IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Hawkes v. Levelton Holdings Ltd.,*
2012 BCSC 1219

Date: 20120815
Docket: S108241
Registry: Vancouver

Between:

Darryl Hawkes

Plaintiff

And

**Levelton Holdings Ltd., Levelton Consultants Ltd.,
Neil Alexander Cumming, and Alex Schutte**

Defendants

And

Robert Bourne and Elite Sports Management Inc.

Defendants by Counterclaim

Before: The Honourable Madam Justice S. Griffin

Reasons for Judgment

Counsel for the Plaintiff:	Donald Boyle
Counsel for the Defendants:	Scott R. Brearley Debra L. Rusnak
The Defendants by Counterclaim:	No appearances
Place and Date of Trial:	Vancouver, B.C. April 10-13, 16-19, 23-24, 2012
Place and Date of Judgment:	Vancouver, B.C. August 15, 2012

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INTRODUCTION

[1] After 18 years of employment as a professional engineer with the defendant Levelton Consultants Ltd. ("Consultants") or its predecessors, the plaintiff Darryl Hawkes was terminated from his employment on November 22, 2010. He received no prior notice. He sues Consultants and its parent company for damages on the basis that the termination, without reasonable notice, was wrongful.

[2] Consultants says Mr. Hawkes had been dishonest in respect of expenses he had in the past submitted to the firm for reimbursement, and this justified his dismissal without notice. Mr. Hawkes disputes these allegations.

[3] Like many of the professional engineers who are employees of Consultants, Darryl Hawkes was also a shareholder in a related company, Levelton Holdings Ltd.[1] ("Holdings"), which wholly owns Consultants. Mr. Hawkes claims that the method and fact of the termination of his employment by Consultants was oppressive or unfairly prejudicial to him as a shareholder, giving rise to remedies under s. 227 of the *Business Corporations Act*, S.B.C. 2002, c. 57 ("*BCA*").

[4] Mr. Hawkes says, amongst other things, that the real motive for his dismissal was that the powers that be in the firm, particularly the president, Tom Cotton, were unhappy with the fact that Mr. Hawkes had opposed a key shareholder resolution proposed by management. This resolution proposed a change to share valuation that the management had worked on for over two years. It would have dramatically increased the value of shares, of particular import for senior members of the firm who were nearing retirement, such as Mr. Cotton.

[5] The defendants Consultants and Holdings dispute that the actions of terminating the plaintiff's employment were oppressive or unfairly prejudicial or that Mr. Cotton had any ulterior motive.

[1] As of January 2012, Holdings was renamed Caravel Investments Ltd. but for convenience I will refer to it as Holdings.

[6] Regardless, the plaintiff was party to a shareholder's agreement made effective July 1, 2009. His termination from employment raises questions as to the effect of this agreement on the disposition of his shares and the value of his shares in Holdings.

[7] In this regard, it should be noted that Neil Cumming and Alex Schutte were originally named as defendants simply because of their technical roles in steps taken by Holdings to acquire the plaintiff's shares after the termination of his employment. The claim against them has since been discontinued and the parties are awaiting the outcome of this court's judgment in respect of any such share purchase.

ISSUES

[8] The following issues arise in respect of the claims and defences advanced in this proceeding:

1. Was the plaintiff dismissed from his employment without just cause?
2. If the plaintiff was wrongfully dismissed without notice, did he fail to mitigate his damages?
3. If the plaintiff was wrongfully dismissed without notice, what is the measure of his damages?
4. Was the termination of the plaintiff's employment oppressive or unfairly prejudicial to him as a shareholder within the meaning of the *BCA*, and if so, what remedy is appropriate?
5. Did the defendants by counterclaim, Mr. Robert Bourne and Elite Sports Management, act together with the plaintiff to deliberately deceive Consultants for the sole purpose of obtaining a financial benefit to the detriment of Consultants, in respect of the submission of receipts for the 2008 and 2010 hockey camps, and if so, is Consultants entitled to damages in respect of the $7,035 it paid to the plaintiff to reimburse him in respect of those hockey camps?

[9] Certain other issues raised in the pleadings have been abandoned and do not need to be addressed.

OVERVIEW OF EMPLOYMENT RELATIONSHIP

[10] I will give a brief overview of the facts before addressing the issues. Darryl Hawkes is a 53-year old professional engineer. He graduated from the University of British Columbia with his Civil Engineering degree in 1983. He then joined a smaller geotechnical engineering firm, SCS Engineering Ltd., in Vancouver, and obtained his full professional engineer registration in January 1987. Mr. Hawkes focussed in the field of geotechnical engineering.

[11] In 1992, Darryl Hawkes joined the predecessor of Levelton, a firm of engineers with multiple engineering disciplines, then based in Richmond, BC. At that time, the firm had no geotechnical engineering presence in the Lower Mainland. One of the goals for Mr. Hawkes was to help Levelton develop geotechnical engineering capability.

[12] Mr. Hawkes' experience was mostly in the property development side of geotechnical engineering, and not in larger projects such as mining.

[13] After hiring Mr. Hawkes, Levelton began hiring more geotechnical engineers. In 1997, SCS Engineering contacted Mr. Hawkes expressing an interest in the firm being purchased by Levelton. Mr. Hawkes passed this information on to the president of Levelton and this transaction ultimately occurred. Around this time, the geotechnical services group had grown sufficiently that Mr. Hawkes was named manager of the group.

[14] As well, in 2005, another smaller firm with geotechnical experience was purchased by Levelton and Mr. Hawkes continued to manage the geotechnical group.

[15] Levelton had a structure whereby the professional employees of Consultants were entitled to purchase shares in Holdings, which wholly owned Consultants.

Mr. Hawkes purchased shares in 1995 and continued to accumulate shares in the firm (through its corporate changes), last purchasing shares in 2004.

[16] For ease of reference, when I refer to Levelton in this judgment I am referring collectively to Holdings and Consultants and their predecessors.

[17] From 1999 to 2004, Mr. Hawkes was a director on the board of a predecessor Levelton entity.

[18] In the 2005-2007 timeframe, there was some lack of cohesion as between Mr. Hawkes' views of the leadership of the firm and the views of the president and board of Levelton.

[19] In 2005, the president of the board of Holdings, Neil Cumming, decided to step down from that role. The board sought out persons interested in replacing him. Mr. Hawkes put his name forward, as did Tom Cotton. The board selected Mr. Cotton as president, rather than Mr. Hawkes.

[20] In 2006, Mr. Hawkes was informed that his position as manager of the geotechnical division was to be removed from him. At that time, Mr. Hawkes sought legal advice regarding the impact of the change in his employment status and, if it did amount to constructive dismissal, the impact on his shareholdings. He entered into without prejudice discussions with management to cease his employment altogether and have the company purchase his shares. He did not, however, formally resign and in the end Mr. Hawkes agreed to continue his relationship with the Levelton entities on both fronts, as an employee and as a shareholder.

[21] Mr. Hawkes' change in position at Consultants was documented by letter from Consultants to him dated June 18, 2007. That letter set out that he would move from the Richmond office to the Surrey office. He would be a senior project manager in the geotechnical group in the Fraser Valley Region ("FVR"). He was to work under the direction of Calum Buchan on engineering matters and Mel Magee on business-related matters. The FVR consisted of Surrey, Abbotsford, and the Kelowna areas. Levelton also had an office in Kelowna, managed by Paul Ell.

[22] Mr. Hawkes physically relocated to the Surrey office in June 2007.

[23] By all accounts Mr. Hawkes performed well as an employee of Consultants. From 2007 to 2009 his performance reviews indicated that he was meeting or exceeding Consultants' expectations.

[24] Employees of Consultants who were shareholders of Holdings participated in the profits in Consultants. The way this was structured was not as dividends, but rather as bonuses based on a profit distribution formula set by the board.

[25] In addition, some employees, including Mr. Hawkes, were entitled to a vehicle allowance.

[26] By January 2010, there were 24 shareholders and the operating companies owned by Holdings employed over 200 people.

[27] I now turn to address the issues that arise in this proceeding.

ISSUE 1 - WAS THE DISMISSAL WITHOUT JUST CAUSE?

[28] Here it is common ground that there was no written contract of employment. In such circumstances, the law ordinarily implies certain terms of employment: first, that the employer is entitled to dismiss an employee, even without cause; second, if the dismissal is without cause, the employee is entitled to reasonable notice: *Machtinger v. HOJ Industries Ltd*, [1992] 1 S.C.R. 986 at p. 997-998. It is well-accepted that the employer has the burden of proving just cause for an employee's dismissal when the dismissal is without notice: *Horvath v. SAAN Stores Ltd.,* 2003 BCSC 1845, at para. 2, *Nowlan v. Midland Transport* (1996), 174 N.B.R. (2d) 81 (C.A.) at para. 17.

[29] Given the seriousness of the defendants' allegations that the dismissal was based on the plaintiff's dishonesty, it is useful to focus on the particulars as pleaded in the defendants' Amended Response to Civil Claim at paras. 4-11:

> 4. In October 2010, Levelton Consultants learned that the plaintiff had improperly attempted to expense the cost of personal travel to Edmonton, Alberta.

5. As a result, Levelton Consultants undertook a review of historical expenses submitted by the plaintiff for reimbursement. That review revealed:

    a. Reimbursement for expenses related to three personal vehicles where company policy only allowed reimbursement in respect of one vehicle;

    b. Reimbursement for the cost of flight insurance related to a private holiday;

    c. Reimbursement for attendance at the "Kelowna Networking and Business Development Symposium" in 2010 that was, in fact but unknown to the defendants, attendance at a "Hockey Greats Fantasy Camp".

    d. Reimbursement for attendance at a "BC and Alberta Business Development and Networking Symposium" in 2008 that was, in fact but unknown to the defendants, attendance at a "Hockey Greats Fantasy Camp".

6. These expenses were not authorized by the defendants.

7. The plaintiff led Levelton Consultants to believe that the events described at 4(c) and (d) [*sic*] were business development seminars and at no time was Levelton Consultants advised that they were in fact hockey camps.

8. Levelton Consultants' review of the plaintiff's expenses revealed that one of the invoices submitted by the plaintiff for reimbursement had been altered, at the request of the plaintiff, to remove all references to the Hockey Fantasy Camp and replaced with language that was intended to deceive Levelton Consultants into reimbursing the expense as business related.

9. In seeking and obtaining reimbursement of these expenses, the plaintiff acted deliberately to deceive the defendants and for the sole purpose of obtaining a personal financial benefit at the expense of the defendants.

10. The plaintiffs' actions as alleged herein constitute a breach of fidelity and a material breach of the contract of employment.

11. On November 22, 2010, the plaintiff's employment was terminated for cause.

[30] I will examine these allegations one-by-one. When doing so, I will keep in mind the general legal principles that apply to allegations of employee dishonesty as just cause for dismissal. The law is clear that not every act of dishonesty justifies dismissal without notice. Rather, the court must consider the context of the alleged misconduct, examining how minor or how serious it was. As explained by the Supreme Court of Canada in *McKinley v. BC Tel*, 2001 SCC 38, at para. 48, “the

test is whether the employee's dishonesty gave rise to a breakdown in the employment relationship." The principle of proportionality applies, requiring a balancing between the severity of the alleged misconduct and the sanction imposed by the employer (at para. 53).

Mr. Hawkes' Trip to Edmonton October 2010

[31] The defendants allege that the plaintiff tried to improperly expense the cost of personal travel to Edmonton, Alberta in October 2010. They allege that he did this through his manager, Calum Buchan. This is not advanced as cause for dismissal, but as an explanation as to why the president, Mr. Tom Cotton, then began to look into Mr. Hawkes' historical expenses, discovering the allegedly improper hockey camp expenses. The defence position is that Mr. Buchan reported the matter to Alex Schutte who told Tom Cotton, and this led to the investigation of Mr. Hawkes' expenses.

[32] Calum Buchan is a key witness for the defence at trial not just because of this allegation, but also because as Mr. Hawkes' manager, Calum Buchan was directly responsible for overseeing and approving Mr. Hawkes' submission of expenses. He had done so and had approved the very expenses that were later said by Levelton to have been dishonestly submitted. The evidence as to what transpired between Calum Buchan and Darryl Hawkes therefore is key to the defence case that there was just cause for dismissal.

[33] Mr. Hawkes' evidence was that before the Thanksgiving weekend in October 2010, he planned to go to Edmonton. His sister who lives in Victoria was donating a kidney to his cousin who lives in Edmonton and was going to be recovering from surgery there, and he wanted to be with her.

[34] Levelton had recently acquired an engineering firm in Edmonton, and had sent an engineer from the Surrey office to Edmonton. That engineer, Armando Abello, was junior to Mr. Hawkes in terms of his geotechnical experience and had often consulted with Mr. Hawkes. There were a number of ongoing files in the Surrey office with which Mr. Abello had previously been involved but which had been

assigned to Mr. Hawkes. One of those files in particular gave rise to some questions which Mr. Hawkes wanted to discuss with Mr. Abello. He recognized that he could have discussed those issues over the telephone, but since he was going to Edmonton, thought it would be useful to stop by and visit with Mr. Abello directly. Furthermore, prior to Mr. Abello relocating to Edmonton, Mr. Hawkes had assured him that if he needed any help, Mr. Hawkes would be able to help him. He thought that stopping by and visiting Mr. Abello at the Edmonton office would show that this support was real.

[35] Thus, Mr. Hawkes contacted Mr. Abello and asked about meeting him in Edmonton. Mr. Abello agreed, and on October 6, 2010, Mr. Hawkes sent Mr. Abello an email asking him if it would work if he came to Edmonton on the Thursday or Friday (October 7 and 8, 2010). Mr. Abello agreed to a meeting and Mr. Hawkes flew out on the Thursday morning, October 7, 2010. He went to the Edmonton office mid-morning, and then had lunch with Mr. Abello.

[36] Before Mr. Hawkes went to Edmonton, Calum Buchan called him earlier in the week and asked if he was available on the Friday (October 8, 2010). Mr. Hawkes recalled that Mr. Buchan wanted him to attend an interview with another geotechnical engineer. Mr. Hawkes told him he was going to Edmonton and going to see Mr. Abello. Mr. Buchan was annoyed at this and made it clear that he did not want to pay for the expense of the flight. Mr. Hawkes told him he would not charge the Surrey office for any of the expenses. Mr. Hawkes then understood that Mr. Buchan was fine with it.

[37] Later that day, Calum Buchan sent Mr. Hawkes an email message, copied to Armando Abello and Mel Magee stating that he could not approve the trip to Edmonton on a "FV overhead number". He said that if Armando Abello needed Mr. Hawkes' help, it must be on Edmonton overhead or jobs.

[38] According to Mr. Hawkes, this email did not quite make sense because he had already told Mr. Buchan that he was not going to be charging the Surrey office

for the trip. In any event, Mr. Hawkes replied by email stating, "[a]s I said, there would be no costs to the FV". Mr. Buchan replied "[t]hanks. I did not realize that."

[39] Mr. Abello also replied by email to Mr. Buchan, writing that he had spoken with Mr. Hawkes and confirmed that his trip was under his own expense.

[40] Nowhere in Mr. Hawkes' evidence is there any suggestion that in October 2010 he improperly tried to expense a personal trip to Edmonton to the office. What the evidence indicates is that he decided to combine a business trip with a personal trip for convenience. On his evidence, it would appear that Mr. Buchan then assumed that the trip would be charged to the Surrey office. However, at no time did Mr. Hawkes attempt to do this.

[41] Calum Buchan's evidence in direct was that early in the week before Thanksgiving 2010, he phoned Mr. Hawkes and asked him if he was available for a meeting on Friday with a client. Mr. Hawkes told him that he was not because he was going to Edmonton to help Armando. Calum Buchan told him that he did not know anything about this and Mr. Hawkes said that Armando had called him and "desperately needed his help" in Edmonton, and that he was obliged to help out.

[42] Mr. Buchan testified that he then told Mr. Hawkes that if Armando Abello needed him in Edmonton, Armando should call Calum because Calum would be paying the bill for flight and accommodation. Mr. Buchan said he asked Mr. Hawkes to stay behind and he refused and said he was going to Edmonton because Armando needed his help.

[43] Calum Buchan testified in direct evidence that after that conversation with Mr. Hawkes, he called Armando Abello and told him that he should have called him, Mr. Buchan, first if he needed help in Edmonton. Mr. Buchan admitted that he was "not very nice" to Armando over the phone and told him that he had left all these projects behind in the Surrey office and he did not know why he needed Mr. Hawkes. Mr. Abello then said that he did not call Mr. Hawkes and ask him to come to Edmonton, rather Mr. Hawkes called him and asked if he could come to

Edmonton and say hello. According to Mr. Buchan, after he finished this conversation with Mr. Abello, he sent his email to Mr. Hawkes stating:

> As discussed, I cannot approve your trip to Edmonton on a FV overhead number. [I]f Armando needs your help this Friday, it must be on Edmonton overhead or jobs.

[44] Mr. Buchan testified that he then telephoned Alex Schutte, whose role in Levelton was in a chief of operations capacity. He told Mr. Schutte that he was upset that he had all this work that needed to be done in Surrey and instead of sticking around and helping out, Mr. Hawkes was going to Edmonton and he misled him as to what was going on. In this regard, Mr. Buchan explained at trial that he felt misled by Mr. Hawkes because Mr. Hawkes told him that Mr. Abello called him and desperately needed his help, when in fact it was Mr. Hawkes who called Mr. Abello and the reality was Mr. Buchan needed Mr. Hawkes' help in the Surrey office.

[45] Mr. Schutte in his evidence did not recall Mr. Buchan raising with him anything specific other than copying him with the email that said that the FVR office would not be paying for Mr. Hawkes' trip to Edmonton.

[46] No defence witnesses testified that at any time Mr. Hawkes improperly attempted to expense the cost of his trip to Edmonton, Alberta. In order to expense that trip, he would have to fill out a form and request payment. He did not ever do so.

