Court of King's Bench of Alberta

Citation: Lischuk v K-Jay Electric Ltd, 2025 ABKB 460

Date: 20250731
Docket: 1503 03991
Registry: Edmonton

Between:

Glenn Lischuk and 997878 Alberta Ltd.

Plaintiffs

- and -

K-Jay Electric Ltd.

Defendant

Memorandum of Decision
of the
Honourable Justice L.M. Angotti

I. Introduction

[1] Glenn Lischuk spent almost his entire working life with K-Jay Electric Ltd., an electrical contractor for both residential and commercial properties, based in Edmonton. He started as a helper when he was approximately 23 years old, earned his Master Electrician certification, and worked his way up in the company to the General Manager position in 2008. Mr. Lischuk became a shareholder in 2002, through his company 997878 Alberta Ltd.

[2] K-Jay was started in 1973 by John (Jan) Bakker, with another partner who John eventually bought out. When Mr. Lischuk became the General Manager, he ran the day-to-day business operations, while John controlled the corporate finances and overall business direction. In the late Spring of 2013, John began to transition the duties of President of K-Jay to his son,

Mark Bakker, who was also one of the shareholders. John remained the directing mind of K-Jay until approximately late 2015. Even though Mark's assumption of the role of President was formally finalized in late 2015, he was involved with John in decision making for the company during the transition period starting in Spring 2013. Mark and John determined that changes were required in the direction of the company, including a change in management styles. As a result, Mr. Lischuk was terminated without cause on November 21, 2013.

[3] At the time of his termination, Mr. Lischuk was earning $254,000 in base salary and Christmas bonus, as well as $137 per month in benefits.

[4] Disputes arose over the compensation K-Jay owed to Mr. Lischuk and 997, as a result of the termination and the triggered re-purchase of 997's shares by K-Jay under a Unanimous Shareholders Agreement. At the time of trial, the remaining issues surrounding Mr. Lischuk's wrongful dismissal claim were:

a) Is Mr. Lischuk owed vacation pay, for vacation time earned but not taken prior to his termination?

b) What is Mr. Lischuk's reasonable notice period?

c) Did Mr. Lischuk fail to meet his obligation to mitigate his damages?

d) Is Mr. Lischuk entitled to payment under K-Jay's annual bonus plan during his reasonable notice period, despite the triggered repurchase of 997's shares under the USA?

e) Is Mr. Lischuk entitled to payment of the increased value of 997's shares in K-Jay over the length of his reasonable notice period?

f) Should a minority discount apply to the valuation of the shares?

g) How should damages for the annual bonus be calculated?

[5] The parties provided the court with a substantial Agreed Statement of Facts. While there was some conflict between the parties' oral evidence, the disputes centred around the application of the law to the facts.

II. Is Mr. Lischuk owed vacation pay, for vacation time earned but not taken prior to his termination?

[6] Mr. Lischuk did not have a written employment agreement. K-Jay did not have a written vacation policy. There is no evidence as to how K-Jay dealt with vacation for its employees, including earned days off that were not taken by an employee.

[7] Mr. Lischuk testified that he was entitled to eight weeks of vacation, but he only took two weeks in his last year with K-Jay. His evidence is not clear on what happened to his vacation in previous years. He stated that, as part of his general manager duties, he tracked vacation for salaried employees on a spreadsheet, saved on his work computer. Despite Mark taking over Mr. Lischuk's duties in 2013, he did not provide any evidence with respect to vacation entitlements, vacation records, or expectations around the taking or payment of vacation. One would expect that, for a company of K-Jay's size, there would at least be records with respect to vacation earned and taken.

[8] Mr. Lischuk has met his onus to establish that he was entitled to eight weeks of earned vacation time in 2013 and he had only taken two weeks of vacation. Upon termination, an employer must pay an employee for vacation time earned and not taken, prior to the termination: *Employment Standards Act*, R.S.A. 2000, c. E-9, s 42. Therefore, K-Jay owes Mr. Lischuk six weeks of vacation pay, in the amount of $20,320 (8% of $254,000).

III. What is Mr. Lischuk's reasonable notice period?

[9] The analysis for any reasonable notice period begins with the principles established in ***Bardal v Gobe & Mail Ltd.***, 1960 CanLII 294 (ONSC), which established the four main factors for determining the length of reasonable notice upon termination: a) the character of the employment, b) the employee's length of service, c) the employee's age, and d) the availability of comparable employment in the market, having regard to the experience, training, and qualifications of the employee.

[10] K-Jay acknowledges, and has done so since the termination in 2013, that Mr. Lischuk is entitled to 24 months of notice on the ***Bardal*** factors. However, K-Jay argues that 24 months is the maximum level of reasonable notice any employee may receive. Mr. Lischuk argues that he is owed a reasonable notice period of 26 months, based on his circumstances. He submits that 24 months is not a strict upper limit, as seen in Ontario cases that have awarded a reasonable notice period exceeding that amount.

[11] Since the ***Bardal*** case in 1960, courts have incrementally increased what would be considered the rough upper limit. In 1977, 21 months was considered the rough upper limit, which was then increased to 24 months in 1983. While a cap on notice provides certainty and avoids unnecessary litigation, the issue is what is reasonable in the circumstances of a particular case based on the relevant factors, and not a particular maximum: ***Suttie v. Metro Transit Operating Company***, 1983 CanLII 475 (BCSC) at para 17-18, aff'd 1985 CanLII 525 (BCCA).

[12] Although the Supreme Court of Canada has adopted the ***Bardal*** factors as an appropriate starting point for determining reasonable notice and confirmed that the assessment depends on the particular circumstances of the individual plaintiff, it has not addressed the issue of the upper limit of reasonable notice directly: ***Machtinger v HOJ Industries Ltd.***, [1992] 1 S.C.R. 986 at p. 998; ***Wallace***, [1997] 3 SCR 701, at para 81-82; ***Honda Canada Inc. v Keays***, 2008 SCC 39 at para 28-30. At most, the Supreme Court has simply noted that 24 months is "at the high end of the scale": ***Wallace***, at para 87.

[13] Alberta courts have described 24 months as a "rough upper limit" or "the very upper end of the range" rather than a set limit: ***Carroll v ATCO Electric Ltd.***, 2018 ABCA 146 at para 40-41; ***McDonald v Sproule Management GP Limited***, 2023 ABKB 587 at para 148. I am unaware of any Alberta authorities that have awarded a reasonable notice period beyond 24 months.

[14] In ***Carroll***, the employee sought a 28 month reasonable notice period. The trial judge determined that 24 months was appropriate for a 54 year old executive with 28 years of service. The plaintiff had 12 years of working life before normal retirement age and good employability prospects as a highly trained professional with extensive transferable experience in the field of construction of major industrial projects. The trial judge did not believe, based on his age and employability prospects due to his transferrable skills, that his circumstances warranted a notice period exceeding the "rough upper limit in Alberta" of 24 months. On appeal, the plaintiff argued that his case was exceptional, such that his specific circumstances deserved more than 24

months notice. The Court of Appeal stated the determination of reasonable notice arises from findings of fact and the trial judge's findings of fact that the plaintiff did not have special circumstances to exceed 24 months were supportable, having considered all relevant circumstances in light of the ***Bardal*** factors and the particular facts of the case. The Court of Appeal also noted that 24 months was "already at the 'rough upper limit' for such a notice period" (para 40), such that there was no palpable and overriding error in the trial judge's decision.

