SUPREME COURT OF NOVA SCOTIA
Citation: *Hiltz v. Elmsdale Landscaping Ltd.*, 2022 NSSC 243

Date: 20220819
Docket: *Halifax*, No. 502638
Registry: Halifax

Between:

James Hiltz

Plaintiff

v.

Elmsdale Landscaping Limited

Defendant

Judge:	The Honourable Justice Diane Rowe
Heard:	March 1 and 2, 2022, in Halifax, Nova Scotia
Final Written Submissions:	March 4 and 10, 2022
Counsel:	Laura H. Neilan, for the Plaintiff Dante Manna, for the Defendant

By the Court:

[1] James Hiltz was a seasonal labourer with Elmsdale Landscaping Limited ("Elmsdale") for 17 years.

[2] Mr. Hiltz's employment with Elmsdale ended during the summer of 2020. Mr. Hiltz and Elmsdale dispute the circumstances surrounding the end of his working relationship with the company, and their meaning.

[3] Mr. Hiltz claims that he was wrongfully dismissed, without notice or pay in lieu, by Elmsdale. He also claims that the manner of this dismissal was done in bad faith and is seeking an award of either aggravated or punitive damages for the breach.

[4] Elmsdale responds by denying that Mr. Hiltz was dismissed. It submits that he chose to end his employment with the company after it exercised its option to lay him off work for a period of time, and he then refused its later offer to him for a return to work. It also submits that, even if he had been dismissed, Mr. Hiltz was not entitled to a period of statutory notice as he was seasonally employed in the construction industry, and not entitled to substantial notice if a common law notice period is applied.

Issues

[5] 1. Did Elmsdale wrongfully dismiss Mr. Hiltz?

2. If Mr. Hiltz' employment agreement was breached, was the breach done in bad faith?

3. If bad faith is proven, does it rise to the level for an award in aggravated or punitive damages?

Employment

[6] The facts set out within this decision were determined on a consideration of the documentary and oral evidence presented to the Court in the course of the trial.

[7] Mr. Hiltz is now 43 years old. He began working with Elmsdale in 2003, when he was about 24 years old.

[8] There is no written employment agreement between him and Elmsdale, however the evidence of both Mr. Hiltz and Elmsdale on general aspects of the employment relationship were made out as follows.

[9] When Mr. Hiltz began work with Elmsdale, he was a general labourer. Eventually, he was tasked with sod cutting in the sod fields cultivated by the company.

[10] Mr. Hiltz' hourly rate was $22 per hour, averaging about 55 hours per week in the landscaping season, with a "per pallet loaded" bonus of another $75 to $100 per pay. He also had use of the company truck. His tasks in 2020 included cutting sod lengths, loading pallets with sod, and general yard work and cleanup of the site. It is heavy physical labour.

[11] Mr. Hiltz' evidence was that he was typically offered work by the company beginning in June, which was the busiest time of the year, and he would work until the end of December, when landscaping was no longer possible. Mr. Hiltz would then receive a lay off notice from the company, make a claim for unemployment benefits, and then resume work with Elmsdale when recalled in the spring.

[12] Over the years, this was the pattern of his employment with the company, with the exception of one year when he worked through the winter snow clearing for Elmsdale. This exception occurred as a result of a direct request he made to Mr. George Coupar, the owner of Elmsdale.

[13] Mr. Hiltz' evidence was that he wanted to work with Elmsdale's trucks in the mechanic shop and wished to become a mechanics apprentice. He recognized that his personal circumstances and Grade 10 education made it unlikely he could pursue this career path without additional training, and his expectation was that he would continue working with Elmsdale in landscaping.

[14] Mr. Hiltz acknowledged on cross examination that he was subject to disciplinary action on July 3rd, 2017, when he argued with Mr. Coupar on site. The discipline was a two-day unpaid suspension from work, with an apology to management. Mr. Hiltz was presented with a handwritten entry in his human resource record, as written by Ms. Sheila Ashley, the company's human resources staff. This document was contained in the joint exhibit book before the Court and admitted as a business record. It consists of Ms. Ashley's one page report outlining a verbal incident between Mr. Hiltz and Mr. Coupar with Mr. Hiltz acting in a "belligerant" [sic] manner, with a handwritten signature by Mr. Hiltz and Mr. Coupar concerning its contents. This was not disputed by Mr. Hiltz on examination.

[15] Mr. Hiltz recalled that he had words with Mr. Coupar on July 3rd, 2017, on site, and was sent home immediately. He was required to apologize to Mr. Coupar, and to sign the entry in the human resources ledger placed before the Court as a

condition of his return. He did not consider this two-day suspension a dismissal from employment.

[16] Mr. Hiltz's evidence on cross examination was that Elmsdale also made certain accommodations for him during his employment. One accommodation included finding work for him when he requested, in one instance to assist him in qualifying for employment insurance benefits. The company's assistance also included extending loans in the form of "pay advances", made on a zero-interest basis, with the company assigning work to him so that the amounts would be paid off in labour.

[17] Mr. Hiltz' evidence was that he saw Elmsdale as more than an employer, and more like family.

[18] Elmsdale, through the evidence of Ms. Laura Coupar and Ms. Ashley, presented evidence that Mr. Hiltz was hired seasonally and was laid off regularly, with a recall to sod cutting work or a reassignment to other work as an ongoing possibility. Mr. Hiltz did perform other work, as offered, in the course of his employment and was tasked mainly with sod cutting duties at the end of his time with the company.

[19] They each characterized Mr. Hiltz as having an issue with “attitude”, and aggression toward management when instructed to perform job tasks. Their evidence is that he did not respond positively to reassignment, with management decisions being based on this experience.

The End of the Employment Relationship

[20] In March of 2020, Mr. Hiltz was in receipt of regular employment insurance benefits. This was also the beginning of the Covid-19 pandemic, with public health restrictions in place and employment disruptions occurring, as some industries shut down and others continued. Mr. Hiltz was called back to work by Elmsdale in the spring of 2020, to return to sod cutting as that industry continued to operate.

[21] A series of texts were submitted by both parties and were admitted as evidence, with both Mr. Hiltz and Ms. Coupar acknowledging that they are accurate and complete exchanges, made at the relevant time, as captured on their respective devices. Ms. Coupar’s hearsay in her texts concerning what her father said to her is disputed by Mr. Hiltz. To the extent this hearsay is admissible, I will admit it as not offered for its truth concerning a fact in issue, specifically the quality of the sod field, but for its having been communicated to Ms. Coupar as she texted Mr. Hiltz. The company is not putting forward a defence that Mr. Hiltz was

terminated for cause, but that he was laid off due to lack of work and resigned when refusing a recall. Where the contents of the texts appear in this decision, they do so with original spelling and punctuation.

