXP provided him with the calculations.
- [59] There is no evidence that EXP ever once initiated the calculations or payments throughout the remainder of his employment.
- [60] Throughout his employment, whenever a bonus was outstanding, the Plaintiff would ask McKee about its status. Contrary to the express payment deadlines, McKee would always indicate that the timing of payment was a decision to be made by upper management. The Plaintiff never had any direct conversations or meetings with either Henderson or Walters about his bonuses.
- [61] The annual bonus for fiscal year 2014 was due on May 31, 2014. The Plaintiff was also owed a success bonus for fiscal year 2015 based on securing a renewal of an Imperial Oil contract for the upcoming year. The renewal was signed on March 5, 2014 and so the success bonus was due on April 5, 2014. These amounts were calculated by the Plaintiff to be, respectively, \$150,379.86 and \$106,054.19.
- [62] The Plaintiff testified that it took him about two days to calculate his success bonus if it was based on a contract extension from Imperial Oil, as opposed to being a new contract that would show the contract's gross amount on its face, because he would have to calculate the various numbers to insert in the bonus calculation's equation.
- [63] Having not yet been paid, the Plaintiff followed up by email to McKee in September 2014. On November 4, 2014, still not having been paid, the Plaintiff sent McKee another email that read:

John, I am requesting an official written response clarification on this. As you are aware, these are not discretionary bonuses. They are stipulated as part of my employment agreement; the bonus calculation is defined and the payment date is defined. If you are unable to clarify this today, then I would like to have a meeting with you and Vlad to discuss as soon as possible.

- [64] The response from McKee was to inform the Plaintiff that he had followed up with Henderson as recently as the previous day. Having been copied on McKee's response, Henderson replied "George I will get back to you on the fiscal 14 bonus. As you are aware we have not paid any fiscal 14 bonuses".
- [65] Henderson eventually came up with a different calculation of the Plaintiff's 2014 annual bonus (\$140,346) later in November. The Plaintiff agreed to accept that figure because Henderson had used the company's financial information previously unknown to the Plaintiff. He was paid that amount for his annual bonus on December 12, 2014. This payment was 7 months late. He was also paid his 2015 success bonus on that same date, in the amount of \$106,054, which was 8 months late.
- [66] The delay was repeated in 2015, only more markedly. The Plaintiff sent an email to McKee on October 1, 2015, providing the calculations of his 2015 annual and success bonuses. Again, EXP was supposed to have done the calculations but had not. The annual bonus should have been paid to the Plaintiff by May 31, 2015, four months before he sent his request to McKee. The Plaintiff calculated the annual bonus to be \$29,981.12, and the success bonus at \$106,764.71, together totaling \$136,745.83.²
- [67] Neither of those bonuses were paid in 2015, nor was any written explanation given to the Plaintiff.
- [68] Around this point in EXP's history, at the end of 2015, Ivan and Mark Dvorak entered the scene. The Dvoraks became the primary shareholders. The senior Dvorak, Ivan, was the Chairman and CEO, and his son, Mark, was the President and COO. Stritesky remained Co-CEO.
- [69] In March 2016, the Plaintiff forwarded the October 1, 2015 email to Henderson. He reminded Henderson that it was a contractual requirement that his bonuses were to be paid in 2015.
- [70] Henderson said that when the Plaintiff would make a request for his bonuses, he would reply to him when he was in a position to pay those bonuses. He agreed that none of the Plaintiff's bonuses were ever paid on time.
- [71] Henderson attributes the delays in payment of bonuses to the financial performance of the company in 2014 and throughout 2015, until the company was sold to the Dvoraks and additional bank financing was secured in early 2016. It was his evidence that the Plaintiff

² The email sent by the plaintiff sets out the number as 136,745.80.

was aware that the company was under heavy financial strains, and that the bank was monitoring their spending. During that time, bonus payments were at the bottom of the list of expenditures the bank would approve.

- [72] At trial, Henderson said that because of the company's dire financial position, he was not in a position to get back to the Plaintiff and promise a date by which his 2015 annual and success bonuses would be paid.
- [73] Henderson said that the reason that no emails exist from him to the Plaintiff explaining that the delay in payment was because of the company's financial position is because the Plaintiff attended shareholder meetings and management meetings on a quarterly basis, where these matters were discussed at length.
- [74] By contrast, Skinner was unable to explain why someone did not tell the Plaintiff that this was the reason why his bonuses were not being paid.
- [75] There is not a single email from anyone in upper management that confirmed for the Plaintiff that financial constraint was the cause of his bonuses not being paid.
- [76] Walters said that when she arrived in May 2016, the company was in the process of trying to restructure the debt and improve profitability. She confirmed that before the Dvoraks' acquisition in December 2015, the company had had a disproportionate amount of debt to income. She did not say, as Henderson had testified, that EXP had been on the brink of bankruptcy before new bank financing was secured a few months before she joined EXP.
- [77] On May 25, 2016, the Plaintiff followed up with Stritesky, asking that they meet again to resolve the matter. Stritesky responded the same day, noting that he needed McKee's comment. The email also states, "I understand that you are not interested in our internal screw ups with corporate finance, but John is trying his best to get this done. I apologize for any delays".
- [78] The Plaintiff testified that he did not know exactly what Stritesky was referring to, surmising that he was referring to problems in Henderson's corporate finance department. Henderson denied that there were any "screw ups" in corporate finance, explaining that the company had just been sold and was refinancing.
- [79] On June 7, 2016, the Plaintiff asked for an update from McKee and Stritesky, as he had not heard back from anyone on the issue.
- [80] Stritesky's response was that he and McKee had the best of intentions to resolve this quickly, but Henderson, whose last date with the company was the previous Friday, had refused to cooperate. McKee's response was that he had been "chasing [Henderson] who had promised to have it done on a number of occasions over the past six or eight months, most recently last week he indicated he would have it done before he left. I have seen nothing at this point".
- [81] Neither the emails from Stritesky nor McKee's response suggest that financial problems caused the delay. To the contrary, if McKee had been reminding Henderson to make the

payment to the Plaintiff for “six or eight months”, this would have included the time even before new bank financing was secured.

- [82] Henderson denied that he had been uncooperative. He acknowledged receiving a couple of emails on the issue, but McKee was not “chasing him”. He insisted that he had done the calculations to come up with the Plaintiff’s bonus before he left, and that one of the loose ends that he wanted to clear up before he left the company was to ensure that individuals like the Plaintiff were paid. He testified that he passed his calculations on to Walters and Ivan Dvorak before leaving.
- [83] Walters denies that she received any such calculations from Henderson. Her evidence was that Henderson was not particularly helpful to her with respect to particulars during the transition. She had to obtain such details for herself from others.
- [84] Walters was a more careful and credible witness than Henderson; where his testimony conflicts with hers or the Plaintiff’s, theirs is more reliable. The preponderance of evidence suggests that Henderson was neglectful of his duties and wilfully blind to EXP’s payment obligations under the 2013 Amendment.
- [85] On June 10, 2016, the Plaintiff was told by Stritesky that he would hear shortly from McKee. He testified that he did not.
- [86] By June 22, 2016, Walters had prepared a calculation of the Plaintiff’s annual fiscal 2015 and 2016 bonuses, and a recalculation of payments made to him in 2014 for purposes of her own understanding. By that time, she had been at the company for about six weeks. She testified that the calculations were done by her over a single week.
- [87] The Plaintiff received her calculations on June 28, and responded on July 5, 2016. At that time, he took the position that there was \$171,366.56 owing to him in bonuses. He took issue with Walters’ numbers because in her calculation of his annual bonus, she had removed the intercompany revenue from company no. 37. In his responding email, he pointed out that there was no provision in his employment agreement to remove intercompany transfer work performed by his group. Walters confirmed that following that exchange, EXP ultimately made the concession to no longer deduct the intercompany revenue that the Plaintiff had earned from working on projects and with other groups not related to Imperial Oil. Yet, he was still not paid.
- [88] In the fall of 2016, the Plaintiff continued to follow up with McKee whenever they spoke.
- [89] On October 3, 2016, McKee sent an email to the Dvoraks, Stritesky, and Walters, indicating that he had met with the Plaintiff the previous week and advised him that EXP senior management were “probably all in agreement with the amounts owed for his existing agreement and discussions dating back to June”. Still, no one gave direction to Walters to pay the Plaintiff the amounts that they agreed were owed.
- [90] On October 4, 2016, the Plaintiff retained counsel, explaining that he did so because EXP had been egregiously late on the outstanding payments. There is no evidence that EXP was made aware of the involvement of counsel at that time.

- [91] On December 1, 2016, the Plaintiff signed another two-year contract extension with Imperial Oil. As with the last contract extension, the Plaintiff testified that the value of the contract was derived from the gross revenue from the previous fiscal period. That gross revenue was approximately \$5 million, and, accordingly, the contract that he secured on December 1, 2016 was worth about \$10 million.
- [92] The Plaintiff sent an email to McKee on December 9, 2016, outlining the calculation of his latest success bonus. He calculated the success bonus, based on the formula in the 2013 Amendment, at \$136,110.95. He reminded McKee that under the terms of the 2013 Amendment, the success bonus was due on January 1, 2017. He asked for McKee’s concurrence with his calculation. He testified that up to that point, EXP had always agreed with his calculations for each success bonus that he had been paid.
- [93] No one from EXP provided a response to his success bonus calculations. Walters does not recall whether the Plaintiff’s December 9, 2016 email was ever forwarded to her.
- [94] Skinner acknowledged that as a result of securing a \$10 million contract with Imperial Oil on December 1, 2016, the Plaintiff was entitled to a success bonus that should have been paid on January 1, 2017.
- [95] On December 19, 2016, the Plaintiff met with McKee and Stritesky. Finally, that day he was paid for everything except the success bonus from the most recent Imperial Oil contract extension. He received his 2015 and 2016 annual bonuses and his 2016 success bonus, together totalling \$171,377. By that time, payment of his 2015 annual bonus and his 2016 success bonus had been owed for 19 months. The payment of his 2016 annual bonus was 6 ½ months overdue.
- [96] The Plaintiff’s evidence is that at the time of his meeting with McKee and Stritesky on December 19, 2016 when he was paid, he had been made aware that the company wanted to propose a different bonus format.
- [97] On the same day as that meeting, the Plaintiff followed up by requesting further financial information in order to “go through [McKee’s] calculations”. His evidence is that he never received that information.
- [98] A chart was prepared by the Plaintiff setting out when each bonus was due, the date requested, the date each bonus was paid and the amount paid. Its accuracy was confirmed by the Plaintiff during cross-examination. Walters was able to confirm the accuracy of the payment dates and amounts. It is reproduced below:

Item	Bonus Name	Amount	Date Requested	Due Date	Date Paid	Amount Paid
1	2014 Annual	\$150,379.86	9-May-14	31-May-14	12-Dec-14	\$140,346.00
2	2015 Success	\$106,054.19	9-May-14	5-Apr-14	12-Dec-14	\$106,054.00
3	2015 Annual	\$29,981.12	1-Oct-15	31-May-15	19-Dec-16	\$24,757.00
4	2016 Success	\$106,764.71	1-Oct-15	7-May-15	19-Dec-16	\$106,765.00
5	2016 Annual	\$84,506.67	2-May-16	31-May-16	19-Dec-16	\$39,855.00

6	2017 Success	\$136,110.95	9-Dec-16	1-Jan-17	unpaid	unpaid
7	2017 Annual	\$12,559.28	18-May-17	31-May-17	unpaid	unpaid

- [99] Instead of the \$450,000 or annual income that he had hoped for, the Plaintiff testified that he received an average income of \$360,000 in 2014, 2015, and 2016, inclusive of his bonuses.
- [100] Skinner confirmed that EXP did not abide by the terms of the employment agreement when it came to the timing and payment of the bonuses. To her knowledge, the Plaintiff never agreed to the delayed payment of his bonuses.
- [101] Walters' explanation for the delay in payment until December 2016 was because of ongoing discussions about moving the Plaintiff to the company bonus program, and about the amounts that were owed in general.
- [102] As the following evidence shows, EXP's upper management had been considering the topic of changing the Plaintiff's compensation since the spring of 2016, excluding the Plaintiff from those discussions.