[47] Asked in his direct examination why his email to Mr. Hawkes started off "[a]s discussed", Mr. Buchan explained that he had first spoken with Mr. Hawkes on the telephone and told him that he was not billing the trip to Mr. Buchan's overhead. Asked further why he thought Mr. Hawkes was going to do so, Mr. Buchan's reply was telling. Mr. Buchan did not suggest that Mr. Hawkes had ever asked to charge the Edmonton trip to the Surrey office. Rather, Mr. Buchan's reply was that he was simply not happy about the trip and felt that since Mr. Abello's files were based in Surrey, Mr. Hawkes did not need to go to Edmonton to work on them.

[48] In cross-examination at trial, it was suggested to Mr. Buchan that in his first conversation with Darryl Hawkes about the trip to Edmonton, Darryl Hawkes agreed that he would not be charging the cost of the trip to the FVR. Mr. Buchan was evasive in his evidence on this point. Initially he said he did not recall Mr. Hawkes saying anything at the time, and that is why he sent his email. However, sending an email was clearly just to create a record, as on Mr. Buchan's own evidence he had already spoken to Mr. Hawkes over the telephone when he told him he could not charge the expense to FVR overhead. Since Mr. Buchan was the one who approved those expenses, it was not as if Mr. Hawkes could disagree, nor did Mr. Buchan ever suggest that Mr. Hawkes had disagreed with his decision. So clearly, on Mr. Buchan's own evidence, his email of October 6, 2010 to Mr. Hawkes was after-the-fact of a discussion already having occurred that Mr. Hawkes would not be submitting the expense of his trip to Edmonton for reimbursement by the FVR.

[49] Nevertheless, Mr. Buchan would not concede this point in his cross-examination, even when inconsistent evidence from his examination for discovery was put to him. When Mr. Buchan was examined for discovery on March 10, 2011, he offered that in his initial conversation with Mr. Hawkes about the Edmonton trip, Mr. Hawkes said that he was not going to charge him for this trip, and then followed it up with his email. When this discovery evidence was put to Mr. Buchan at trial, he was not willing to accept that his evidence on examination for discovery was true, even though it was closer in time to the events (some five months after the events). Mr. Buchan asserted that it was simply a detail and that his memory had changed about the exact details by the time of trial.

[50] Furthermore, Mr. Buchan's evidence in his testimony at trial that he felt that Mr. Hawkes had misled him by suggesting that Mr. Abello had requested his help in Edmonton, is inconsistent with the content of Mr. Buchan's email message on October 6, 2010. In that message, he states "if Armando needs your help this Friday" but he does not take the position that Mr. Hawkes has deceived him on this

point, despite the fact that Mr. Buchan had already spoken to Mr. Abello. Indeed, Mr. Abello's email to Mr. Buchan and Mr. Hawkes, dated the same day, stated that:

> While [Mr. Hawkes] is in town, he will drop by the office to check out our facility. We can also discuss some possible projects he can be involved with.

[51] This message made it clear that the visit was not because of any urgent need, yet Mr. Buchan did not confront Mr. Hawkes about any suggestion to the contrary which one would think he would have done if he truly felt that Mr. Hawkes had misled him.

[52] Mr. Abello testified that he did receive a telephone call from Calum Buchan, where Mr. Buchan was upset. Mr. Abello came to realize during the call that Mr. Buchan was assuming that Mr. Abello had asked Mr. Hawkes to come to Edmonton. Mr. Abello explained to him that he had not asked Mr. Hawkes to come.

[53] In cross-examination, Mr. Buchan agreed that he did not tell Mr. Hawkes he could not go to Edmonton. I accept that Mr. Hawkes was not forbidden by Mr. Buchan to go to Edmonton, because he was a senior professional engineer entitled to some respect and discretion with respect to how he used his time.

[54] It is clear from the evidence that Mr. Hawkes did not tell Mr. Buchan that there was a personal aspect to his trip to Edmonton. There was strong evidence that Mr. Hawkes was a professional engineer who ran an independent practice. Although he also worked as part of a team, there was no suggestion that his employment structure was such that he needed to report his time by the day to his manager. He was responsible for generating his own work and for meeting his targets for revenues.

[55] As Mr. Hawkes explained in his evidence, his sister's situation was highly personal and private to her and he did not think it appropriate to disclose it and so chose not to do so at the time.

[56] I find that what likely happened is that Mr. Hawkes was coy about why he was going to Edmonton because he did not want to disclose private family matters.

However, he did legitimately intend to visit the Edmonton office while there, and was honest in stating this when he told Mr. Buchan that he would not be available on the Friday before Thanksgiving.

[57] Mr. Buchan was upset about Mr. Hawkes not being present to help him on the Friday before the Thanksgiving weekend. Since Mr. Abello had recently left the Surrey office, they were short-handed and Mr. Buchan was under a lot of pressure. He was, by his own admission, annoyed at the number of projects that Mr. Abello had left behind for them to take over.

[58] Mr. Buchan's evidence does not support the allegation that Mr. Hawkes improperly attempted to expense a trip to Edmonton in October 2010.

[59] I find that Mr. Buchan is a little hot-headed, and that what likely happened is that he reacted to Mr. Hawkes' position that he was not going to be available on the Friday (October 8, 2010), by making a number of angry assumptions: that Mr. Abello, who Mr. Buchan felt had left Mr. Buchan's office in the lurch, was requiring Mr. Hawkes to go to Edmonton; and that the cost of the trip would be unfairly charged to Mr. Buchan's FVR overhead. These were Mr. Buchan's assumptions, not something that anyone said to him. When he raised questions, his assumptions were quickly put to rest by both Mr. Hawkes and Mr. Abello.

[60] At no time did Mr. Hawkes try to submit an expense for the cost of his trip to Edmonton and claim it as a business expense. I find that he made it clear from his initial conversation with Mr. Buchan that he would not seek to have the FVR pay for the trip.

[61] The defendants have not proven their allegation at paragraph 4 of the Amended Response to Civil Claim, that in October 2010 Mr. Hawkes improperly tried to expense the cost of personal travel to Edmonton.

Was the Plaintiff's Submission for Reimbursement of Certain Vehicle Expenses Just Cause for his Dismissal?

[62] The next allegation of the defendants is that Mr. Hawkes had submitted for reimbursement expenses related to three personal vehicles whereas company policy only allowed reimbursement with respect to one vehicle (paragraph 5(a) of Amended Response to Civil Claim).

[63] Mr. Cotton asserted in his evidence in absolute terms that the policy of Consultants allowed for reimbursement in respect of one vehicle's expenses only.

[64] The only written policy that Mr. Cotton could point to with respect to vehicle expenses was in a memo from the then president of Levelton, Mr. Cumming, to "Principals" dated January 9, 2006. The subject of the memo is "Principals' Salary Reviews". It was directed to Mr. Hawkes personally, but I assume from the content that a similar memo went to each "principal" of the company. The memo identified the salary that Mr. Hawkes was entitled to as a principal. As well, the memo went on to address the vehicle allowance as follows:

> In addition to the base salary, all Principals will be entitled to a vehicle allowance in accordance with the established policy, which has now been slightly modified. It is:
>
> - The company will lease a vehicle for the personal and business use of a Principal, to a maximum value of $500 per month, plus applicable PST and GST. Principals wishing to lease a more expensive vehicle may do so, but the amount over $500 will be deducted from their salary:
> - Principals may opt to take the $500 monthly allowance as salary in lieu of a leased vehicle;
> - In either case the company will pay for reasonable fuel, maintenance and insurance costs; please use your discretion;
> - Principals are asked to be cognizant of the optics of driving obviously extravagant vehicles;
> - If a Principal leaves the employment of LCL, they will be required to assume the lease of their vehicle.
>
> [Emphasis in original.]

[65] The memo went on to note that the value of the vehicle lease and operating expenses, minus the business use portion, must be recorded as a taxable benefit. In noting this, Levelton's management was acknowledging that persons would be

using and claiming reimbursement for vehicle expenses where the use might be personal. The memo noted that the benefit was worth about $1,000 per month in equivalent salary and "should be considered as part of the overall remuneration package".

[66] Mr. Hawkes has never hidden the fact that he submitted for reimbursement expense claims in relation to the operation and maintenance of more than one vehicle. When he submitted his receipts, he wrote identifying vehicle information down on the receipt. He admits that his vehicles were at times used by others in his family. However, his evidence is that he always understood the policy to be that "reasonable" expenses could be submitted and that this was up to the shareholder-employee's discretion. He attempted to be reasonable by not claiming every expense for each vehicle, but simply submitting some of the expenses. No one questioned him doing so for over ten years. No one at the company ever stated to him that he could only charge the expenses in relation to one vehicle.

[67] In cross-examination, Mr. Cotton agreed that the January 9, 2006 memo did not state that a party could only charge expenses in relation to one vehicle, however, he argued that this was to be inferred from the memo which referred to leasing a single vehicle.

[68] As part of this proceeding, Mr. Hawkes requested and had produced to him by Levelton the claims submitted by him and by other shareholders in respect of vehicle maintenance expenses. Information produced to him showed that in 2008 he claimed $915.17; in 2009 he claimed $1,849.52; and in 2010 he claimed $865.78. When he contrasted his vehicle expense claims to those of other shareholders as produced to him by the defendants, he was the second lowest claiming shareholder in 2008; he was closer to the middle of the pack in 2009, but there were other shareholders who claimed significantly more (for example, Calum Buchan claimed $3,729.97 that year and another shareholder claimed even more); and in 2010 Mr. Hawkes submitted the third lowest claim when compared to the other shareholders submitting expenses for vehicles.

[69] I do not accept the defence position that Mr. Hawkes contravened company policy by submitting for reimbursement maintenance expenses in relation to more than one vehicle. There was no clear policy by the company that if a shareholder chose to submit expenses for their own vehicle rather than leasing a vehicle, they could only do so in relation to one vehicle. Many people own more than one vehicle and use the vehicles intermittently for work. The company policy clearly approved of vehicle expenses being repaid by the company where the vehicle was being used personally and not just for business use, and warned the shareholder-employees that they should be mindful of tax implications of doing so. I find that the only governing parameter for submission of expenses was that the shareholder-employee should be "reasonable".

[70] The true test of whether or not Mr. Hawkes was being reasonable in his claims for vehicle expenses is that they were approved at the time by someone overseeing these expenses. Furthermore, the defendants have not led any evidence to suggest that the amounts claimed by Mr. Hawkes were extraordinary in comparison to other shareholders or employees. While the amount claimed by other shareholders as referred to in Mr. Hawkes' evidence was hearsay, it was not disputed by the defendants, and leads to the natural inference that the totality of Mr. Hawkes' vehicle expense claims was not unreasonable.

[71] In *Poirier v. Wal-Mart Canada Corp.*, 2006 BCSC 1138, at para. 61, the court cited *Roney v. Knowlton Realty Ltd*. (1995), 11 C.C.E.L. (2d) 205 (B.C.S.C.) at para. 8 for the proposition that an employer must establish certain facts about a company policy in order to rely on an allegation that the employee breached the policy as cause for dismissal, namely:

(1) it has been distributed to employees;

(2) it is known to the employee affected;

(3) it is unambiguous;

(4) it is consistently enforced by the company;

(5) employees are warned that they will be dismissed should they breach the rule or policy;

(6) it is reasonable; and,

(7) the breach thereof is sufficiently serious to justify dismissal.

[72] Levelton had no unambiguous policy in place to the effect that an employee could only submit expense claims with respect to one vehicle. Furthermore, Levelton received expense claims from Mr. Hawkes with respect to more than one vehicle for many years, and reimbursed him for those claims, without ever warning him that this was contrary to policy. Levelton has not proven its allegation that Mr. Hawkes breached company policy with respect to vehicle expense claims.

[73] The fact that Mr. Cotton gave evidence suggesting that the firm's vehicle expense policy was clearly violated by Mr. Hawkes negatively impacts on Mr. Cotton's credibility. It appears as a self-serving after-the-fact justification for terminating Mr. Hawkes' employment. While in the witness stand, Mr. Cotton attempted to somewhat distance himself from this allegation by suggesting that it was not the major point justifying Mr. Hawkes' dismissal, this suggestion does not lessen the impact of Mr. Cotton's absolutist position that the vehicle expense policy was clearly violated by Mr. Hawkes. It was a point that Mr. Cotton thought necessary to raise in affidavit evidence in opposition to an application by Mr. Hawkes early on in this proceeding; it was a point that the defendants thought necessary to plead as justifying Mr. Hawkes' dismissal; and it therefore was a point that Mr. Hawkes had to address in his own evidence.

[74] I conclude that the plaintiff's submission to Levelton of claims for reimbursement of vehicle expenses was not just cause for his dismissal.

Allegation Regarding Flight Insurance

[75] Soon after Mr. Hawkes was fired, Levelton took steps to acquire his shares. Mr. Hawkes commenced this proceeding and sought injunctive relief restraining the company from repurchasing his shares. In opposition to that application, Tom Cotton swore an affidavit made December 20, 2010. Parts of that affidavit were put to him in cross-examination. Of note, Mr. Cotton deposed that "the plaintiff had claimed and received the cost of flight insurance for he and his spouse in respect of a private holiday".

[76] Mr. Cotton admitted at trial that he was mistaken in concluding that Mr. Hawkes had claimed the cost of flight insurance for a personal flight rather than business. This issue was also alleged by the defendants at paragraph 5b of the Amended Response to Civil Claim as one of the grounds supporting cause for Mr. Hawkes' dismissal. However, the defendants have since abandoned that allegation. It is nevertheless significant in that it reveals a "rush to judgment" that occurred on the part of Mr. Cotton and the defendants in their attitude toward Mr. Hawkes leading up to the termination of his employment.

Was the Plaintiff's Submission for Reimbursement of Expenses Related to Hockey Camps in 2008 and 2010 Just Cause for his Dismissal?

[77] The defendants allege that in 2008 and in 2010, Mr. Hawkes submitted for reimbursement expenses related to his attendance at a hockey camp in Kelowna, describing them as networking and business development symposiums, without disclosing that the events were hockey camps. They say that he acted deliberately to deceive the defendants for the sole purpose of obtaining a personal financial benefit at their expense (paragraphs 5(c) and (d); 6-9, Amended Response to Civil Claim).

[78] It is not disputed that in 2008 and 2010 Mr. Hawkes attended a hockey camp in Kelowna. He says that he considered the events to be ways he could market his and the firm's services, and so he obtained pre-approval from Mr. Buchan, and then submitted the expenses for reimbursement. He then was reimbursed a total of $7,035 by Consultants.

[79] The discussions that Mr. Hawkes had with Mr. Buchan prior to his attendance at these events are key to the determination of this issue, and so I will review the evidence carefully in this regard. But first, it is important in determining this issue to understand Levelton's expectations and practices with respect to business development.

Levelton's Lack of Policies

[80] Levelton had no written policy dealing specifically with marketing or business development expenses: no policy on what was or was not an acceptable expense for an employee or shareholder to submit for reimbursement; and no policy allocating a certain sum to each shareholder as a cap on marketing expenses. It was understood that the costs of some social or recreational events, such as golf tournaments, were considered acceptable to submit for reimbursement as incurred in relation to business development. There was no policy as to when a social event would or would not be considered a business development opportunity for which reimbursement of the cost would be provided.

[81] Further, there was also no evidence that Levelton circulated amongst its shareholders an annual summary of expenses claimed by each shareholder, whether by category (vehicle expenses, business development, seminars) or otherwise. Thus, there was no easy way for one shareholder to judge whether or not expenses claimed by that shareholder were excessive in comparison to others.

[82] Rather, Levelton's practice with respect to marketing expenses was informal. It seems that at times pre-approval from a manager for an expense was obtained. But once the expense was incurred, an employee or shareholder would submit the claim for reimbursement of the expense to his manager for approval, and if the manager approved it, it would be paid back to the employee. These computer-generated forms could be submitted electronically, with a paper copy attaching receipts also provided as back-up.

[83] Despite the absence of any formal policy on marketing, Levelton's professional employees were expected to develop and grow their business. Since they were providing professional services, it is natural to expect that one way to do this was by building relationships in the business community with people who held common interests.

Mr. Hawkes Was Responsible for Generating Work

[84] Throughout his career at Levelton, Mr. Hawkes was responsible for generating his own work. One of his initial sources of work was from an architect with whom he played recreational hockey. The architect sent along his own work and passed Mr. Hawkes' name along to other architects he knew. As well, Mr. Hawkes tried to get repeat business from clients.

[85] In approximately 2005, Mr. Hawkes started providing services in respect of insurance claims where he would also be available to act as an expert witness. This work also was generated from one of his hockey contacts, a man who had an insurance adjusting company. This contact introduced Mr. Hawkes to his business partner who started giving this type of work to Mr. Hawkes as well and who also passed his name along to lawyers.

[86] According to Mr. Hawkes' evidence, by 2010, 60-70% of his work was related to insurance claims and litigation expert witness services.

The Hockey Camp as Business Development

[87] When Mr. Hawkes moved to the Surrey office in 2007, one of the expectations that Levelton had for him was that he would grow the business in the FVR, which included Surrey, Abbotsford and Kelowna. His ability to earn a performance bonus was in large part based on the fees and book of business that he could generate.

[88] Mr. Hawkes had a professional relationship with Chris Fraser, a lawyer. He had reason to trust Mr. Fraser, as he was a long-time friend of Mr. Hawkes' older brother, and Mr. Hawkes had known him since childhood.

[89] In 2008, Mr. Fraser and his friend, a former NHL hockey player, Bob Bourne, developed the idea of putting on an NHL hockey camp and inviting men who were well-off to participate in it. Mr. Fraser suggested it to Mr. Hawkes as something he might like to do. He told Mr. Hawkes that it would include golf and a boat cruise. He knew Mr. Hawkes' business and had provided him with work in the past. According

to Mr. Hawkes, Mr. Fraser told him that he thought it would provide a good business networking opportunity.

[90] One question is whether or not Mr. Hawkes believed Chris Fraser that this would be a good business marketing opportunity, or did he expect all along that the benefit would be purely personal. I accept Mr. Hawkes evidence that he believed Mr. Fraser that the event would attract wealthier men who could potentially be good business connections for him. Mr. Hawkes had no reason to distrust Mr. Fraser's judgment. In addition, because Mr. Fraser had given him work before, he probably wanted to be supportive of this venture in order to continue to develop goodwill and future work from Mr. Fraser.