[22] Elmsdale is a family owned and operated company, with control over related companies. Ms. Laura Coupar is the third generation to manage the company and is Vice President of Elmsdale. Her father Mr. George Coupar is President and owner of Elmsdale.

[23] On Thursday June 4th, 2020, Ms. Laura Coupar sent a text message to Mr. Hiltz in the late afternoon. Ms. Coupar texted Mr. Hiltz to remind him to clean up any broken pallets in the sod field, or Mr. George Coupar would do it himself, as she indicated he had done the night before on the sod growing site.

[24] Mr. Hiltz's response was: "So you want us to stay here all night? There's not even a mess here???"

[25] Mr. Hiltz was working with three other men that day, including Mr. Cameron Crossman. Mr. Crossman appeared and gave evidence concerning his observations on the site at the end of that day.

[26] Mr. Crossman recalled that he saw Mr. Hiltz as his foreman, while he worked for Elmsdale from 2016 to 2020 as a sod cutter. His evidence was that the

site was not “too bad” that day and “probably pretty good to my definition.” This was subject to more qualification as he added that the field was clean “to an extent”.

[27] Mr. Hiltz’ evidence was that he had cleared the field, and it was “not too bad” and “fairly clean.”

[28] Mr. Hiltz, and the three other men, had continued working on site until Mr. Hiltz texted Ms. Coupar at 5:35 pm with “All done clean as we can see”. This elicited an enthusiastic “Thank you!!!” from Ms. Coupar.

[29] However, at 7:59 pm, Ms. Coupar texted Mr. Hiltz, indicating that her father had contacted her to express dissatisfaction with the work, and that she was directed by him to have Mr. Hiltz stay home the following day. Her text indicated that Mr. George Coupar and his spouse were then cleaning up the site. She characterized Mr. Coupar as being “wild”. Mr. Hiltz interpreted this as indicating Mr. Coupar was very angry.

[30] Mr. Hiltz responded with disbelief. The other workers were not told to remain home from the site. He texted: “I’m doing what’s right on my end not sending out crap sod I thought that was my job.”

[31] Three days later, on Sunday, June 7th, 2020 another text exchange occurred between Mr. Hiltz and Ms. Coupar. Ms. Coupar texted Mr. Hiltz to indicate his supervisor was not returning to the sod field and directing Mr. Hiltz to stay at home the next day on Mr. Coupar's instruction. This text stated: "… dad would like you to stay home tomorrow as well I will give you a call tomorrow afternoon and let you know what's going on…"

[32] Mr. Hiltz disputed this decision, and Ms. Coupar reiterated her initial message, that Mr. George Coupar and his spouse had cleaned the site and Mr. Coupar had "lost it".

[33] Mr. Hiltz' responses included: "So you want us to stay all night and day I'm not the only one who works there, this is gonna change that's for sure…… 17 years and you treat me like I'm nothing we will see".

[34] Ms. Coupar responded to this with: "Your reply with attitude is a big part of the problem. I already told you I'm just the messenger I'll talk to you tomorrow". Ms. Coupar's evidence was that she did not take Mr. Hiltz's messages to her personally, as it was his usual tone. She did not show these to her father.

[35] She requested that Mr. Hiltz give her another day for her to "calm this whole situation down."

[36] On reviewing the exchange, and hearing the evidence of Ms. Coupar and Mr. Hiltz concerning this time period, it appears that Mr. Hiltz' supervisor, who was the person who hydroseeded the sod fields, had left the company abruptly. Ms. Coupar's texts allude to the company's view that Mr. Hiltz had broader responsibility for the sod fields in tandem with this supervisor as "second contact" at the field, which Mr. Hiltz disputed as he saw his position as a sod cutter, solely. However, Mr. Crossman characterized him as a "foreman" at the site.

[37] Ms. Coupar's text response on June 7th refer to Mr. Hiltz having "attitude" and concludes with: "These aren't my decisions. I didn't check the field after I asked you to. Dad and Carol did and he's the one who said for you to stay home tomorrow as well..".

[38] Neither Mr. George Coupar, nor his spouse, appeared as witnesses at the trial. Any hearsay statements made regarding the sod site, its level of care, their inspection and any clearing of it during this time period were not the subject of examination or cross examination.

[39] The following day, Monday June 8th, 2020, before 5:00 pm, Ms. Coupar texted Mr. Hiltz and offered him a return to work as a sod layer, rather than sod cutter, to start the next day. Two potential days of work at Elmsdale had passed at

this point. Sod laying duties would result in a loss of the sod bonus, with work done on location on varying locations as needed, rather than the sod fields. Mr. Hiltz perceived this as a demotion and questioned its fairness.

[40] His evidence was that the texts sent did not say he wouldn't work as a sod layer, but that he wanted to know why the decision was made.

[41] Within hours, Mr. Hiltz then received a phone call from Mr. George Coupar in response. It was Mr. Hiltz' evidence that Mr. Coupar was very angry during this phone call. Mr. Hiltz placed his phone on "speaker" mode. Ms. Melissa Gilby, Mr. Hiltz' spouse, was present and heard the tone of the call. Her evidence corroborated Mr. Hiltz' regarding the level of Mr. George Coupar's anger.

[42] Mr. Hiltz stated that Mr. Coupar said he "was the worst employee" at Elmsdale, that he "sucked with money", and his lack of care on the site would cause an accident and possibly death to another employee. His evidence was that he said nothing in response to Mr. Coupar, and after a few minutes of listening to him, he asked if Mr. Coupar was finished and then hung up. His immediate emotional reaction included shame, embarrassment, and a feeling of degradation, as he did not think Mr. Coupar felt that way about him. His recollection of Mr. Coupar's tone was that it was "vicious".

[43] Mr. Coupar did not give evidence regarding the phone call with Mr. Hiltz.

[44] Mr. Hiltz and his partner Ms. Gilby gave reliable and consistent evidence in regard to the phone call, its tone and content. I am satisfied that they were credible on this point, specifically.

[45] Shortly after, Mr. Hiltz texted Ms. Coupar again, this time to accept the sod laying assignment by an attempt to lighten the situation, with: “Lol what time Laura??????”.

