CITATION: Wilds v. 1959612 Ontario Inc., 2024 ONSC 3452
COURT FILE NO.: CV-21-00661737-0000
DATE: 20240614

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: BARBARA WILDS, Plaintiff

AND:

1959612 ONTARIO INC. o/a GIBSON BUILDING SUPPLIES

BEFORE: VERMETTE J.

COUNSEL: *Alexis Radojcic and Patrycia Geca*, for the Plaintiff

Jonathan L. Frustaglio, for the Defendant

HEARD: November 17, 2023

ENDORSEMENT

[1] The Plaintiff brings a motion for summary judgment in this wrongful dismissal action against the Defendant, her former employer. Among other things, the Plaintiff argues that the termination provisions in her employment agreement are unenforceable, and she seeks damages in lieu of reasonable notice for a period of five months, reimbursement of business expenses incurred before the termination of her employment, mental distress damages and punitive damages.

[2] In my view, this is an appropriate case for summary judgment, even though both sides failed to put their best foot forward on various issues. I find that the termination provisions in the Plaintiff's employment agreement are unenforceable because they violate the *Employment Standards Act, 2000*, S.O. 2000, c. 41 ("***ESA***"). I conclude that the appropriate notice period is two months and that the Plaintiff failed to establish her entitlement to mental distress damages. However, the Plaintiff is granted punitive damages.

A. FACTUAL BACKGROUND

1. The parties

[3] The Defendant, 1959612 Ontario Inc. ("**Gibson**"), is a corporation engaged in the business of providing roofing and exterior building supplies. Gibson has seven locations across Ontario. Its head office is located in Aurora.

[4] The Plaintiff, Barbara Wilds, worked for Gibson for 4.5 months in the position of executive assistant. She started working for Gibson on June 15, 2020 and was terminated without cause and without notice on October 29, 2020. She was 52 years old at the time of termination.

2. The Employment Agreement

[5] Ms. Wilds received a written offer of employment from Gibson on June 4, 2020. The letter setting out the offer enclosed an employment agreement ("**Employment Agreement**") and stated that other important terms of Ms. Wilds' employment were set out in the Employee Handbook, which formed part of her Employment Agreement. Ms. Wilds executed a copy of the Employment Agreement on June 8, 2020.

[6] The Employment Agreement provides for a 90-day probation period. It includes the following sections on bonuses and expenses:

> **7. BONUSES**
>
> 7.1 The Organization may, at its sole discretion, pay bonuses to you from time to time. You agree that the Organization has no obligation to do so, and that payment of any bonus does not create a future obligation to pay further bonuses. A bonus schedule for the first year amounting to a potential of 5% of annual salary will be mutually formulated during the first 90 days of employment.
>
> 7.2 You also agree that no bonus will be payable once you cease active employment with the Organization. For example, should you resign from your employment with the Organization, you will not be entitled to payment of any bonuses that might otherwise have been paid after the date of your resignation. Should you be dismissed with or without cause, you will not be entitled to payment of any bonuses that might otherwise have been paid after the date of your resignation or dismissal, even if it would have been payable during the applicable period of notice.
>
> 7.3 Other than as required by the *Act*, bonuses will not be taken into consideration in calculating any termination pay or pay in lieu of notice.
>
> […]
>
> **9. EXPENSES**
>
> 9.1 You shall be reimbursed for all authorized out-of-pocket expenses actually and properly incurred by you in connection with your duties hereunder. Any expenses incurred by you must have prior approval by a supervisor. For all such expenses, you shall furnish to the Organization statements and vouchers as and when required by the Organization.
>
> 9.2 Use of your personal automobile is expected for business purposes (which does not include travelling to and from the office) and will be reimbursed at the current rate, which will change over time. Currently, it is reimbursed at the rate of $0.46 per kilometre.