EXP's Company Bonus Plans

- [103] When the Dvoraks took control at the end of 2015, they introduced a new incentive plan and worked to standardize it across the organization. Skinner confirmed that the Dvoraks wanted the same bonus plan to apply to all of the then approximately 2,100 employees across its various divisions. They were examining any employee who had a unique bonus structure, such as the Plaintiff. Skinner agreed that another one of those individuals was Mike Kosky, who had been a Vice President of Energy Services working out of the Tallahassee office for 29 years and left EXP around 2017.
- [104] Walters confirmed that there were discussions of moving the Plaintiff to a different bonus plan, as EXP was trying to move the Plaintiff to the bonus program that was based on the real performance metrics of the project.
- [105] Walters explained that there were two parts to EXP's typical bonus structure following the Dvoraks' acquisition. There was a project management incentive compensation ("PMIC") plan. This was a program for project managers to share in the profits earned on projects, based upon the real numbers those projects experienced. This contrasted with the Plaintiff's success bonus, which was based on aspirational metrics defined in the contract. There was also a regional bonus program, also based upon sharing profit, that was separate from the PMIC program. The regional bonus program was based upon how much the group brought to the firm and was based on a percentage of EBITDA.

Proposed Changes to the Plaintiff's Compensation

- [106] On April 15, 2016, McKee sent an email to the Dvoraks regarding the Plaintiff's compensation package, attaching the 2013 Amendment. He recommended that Henderson do the calculations to bring the Plaintiff's payouts up to date, suggesting that any bonuses that were due should come out of the company no. 37 "pool". The email concludes "[y]ou

should then decide on how you want to move forward and negotiate with George for transition to Company bonus plan”.

- [107] The next event occurred on July 28, 2016, when the Dvoraks arrived from Chicago. During a brief meeting, Ivan Dvorak bluntly told the Plaintiff that he did not like his employment contract. He also indicated that he did not like the contract between Mike Kosky and EXP Energy Services Inc., on which the 2013 Amendment was based. The Plaintiff testified that he was taken aback, but told them that he would consider a proposal, although would not accept a contract that provided less compensation.
- [108] On August 15, 2016, there was a round of emails between senior management: McKee, Stritesky, and the Dvoraks. The Plaintiff had still not received payment of the \$171,377 that was owing at that time.
- [109] In that exchange, Walters confirmed that the Plaintiff was still owed a success bonus of \$106,765 on his current Imperial Oil contract. Because it was a two-year contract, she pointed out that one half of the success bonus (\$53,382.50) should be deducted from each of his 2016 and 2017 annual bonuses in the future. She also wrote “if we are changing his deal and he won’t be paid his 2017 annual bonus, then there is a trailing \$53,382 in success bonus that needs to be deducted from something. We could either deduct from his 2016 annual bonus all at once or deduct from something else in the future”. She confirmed for upper management that as of August 15, 2016 there was a total due and owing to the Plaintiff of \$171,378.
- [110] In response, Ivan Dvorak suggested that going forward, with any employee, “we should keep it simple, stop use [using] a gross margin and focuses [focus] on real profit and sharing of it...”. Stritesky then directed McKee to “make a request for payment with stipulation that original deal no longer applies”.
- [111] Walters agreed that Stritesky’s comment could be interpreted as suggesting that if EXP paid the Plaintiff, it could potentially say that his agreement would no longer apply. However, she was aware that the Plaintiff would have to agree to have his bonus structure changed and any change could not be imposed unilaterally. As Walters pointed out, his outstanding bonuses were eventually paid in December without such a stipulation.
- [112] The email chain that circulated among McKee, Stritesky, and the Dvoraks on August 15 also included the following, where McKee wrote:
- ...The problem is we also want to convince him to leave his current plan and preferably participate in the PMIC and Regional Plan as is everyone else. I think you are suggesting this success bonus (actually an advance) would be netted out against his PMIC/Regional bonus. The challenge is that it will not pay anywhere near what he gets on his current plan.
- [113] Walters agreed that the Plaintiff would not earn as much on the company bonus plan due to a decline in Imperial Oil revenue, but said that the Plaintiff would have future

opportunities to earn more on the PMIC and Regional Plan. No evidence was provided about why she believed that to be the case. Walters knew that there was a concern that the Plaintiff would earn less in the short term, even if there was more potential for him to earn much more in the future.

[114] Walters said that nothing was resolved after August 15, 2016; she was not given direction to pay the calculated amount, and resolution was still needed about whether the Plaintiff was moving to the company bonus program, as well as what to do with the \$53,000 in success bonus that would need to be deducted against some future bonus program. These issues continued into the fall of 2016.

[115] On September 8, 2016, the email discussion continued among senior management, including the Dvoraks, Stritesky, Walters, and McKee. Mark Dvorak wrote:

“We are only paying him per the formula for work in FY16, correct?
If yes, then let’s pay him, close his bonus program, align him to the current exp bonus program, and close this chapter”.

[116] On September 17, 2016, McKee acknowledged that Imperial Oil had approached the Plaintiff about a new project, and that “if we haven’t changed his existing agreement, this new potential would fall under”.

[117] In the fall of 2016, senior management continued to have discussions, without the Plaintiff’s knowledge, about persuading him to transition to the PMIC program by the 2018 fiscal year, to be documented in a revised employment agreement. Walters recommended paying the Plaintiff what he was owed through the fiscal year 2016. She acknowledged that this would give him a payment of \$171,778 and would leave remaining an advance on a success bonus of \$53,382 to be deducted from any annual bonus for 2017.

[118] Walters’ evidence was that the decision had been made that the other half of the success bonus in the amount of \$53,000 would remain as an advance to be deducted from a future bonus.

[119] Meanwhile, McKee and the Plaintiff met sometime around the end of September 2016. McKee sent an email to the Dvoraks, Walters, and Stritesky on October 3, 2016 that states, in part:

...George indicated [that] he is open to considering this approach but asked that I provide him with details on what the ICP plan would consist of for him in FY2018. Since we have not finalized the plan for FY2017, and have not discussed FY2018 I am not in a position to provide him these details.

[120] The Plaintiff confirmed that he was open to considering the company bonus plan but was not given all necessary details at that time.

- [121] Walters testified that senior management were in discussions with the Plaintiff to try to show him the merits of the other bonus programs. But beyond the meeting with McKee in October, there is no evidence that the Plaintiff was included in such discussions.
- [122] On February 1, 2017, McKee followed up with Walters to see whether the information requested by the Plaintiff had been provided to him. Walters responded by sending McKee all of the calculations for bonuses since 2014, and the financial details requested. She confirmed that all of the documentation could support the PMIC allocation, and that she would be able to have a Skype call with the Plaintiff to walk through “how it works”. There is no evidence that this email or its contents were ever shared with the Plaintiff.
- [123] During these discussions among the Dvoraks, Stritesky, McKee, and herself, Walters’ advice was that the Plaintiff’s contract was legally binding and EXP would need the Plaintiff’s agreement to move to a new bonus program. She agreed that the payment of the bonuses was a separate issue from any amendment to the Plaintiff’s employment contract.
- [124] The success bonus for the last contract extension, due on January 1, 2017, has never been paid. Walters testified that she has no explanation for that. She confirmed that she was never directed to pay out his 2017 bonuses. Despite confirming that a decision had been made to deduct the \$53,000 from a future bonus, she stated that she does not believe agreement was reached on the amount. Further, there were still ongoing discussions about moving him to the company bonus plan by the time his employment came to an end.

Revenue from Imperial Oil

- [125] Henderson’s evidence is that from 2014 to 2016, the revenue from Imperial Oil declined. Walters’ evidence confirmed a four-year track record of declining revenues from Imperial Oil.
- [126] Walters explained that this decline in revenue affected the Plaintiff’s bonuses. Walters testified that the direct labour multiplier experienced by the Plaintiff’s group was never as high as the multiplier found in the success bonus calculation in the 2013 Amendment. The direct labour multiplier is a metric that explains how many dollars of revenue is earned for each dollar of direct labour cost. The formula for the Plaintiff’s success bonus used a direct labour margin of 2.6. In 2014, the actual direct labour multiplier was 2.06, in 2015, it was 2.1, and in 2016, it was 2.12. This meant that the success bonus, which was an advance payment on projected earnings, was estimated to be more profitable than the actual results.
- [127] Walters explained that the success bonus was to be paid at the contract signing based upon an estimate of how much the contract would earn, to be deducted against the term of the contract or its extension. In any fiscal year, if the Plaintiff performed in excess of his success bonus, there would be an additional annual bonus. That had not been an issue in 2014 or 2015 because the actual revenue earned from the Imperial Oil contract still resulted in an additional annual bonus. But for fiscal years 2016 and 2017, the Imperial Oil revenues were in a state of decline. According to her, this put the Plaintiff in a situation where he would be in a deficit on his annual bonus; he was not going to earn an annual bonus that exceeded his success bonus.

- [128] In her own calculations, Walters came up with a figure of negative \$5,353 for the Plaintiff's 2017 annual bonus. During his cross-examination, the Plaintiff was never confronted with this calculation, nor is there evidence that he was provided with it while an employee. He was also never cross-examined on the 2017 success and annual bonus calculations that he had provided to EXP. As he testified, no one ever challenged them after he provided them to McKee, and he never had a direct discussion with Walters or Henderson about his bonuses. As Walters testified, there is no evidence that the Plaintiff's calculations were ever forwarded to her.
- [129] The Plaintiff estimates that during his time at EXP he brought in \$60-\$70 million in revenue, approximately \$40-\$50 million being from Imperial Oil. He considered his performance throughout his employment to have been exemplary, and never received any negative comments from his direct supervisor, McKee, or anyone else.
- [130] Skinner agreed that she believed that the Plaintiff was a good employee who was honest and hard-working, and that EXP enjoyed a positive and mutually beneficial working relationship with him.