[46] Ms. Coupar’s texted response was that she “heard from George and he no longer wants you going with Jeremy. He said we’ll call you if something comes up.” She also informed Mr. Hiltz that another employee was on their way to get the company truck from him.

[47] In response Mr. Hiltz texted: “So you are firing me?”

[48] Ms. Coupar’s response was: “He didn’t want you back in the sod field and then you didn’t want to work with Jeremy where we need people. That’s all I know”.

[49] The response from Mr. Hiltz was lengthy:

> I hope you know this is bullying, I stayed late and did what you asked to do, ask Sheldon, Noah and cam. Oh and by the way I NEVER said I wouldn't work with Jeromy I asked why I was getting demoted and then George called and reamed me out on my phone while I had it on speaker and my whole house heard George freak out at me and put me down to the lowest and said I'm the worst employee in the company and I suck with money and not to complain to other employees and that I've been a problem for years now… even my kids heard him say everything he said!!! although 17 years in the same profession says I've done something right, anyways have a good night Laura.

[50] Nine days later, Mr. Hiltz filed a Labour Standards Board complaint on June 17th, 2020. He indicated he was "not sure" what his employment status was, and that Elmsdale had posted they were seeking new employees. The Labour Standards Board passed on the complaint to Elmsdale.

[51] Two more days later, on June 19th, 2020, Mr. Hiltz assumed he was fired as he had not heard from the company regarding other assignments. Mr. Hiltz texted Ms. Coupar requesting that she sign a document. This would permit him to withdraw his RRSP held with the company. Ms. Coupar's evidence is that she interpreted this request as indicating Mr. Hiltz intended to resign and processed his request. Her experience was that employees drew upon their deposits if they retired or if they left the company. She also gave evidence that Mr. Hiltz did not say anything about what he thought his employment status was, whether he would be recalled, and she did not speak to him about it. She stated she had no knowledge of the Labour Standard complaint at that time.

[52] On June 29th, 2020, Elmsdale issued a Record of Employment to Mr. Hiltz, noting that "shortage of work/end of contract or season" was the reason for ending his employment, thereby indicating a layoff. Ms. Coupar stated that the company indicated a layoff, rather than that Mr. Hiltz had quit, to ensure Mr. Hiltz could receive employment insurance benefits.

[53] Elmsdale did hire other personnel that summer, including three (3) positions as sod cutter and as labourer in maintenance. Mr. Hiltz was not recalled for these positions.

[54] In the background, Mr. Hiltz' Labour Standards complaint continued its administrative process. On July 23rd, 2020, Mr. Hiltz' written complaint was received by the Office of the Employer Advisor ("OEA"). Correspondence from the OEA, dated July 24th, 2020, sent on behalf of Elmsdale to the Labour Standards Division, submits that as an employee of Elmsdale, Mr. Hiltz was a person "employed in the construction industry", and therefore exempt from ss 71 and 72 of the *Nova Scotia Labour Standards Code*, R.S.N.S. 1989, c. 246, requiring notice on termination. The OEA relied upon *Joseph Edward Fleet v. Elmsdale Landscaping Limited*, 2003 CanLii 87942 (NS Labour Standard Tribunal), included with the correspondence. In that decision, the Tribunal held that Elmsdale's business operations as a landscaper on construction builds was part of

the “construction industry”, addressing a complaint by a former employee working as a truck driver who was terminated without notice.

[55] On July 28th, 2020, Ms. Coupar wrote a letter to Mr. Hiltz to “clarify” Mr. Hiltz’ employment with Elmsdale, stating that he was “temporarily laid off due to a shortage of work”. She did not refer to his suspension from work in regard to the sod field incident in early June, or the company’s response to his agreement to take on the sod laying reassignment after Mr. Coupar’s phone call.

[56] Ms. Coupar’s evidence was that she had not seen the Labour Standards complaint. However, she recalled that the company was also “not sure” of Mr. Hiltz’ status with the company, so this was the reason for sending Mr. Hiltz this letter to “clarify” his status. The Court finds this difficult to accept as fact. It appears to be an attempt to create a record, in service to the particular narrative that Mr. Hiltz was laid off due to a shortage of work.

[57] On August 9th, 2020, Ms. Ashley phoned Mr. Hiltz to offer work but he did not respond to the call. Ms. Coupar followed up with a text on August 11th, 2020. The text exchange is as follows:

> Ms. Coupar: Hi Jamie, Further to us notifying you last week of recall to work, you did not contact anyone to say you wouldn’t be in August 10 as discussed, nor did you show up to the office for work at 5:45 am. … If you are refusing to be recalled please let us know…

> Mr. Hiltz: George told me I was the worst employee of Elmsdale Landscaping.. Further more you aren't even offering me my original job back and I feel like you won't call me back after layoffs… I feel like I've been a devoted employee for the last 17 years working the busiest time of year 6 days a week. I don't feel like I was treated in a way that I would want to come back to. I start a new job this week so unfortunately I'm not interested in what your offering,
>
> Ms. Coupar:…. We have started the new job yesterday and need all the people we can on that site This recall work is at the same rate of pay and same job duties you have done many times before that are part of your job position with Elmsdale Landscaping. Sorry to hear that you don't want to return to work with us, and best of luck at your new position.

[58] Coincidentally, on August 10th, 2020, OEA again corresponded with the Labour Standards Division, in response to a request for better particulars concerning Mr. Hiltz' assignment at construction sites. The correspondence submitted indicates five instances of Mr. Hiltz working at construction sites, acting as a sod layer. It also maintains Mr. Hiltz was not terminated, but laid off, with a record of employment issued to that effect. It also references the recent contact by Elmsdale with Mr. Hiltz for a recall to work, intended to be at a Dexter Construction site as a sod layer.

[59] I will also note that the OEA correspondence corroborates Ms. Coupar's direct evidence that the sod fields work was night shift work. However, the correspondence indicates no offer was made to Mr. Hiltz of this work as the OEA writes that he "… never wanted to work night shifts." Ms. Coupar did not give

evidence on this point in Court, or Ms. Ashley, in regard to any offer of potential night shift work to Mr. Hiltz.

1. Did Elmsdale wrongfully dismiss Mr. Hiltz?

[60] The Court reviewed and considered *Potter v. New Brunswick Legal Aid Services Commission*, 2015 SCC 10, and particularly the guidance in paras 30- 45. Justice Wagner (as he then was) notes at the outset in this portion of the decision that, in the absence of a formal dismissal, the burden rests upon the employee to establish that they have been constructively dismissed by the conduct or changes made by the employer, such that these actions evidence a repudiation of the employment contract between the parties.