[7] The Employee Handbook states the following regarding expense reimbursements:

> Expenses incurred by an employee must have prior approval by a supervisor. Gibson reimburses employees for approved business expenses and for all approved business related travel on a monthly basis. Employees who have incurred business expenses are required to submit an Expense Report Form with itemized receipts to the Accounts Payable/Payroll Department no later than the end of the month following the month in which the expense was incurred.

[8] The Employment Agreement also includes a section on termination which provides the following:

> **15. END OF EMPLOYMENT AND TEMPORARY LAYOFFS**
>
> 15.1 Although it is difficult to contemplate ending our relationship when it is just beginning, it is mutually beneficial to determine our respective obligations ahead of time. This Agreement can be terminated prior to the expiration of the term set out above in any of the following circumstances:
>
> […]
>
> (c) **Termination Without Cause:** We may terminate your employment at any time and in our sole discretion by providing you with written notice and/or pay in lieu of notice. The notice / pay in lieu to be provided will be two (2) weeks plus any applicable notice and severance requirements in accordance with the *Employment Standards Act, 2000* (the "**Severance Period**").
>
> If pay in lieu of notice is provided, you will receive only your base salary and employment-related health and dental benefits for the applicable period, save and except for short-term disability, long-term disability, and which will not continue beyond the statutory notice period or as required by applicable employment standards legislation.
>
> You have an obligation to take all reasonable steps to mitigate the loss of your employment. Your obligation includes an obligation to accept reasonable alternate work offered to you if your position with the Organization ends.
>
> If you obtain alternative employment (or otherwise commence earning income in lieu of working for the Organization) before the expiry of the Severance Period, the payments will end immediately and the Organization will pay you the equivalent of 50% of the amount owed from the date you commence alternative employment (or otherwise commence earning income in lieu of working for the

Organization) and the expiry of the Severance Period, provided that you will never receive less pay in lieu of notice (and severance pay, as applicable) than you are entitled to under the employment standards legislation applicable to your employment.

You agree to immediately advise the Organization when you receive an offer of employment, commence alternative employment (or otherwise commence earning income in lieu of working for the Organization).

You agree that in exchange for the notice and/or pay set out herein, you will execute a Full and Final Release, in a form acceptable to the Organization, pursuant to which you will agree to waive any and all claims relating to your employment with the Organization or the termination thereof.

[…]

(e) **Termination With Cause:** We may terminate your employment for just cause at any time without notice, pay in lieu of notice, severance pay, or other liability, other than any notice, pay in lieu of notice or severance required pursuant to the applicable employment standards legislation. For the purposes of this Agreement, just cause includes, but is not limited to:

(i) a material breach of this Agreement or our employment policies;

(ii) unacceptable performance standards;

(iii) theft, dishonesty or falsifying records, including providing false information as part of your application for employment;

(iv) intentional destruction, improper use or abuse of Organization property;

(v) violence in the workplace;

(vi) obscene conduct at our premises, property or during Organization-related functions at other locations;

(vii) harassment of your co-workers, supervisors, managers, customers, suppliers or other individuals associated with the Organization;

(viii) insubordination or willful refusal to take directions;

(ix) intoxication or impairment in the workplace;

(x) repeated, unwarranted lateness, absenteeism or failure to report for work;

(xi) personal or off-duty conduct (including online conduct) that prejudices the Organization's reputation, services or morale; or

(xii) any conduct that would constitute just cause pursuant to common law.

It is intended that this termination provision includes any entitlements you have pursuant to the *Act*. In the event that your entitlements pursuant to the *Act* exceed these contractual provisions, those statutory provisions shall replace these contractual provisions and no further payments are required. You agree that the provision of notice, pay in lieu, or a combination of both as set out above will fully satisfy all obligations of the Organization to you, whether arising pursuant to statute, common law or otherwise, and that you will have no further entitlement to notice, pay in lieu, or severance arising out of your employment or the termination thereof. To be clear, these provisions replace any common law entitlement that you would otherwise have.