[15] The Ontario Court of Appeal has stated that, while there is no absolute upper limit on reasonable notice, "exceptional circumstances" are generally required to support a notice period that exceeds 24 months: ***Keenan v Canac Kitchens Ltd.***, 2016 ONCA 79 at para 30; ***Lynch v Avaya Canada Corporation***, 2023 ONCA 696 at para 9-10; ***Currie v Nylene Canada Inc.***, 2022 ONCA 209 at para 12, citing ***Dawe v. The Equitable Life Insurance Company of Canada***, 2019 ONCA 512. Exceptional circumstances have included:

a) Working for only one employer for the entirety of the employee's working life, combined with their age and position of significant responsibility at the time of termination: ***Keenan***;

b) The employee's specialisation in designing software unique to the employer, such that his skills were tailored to and limited by his very specific workplace experience, combined with his position as a key performer, over 38 years of service, and the need to move to another city to find similar and comparable employment: ***Lynch***;

c) Termination equalling a forced retirement, where the employee was terminated at age 58, with limited computer skills and education, and specialized skills from a very particular manufacturing environment that were not easily transferable: ***Currie***;

d) Being employed by a single employer for so many years, as that can impact upon an employee's employability, such as the possibility that a potential employer may view the individual as rather set in his ways and not as adaptable to change: ***Milwid v IBM Canada Ltd.***, 2023 ONSC 490 at para 48.

[16] Although the Court was not asked to award a notice period beyond 24 months in ***Ansari v. British Columbia Hydro & Power Authority***, 1986 CanLII 1023 (BCSC), at para 27, the Court highlighted that it is important to consider the Bardal factors as whole, assessing their impact in combination. In that case, advanced age combined with significant years of service was important, as prospects for other similar employment could be extremely limited for older employees, such as professionals. In considering the appropriate reasonable notice period for four plaintiffs, the trial judge went on to summarize the high end of the range for reasonable notice at para 39:

> **Subject, therefore, to exceptional cases such as *Suttie* and *Sorel*, where the degree of responsibility, age and years of service were very extensive**, it seems to me that 18 to 24 months is the rough upper limit for reasonable notice, and other cases should be scaled downward from there unless there are extenuating circumstances which cannot all be enumerated in this crude attempt to provide guidance for the settlement of the many cases still outstanding. [*emphasis added*]

[17] In ***Dawe***, *supra*, the Court of Appeal reduced a 30 month notice period to 24 months, concluding that exceptional circumstances did not exist. The plaintiff had worked for the employer his entire working life, for 37 years from age 25 to 62. The Court rejected the motion judge's finding that this was "tantamount to a forced retirement", because the plaintiff had initiated the process of his own departure when he requested an "exit strategy". At para 41, the Court stated "...this factor ought to have weighed against a finding that this case involved "exceptional circumstances" justifying a notice period in excess of 24 months".

[18] In determining whether a reasonable notice period above the "rough upper limit" is appropriate, I also keep in mind that the purpose of a reasonable notice period at common law is to afford an employee a reasonable period of time to search for and secure similar or commensurate employment: ***Lynch***, at para 9; ***Wallace***, at para 115 (McLachlin J., dissent); ***McDonald***, at para 133. The ***Bardal*** factors relate directly to this purpose, as they consider circumstances that may result in a higher or lower amount of time required to obtain alternative employment. Further, I agree with the statement in ***McDonald***, at para 148, and ***Geddes v Silvestri Holdings Inc.***, 2014 ABQB 416 at para 71, that the Court needs to consider all the appropriate factors to make a fact-driven determination as to the proper notice period, rather than rely upon formulaic rules.

[19] None of the cases before me state that 24 months is a hard cap on the level of reasonable notice, although the rarity of cases providing for reasonable notice in excess of 24 months in the last 60 plus years speak to the caution that a court should exercise about exceeding this rough upper limit. This is further reflected in Ontario's law requiring exceptional circumstances in an individual case to support awarding a reasonable notice period that breaks through the ceiling of 24 months.

[20] "Exceptional circumstances" usually arise where an individual begins working for a company as a young adult and is terminated near potential retirement age, after becoming a key or highly specialized employee. The employee, upon termination, is in a situation where their prospects of obtaining similar and comparable employment are significantly limited based on factors specific to their singular employment, such that they have effectively been "forced into retirement".

[21] At the time of his termination, Mr. Lischuk was 58 years old and had worked at K-Jay for 34 years. He started working for them at the age of 21. His only other work experience was as a labourer in his early twenties. K-Jay was effectively the only employer Mr. Lischuk had. Although he took three years of university prior to working, he did not complete a degree. He did obtain first his journeyman certificate and then his master electrician certificate, but at the time of his termination, he had not worked in the field for many years and his ability to work in a physically demanding job had diminished.

[22] When Mr. Lischuk started at K-Jay in 1978, the business was small, operated out of John's residential garage with a handful of employees. He was a labourer. Over the years, as the company grew, Mr. Lischuk took on greater roles and was entrusted with larger projects. In 2008, he was promoted to the position of General Manager, responsible for the day-to-day running of the business and second in command to John. Over those same years, K-Jay grew to be one of the top companies in electrical contracting industry, earning multi-million dollar annual revenues and annual profits in excess of $1 million or much more in the years that Mr. Lischuk was General Manager. I find that he was a key employee for many years at K-Jay.

[23] Mr. Lischuk distinguishes ***Carroll***, *supra*, as unlike that plaintiff, he did not have a multitude of transferable skills and specialized in one field of work. His employability would be impacted by working for only a single employer, as K-Jay decided it wanted to move away from Mr. Lischuk's old school mentality, so it was time for him to retire. Thus, his termination was akin to a forced retirement.

[24] I find that K-Jay's decision to terminate Mr. Lischuk reflected the type of thinking addressed in ***Milwid*** as creating difficulties for a long time, older employee to find comparable employment. Mark testified that K-Jay terminated Mr. Lischuk, as his "very old school mentality" was no longer a fit for the company and the direction that it wished to take. Mark agreed that the decision was made, because it was "time for him to retire". In contrast, Mr. Lischuk had no intention of retiring from his dream job – part owner and running the day-to-day operations of a successful business he had helped to build. The termination was a shock to him.

[25] Mr. Lischuk had a 20% equity interest in K-Jay and a compensation level substantially higher than others in similar management positions within the electrical industry. While he has the skill set of planning, estimating, and managing the electrical needs of a project, the particular skills required to do so are not readily adaptable to other trade industries that involve different certification and specialized knowledge. I find that his skill set would be transferable within the electrical industry, but I do not accept that it would be readily transferable to other industries at the management or executive level. There is no evidence that, within the electrical contracting industry, Mr. Lischuk had realistic potential options to obtain similar employment.