[91] In cross-examination of Mr. Hawkes, it was suggested that he did not do enough to inquire of who would be attending the event, nor did he do enough when he attended the event to take notes of who was there or follow-up with them. Even if this is true, this line of questioning seemed based on the presumption that business development is a refined science, which is not the way it was approached by Levelton.

[92] There was no evidence before me that Levelton had put on any training courses in marketing for its professionals, or had any written aids to assist in educating its professionals in making best use of social and recreational opportunities to market their services. Nor did there seem to be any process in place to measure the effectiveness of incurring costs to attend social events. This may simply be because of the nebulous nature of such things — it can be hard to know what specific occasion and interaction strengthens a relationship to the point where it leads to a decision by a client to hire the professional.

[93] Thus, the evidence suggests that the means and method of business development was left to the discretion of the individual engineers at Levelton, with the approval of expenses for these efforts left to managers. It is fair to expect that the level of seniority of the individual engineer undertaking a business development

activity, and hence the corresponding trust and respect by the manager, would play a large role in the manager approving expenses.

[94] I accept that after speaking to Mr. Fraser about the event in 2008, Mr. Hawkes was interested in attending it and thought it could be a useful business development opportunity. I recognize that Mr. Hawkes may have engaged in a certain level of wishful thinking as to the business utility of this event, since the event was a first-time event and he had no certainty of who would be attending. He may have relied too heavily on the promotion being made by someone he knew, Mr. Fraser. He may have been influenced by his own personal enjoyment of hockey, and perhaps even by the fact that he would have learned at some point that his brother was going to attend. These criticisms could likewise no doubt be levelled at many a business person who has attended a golf tournament or dinner, and then treated the expense as a marketing expense, with little real thought to the true marketing utility of the occasion. For this Mr. Hawkes could be criticized for poor training in marketing. But his state of mind did not in my view come close to approaching dishonesty.

[95] That people often form good business relationships socializing and watching or playing sports seems well-accepted, and has justified many attendances at professional sports games and many golf games and golf memberships. I see no reason why the same logic would not apply to men playing hockey together.

[96] I find that Mr. Hawkes did not think that the benefit of attending the 2008 event was purely personal and that there would be no potential for business connections; rather, he believed that the event could create opportunities to meet people that might translate into generating business for him and Levelton.

Mr. Hawkes' Evidence: Conversation with Mr. Buchan Prior to 2008 Event

[97] Mr. Hawkes' evidence was that a few weeks prior to the 2008 event he called Calum Buchan on the telephone and told him that a lawyer he'd worked with had contacted him and invited him to an event, that it was strictly social, and involved a

boat cruise, golf and hockey. Mr. Hawkes explained that because it was strictly social, he was willing to take the time to attend as vacation time if Levelton would cover the hard costs. Mr. Buchan agreed, and so Mr. Hawkes went to the event.

[98] Mr. Hawkes recorded the time to attend the event, August 5 - 8, 2008, as vacation time. He thought this was appropriate since the event was social.

Attendance at the 2008 Event

[99] At the 2008 event, Mr. Hawkes made two contacts that he thought could be helpful to develop business for Levelton. One was a person who had a construction company, referred to as "Tyam", which had been awarded a large contract for work on the South Fraser Perimeter Road. Mr. Hawkes did some internet research in his room at night during the event to find out more. This company did end up hiring Levelton. However, Mr. Hawkes said in his evidence that he feels now that they may have done so without him having attended the hockey camp event, but the research he did about them during the hockey camp came in useful when he did subsequently meet with Tyam professionally.

[100] Another contact he met at the 2008 hockey camp, who he thought might be useful, was a fellow who worked at a Vancouver community college. Since Mr. Hawkes had done a significant amount of work for another community college, he thought this would be a useful contact to follow-up. However, later when he made inquiries the same fellow no longer worked for the college and so this did not lead to any work.

[101] Also at the hockey camp event, Mr. Hawkes met a former coach of the Vancouver Canucks, and he and his wife ultimately became social friends with Mr. Hawkes and his wife. Mr. Hawkes felt that this introduction has led to other introductions that are useful for business networking.

The 2008 Receipt

[102] When Mr. Hawkes prepared to submit his expense report in relation to the 2008 event, he asked Mr. Fraser for a receipt. Mr. Fraser prepared and sent a

receipt to Mr. Hawkes, which Mr. Hawkes submitted to Levelton with his expense claim.

[103] The 2008 receipt did not show the name of the organisation providing it, but was dated August 30, 2008. It stated in the reference line:

> Re: B.C. and Alberta Business Development and Networking Symposium
> From August 5th, 2008 to August 9th, 2008 inclusive

[104] There was no other description of the event in the document.

[105] The receipt accurately showed the amount that had been paid by Mr. Hawkes, namely $3,500 plus GST of $175 for a total of $3,675.00. The receipt was signed by Mr. Fraser. There is no dispute that this amount was in fact paid by Mr. Hawkes to attend the event.

[106] When Mr. Hawkes prepared his expense form, he selected on the computer drop-down menu the category “Seminar and Training” rather than the category “Marketing”. His evidence was that this was simply a mistake.

[107] After the expense form with the attached receipt was submitted, Mr. Buchan did not ask Mr. Hawkes any questions about the receipt or the event. Mr. Buchan signed his approval of the expense, and in due course Mr. Hawkes was reimbursed for the expense.

[108] Nowhere on the receipt does it reveal that what Mr. Hawkes attended in 2008 was a hockey camp. We do know that by 2010 the promoters of the event called it a “hockey greats fantasy camp”. However, it was unclear on the evidence as to when it received this name.

[109] The plaintiff called Mr. Fraser as a witness at trial. In his evidence, he was not sure what name he and Mr. Bourne had given the 2008 event, and he noted that he had only personally participated in the golf and social events and not the hockey. Mr. Fraser said he did not have any input in the name “hockey greats fantasy camp”. Mr. Fraser said that soon after the initial event, his interest in it was bought out and

Mr. Bourne and his new partner may have created the name "hockey greats fantasy camp".

[110] Mr. Fraser explained that he alone came up with the wording for the receipt that he gave Mr. Hawkes in relation to the 2008 event. Mr. Bourne was away, so Mr. Fraser prepared the receipt.

[111] In cross-examination, Mr. Fraser agreed that he assumed the purpose of the receipt was for business purposes, both for Mr. Hawkes to claim as a business expense and for the appropriate entity to maintain in its records as a basis for reporting the expense to Canada Revenue Agency as a business expense for tax purposes.

[112] Mr. Fraser agreed that in promoting the event, he did not describe it to people as a "B.C. and Alberta Business Development and Networking Symposium". However, he said it was presented as an opportunity for people to network with each other.

[113] Mr. Fraser agreed that the only person who had come from Alberta to attend the 2008 event was Mr. Hawkes' brother. However, he said that he promoted the event in both Alberta and British Columbia.

[114] In cross-examination, Mr. Fraser denied that the reason he did not put the words "hockey camp" on the invoice was that he assumed that Mr. Hawkes would not obtain reimbursement for the expense if it revealed those words.

[115] I accept Mr. Fraser's evidence. He was straightforward in his evidence and did not appear to overstate nor was he evasive. It seems to me inherently unlikely that a practicing lawyer would risk his own reputation and professional status by participating in a deliberate attempt to deceive Mr. Hawkes' employer, just so as to enable Mr. Hawkes to be reimbursed for $3,500 rather than pay that money out of pocket. I find that Mr. Fraser was not attempting to deceive Mr. Hawkes' employer when he prepared the receipt.

[116] Rather, I find that Mr. Fraser assumed that the receipt would be more suitable to support the tax deductibility of the expense, if it emphasized the business networking aspect of the event rather than the recreational and social aspect, and so that is why he drafted it the way he did. From the beginning, Mr. Fraser must have recognized that if the cost of the event could be treated as a business expense, he would have more success in persuading men to attend and this was part of his promotion of the event.

[117] I also give considerable weight to the fact that the person who prepared the 2008 invoice was Mr. Fraser, a lawyer, and that this would have influenced Mr. Hawkes to accept the receipt as appropriate. It has to be recognized that lawyers carry stature in the community, as people who are honest and who are expected to know and act within the law. As a lawyer, Mr. Fraser's creation of the receipt gave it the stamp of being an appropriate description for tax and business expense purposes. Mr. Fraser was also a long term family friend so Mr. Hawkes had no reason to question his judgment.

[118] Mr. Fraser was not misled by Mr. Hawkes as to why the receipt was needed, nor was he asked to disguise the event. He was the one who had told Mr. Hawkes that the event would be a good business networking opportunity. He clearly recognized that this aspect of the event was important to Mr. Hawkes when he promoted the event to him.

[119] Mr. Hawkes was taking the time as vacation time, which is inconsistent with the notion that he wanted Levelton to believe he was attending a seminar or training. Furthermore, when he went to the event in 2010, he indicated on the same type of form that it was for marketing, which is also inconsistent with the notion that he was trying to disguise the event as educational in 2008.

[120] Mr. Hawkes had told Mr. Buchan about attending this social event for marketing purposes and had received approval in advance. I accept Mr. Hawkes' evidence that he simply made a mistake in designating the expense as "seminar and training" on his computer generated form. He was not being dishonest.

The 2010 Event and Receipt

[121] In 2010, Mr. Hawkes again asked Mr. Buchan if he could attend the event. According to Mr. Hawkes' evidence, he did not describe it in detail other than to say it was the same thing he had attended in 2008, and he would book it as holiday time (which he did) if Levelton would cover the hard costs. Mr. Buchan agreed.

[122] By this time, the event was called the "Hockey Greats Fantasy Camp". It was being promoted by Bob Bourne, and Chris Fraser was no longer involved.

[123] When it came time to submit his expense report to Levelton, Mr. Hawkes again asked the organizers for a receipt, this time directing the request to Bob Bourne. Mr. Bourne sent him a receipt by email dated August 24, 2010. His email said "if you need something changed, please let me know".

[124] The receipt showed a logo "Hockey Greats Fantasy Camp", and was issued by "Elite Sports Management", Mr. Bourne's related company. Under product description it stated "Corporate Membership to the 2010 Hockey Greats Fantasy Camp". It accurately showed the amount that Mr. Hawkes had paid, $3,000 plus taxes of $360.

[125] When he received the receipt, Mr. Hawkes called Mr. Bourne on the telephone, and asked him if he could have a receipt similar to what had been issued in 2008. The same day, Mr. Bourne emailed a new receipt to Mr. Hawkes. The new receipt did not show the Hockey Greats Fantasy Camp name or logo, and the description had been changed to read "Kelowna Networking and Business Development Symposium".

[126] Mr. Hawkes attached the second receipt to his expense report for August 2010, and indicated that the expense was a marketing expense.

[127] Mr. Hawkes' 2010 expense report relating to the hockey camp event was signed off by Mel Magee. Before signing his approval on the form, Mr. Magee did not ask Mr. Hawkes any questions but did make inquiries of Mr. Buchan by

telephone. According to Mr. Magee's evidence, he asked Mr. Buchan about "this marketing expense". Mr. Buchan told him that he had spoken to Mr. Hawkes and given him approval to attend this marketing event in Kelowna, and it was something that Mr. Hawkes had previously attended in 2008. Mr. Hawkes was therefore reimbursed for the expense.

Defendants' Evidence

[128] The defendants plead that Mr. Hawkes "led Consultants to believe" that the 2008 and 2010 events he attended were "business development seminars" (para. 7 of Amended Response to Civil Claim).

[129] After Thanksgiving in October 2010, Mr. Tom Cotton decided to review Mr. Hawkes' previously approved expense reports. He came upon this 2010 marketing expense, and felt that a $3,000 expense was unusually large, more than what he would spend himself on marketing. He looked at the attached receipt, and according to him it raised red flags because the sports company name was not something he felt would be associated with marketing, and the product description was more like a service description.

[130] As well, according to his evidence, Mr. Cotton was suspicious of why Mr. Hawkes would be attending an event in Kelowna when they had a Kelowna office.

[131] On the latter point, Mr. Cotton expressed the strong view that Mr. Hawkes had no reason to be marketing in Kelowna. I do not accept this evidence as it is inconsistent with other evidence, including Mr. Cotton's admissions that he was not Mr. Hawkes' direct manager and did not concern himself on a day-to-day basis with marketing efforts of individual engineers.

[132] Mr. Hawkes' managers, Mr. Buchan and Mr. Magee, both understood that the purpose of the event was marketing. They had no issue with Mr. Hawkes marketing in Kelowna. Mr. Hawkes was responsible for generating his work, and the area in

which he was supposed to grow the business was the FVR, which included Kelowna.

[133] In any event, Mr. Cotton did his own internet research on "Elite Sports Management", and found the hockey camp advertised on the internet with Mr. Hawkes' photograph at the event. He testified that he associated a "symposium" with some kind of training and he would have expected an educational component for the cost of the event. He felt that the receipt was not representative of what Mr. Hawkes attended. He says that he called Mr. Bourne on the telephone, and did not receive satisfactory answers about the receipt and formed the conclusion that Mr. Bourne was evasive (Mr. Bourne was not called as a witness at trial).

[134] Before talking to Mr. Hawkes or either one of his managers about the expense, Mr. Cotton formed the view that Mr. Hawkes had committed a dishonest act.

[135] Mr. Cotton saw that the 2010 expense had been signed off by Mr. Magee and so he called him and asked him about it. According to Mr. Cotton, Mr. Magee told him that it was the same event that Mr. Hawkes had gone to a couple of years earlier, and that Mr. Buchan had approved it. Mr. Cotton asked him if Mr. Buchan had told him it was a hockey camp, and Mr. Magee said he had not.

[136] Mr. Buchan was the only person at Levelton who Mr. Hawkes spoke to about the events prior to attending and submitting his expense form for reimbursement.

[137] Mr. Buchan's first time to explain what had happened in approving the expenses was when Mr. Cotton telephoned him during the week of October 18, 2010. Mr. Cotton was hostile and aggressive in the telephone conversation, inquiring about what Mr. Buchan knew about the expenses.

[138] Having seen Mr. Cotton testify, it is fair to say he bears a strong demeanour and is a confident man. I find that it is likely that by the time he talked to Mr. Buchan he was furious and had concluded that Mr. Hawkes had been dishonest in

submitting expenses, and that as his manager, Mr. Buchan had been sloppy in approving large expenses.

[139] I pause to briefly comment on the limited use to which some of the evidence at trial can be put. At trial, there was no objection to Mr. Cotton in his direct evidence repeating what Mr. Buchan told him on the telephone, nor was there any objection to Mr. Buchan testifying in direct as to what he told Mr. Cotton in that call about what Mr. Hawkes had originally told him when requesting approval of the expense.

[140] Like many other portions of Mr. Cotton's evidence, what others told him is hearsay and not admissible for the truth of it. Nor are Mr. Buchan's repeated subsequent statements to Mr. Cotton or others about what he had originally been told by Mr. Hawkes admissible as prior consistent statements to help buttress Mr. Buchan's evidence. However, this evidence does go to Mr. Cotton's and Levelton's state of mind when subsequently terminating Mr. Hawkes, and to potentially rebut the suggestion by the plaintiff that Mr. Cotton had an ulterior motive. Furthermore, to the extent there are prior inconsistent statements in what the Levelton witnesses are reported to have said to each other in investigating Mr. Hawkes' expenses and deciding to terminate him, and their evidence in this regard at trial, that evidence is admissible as reflecting on their credibility.

[141] I will start therefore with Mr. Buchan's evidence at trial as to what he recalled Mr. Hawkes telling him when he asked him about attending the event in the summer of 2008. Their conversation was likely over the telephone, as Mr. Hawkes worked in the Surrey office and Mr. Buchan worked primarily in the Abbotsford office. According to Mr. Buchan's direct evidence at trial, Mr. Hawkes' "primary description" of the event was "either" "a conference or seminar or symposium". Mr. Hawkes told him it was primarily related to the insurance industry, that he was planning to attend and "schmooze" and look for clients, that he was not interested in going to any seminar but was interested in going to the trade booths and meeting people. Mr. Hawkes indicated he would participate in outside activities like golf, and he saw

it as a business networking opportunity. Mr. Buchan said that Mr. Hawkes did not tell him there would be a boat cruise, ice time, or that it was a hockey camp.

[142] Mr. Buchan testified in his direct evidence that because the cost seemed high, he negotiated with Mr. Hawkes, who offered to take it as vacation time because he was primarily there to socialize and network and would be having fun.

[143] Mr. Buchan said that when he signed off on Mr. Hawkes' August 2008 expense report later, the fact that Mr. Hawkes had indicated the expense was in the seminar and training category was consistent with what Mr. Hawkes had told him.

[144] I found Mr. Buchan's evidence to be unreliable. I find that it was influenced by what had been brought to his attention after-the-fact when Tom Cotton called him in October 2010 and aggressively questioned the 2010 marketing expense.

[145] Mr. Buchan's evidence in direct was that when Tom Cotton called him and asked him about the receipt, he told Mr. Cotton that Mr. Hawkes went on a business development and marketing "symposium" (my emphasis), and was primarily there to do marketing and develop legal and insurance clients, and so Mr. Buchan had approved the expense.

[146] Mr. Cotton's evidence in direct was that when he called Mr. Buchan in October 2010, he asked him what this marketing expense from Mr. Hawkes' August 2010 expense account was. Mr. Buchan replied that it was the same thing that Mr. Hawkes had attended a couple of years prior. Mr. Cotton said "it's a $3,000 event" and Mr. Buchan replied that he thought it was less: "like $1,000 or $2,000".

[147] Stopping there, it can be seen that immediately in the conversation, Mr. Cotton, the president of the company, put Mr. Buchan on the spot for having approved an expense that was too high. Mr. Buchan's first response was defensive and less than accurate, as it was always clear that the expense was $3,000 and that is in part why Mr. Hawkes took the time as vacation time. Mr. Buchan's first response, trying to minimize the cost, suggests that he instinctively feared that his approval of the expense might look extravagant in hindsight.