EXP's Proposed 2017 Amendment

- [131] Skinner testified that the Plaintiff's compensation package never sat well with her because it was unusual, and resulted in the Plaintiff being paid more than the person he reported to, McKee. However, Skinner agreed that EXP could not unilaterally amend the Plaintiff's bonus provision or any fundamental part of his agreement without his consent.
- [132] On May 1, 2017, a meeting was held between the Plaintiff and upper management. The purpose of the meeting was to discuss a promotion or increased role for the Plaintiff, in line with previous discussions that had been held with the Plaintiff, as well as how to expand EXP. There was no discussion of changes to the 2013 Amendment, nor was any indication given to the Plaintiff of what, if any, changes in compensation would accompany any new role.
- [133] In May 2017, McKee and the Plaintiff met at their usual coffee shop location between their respective offices. Without any warning, McKee handed the Plaintiff a document dated May 3, 2017, which had been signed by McKee (the "2017 Proposal"). The preamble stated that, effective immediately, EXP was pleased to offer the Plaintiff continued employment based on certain revised terms and conditions. The document outlined a new bonus structure, subject to change at the sole discretion of EXP, with bonuses paid at the discretion of the Board of Directors. He and McKee had had no previous discussions about the contents of this document.
- [134] The Plaintiff's evidence is that McKee knew that he would never accept discretionary bonuses, as non-discretionary bonuses had always been a key component of his employment contract.
- [135] Skinner confirmed that she drafted the 2017 Proposal. McKee gave her direction to draft it, but Mark Dvorak and possibly Stritesky would have had input. At the time that she

created it, she was aware of McKee's assessment that the Plaintiff would receive less under the company bonus plan than under the 2013 Amendment.

[136] Skinner forwarded the proposal to McKee on May 3, 2017 for review, prior to his meeting with the Plaintiff. Her email includes:

I didn't realize there had also been a (very generous) termination provision extended to him. We can't do much about that but I think we should change the outside activities clause given that when this was drafted it was very specifically based on his desire to start that company, which he never did.

[137] Skinner's evidence is that she asked the Plaintiff whether he had started his business a couple of times over the years. His response was always that he had been too busy to start it. She recalled asking McKee about it when she returned from maternity leave at the end of November 2016, and learned that the Plaintiff had not yet done anything to pursue his idea.

[138] The 2017 Proposal also provided that the Plaintiff's base salary would continue to be paid at a rate of \$218,400, without reference to a 28-hour work week. When asked whether the intent was to remove that reference found in the 2013 Amendment, Skinner could not say.

[139] The 2017 Proposal also reduced the "outside activities" clause to one sentence that stated, "you agree to seek prior approval to participate in any outside activities which may overlap, compete or conflict with the interests of EXP". Up to that point, no one at EXP had expressed concern to the Plaintiff about this issue.

[140] While Skinner insisted that there were ongoing discussions with the Plaintiff thereafter, in which many people, including herself, were trying to persuade the Plaintiff to switch to a different plan, EXP has not produced any emails regarding negotiations that they were engaging in with the Plaintiff after he was presented with the 2017 Proposal.

[141] The Plaintiff did not sign the 2017 Proposal. On May 18, 2017, he told both McKee and Stritesky by email that he did not agree to the proposed changes to his employment agreement and requested another meeting with McKee to discuss the proposal.

[142] On that same day, he prepared his annual bonus calculation for fiscal 2017 and asked for confirmation of agreement with his calculation of \$12,559.28. Additionally, he reminded McKee and Stritesky of the email sent to them over five months earlier, on December 9, 2016, pertaining to his success bonus calculation of \$136,110.95 for the latest Imperial Oil contract extension. He pointed out that this success bonus had still not been paid, and asked to have a meeting at their earliest convenience to discuss the status.

[143] No meeting was ever set up to discuss the Plaintiff's bonuses in the weeks following May 18, 2017. No one responded to his calculations. Walters' evidence was that this email was not forwarded to her, nor his calculations. The Plaintiff has never seen any communication from EXP that disputed his calculation of his annual fiscal 2017 bonus and success bonus. These bonuses total \$148,670.23.

- [144] The Plaintiff agreed that no one told him that he would be fired if he did not agree to the terms of the document presented to him by McKee, nor did he receive confirmation that EXP was implementing the 2017 Proposal.
- [145] On June 15, 2017, Skinner suggested to the Plaintiff that Mark Dvorak would discuss the proposed agreement with him at an upcoming meeting in Chicago. The Plaintiff testified that he sat beside Dvorak at dinner and the topic was not raised once. They managed to have a quick discussion as the Plaintiff was leaving for the airport, in which the Plaintiff expressed that he could not live with an agreement that reduced his income. Dvorak stated that he would get back to him.

Departure from EXP

- [146] In August 2017, the Plaintiff's employment with EXP came to an end.
- [147] It began on July 19, 2017, when Mark Dvorak followed up on their brief exchange by sending the Plaintiff an email describing how EXP wanted to structure his bonus compensation and amend his employment agreement (the "July 19 Proposal"). It offered what was described as a "short-term incentive compensation". The Plaintiff's evidence was that the proposed new structure would reduce his remuneration drastically.
- [148] Skinner testified that the proposal sent by Mark Dvorak was different than that contained in the 2017 Proposal, and more generous. The offer made by Dvorak was only made to a handful of key employees.
- [149] The Plaintiff did not directly respond to Dvorak. A few hours later, the Plaintiff's litigation counsel, Kevin MacDonald, delivered a letter to EXP to the attention of McKee, copying Skinner and Mark Dvorak. It reiterated the Plaintiff's rejection of any changes to his employment contract and asked for confirmation that the outstanding bonus payments would be paid within the next week.
- [150] EXP did not respond.
- [151] On July 28, 2017, Mr. MacDonald followed up by email to McKee, Skinner, and Dvorak to indicate that EXP had not acknowledged his correspondence. Because the Plaintiff had appointed counsel to address the matter, he requested that EXP communicate solely with his office. He asked them to immediately confirm that EXP would:
- a) pay the Plaintiff's outstanding bonuses by July 31, 2017;
 - b) comply with the terms of the Plaintiff's contract; and
 - c) cease all attempts to unilaterally vary the contract terms.
- [152] Skinner replied on the same date, confirming receipt of the July 19, 2017 correspondence, and advising that EXP was "reviewing this matter internally and will reply in due course".

- [153] Skinner agreed with the proposition that a failure to pay an employee was a “sure fire way” to get them to leave.
- [154] Despite having been asked by Mr. MacDonald to correspond only through his office, Skinner sent an email to the Plaintiff on August 1, 2017, requesting that “we first try to resolve this internally”. She asked to have a meeting on August 21, 2017 with the Dvoraks and McKee, so that “we can all sit down and walk through the bonus calculation”. The email does not say that the bonuses would be paid.
- [155] The Plaintiff confirmed that it was his choice that all communication go through his counsel. He did not respond to Skinner. Because they did not pay his overdue bonuses, he refused to engage in any communication.
- [156] The Plaintiff agreed that EXP never expressly communicated that they would not pay his bonuses.
- [157] On August 9, 2017, Mr. MacDonald sent another email. He referenced Skinner’s email of July 28, 2017 and EXP’s attempts to convene a meeting with the Plaintiff to review the bonus calculation. He continued: “we have not received any substantial response to my emails dated July 19 and 28, 2017 and EXP continues to refuse to pay our client’s outstanding wages. In the circumstances, EXP has terminated our client’s employment.”
- [158] On August 11, 2017, Skinner responded, stating that EXP’s intention always was, and continued to be, to pay the Plaintiff all bonus monies owing under his current agreement and to establish a mutually agreeable bonus structure on a go-forward basis. She stated that EXP’s intention was to finalize payment of the bonus, including the bonus amount, at the proposed August 21, 2017 meeting. The letter also denied that EXP had terminated the Plaintiff’s employment, or that that was EXP’s intent. Her correspondence stated that the Plaintiff remained employed with EXP and, as such, should be reporting to work.
- [159] The Plaintiff’s evidence is that he may have considered returning to work and would have gone to the requested meeting if EXP had paid him his 2017 bonuses.
- [160] Skinner confirmed that at the time that she sent the letter, EXP wanted to have further discussions with the Plaintiff to see whether they could agree on what his bonus structure would look like going forward. However, she confirmed that he was owed bonus pay at that time.
- [161] When asked why EXP did not paid the bonuses at the time, her response was that she was unsure whether she was the best person to answer the question. However, from her perspective, there were complications at the time, including a transition from Henderson to Walters as CFO (which had occurred in May and June of the previous year), and there seemed to be confusion about how to calculate his bonuses (which debate had been finalized by the fall of 2016, according to Walters). Skinner also said that potentially the financial position of the company could have been a factor (new financing had been secured in February of the previous year). Skinner confirmed that any decision approving payments to the Plaintiff at that time would have had to come from Ivan or Mark Dvorak.

- [162] Next came a letter dated August 16, 2017 from EXP's counsel, Mark Tector. His correspondence reiterated that it was EXP's intent to continue the Plaintiff's employment and address the payment of his bonus, expressing a hope that EXP's "positive and mutually beneficial working relationship" with the Plaintiff would continue.
- [163] The letter asked for confirmation that the Plaintiff would return to work by August 18, 2017, failing which EXP would consider that he had resigned and/or otherwise abandoned his employment. Skinner confirmed that this was the position taken by EXP, and that when he did not return, they processed his resignation.
- [164] She also confirmed that when EXP processed his resignation, the bonus amounts were still owed but not paid to him. She acknowledged that EXP was not authorized to withhold wages, and that under the *ESA*, wages were to be paid within seven days following the end of employment.
- [165] Like Walters, Skinner could not explain why, eight years later, the bonuses have still not been paid.

Impact on the Plaintiff

- [166] The Plaintiff testified that the delay and non-payment of bonuses was very stressful for him. He had negotiated his 2013 Amendment because of his high costs of living, having three sons attending St. Andrew's College private school. The situation resulted in poor sleep, anxiety, and stress.
- [167] He saw his family doctor in 2017 and 2019 and many times since then about stress-related issues, culminating in a procedure in September 2023 to insert stents in a blocked artery. He attributes this to the stress experienced while at EXP, since he has otherwise lived a health-conscious lifestyle.
- [168] There are three medical notes in the productions. The Plaintiff confirmed that these were from his family doctor's clinical notes. The first is dated August 10, 2017, and under current issues reads: "doing well and feeling well. Under stress with work and contractual issues". The last two post-date the Plaintiff's work relationship with EXP. The most recent, dated May 23, 2019, reads: "Has been under significant stress work wise. Not happy at work and feels unsatisfied. Working as a consultant".

The Plaintiff's Next Steps

- [169] The Plaintiff's evidence is that he did not pursue any outside interests during his tenure at EXP until 2016, and even then, made no revenue. The pursuit in 2016 involved receiving a market survey from Imperial Oil, called a Request For Information ("RFI"), concerning the purchase of contaminated real estate. The Plaintiff sent it to McKee to see if it was something that EXP wanted to do. When the response from EXP was "no", he asked whether he could explore the matter and received McKee's consent.