[9] Schedule B to the Employment Agreement is entitled "Employee Benefits". It states as follows:

Separate Employee Benefits booklet can be provided (Life, Health & Dental)

(no Short term or Long term disability is available)

[10] The Employee Handbook states that Gibson provides the following benefits for regular full-time employees: health insurance, dental insurance, accidental death and dismemberment insurance, and basic life insurance.

[11] Schedule C to the Employment Agreement is entitled "Bonuses" and reads as follows:

- $2,250.00 (5% of annual salary)

  Objectives to be mutually determined during the first 90 days of employment

3. Ms. Wilds' employment at Gibson

[12] Ms. Wilds started working for Gibson on June 15, 2020. She reported to the Chief Executive Officer ("**CEO**"), the Director of Operations and the Director of Sales and Development. She was the only executive assistant at Gibson during her employment. Her duties and responsibilities included the following:

a. preparing weekly and ad hoc reports, charts, graphs, and presentations;

b. assisting with purchasing supplies;

c. maintaining and updating warehouse inspection documents, inventory documents, and health and safety documents;

d. assisting with hiring and/or job postings, and recruitment;

e. assisting with writing policies and procedures;

f. managing expense reporting for the persons she reported to;

g. sending and monitoring daily COVID-19 surveys; and

h. preparing for training and support of systems.

[13] Ms. Wilds completed her probationary period on September 15, 2020.

[14] Ms. Wilds' duties and responsibilities required her to travel to Gibson's various branch locations and other places as required for the purposes of attending meetings, undergoing training, or picking up supplies, including food for meetings. To expedite her work travels, Gibson authorized her to take the 407 ETR (express toll route) highway and to expense the charges. Ms. Wilds submitted the invoices she received for using the 407 ETR highway to Gibson for reimbursement.

[15] In early October 2000, Ms. Wilds met with Gibson's CEO to discuss her bonus targets for her first year. The following bonus criteria/schedule were formulated at that time:

a. 1% to be earned upon completion of phone reorganization and rollout of Company phone change from Rogers to Telus;

b. 1% to be earned upon completion of getting supplier meetings organized;

c. 1% to be earned upon completion of onboarding and offboarding policies and procedures;

d. 1% to be earned upon assisting with moving office locations in March 2021; and

e. 1% to be earned upon fulfilling any other task required at the Company's discretion.

[16] Ms. Wilds' evidence is that she completed the tasks set out in (a) and (b) above, and that she would have had the opportunity to complete the other tasks had Gibson not terminated her employment. According to Ms. Wilds, Gibson's CEO informed her that she would be paid the appropriate portion of her bonus upon completing each of the bonus tasks, i.e., 1% of her base salary for each task.

[17] In answers to undertakings, Gibson stated without any detail or explanation that Ms. Wilds had not completed any of the bonus criteria.

[18] Ms. Wilds did not take any vacation time during her employment.

4. Termination of employment

[19] On October 29, 2020, Ms. Wilds was given the following letter ("**Termination Letter**"):

> The management of Gibson Building Supplies has decided to terminate your Employment Contract dated June 4th, 2020.
>
> The termination is effective Thursday Oct. 29, 2020, in accordance with section 15.1(c) "Termination without Cause". The notice / pay in lieu to be provided will be 2 (two) weeks plus any applicable notice and severance requirements in accordance with the *Employment Standards Act, 2000* (the "**Severance Period**"). This amounts to 3 (three) weeks, calculated to be $2,596.16 less applicable taxes. Accrued vacation less vacation taken will be an additional $726.92 less applicable taxes. An additional bonus of 1% equivalent to $450.00 less applicable taxes will also be provided. Health and Dental benefits will continue until November 20th, 2020.
>
> All amounts will be paid within 10 business days upon receipt of a signed "Full and Final Release" (enclosed).

[20] Ms. Wilds did not sign the full and final release enclosed with the Termination Letter. As a result, Gibson did not pay her any of the amounts set out in the Termination Letter. Gibson only paid Ms. Wilds her wages up to the termination date.