[61] In *Potter*, at para 32, a two branch test is set out:

> 1. The Court must identify whether an express or implied contract term has been breached;
> 2. If a breach is found, the Court must determine whether that breach was "sufficiently serious to constitute constructive dismissal". This may be inclusive of a change in compensation, assignment or place of work that is unilateral and substantial.

[62] An employer's conduct will constitute constructive dismissal if "… it more generally shows that the employer intended not to be bound by the contract" and specifies that an employee can be found to be constructively dismissed "…if the

employer's treatment made continued employment intolerable." (*Potter,* supra at para 33).

[63] In regard to the first branch of the test in the case of administrative suspensions of an employee, the Court noted at paragraph 41 in *Potter*:

> [41] The uniqueness of the application of this first branch of the test is evident in cases involving administrative suspensions. **In all cases, the primary burden will be on the employee to establish constructive dismissal, but where an administrative suspension is at issue, the burden will necessarily shift to the employer, which must then show that the suspension is justified. If the employer cannot do so, a breach will have been established, and the burden will shift back to the employee at the second step of the analysis. [emphasis added]**

[64] Further, at para 65, Wagner, J. notes:

> [65] As I mentioned above, the question whether a suspension amounts to a breach will often require a more careful analysis than might be necessary in constructive dismissal cases involving other types of changes. This is because, unlike with such unilateral changes as a demotion, a reduction in wages or a modification to the pay structure, an employer's ability to suspend an employee can be found to be implied in the contract. The court must therefore determine whether the suspension was implicitly authorized by the contract. In *Carscallen v. FRI Corp.* (2005), 2005 CanLII 20815 (ON SC), 42 C.C.E.L. (3d) 196 (Ont. S.C.J.), aff'd (2006), 2006 CanLII 31723 (ON CA), 52 C.C.E.L. (3d) 161 (Ont. C.A.), for example, the Ontario Court of Appeal, in inquiring into whether an employee's disciplinary suspension amounted to a breach, considered multiple factors, including the facts that the suspension was without pay and that it was indefinite. A similar approach was taken in *Labarre c. Spiro Méga inc.*, 2001 CarswellQue 1753 (C.S. Can.), in which the Quebec Superior Court also considered a notice sent to other employees to inform them of the suspension, as well as the revocation of a company credit card and of the use of a vehicle.

[65] Mr. Hiltz brings to the Court's attention *Carscallen v. FRI Corp.* (2005) CanLII 20815 (ONSC), upheld on appeal, as referenced in *Potter* at para 65, above, and submits that the facts are similar to this matter. *Carscallen* was

considered, and approved, in Nova Scotia in *Burns v. Sobeys Group*, 2007 NSSC 363.

[66] In *Carscallen*, Ms. Carscallen, a 43 year old marketer, was required to transport materials to Spain for a trade show, however the marketing materials did not arrive in time, triggering a heated exchange by email with Mr. Gaudio, the President and CEO of FRI. This resulted in an immediate suspension of an indefinite duration. She had been employed with the company for about 15 years. There was no written agreement in place between the employer and employee. Subsequent attempts were made by the employer to place her in a different position within the company, however the plaintiff elected to withdraw from the company.

[67] The Court in *Carscallen* found that the plaintiff had established that FRI had reacted in a unilateral manner, and in an "ad hoc/knee jerk reaction approach to employee discipline" in imposing a suspension of an indefinite period, without payment.

[68] Further, and with some similarity to Mr. Hiltz' employment experience, Ms. Carscallen had also been subject to an earlier short disciplinary suspension, though with pay, for a performance issue. The employer attempted to rely upon this prior suspension to demonstrate that the power to suspend without pay was a term of

their unwritten employment agreement. However, the Court did not find that this one incident was sufficient evidence to imply that the parties were in agreement there was a contractual term to the effect that the employer's power of discipline included suspension without pay, and noted the imbalance in negotiating positions between the parties and the Court's restrictive approach in implying contractual terms. (*Carscallen*, paras 51-58).

[69] Mr. Hiltz is a non-unionized employee, working as a seasonal labourer. He has not completed high school, and his career was wholly focused on remaining with Elmsdale. This imbalance in bargaining position mitigates against this Court finding that the parties agreed there is an implied term of agreement between Mr. Hiltz and Elmsdale that the employer's disciplinary measures include suspension of an indefinite period without pay.

[70] As was noted in *Carscallen* at paras 42- 44:

> [42] When and how is it appropriate for an employer to suspend a non-unionized employee without pay for misconduct?
>
> [43] In the unionized setting, employers and unions expressly bargain for suspension rights at the time of the formation of a collective agreement. Notably, most collective agreements containing the right to suspend also provide the employee with the right to grieve the fact or the nature of the suspension. The parties, of relatively even bargaining power, jointly determine that a monitoring process containing a contemporaneous right of appeal should accompany the employer's disciplinary rights.

> [44] In the white collar non-unionized setting, if a right of suspension is to be contracted for, and upheld as fair and reasonable, a right of review must exist in the contract or policy akin to the unionized employee's right to grieve. The supervisor imposing the discipline must not be permitted to be the sole judge, jury and executioner. There must be an opportunity to have whatever penalty is imposed reviewed by another party. In the instance in which the CEO seeks to impose the discipline, a review might involve consultations with an independent human resources professional.

[71] The impacts that the Court in *Carscallen* considers as supporting a right of review, such as loss of respect for a manager in a white collar setting subject to a suspension, differ from Mr. Hiltz' circumstances. However, the impacts of the immediate disciplinary suspension on Mr. Hiltz, contextually, are still serious. Mr. Hiltz was considered a "foreman" by his peers. The loss of his income, plus the pallet bonus, and the company truck were all tangible benefits accorded in relation to his status as a senior employee of the company with specific experience at the sod growing fields. There is no "relatively even bargaining power" in the context of his employment, as would be the case if he were a unionized employee. Therefore, even in the absence of a written agreement, there should be an objective basis established to ground a disciplinary suspension, with a set duration, and a corresponding opportunity for the employee to respond.

[72] In regard to the first branch of *Potter*, the Court must also consider whether the suspension was justified, on the evidence before it.

[73] Ms. Coupar confirmed that Mr. Hiltz was never disciplined for sloppy work product, or reprimanded for site cleanup formally. He was acknowledged as a good employee, on task.