- [170] The RFI was submitted through a company formed in June 2016, Eskay Canada Inc. Eskay Canada Inc. was incorporated in June 2016 with the Plaintiff's friend, Scott Sutherland, as its sole director. Its intended business was the purchase of brownfield real estate.
- [171] Nothing came of the RFI because Imperial Oil decided not to proceed. The Plaintiff explained that the purpose of the RFI was for Imperial Oil to explore whether potential companies like Eskay Canada Inc. had the interest, capability, and experience to enter into an agreement with Imperial Oil to purchase, remediate and subsequently sell or develop former retail service station properties.
- [172] In Eskay Canada Inc.'s response to the RFI, the Plaintiff is described as one of the principals and the CEO of Eskay Canada Inc., and VP of EXP Energy Services Inc. The Plaintiff's evidence is that he had obtained McKee's permission to include EXP as a member of the service provider team. Although Skinner testified that, to her knowledge, this permission was never given, McKee is the only person who could have definitively refuted providing such permission.
- [173] Skinner's evidence around this issue is a minefield of hearsay, testimony which Mr. Weisberg said he was introducing for narrative only but which has found its way into EXP's closing argument. Examples are: her testimony about whether McKee or anyone at EXP ever knew about Eskay Canada Inc., whether McKee or anyone else at EXP ever gave their consent to the Plaintiff to pursue the RFI in 2016, and whether McKee or Stritesky were aware of the RFI. These individuals were not here to be cross-examined on their knowledge; the evidence from Skinner is hearsay and the court will not take it into consideration.
- [174] It was only after his departure from EXP that the Plaintiff became an officer and shareholder of Eskay Canada Inc. on August 16, 2017. The Plaintiff testified that it has no revenue, has done no transactions, and has no employees. The Plaintiff incorporated Kirch Corp. on that same date, which is a holding company for shares he owns in other companies.
- [175] On September 12, 2017, he set up Eskay Environmental Services Inc., intended to be a company for management consulting done exclusively by him. It has no employees or website and is not registered with his professional body.
- [176] The Plaintiff now works for YORK1, formerly York Excavating and York Environmental ("York"). He was introduced to the company's owner, Andrew Guizzetti, through Sutherland. He said that his first contact with Guizzetti was on September 6, 2017.
- [177] He explained that in September 2017, the principals of York asked him to help them bid on a large excavation contract for a former Imperial Oil property that had been sold to a developer. He agreed to do this work, beginning on September 11, 2017. The arrangement was that the Plaintiff would only receive a commission if York won the excavation contract, which it did not. However, the Plaintiff remained with them, working in a consulting role in the fall of 2017 and billing them through Eskay Environmental Services Inc. In December 2017, he began to work in a consulting role for York on a full-time basis.

He then accepted a full-time position with York, and currently holds the title of Vice President of Strategic Development.

[178] He explained that York is not a competitor of EXP, as it does not do engineering consulting work. In his current role, he has directed hundreds of thousands of dollars of engineering consulting work to EXP.

[179] There is no evidence that York, either Eskay company, or Kirch Corp. have ever competed with EXP or used any proprietary or confidential information belonging to EXP.

EXP's Next Steps

[180] In late August 2017, EXP made several misconduct allegations toward the Plaintiff. These allegations arose because, following the Plaintiff's departure, Skinner reviewed his email correspondence and found what she described as "red flags". She said that she did that because the Plaintiff left under "very odd circumstances", being a VP, a person key to the business, and yet just "walked out". She was looking specifically for correspondence indicating that the Plaintiff was going to a competitor or taking clients with him.

[181] Her evidence is that she would have been directed to do so by McKee and the Dvoraks. When asked whether these communications were in writing, her response was that she did not know. In EXP's affidavit of documents, Schedule "B", there are no emails over which solicitor-client privilege was claimed that were between Skinner and McKee, Stritesky or the Dvoraks, or anyone else, dated later than June 22, 2017.

[182] In her review, Skinner testified that she found emails sent to his personal email address, including proprietary EXP documents and contact information. Based on her review, she could find no historic practice of the Plaintiff doing this before the months leading up to August 2017. She testified that at the end of her review, she did not reach any conclusions, but felt that something strange was going on. There was a flurry of activity with the email leading to his departure, and it was very unusual for someone at the Plaintiff's level to just depart. Her role was to flag the issues and then bring them to the attention of McKee and the Dvoraks.

[183] She does not know whether anyone sought an explanation from the Plaintiff. She confirmed that no third-party investigator was hired to explore these issues.

[184] Those allegations were summarized in correspondence between counsel dated September 1, 2017, as follows:

1. That the Plaintiff forwarded emails to his personal email address including various client employee and contact information, along with an ODB Report (opportunities report that includes client contact information), template information relating to EXP, and at least one employment agreement for another employee.
2. The emails and information were not needed by the Plaintiff to do his work for EXP and the nature of the emails suggest that he was planning to leave EXP and was gathering information to launch his own business or go to a competitor.

3. Even if the Plaintiff needed these emails/information for his work at EXP, there would be no need for him to send them to his private email because he could access EXP's systems remotely. He also had a laptop provided by EXP.
4. There is a noticeable increase in his forwarding of emails to his private email account in July 2017, particularly on July 18, 2017.
5. The Plaintiff may have breached the departure protocol in paragraph 12 of his 2010 Agreement.

[185] Mr. MacDonald's correspondence offered that the Plaintiff would fully cooperate to prove that EXP's allegations were unfounded. The Plaintiff requested that EXP forward a list of all emails of concern and that he would provide a comprehensive explanation. The Plaintiff also requested full particulars of the departure protocol violations, which he would address in the same manner. The Plaintiff also requested that the parties agree upon a written response if he was contacted by clients directly, and sought assurances that EXP was prepared to be truthful regarding the circumstances under which the relationship had ended.

[186] The letter concluded "as you know, our client is a director/shareholder of Eskay Canada Inc. ("Eskay"), a real estate investment company which focuses on land decommissioning and redevelopment. King and Benson, York Excavating and Ros-Bay Developments are involved in confidential deals with Eskay and they are customers of EXP who were referred by our client. Can we agree upon a joint announcement to such customers?"

[187] The Defendants did not accept the Plaintiff's offer, nor did they provide the assurance that the Plaintiff was seeking in regard to EXP's clients.

Content of the Emails

[188] There is evidence that emails were in fact forwarded by the Plaintiff to his personal email account that contained client employee and contact information, along with an ODB Report, staff bonus payments made by EXP in 2011, template information relating to EXP, and at least one employment agreement for another employee.

[189] The Plaintiff explained that during his career he worked long hours, working in the evening after returning home. Rather than bringing home his laptop from work, he got in the habit of forwarding work emails to his home email address. Mostly, he forwarded documents that he needed to read. He denies that any emails or other information were sent to assist him in launching his own business or to join a competitor of EXP. He explained that there was a way of accessing his EXP email remotely through a software program, but it was not very user-friendly, and he had done it only once or twice. Skinner disagreed with this evidence, indicating that it was not a difficult process to log in remotely to company email.

[190] The number of emails sent to his personal email over three days between July 17 and July 19, 2017 total 44 in number. 35 of those were VCFs (electronic business cards). The Plaintiff's evidence was that he was updating his LinkedIn account on his own time over the weekend since he did not have time in the office to do so, at the request of someone at EXP. Several months earlier he had requested that they be sent to him by his executive

assistant, in the months of February to June 2017. One of these was for Daniel Guizzetti, one of the principals of York. The Plaintiff requested that additional VCFs be sent between July 18-24, which he forwarded to his personal account on the same day.

EXP's Financial Position

[191] Walters testified that she did not have an exact memory of gross revenues for EXP Global Inc. for fiscal 2017, but estimated it to be about \$500 million. Her best estimate of the gross revenue of EXP Global Inc. for fiscal 2024 was about \$900 million. She confirmed that EXP's performance in 2017 would allow it to pay bonuses, and that situation has continued to the present time.

ANALYSIS

Issue 1: Adverse Inference

[192] Four of the major contested areas of evidence in this case are: 1) the reason why there was always delay in payment of bonuses under the 2013 Amendment; 2) the relationship between the failure to pay bonuses and the proposals to change the Plaintiff's bonus structure; 3) EXP's intention for the meeting to which they invited the Plaintiff in August 2017; and 4) the reason why the Plaintiff's 2017 bonuses have never been paid.

[193] While the Plaintiff has the burden of proving that he was constructively dismissed, there remains an evidentiary burden on the Defendants to prove, as they allege, that he resigned from or otherwise repudiated his employment relationship.

[194] The witnesses proffered by EXP offered incomplete and sometimes conflicting evidence on these issues. For example, Henderson did not testify about the proposed changes to the bonus structure or the genesis of this idea, even though the evidence establishes that management was initiating the idea in the months before Walters arrived. No one explained why the Plaintiff was not included in these discussions, or why so little information was provided to him. Walters and Henderson's evidence about the financial viability of the company in 2015/16 and the ability to pay bonuses was not fully consistent; Walters, who I find was a much more careful and diligent witness, had reviewed the financials on her arrival and did not characterize EXP's financial position nearly as direly as Henderson.

[195] Walters could not explain why no direction had been given to her to pay the 2015 and 2016 bonuses until the payment was made on December 19, 2016. While part of the Defendant's explanation is that EXP needed the Plaintiff's agreement on numbers before the bonus could be paid, other than the exchange over the exclusion of intercompany revenue in July 2016 related to his annual bonus, there is no evidence that the Plaintiff's calculations were otherwise challenged or that consensus was obtained between then and the payment of \$171,377 in December 2016.

[196] Further, other than stating that transitioning the Plaintiff to a new bonus system was still under discussion, Walters could not explain why any part of the bonuses have still not been paid. Nor could Skinner, even though she was aware that they were due.

- [197] None of them explained why there was no response to Mr. MacDonald's initial correspondence, or why another week passed before Skinner took action, too late to be of any use.
- [198] Neither adequately explained why no bonus was paid at the time that attempts were made to convince the Plaintiff to attend a meeting for further discussion in August 2017. Neither Skinner, nor EXP's counsel's letters from August 2017 mentioned any issue about difficulties in calculating the bonuses, or the financial issues raised by Walters, such as declining Imperial Oil revenues. Skinner referenced the short-term nature of the 2013 Amendment as the genesis. Mr. Tector's letter is silent about how EXP planned to address the outstanding bonuses.
- [199] However, there was consensus in the evidence that the Dvoraks and Stritesky were the ultimate decision makers in respect of all of these issues. I find that they were involved in these financial decisions and had crucial evidence to provide on each of these key matters. Further, there was no compelling explanation for their absence as witnesses. Both Dvoraks remain involved with EXP. Despite Stritesky's absence from EXP for some time, no evidence was offered about attempts to locate him to testify.
- [200] The evidence also shows that McKee was a key player in these discussions and decisions, but given the confidentiality agreement and lack of evidence surrounding the extent to which McKee is or is not constrained by it, I place no weight on his absence.
- [201] In Sidney N. Lederman, Michelle K. Fuerst, and Hamish C. Stewart, *The Law of Evidence in Canada*, 6th ed. (Toronto: LexisNexis Canada Inc., 2022), at p. 437, the authors summarized the effect of the failure to call a material witness:

In civil cases, an unfavorable inference can be drawn when, in the absence of an explanation, a party litigant does not testify, or fails to provide affidavit evidence on an application, or fails to call a witness who would have knowledge of the facts and would be assumed to be willing to assist that party. In the same vein, an adverse inference may be drawn against a party who does not call a material witness over whom he or she has exclusive control and does not explain it away. The inference should only be drawn in circumstances where the evidence of the person who was not called would have been superior to other similar evidence. The failure to call a material witness amounts to an implied admission that the evidence of the absent witness would be contrary to the party's case, or at least would not support it.