[148] According to Mr. Cotton, in the same telephone conversation in October, 2010, he then asked Mr. Buchan why he authorized Mr. Hawkes to go to a hockey camp. Mr. Buchan responded that Mr. Hawkes had said that there would be "some social and some golf" but had not said anything about hockey. Mr. Cotton then told him it was a hockey camp, and Mr. Buchan responded that "no, it was a symposium for insurers and lawyers" (my emphasis). Mr. Cotton pushed him on this, directing him to look at the website which showed it was a hockey camp. He again asked Mr. Buchan why he approved the expense, and Mr. Buchan responded that it was all about trying to get a book of business from lawyers and insurers, and that Mr. Hawkes had said these people would be attending and so he thought it would be a good idea.

[149] Mr. Cotton testified that it was clear to him from that conversation with Mr. Buchan, that Mr. Buchan had not approved a hockey camp, he had approved a "business development symposium" (my emphasis). However, this conclusory evidence is not admissible for the truth of it.

[150] I find it telling that in their evidence, both Mr. Cotton and Mr. Buchan suggested that in Mr. Hawkes' original description of the event to Mr. Buchan in 2008, he described it as a "symposium" and that this is what Mr. Buchan understood it to be. But Mr. Hawkes could not have known, prior to attending the 2008 event, that Mr. Fraser would subsequently describe it in the receipt as a "business development and networking symposium". The choice of the word "symposium" is somewhat unusual. It is not credible that Mr. Hawkes would have described it in advance to Mr. Buchan in this way in 2008, or even as a seminar or conference. And after his first attendance at the event, when he asked to attend again in 2010, he simply described it as the same event he had attended before.

[151] It is also highly unlikely that Mr. Buchan's memory is accurate and that in responding to a phone call from Tom Cotton about the expense which had been described by Mr. Hawkes over two years earlier, that he would have remembered Mr. Hawkes describing it as a "business development" or "networking" "symposium".

Both his and Mr. Cotton's evidence in direct at trial was clearly influenced by an after-the-fact close reading of the receipt which used these words. In short, convinced that the receipt was misleading, these two men also convinced each other that Mr. Hawkes must have orally misled Mr. Buchan as well.

[152] Mr. Buchan's direct evidence at trial, that suggested he read Mr. Hawkes' 2008 expense form, saw that it indicated the expense was in the "seminar and training" category, and concluded that this was consistent with what Mr. Hawkes told him was strongly influenced by what he learned after the fact of events and is not credible.

[153] A problem with Mr. Buchan's evidence in this regard is that the "seminar and training" category on the standard expense form must be there to refer to the cost of a seminar and training for the education of the Levelton professional, not a seminar and training event for some other industry which the Levelton professional is simply attending in order to market Levelton's services. On Mr. Buchan's own evidence, he knew in 2008 that Mr. Hawkes was not attending the event for educational purposes, but for marketing purposes, so the use of the "seminar and training" category on the 2008 expense form had to be wrong. Instead of acknowledging that he did not carefully read the form when it was originally submitted, I find it likely that Mr. Buchan has seized on this and added the embellishment that Mr. Hawkes told him there would be a "symposium" or "seminars" involved.

[154] Also telling is that when Mr. Cotton called Mr. Buchan in October 2010, Mr. Cotton only had the 2010 expense form in front of him, which correctly indicated that the expense was a "marketing expense". The mistake in checking off the "seminar and training" category of expense only happened on Mr. Hawkes' 2008 expense form. Mr. Cotton and Mr. Buchan's testimony at trial — recounting their initial telephone conversation in October 2010, and emphasizing that Mr. Buchan had believed that a seminar was involved— was likely influenced by the subsequently revealed 2008 expense form which referred to the expense being in the "seminar and training" category.

[155] Regardless, even if Mr. Hawkes had in 2008 described the event to Mr. Buchan as primarily for the insurance industry and that there would be seminars that he would not be attending, then these seminars must have related to the insurance industry and not to engineering. It would still have been inaccurate for him to submit the 2008 expense as "seminar and training", instead of what both he and Mr. Buchan knew was appropriate, namely the "marketing" category. As well, it would not make sense that the insurance industry seminars would be about "business development and networking", which is how the receipt reads. As to how the insurance industry event would have trade booths relevant to Mr. Hawkes' marketing efforts, Mr. Buchan did not explain.

[156] Mr. Hawkes denied that he ever told Mr. Buchan that the event involved a seminar, conference, symposium or trade booths. I accept his evidence, as there was no need for Mr. Hawkes to state these things if he told Mr. Buchan that he would only be marketing at the event. I believe Mr. Buchan either made the assumption at the time that the event would include lawyers and insurers, because Mr. Hawkes' lawyer-client contact Mr. Fraser was involved and this type of work made up a large portion of Mr. Hawkes' client base, or Mr. Buchan added this embellishment later to justify to Mr. Cotton why he had approved the expense.

[157] I also find that Mr. Buchan did not look closely at the 2008 expense form or receipt prior to approving it, because he already knew that Mr. Hawkes was going to be submitting this magnitude of expense as a marketing expense and he had approved it in advance.

[158] On Mr. Magee's evidence, and the 2010 expense form, it was clearly known that the expense was a marketing expense and not in relation to a seminar or training. When Mr. Magee was in the situation of having to approve the 2010 expense form and called Mr. Buchan about it, both Mr. Buchan and Mr. Magee said that it was approved in relation to marketing.

[159] Both Mr. Magee and Mr. Cotton said that when Mr. Buchan was asked about the 2010 marketing expense submitted by Mr. Hawkes, that Mr. Buchan said in reply

it was the same thing that had been authorized a couple of years ago. This is consistent with Mr. Hawkes' evidence that suggests that he and Mr. Buchan did not discuss the 2010 event in detail other than to say it was the same thing as a couple of years earlier.

[160] However, when Mr. Buchan gave his direct evidence at trial, he gave a much lengthier description of his conversation with Mr. Hawkes prior to the 2010 event. He said Mr. Hawkes asked about attending a seminar or conference in Kelowna, attended by the insurance industry and lawyers, that he was not going to attend the technical part of it but would go there to establish business contacts. I do not believe that any of this was said by Mr. Hawkes. The suggestion that Mr. Hawkes said this prior to the 2010 event was not put to Mr. Hawkes in cross-examination and is inconsistent with his evidence.

[161] In cross-examination, Mr. Buchan denied that when Mr. Hawkes approached him seeking approval to attend the event in 2010, he said it was the same event he had gone to in 2008. I do not accept that evidence and prefer Mr. Hawkes' evidence. I find Mr. Hawkes' evidence more consistent with the initial explanation given by Mr. Buchan when he was asked by Mr. Magee and then Mr. Cotton about the 2010 expense, according to the evidence of Mr. Magee and Mr. Cotton: the explanation was simply that it was the same thing Mr. Hawkes had attended in 2008.

[162] I note also that in 2009 Mr. Buchan and Mr. Hawkes had a brief conversation about the same event. Mr. Hawkes told Mr. Buchan that he had been asked if he was interested in going; Mr. Buchan said no, that the company was not doing any of this kind of stuff right now. This was because the company was suffering from the economic downturn. Mr. Hawkes felt that decision was the right decision and did not pursue it. Mr. Buchan admitted in his evidence that Mr. Hawkes did not describe the event to him again in that conversation. If that was so, it would seem odd that Mr. Hawkes would go into a lengthy description of the event in 2010, especially when Mr. Buchan's evidence sounds like a repeat of what Mr. Buchan said he was told in 2008 (which I also have not accepted as accurate).

[163] It has caused me pause that it appears on the evidence that at no time did Mr. Hawkes expressly describe the event to Mr. Buchan as a "hockey camp". However, this does not in my view amount to dishonesty justifying dismissal. In 2008, Mr. Hawkes did not know the name of the event. I am satisfied that the event was social, that it involved men playing sports and socializing with each other, that Mr. Hawkes truly thought it was an opportunity for him to develop friendships with people who might send business his way, that these were the essential points relevant to it being a marketing expense, and that he communicated all of this to Mr. Buchan.

[164] Given the long history that Mr. Hawkes had with the firm, and his seniority, I find it extremely unlikely that Mr. Buchan felt it necessary to obtain much detail about the event, or that Mr. Hawkes felt it was necessary to supply much detail. As Mr. Buchan admitted at one point in his cross-examination, he did not feel the need to ask Mr. Hawkes a lot of questions. Mr. Hawkes was someone who used to be Mr. Buchan's supervisor, and Mr. Buchan wanted to give him a lot of latitude as a professional. There was no policy in place as to what was or was not an appropriate social event to attend for marketing, or how to best approach marketing at social events. Mr. Hawkes was simply trusted to use his judgment as to what marketing efforts might be worthwhile.

[165] I am of the view that not only is Mr. Buchan's evidence unreliable concerning what he was told by Mr. Hawkes in 2008 and 2010, it is also unreliable with respect to what he says he told Mr. Cotton about the expense in October 2010.

Use of the Second 2010 Receipt

[166] There remains the question of whether or not Mr. Hawkes was dishonest, justifying his dismissal, due to the way he handled the 2010 receipt for the hockey camp. After his employment was terminated, his computer records were searched, and Levelton discovered the email exchange with Bob Bourne where Mr. Hawkes requested and received a new receipt. Mr. Hawkes' conduct justifiably raised

questions amongst his colleagues. Mr. Hawkes admitted this was a mistake, when speaking to his co-worker Nick Davis after he was fired.

[167] The defendants' position on the 2010 receipt is somewhat inconsistent with their position on the 2008 receipt. The defendants suggest that the 2008 invoice was misleading, and that therefore Mr. Hawkes was misleading to submit it with his expense account. But since the evidence is that Mr. Fraser created that form of receipt all on his own, and I have accepted that evidence, the defendants' position infers that Mr. Hawkes should have rejected the form of receipt in 2008.

[168] In other words, the logic of the defendants' position is that there would have been nothing wrong if Mr. Hawkes had asked Mr. Fraser to change the 2008 receipt to re-describe the event as a hockey camp.

[169] That being so, it cannot be a dishonest act in and of itself, to ask the recipient of funds to consider changing the description of a receipt for those funds. What matters is whether or not the description is accurate.

[170] Mr. Hawkes' request to Mr. Bourne in 2010 to change the description of the receipt to that closely matching the 2008 receipt, has to be viewed in context of the fact that the 2008 receipt was for the same event, and had been prepared by a lawyer and the co-founder of the event.

[171] The defendants infer that Mr. Hawkes' purpose was dishonest, to conceal the fact that he had been to a hockey camp. I do not infer that this was his purpose. Mr. Bourne invited Mr. Hawkes to comment on the form of the receipt. Mr. Hawkes testified that he wanted the receipt to reflect the marketing aspect, which was his purpose in attending the event. I find that since the 2008 receipt had the imprimatur of a trained lawyer, Mr. Fraser, someone who would be presumed knowledgeable in legal matters and in documenting tax expenses, that it was not untoward for Mr. Hawkes to ask Mr. Bourne if he could have a similar receipt in 2010. I cannot infer that Mr. Hawkes was attempting to be deceitful in asking for a similar receipt to use for similar purposes as he had used the 2008 receipt.

[172] I note that Mr. Hawkes did not alter the 2010 receipt himself, nor did he attempt to delete from his work computer the earlier version of the receipt sent by Mr. Bourne or his email communications with Mr. Bourne.

[173] Since the issuer of the second 2010 receipt was comfortable with the wording describing what the payment was for, it is difficult to see this as an alteration of the receipt by Mr. Hawkes. He wanted the receipt to show what he thought he had paid for, namely, an opportunity for him to network and to try to develop business.

Evidence of Nick Davis

[174] Mr. Nick Davis, a longstanding friend of Mr. Hawkes and shareholder and employee of the defendants, was called by the defendants as a witness. He testified that the day after Mr. Hawkes' employment was terminated, Mr. Hawkes called him and told him about it. Mr. Davis said that Mr. Hawkes explained that it was expense related, and that he had gone to a symposium in Kamloops for business development purposes, centered around the legal and insurance profession, and there was a hockey camp attached to it. He said he had well-communicated this to Calum but had screwed up in relation to a changed invoice.

[175] Mr. Hawkes denied in cross-examination the suggestion that he told Nick Davis, after the fact of his termination, that he had gone to a seminar to meet lawyers and insurers.

[176] I note that Mr. Davis is more independent a witness than Mr. Buchan, and as a long-time friend of Mr. Hawkes', had no reason to mischaracterize their conversation. It is likely that Mr. Hawkes did tell him it was a hockey camp and for business development purposes. However, I find it unlikely that Mr. Hawkes would state to him that he had been to a "symposium". This word, the same word as was on the two receipts, is a word that has permeated the defence witnesses' testimony. It is possible that their collective memories have been tainted by discussions amongst themselves about the receipt. The topic of Mr. Hawkes' dismissal and this lawsuit had to be of great interest around Levelton's office, and to a great extent the reason for the dismissal turns on Mr. Buchan's insistence that Mr. Hawkes falsely

told him he was going to a "symposium" prior to him approving the expense in 2008. But as I have already concluded, I do not accept that Mr. Hawkes said this or anything to Mr. Buchan to suggest he was attending a symposium, or a seminar or conference for that matter.

[177] While I do acknowledge that it would be a poor reflection on Mr. Hawkes' credibility if his evidence in respect of his conversation with Mr. Davis was not true, it would not cause me to reject the whole of his evidence. By the time Mr. Hawkes spoke to Nick Davis, he had been fired, he was under great pressure, he had been told that the receipt for the 2010 hockey camp was dishonest, he was looking for support from a friend rather than testifying under oath, and he may not have been thinking straight. For these reasons, it is possible that he could have overstated to Nick Davis the content of his past conversations with Mr. Buchan. But even if I was to reject Mr. Hawke's evidence as to what he told Mr. Davis, I still prefer Mr. Hawkes' evidence over that of Mr. Buchan as to how Mr. Hawkes described the event in 2008 and 2010. Mr. Hawkes' evidence is more consistent with all of the circumstances and more reliable than Mr. Buchan's evidence.

The November 22, 2010 Meeting and Termination

[178] In the course of calling evidence and argument, there was some suggestion that the defendants were critical of Mr. Hawkes for "not coming clean" when he was confronted about the 2010 hockey camp at a meeting on November 22, 2010. At that meeting, Mr. Hawkes was given notice of termination of employment.

[179] It is true that if an employee is dishonest in responding to an employer's questions about alleged misconduct, the dishonest responses may provide cause for dismissal even where the underlying misconduct might not: *Poirier v. Wal-Mart Canada Corp.,* 2006 BCSC 1138 at para. 59.

[180] Nowhere do the defendants plead that the way in which Mr. Hawkes responded on or after November 22, 2010, when confronted about the 2010 hockey camp expense, was dishonest and justified termination of his employment without notice. I therefore will not spend much time on this point.

[181] What happened, after Mr. Buchan's and Mr. Cotton's telephone call sometime in the week of October 18, 2010, is that a group of senior people within Levelton met for breakfast on November 17, 2010. Those present were Mr. Buchan, Mr. Cotton, Mr. Schutte, and Mr. Magee.

[182] Mr. Buchan's evidence regarding this November 2010 breakfast meeting had significant inconsistencies with the evidence of the others present, and these inconsistencies support my overall impression that he tended to exaggerate and his memory and evidence as a whole was not reliable. Mr. Buchan testified that Mr. Cotton held a vote on whether or not to terminate Mr. Hawkes' employment, and Mr. Buchan voted to terminate, as did the others.

[183] However, the three other people present at the meeting did not confirm that any vote was held. Furthermore, when examined for discovery on March 10, 2011, Mr. Buchan could not remember what the positions of Mr. Magee or Mr. Schutte were at that breakfast meeting. This is another example of Mr. Buchan purporting to have a stronger memory at trial than he did a few months after Mr. Hawkes' termination.

[184] Further, Mr. Buchan's evidence at trial was that at the November 2010 breakfast meeting discussing Mr. Hawkes' termination, those present knew that there had been an original receipt for the 2010 hockey camp which Mr. Hawkes had altered and then submitted. He insisted, in cross-examination, that this was the reason for Mr. Hawkes' termination, rather than any discrepancy between Mr. Buchan's version of what Mr. Hawkes had told him and his actual expense.

[185] Mr. Buchan's evidence of what happened when Mr. Hawkes was confronted on November 22, 2010 and given notice that his employment was terminated was inconsistent with the evidence of others. Mr. Buchan's evidence at trial was that the two receipts for the 2010 hockey camp were referred to at that meeting. This is clearly inaccurate, based on the evidence that the first receipt was not discovered until later.

[186] In fact, as of the November 2010 breakfast meeting, none of the men present knew that Mr. Hawkes had received an earlier version of the 2010 receipt, and then had asked for and submitted a second version of the receipt. This was not discovered until post-termination, when Mr. Hawkes' computer was searched.

[187] There is no dispute that on November 22, 2010, Mr. Hawkes was called into a meeting with Mr. Cotton, Mr. Buchan, Mr. Magee and Mr. Schutte. Mr. Cotton asked Mr. Hawkes about the 2010 expense report at issue in this proceeding.

[188] Mr. Buchan testified at trial that when Mr. Hawkes was confronted with the 2010 expense account with attached receipt and was asked what it was all about, Mr. Hawkes said words to the effect that it was a "business development seminar" and that Calum approved it. Yet, on examination for discovery, Mr. Buchan could not recall if Mr. Cotton asked Mr. Hawkes for his explanation. Again, Mr. Buchan claims his memory has improved since discovery. I was not directed to any reason why it would have improved over time, and there is no external evidence which could have reminded him of something he had forgotten, such as a document or another witness. Since ordinarily memories do not improve over time, Mr. Buchan's repeated willingness to suggest that his did so was more effective in persuading me that he was not intellectually honest about his memory than it was in persuading me that his evidence at trial was reliable.