[26] K-Jay's reasons for termination reflect a significant impact upon Mr. Lischuk's ability to find work. Despite his transferable skills within the industry, there were only about two other companies comparable to K-Jay in the electrical contracting business. An "old school mentality" would be difficult to sell to potential employers. It is not a stretch to believe that others in the industry would be aware of his management style, given K-Jay's significant presence in the industry. His ability to find similar and comparable employment would be significantly limited as a result of working solely for K-Jay over three decades.

[27] In ***Bardal*** at 145, McRuer C.J.H.C. said:

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

[28] The increase of reasonable notice beyond 24 months is not a result of factors different from the ***Bardal*** factors. It is the combination of these factors in a particular case that give rise to the exceptional circumstances set out in the Ontario caselaw.

[29] I find that the ***Bardal*** factors in Mr. Lischuk's situation give rise to the exceptional circumstances that are necessary to award a reasonable notice period beyond the rough upper limit of 24 months. The proper reasonable notice period for Mr. Lischuk is 26 months.

IV. Did Mr. Lischuk fail to meet his obligation to mitigate his damages?

[30] In wrongful dismissal litigation, a plaintiff has a duty to take all reasonable steps to mitigate their loss by seeking a comparable source of income, as a defendant is not required to pay for "avoidable losses". However, the defendant bears the onus of proving that the plaintiff could have avoided some part of their loss through reasonable mitigation efforts: ***Red Deer College v Michaels*** [1976], 2 S.C.R. 324, at p. 330-331.

[31] The test for failure to mitigate is based on an objectively reasonable standard in respect of finding comparable employment. The reasonableness standard was described in ***Hyland v Advertising Directory Solutions Inc***, 2014 ABQB 336 at para 39:

> The duty to mitigate is not an obligation to act in the former employer's interests to reduce the plaintiff's claim. Rather, it is a duty to take such steps as a reasonable person in the dismissed employee's position would take in his own interests, to maintain his income and his position in his industry, trade or profession. Our Court of Appeal has emphasized that a terminated employee, in mitigating his or her damages, is only required to make objectively reasonable decisions; he or she need not make the best possible decision.

While mitigation can occur where income is generated from employment that is not comparable, the plaintiff is not expected to take a significant demotion or pursue a substantially lesser position: ***Christianson v North Hill News Inc.***, 1993 ABCA 232 at para 11; ***Johnson v Top-Co LP***, 2009 ABQB 731 at para 66; ***Robinson v Team Cooperheat-MQS Canada Inc.***, 2008 ABQB 409 at para 115.

[32] Where a plaintiff has not obtained other employment during his reasonable notice period, the issue of mitigation is determined based on whether the plaintiff "...has stood idly or unreasonably by or has tried without success to obtain other employment...". The defendant may seek to prove a failure to mitigate solely upon the plaintiff's evidence: ***Michaels***, at p. 331. However, such a strategy is at the defendant's own risk, as the burden always remains on the defendant, and includes proving both that the employee failed to make reasonable efforts to find work and that work could have been found: ***Evans v. Teamsters Local Union No. 31***, 2008 SCC 20, at para 30.

[33] The second prong of the test is not simply satisfied by a failure of the plaintiff to take steps; it requires the defendant to prove that suitable jobs were available and, had the plaintiff taken steps to pursue such opportunities, they would probably have found employment: ***Plotnikoff v Associated Engineering Alberta Ltd.***, 2024 ABKB 706 at para 115-117, 138; ***Johnson***, at para 67; ***Robinson***, at para 122. As Justice Bensler stated in ***Hyland*** at para 60, the employer must demonstrate that "…similar work was available during the notice period in order to prove that the terminated employee's failed efforts to obtain similar employment actually caused the loss." Absent evidence of similar jobs being available, it would be "pure speculation" to find that the plaintiff could have found similar employment. Any gap in the evidence accrues to the plaintiff's benefit: ***Christianson***, at para 11.

[34] There is no dispute that Mr. Lischuk did not take any steps to seek comparable income or employment.

[35] Mr. Lischuk submits that his failure to take reasonable steps should be considered in the context of the severance offer that contained a non-compete agreement, leading him to believe

that he would not be paid severance if he found another position. He also points to a failure by K-Jay to assist his mitigation efforts. He emphasizes the second part of the test, which is the onus on K-Jay to prove that reasonable efforts to mitigate would have resulted in Mr. Lischuk finding comparable work. He views this as a "heavy onus", which K-Jay failed to meet, as there was no evidence of available jobs, let alone comparable jobs. Finally, Mr. Lischuk argues that, at his advanced age, it would be unlikely that he would be hired in a comparable management position, as evidenced by K-Jay's reasons for terminating him in the first place. His job prospects would also be limited by having one role with one employer for such an extended length of time.

[36] K-Jay argues that the onus in mitigation is different when the plaintiff has made no effort whatsoever to mitigate, as the onus first rests on the plaintiff to show that they took steps in mitigation. In the absence of medical evidence supporting a condition that would prevent him from doing a management position, it was unreasonable for Mr. Lischuk to not engage in mitigation efforts. Even where there is a lack of evidence on the second prong of the test, such as a lack of position postings evidencing appropriate employment opportunities, mitigation must still be considered. K-Jay submits that there was evidence of a hot market, given K-Jay's upward financial performance and the expert reports showing a busy marketplace. This would reflect a need for more personnel, not just labourers. Mark testified that he could go to another contractor and obtain a job. Although comparable pay would not be available, Mr. Lischuk still needed to "scale down" and take a management position without ownership.

[37] During his time with K-Jay, it was agreed that Mr. Lischuk gained "deep and extensive experience in the electrical contracting industry..., along with extensive connections with suppliers and other key industry players". He had a lot of expertise and experience in all aspects of running a residential electrical construction company, including expertise in estimating jobs. At the time of the termination, Mr. Lischuk did not have any plans to retire any time soon.

[38] I do not give any weight to Mr. Lischuk's concerns that if he worked somewhere, he would not get a severance package. The non-competition agreement referenced in the offer would only be effective, if Mr. Lischuk decided to sign it. He did not. Therefore, the only reason why he would not get severance if he obtained another position would be the doctrine of mitigation, which applied to him regardless. Ignorance of the law is not an excuse; if Mr. Lischuk misunderstood his rights and obligations, this does not excuse his failure to takes steps to seek comparable employment or income. He was advised in the offer letter to obtain legal advice; such advice could have clarified his obligations.

[39] However, this does not necessarily assist K-Jay, who must prove a failure to mitigate. I further reject K-Jay's positions that Mr. Lischuk bears an onus of proof on mitigation or that he needed to "scale down". Both positions are contrary to the law I have already summarized.