- [202] The law permits this court to make the inference that neither of the Dvoraks or Stritesky would have provided evidence to support the positions taken by EXP at this trial on key issues, which is an inference that I make. At all times, they were the instigators and ultimate decision makers about all matters affecting the Plaintiff at issue in this lawsuit, and at least one of them should have been here to provide the best evidence available from the Defendants.

Issue 2: The Effect of the Entire Agreement Clause

- [203] This issue centres around Skinner's evidence that, prior to signing the 2013 Amendment, the Plaintiff represented that he would be leaving EXP once he got his brownfield site business up and running. According to her, this was a foundational premise of the agreement, and the Plaintiff knew that it was not intended to be long-term.
- [204] The probative value of this evidence is that, if accepted as true, EXP wishes to rely on it to assist in explaining why it wanted to change the Plaintiff's bonus system when it became evident several years later that he was not intending to leave EXP, and somewhat ironically, to show that the Plaintiff had a plan to leave EXP all along.
- [205] As for an implied term of the 2013 Amendment being its short-term nature, the law is clear that the entire agreement clause found in the 2013 Amendment forecloses reading in such an intention: *Soboczynski v. Beauchamp*, 2015 ONCA 282, 125 O.R. (3d) 241, at paras. 43-46; *McNeely v. Herbal Magic Inc.*, 2011 ONSC 4237, 89 B.L.R. (4th) 226, at paras. 10, 11 and 15. The outside activities clause is not enough to establish that the parties intended it to be short-term. The evidence is clear that the Plaintiff expressed an interest in pursuing his own business, but that in itself does not establish that he was planning to work for EXP for a short time only.
- [206] The evidence also does not support Skinner's recollection of events. For this reason, I accept the Plaintiff's evidence that his idea, which never came to fruition, was to create a business only to augment his income from EXP. Skinner first testified that the Plaintiff told her and McKee that if he did not receive the compensation he wanted at the time of the renegotiations, he intended to leave to start his own business. But he was obviously satisfied enough with his compensation package that he did not leave. Also, Henderson, who was involved in drafting the 2013 Amendment, knew that the Plaintiff was interested in pursuing outside activities but never testified that the Plaintiff was holding out that he would be leaving EXP to carry on that business. There is also no evidence that EXP took any steps to groom someone to step into the Plaintiff's role in anticipation of his departure.
- [207] As a result, I reject the submission that EXP initiated the change in the Plaintiff's bonus system because of an understanding that it was not meant to continue long-term. I further reject the submission that any discussion in 2013 about setting up a side business had anything to do with what occurred in 2016 and 2017.
- [208] I find that the evidence establishes that EXP's upper management considered the Plaintiff's existing bonus structure to be complicated and not aligned with true performance measures, and wanted it changed for these reasons. Also, those individuals were not concerned with whether their proposed changes would result in lesser compensation overall or eliminate two fundamental terms of the existing bonus system, which were payment deadlines and non-discretionary payments.

Issue 3: Whether EXP owes the Plaintiff \$148,670.23 for unpaid bonuses plus 10% vacation pay

- [209] The Plaintiff asserts that his 2017 success bonus amounts to \$136,110.95, and that his 2017 annual bonus is \$12,559.28. He was taken through his calculations of these bonuses at trial, and was not cross-examined on them.
- [210] When EXP tried to lead evidence of a different calculation through Walters, an objection was made and this court ruled that on the basis of the rule in *Browne v. Dunn*, the evidence of Walters' calculations could not be introduced.
- [211] In its closing submissions, EXP's counsel has not referenced the numbers that he attempted to elicit from Walters, but rather has made a different argument based on what appears to be an acceptance of the calculations done by the Plaintiff. This does not conflict with the court's ruling.
- [212] EXP's position is that since the Plaintiff was no longer employed at EXP when the 2018 annual bonus would have been payable, it follows that the deduction from his 2017 success bonus must be applied now, as he never earned the profits in 2018 on which it was based. EXP contends that the amount owing for the Plaintiff's success bonus should be one-half of \$136,110.95, or \$68,055.48, plus the annual bonus of \$12,559.28.
- [213] The bonus provisions in the 2013 Amendment, as well as the evidence of the Plaintiff and Walters, all establish that if the Plaintiff's employment had continued and his bonus structure remained, one-half the success bonus for 2017 would be deducted from his 2018 annual bonus, if any, because the last Imperial Oil contract extension was for a two-year term.
- [214] Accordingly, there is some basis for EXP's position; the success bonus was an advance payment, one-half of which should have factored into the calculation of his future annual bonus.
- [215] However, the 2013 Amendment is silent about what should occur in this situation in the event of resignation or termination of the Plaintiff's employment, other than stating:
- ... if multiple extensions or awards of new contracts with Imperial Oil are awarded to EXP, then multiple Success Bonuses will be paid to you, so long as you have not resigned or otherwise been terminated at the time of the contract award/extension...
- [216] The other difficulty in analyzing this situation is that the Plaintiff did work for over four months into the 2018 fiscal year, but nothing in the employment contract allows for bonuses to be prorated over partial years.
- [217] The only fair way to approach this issue is to decide it on the basis of the determination of whether the Plaintiff was terminated, or whether he resigned. If he was terminated, then his inability to earn an annual bonus in 2018 was beyond his control and the result of EXP's

conduct. Accordingly, awarding him the full amount of the success bonus is reasonable and he would be owed \$148,670.23.

[218] On the other hand, if this court finds that the Plaintiff resigned, then he deprived EXP of the ability to offset one-half of his success bonus from his future annual bonus and so it should be deducted. He would be owed \$80,614.76.

[219] On either outcome, this court finds that EXP has violated the *ESA*. EXP was not authorized to withhold bonus payments from the Plaintiff unless they had his written authorization pursuant to s. 13(3) of the *ESA*. There is no evidence that he provided such authorization, a fact confirmed by Skinner.

[220] Section 11(1) of the *ESA* requires an employer to pay all wages earned during each established pay period, no later than the pay day for that period. Pursuant to s. 11(5), if employment ends, the employer is required to pay any wages to which the employee is entitled to the employee not later than the later of:

- (a) seven days after the employment ends; and
- (b) the day that would have been the employee's next pay day.

[221] "Wages" are defined in s. 1 of the *ESA* to include:

(a) monetary remuneration payable by an employer to an employee under the terms of an employment contract, oral or written, express or implied,

(b) any payment required to be made by an employer to an employee under this Act,

...

but does not include,

(e) any sums paid as gifts or bonuses that are dependent on the discretion of the employer and that are not related to hours, production or efficiency.

[222] As a non-discretionary bonus pursuant to the terms of the 2013 Amendment, the bonuses are captured by s. 1(a) of the *ESA*, and were required to be paid, at the latest, seven days after the Plaintiff's employment ended. The absolute latest date for that would have been August 25, 2017, seven days after EXP's demand that the Plaintiff return to work by August 18.

[223] Employers and employees are prohibited from contracting out of an employment standard provided by the *ESA* unless an employment contract provides a greater benefit to an employee. Section 5(1) of the *ESA* provides:

(1) Subject to subsection (2), no employer or agent of an employer and no employee or agent of an employee shall contract out of or waive an employment standard and any such contracting out or waiver is void.

(2) If one or more provisions in an employment contract or in another Act that directly relate to the same subject matter as an employment standard provide a greater benefit to an employee than the employment standard, the provision or provisions in the contract or Act apply and the employment standard does not apply.

[224] The 2013 Amendment provides that the Plaintiff “will continue to accrue vacation at a rate of 10% of all earnings for each pay period”. The Plaintiff has not claimed 10% vacation pay in the Statement of Claim, but seeks it from this court. EXP’s submission is that the failure to formally claim this relief bars the Plaintiff from recovering such pay.

[225] However, payment of this vacation pay is a requirement under the *ESA*. Section 38 provides:

If an employee’s employment ends at a time when vacation pay has accrued with respect to the employee, the employer shall pay the vacation pay that has accrued to the employee in accordance with subsection 11(5).

[226] Section 35.2 of the *ESA* states:

Vacation pay

35.2 An employer shall pay vacation pay to an employee who is entitled to vacation under section 33 or 34, equal to at least,

(a) 4 per cent of the wages, excluding vacation pay, that the employee earned during the period for which the vacation is given, if the employee’s period of employment is less than five years; or

(b) 6 per cent of the wages, excluding vacation pay, that the employee earned during the period for which the vacation is given, if the employee’s period of employment is five years or more.

[227] Accordingly, the Plaintiff will be entitled, in accordance with the employment contract and the *ESA*, to an additional 10% of the amount that this court finds is owed to him as wages.

Issue 4: Whether the Plaintiff was Terminated or Constructively Terminated

Elements of a Constructive Termination

- [228] To succeed in establishing a constructive dismissal, the Plaintiff must show either that EXP, by a single unilateral act, breached an essential term of the contract of employment, or engaged in a series of acts that, taken together, evinces an intention to no longer be bound by the terms of the employment contract: *Farber v. Royal Trust Co.*, [1997] 1 S.C.R. 846, at para. 33; *Potter v. New Brunswick Legal Aid Services Commission*, 2015 SCC 10, [2015] 1 S.C.R. 500, at paras. 30-31.
- [229] *Potter* established the test for constructive dismissal, confirming that constructive dismissal can occur in one of two ways. In the first way, the court initially determines whether the employer has breached an express or implied term of the contract and then, second, determines whether the breach was sufficiently serious to amount to constructive dismissal: *Potter*, at paras. 32, 37 and 39.
- [230] If a fundamental breach is determined, the court must then go on to ask whether, at the time the breach occurred, a reasonable person in the same situation as the Plaintiff would have felt that an essential term of his employment contract had been substantially changed: *Potter*, at para. 39.
- [231] In the second way, the court determines whether the employer's course of conduct generally demonstrates an intention to no longer be bound by the contract. This would occur where, for example, the employer's treatment of the employee made continued employment intolerable: *Potter*, at para. 33. For example, in *Shah v. Xerox Canada Ltd.* (2000), 49 C.C.E.L. (2d) 166, (Ont. C.A.), at para. 6, the Court of Appeal for Ontario held that even where no specific fundamental term has been breached, constructive dismissal can occur where the employer's behavior shows an intention to no longer adhere to the employment contract.
- [232] On both branches, it is "the employer's perceived intention no longer to be bound by the contract" that gives rise to the constructive dismissal: *Potter*, at para. 43.
- [233] The Plaintiff relies on both ways in this case. Accordingly, the court must review the terms of the contract, and determine whether EXP unilaterally changed it. If an express or implied term gave EXP the authority to make the change, or if the Plaintiff consented or acquiesced to that change, the change is not a unilateral act and therefore will not constitute a breach: *Potter*, at paras. 37, 39. Alternatively, the court must decide whether an environment was created by EXP that demonstrated an intention to no longer be bound by the contract.
- [234] The type of breaches that may constitute a breach may involve a unilateral and substantial change to the employee's compensation, work assignments or place of work, a unilateral change to the method of calculating an employee's remuneration, or a significant reduction in an employee's income: *Potter*, at para. 32; *Farber*, at para. 36.