[21] At the time of her termination, Ms. Wilds was 52 years old and her annual compensation included the following:

a. a base salary of $45,000.00 per annum;

b. group benefit plan, which included health and dental benefits, life insurance, and accidental death and dismemberment insurance;

c. eligibility for a bonus equal to 5% of her base salary, i.e., $2,250.00; and

d. two weeks of vacation per year.

[22] On the day Gibson terminated her employment, Ms. Wilds informed Gibson that she had incurred 407 ETR highway expenses for which she needed to be reimbursed. At that time, she had not yet received the invoices for these expenses. On November 12, 2020, through her lawyer, she submitted invoices to Gibson's lawyer showing that she had incurred $46.93 in 407 ETR highway charges – $12.78 on September 30, 2020 and $34.15 on October 28, 2020. Gibson has not reimbursed these amounts to Ms. Wilds.

[23] Ms. Wilds states in her affidavit that Gibson has also not paid:

a. her statutory minimum entitlement to one week of termination pay;

b. her statutory minimum entitlement to payment of all accrued and unused vacation pay; and

c. her contractual entitlement to unpaid wages for the earned bonus.

[24] Ms. Wilds' lawyers have notified Gibson in writing of its failure to pay Ms. Wilds' statutory minimum entitlements on numerous occasions.

[25] Gibson has acknowledged owing Ms. Wilds $762.92, less applicable taxes, for accrued vacation.

[26] In answers to undertakings, Gibson stated that Ms. Wilds' vacation pay, *ESA* minimum entitlements and business expenses (i.e., 407 ETR highway expenses) had been approved, but had not been paid to date due to a clerical error.

[27] Ms. Wilds submitted her application for employment insurance benefits on November 26, 2020.

[28] Gibson issued Ms. Wilds' record of employment on December 1, 2020, approximately one month after her termination. Ms. Wilds alleges that this lateness delayed her ability to seek employment insurance benefits and exacerbated her already-precarious financial situation.

[29] Ms. Wilds gives the following evidence in her affidavit:

> I do not know why Gibson has refused to provide me with the payments required by the Employment Agreement and *Employment Standards Act, 2000*. Because Gibson has failed to communicate a reason for its refusal to pay me, I am left with the belief that its conduct is intended to be a form of bullying and intimidation.
>
> Gibson's high-handed conduct was vindictive, malicious, and intended to cause me mental distress.
>
> Gibson's misconduct flagrantly breached my Employment Agreement, the *Employment Standards Act, 2000,* and the *Employment Insurance Act*.

Gibson failed to deal with me honestly and in good faith.

I suffered mental and financial distress because of Gibson's reprehensible misconduct.

5. Mitigation

[30] Soon after her termination, Ms. Wilds updated her resume to apply for jobs. Gibson did not provide her with any type of reference letter or a letter confirming her employment, despite Ms. Wilds' request for such a letter at the time of her termination and a subsequent request by her lawyer.

[31] Ms. Wilds maintained a "mitigation journal" setting out her efforts to find employment following her termination. The mitigation journal shows that she applied for over 245 positions and had a number of interviews. Ms. Wilds states in her affidavit that it was incredibly difficult to find reasonable, alternative employment given the extensive lockdowns, stay-at-home orders, and other pandemic-related restrictions. She believes that the government restrictions that were intended to curb the COVID-19 pandemic had a direct and meaningful impact on her ability to find replacement employment.

[32] Ms. Wilds remained unemployed for 8.5 months. On June 28, 2021, approximately three weeks after a stay-at-home order was lifted, she was offered full-time employment as a Payroll and Benefits Assistant in the health care sector. She started working on July 12, 2021. Her base salary was $40,000.00 per annum.

6. The litigation

[33] This action was commenced on May 5, 2021. Ms. Wilds seeks the following relief in her Statement of Claim:

a. a declaration that she was wrongfully dismissed;

b. damages for wrongful dismissal in the amount of $25,000.00, representing lost earnings, value of lost bonus entitlements, and employment-related benefits over the reasonable notice period;

c. unpaid wages in the amount of approximately $1,500.00

d. accrued but unpaid vacation pay;

e. aggravated, mental distress, moral, and/or punitive damages in the amount of $25,000.00 for Gibson's high-handed, oppressive, and wrongful conduct;

f. special damages incurred by Ms. Wilds to mitigate her losses; and

g. pre-judgment and post-judgment interest.