[40] Mark testified that Mr. Lischuk's income was "extremely high" compared to the market rate and it was "highly unlikely" that Mr. Lischuk could find a job with the same remuneration level or ownership. He also noted that K-Jay, as a company, was equivalent in size with two other companies, all three being the significant players in a market with approximately 30 to 40 electrical companies. Mark stated that, in 2014, the electrical market in the housing industry was very busy and K-Jay was having a tough time finding people in this period. However, there was no specific evidence as to whether this was high level management versus electricians or labourers in the field or somewhere in between. Further, the only evidence of K-Jay itself hiring management staff following the termination of Mr. Lischuk, was their current general manager

being in place for the last three years prior to trial. Although Mark testified that he believed Mr. Lischuk could have found a job relatively easily in the market, K-Jay did not present any evidence of available jobs, let alone jobs equivalent to Mr. Lischuk's position with K-Jay.

[41] Where the employer is able to show that the plaintiff was aware of potential employment opportunities and the plaintiff did not take any steps to pursue the opportunities, the court has found that the plaintiff's inaction amounted to a failure to mitigate, even in the absence of evidence from the employer as to the general job market and employment opportunities: ***Johnson***, *supra*. Where the employer can establish that there is some labour market with suitable employment opportunities for the plaintiff, it can establish a failure to mitigate: ***Hyland***, *supra*; ***Robinson***, *supra*; ***Logan v Numbers Cabaret Ltd.***, 2016 BCSC 1473. I find ***Logan*** to be of limited assistance otherwise, as the decision errs in its characterization of the burden of proof for mitigation. ***Belyea v Syncrude***, 2018 ABQB 132 is also of little assistance, as the issue of mitigation was dealt with in *obiter* and contained limited analysis.

[42] ***Link v Venture Steel Inc.***, 2010 ONCA 144 and ***Plotnikoff***, *supra*, are very similar to Mr. Lischuk's situation. In both cases, the plaintiff did not search for employment during his reasonable notice period. In ***Link***, Venture Steel did not lead any evidence of comparable employment available within the notice period. In ***Plotnikoff***, there was evidence that the plaintiff was aware of a handful of job postings, but there was no evidence that the positions were of comparable employment. Therefore, in both cases, the employer failed to meet the second part of the mitigation test and the claim of lack of mitigation was dismissed. Both cases were upheld on appeal.

[43] What is clear from the caselaw is that the onus always remains on the defendant; it does not shift when the plaintiff does not make any efforts to mitigate. Rather, it is easy in those circumstances for the defendant to establish the first prong of the test and the focus shifts to the second prong. The defendant must then provide enough evidence of a labour market or specific job opportunities that would have sufficient potential to give rise to comparable employment for the plaintiff, had steps been taken to pursue the market. Only then is failure to mitigate proven.

[44] Ultimately, Mark's assertion as to the ease of Mr. Lischuk finding employment in the market is the sum total of K-Jay's evidence as to available employment, which total is very slim. There is no evidence that Mr. Lischuk could find work in other industries outside the electrical contracting industry. His skills are not necessarily transferable, as his ability to manage K-Jay was built upon his knowledge, skills, and connections within the electrical contracting industry. Given Mr. Lischuk's ownership stake, extremely high compensation level, his advanced age, employment with in one industry, employment with only one employer who had determined that his "old school mentality" resulted in the need for a culture shift, and the limited number of companies equivalent to K-Jay, I find that it would be highly unlikely that Mr. Lischuk would obtain work in the electrical industry. K-Jay has not met its onus on the second part of the test for failure to mitigate. The claim for lack of mitigation is dismissed.

V. Is Mr. Lischuk entitled to payment under K-Jay's annual bonus plan during his reasonable notice period, despite the triggered repurchase of 997's shares under the USA?

[45] The most significant issues in dispute between the parties relate to matters arising from 997's shareholdings in K-Jay and Mr. Lischuk's participation in the distribution of K-Jay profits

through an annual bonus system. Although I will detail facts and law relevant to both issues initially, I will deal first with Mr. Lischuk's entitlement to damages for an annual bonus during the reasonable notice period.

[46] The parties' comprehensive Agreed Statement of Facts set out the history of ownership and profit sharing prior to Mr. Lischuk's termination. I will summarize the important points here.

[47] Prior to 2002, John held all of K-Jay's shares through his holding company, Greenbank Developments Ltd. In 2002, Mr. Lischuk became the first employee to hold shares in K-Jay, which he did through 997, a holding corporation in which his wife was also a shareholder. Through transactions in 2002, 2004, and 2008, 997 acquired K-Jay shares directly from Greenbank. Therefore, by 2008, 997 had 20.1% ownership of K-Jay and maintained that level of ownership until its shares were repurchased following Mr. Lischuk's termination.

[48] Throughout Mr. Lischuk's employment, Greenbank held the majority of shares and 997 was the next largest shareholder. Starting in 2008, other employees or their holding companies purchased shares over the years. In 2008, the then existing shareholders entered into a Unanimous Shareholder Agreement. All future shareholders were also required to be bound by the USA. The USA did not address profit distribution or K-Jay's annual bonus plan.

[49] By 2013, Mark's holding company held 10% of K-Jay's shares. Michael Bakker was Mark's brother and John's son. His holding company also held 10% of K-Jay's shares. Three other employees each held 5% of the shares, as individuals. Therefore, by 2012, Greenbank held 44.9% and 997 continued to hold 20.1% of K-Jay's shares.

[50] The employees who held shares individually or owned the holding companies that held shares were considered shareholder employees. It is agreed that holding corporations were used to take advantage of certain tax structuring opportunities. Both Mr. Lischuk and his wife were defined as principals of 997 under the USA. However, she was never an employee of K-Jay and was never paid remuneration by K-Jay.

[51] During the relevant time period until at least 2013, corporations were taxed at a lower rate under the small business limit of $500,000 taxable income. Taxable income above this limit was taxed at a less advantageous rate. Due to corporate and personal tax rates, as well as the different tax treatment of employment wages and dividends, it was more tax advantageous to pay out a corporation's taxable income in excess of $500,000 as wages and have the corporation pay taxes on the $500,000 taxable income. However, shortly after 2013, the tax legislation changed, and it was no longer so disadvantageous from a tax perspective to leave active income in a corporation over and above the small business limit. The tax laws impacted how K-Jay dealt with its distribution of profits.

[52] From 2008 and onwards past Mr. Lischuk's termination, K-Jay was a profitable company. It was so profitable in each year, that it looked to distribute its income to take advantage of the tax laws, particularly the small business limit. Therefore, K-Jay established an annual bonus plan, which was never reduced to writing, but was followed in the years 2008 to 2013. It changed in 2014 and following years.

[53] The annual bonus plan was based upon K-Jay's fiscal year, which ran from June 1 to May 31. At the end of each fiscal year from 2008 to 2013, K-Jay's accountants would determine a bonus pool, which would consist of income exceeding the small business limit. In 2008, the bonus pool was divided between John and Mr. Lischuk in accordance with their shareholdings.

Starting in 2009, the total bonus pool was divided into two parts and paid to the shareholder employees, in addition to their regular salary. All payments of bonus were paid as taxable employment income and reported on their T-4. Non-shareholder employees, including Mark when he was not a shareholder employee for a few years, did not receive any payments from the bonus pool.