- [235] A failure to pay an employee's compensation may also constitute such a breach: *Theofylatos v. Plechac*, 2010 CarswellOnt 7688 (Ont. S.C.), at paras. 22-26, aff'd 2012 ONSC 601 (Div. Ct.).
- [236] In *Ilkay v. Acadia Motors Ltd.*, 2006 NBCA 103, 308 N.B.R. (2d) 122, at para. 8, the New Brunswick Court of Appeal held that a repeated failure of an employer to pay a substantial portion of the remuneration owing to an employee on specified dates constitutes constructive dismissal. In *Piron v. Dominion Masonry Ltd.*, 2013 BCCA 184, 43 B.C.L.R. (5th) 267, at paras. 29-40, non-payment of a continuous substantial performance bonus was held to be a constructive dismissal.
- [237] In contrast, in *Chapman v. GPM Investment Management*, 2017 ONCA 227, at para. 38, the Court upheld the trial judge's decision that a dispute over the calculation of a bonus or commission arising from one particular transaction does not necessarily amount to constructive dismissal. The trial judge found that the employer's conduct in not paying a bonus on a single, out-of-the-ordinary transaction did not change the appellant's duties or his compensation, including his bonus calculation: at para. 30.

Condonation

- [238] At paragraph 19 of the Statement of Defence, EXP pleads:

However, subsequent to the date of the Amendment, it became an accepted and agreed upon practice to pay the bonuses in a time period outside of that originally provided for by the Amendment. The historical practice of the payment of these bonuses, including the history provided by the Plaintiff at paragraph 27 of the Statement of Claim, reflects this agreement. Further, and in any event, the Defendants plead that the Plaintiff condoned and otherwise accepted a bonus payment timeline that was different than the one set out in the Amendment.

- [239] Condonation of a change to the employment agreement constitutes acceptance of that change, and is a defence to a claim of constructive dismissal. The burden is on the employer to establish that the employee has acquiesced or consented: *McGuinty v. 1845035 Ontario Inc.*, 2020 ONCA 816, 154 O.R. (3d) 451, at para. 24.
- [240] "Condonation requires a determination that, viewed objectively, the employer would believe at the time that the employee 'consented freely to the change'": *Pham v. Qualified Metal Fabricators Ltd.*, 2023 ONCA 255, at para. 45, citing *Greaves v. Ontario Municipal Employees Retirement Board* (1995), 129 D.L.R. (4th) 347, at para. 63 (Ont. Gen. Div.).
- [241] In *Persaud v. Telus Corporation*, 2017 ONCA 479, at para. 14, Lauwers J.A. adopted the following statement from the trial judge as a correct statement of the law:

An employee is entitled to a reasonable period of time to assess his or her circumstances and make an election. However, a considerably extended period of time will preclude an action for constructive

dismissal. In most circumstances, courts will view an employee's willingness to remain in the altered position for a significant period of time as acceptance of the new terms, absent other mitigating factors.

Causation

[242] An employee cannot claim damages for constructive dismissal unless there is a causal link to the reason for the resignation, even if there has been a unilateral change to a fundamental term of the contract: *Persaud*, at paras. 7-10.

Analysis

(i) Was there a breach of the employment contract?

[243] I find that the timeline for the payment of the Plaintiff's non-discretionary bonuses was an unambiguous and fundamental term of the 2013 Amendment. There is no evidence that conflicts with the Plaintiff's evidence that it was a key requirement of his continued employment that his bonuses be non-discretionary and paid by a defined due date, and this is exactly what the 2013 Amendment delivered.

[244] Even EXP's witnesses agreed that under the terms of the 2013 Amendment the bonuses had milestones for payment, were non-discretionary, and were as much a part of the Plaintiff's compensation as his salary.

[245] The evidence is likewise straightforward – those contractual obligations were breached *at every single deadline* by EXP. Accordingly, it is not difficult to conclude that EXP consistently breached a fundamental term of the employment contract for a period of over three years. This was not just a single breach. I find that the bonuses were paid late on five occasions, and the non-payment of bonuses has continued to this day, more than seven years after they came due.

(b) Was the breach sufficiently serious?

[246] The question is whether the breaches were sufficiently serious to qualify as a constructive dismissal. Certainly. Payment of wages is a fundamental term of any employment contract. The *ESA* required that all wages due be paid by the next scheduled payroll, and the 2013 Amendment required that it be paid by the deadlines outlined. EXP was not just a few days or weeks late, and it did not happen just a couple of times. The breaches were ongoing and repeated, and payments were made when long overdue, or not at all.

(c) Did the Plaintiff condone EXP's late payments?

[247] The next question is whether the Plaintiff condoned the late payments. EXP's argument is two-fold: the bonuses could not be paid without his agreement on the amount, and it was a commonly accepted norm that they were always late; sometimes the Plaintiff even requested them after they were due. EXP seems to rely on the length of its own breaches

as support for the defence of condonation, arguing that the Plaintiff went for long periods without protesting the lateness of the payments.

- [248] I fully reject these arguments. The evidence contained in the emails sent by the Plaintiff demonstrate that he was never content with the delay in payment from 2014 onward. Several times he reminded McKee or Henderson that these bonuses were a contractual obligation; “the bonus calculation is defined and the payment date is defined”. In addition to the demands sent in writing, nothing contradicts the Plaintiff’s evidence that he made verbal inquiries from time to time whenever he and McKee spoke.
- [249] Certainly, his retainer of Mr. MacDonald in October 2016 demonstrates just how unsatisfied he was with the situation.
- [250] The Plaintiff should never have had to ask, or remind his superiors, for payment of his bonuses. They were obliged to calculate them, and to pay them on time. That he asked for them after they were due, which occurred on only three occasions, is not evidence of acquiescence. In the view of the court, he exhibited significant tolerance, but never implicitly agreed to waive the compensation terms of his contract.
- [251] None of EXP’s excuses for not paying are sufficient. The evidence does not support a finding that the late payments were due to company finances. If there was a financial impediment to paying the Plaintiff at any time, this should have been fully documented and at a minimum, the Plaintiff given the clear option to accept delay in payment or to consider the agreement rescinded and move on. The evidence of EXP’s indifference toward the Plaintiff’s contractual rights is overwhelming. Those who could have explained the real reasons for EXP’s failures did not come to court to provide that explanation.
- [252] As for the parties having to agree upon the amounts before payment could be made, the evidence does not support this interpretation. First, the only reason that such “back and forth” occurred in 2014, or anytime thereafter, was because the Plaintiff felt compelled to do his own calculations when EXP showed no initiative by the payment deadline. It was EXP’s role to do the calculations in advance of the deadlines. The communications in 2014 were necessitated by the fact that the Plaintiff did not have, as EXP did, all year-end information available to him to accurately calculate his annual bonus.
- [253] Second, for the three combined bonus payments made in December 2016, there was minimal “back and forth” to reach consensus. There was communication with the Plaintiff about his annual bonus that resolved a small dispute over the removal of intercompany revenue made by Walters. The evidence is that once the Plaintiff responded with his critique of Walters’ calculation on July 5, 2016, EXP capitulated and that was the end of the matter. EXP never disputed the Plaintiff’s calculations of his success bonuses and eventually paid them five months later.
- [254] The evidence shows that from early 2016 onward, it was not the financial position of the company that caused payment to be delayed to the end of 2016, but rather the debate going on in upper management about the Plaintiff’s contract.

[255] Finally, the evidence shows that the non-payment that occurred in 2017 was not due to a lack of consensus on how to do the bonus calculation, or EXP's cash flow, but rather how to deal with the anticipated effects of declining Imperial Oil revenue combined with a change in the bonus structure – where and how to deduct the second year of the 2017 success bonus in the context of transitioning the Plaintiff into a different bonus arrangement.

(d) Would a reasonable person conclude that they had been constructively terminated?

[256] The next step in the analysis is to determine whether a reasonable person standing in the position of the Plaintiff would have felt that the essential terms of his 2013 Amendment had been changed.

[257] In determining this question, the court is to look at what was known to the Plaintiff at the time he advised EXP on August 9, 2017 that he considered his employment to have been terminated by EXP. As stated in *Farber*, at para 42:

Thus, what is relevant is what was known by the appellant at the time of the offer and what ought to have been foreseen by a reasonable person in the same situation. Evidence of events that occurred *ex post facto* is not relevant....

[258] The evidence of what was known to the Plaintiff at the time that he concluded that his employment had been constructively terminated by EXP is as follows:

- (a) after signing the latest contract extension in December 2016, he communicated the calculation of his success bonus, due January 1, 2017, and on December 9, 2016 sent it to McKee and asked for his confirmation. By August 9, 2017, no one had provided him with any response;
- (b) he had sent his 2017 annual bonus calculation to McKee and Stritesky on May 18, 2017, and had not received any response;
- (c) he knew that EXP wanted to move him to a new bonus arrangement;
- (d) no one had presented the Plaintiff with any calculations or information about the company bonus plan in response to his query;
- (e) the 2017 Proposal proposed to substitute non-discretionary bonuses. The July 19 Proposal contained terms such as “half of the bonus (ie. 0.5%) will be paid upon review and approval by Mark Dvorak”, and, while providing for a fiscal year bonus of 3% of EBITDA on “projects which you brought in and were approved by Mark Dvorak”, there was no deadline for payment;

- (f) his lawyer had sent a letter on July 19 asking for confirmation that the bonus payments would be made the next week, and rejecting the July 19 Proposal;
- (g) EXP did not respond to that letter over the next nine days;
- (h) On July 28, his lawyer sent another letter asking that his outstanding bonuses be paid by July 31. On the same date, the response from EXP was non-committal. It did not confirm that his bonuses would be paid by July 31, or ever.
- (i) His bonuses were not paid by July 31;
- (j) the Plaintiff had told his lawyer that he wanted all communications with EXP to go through him;
- (k) On August 1, Skinner told him that EXP wanted to have a meeting to “walk through the bonus calculation”. This was the first time, in the intervening nine months since he had sent the calculation for his 2017 success bonus and two and a half months since he had sent the calculation of his annual bonus, that it had ever been communicated to him that there was any need to review the calculations.
- (l) the August 1 communication from Skinner did not say that his bonus would be paid, in whole or part, at the suggested meeting or at some other time;
- (m) the Plaintiff had no intention of attending the meeting without first being paid;
- (n) the Plaintiff had never been told that his bonuses would not be paid;
- (o) his success bonus had been due for seven months and his annual bonus for two months; and
- (p) he had not been told that he would be terminated if he did not accept the July 19 Proposal.