[74] The evidence concerning the state of the sod field was qualified by both Mr. Hiltz and Mr. Crossman as being "pretty good" in their view, however there is no evidence offered by Elmsdale that is admissible on this issue in response, which might assist the Court to determine on an objective basis, whether there was unacceptable work on site maintenance and whether the suspension imposed was fair and reasonable.

[75] It is well established that Mr. Coupar was angry with Mr. Hiltz during this time period, and that he made the immediate decision and unilaterally directed Ms. Coupar to tell Mr. Hiltz to remain at home, without pay, for an unknowable amount of time. Mr. Hiltz was the only employee on the site disciplined in this manner. Mr. Coupar is not available to the Court to speak to the basis for this direction. It is not possible for the Court to find that the imposition of the disciplinary suspension was justified in the circumstances or for "just cause".

[76] Mr. Hiltz has met the first branch of the test in *Potter*, as there was a breach of the employment agreement by Elmsdale's imposition of an immediate

indeterminate suspension for a disciplinary purpose, without adequate opportunity to respond.

[77] Turning to the second branch of the test in *Potter*, Wagner J. wrote at paras 42-43 that:

> [42] **The second branch of the test for constructive dismissal necessarily requires a different approach. In cases in which this branch of the test applies, constructive dismissal consists of conduct that, when viewed in the light of all the circumstances, would lead a reasonable person to conclude that the employer no longer intended to be bound by the terms. of the contract. The employee is not required to point to an actual specific substantial change in compensation, work assignments, or so on, that on its own constitutes a substantial breach. The focus is on whether a course of conduct pursued by the employer "evince[s] an intention no longer to be bound by the contract": *Rubel Bronze*, at p. 322. A course of conduct that does evince such an intention amounts cumulatively to an actual breach. Gonthier J. said the following in this regard in *Farber*:**
>
> > In cases of constructive dismissal, the courts in the common law provinces have applied the general principle that where one party to a contract demonstrates an intention no longer to be bound by it, that party is committing a fundamental breach of the contract that results in its termination. [para. 33]
>
> [43] Thus, constructive dismissal can take two forms.: that of a single unilateral act that breaches an essential term of the contract, or that of a series of acts that, taken together, show that the employer no longer intended to be bound by the contract. The distinction between these two forms. of constructive dismissal was clearly expressed by Lord Denning M.R. in a leading English case, *Western Excavating (ECC) Ltd. v. Sharp*, [1978] 1 All E.R. 713 (C.A.). First of all, an employer's conduct may amount to constructive dismissal if it "shows that [he] no longer intends to be bound by one or more of the essential terms. of the contract": p. 717. But the employer's conduct may also amount to constructive dismissal if it constitutes "a significant breach going to the root of the contract of employment": ibid. In either case, the employer's perceived intention no longer to be bound by the contract is taken to give rise to a breach. [emphasis added]

[78] Mr. Hiltz' burden of proof at this branch requires he establish there are facts that would lead a reasonable person to conclude that the employer no longer intended to be bound by the terms. of the contract.

[79] Mr. Hiltz has proven that he was placed on an unpaid indeterminate suspension on June 4th, 2020 when he was informed that he was not to come to work as a result of Mr. Coupar's direction and reaction concerning the sod fields. The suspension, with indications that the President of the company was angry with him, was communicated to him in an exchange of texts from Ms. Laura Coupar over the following four days. This then included a heated phone call he received from Mr. George Coupar, the President of Elmsdale. Mr. Hiltz then contacted Ms. Coupar to indicate he would agree to take on different duties as a sod layer, but was informed that this assignment was not available to him and that the company might contact him at an indeterminate time in the future "if something came up". Ms. Coupar then informed him another employee was coming to take the company truck.

[80] His interpretation of Elmsdale's communications and actions was that his employment with the company was ended. Mr. Hiltz texted: "So you are firing me?"

[81] Ms. Coupar's response was: "He didn't want you back in the sod field and then you didn't want to work with Jeremy where we need people. That's all I know"

[82] Mr. Hiltz' reply continued to dispute the suspension and was unanswered.

[83] Two weeks passed. Mr. Hiltz determined that he must have been fired as he had heard nothing further. He then requested a payment from his RRSP deposit held at the company, as he did not then have a Record of Employment and was unable to claim employment insurance.

[84] Elmsdale's response to Mr. Hiltz is that, although their former employee was difficult, argumentative, and occasionally insubordinate, the company did not terminate him, but intended to re-assign his duties as his job performance in the fields had not met the company's standard. Elmsdale submits that Mr. Hiltz resisted the reassignment. As the company had no other roles for him to fill that would be appropriate, it laid him off, but still considered Mr. Hiltz to be its employee.

[85] Elmsdale's evidence is that a Record of Employment was issued to Mr. Hiltz with a lay off on June 29th, 2020, although the company was confused by Mr. Hiltz' request for a payout of his RRSP just weeks before as it interpreted this as

an indication he left the company. After two months, the company then sent correspondence to Mr. Hiltz to clarify his status as a laid off employee. Elmsdale indicates it invited him to resume active employment, despite the June RRSP withdrawal, but Mr. Hiltz refused, telling the company he had accepted a new job elsewhere. Elmsdale interpreted this response as confirmation of Mr. Hiltz' resignation.

[86] However, if the company presumed that Mr. Hiltz had resigned in June 2020 because he asked for his RRSP deposit then it is illogical for it to have sent a clarifying letter confirming layoff on July 28th, 2020, and to then make him an offer of work on August 9th, 2020.

[87] Elmsdale cited *Coutlee v. Apex Granite & Tile Inc.*, 2020 BCSC 315, as support for the proposition that Elmsdale was correct in its layoff of Mr. Hiltz as in keeping with company and industry practices concerning lay offs of seasonal labour in the construction industry. However, in *Coutlee*, the plaintiff had received a written Notice of Non-compliance concerning his work, there was evidence presented by the company concerning the standard expected and the work of the employee, and the Notice of Non-compliance contained terms concerning conditions for the employee to meet in order to return to work. These elements are not before the Court in this matter.

[88] Ms. Coupar's evidence on cross examination was that "nothing came up" until August for James Hiltz, specifically. She reiterated this statement in her evidence that the shortage of work for Mr. Hiltz, as an individual, was such that it was part of her writing her letter to "clarify" his status on July 28th, 2020.

[89] It was acknowledged by the parties that the summer season was a very busy one for the company, with as many as 160 employees engaged. There was evidence that additional hires were made at the sod site and for maintenance in the 2020 season, which Mr. Hiltz was not offered.