[54] The first part was 10% of the bonus pool, which was paid out in July or August. John would allocate the 10% among the shareholder employees based on his determination of their relative employee performance. While John would make the decision on this allocation, he gathered input from Mr. Lischuk with respect to employee performance. No other individual in K-Jay was consulted. This was considered the "performance bonus".

[55] The second part was 90% of the bonus pool, which was paid out in September or October. This portion of the bonus pool was not related to employment performance. It was paid out strictly according to percentage of shares held by the shareholder employee, whether they held shares individually or through a corporation. This was considered the "share bonus".

[56] All shareholder employees, regardless of whether the shares were held by a corporation or individually, were paid both the performance and the share bonuses personally and the payments were reported on their T-4 as taxable employment income. The parties agree that the performance bonus payments were made in connection with the shareholder employees' employment, but dispute that the same connection existed for the "share bonus".

[57] From 2009 to 2013, K-Jay also paid out dividends to its shareholders. Payments were made either directly to shareholder, whether the individual or the holding corporation. For individual shareholders, the payments were reported as dividend payments, not employment income. After 2013, the only dividend issued was paid to 997, for the repurchase of its shares.

[58] In 2014, K-Jay stopped paying performance bonuses and no longer paid shareholder dividends. It continued to distribute some company profits until at least 2016 through the annual bonus plan to all shareholder employees. As per the Agreed Statement of Facts, "K-Jay was no longer distributing the bonus pool to the shareholders based on percentage shareholdings but rather based on a relatively arbitrary division aimed mostly at concentrating funds to John Bakker to gradually buy out his shares over the 2014 and 2015 fiscal years." There were also payments from the bonus pool made to two non-shareholder employees. I reject Mark's evidence that he, as the new President and CEO, distributed the bonus pool solely upon an employee's percentage of shareholdings.

[59] However, the payment of significant funds to John did not occur in 2014. Instead of a mid-year distribution, the bonus pool was distributed only at the end of the year. The evidence is not clear as to the basis for the distribution of the $600,000 bonus pool, which was the lowest bonus pool since 2008 and substantially lower then 2013, 2015, or 2016. The lower bonus pool was not a result of lower profits; the financial statements reflect that K-Jay retained significant earnings in fiscal year 2014. John received only 10% of this bonus pool, less than every other individual who shared in the pool and far less than his share in previous years. Approximately 13% of the bonus pool was also paid to a non-shareholder employee and shareholder employees with lower percentage holdings were paid more than some shareholders with higher percentage holdings.

[60] In 2015, the concentration of funds to John occurred, as he received over 58% of the bonus pool. K-Jay began to keep track of excess monies every 6 months, to make payments twice per fiscal year. The profits were distributed to both shareholder employees and some non-shareholder employees. The distribution remained arbitrary. Greenbank ceased to be a shareholder on October 15, 2015, in the 2016 fiscal year. Greenbank was paid the final installment for the shares in December 2015, which was also a significant allocation from the 2016 bonus pool monies.

[61] The starting point for a dispute over bonus damages is ***Matthews v Ocean Nutrition Canada Ltd.***, 2020 SCC 26. The Supreme Court set out a two part test for determining whether reasonable notice damages include bonus payments: ***Matthews***, at para 55. First, but for the termination, would the employee have been entitled to the bonus during the reasonable notice period? Second, if the answer is in the affirmative, do the terms of the employment contract or bonus plan unambiguously take away or limit that common law right?

[62] Mr. Lischuk argues that the first question in Matthews must be answered in the affirmative. K-Jay followed the same pattern for years with the bonus pool, paying it out amongst the shareholder employees based upon their shareholdings. If not for his termination, Mr. Lischuk would have remained a shareholder and therefore he would have been entitled to the bonus payments. The payments were inextricably linked to his employment, as they were paid as employment income, rather than dividends. Payments were not made to 997, the actual holder of the shares. On the second question, a contract must be clear if it attempts to take away the common law right to reasonable notice, which provides that employment does not end until the end of the reasonable notice period. The USA is the only contract in writing between the parties. The language of Article 15.1 states “ceases to be an employee” and would include a termination with notice. As termination with notice involves employment until the end of the reasonable notice period, the USA does not unambiguously restrict the rights. More restrictive and clear language would be required than that contained in the USA.

[63] K-Jay submits that this issue relates to the basic distinction between corporate and employee rights. It characterizes the bonus as a payment to 997, the holder of K-Jay shares, through 997’s owner and director, Mr. Lischuk. As 997 already litigated and lost its claim to the bonus and delayed share valuation, Mr. Lischuk is bound by that decision and the same analysis applies to him. As they are separate legal entities, K-Jay argues that only 997 has a claim to both the bonus that is based on shareholder equity and the increase in share value. K-Jay argued that the shares were governed by the USA and, although the bonus is not addressed by the USA, such payments were corporate compensation, not employment compensation captured by common law employment principles. Even if Mr. Lischuk does have a valid claim to the bonus and the increase in share value, K-Jay submits that the language in Article 15.1 of the USA is clear that these claims end at the time that Mr. Lischuk received notice of this termination, rather than at the end of his common law reasonable notice period. In any event, Mr. Lischuk is bound by the arbitration decision on the valuation of the shares under s 15.2 of the USA, as the USA provides that an arbitration decision is final and binding upon the parties.

[64] I find that both parties’ positions attempt to unnecessarily pierce the corporate veil and treat Mr. Lischuk and 997 as the same entity. The bonus pool monies were paid to Mr. Lischuk, even though they were calculated, in part, on the amount of shares held by 997. There was no requirement upon Mr. Lischuk to transfer those monies, in whole or in part, to 997 after he received them. During his employment, K-Jay issued dividends to its shareholders in 2009, 2011,

2012, and 2013, with 997's dividends paid directly to 997. Mr. Lischuk is not seeking payment of dividends, which would be the claim of 997. He is seeking bonus payments, which would be his claim as an employee. Basic contract law provides that 997 and Mr. Lischuk are separate legal entities. 997 is its own legal person. There is no reason to pierce the corporate veil and treat them as the same people.

[65] The claim for the annual bonus payment and the increase in share value during his reasonable notice period must be determined separately, as each issue has different relevant facts. Because Mr. Lischuk was the employee and 997 was the shareholder, the result on one claim does not necessarily equate to the same result on the other claim. Still, both can be answered through the application of basic corporate and employment principles, and the test set out in ***Matthews***.

[66] Maintaining that Mr. Lischuk and 997 are separate entities is consistent with the summary dismissal decision by Justice Richardson, who specifically concluded that the decision with respect to 997's claims did not extend to Mr. Lischuk's personal claims for any other shareholding entitlements related to his employment. She determined that 997's claims were unrelated to the wrongful termination claim of Mr. Lischuk, flowing from his employment: ***Lischuk v K-Jay Electric Ltd.***, 2021 ABQB 280 at para 140-141 [***Lischuk Summary Dismissal***].