[189] Inconsistent with Mr. Buchan's evidence at trial, others present at the November 22 meeting did not suggest that Mr. Hawkes claimed that the 2010 expense was to attend a "business development seminar". For example:

a) As already mentioned, Mr. Magee knew that the expense was a marketing expense, as that was indicated on the form when it was submitted to him earlier that year, and Mr. Buchan had confirmed that in a telephone conversation with him at that time. Mr. Magee testified that in the November 22 meeting, Mr. Hawkes tried to stress that it was a marketing event that Mr. Buchan had approved.

b) Mr. Schutte recalled that when confronted with the 2010 expense at the November 22 meeting, Mr. Hawkes said that Mr. Buchan had approved the event, and that they even got a client from it (Tyam). Mr. Buchan disagreed in the meeting that the client came from that event. Mr. Schutte did not recall Mr. Hawkes telling the group what he had told Mr. Buchan about the event before attending.

c) Mr. Cotton testified that when confronted with the 2010 expense Mr. Hawkes turned to Mr. Buchan and said something to the effect of "this is what we talked about, this is the same thing I went to in 2008". Then Mr. Hawkes said the 2008 event was better than the 2010 event, and that they had got some work from Tyam out of it. Mr. Buchan replied by denying that the Tyam work was generated that way. Then Mr. Cotton told Mr. Hawkes that it was a hockey camp, and Mr. Hawkes again said to Mr. Buchan, "you know about this, you approved it", and that he had told him it involved ice time, golf and activities. Mr. Buchan then denied that Mr. Hawkes had ever said anything about ice or hockey.

[190] Mr. Cotton did not change his mind in the November 22, 2010 meeting about Mr. Hawkes' dishonesty, and so he told him that his employment with Levelton was over. He gave him a prepared termination letter.

[191] Mr. Hawkes' evidence is that at the meeting, Mr. Cotton passed him the receipt that he had submitted with his 2010 expense account, and said "you stepped over the line". Mr. Hawkes responded by saying that Calum knew about it and approved it. Mr. Cotton said he had spoken to Bob Bourne and knew it was a hockey camp. Mr. Hawkes replied that Calum knew that it was strictly social, and included golf, a boat cruise and hockey, and that they had made an arrangement where if Levelton covered the hard cost, he would take it as holiday time. Mr. Cotton asked him how much work they got out of it, and Mr. Hawkes mentioned that it helped him get work from Tyam. Mr. Buchan responded that the Tyam work came from someone else, but otherwise did not say anything.

[192] The defendants criticize Mr. Hawkes for not admitting in the meeting that he had requested a second receipt for the 2010 hockey camp and submitted it, rather than using the first receipt. They suggest that he was dishonest in not making this admission at the time. However, Mr. Hawkes was under attack at the meeting and was probably shocked at what was happening. The meeting was over very quickly. I do not consider Mr. Hawkes' failure to describe what had happened with respect to the 2010 receipt for the hockey camp to be material.

[193] The defendants suggested that there were inconsistencies in Mr. Hawkes' version of that meeting, as between what he said in an affidavit in this proceeding, on examination for discovery, and at trial. I disagree. I did not find any material inconsistencies in his evidence. The inconsistencies the defendants focussed on were excessively critical of minor differences in memory.

[194] For example, the defendants suggest that there was a contradiction as between Mr. Hawkes' evidence at trial and that in his affidavit #2. In that affidavit, Mr. Hawkes deposed at paragraph 51 that at the November 22 meeting, he turned to Mr. Buchan and said:

> 'You approved all this. The deal was that I would book it as vacation time and Levelton would pick up the hard costs.' Calum Buchan nodded his head and said very little if anything after that.

[195] However, during cross-examination at trial, the proposition was put to Mr. Hawkes that Mr. Buchan did not nod his head, and Mr. Hawkes could then not recall if he did.

[196] With respect, this is not a material inconsistency. Mr. Buchan himself gave evidence at trial that he did nod his head in response to Mr. Hawkes' suggestion at the meeting that Mr. Buchan had approved the expense. The fact that Mr. Hawkes could no longer remember this detail when he testified at trial does not undermine his credibility.

[197] I find that there was no misconduct by Mr. Hawkes when he was confronted during the November 22, 2010 meeting. I also find that Mr. Buchan's evidence of

what happened at that meeting is not reliable and further undermines his overall credibility.

Conclusions on the 2008 and 2010 Expense Claims

[198] I found Mr. Hawkes to be a credible and reliable witness who did not attempt to stretch the truth or exaggerate. I prefer his evidence over that of Mr. Buchan.

[199] I find that Mr. Hawkes did not mislead Mr. Buchan or Levelton about either the 2008 or 2010 event. Mr. Hawkes obtained prior approval from Mr. Buchan to attend these social events that Mr. Hawkes hoped would generate business for him. Mr. Hawkes submitted the 2008 receipt given to him by a lawyer and co-promoter of the event. He simply requested a consistent receipt in 2010, and was given one by the promoter of the event.

[200] It was only when confronted by an angry Tom Cotton in October 2010, that Mr. Buchan looked at the whole matter in hindsight, and began to shape his memory and overstate what had happened so as to deflect Mr. Cotton's criticism of his own supervision. Mr. Buchan's memories continue to evolve in a way that more and more buttress his position, which, as I have noted, has cast considerable doubt on his reliability as a witness.

[201] I conclude that viewed in its entire context, Mr. Hawkes' conduct in relation to his 2008 and 2010 expense claims was not such as to give rise to a breakdown in the employment relationship. I have concluded that the defendants did not have cause to terminate Mr. Hawkes' employment.

ISSUE 2: IF THE PLAINTIFF WAS WRONGFULLY DISMISSED WITHOUT NOTICE, DID HE FAIL TO MITIGATE HIS DAMAGES?

[202] Before I turn to the measure of damages for wrongful dismissal, I will first deal with the defendants' allegation that Mr. Hawkes failed to mitigate his damages.

[203] Mr. Hawkes kept good records and was able to give detailed evidence as to his efforts to obtain alternate employment following his termination.

[204] Because Mr. Hawkes had a number of ongoing projects where he was providing engineering services in respect of insurance or litigation claims, he wanted to ensure there was continuity on those projects. He did not want to start his own firm, which would require liability insurance as well as various administrative steps, and so in January 2011 he approached a friend at a firm named Team Engineering and they agreed to form an association. Mr. Hawkes was entitled to continue to work on existing files, but Team Engineering would do the billing and he would be covered by their insurance. Mr. Hawkes would be entitled to 85% of the billings related to his files, and Team would retain 15%.

[205] Mr. Hawkes worked on some continuing files through the auspices of Team and then also pursued other employment opportunities. He inquired of a firm in Phoenix, where he and his wife have property, but received no response. He also followed up on a lead about providing geotechnical services for construction of an orphanage in Sierra Leone, but nothing came of that. From March through August 2011, Mr. Hawkes made numerous attempts to contact engineering firms and to submit his application for employment, which was often online as required. Many applications he submitted went unanswered.

[206] Ultimately one engineering company got back to him, and while it was slow to complete the process, it ultimately hired him to start work on December 5, 2011.

[207] Mr. Hawkes' efforts through Team netted him $12,750.00 which he agrees should be deducted from his damages claim. His present salary, which he has been receiving since beginning his new employment in December 2011, is roughly equivalent to that which he was paid at Levelton, and so he does not claim a loss of salary past that date (although he claims a loss of other benefits).

[208] The onus is on the defendants to prove their allegation that Mr. Hawkes could have reasonably avoided some of his damages claimed. The employer bears the onus of showing that the employee did not make reasonable efforts to find work and that work could have been found: *Red Deer College v. Michaels*, [1976] 2 S.C.R. 324.

[209] The defendants did not challenge in cross-examination Mr. Hawkes' evidence as to the efforts he made to obtain employment after his dismissal. The defendants did not call any evidence to suggest that had Mr. Hawkes done something differently, there were geotechnical engineering positions available to him at an earlier date than the position he obtained in December 2011.

[210] The defendants argue that Mr. Hawkes failed to take reasonable steps to find alternative employment for a period of six months. They say that proof of this follows as an inference which can be drawn from the fact that once he began taking appropriate steps to inquire of engineering firms, which they say was in June 2011, he found full-time employment by December that year.

[211] The defendants rely on *Aljmja Holdings Inc. v. Proper Ford Lincoln Ltd*. (2006), 15 B.L.R. (4th) 12 (Ont. S.C.J.) at para. 64, where such an inference was drawn on the facts of that case. However, that case does not stand for any general proposition that such an inference should be drawn as a matter of presumption. The reasons for judgment in the *Aljmja Holdings* case are primarily directed to other issues and do not shed light on what the plaintiff did or did not do to obtain alternate employment. In short, I find that authority to be unhelpful on the issue of mitigation of damages here.

[212] I also point out that outside of his employment through Team Engineering, Mr. Hawkes began contacting local engineering firms searching for employment opportunities earlier than when the defendants submitted he did, and at least by March 2011.

[213] Given that Mr. Hawkes' career at Levelton involved him generating most of his own work, I do not find that it was a failure to mitigate for him to decide to initially try to work with Team Engineering. This provided a means of continuing existing projects, keeping clients who might provide future work happy, and generating more work. The fact that he did not have huge earnings through Team does not indicate a failure to mitigate. Given that he would have previously been associated with

Levelton, it could be expected it would take him some time to build confidence in his clients that he could still do the work and to build new profile.

[214] The defendants also assert that proof of the plaintiff's failure to mitigate can be inferred by the fact that Levelton had difficulty replacing him, and they rely on *Baumgart v. Convergent Technologies Can. Ltd.* (1989), 28 C.C.E.L. 250 (B.C.S.C.) at p. 259. However, again, that case does not stand for any such general proposition or presumption. In that case, the plaintiff computer salesman was dismissed after 18 months employment, with three months notice, and the court specifically found that he made no serious efforts to find other employment. The facts of that case are not similar to the facts in the present case.

[215] I find that the defendants have failed to prove that the plaintiff failed to mitigate his damages.

ISSUE 3: IF THE PLAINTIFF WAS WRONGFULLY DISMISSED WITHOUT NOTICE, WHAT IS THE MEASURE OF HIS DAMAGES?

[216] Normally the law implies in an indefinite and unwritten employment contract an implied term that the employment can be terminated on reasonable notice to the employee: *Bardal v. Globe & Mail* (1960), 24 D.L.R. (2d) 140 (Ont. H.C.) at p. 143. I will approach the damages issue on that basis.

[217] At one point in his relationship with Levelton, Mr. Hawkes asserted that his relationship as a shareholder meant he was entitled to be employed for so long as he was a shareholder, absent cause for dismissal. This argument, based on the terms of a 2005 shareholder agreement, was not pursued before me. Had it been, I would not have found it persuasive. As will be touched on later, there was indeed a significant intertwining of Mr. Hawkes' role as shareholder and his role as employee. However, the terms of the written shareholder agreement did not contain all the terms of employment. There was no express term of the shareholder agreement which overrode the implied term of employment that an employer has the right to terminate employment of an employee.

[218] As noted in *Bardal*, damages in a case of dismissal of such employment without cause and without notice are based on breach of the implied contractual obligation to continue the employment during a period of reasonable notice. Damages are measured as follows:

> The contractual obligation is to give reasonable notice and to continue the servant in his employment. If the servant is dismissed without reasonable notice he is entitled to the damages that flow from the failure to observe this contractual obligation, which damages the servant is bound in law to mitigate to the best of his ability.
>
> [*Bardal*, p. 143-44]

[219] Another way of putting it is that damages in a wrongful dismissal case are measured by what the employee would have earned had his employment continued to the end of the reasonable notice period.

[220] In *Saalfeld v. Absolute Software Corp.*, 2009 BCCA 18, Huddart J.A. stated at para. 20:

> It is not disputed that the measure of damages for breach of an employment contract is what the employee would have received if the contract had been performed according to its terms: *Nygard International Ltd. v. Robinson* (1990), 46 B.C.L.R. (2d) 103 (C.A.); and *Iacobucci v. WIC Radio Ltd*., 1999 BCCA 753, 72 B.C.L.R. (3d) 234.

[221] The measure of damages includes not just the salary that would have been received if the contract had been performed, but also any other pecuniary benefits that would have been received if the contract had been performed until the end of the reasonable notice period. Again in *Saalfeld*, Huddart J.A. held at para. 33 that the employee:

> ...is entitled to damages for any benefits she would have accrued if the employment contract had been performed according to its terms until the end of the reasonable notice period... .

[222] And further, in *Saalfeld*, Saunders J.A. made a similar point at para. 37:

> This means, in my view, the remedy for Ms. Saalfeld is the value of the emoluments she would have earned during the notice period had she continued to work until its end.

[223] In assessing damages I must therefore first determine the appropriate notice period that should have been given to Mr. Hawkes prior to his dismissal, and then determine what financial benefits he would have earned had he been given that notice.

Reasonable Notice Period

[224] The trial decision of McRuer C.J.O. in *Bardal* not only concisely captured the relevant principles of damages, it helpfully summarized, at p. 145, the kinds of factors to be considered in determining the length of reasonable notice of termination to be implied in a particular employment contract:

> 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.

[225] These principles are affirmed by the Supreme Court of Canada in *Keays v. Honda Canada Inc.,* 2008 SCC 39 at paras. 28-32.

[226] The plaintiff argues that in addition to these factors, where the circumstances surrounding the manner of dismissal warrant it, the court may increase the period of reasonable notice in the type of circumstances identified by the Supreme Court of Canada in *Wallace v. United Grain Growers. Ltd.*, [1997] 3 S.C.R. 701. The plaintiff argues that these factors apply here due to the defendants' unproven allegations of dishonesty against Mr. Hawkes and their failure to consider fairly Mr. Hawkes' explanation.

[227] The defendants submit that the "*Wallace* bump", extending the reasonable notice period for assessment of damages in a case where the method of employment termination was in bad faith, was effectively overruled in *Keays* at paras. 57 and 59; see *Beggs v. Westport,* 2011 BCCA 76 at para. 50. I agree with the defendants that this authority provides that if the manner of dismissal gives rise to a damages claim due to unfair conduct or bad faith, this aspect of the damages

claim is to be separately addressed and calculated and not dealt with by an arbitrary extension of the notice period.

[228] The plaintiff did not address any argument specifically to an additional category of damages for wrongful dismissal beyond that which flows from failure to give reasonable notice, leaving aside the plaintiff's claim in relation to his position as a shareholder of Holdings and the oppression remedy. In other words, the plaintiff did not address any argument to a separate calculation of "*Wallace*" damages in respect of the calculation of his damages for wrongful dismissal, whether as aggravated or punitive damages or otherwise.

[229] Thus, outside of the shareholder's remedies claim which I will address later, I will not consider any additional claim for damages flowing from the wrongful dismissal on the basis that the termination of the plaintiff's employment was conducted in a bad faith manner. In this section of the judgment, I will simply deal with the damages that flow from the failure to give Mr. Hawkes reasonable notice of the termination of his employment.

[230] Dealing with the period of reasonable notice, Mr. Hawkes was 51 years old at the time of the termination of his employment. He had been employed by Levelton for 18 years. He was a senior geotechnical engineer. As the defendants submitted in closing argument, "he was responsible for building his own book of business and providing mentorship to junior engineers". He did not have wider management responsibilities with employees reporting to him. However, he had earned a significant equity investment in the firm due to his seniority.

[231] The defendants say that Mr. Hawkes did not have a difficult time replacing his employment. If by this they mean that by December 2011 he had found a job as a geotechnical engineer with a roughly equivalent salary, they are correct. However, there is no evidence that Mr. Hawkes has been able to replace his position as a significant equity holder in his employer's firm.

[232] In the circumstances, the defendants submit that a reasonable notice period would have been in the range of 16 to 18 months.

[233] The plaintiff submits that a reasonable notice period, given his age and responsibilities, was 24 months.

[234] Both parties point to various examples in the authorities of other employment situations. The plaintiff helpfully put his cases in table format, and I will add the defendants' cases to the same table (the notice period in this table does not include any time deducted for failure to mitigate):

	Position	Age	Service Length	Notice Mos.
Plaintiff's authorities				
Squires v. Corner Brook Pulp and Paper Ltd. (1999), 175 Nfld. & P.E.I.R. 202 (Nfld. C.A.)	Resident Engineer	47	17	24
Stolze v. Delcan Corp. (1998), 40 C.C.E.L. (2d) 70 (Ont. C.J. Gen. Div.)	Survey Engineer	56	32	24
Burry v. Unitel Communications Inc. (1997), 46 B.C.L.R. (3d) 349 (C.A.), varying (1996), 21 C.C.E.L. (2d) 36 (B.C.S.C.), additional reasons [1996] B.C.J. No. 1816 (S.C.)	System Engineer/ Project Mgr.	51	33	20
Jervis v. Raytheon Canada Ltd. (1990), 35 C.C.E.L. 73 (Ont. H.C.J.), aff'd on other grounds (1997), 26 C.C.E.L. (2d) 101 (C.A.)	Senior Engineer, Mgt.	not known	21	24

	Position	Age	Service Length	Notice Mos.
Defendants' Authorities:				
Plotogea v. Hearland Appliances Inc. (2007), 60 C.C.E.L. (3d) 216 (Ont. S.C.J.) at para. 61	Senior computer aided design engineer	43	11	9
Tracy v. Atomic Energy of Canada Ltd. (1998), 2 W.W.R. 757 (Man. Q.B.) at para. 56	Mechanical engineer	42	16	15
Orlando v. Essroc Canada Inc. (1995), 17 C.C.E.L. (2d) 19 at para.18	Engineering manager	42	16	15

[235] As for the plaintiff's authorities, I note that on appeal in *Squires*, the length of notice was increased from 18 months to 24 months because of the bad faith method of termination and an application of *Wallace*, an approach which I have already noted is not generally followed today. In *Stolze* and *Burry* the years of service were much longer than Mr. Hawkes' years of service. In *Jervis*, the notice period was *obiter* given that the court found that the plaintiff had not been constructively dismissed, and it was also based on the finding that it would be extremely difficult for the plaintiff to find replacement work.

[236] In another authority relied on by the defendants for a different proposition, the Ontario Court of Appeal noted that an employee's equity ownership is a consideration in determining reasonable notice, as it affects that employee's ability to obtain similar employment: *Love v. Acuity Investment Management Inc.*, 2011 ONCA 130. None of the defendants' cases cited for reasonable notice deal with that issue, which is present here.