[90] On cross examination, Ms. Coupar was asked whether she felt that the ball was in Mr. Hiltz' court to apologize and ask for work. Her response was "yes", and that normally he would come to the company if he wanted work, and that she didn't expect him to apologize to her but to George Coupar, and ask for work.

[91] The Court found that Ms. Coupar was less forthcoming in regard to her evidence on the company's intent concerning the July 28th, 2020, letter to Mr. Hiltz, and evasive in regard to her knowledge of the Labour Standards Complaint or of the "layoff" notation on his Record of Employment.

[92] The content of the texts sent to Mr. Hiltz on August 11th, 2020, by Ms. Coupar, seeking that Mr. Hiltz confirm that he is "refusing to be recalled" were

very formal, in contrast with the prior exchanges between them just two short months before. Mr. Hiltz' response understandably references the manner in which he was treated by the company and indicates that he felt a return to work was intolerable.

[93] I have also read and considered the case *Strizzi v. Curson Management Associates Inc.* 2011 ONSC 4292. In that matter, the Court stated that:

> …employers do not have the right to harass, humiliate, belittle and berate employees as they go about their responsibility of managing and supervising them. They do not have the right to yell and swear at employees and call them "every name in the book". When employers carry matters to this extreme, they risk the employee reasonably concluding that continued employment is intolerable" (at para 48).

While the facts in this matter do not rise to the level in *Strizzi*, the observation of the Court is applicable to a degree in this matter.

[94] The Court finds that it was reasonable for Mr. Hiltz to conclude that his continued employment at Elmsdale after June 8th, 2020, was not what the company intended, as it had not communicated an intent to continue the relationship with any certainty in a timely manner, and not recalled him to work during a busy season when available positions were unfilled. While it is the usual business practice for Elmsdale to call in and assign labourers work, it was also evident that Mr. Hiltz specifically was not to be called until he was personally deemed appropriate for continued employment with the company. This, coupled with the

circumstances of Mr. Coupar's phone call, would also lead a reasonable person to conclude, as Mr. Hiltz certainly had by August 2020, that he should take steps to find other employment.

Mitigation

[95] Both parties cite *Evans v. Teamsters Local Union No. 31*, 2008 SCC 20. The principle established in the decision is that in cases of both constructive and wrongful dismissal, the employee is required to take steps to mitigate the lack of notice of termination. The employer must show that the employee failed to make reasonable efforts to return to work and that work could be found. The employee may also be expected to return to work to a dismissing employer, assuming that there are no barriers to re-employment, as a reasonable mitigation to address the financial impact of notice. in regard to mitigation is that I note that, at para 30, Bastarache J. notes a qualification that:

> ... although an objective standard must be used to evaluate whether a reasonable person in the employee's position could have accepted the employer's offer (*Reibl v. Hughes*, [1908] 2 S.C.R. 880 (S.C.C)), it is extremely important that the non-tangible elements of the situation – including work atmosphere, stigma and loss of dignity, as well as nature and conditions of employment, the tangible elements – be included in the evaluation.

[96] The defendant Elmsdale acknowledges that it must prove Mr. Hiltz failed to mitigate his losses. Elmsdale submits that he failed to do so by refusing the recall

to work, and relies upon *Gillis v. Sobeys Group Inc.*, 2011 NSSC 443, as an illustration of a similar situation. However, in *Gillis*, the employee was held to have voluntarily resigned upon her reassignment, and she had not mitigated her losses by refusing to return for a notice period as a mitigation. The Court noted that the employment relationship was absent any "animus" between the employer and employee.

[97] The Court finds he was rebuffed in his attempt to take up the sod laying reassignment on June 8th, 2020. The Court will consider Mr. Hiltz' response to the company's offer of continued work as a sod layer made on August 9th, 2020.

[98] At that point, Mr. Hiltz had experienced two months of mixed signals concerning his employment with Elmsdale. His attempt to take up the sod laying reassignment on June 8 was subsequently refused, with a conditional offer of an unknown task "if something" came up. His request for a payout of his RRSP funds was granted, without the company advising what its intentions were in regard to his continued employment. Then a Record of Employment was issued with "layoff" due to lack of work, despite his knowledge that the company was in its busiest season and advertising for new hires, approximately a month after his suspension. Then another month passed before he received a letter from Elmsdale indicating he was temporarily laid off due to a shortage of work.

[99] A reasonable person would have taken steps to obtain other employment in the interim. Mr. Hiltz took steps to do so. He was then 42 years old, with a limited education, and an experienced labourer who had not looked for work in 17 years. When Elmsdale contacted him on August 9th, 2020, he advised the company that he had accepted a position with another company and stated that he did not feel, given his treatment by Mr. Coupar in their phone call with personally denigrating comments, that he could return. In the Court's view, in light of the evidence, this was a reasonable response.

[100] Further, the company's evidence was that it would not have contacted him for a reassignment unless he asked them first for work, and coupled it with a personal apology to Mr. Coupar, the owner. These conditions for return were not communicated to Mr. Hiltz, and seem counter to the company's submissions that it made a good faith layoff, or there was a justified suspension of Mr. Hiltz for cause, as was canvassed previously.

[101] Elmsdale told him that it considered he had resigned his position with the company and stopped further contact. Mr. Hiltz continued his job search in the following months.

[102] Justice Davison, in *Murphy v. Optipress Inc.* 2008 NSSC 75, in finding a former employer failed to establish its employee's mitigation was insufficient, referred to Wrongful Dismissal Practice Manual (2d Edition) (at para 40) in which Ellen E. Mole wrote:

> 10.15 Only reasonable efforts are required, not a job search that aggressively pursues possible means of mitigation. Even efforts that were not assiduous as they might have been will not be a failure to mitigate unless they were unreasonable. The standard of reasonableness may not be exacting, given that the employer is the wrongdoer in a wrongful dismissal case, and the employee's perspective on reasonableness usually takes precedence over the employer's view of reasonableness; the employee is not required to act in the employer's best interests to the detriment of his or her own interests…

[103] Evidence was presented by Mr. Hiltz that he had obtained employment since June 8th, 2020. These positions resulted in earnings of $14,048 in 2020, $27,237 in 2021, with his continued employment to date of trial in 2022 at a rate of $700 per week, resulting in a calculation of $45,485 in total.

[104] Mr. Hiltz submits that this amount should be deducted from any award for notice he may receive as a result of this decision.