[67] K-Jay relies upon the Ontario case of ***Mikelsteins v Morrison Herschfield Limited***, 2021 ONCA 155, which follows the line of authority from ***Love v Acuity Investment Management Inc.***, 2011 ONCA 130 and ***Evans v Paradigm Capital Inc.***, 2018 ONCA 952. All three cases address the impact of termination of employment upon either bonuses related in some fashion to shareholdings or shareholder rights and obligations under a unanimous shareholder agreement. They start from the premise that "the employee's employment is terminated when he or she is dismissed without cause, not when the notice period ends"; ***Evans***, at para 26, summarizing the conclusion in ***Love*** for the relevant date for the valuation of shares.

[68] With all due respect, this appears contrary to the admonition and principles set out in ***Matthews***, at para 53-54:

> I agree with van Rensburg J.A. that this is the appropriate approach. It accords with basic principles of damages for constructive dismissal, anchoring the analysis around reasonable notice. As the court recognized in *Taggart*, and reiterated in *Paquette*, when employees sue for damages for constructive dismissal, they are claiming for damages as compensation for the income, benefits, and bonuses they would have received had the employer not breached the implied term to provide reasonable notice (see also *Iacobucci v. WIC Radio Ltd.*, 1999 BCCA 753, 72 B.C.L.R. (3d) 234, at paras. 19 and 24; *Gillies v. Goldman Sachs Canada Inc.*, 2001 BCCA 683, 95 B.C.L.R. (3d) 260, at paras. 10-12 and 25; *Keays*, at paras. 54-55). **Proceeding directly to an examination of contractual terms divorces the question of damages from the underlying breach, which is an error in principle**.
>
> Moreover, the approach in *Paquette* respects the well-established understanding that **the contract effectively "remains alive" for the purposes of assessing the employee's damages, in order to determine what compensation the employee would have been entitled to but for the dismissal** (see, e.g., *Nygard Int. Ltd. v.*

> *Robinson* (1990), 46 B.C.L.R. (2d) 103 (C.A.), at pp. 106-7, per Southin J.A., concurring; *Gillies*, at para. 17). **(emphasis added)**

The test in ***Matthews*** requires a determination whether the employee had a right, as an employee, to acquire and to benefit from the shares, subject to the terms of, and under the limitations of, the USA: ***Kirke v Spartan Controls Ltd.***, 2025 ABCA 40, at para 17. The Court of Appeal also cites ***Taggart***, confirming that an employee has "...the contractual right to work and to be paid his salary and receive benefits throughout the entire ... notice period": ***Spartan Controls***, at para 21. Thus, damages are based upon principle of the employee working to the end of the notice period, which is inconsistent with the Ontario line of cases.

[69] The Supreme Court directed the Ontario Court of Appeal to reconsider its decision in ***Mikelsteins***, based on the test set out in ***Matthews***. I agree with the critique of the trial judge as set out in ***Spartan Controls***, at para 18, that the Ontario Court of Appeal did not engage in the analysis required. In the reconsideration decision, the Court simply distinguished the test as inapplicable, based on the conclusion that the employee's obligations with respect to their shares are not "the rights of the employee qua employee". This was really a departure from the order of analysis by considering the second question first.

[70] K-Jay submitted that the decision in ***Mikelsteins*** dealt with the claim for bonus and increased share value as a true corporate matter. That is a fair summary of the analysis in that case. After stating that the shareholder claims were not related to the employee's employment, the Court of Appeal applied an analysis that maintained a principle from Ontario authority that, legally, the employment ended upon the date that the employee received notice of his immediate termination for the purposes of determining claims arising from shareholdings. The Court expressly stated it was preserving established law in Ontario on the rights and obligations of shareholders to support the interests of the corporate employer who allows employees to be shareholders over the interests of the employee shareholder.

[71] In my respectful view, this is not consistent with either the law in Alberta or the Supreme Court's direction in ***Matthews*** as to the legal characterization of when employment terminates and the appropriate analysis to consider an employee shareholder's claims. I disagree that an individual shareholder, whose ability to hold shares is tied to their employment in any fashion, can be dealt with simply as a corporate law matter. This places the interests of the corporate employer above those of the employee, which is not consistent with the balance between employees and employers established over decades of employment law, a balance that is maintained by the required analysis set out in ***Matthews***. Therefore, I decline to follow the Ontario line of cases.

[72] In ***Spartan Controls***, the trial judge determined that the payments under the optional shareholder profit sharing program were part of the employee's compensation as an employee of Spartan. The payments, which were made pursuant to the unanimous shareholders agreement, were treated as employment income, in whole or in part. This was upheld on appeal, where the Court concluded that Mr. Kirke had a right, as an employee, to acquire and to benefit from the shares, subject to the USA. Therefore, the answer to the first question was affirmative and *prima facie* entitlement to the payment during the reasonable notice period was established. However, under the second question, the USA did unambiguously limit the common law right, as it permitted the company to buy back shares at any time upon 90 days of notice. Therefore, Mr. Kirke was only entitled to 90 days of payments, following the notice to sell back his shares.

[73] Mr. Lischuk relies upon ***Hawkes v Levelton Holdings Ltd.***, 2013 BCCA 306, which also dealt with entitlement to bonuses related to shareholdings and share value during the reasonable notice period. Although decided prior to ***Matthews***, the Court of Appeal decided the case on similar principles. Mr. Hawkes was entitled to "the benefits he would have received had he continued as an employee during the 18 month notice period": ***Hawkes***, para 65. Therefore, damages were determined based on what Mr. Hawkes would have earned during his reasonable notice period, had the employment contract been performed according to its terms. His entitlement to shareholdings and the resulting bonuses were a benefit of his employment. While Mr. Hawkes could not prevent the sale of his shares, his entitlement to damages was based upon the cash value of the benefits that he lost, calculated based upon the general legal principle regarding remedies for wrongful dismissal damages. However, the Court did not see the shareholder agreement as relevant to the determination, and thus did not specifically do the second part of the ***Matthews*** analysis. Still, this case supports the application of general wrongful dismissal principles to the issue of employee shareholdings and bonuses.

[74] The first question is whether Mr. Lischuk would have been entitled to receive payments from K-Jay's annual bonus pool as part of his compensation during the reasonable notice period. Prior to his termination, Mr. Lischuk received both performance and share bonuses as part of his employment compensation. Although the annual bonus pool distribution changed after Mr. Lischuk's termination, it was still paid out to all shareholder employees, as well as some non-shareholder employees. The payments were made as employment income, included on tax forms. Mr. Lischuk would have received these bonus payments as part of his employment compensation, had he continued working during his reasonable notice period. Mr. Lischuk is *prima facie* entitled to receive damages for the lost bonus payments.

[75] The second question is whether the USA unambiguously limits or removes Mr. Lischuk's common law right. The determination is not whether the USA is ambiguous, but whether the USA impacts the common law right in an unambiguous manner. As the USA does not, in any fashion, deal with bonus payments or profit sharing, it does not unambiguously limit or remove Mr. Lischuk's common law right. The fact that there is a buy back of shares triggered by the termination of the employee does not change this analysis, as the language of Article 15.1 – "ceases to be an employee" and "termination of employment" – can be interpreted to include termination in accordance with the employment contract, being termination with reasonable notice such that employment does not end until the reasonable notice period ends.