[237] Having considered the facts of the plaintiff's circumstances, including his age, professional qualifications, salary, equity ownership and seniority, and the absence

of evidence as to how the economy or his area of expertise either made the job search easier or more difficult, and comparing the facts of the above authorities, I find that a reasonable period of notice of dismissal to be implied in Mr. Hawkes' contract of employment was 18 months. This means that as of November 22, 2010 had it not breached the employment contract, Levelton should have given Mr. Hawkes notice that his employment would be terminated as of approximately the end of May 2012.

Damages

[238] The plaintiff claims damages for wrongful dismissal in relation to his lost salary and car allowance. He also claims damages for loss of the benefits he would have continued to receive as both employee and shareholder during the notice period, including bonuses and an increase in share value, as well as return of his shareholder's loan.

Salary Loss

[239] The plaintiff replaced his salary within the 18 month notice period. He was earning $116,500 in annual salary at the time of his dismissal. He is entitled to recover damages equivalent to his lost salary for the time period from his dismissal on November 22, 2010 until December 5, 2011, when he started employment with another engineering firm. Deducted from this will be the net earnings that Mr. Hawkes generated through Team Engineering of $12,750. I accept the plaintiff's calculations that this amounts to $107,900 and note that the defendant did not point out any issues with this calculation.

Vehicle Allowance

[240] In addition, at the time of his dismissal, Mr. Hawkes had benefited from an annual vehicle allowance. As I have already noted, he was notified of the terms of this vehicle allowance in a memorandum to "principals" from the then company president, Neil Cumming, dated January 8, 2006. The vehicle allowance was a flat $500 per month "as salary in lieu of a leased vehicle", plus "reasonable" fuel, maintenance and insurance expenses. The memo estimated the value of this

benefit as $1,000 per month in equivalent salary. It was clear that this allowance contained a personal benefit, and was not restricted to business-related vehicle expenses.

[241] The plaintiff therefore claims $1,000 per month in relation to the lost vehicle allowance and expense benefit during the period for which he ought to have been given reasonable notice: $500 as the lost vehicle allowance, and $500 as the lost vehicle -related expense reimbursement.

[242] The evidence did not address whether Mr. Hawkes' salary at Levelton of $116,500 did or did not include the $500 per month vehicle allowance in lieu of a leased vehicle. Given that the defendants did not take issue with the plaintiff's calculations in this regard, I will accept the plaintiff's position that his vehicle allowance was not included in his claim for lost salary and that there is no double-counting in claiming this benefit.

[243] As for the $500 per month claimed by Mr. Hawkes in relation to the lost vehicle-related expense reimbursement, I find that this claim is not made out in full. Mr. Hawkes, on his evidence, did not in fact claim or benefit from this amount per month while working at Levelton. If one was to average his vehicle expense claims over the last three years of his employment (and pro-rating the 2010 expenses for a full year), a fair assessment would be that he claimed and received roughly $100 per month in relation to vehicle-related expenses.

[244] There was no evidence as to how much of the vehicle allowance and vehicle-related expenses could be attributable to personal use, and how much was attributable to actual business use. It does not seem to me to be appropriate to award the plaintiff damages for the business use as opposed to personal use: *Beatty v. Canadian Mill Services Association*, 2003 BCSC 1053 at para 72. It seems fair to infer on the evidence that 50% of the vehicle benefit was personally related, which amounts to $250 allowance plus $50 expenses per month.

[245] There was no evidence suggesting that the vehicle allowance and expense benefit was replaced when Mr. Hawkes found replacement employment. But Mr. Hawkes' new employment is at a salary which is a few thousand dollars higher than his former employment. I find the higher salary to offset any additional vehicle benefits he might have had in his former employment. In other words, for the remaining six months of the reasonable notice period which notionally continues after he found employment, the loss of his vehicle benefits was replaced by a slightly higher salary.

[246] I do consider it fair to award Mr. Hawkes damages in relation to the lost vehicle allowance and vehicle expense for the approximate one year until he found new employment, assessed roughly at $250 (lost vehicle allowance) plus $50 (lost vehicle expense reimbursement) per month respectively, for a total of $3,600.00.

Loss of Benefits Received by Shareholders

[247] The most contentious aspects of Mr. Hawkes' claim for damages for wrongful dismissal, outside of the calculation of the notice period, are his claim for a portion of the annual bonus paid to shareholder-employees and his claim for the loss of the value of his shares in Holdings. He claims damages for the loss of these benefits through the 18-month period of reasonable notice of dismissal.

[248] Both of these categories of damages, loss of bonus and loss of increased share value, are conceptually similar. They raise issues as to whether certain benefits Mr. Hawkes enjoyed as a shareholder would have continued during the period of reasonable notice of termination of his employment contract.

[249] The defendants' position is that the benefits enjoyed by shareholders must be considered as entirely separate from the employee-employer contract, relying on *Guildford v. Anglo-French Steamship Co.* (1883), 9 S.C.R. 303 at p. 307; *Murphy v. Optipress Inc.*, 2008 NSSC 75 at paras. 14-16; and *Lynch v. J.D. Mack Ltd.*, (1984), 65 N.S.R. (2d) 417 (S.C.), var'd on other grounds (1985), 68 N.S.R. (2d) 6 (C.A.) at para. 17.

[250] The defendants further assert that the written agreement between shareholders of Holdings makes it clear that the right to continue as a shareholder and to enjoy the benefits of being a shareholder ends with the cessation of employment, even on dismissal without cause.

[251] The plaintiff says that the measure of damages for breach of an employment contract is what the employee would have received had the contract been performed and the employee had received reasonable notice prior to its termination.

[252] The plaintiff says that had Mr. Hawkes been given reasonable notice of termination of employment, he would have remained both an employee and shareholder during that time and would have been entitled to all forms of remuneration that brings, including bonuses distributed to shareholder/employees and the increase in share value over time.

[253] The plaintiff relies on *Saalfeld, supra,* ; *Wilson v. UBS Securities Canada Inc.,* 2005 BCSC 563; *Mandell v. Apple Canada Inc.,* 2005 BCSC 563; *Veer v. Dover Corp. (Canada) Ltd.* (1990), 45 C.C.E.L. (2d) 183 (Ont. C.A.); *Jamieson v. Finning International Inc.*, 2009 BCSC 861; *Gillies v. Goldman Sachs Canada Inc.*, 2001 BCCA 683, rev'g 2000 BCSC 355; and *Gilchrist v. Western Star Trucks Inc.*, 2000 BCSC 1523.

[254] The question of whether or not an employee would be entitled to share in the benefits accruing to shareholders during a period of reasonable notice of termination of his employment is essentially a question of fact as to what was the employment contract.

[255] I have come to the conclusion that it was an implied term of Mr. Hawkes' employment contract that he would be entitled to share in the benefits accruing to shareholders, both bonuses and any increases in share value, during a period of reasonable notice of termination of employment.

[256] I have reached this conclusion based on an examination of first, the intertwined nature of the employment and shareholder relationship, and second, an analysis of the written shareholders agreement itself.

The Intertwined Employee-Shareholder Relationship

[257] The intertwined nature of the shareholder-employee relationship is readily illustrated by looking at the bonus.

[258] Employees of Consultants who were also shareholders of Holdings received an annual bonus. The bonus was added to the employee's salary at Consultants.

[259] The bonus was a way of distributing profits and rewarding performance. Holdings did not issue dividends.

[260] What the management of Levelton would do each year is determine the total bonus pool available to distribute to its members who were both shareholders and employees (the "Bonus Pool"). Once the total Bonus Pool was calculated, it would be distributed on a per person basis in accordance with the following formula:

a) 35% of the Bonus Pool would be carved out and distributed based purely on the number of shares held by a shareholder (the "Share Pool"). For example, if a shareholder held 10% of the shares, that shareholder would receive10% of the Share Pool, or 10% of the 35%;

b) 15% of the Bonus Pool would be distributed to shareholders on an equal basis (the "Equal Pool"), so for example, if there were 24 shareholders, each would get 1/24th of the Equal Pool; and,

c) the remaining 50% of the Bonus Pool would be distributed to shareholders based on management's assessment of each person's performance as an employee over the year (the "Performance Pool").

[261] The Bonus Pool was substantial: $2,837,850 in 2007; $2,301,573 in 2008; $1,628,894 in 2009; and $1,728,138 in 2010.

[262] Mr. Hawkes' share of the Bonus Pool was $167,220 in 2007; $132,815 in 2008; and $86,877 in 2009.

[263] The whole bonus payment structure was based on the employment and shareholder positions being intertwined: the bonus was not a dividend but was paid by way of salary, and involved components related to the employee's shareholdings as well as related to on-the-job performance. The bonus components related to the employee's shareholdings were objectively measured in the sense that they simply involved a calculation based on the shares held; the component related to performance was more subjectively measured. But both bonuses were non-discretionary bonuses given to Mr. Hawkes because he was both an employee and a shareholder, just as other shareholder-employees received the same benefits.

[264] Also illustrative of the intertwined nature of the employment and shareholder relationship is the fact that a person could not simply purchase shares in Holdings. Rather, the person had to be an eligible employee of Consultants. The determination of eligibility to purchase shares was very much tied into the person's status and performance as employee. The Board of Holdings repeatedly set out that in making such decisions the Board considered such criteria as the person's demonstrated business acumen, management skills, ability to bring in work, and technical expertise. These are qualities that were only apparent as employee qualities, not shareholder qualities.

[265] Once an employee was approved to purchase shares in Holdings, he could not transfer those shares to another employee unless it was approved by the Board.

[266] The share price was not determined by market value or other market forces, but by management of the firm.

[267] The employee-share ownership program was also seen as a good management tool in the interests of the long-term health of the operating business, Consultants: it encouraged older employees to pass on the legacy of their engineering practices and it encouraged younger employees to stay with the firm.

[268] Thus, the right to own shares in Holdings, and thereby receive the related bonus benefits, was clearly earned by being a good employee of Consultants. The opportunity to purchase shares was a reward for employment performance. It follows that it was an implied term of the employment contract between Levelton and its employee-shareholders that the employee would enjoy all benefits normally accruing to him as shareholder based on the shares he held, during the full term of the employment relationship.

[269] I find that the only reasonable interpretation of the combined shareholder-employee relationship is that it was an implied term of the employment contract that if the employee received notice of termination of employment, he would continue to receive all the benefits of employment and of his shareholdings during the period of reasonable notice.

Interpretation of the Buy/Sell Agreement

[270] The second branch of the analysis of this issue involves looking at the question of whether there is any language in the written shareholders agreement that precludes an employee from the right to claim as damages the loss of the benefits of being a shareholder during a period of reasonable notice of termination of employment. Or, to put it another way, is there any express agreement that overrides what I have found was an implied term of the employment contract?

[271] While there was no written employment contract, there was a shareholders agreement dealing with the shareholdings of Holdings. It was stated to be effective as of July 1, 2009, and was described also as a "Shareholders Buy/Sell Agreement" ("BSA").

[272] It is important to consider whether there is any language in the BSA between the plaintiff and the defendants which limits the benefits he would expect to receive as an employee, if he is dismissed from his employment without cause and without reasonable notice. Levelton says there is.

[273] Levelton argued that after November 22, 2010, Mr. Hawkes' entitlement to participate in any benefit as a shareholder ceased. Levelton relies on clause 10.1(g) of the BSA which provides for a "Triggering Event" as follows:

> 10.1 Causes of Triggering Event
>
> Any of the following shall constitute a Triggering Event:
>
> …
>
> (g) if a Shareholder ceases to be an employee of the Company or any Subsidiary for any reason other than for cause.
>
> [Emphasis added.]

[274] Other Triggering Events in clause 10.1 are such things as death, a claim by a spouse, mental incapacity, bankruptcy, and lengthy leaves without the approval of the Board.

[275] Clause 10.2 states that on the occurrence of a Triggering Event, the Board shall notify the Shareholder of the Triggering Event, and the notice will set out the Company's intent to purchase the shares of the Triggering Shareholder in accordance with Section 12.0 (the buy-sell procedure). Parenthetically, I note that while the defendants now rely on the language of 10.2 of the BSA, the fact is that when they dismissed Mr. Hawkes, they did not do so. The defendants took the position that Mr. Hawkes was dismissed for cause, and so did not give a clause 10.2 notice of triggering event to him. Nevertheless, the defendants suggest that clause 10.2 does apply where an employee is dismissed without notice and without cause.

[276] Section 12.2(a) and (c) of the BSA state:

> (a) On the occurrence of a Triggering Event and service of notice pursuant to Paragraph 10.2, the Company shall cause the Shares (the "Triggered Shares") owned by the Triggering Shareholder to be offered for sale…
>
> …
>
> (c) If any Triggered Shares are not purchased by existing or new Shareholders within thirty (30) days of the Triggering Event, the Company shall purchase the remaining Triggered Shares.

[277] Section 12.2(e) of the BSA provides that "all transactions of Triggered Shares between the Triggering Shareholder and other Shareholders shall be completed within sixty (60) days of the Triggering Event as determined by the Board".

[278] Thus, the defendants say that Mr. Hawkes' employment ceased on November 22, 2010, and according to the Triggering Event terms of the BSA, that meant that his shares would have to be sold to other shareholders or back to Holdings within 60 days. They say that the only way to interpret all of this is to conclude that Mr. Hawkes would have no right to participate in any of the benefits of a shareholder after that date.

[279] The defendants' argue that the triggering event clause is mandatory. They argue that the phrase "ceases to be an employee … for any reason other than for cause" does encompass wrongful dismissal, and in this regard they rely on the Ontario Court of Appeal decision in *Brock v. Matthews Group Ltd.* (1991), 34 C.C.E.L. 50 (C.A.) at para. 22. The defendants submit that their interpretation of the BSA is also supported by the Ontario Court of Appeal decision in *Love, supra.*

[280] The *Love* decision is distinguishable because there the written agreement, described as the Investment Agreement, specifically addressed the situation where Mr. Love's employment was "terminated…without cause". This was included as an example of the situation where Love "ceases to be an employee". There is no such express language in the BSA here expressly treating cessation of employment as including the situation of employment being terminated "without cause".

[281] The Ontario Court of Appeal in *Love* did not overturn its earlier decision in *Veer v. Dover Corp. (Canada) Ltd.* (1999), 120 O.A.C. 394.

[282] The Ontario Court of Appeal in *Veer* interpreted language in a stock option agreement, terminating option rights on "voluntary or involuntary" termination of employment, as limited to the situation of the party being terminated for a lawful reason, and not applying to the situation where the party was terminated in breach of the implied contractual term of reasonable notice. As held at para. 14 of *Veer*:

> In either case, the termination contemplated must, I think, mean termination according to law. Absent express language providing for it, I cannot conclude that the parties intended that an unlawful termination would trigger the end of the employee's option rights.

[283] In *Veer* the court distinguished its earlier decision in *Brock*. In *Brock* the court held that the date for measuring the price of share option rights was the date of termination of employment and not the end of the period of reasonable notice.

[284] The basis for the distinction between *Veer* and *Brock*, was that in *Brock* the Ontario Court of Appeal found specific language in the option agreement to support its conclusion that the rights granted under it would terminate even on unlawful termination of employment.

[285] When considering the court's earlier decision of *Brock* the Ontario Court of Appeal in *Veer* stated:

> 18 The language of the option agreements in this case is clearly different from that in *Brock*, supra. The relevant paragraph from one option agreement in that case is representative:
>
> > 4. Upon the occurrence of any event specified in clause 10 hereof [which commenced 'In the event of the Employee *ceasing to be an employee* or servant of the Corporation'] (except the death of the Employee) prior to October 31, 1985, the option hereby granted shall forthwith cease and terminate and shall be of no further force or effect whatsoever as to such of the Optioned Shares in respect of which such option has not previously been exercised; provided that where the Employee is dismissed by the Corporation, the Employee shall have 15 days *from the date notice of dismissal* is given in which to exercise the option hereby granted in respect of the Optioned Shares available as of October 31 of the Year preceding *such dismissal*. [Italicized emphasis in *Veer.*]
>
> 19 That case also involved an employee terminated without cause and without reasonable notice. This court read the language quoted above to provide that the date of the actual dismissal of the employee was the reference point for the ending of the employee's option rights. In doing so, it focused on the special language in that provision of "ceasing to be an employee ... from the date of the notice of dismissal" and "such dismissal" to conclude that it was the day on which the employee was in fact dismissed that mattered, irrespective of whether that dismissal was lawful or unlawful. Absent language such as this, it seems to me that parties must be presumed to contemplate triggering action that complies with the law. There being nothing in the provision in this case that resembles the language in *Brock*, I would conclude that the respondent's rights under these option agreements

> were alive until the end of the reasonable notice period required for his lawful termination.
>
> [Underline emphasis added.]

[286] Thus it was not just the contractual language referring to "cessation of employment" that explains why in *Love* and *Brock* the court held that the rights under the share or option agreement terminated when the employment was terminated without notice, as opposed to terminating at the end of a reasonable notice period. Rather, in each of *Love* and *Brock* there was other language in the written agreement which clearly identified that the parties contemplated that the termination of rights under that agreement would occur even where, as in *Love*, termination was "without cause", or as in *Brock*, when the employee received "notice of dismissal".

[287] In addition, the defendants' position (that the Triggering Event language in the BSA was mandatory and would have resulted in Mr. Hawkes ceasing to be a shareholder within 60 days after he received notice of termination) does not squarely address the question of whether the BSA limits Mr. Hawkes' claim to damages for breach of the employment contract. In other words, so what if, as the defendants assert, Mr. Hawkes ceased to be a shareholder after termination of employment due to the operation of the BSA — is he nonetheless entitled to claim damages for the loss of the benefits he would have received as shareholder had there been no breach of the employment contract?

[288] Contractual interpretation requires considering the entire contract in the context of the parties' relationship. Other than the language in clause 10.1(g) referring to when a "[s]hareholder ceases to be an employee…for any reason other than for cause", there is no other express language in the BSA dealing with the issue of termination of employment without cause.

[289] The language of clause 10.1(g) of the BSA on its own does not support the position that the parties intended such language to mean that if the shareholder-employee was terminated without cause and without reasonable notice, he would be

precluded from claiming as his damages the loss of the benefits he would have earned as shareholder-employee during the reasonable notice period.