[259] This evidence leads this court to conclude that a reasonable person in the Plaintiff's position would conclude that a unilateral, fundamental change was being imposed by EXP. Even without being privy to the emails circulating in 2016 between senior officers, the obvious conclusion to draw was that EXP was conflating two separate issues in an impermissible way. It was not permitted to tie any discussions that it had had with the

Plaintiff with respect to changes in the bonus structure, or proposals sent to him, to payment of the bonuses as they came due under his existing contract. A reasonable person standing in the Plaintiff's shoes would conclude that his bonuses were not being paid because of considerations outside of the terms of the 2013 Amendment. Specifically, a reasonable person would be led to believe that payment was being withheld because EXP wanted to change the bonus structure.

[260] Even if the delay in 2017 had not reached the duration of the earlier payment delays, the Plaintiff had not received any reaction to his calculations of his 2017 success and annual bonuses by August 9. He had not received a single promise of payment. His demand for payment had effectively been snubbed by EXP; all that it had proposed was a meeting to discuss the calculations, without confirmation of payment. Even when EXP had been fully apprised of the seriousness of the situation after Mr. MacDonald became involved, it still gave no reassurance of payment. EXP argues that it could not have confirmed payment because there was no consensus on payment.

[261] This is not factually true. Walters testified that an agreement had been made to deduct the other half of the success bonus from a future bonus. The bonus calculations were defined in the 2013 Amendment and had been applied in the past. What there was no consensus over was an entirely different topic, which was a new bonus system. That, I find, was EXP's priority for any such meeting, and the Plaintiff reasonably refused that meeting when there was no promise of payment of his already well-overdue bonuses.

[262] EXP also alleges that no bonus could have been paid at the time of the Plaintiff's demand because the parties were enmeshed in negotiations over the new bonus system. It is a quite a stretch to characterize what had been going on as a "negotiation". Starting in the last quarter of 2016, when the company bonus plan idea was first introduced to the Plaintiff, there is little evidence of attempts to engage him in discussion or even provide him with information that he requested following, first, his September 2016 discussion with McKee or the later December 19, 2016 meeting. In February 2017, McKee was still following up, asking Walters whether the Plaintiff had received what he was asking for. Walters responded to McKee and Mark Dvorak the same day but there is no indication that any of the information conveyed in her message was ever delivered to the Plaintiff. There is no evidence of any further engagement with the Plaintiff on the topic of revision of his bonus structure beyond presenting him with the 2017 Proposal and the July 19 Proposal.

[263] Respectfully, the focus of EXP's submissions is not on point. It argues that any alleged changes to the Plaintiff's employment contract were merely being contemplated by EXP but were not being imposed without the Plaintiff's consent. Accordingly, there was no unilateral imposition of a change to the employment contract, and so constructive dismissal cannot be made out. I accept that the evidence shows that EXP never insisted that the Plaintiff accept the July 19 Proposal or the 2017 Proposal, and the Plaintiff was never told that that was the case. However, what EXP did unilaterally impose was a repeated change to the terms of the 2013 Amendment by failing to pay the bonuses on time and in accordance with the requirements of that contract, even though doing so was binding on EXP.

[264] Further, what happened after August 9 is of no relevance to this analysis. Although EXP asks this court to take into account the reassurances in the later correspondence from Skinner and EXP's lawyer that they did not intend to terminate the Plaintiff's employment and planned to pay the bonuses, this is after-the-fact information that was not foreseeable to the Plaintiff at the time that he took the position that he was constructively dismissed. Also, rather than characterizing the invitation to meet as evidence of good faith, as EXP does, at that point in the chronology any meaningful show of faith would have had to include abiding by its contractual obligations and paying the bonuses.

[265] Without a doubt, EXP had been acting for years as though the terms of the 2013 Amendment were not binding on it. All timelines for payment were repeatedly ignored. While that attitude was evident for years, it was never more pronounced than when EXP, having been given a deadline to meet their contractual obligations, ignored that deadline. The "internal review" communicated by Skinner with no assurance of payment would reasonably have been interpreted by the Plaintiff as more deflection and delay.

[266] By August 9, I find that EXP had communicated that it had no intention to meet its obligations under the 2013 Amendment. By that date, EXP had demonstrated conduct that made continued employment intolerable.

(e) Did EXP's breach cause the Plaintiff damages?

[267] EXP's main argument is that none of these events caused the Plaintiff's resignation; causation has not been established. Rather, he orchestrated his dismissal, alleging that he was dismissed by EXP only to exploit the enhanced contractual notice provision.

[268] EXP states that when it became apparent to the Plaintiff that his bonus structure would no longer yield the financial benefits he desired, he strategically devised a way to exit EXP to pursue other business opportunities. His actions leading up to August 9 demonstrate his bad faith and opportunistic intentions.

[269] Two of the facts relied on by EXP were the Plaintiff's refusal to attend the meeting, which he was invited to attend on August 21, and his insistence that all communication go through his lawyer. On the facts known to him at the time, I find that it was reasonable that he refused to attend the meeting, and that he sought legal representation and wanted to have communication flow through his counsel.

[270] There are also several steps that the Plaintiff took in 2017 that EXP relies on to demonstrate the Plaintiff's intentions. In summary, I do not accept the Plaintiff's evidence in all respects when it comes to explaining his actions. I conclude that the evidence shows that he did not know where he stood with EXP once he became aware that his bonus structure was under reconsideration, particularly after he was presented with the 2017 Proposal, and was taking some measures to protect his interests. Some of those steps violated the confidentiality provisions of his contract and EXP's policies. However, on a balance of probabilities, the evidence falls short of establishing EXP's theory that the Plaintiff was intending to exit EXP of his own volition to move on to a position that would fulfill his expectation of earning closer to \$450,000.

- [271] The Plaintiff testified that he recognized that the employment agreement belonging to another employee was confidential information, which he sent to his personal email on July 19, 2017. On July 24, 2017, he also forwarded an email from 2012 that set out staff bonus payments made by EXP in 2011. The Plaintiff agreed that in July he was collecting information to give to his lawyer for potential use against EXP.
- [272] The employment agreement and information about bonus payments to other employees was confidential information, and sharing it was a breach of the confidentiality provisions in the Plaintiff's employment agreement.
- [273] Any other documents that the Plaintiff forwarded to himself have either not been proven to be part of EXP's work, or I find were forwarded to himself to work on at home. I accept the Plaintiff's evidence that he was continuing to do work for EXP throughout June and July 2017, some of which was time sensitive. Every person's facility with technology differs and there is no reason to reject his evidence that he found it was cumbersome to work with the software that allowed him to access his work email from his home computer. That he adopted his own process instead of taking his work laptop home does not prove that something nefarious was occurring.
- [274] EXP relies on the Plaintiff having forwarded contact information of over 50 people to his personal email address, particularly on July 19 and 24, 2017. The Plaintiff's innocent explanation of needing to update his LinkedIn profile is not believable, given when these emails occurred. He may well have been collecting them in the event that he found himself without a job, or even to initiate his own venture if he and EXP were going to part company. But on their theory, EXP has to prove that the Plaintiff had a premeditated plan to leave EXP. The Plaintiff's evidence is that he has not reached out to any of these individuals since leaving EXP and EXP has not proven that he has, other than Andrew Guizzetti. The evidence does not show that he was collecting employee and client contact information for the purpose of either setting up a competing business or advancing some other business opportunity that he was pursuing.
- [275] The only individuals of concern are those from York, the only company that he has been employed by since leaving EXP. There is no evidence that York is a competitor of EXP. While I agree with Mr. Weisberg that the Plaintiff was at times inconsistent, argumentative, and dismissive about the evidence that he provided concerning his involvement with Eskay Canada Inc. and Eskay Environmental Services Inc., there is insufficient evidence to prove that he took on any role as an officer or director of either company until after his departure from EXP.
- [276] Although the RFI that was submitted in 2016 by Eskay Canada Inc. describes him as CEO of Eskay Canada Inc., there is no evidence that he was a director or shareholder of that company at that time.
- [277] I have spent considerable time contemplating this evidence, including Mr. MacDonald's correspondence of September 1, 2017, which confirms Eskay Canada Inc.'s involvement in confidential deals with some of EXP's clients. By that date, the Plaintiff had become an officer of Eskay Canada Inc. The letter conflicts with his evidence that he had no

introduction to York before the first week of September 2017. Even in rejecting the Plaintiff's evidence about when he was introduced to York, which I do, there is otherwise no support in the evidence to establish that there was a premeditated plan to leave EXP to go to York. There is no evidence to establish that this was initially a lucrative move for the Plaintiff in the fall of 2017. There is also nothing to contest his evidence that full-time employment with York did not begin until December 2017.

[278] The evidence falls short of proving that Eskay Canada Inc. had any active clients or was doing active work in the summer of 2017 while the Plaintiff was still employed at EXP.

[279] Mr. Weisberg argued that the Plaintiff's actions after leaving EXP all occurred too quickly to have only been initiated after August 9. The Plaintiff is obviously a driven and hard-working person; it is not difficult to accept that he worked quickly to try to re-establish himself.

[280] The evidence is that the Plaintiff was considered a hardworking and honest employee. EXP's counsel's letter of August 16, 2017 states that "Exp and Mr. Kirchmair have enjoyed a positive and mutually beneficial working relationship; it remains EXP's sincere hope that this relationship will continue". None of this evidence paints the picture of the Plaintiff as a disgruntled employee who intended to "jump ship". As he testified, he wanted to remain with EXP, and had they paid him his bonuses, he may have considered it.

(f) Conclusion

[281] I find that the Plaintiff was constructively dismissed.

Issue 6: Whether the Plaintiff is entitled to Liquidated Damages

[282] The terms of the 2013 Amendment are unambiguous. The Plaintiff was terminated without cause, and so is entitled to 21 months' pay in lieu of notice, calculated on his base salary, excluding bonus. That amount is \$382,000.

[283] There is no requirement that the Plaintiff show mitigation efforts given that it is an amount stipulated in the contract, readily calculable under its terms, and is silent as to the duty to mitigate: *Bowes v. Goss Power Products Ltd.*, 2012 ONCA 425, 351 D.L.R. (4th) 219, at paras. 34, 61.

Issue 7: Whether EXP Acted in Bad Faith

[284] As explained throughout the preceding sections, I find that EXP treated the Plaintiff poorly and without regard to its legal obligations, acting as though the 2013 Amendment did not exist.

[285] There are several ways in which EXP demonstrated bad faith. The first is the continual breach of the payment provisions of the 2013 Amendment. No one took responsibility for ensuring that the Plaintiff was paid on time. EXP was never transparent with the Plaintiff about providing an explanation for senior management's conduct. This same behavior

continued up to the date of his constructive termination, and beyond, and formed the basis of his constructive termination.