[76] Therefore, Mr. Lischuk is entitled to damages for annual bonus payments for his reasonable notice period.

VI. Is Mr. Lischuk entitled to payment of the increased value of 997's shares in K-Jay over the length of his reasonable notice period?

[77] Along with Mr. Lischuk's notice of termination on November 13, 2023, K-Jay provided a notice that they would buyout 997's shares in K-Jay pursuant to Articles 15 and 16 of the USA. The parties then engaged the valuation process under the USA. During that valuation process, the parties agreed to November 30, 2013, as the effective date for the valuation of 997's shares in K-Jay. Following the valuation process, Mr. Lischuk and 997 pursued separate claims to have the shares valued as at November 30, 2015, an approximation as to the end date of Mr. Lischuk's reasonable notice period. 997's claim was dismissed in ***Lischuk Summary Dismissal***. Therefore,

the only issue before me is whether Mr. Lischuk, as distinct from 997, has a claim in damages for the change in the share value.

[78] K-Jay submits that this claim cannot succeed, based upon the dismissal of 997's claim and the principles of estoppel.

[79] Mr. Lischuk submits that the corporate veil should be lifted, as 997 is his alter ego, and such lifting of the veil occurs in relation to mitigation where an employee earns money through a "single person" corporation to earn income. He also relied upon family law principles, given his wife's ownership in 997.

[80] Mr. Lischuk and 997 were treated as separate legal entities in the ***Lischuk Summary Dismissal*** hearing, with claims arising from Mr. Lischuk's termination on separate legal principles. Only Mr. Lischuk has the common law employment rights in respect of his employment with K-Jay, even though 997's shareholdings in K-Jay formed part of the basis for the calculation of the bonus payments. 997 did not have standing to bring the wrongful dismissal action, as 997 was not the employee. Mr. Lischuk did not have standing to bring the claims on behalf of 997 under the USA, as he was not the shareholder: ***Lischuk Summary Dismissal***, at para 95-98, 105-106, 126. It would be inconsistent with that decision to treat them in any other fashion.

[81] In the mitigation cases, the Court did not lift the corporate veil, but rather attributed to the employee all of the income earned by the corporation, on the basis that they are the only individual entitled to benefit from the corporation's earnings and would have access to such earnings as the sole shareholder. However, 997 is not a "single person" corporation. 997 was owned by both Mr. Lischuk and his wife. It is a further stretch of corporate principles to then lift the corporate veil on the basis that, under family law principles, she may be entitled to half of the corporate value in any event. Both Mr. Lischuk and his wife were considered Principals under the USA. It is illogical to now accept that 997 is Mr. Lischuk's alter ego, for the purpose of establishing a claim to the share value (or, alternatively, to deny a claim for the bonus structure). Rather, Mr. Lischuk's claim under the share value must be considered in respect of him as an individual, not based on a connection to 997.

[82] Thus, this issue is also answered by general principles of contract law and employment law, and the questions in ***Matthews***.

[83] The first question is whether, but for the termination, would Mr. Lischuk have been entitled to the increase in share value during the reasonable notice period? The answer must be no.

[84] ***Hawkes*** is not of assistance, nor are the other cases cited from Ontario and Alberta. They are distinguishable on the basis that the employee in each case held the equity personally, not through a corporation.

[85] 997 and Mr. Lischuk are separate legal entities. Mr. Lischuk did not own the shares in K-Jay; 997 owned the shares. 997 was paid dividends related to the shares and was ultimately paid for the shares by K-Jay upon the triggered USA buyback. 997 was entitled to the share value at any time that the shares were purchased by another entity. Only 997 had the rights and obligations of a shareholder in respect of the USA, even though those rights and obligations could only remain so long as Mr. Lischuk was an employee of K-Jay. It has already been

determined that 997 is not entitled to the increase in share value at the end of the reasonable notice period.

[86] Therefore, Mr. Lischuk is not entitled to damages for the increase in the value of K-Jay shares from the time they were valued and paid out to the end of his reasonable notice period.

[87] As I find that the answer to the first question is "no", it is not necessary to analyze s 15.1 of the USA under the second ***Matthews*** question. However, even if I am wrong and it would be appropriate to lift the corporate veil on 997, Mr. Lischuk would then stand in the same shoes of 997. It would be as if Mr. Lischuk was the shareholder. As a shareholder, he would be subject to the arbitration and valuation clauses in the USA, and thus subject to the arbitration decision with respect to valuation that was binding on 997. Mr. Lischuk brought his claim for increased share value too late. By then, he had agreed to the valuation process, including the valuation date. For the same reasons expressed in ***Lischuk Summary Dismissal***, he would be estopped from claiming a different valuation date now. Mr. Lischuk cannot be both 997's alter ego and not be subject to the same result 997 obtained, dismissal of its claim.

[88] As Mr. Lischuk's claim for the increased share value is dismissed, I do not need to address the issue of a minority discount in the valuation of the shares.

VII. How should damages for the annual bonus be calculated?

[89] Mr. Lischuk argues that the bonus payments were not discretionary; they were consistently paid from 2008 to 2013 based on the profitability of the company and the small business limit, with the share bonus based upon a shareholder employee's shareholding percentage. They were a significant part of his employment remuneration, in excess of $160,000 per year.

[90] Mr. Lischuk suggested three possible methods to determine damages for the annual bonus payment. In short, the three methods were: 1) the same bonus Mr. Lischuk received in the May 2013 fiscal year (historical method); 2) a bonus based on the same formula that previous bonuses were calculated upon (formula method); or 3) a calculation based upon the changes to the bonus structure made by K-Jay following Mr. Lischuk's termination (future method). Mr. Lischuk argued that the best method is the formula method, based on the formula that existed at the day of the breach, as damages are calculated as of the date of the breach of contract.

[91] K-Jay submits that bonus pool damages should be calculated on a historical basis, being the average of his last three years of bonus payments.

[92] Damages for a breach of contract based on the failure to provide reasonable notice are calculated on the basis of what the employee would have earned during the reasonable notice period, as if they had continued to work to the end of the reasonable notice period: ***Matthews***, at para 49, 59. In other words, damages are to place "...the employee in the position that he or she would have been in had the contract been performed -- the proper measure of damages for breach of contract": ***Wallace v United Grain Growers***, [1997] 3 SCR 701 at para 115. In ***Matthews***, Justice Kasirer further explained this basis for compensation at para 54 and 66:

> [54] Moreover, the approach in *Paquette* respects the well-established understanding that the contract effectively "remains alive" for the purposes of assessing the employee's damages, in order to determine what compensation the employee would have been entitled to but for the dismissal (see, e.g., *Nygard Int.*

> *Ltd. v. Robinson* (1990), 46 B.C.L.R. (2d) 103 (C.A.), at pp. 106-7, per Southin J.A., concurring; *Gillies*, at para. 17).
>
> [66] …Yet, it bears repeating that, for the purpose of calculating wrongful dismissal damages, the employment contract is not treated as "terminated" until after the reasonable notice period expires.…

[93] This same principle is reflected in ***Spartan***, at para 27. As in ***Rosscup v Westfair Foods***, 1999 ABQB 629, I have objective criteria upon which to base the determination of bonuses during the reasonable notice period.