[290] The BSA made it clear that a shareholder had to be an employee. I have already found that the two roles were intertwined. Clearly the BSA did not address every term of employment and so there was an implied employment contract that co-existed with the shareholders agreement. Of necessity, the defendants are relying on the implied term of employment that an employer can terminate an employee without cause.

[291] As mentioned earlier, another standard implied term of employment is that an employer must give reasonable notice before terminating an employee's contract of employment without cause. The terms of the BSA did nothing to address or override this implied term of employment. To the contrary: the defendants expressly incorporated into the BSA terms of an earlier agreement which on its face clearly did not provide for termination without notice and without cause. They did so by virtue of a memorandum dated May 25, 2009.

[292] In order to understand this last point, it is necessary to review some of the history preceding the BSA.

History of the BSA and the May 25, 2009 Memorandum

[293] When Mr. Hawkes' employment position with Levelton changed in 2006 from that of a manager of the geotechnical services group to simply one of the members of that group, the shareholders agreement then in place amongst shareholders of Holdings was dated September 6, 2005. Mr. Hawkes was concerned that he had been constructively dismissed, and he obtained legal advice about the interplay between his employment relationship and his role as shareholder. This advice was based in part on interpretation of the 2005 shareholders agreement.

[294] The 2005 shareholders agreement between all shareholder-employees of Holdings and Holdings dealt with "default, incapacity and ending of employment" in clause 9.0. That clause identified that a shareholder committed a default if he

materially breached the employment agreement, or Consultants terminated his employment with cause (clause 9.1(e)). This is similar to the current clause 11.1(d) in the BSA.

[295] The 2005 shareholders agreement also provided at clause 9.2(c) that the definition of a defaulting shareholder included a shareholder who commits a default, and a shareholder who "voluntarily ends his employment" with Levelton.

[296] While clause 9.0 of the 2005 shareholders agreement thus dealt specifically with termination of employment for cause, or a shareholder voluntarily ending his employment, nowhere in clause 9.0 of the 2005 shareholders agreement (or elsewhere in the agreement for that matter) was there any mention of termination of a shareholder's employment without cause.

[297] In short, the legal advice that Mr. Hawkes received in 2006 flagged the issue that there was some ambiguity as to whether a shareholder's employment could be terminated absent just cause, given that the 2005 shareholders agreement only referred to termination for cause or the shareholder voluntarily quitting his job.

[298] In 2009, a new shareholders agreement was proposed to the shareholders by the management of Levelton, which ultimately became the BSA. A draft of the agreement was circulated for comment and some revisions were made to it reflecting the comments of shareholders. Mr. Hawkes raised a general concern about the draft agreement being silent on the issue of whether the shareholders had security of employment, absent cause for dismissal. He suggested that under the existing 2005 shareholders agreement, there was no power on the part of Consultants to terminate a shareholder's employment without cause.

[299] Without the Board of Directors agreeing with Mr. Hawkes' suggested interpretation of the existing shareholders agreement, the Board agreed that it would preserve the status quo on that issue by way of a memorandum to all shareholders.

[300] That memorandum, dated May 25, 2009, the wording of which was in part influenced by Mr. Hawkes' concerns and drafting changes, attempted to preserve

whatever rights a shareholder had regarding termination without cause under the 2005 shareholder agreement.

[301] The May 25, 2009 memorandum to shareholders on behalf of Holdings stated as follows:

> Section 9.0 of the September 6, 2005 Shareholders Agreement is silent on the matter of a termination of a shareholder's employment without cause. One interpretation of this is that the company does not have the ability to terminate a shareholder's employment without cause. In the event of a future termination of a shareholder's employment without cause, the ability to argue the validity of the termination under the terms of the 2005 Agreement should be preserved.
>
> Without admitting that anything precludes Levelton Holding Ltd. or any of its subsidiaries (the "Corporations") from terminating any employee without cause at any time, the Corporations agree that if any shareholder (the "Shareholder") of Levelton Holdings Ltd. as of June 29, 2009, is terminated without cause at any time prior to June 30, 2014, the Corporations agree that the issue of whether the Shareholder can be terminated without cause will be decided as if Section 9.0 of the 2005 Agreement remains in force and effect.
>
> The effect of this document is not excluded by paragraph 15.4 of the proposed 2009 shareholders agreement.
>
> [Emphasis added.]

[302] The defendants concede that the May 25, 2009 memorandum is binding on the defendants.

[303] Given this history, I conclude that the defendants have agreed that the language of clause 10.1 of the existing BSA must be read as not incorporating in it the concept of termination of a shareholder's employment without cause, unless clause 9.0 of the 2005 shareholders agreement contemplated termination of a shareholder's employment without cause.

[304] Clause 9.0 of the 2005 shareholders agreement clearly did not contemplate termination without cause, with or without notice: it only contemplated termination with cause or by the employee voluntarily quitting his employment. That position was incorporated by reference into the BSA by virtue of the May 25, 2009 memorandum. Thus, likewise, the BSA must be read as not containing any terms

overriding the implied term in the employment contract that an employee would not be terminated without cause without reasonable notice.

Context of the BSA

[305] Even if I am wrong on the effect of the May 25, 2009 memorandum, it would not change my conclusion regarding the interpretation of the BSA. My interpretation is consistent with the entire context of the commercial relationship between Levelton's owner-employees.

[306] Levelton's witnesses emphasized that Levelton has workplace culture marked by integrity. The BSA was an agreement between Levelton and all of its employee-shareholders. It was not a one-off agreement negotiated between Levelton and a single employee who had recently joined the firm, as in the *Love* case (it is unclear in *Brock* whether or not the language of the option agreement was specific to the plaintiff who was the president of the company, but there is a good chance it was).

[307] Clause 10.1(g) of the BSA does not expressly state that if a shareholder is dismissed from his employment without cause and without reasonable notice, he is, for purposes of any damages claim in relation to breach of his employment contract, considered to have ceased to be an employee as of the date of his dismissal as opposed to as of the date of the expiry of reasonable notice. If that was the meaning, it would provide an incentive to Levelton to treat its employee-shareholders unfairly. For example, in event of an economic downturn and consequential need to reduce staff by dismissing employees without cause, Levelton would have the incentive to fire employee-shareholders unlawfully, in breach of contract, without notice, so that it could avoid having to pay out the bonuses already earned by those employees as shareholders but not yet distributed, or which could have been earned over the contractual notice period. That would be manifestly unfair and not in accord with the intentions and expectations of the Levelton employee-shareholder group.

Conclusion on Interpretation of the BSA

[308] I find that had the defendants not breached Mr. Hawkes' contract of employment, Mr. Hawkes would have continued in his employment for 18 months after receiving reasonable notice of his dismissal. Given that his employment would not have ceased during this time, clause 10.1(g) of the BSA would not have applied and there would have been no triggering event to cause the sale of his shares until after his employment did actually cease 18 months later.

[309] As damages flowing from the breach of the employment contract, Mr. Hawkes is therefore entitled to compensation for the loss of the opportunity to share in whatever pecuniary benefits flowed from being a shareholder during that 18 month notice period. This conclusion is in keeping with the analysis of the Court of Appeal in *Saalfeld* at paras. 33 and 42.

Default Under the BSA

[310] I come back to the point that in any event, the defendants did not rely on clause 10.1(g) of the BSA after Mr. Hawkes' termination. They did not admit that they had terminated him without notice and without cause. Instead, the defendants followed another route in the BSA, the route of treating Mr. Hawkes as a defaulting shareholder.

[311] Clause 11.1 of the BSA lists the ways in which a shareholder is deemed to have committed a default, including pursuant to clause 11.1(d), materially breaching terms of an employment agreement with Levelton. After Mr. Hawkes was dismissed, Levelton relied on this clause and wrote to Mr. Hawkes by letter dated December 15, 2010, giving him a Default Notice and Default Purchase Notice.

[312] Once this process is initiated, the BSA contains terms allowing Holdings to ultimately purchase the defaulting shareholder's shares.

[313] While this process was initiated by Holdings, it was flawed because it was based on the allegation that Mr. Hawkes had materially breached his employment

agreement. My findings that Mr. Hawkes was dismissed without cause put that allegation to rest: Mr. Hawkes did not breach his employment agreement.

[314] Thus, the BSA process for purchasing a defaulting shareholder's shares did not apply to Mr. Hawkes.

Shareholder Benefits During the Reasonable Notice Period

[315] I now turn to assessment of damages in relation to lost shareholder benefits.

The Share Pool and Equal Pool Portions of the Bonus

[316] Mr. Hawkes claims as damages his portion of the Bonus Pool that would have accrued to him prior to his termination and during the implied notice period i.e. his portion of the Share Pool, the Equal Pool and the Performance Pool.

[317] The fiscal year for Levelton was the same as the calendar year. Based on the above analysis, the plaintiff is entitled to damages related to the loss of his right to participate in the Share Pool and Equal Pool portions of the Bonus Pool for 2010, 2011 and the first 5 months of 2012 i.e. to the end of the 18 month notice period.

[318] The plaintiff provided me with calculations of the bonuses due to him from the Share Pool and Equal Pool. The defendant provided no alternative calculations.

[319] I accept the plaintiff's calculations, however his figures for 2012 must be adjusted to reflect an 18 month, rather than 24 month notice period.

[320] The 2010 bonuses were in large part determined algebraically by working backwards from numbers established in the evidence, such as from the total size of the Bonus Pool in 2010.

[321] Based on the total Bonus Pool known for 2010, I find that for that year, the plaintiff was entitled to a distribution of $53,984 in relation to the Share Pool; and $11,270 in relation to the Equal Pool, for a total of $65,254.

[322] There was no evidence as to the actual 2011 Bonus Pool. The plaintiff argues that the 2011 Bonus Pool would have been at least equal to the 2010 Bonus Pool. I agree based on all of the evidence as to the company's continued success and its consistent financial history. There was no evidence to the contrary from the defendants. I therefore conclude that the 2011 Bonus earned by the plaintiff in relation to the Share Pool and Equal Pool would have been $65,254.00.

[323] One question not addressed by the defendants is whether Mr. Hawkes would have been entitled to receive any portion of the 2012 Bonus Pool, given that it would not be calculated and distributed until sometime in 2013. I conclude that he would have, given my finding that these bonuses were so inextricably linked with employment.

[324] In this regard, it is perhaps notable that the BSA provides that departing shareholders will be paid not just the "Purchase Price" of their shares, which is based on the Board's latest calculated share price as at the date when the shares are purchased, but also that departing shareholders will be paid the balance of their "Interest", which is defined as including their shareholder loans and any amount owing to the shareholder arising from an employment agreement. The BSA does not exclude bonuses owed to the employee-shareholders which in practice are ordinarily deferred until after year-end. The evidence does not support implying a term in the BSA that would exclude bonuses earned during the period of employment and reasonable notice period.

[325] I find that the 2012 Bonus Pool would have been at least equal to the 2010 Bonus Pool based on Levelton's historical pattern of earnings. Again, Levelton declined to call evidence to suggest that its earnings will be less than this amount. I therefore conclude that Mr. Hawkes is entitled to damages representing approximately 5/12th of the 2012 Bonus Pool related in to the Share Pool and Equal Pool, which I assess as $27,189.00.

[326] The total awarded as damages in relation to the plaintiff's lost share of the Share Pool and Equal Pool is $157,697.00.

Performance Pool Portion of the Bonus

[327] Mr. Hawkes says that if he had been given reasonable notice prior to dismissal, he would have been able to earn a portion of the Performance Pool bonus during the 18 months of notice. He also says that he is entitled to a Performance Pool bonus for 2010 earned when he was still employed at Levelton.

[328] The defendants seem to concede that had he earned a performance bonus due to his performance as employee in 2010, the plaintiff would be entitled to this amount as damages for wrongful dismissal. In other words, the defendants appear to concede that this bonus was earned by employees based on their performance as employees. However, the defendants say that the performance of Mr. Hawkes during 2010 was so poor that he earned no bonus.

[329] The defendants point to a document created within Levelton's management systems called a "scorecard", and argue that it indicates that Mr. Hawkes' performance was well below target for the year. The problem with this argument is that the 2010 scorecard was based on hearsay evidence and no witness from Levelton made any attempt to prove that the figures in it were based on Mr. Hawkes' actual performance for the year.

[330] As illustrated by a thorough review of Mr. Hawke's actual time cards, it is likely that this scorecard reflects adjustments made after Mr. Hawkes received notice of his dismissal on November 22, 2010. These adjustments could reflect decisions to assign clients and earnings to other shareholder-employees or to not follow-up on timely payment of billings for Mr. Hawkes' clients. I therefore can give no weight to the scorecard.

[331] The plaintiff points out that in 2007, 2008, and 2009 Mr. Hawkes was consistently awarded a performance bonus that amounted to between 3.1% and 3.3% of the total Performance Pool available to all employee-shareholders.

[332] The performance review for Mr. Hawkes conducted in March 2009 noted that:

> Darryl fills an important senior role in FV Geo Department. He provides valuable insight to other engineers and keeps himself busy with a variety of project work. Performance as a senior Geo PM [Project Manager] and consultant is excellent.

[333] Prior to November 22, 2010, and even when he was dismissed, there was no complaint regarding Mr. Hawkes' performance in 2010. The evidence was that he brought great value to Levelton.

[334] I do not accept that Mr. Hawkes' performance in 2010 had deteriorated to any degree from that of previous years. He had performed consistently for several years.

[335] I find that Mr. Hawkes earned a performance bonus in 2010. I also find that during the notice period Mr. Hawkes would have been awarded a performance bonus. These bonuses would have been consistent with those he was awarded in 2009, namely 3.1% of the Performance Pool available.

[336] For 2010, I accept the plaintiff's figures that the Performance Pool was approximately $864,069 (working backwards as being 50% of the total Bonus Pool known for 2010). I find that Mr. Hawkes' damages include $26,786 in relation to the Performance Bonus he should have been awarded for the 2010 year.

[337] As for 2011, I find that it is likely that Mr. Hawkes would have continued to perform well, Levelton would have likely continued to generate similar profits, and Mr. Hawkes therefore would have earned a similar Performance Bonus, namely $26,786.00.

[338] Lastly, for January through May 2012, I make the same findings as to the likelihood that Levelton would have continued to generate similar profits and Mr. Hawkes would have performed in a similar way. I assess Mr. Hawkes' damages for the loss of the 2012 Performance Pool bonus to be roughly 5/12th of $26,786, or $11,161.00.

[339] I therefore award Mr. Hawkes damages in relation to the loss of the Performance Pool bonus in the amount of $64,733.00.

Shareholder Loan

[340] The Bonus Pool payments were calculated and paid (in part actually and in part notionally) in the year following that in which they were earned. In other words, in 2010, there was a calculation of the Bonus Pool for 2009; in 2011 there was a calculation of the Bonus Pool for 2010.

[341] For tax reasons, some of the Bonus Pool amounts were distributed as salary in the year calculated and some were paid to a related company and treated as a shareholder loan to that company by the employee-shareholder. There was then a process in subsequent years when that shareholder loan would be "repaid" to the employee-shareholder together with interest at the rate of 1% over the average Bank of Montreal Prime Rate.

[342] Mr. Hawkes seeks immediate payment of anything remaining owed to him in his shareholder loan account. The defendants concede he is owed this amount.

[343] As for any award of damages relating to bonuses which had been denied Mr. Hawkes after his dismissal, these can be paid out as part of the damages claim because Levelton has not allocated them to the plaintiff by way of shareholder loans. Levelton has not argued that any damages award in relation to bonuses ought to be deferred.

[344] I therefore find Mr. Hawkes is entitled to repayment of his shareholder loan account. According to the plaintiff's submissions which rely on the documents produced by the defendants, the shareholder loan account of Mr. Hawkes as of December 31, 2011 stood at $58,581.67. The defendants did not contest this figure.

[345] The parties did not direct submissions to the calculation of interest on this shareholder loan account. Certainly on the applicable principles of damages, Mr. Hawkes is entitled to interest on his shareholder loan based on the same

calculation as he would have been entitled had he continued as an employee during the reasonable notice period of 18 months.

[346] Based on the evidence, it appears that had he remained employed during the reasonable notice period, he would have been paid interest on his shareholder loan at the same rate as management had determined was payable to other employee-shareholders, namely 1% over the Bank of Montreal prime rate, calculated to the date other employees were paid their shareholder loans for the same time period. After that date, Mr. Hawkes would be entitled to pre-judgment interest on the whole amount of that shareholder loan account (principal plus interest). I trust that the parties will be able to come to some agreement on these numbers, but if not, I direct them to the Registrar for resolution of the amount of interest due to the plaintiff on his shareholder loan.

Difference in Share Value

[347] The plaintiff says that had he been given reasonable notice of termination of his employment, and if that meant that upon the cessation of that notice period his employment would end and he would have to sell his shares in Holdings to Levelton or other shareholders, then the value of his shares at the end of the notice period would have been much higher than it was as of November 22, 2010.

[348] It is clear that Levelton's management significantly increased the share price of Holdings' shares, between November 22, 2010 (actual dismissal) and May 2012 (the end of the reasonable notice period).

[349] Levelton says that Mr. Hawkes should be forced to sell his shares pursuant to the terms of the BSA, at the price existing as of November 22, 2010 or 60 days afterwards (the price is likely the same between those two dates).

[350] Mr. Hawkes says that if he is forced to sell his shares then he should be compensated for the loss of the increase in value of his shares over the period of reasonable notice. I will deal with the question of whether he should be forced to sell his shares shortly when dealing with Mr. Hawkes' claim in relation to the oppression

remedy, but for now, assuming upon termination of his employment without notice he would have been forced to sell his shares, I will determine if any damages flow from this.

[351] Conceptually I have already found that the plaintiff is entitled to damages for the loss of any benefits he would have enjoyed as a shareholder during the notice period. The increase in share value is one of those benefits.

[352] Had Mr. Hawkes been given reasonable notice of the termination of his employment, he would have continued as an employee-shareholder until roughly the end of May 2012, and only then would his employment and all related benefits end, including the benefit of owning shares. Thus only then would he have been required to sell his shares.

[353] Therefore, if the employer's breach of the employment contract would have caused him to sell his shares (as Levelton claims it did), it would have caused Mr. Hawkes to suffer damages equal to the difference in share price as between his actual dismissal and what would have happened had he had to sell his shares at the end of the period of reasonable notice.