- [286] The second is that EXP very obviously tied the payment of the bonus to the revision of his employment contract. He was not paid because of lengthy dithering over what to do about his bonus system. Management was never up front with the Plaintiff while doing so; McKee was making promises that payment was forthcoming even when he knew that Stritesky and the Dvoraks were contemplating how to make the transition. They were strategizing about changing his bonus structure while at the same time either leading the Plaintiff on to believe that he was going to be paid, or completely ignoring him for lengthy periods.
- [287] The third basis is the decision to mine the Plaintiff's email. I find that EXP has not adequately explained its decision to do so. Skinner appears to have taken charge of this matter in the period of July and August 2017. While the suggestion from Skinner was that the direction came from upper management, Schedule "B" to the affidavit of documents suggests otherwise. Skinner and the Dvoraks, Stritesky, and McKee regularly communicated by email and yet there is nothing between them on this topic during the relevant period following August 9, 2017. Yet, senior management obviously became aware at some point of Skinner having taken those steps, and allowed the results to remain an issue in the litigation.
- [288] But the results of Skinner's search were not considered enough of an issue to form the basis for just cause, formed after the fact. The results were not enough for EXP to believe that a third party investigation was warranted.
- [289] Despite knowing that EXP was obligated to pay the bonuses that were owed and acknowledging that they were always paid later in breach of EXP's obligations, Skinner somehow found the Plaintiff's conclusion that he was constructively terminated and his decision not to return to work to be "very odd". Her mischaracterization of him having just "walked out" is wholly inaccurate. It is also deliberate, I find, and being offered as an excuse. Her decision to write to deny termination, after the deadline had passed and the constructive termination announced, was strategic. Despite acknowledging that she considered him to be an honest and hard-working employee, the decision was made to investigate his email. It was done, I find, for the ulterior motive of attempting to build a case against the Plaintiff after recognizing that EXP had miscalculated the seriousness of his intention to be paid what was owed to him.

Issue 8: Whether the Plaintiff is Entitled to Moral Damages

- [290] Contracts of employment, as with all contracts, entail a common law duty of honest performance, which requires the parties to be honest with one another in relation to the performance of their contractual obligations: *Bhasin v. Hrynew*, 2014 SCC 71, [2014] 3 S.C.R. 494, at para. 93. This duty of honest performance means that the "parties must not lie to or otherwise knowingly mislead" the other "about matters directly linked to the performance of the contract": *Matthews v. Ocean Nutrition Canada Ltd.*, 2020 SCC 26, [2020] 3 S.C.R. 64, at para. 40.

- [291] Accordingly, at law there is an expectation by both parties to the contract that an employer will act in good faith in the manner of dismissal. Moral damages are designed to compensate the employee for mental distress beyond normal distress and hurt feelings from dismissal, where the employer engages in conduct during the course of dismissal that is “unfair or is in bad faith by being, for example, untruthful, misleading or unduly insensitive”: *Honda Canada Inc. v. Keays*, 2008 SCC 39, [2008] 2 S.C.R. 362, at para. 57; *Matthews*, at para. 44.
- [292] The conduct in question is not limited to the exact moment of the termination, but may extend to the entire period in which bad faith conduct is alleged: *Matthews*, at para. 40. Furthermore, along with pre-termination conduct, the post-termination conduct of an employer can also support an award of moral damages provided that that conduct is a “component of the manner of dismissal”: *Doyle v. Zochem Inc.*, 2017 ONCA 130, at para. 13; *Ruston v. KeddcO MFG (2011) Ltd.*, 2019 ONCA 125, 52 C.C.E.L. (4th) 1, at para. 13.
- [293] After reviewing the state of the law in some detail, in *Galea v. Wal-Mart Canada Corp.*, 2017 ONSC 245, 44 C.C.E.L. (4th) 251, Emery J. concluded that a plaintiff is not required to lead medical evidence to make out a case for damages for mental distress in the employment context: at para. 270. In *Galea*, the plaintiff was awarded \$200,000 in moral damages for her employer misleading her for over eleven months about its decision that it no longer wanted her in its employ, and a further \$50,000 for its post-termination conduct.
- [294] The Plaintiff requests that this court award him moral damages in the amount of \$200,000. He has testified that the delay in receiving his bonuses was stressful for him. Medical evidence is not required, but in this case, I find that the medical evidence offered does not establish that the cardiac surgical intervention that the Plaintiff was required to undergo in 2019 was caused by EXP’s treatment.
- [295] Nonetheless, EXP knew that timely payment of a non-discretionary bonus was important to the Plaintiff. There were sufficient reminders and requests from the Plaintiff to demonstrate his ongoing concern. It would have been foreseeable to EXP that its conduct would cause mental distress to the Plaintiff.
- [296] However, no evidence was led from the Plaintiff about the effect on him of the accusations made in relation to the emails, or the allegation made in the proceeding that he orchestrated his departure from EXP. There is nothing in the evidence that he provided on either of these topics from which the court can infer that the allegations were troubling to him or caused him to experience distress above the normal stress caused by a dismissal. Accordingly, the post-termination conduct of EXP is not a basis for compensation in this case.
- [297] Having regard to the bad faith conduct that preceded the termination, and length of time over which it occurred, I find that an award that is in line with the precedent in *Galea* is appropriate in this case. However, EXPs conduct does not warrant as much compensation as was awarded in *Galea*. In *Galea*, the defendant knew that it was intending to terminate the plaintiff while making misrepresentations to her about her career prospects, exhibiting “corporate behavior [that] was not just unduly insensitive, it was mean”: at para. 290.

[298] I award the Plaintiff \$150,000 in moral damages.

Issue 8: Whether the Plaintiff is Entitled to Punitive Damages

[299] The law is clear that punitive damages are to be awarded only in exceptional cases against a defendant for “malicious, oppressive and high-handed” misconduct that “offends the court’s sense of decency”: *Whiten v. Pilot Insurance Co.*, 2002 SCC 18, [2002] 1 S.C.R. 595, at para. 36, citing *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130, at para. 196.

[300] EXP’s breach of a duty of good faith is an independent actionable wrong that could form the basis for an award of punitive damages: *Whiten*, at para. 149. However, there are two reasons why this case should not attract punitive damages.

[301] EXP acted in bad faith, but I do not see its actions as malicious or vindictive. While the behavior of senior management was neglectful and obtuse, I do not see them as being deliberately cruel or insensitive. Even its most strategic conduct, which was to look into his emails, is not compensable, as there is no evidence that it caused the Plaintiff to suffer damages.

[302] This is not a case like *Whiten*, where the unsupportable accusation of arson and economic pressure brought to bear by the more powerful insurance company was found to be high-handed and reprehensible. Nor is it like *Pate Estate v. Galway-Cavendish and Harvey (Township)*, 2013 ONCA 669, 117 O.R. (3d) 481, in which the employee was accused of theft, criminally charged and acquitted, and then brought a successful action for malicious prosecution against the employer, or like *McNeil v. Brewers Retail Inc.*, 2008 ONCA 405, 66 C.C.E.L. (3d) 238, in which the employee was similarly criminally charged with theft and the employer withheld exculpatory evidence.

[303] I also distinguish it from the reprehensible conduct of the employer in *Galea*, which was and extreme example of dishonesty and cruelty.

[304] In this case, EXP’s management was thick-headed and short-sighted, because of which it now owes significant damages and pre-judgment interest, and very likely, costs. Its senior management was remarkably indifferent to the Plaintiff’s rights, but immediately after matters came to a head, they wanted him back.

[305] I would also not award punitive damages because of the Plaintiff’s own breach of the confidentiality provisions of his employment contract. It sets an undesirable precedent to punish EXP’s wrongdoing while ignoring the Plaintiff’s conduct.

SUMMARY

[306] For the foregoing reasons, judgment is granted to the Plaintiff as follows:

1. A declaration that the Plaintiff was constructively terminated by the Defendants;
2. Damages for unpaid wages in the amount of \$148,670.23;

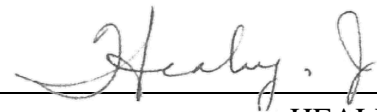
3. Payment of 10% vacation pay in the amount of \$14,867.02;
4. Damages in the amount of \$382,000 pursuant to the termination provisions in his employment contract;
5. Moral damages in the amount of \$150,000; and
6. Prejudgment and post-judgment interest in accordance with the *Courts of Justice Act*, R.S.O. 1990, c. C.43.

COSTS

[307] The Plaintiff is presumptively entitled to his costs of this action as the successful party.

[308] If the parties are unable to agree upon the issue of costs within 15 working days from the date of release of these Reasons, they may make submissions in writing. The Plaintiff's submissions are due on June 20, 2025, the Defendants' on June 27, 2025 and any reply, if necessary, on June 30, 2025. Counsel may amend this schedule on consent, with notification to the court.

[309] Written submissions are limited to 5 double-spaced pages, plus a Bill of Costs and any offers to settle. All authorities relied on are to be hyperlinked in the document or uploaded to Case Center with a tabbed (i.e., hyperlinked) index. The submissions are to be filed with the court, with a copy emailed to my judicial assistant at BarrieSCJJudAssistants@ontario.ca, in addition to being uploaded to Case Center.



HEALEY J.

Released: May 26, 2025

Schedule A

Outside Activities

In accordance with Section 7 of the Original Agreement, EXP consents to your participation in such outside activities as described herein ("Outside Activities"). In providing such consent, EXP has relied on your representation that you will develop a business, either alone or in conjunction with others, focusing on land decommissioning and redevelopment and further that such business may overlap, but not conflict or compete, with the interests of EXP.

You agree not to place yourself in a position where there is conflict between your personal interests and your duty to EXP. Should such potential for conflict or competition arise, you agree to advise EXP Immediately, by giving written notice to your immediate supervisor as well as the General Counsel of EXP. Failure to do so shall result in EXP's consent to the Outside Activities being deemed withdrawn.

You agree that the proposed work will not interfere in any way with your responsibilities at EXP and will not use EXP resources or personnel. You will use reasonable efforts to perform Outside Activities away from EXP premises and outside working hours, including non-duty time, vacation or while on leave without pay.

You shall not disclose to any third party any information derived from work at EXP unless It has been disclosed publicly.

You will have no proprietary interest in any work or intellectual property created at EXP, being work or intellectual property which bears any relation to your duties or that was created in whole or in part during working hours, or with any contribution of EXP facilities, equipment, material, funds, or information or of the time or services of other EXP employees.

You agree to report any intellectual property created by you, whether at EXP or otherwise and whether created alone or jointly. EXP shall have no interest in intellectual property created solely as a result of the Outside Activities without recourse to EXP resources. Despite the foregoing, EXP shall have the ability to use such intellectual property in the usual course of its business without further payment, unless a third party has a reasonable objection to such use.

You will not hold yourself out as an employee or otherwise refer to EXP or to an affiliation with EXP during the course of the Outside Activities without the prior written consent of EXP.

You agree to Indemnify, defend and hold EXP harmless against any claim, demand, action, cause of action, or other demand, by any third party, for any alleged loss, liability, damage or expense arising or in any way related or otherwise connected to the Outside Activities.

The Plaintiff testified that when negotiating the 2013 Agreement, the most significant aspects to him were the causes regarding remuneration, a bonus that was not discretionary, termination, and accommodation for outside business activity.