[94] Even if Mr. Lischuk had remained in his position as general manager, the evidence establishes that Mark would have become President and CEO. With that authority, Mark instituted the bonus pool and distribution changes. Therefore, a mixture of the future and historical calculation method is the most appropriate. Mr. Lischuk would get paid under the bonus structure established by K-Jay following Mr. Lischuk's termination, but his share of that bonus pool would be informed by his expectation based upon his share received prior to termination. In addition, there are two circumstances that would result in an adjustment to the amount of the bonus pool itself: 1) the repurchase of Greenbank's shares by payment to John from company profits; and 2) the allocation of severance liability for Mr. Lischuk's termination in K-Jay's financial statements.

[95] As already summarized above, the Agreed Statement of Facts set out the following about the new bonus structure:

> Beginning in fiscal year 2015, K-Jay was simply tracking the excess money available for distribution according to the first 6 months and last 6 months of the year and allocating those funds to shareholders based on the gross amounts in each half of the year. It was also no longer only paying these funds to employee shareholders, but also to other employees [two non-shareholder employees received bonus payments in 2015).
>
> K-Jay was no longer distributing the bonus pool to the shareholders based on percentage shareholdings, but rather based on a relatively arbitrary division aimed mostly at concentrating funds to John Bakker to gradually buy out his shares over the 2014 and 2015 fiscal years. Specifically, over those two years, about 65.2% of the total bonus pool monies were paid to John, which significantly exceeded his/Greenbank's shareholding percentage, because the other shareholders were taking less than their share percentage from the bonus pool in order to facilitate the monies flowing more to John in light of Greenbank's planned sale of its shares back to K-Jay, which was planned for and did occur during the May 31, 2016 fiscal year on October 15, 2015. John/Greenbank was then paid the final installment from his share relinquishment in 2016, again from a tailored allocation from the bonus pool monies.

[96] While the Agreed Statement of Facts speaks to the overall percentage of the bonus that John received in fiscal years 2014 and 2015 combined, it does not speak to the composition and distribution of the 2014 bonus pool. While the distribution of bonuses changed to a more arbitrary fashion, it was still based upon the payment of company profits to shareholder employees, although not on their percentage holdings. Historically, Mr. Lischuk would have

expected to receive at least 20.1% of the bonus pool, based on his shareholdings alone; when his performance was factored in, he received an average of 20.9% of the bonus pool. Mr. Lischuk would also receive any mid-year bonus that falls within his reasonable notice period.

[97] I accept that Mr. Lischuk should receive 20.9% of the bonus pool. The 2014 and 2015 distributions had no connection to shareholdings. The three individual shareholders who held the same number of shares were all paid different amounts in those years and each of them received over twice the percentage of their shareholdings in 2014. Even if it was based on shareholdings, Mr. Lischuk would have still maintained a 20.1% shareholding. As it is unknown what the basis for distribution was and that it could still amount to more than an employee's shareholding percentage, the use of 20.9% would be in line with the actual distribution made.

[98] As I am determining the bonus pool as if Mr. Lischuk was still working during the reasonable notice period, I must consider the accrued liability of $500,000 in K-Jay's 2014 income statements. This amount represented the liability for a potential severance payout to Mr. Lischuk. K-Jay's accountant testified that, in accordance with accounting practice, a liability that is more likely than not to be paid is accrued at the time it is incurred, even if it is not yet paid. It will stop being accrued when it is determined that it is either not payable or it is actually paid, with a further accounting adjustment to account for any higher or lower difference in the actual amount of the payment. As a result, K-Jay's income for 2014 was reduced by $500,000.

[99] Had K-Jay complied with its common law obligation to provide working notice, rather than engaged in an unlawful termination, the $500,000 would not have been accrued at all, as it would not be owing, Mr. Lischuk being paid his regular salary as if he was working. Therefore, I agree with Mr. Lischuk that it should be added back into the income of the company for 2014 and thus added to the annual bonus pool. This does not inordinately increase the bonus pool, as it would now amount to $1.1 million, which is more in line with the company revenues and previous bonus pools than the $600,000 initially allocated.

[100] John received $60,000 in fiscal year 2014, much lower than his previous shares of the annual bonus. He received approximately $1.8 million in 2015 and a final $750,000 in 2016. As the evidence establishes that John received a disproportionate amount of the bonus pool in 2015 and 2016 for the purpose of buying him out of the company, it is also appropriate to deduct this amount from those bonus pools to establish an appropriate distribution to Mr. Lischuk, which is more in alignment with what other employees received. Therefore, the 2015 bonus pool amount would be reduced by $1,802,266, for a bonus pool total of $1,288,880. The same would apply for the mid-year annual bonus portion in 2016, such that the mid-year bonus pool would be reduced by $750,000, for a total of $2,150,000.

[101] Based on his reasonable notice period, Mr. Lischuk would have been employed until January 13, 2016, such that he would have been an employee of K-Jay in the first six months of the 2016 fiscal year when the bonus would have been earned, and in December 2015, when the mid year bonus was paid.

[102] Therefore, Mr. Lischuk's damages for the annual bonus are:

Fiscal 2014	20.9% of $1,100,000	$229,900
Fiscal 2015	20.9% of $1,288,880	$269,376
Fiscal 2016	20.9% of $2,150,000	$449,350

[103] Mr. Lischuk also submits that his damages should be subject to a tax gross up, to account for the 10 years to trial resulting in a higher tax rate being paid now than prior. No authority was provided for this position nor information on tax rates at the relevant time periods. There is already a remedy that exists for the time from when liability arose to when damages are paid: pre and post judgment interest. Therefore, his claim for a tax gross up is dismissed.

VIII. Conclusion

[104] Mr. Lischuk suffered damages for the reasonable notice period of 26 months, consisting of:

1) Vacation pay of $20,320;
2) Base salary, Christmas bonus, and benefits – ($254,000/12) + $137) x 26 months = $553,895.33;
3) Annual bonuses in the total amount of $948,626.

[105] There is no reduction in damages for a failure to mitigate. Therefore, Mr. Lischuk's total damages are $1,522,841.33, subject to applicable tax withholdings, plus interest in accordance with the *Judgment Interest Act*, RSA 2000, c. J-1.

[106] If within 45 days, the parties are unable to come to a resolution as to costs and interest for this matter, or should an arithmetic error be discovered, the parties may raise these issues with me in writing.

Heard on the 3rd to 6th days of March, 2025.
Dated at the City of Edmonton, Alberta this 31th day of July, 2025.

L.M. Angotti
J.C.K.B.A.

Appearances:

Phillip Prowse and I. Dhiman (Student-at-law)
Prowse Barrette LLP
for the Plaintiff

Geoff Hope and A. Quigley (Student-at-law)
Field Law LLP
for the Defendant