[354] As already mentioned, the value of shares transferred within Levelton was not determined by market forces. As contemplated by the BSA, management issued a report each year called the "Share Allocation and Distribution of Earnings Report" ("SADER") which dealt with the distributions and share allocations and price.

[355] In November 2010, the shares in Levelton were valued at $228.05. This was based on a 2009 SADER, which was under review because management wanted to change the formula and increase the price.

[356] In 2010, Mr. Cotton backed a shareholder proposal to change the formula for share valuation which would increase the share price to $431.13. It was Mr. Hawkes' opposition to this proposal, and its subsequent defeat at a shareholders' meeting, that Mr. Hawkes suggests was the motive for his dismissal. In any event, after Mr. Hawkes was dismissed, a revised but similar proposal was

passed, which resulted in a new formula and a phased-in increase in the share price.

[357] Thus, as of May 2011, management valued shares in Levelton at $404.70. Mr. Cumming admitted selling some of his shares at that price that year.

[358] There is no evidence as to what the SADER-determined value of Holdings shares was as of May 2012. The evidence suggests that the SADER for the coming year was determined by the end of the prior year. This suggests that the evidence of the 2012 share value was available to the defendants by the time of trial, but they chose not to call it. The parties did not ask for any deferral of this question.

[359] Mr. Cotton admitted in cross-examination that the intention for 2012 was to have the share price reach the price for which it had been proposed in 2010 i.e. $431.13. Furthermore, he admitted in cross-examination that historically the share price increased by about $30 each year, given the addition of approximately $500,000 in retained earnings each year.

[360] Based on this evidence, I estimate the value of Mr. Hawkes' shares in 2012, had he been dismissed after reasonable notice, would be $431.13.

[361] If Mr. Hawkes was required to sell his shares as of 60 days after November 22, 2010, pursuant to the terms of the BSA, as argued by the defendants, then his damages from his wrongful dismissal include the difference in the value of his shares sold as at that date, $228.05 per share, and the value as of what would have been the end of a reasonable notice period, May 2012, namely $431.13. This equals an additional $186.92 per share.

[362] After Mr. Hawkes' dismissal, the defendants did not properly invoke the buy-sell provisions of the BSA. However, I conclude that the defendants would have corrected any deficiencies in the buy-sell procedure but for an outstanding injunction order preventing them from doing so. Either way, had reasonable notice been given, the defendants would have been entitled to and would have taken the necessary

steps to purchase the plaintiff's shares as of approximately the end of May 2012 (or within 60 days afterwards), at the price of $431.13.

[363] Subject to what I say in relation to the oppression remedy, his shares ought to be purchased now at the price of $431.13 per share.

ISSUE 4: WAS THE TERMINATION OF THE PLAINTIFF'S EMPLOYMENT OPPRESSIVE OR UNFAIRLY PREJUDICIAL TO HIM AS A SHAREHOLDER?

[364] The plaintiff also claims that the treatment of him by Holdings was oppressive or unfairly prejudicial to him as a shareholder, entitling him to a remedy pursuant to s. 227 of the *BCA*, which provides, in part:

> (2) A shareholder may apply to the court for an order under this section on the ground
>
> > (a) that the affairs of the company are being or have been conducted, or that the powers of the directors are being or have been exercised, in a manner oppressive to one or more of the shareholders, including the applicant, or
> >
> > (b) that some act of the company has been done or is threatened, or that some resolution of the shareholders or of the shareholders holding shares of a class or series of shares has been passed or is proposed, that is unfairly prejudicial to one or more of the shareholders, including the applicant.
>
> (3) On an application under this section, the court may, with a view to remedying or bringing to an end the matters complained of and subject to subsection (4) of this section, make any interim or final order it considers appropriate, including an order
>
> > (a) directing or prohibiting any act,
> >
> > (b) regulating the conduct of the company's affairs, ...
> >
> > ...
> >
> > (j) varying or setting aside a transaction to which the company is a party and directing any party to the transaction to compensate any other party to the transaction,
> >
> > ...
>
> (4) The court may make an order under subsection (3) if it is satisfied that the application was brought by the shareholder in a timely manner.

[365] The leading case on what has become known as the oppression remedy is *BCE Inc. v. 1976 Debentureholders,* [2008] 3 S.C.R. 560. In that case the Supreme Court of Canada noted that the oppression remedy is an equitable remedy, which

gives the court broad discretion to do what is fair. The determination of what is fair is guided by "the reasonable expectations of the stakeholders in the context and in regard to the relationships at play". The Court held at para. 68:

> In summary, the foregoing discussion suggests conducting two related inquiries in a claim for oppression: (1) Does the evidence support the reasonable expectation asserted by the claimant? and (2) Does the evidence establish that the reasonable expectation was violated by conduct falling within the terms "oppression", "unfair prejudice" or "unfair disregard" of a relevant interest?

[366] A useful starting place is to identify the reasonable expectations that Mr. Hawkes claims were violated by Holdings.

[367] Mr. Hawkes submits that he had a reasonable expectation, as a shareholder, that he would be treated fairly as an employee. He submits that this reasonable expectation was violated in two ways:

a) first, Mr. Hawkes submits that he was dismissed as an employee because he voted against a shareholder resolution. He says that this motive for his dismissal was oppressive to him as a shareholder.

b) second, Mr. Hawkes submits that the manner of his dismissal was to accuse him of dishonesty and then summarily dismiss him without giving him the chance to give an adequate explanation. He says that this was unfairly prejudicial to his rights as shareholder.

[368] Mr. Hawkes concedes that in certain circumstances, such as a downturn in the economy or a decision to cease offering services in a particular engineering discipline, it could be reasonable to dismiss an employee-shareholder, but in such circumstances, the reasonable expectations would be that the shareholder would be treated fairly. He concedes that if the shareholder was dismissed without cause, but fairly (for example after reasonable notice), Holdings would be entitled to exercise the buy-sell provisions of the BSA and purchase that employee's shares.

[369] Rather than focus on the plaintiff's suggestion as to what were the reasonable expectations of the shareholders of Holdings, the defendants focused their submissions in response to this claim on the remedy sought by the plaintiff.

[370] Mr. Hawkes seeks one of two remedies: first, that Holdings be prevented from purchasing his shares, such that he can continue being a shareholder of Holdings (this is based on his view that there is a good chance that Levelton may someday be purchased by a larger engineering company, in which case shareholders would benefit from a substantial premium paid for their shares, a point disputed by Levelton); and second, in the alternative, that if his shares must be sold to Holdings, they be sold at fair value, which is considerably higher than a price determined in accordance with the SADER formula.

[371] The defendants say that both remedies are well outside the reasonable expectations of the shareholders and so this claim should not be allowed in any event. The defendants say that the purpose of the oppression remedy is to seek, as best can be done, to rectify the conduct complained of, but not to go further and punish the offending party, citing *Waxman v. Waxman*, [2002] O.T.C. 443 (S.C.J.) at para. 1630; and *Feierstein and Fishman Medical Corp. v. Costas Ataliotis*, 2007 MBCA 132.

[372] Mr. Hawkes was right to concede that it would be consistent with shareholder expectations that the company would be allowed to terminate an employee without cause, if it treats the employee fairly including by giving reasonable notice, and in such a situation, it would be expected to buy the employee's shares based on the formula in the BSA.

[373] It would be contrary to the whole structure of Levelton to consider that a non-employee could remain a shareholder, reaping benefits from the performance of others and not contributing through his own performance.

[374] Mr. Hawkes' concession is consistent with what I find were the reasonable expectations of shareholders, given the terms of the BSA, the implied terms of

employment, and the medium size of Levelton (approximately twenty-four shareholder-employees). This concession is also very important in considering any remedy to be fashioned in this case. I conclude that even if there is a finding of oppressive or unfairly prejudicial conduct, the remedy cannot be designed to prevent the loss of employment or to prevent the sale of that employee's shares pursuant to the formula in the BSA (although the timing of the sale can be dealt with, to remedy unfairness).

[375] I accept the defendants' position that the additional remedies sought by the plaintiff here (that he remain as a shareholder or that his shares be purchased at fair value rather than the BSA formula) would go beyond rectifying unfairness or oppression, even if oppression was established. If I was to order either oppression remedy sought, it would reward Mr. Hawkes with a windfall that I find could never have been expected by him as a shareholder, nor by the other shareholders, and would unduly punish all the other shareholders and the company.

[376] The possibilities of losing employment and having to then sell one's shares in accordance with the formula established by the BSA were part of the reasonable possibilities expected by all shareholders, and I conclude it would be an error to prevent this course here. I find that under the BSA, Mr. Hawkes is required to sell his shares to Levelton.

[377] However, based on the findings I have already made, Levelton's attempt to deny Mr. Hawkes the benefits he would have received as shareholder during a period of reasonable notice of termination of employment (his bonuses and the increase in share value) may be such as to constitute oppressive or unfairly prejudicial conduct, contrary to s. 227(2) of the *BCA*. I have already provided remedies for these wrongs in the wrongful dismissal aspect of Mr. Hawkes' claim: Mr. Hawkes' shares should be purchased at a price of $431.03 per share; and, Mr. Hawkes has been awarded damages for the lost bonuses. I see no need for additional remedies.

[378] But if I have erred in my analysis of the damages due to Mr. Hawkes by reason of his dismissal from employment without notice and without cause, then this alternative remedy would be relevant. I will therefore briefly address the oppression remedy claim.

Mr. Cotton's Treatment of the Plaintiff

[379] The plaintiff argued that the real reason for his dismissal was not his expenses, but the fact that he had recently opposed a shareholders resolution which had been worked on for two years by Mr. Cotton. The plaintiff argued that establishing this motive was necessary for the oppression claim to succeed, pursuant to s. 227(2)(a), but it was not necessary in order to succeed on the claim that the conduct in relation to his termination was unfairly prejudicial to Mr. Hawkes as shareholder pursuant to s. 227(2)(b).

[380] Mr. Cotton was the President of Consultants and on the Board of Holdings. According to his evidence, for approximately two years leading up to August 2010, he and others worked on revising the formula for pricing shares of Holdings. They ultimately came to the conclusion that the share price should be increased. He testified that he felt that this would mean that departing shareholders would be given closer to the market value for their shares, and would have a greater incentive to sell to the other shareholders.

[381] A lengthy proposal explaining the rationale for the change in valuation approach was presented to shareholders in August 2010. The change proposed increasing the price of a share from approximately $228 to approximately $431. This had the potential to impact Mr. Cotton greatly, since he was nearing retirement and would eventually be forced to sell his shares.

[382] By 2010, Mr. Hawkes was tied with another shareholder for holding the third largest amount of shares in Holdings. He made it clear to management and Mr. Cotton that he opposed the increase in share price, and he voted against it. At a shareholders meeting on September 21, 2010 the proposal did not receive the necessary votes to pass.

[383] After Mr. Hawkes was dismissed in November 2010, a revised proposal was put to shareholders in May 2011. This time the proposal was accepted, and the share price was increased in accordance with the formula that had been first proposed, although it was staged over two years as opposed to all in one year.

[384] There is certainly a circumstantial evidentiary basis for suspicion on Mr. Hawkes' part that Mr. Cotton's treatment of him and his resultant dismissal was based on Mr. Cotton's anger that Mr. Hawkes had opposed the shareholders motion in September 2010 and had suggested that the motion was motivated to benefit retiring shareholders.

[385] As noted above, the defendants allege that it was because Mr. Hawkes improperly attempted to expense to the firm a personal trip to Edmonton in October 2010, that Mr. Cotton decided to look into Mr. Hawkes' expenses.

[386] I find that Tom Cotton could not have been under the impression from anything Calum Buchan or anyone else said in October 2010 that Mr. Hawkes was wrongly trying to submit an expense regarding the Edmonton trip to the company as a business expense when it was really a personal expense. I do not accept Mr. Cotton's evidence that this was his state of mind when he began to look into Mr. Hawkes' expense accounts.

[387] Nevertheless, Mr. Cotton was entitled to review Mr. Hawkes' expenses. The evidence indicates that Mr. Cotton felt that spending $3,000 on a marketing event that was purely social was excessive. Because of the curious nature of the 2010 receipt, and what he felt was evasion on the part of Mr. Bourne when he questioned him about it, Mr. Cotton was justified in investigating further.

[388] I do find that when Mr. Cotton decided that Mr. Hawkes' employment should be terminated, his state of mind was such that Mr. Cotton truly believed that Mr. Hawkes had misled Mr. Buchan and hence Levelton. This was because Mr. Buchan gave him this impression.

[389] Mr. Buchan was, like Mr. Hawkes, also opposed to the shareholder proposal, and so his conduct could not be motivated by Mr. Hawkes' opposition to that proposal.

[390] Mr. Cotton was not open-minded in his dealings with Mr. Hawkes. Had he been, he would have reflected on the fact that Levelton did not have clear policies as to what was or was not a proper expense for purposes of business development. There was no guidance in this regard, yet it was acknowledged that some social events were appropriate to charge to the firm (such as golf tournaments).

[391] It is interesting to note that in his report to the employee-shareholders in 2011, after Mr. Hawkes' dismissal, the then President set out the following:

> We must also renew our commitment to completion and preservation of our policy structure which will include updating the written polices and risk management protocols. The recent experience with inappropriate expenditure underscores that we cannot take it for granted that all staff understands corporate expectations with regards to fiscal responsibility.

[392] The above passage highlights that Levelton had taken for granted that there was a common culture or understanding as to what was an appropriate marketing expense, but had not done anything to put this in writing and so it had no basis for presuming such a common understanding. That rather highlights the unfairness in Mr. Cotton's criticism of Mr. Hawkes, which seems based on Mr. Cotton's expectation of what was appropriate rather than based on any commonly known company policy.

[393] Having considered all of the evidence, I do not find that Mr. Cotton dismissed Mr. Hawkes because Mr. Hawkes had opposed the proposed shareholder resolution. However I do find that Mr. Hawkes' dismissal was based on Mr. Cotton having incorrectly and hastily concluded that Mr. Hawkes had done something dishonest in relation to his expense claims, without giving due consideration to the frailties in Mr. Buchan's version of events, or allowing for the possibility of misunderstandings, and without considering Levelton's lack of clear marketing policies. By the time Mr. Cotton confronted Mr. Hawkes in the meeting on

November 22, 2010, I find that he had already made up his mind to fire him. Mr. Hawkes was railroaded in that meeting by Mr. Cotton, after Mr. Buchan had stoked the engine.

[394] Once Mr. Hawkes' employment was terminated, he was soon told he was in default of the BSA based on the same allegations and Holdings attempted to treat this as a triggering event to purchase his shares under the BSA immediately. Thus, Holdings attempted to use the incorrect allegations against Mr. Hawkes, which had not been fairly assessed, to deprive Mr. Hawkes of the benefits he would have otherwise received as a shareholder: his bonuses and the increase in share value.

[395] Levelton's witnesses at trial emphasized that they had high expectations for each other's conduct, as fellow shareholders and employees. Unfortunately, this treatment of Mr. Hawkes was unfair and did not meet those expectations.

[396] Thus I find that the manner in dealing with Mr. Hawkes' dismissal and the corresponding attempt to deny him the benefits he would have been entitled to as a shareholder during a period of reasonable notice, was unfairly prejudicial to him as a shareholder, within the meaning of s. 227(2)(b) of the *BCA*.

[397] Were this relief not duplicative of the relief I have ordered in respect of the wrongful dismissal damages, I would conclude that it would be appropriate to fashion a remedy pursuant to s. 227(3) of the *BCA*, directing Holdings to cause the payment of the bonuses to Mr. Hawkes that I have already assessed as due to him during the period of reasonable notice, and directing Holdings to purchase his shares at a price of $431.13 per share.

ISSUE 5: THE COUNTERCLAIM

[398] This issue addresses the question of whether or not the defendants by counterclaim, Mr. Robert Bourne and Elite Sports Management, acted together with the plaintiff to deliberately deceive Consultants for the sole purpose of obtaining a financial benefit to the detriment of Consultants, in respect of the submission of receipts for the 2008 and 2010 hockey camps, and if so, is Consultants entitled to

damages in respect of the $7,035 it paid to the plaintiff to reimburse him in respect of those hockey camps.

[399] Both Mr. Fraser and Mr. Hawkes testified that they did not intend to deceive Consultants and I have accepted this evidence. Based on the findings of fact I have already made, the counterclaim fails.

CONCLUSION

[400] I have concluded that the defendants did not have just cause for termination of Mr. Hawkes' employment without notice.

[401] Mr. Hawkes is entitled to damages for breach of the implied term of his employment contract that he be given reasonable notice of termination of his employment.

[402] The reasonable notice that should have been given was 18 months notice.

[403] Mr. Hawkes reasonably mitigated his damages.

[404] I award Mr. Hawkes damages from his dismissal without notice as follows:

a) lost salary of $107,900.00;

b) lost vehicle allowance of $3,600.00;

c) lost Share Pool and Equal Pool bonuses of $157,697.00;

d) lost Performance Pool bonuses of $64,733.00; and,

e) his shareholder loan outstanding of $58,581.00 together with interest at the rate of 1% over the Bank of Montreal prime rate calculated to the date when other shareholder-employees were repaid their shareholder loans in the same period.

[405] In addition, the defendants are to purchase Mr. Hawkes' 1,255 shares at the price of $431.13 per share, for a total of $541,068.15.

[406] The total of the above amounts is $933,579.15.

[407] While I have found that the defendants' treatment of the plaintiff was unfairly prejudicial to him as a shareholder of Holdings, I have also found that he is not entitled to any additional remedy.

[408] If the parties are unable to agree on the running of pre-judgment interest, they may seek a further hearing before me, in which case written submissions in advance of the hearing will be required.

[409] Subject to any additional matters that a party wishes to bring to my attention (within 45 days) relevant to costs, I order that the plaintiff is entitled to his costs at the ordinary scale, scale B.

[410] I would like to thank the parties' counsel for their efforts in presenting a well-organized and professionally conducted trial as well as for providing very helpful written submissions.

"S.A. Griffin, J."
The Honourable Madam Justice Susan A. Griffin