[105] Mr. Hiltz' positions were in carpentry, an area he had no prior working experience with, and he is currently engaged with Night Hawk Maintenance. Elmsdale asserts, without evidence, that Mr. Hiltz should have applied for similar positions in landscaping, as there were other positions available to him in the

interim. It is not clear to me on the evidence presented by Elmsdale that there were other positions in this industry with similar rates of pay, hours or the benefits that he formerly received while with the company.

[106] I find that Mr. Hiltz did take reasonable steps to mitigate his loss, as a return to work at Elmsdale was not in his interests, by finding alternate employment.

Notice

[107] *Bardal v. The Globe & Mail Ltd.*, [1960] OWN 253 (HCJ) set out a framework of factors which a Court may consider in calculating an appropriate period of notice. *Bardal* was adopted by the Supreme Court of Canada in *Machtinger v. HOJ Industries Ltd.* [1992] 1 SCR 986. In *Bardal*, at para 145, the Court held that:

> 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.

[108] Elmsdale submits that Mr. Hiltz should receive notice in the amount of time representative of the season in which he was hired, as he was a seasonal worker without any assurance on a layoff of a recall the following season. Mr. Hiltz' dismissal occurred on June 8th with the season ending by late December 2020, which would be roughly equivalent to seven months.

[109] The issue of whether Mr. Hiltz was or was not entitled to minimum statutory notice was before the Nova Scotia Labour Board, in the context of his complaint, and is not before this Court.

[110] Elmsdale has submitted cases in which Courts found that seasonal workers who were engaged with employers over the course of ten years, and more, were not entitled to notice beyond the season in which they worked.

[111] The New Brunswick Court of Appeal's decision in *Saunders v. Fredericton Golf & Curling Club Inc.* (1994) 151 N.B.R. (2d) 184 is somewhat similar to this matter. In *Saunders*, a golf club employee was hired every golf season for 30 years with a definite pattern of recall established. The Court found that the plaintiff was a permanent employee of the club, who worked seasonally, rather than a seasonal worker. Notice should have been given to the plaintiff at the end of the prior season, to enable him an opportunity to obtain comparable work over the winter.

[112] Mr. Hiltz has provided a series of cases involving notice periods for plaintiffs employed from fifteen to nineteen years with a variety of employers. Each of these cases involved full time workers in various industries, rather than workers subject to a regular and expected layoff period. The notice period range

reflective in the decisions submitted by Mr. Hiltz is between seventeen and twenty-four months.

[113] As recognized in *Minott v. O'Shanter Development Co.* 1999 CanLii 3686 (ONCA) at para 62, arriving at "…the period of reasonable notice is an art not a science….".

[114] Mr. Hiltz was engaged in low skilled labour in the landscaping industry, but not to a degree that he would be unable to obtain similar employment if it were available to him. At 43, it would be a challenge for him to obtain this employment, as it involved heavy labour, but still possible.

[115] There was an implicit agreement between Mr. Hiltz and Elmsdale that he would continue as a seasonal labourer with the company, reflected in the lengthy tenure of the relationship over 17 years. While he was not a full-time employee on the payroll from month to month, he had a reasonable expectation of some security of tenure on a year to year basis. However, it is not reasonable that notice in this case should extend beyond the sequence of his usual seasonal employment in a given year.

[116] In the event that notice were given to Mr. Hiltz at the end of a landscaping season, he would have had roughly five to six months to obtain similar employment, if available, before the beginning of the next landscaping season.

[117] I find that the reasonable notice period in this matter is twelve months notice period, taking into account the remainder of the 2020 landscaping season of seven months, and the ensuing five months prior to the beginning of the next year's season.

[118] Mr. Hiltz submits that his annual salary at Elmsdale, averaged $57,154, per annum or $4,762.83 per month. This earnings calculation was not disputed by Elmsdale's counsel.

2. If Mr. Hiltz' employment agreement was breached, was the breach done in bad faith?

[119] I received written submissions, post trial, on *Bhasin v. Hyrniw*, 2014 SCC 71 from the parties. *Bhasin* is a significant decision that examines "good faith" as an element in contractual dealings. While the subject matter of *Bhasin* was a commercial contract, Cromwell J. in para 1, succinctly summarized the issues before the Court as, first, whether Canadian common law imposed a duty on parties to perform contractual obligations honestly, and, if so, was there a breach?

The Court confirmed the existence of a general organizing principle of "good faith", as a standard that underpins more specific legal doctrines.

[120] *Bhasin* was reaffirmed by the Supreme Court of Canada in *Matthews v. Ocean Nutrition Canada Ltd.*, 2020 SCC 26, specifically at para 40:

> 40 It is apparent too from the pleadings here that there is a measure of uncertainty as to the impact of *Bhasin*, not just in Mr. Matthews' case but on employment law more generally. At a minimum, I believe this is an occasion to re-affirm two important principles stated in *Potter*. First, given the various submissions in this case, **I would recall that the duty of honest performance – which Cromwell J. explained in *Bhasin* applies to all contracts, and means simply that parties "must not lie [to] or otherwise knowingly mislead" their counterparty "about matters directly linked to the performance of the contract" — is applicable to employment contracts** (*Bhasin*, at para 33, see also para 73; *Potter*, at para 99). Second, given the four year-period of alleged dishonesty leading up to Mr. Matthews dismissal, I would also reiterate that **when an employee alleges a breach of the duty to exercise good faith in the manner of dismissal – a phrase introduced by the Court in *Wallace* and reinforced in *Keays* – this means courts are able to examine a period of conduct that is not confined to the exact moment of termination itself. All this reflects, in my view, settled law. [Emphasis added]**

[121] *Honda v. Keays*, 2008 SCC 39 is also relied upon by Mr. Hiltz, in regard to his allegation that Elmsdale violated the duty of honesty in its suspension and dismissal.

[122] The Court has found that Mr. Hiltz was placed on an indefinite suspension, effected without independent investigation.

[123] Mr. Hiltz requests that the Court consider the conduct of Elmsdale during the entire two month period, from his initial suspension and continuing until the

penultimate text message from Elmsdale intended to confirm Mr. Hiltz had left the company, as demonstrating conduct that breaches the duty to exercise good faith in the manner of dismissal, as set out in Matthews.

[124] The Court has noted earlier that Elmsdale was not candid with Mr. Hiltz about the suspension, its duration or any conditions that may have ended it. The phone call Mr. Hiltz received from Mr. Coupar reasonably created anxiety and uncertainty. I did not find that Elmsdale was credible or forthright in its evidence concerning the creation of the July 28th, 2020 letter to "clarify" Mr. Hiltz' status as laid off due to a shortage of work, as the company continued to hire additional employees for its busy season. It was clear that Mr. Hiltz specifically was not to be recalled to work, even as work was available. Taken together, I am satisfied the plaintiff has proven bad faith in its dismissal of Mr. Hiltz.

[125] Mr. Hiltz submits that there is a public policy element for the Court to consider. Currently, there are many unskilled or low skilled workers in intermittent employment. A seasonal worker takes a considerable risk in relying upon such employment, hoping that it will be sufficiently stable to meet the financial and moral responsibilities expected of a working adult in contemporary Canadian society.

[126] Elmsdale had intimate personal knowledge and experience with this worker developed over the course of 17 years. Elmsdale had made meaningful accommodations for Mr. Hiltz over that time to support his personal circumstances. It was an act of bad faith for those personal accommodations to be the subject of Mr. Coupar's call to Mr. Hiltz by calling him "bad with money".

[127] All persons, whether engaged in seasonal or regularly intermittent employment, are entitled to dignity in the workplace as an implied condition of their employment agreement.

3. If bad faith is proven, does it rise to the level for an award in aggravated or punitive damages?

Aggravated Damages

[128] Bastarache J, wrote in *Keays*, at para 57 concerning aggravated damages for dismissal as follows:

> [57] Damages resulting from the manner of dismissal must then be available only if they result from circumstances described in Wallace, namely where the employer engages in conduct during the course of dismissal that is "unfair or is in bad faith by being, for example, untruthful, misleading or unduly insensitive."(para 98)

[129] The Court, in canvassing the facts of Mr. Hiltz' dismissal, has determined that Elmsdale acted in bad faith.

[130] Aggravated damages are compensatory, with the quantity of the award based on the harm to the plaintiff. (*Vorvis v. Insurance Corporation of British Columbia*, [1989] 1 S.C.R. 1085 at para. 6:

> Aggravated damages are awarded to compensate for aggravated damage. …they take account of intangible injuries and by definition will generally augment damages assessed under the general rules relating to the assessment of damages. Aggravated damages are compensatory in nature and may only be awarded for that purpose. Punitive damages, on the other hand, are punitive in nature and may only be employed in circumstances where the conduct giving the cause for complaint is of such nature that it merits punishment.

(See also *McIntyre v. Grigg*, 2006 CanLii 37326 (ONCA) at para 49, 50 and 60.)

[131] In some respect, this is a family matter. Mr. Hiltz was visibly distressed when recalling his employment with the company, and its ending. I am convinced that he was deeply affected by the manner in which his job with Elmsdale came to an end, and was distressed at how to deal with the loss.

[132] Mr. Hiltz had come to trust his employer, in a singular way, seeing Elmsdale as not just as a company that paid him to dig and lay sod but as a family enterprise of which he was a member. He especially relied on his relationship with Mr. Coupar. When the employment ended, the relationship ended.

[133] Mr. Hiltz was vulnerable, as he has a limited education. This, coupled with his age and low skilled work experience did not make it likely he could find comparably paid employment. He was wholly reliant on Elmsdale and the regularity of his seasonal employment to support his family. His wife testified that his employment income was not the sole income, and that she was also employed, but the loss of the Elmsdale job caused more stress on the family, and she observed more stress and anxiety for Mr. Hiltz specifically.

[134] Mr. Hiltz' physician Dr Burden provided medical information that was included in the joint exhibit book provided by the parties, and he did not testify. In these materials, Dr Burden notes that anxiety and sleeplessness were triggered at the end of Mr. Hiltz' employment with Elmsdale, that required medication. He noted Mr. Hiltz lost "… a stable framework for an individual who is otherwise not highly resilient." Mr. Hiltz' wife's evidence corroborated this account.

[135] While *Keays* noted that "The normal distress and hurt feelings which result from dismissal are not compensable" (at para. 56) this dismissal was characterized by Elmsdale's bad faith, triggering an unusual level of uncertainty and anxiety for Mr. Hiltz, who did struggle as a result and required medical intervention.

[136] While I have considered the cases provided by Mr. Hiltz to ascertain damages, I find that the appropriate level of aggravated damages in this matter are in the lower range. The cases provided for consideration engaged individuals who experienced significant physical or psychological harms. as a result of their manner of their dismissal, and while Mr. Hiltz was affected, I do not find that his damages rise to the higher level.

[137] The Court will award an amount of $15, 000 for aggravated damages.

Punitive Damages

[138] Mr. Hiltz submits that an award of punitive damages is warranted in this matter, and relies upon *Bhasin*, *Hill v. Church of Scientology* [1995] 2 SCR 1130, and *Whiten v. Pilot Insurance Co.* [2002] 1 SCR 595.

[139] Further, there is reliance on *Boucher v. Wal-Mart Canada Corp*., 2014 ONCA 419 in which punitive damages in breach of an employment contract were awarded to a plaintiff in the amount of $100,000.

[140] The plaintiff is required to prove that the actions of the defendant were malicious, oppressive and high-handed, and a marked departure from ordinary standards of decent behaviour. Further, there must be proof that the award for punitive damages is rationally required to punish the defendant and meet the

objectives of retribution, deterrence and denunciation. And, on the third element, the plaintiff must show that the defendant committed a separate actionable wrong independent of the underlying claim for damages. (*Whiten*)

[141] On a review of the evidence, I do not find that there is a separate actionable wrong established by the plaintiff. While Elmsdale's actions toward the plaintiff warranted an award for aggravated damages, there isn't evidence of conduct that is "harsh, vindictive, reprehensible and malicious", as well as "extreme in its nature" deserving of condemnation. (*Keays* at para. 68, quoting *Vorvis*, at p.1108).

Conclusion

[142] Mr. Hiltz is to receive damages in lieu of notice equivalent to twelve months at an average of $4762.83 per month.

[143] Aggravated damages are awarded in the amount of $15,000.00. There is no award for punitive damages.

[144] The Court received written submissions from Mr. Hiltz and Elmsdale concerning pre-judgment interest.

[145] They are in agreement that 2.5% interest is an appropriate amount to be applied in regard to an award of aggravated damages. They differ in regard to the

rate applicable to damages in lieu of notice, with Elmsdale putting forward 4% and Mr. Hiltz's submission of 5% as an appropriate amount.

[146] I have read the submissions and caselaw submitted on this point, and have determined that 5% pre-judgment interest is applicable.

[147] In the event that the parties are unable to agree on costs, I will receive written submissions within 30 days of this decision to determine the issue.

Rowe, J.