[34] Ms. Wilds pleads that although the Employment Agreement contains a provision that attempts to limit Gibson's obligations on termination, the clause is void for violating the *ESA*.

[35] Gibson's Statement of Defence is dated July 23, 2021. Gibson denies that Ms. Wilds suffered any damages arising from the termination of her employment. Among other things, Gibson states that it provided Ms. Wilds with pay in lieu of notice and denies that Ms. Wilds is entitled to the common law notice. Gibson relies on the termination without cause provision in the Employment Agreement. Gibson also denies that Ms. Wilds is entitled to the payment of a bonus.

B. DISCUSSION

1. Whether this is an appropriate case for summary judgment

i. General principles applicable on a motion for summary judgment

[36] On a motion for summary judgment, the court must first determine if there is a genuine issue requiring a trial based only on the evidence in the motion record, without using the fact-finding powers set out in Rules 20.04(2.1) and (2.2) of the *Rules of Civil Procedure*. There will be no genuine issue requiring a trial if the summary judgment process: (a) provides the court with the evidence required to adjudicate the dispute fairly and justly, and (b) is a timely, affordable and proportionate procedure. See *Hryniak v. Mauldin*, 2014 SCC 7 at para. 66 ("***Hryniak***").

[37] If there appears to be a genuine issue requiring a trial, the court should then determine if the need for a trial can be avoided by using the powers under Rules 20.04(2.1) and (2.2), i.e., weighing the evidence, evaluating the credibility of deponents, drawing any reasonable inference from the evidence or ordering that oral evidence be presented. The court may, at its discretion, use those powers, provided that their use is not against the interest of justice. Their use will not be against the interest of justice if they will lead to a fair and just result and will serve the goals of timeliness, affordability and proportionality in light of the litigation as a whole. See *Hryniak* at para. 66.

[38] While summary judgment must be granted if there is no genuine issue requiring a trial, the decision to use either of the expanded fact-finding powers or to call oral evidence is discretionary. See *Hryniak* at para. 68 and Rules 20.04(2), 20.04(2.1) and 20.04(2.2) of the *Rules of Civil Procedure*.

[39] A party moving for summary judgment has the evidentiary burden of showing that there is no genuine issue requiring a trial with respect to a claim or defence: Rule 20.04(2)(a). The burden shifts to the responding party to prove that its claim or defence has a real chance of success only after the moving party has discharged its evidentiary burden of establishing that there is no genuine issue requiring a trial. See *Sanzone v. Schechter*, 2016 ONCA 566 at para. 30 ("***Sanzone***") and *Kinectrics Inc. v. FCL Fisker Customs & Logistics Inc.*, 2020 ONSC 6748 at para. 35.

[40] Each party must put its best foot forward to establish whether or not there is a genuine issue requiring a trial: see *Ramdial v. Davis*, 2015 ONCA 726 at para. 27 ("***Ramdial***"). The court is

entitled to assume that the record contains all the evidence that the parties would present at trial: see *Toronto-Dominion Bank v. Hylton*, 2012 ONCA 614 at para. 5 and *Broadgrain Commodities Inc. v. Continental Casualty Company*, 2018 ONCA 438 at para. 7. Thus, if the moving party meets the evidentiary burden of producing evidence on which the court could conclude that there is no genuine issue of material fact requiring a trial, the responding party must either refute or counter the moving party's evidence or risk a summary judgment: see *Soliman v. Bordman*, 2021 ONSC 7023 at para. 133. A responding party has an obligation to "lead trump or risk losing" and cannot rely on allegations or denials in the pleadings; it must present evidence of specific facts demonstrating that there is a genuine issue requiring a trial: see *Ramdial* at paras. 28 and 30, and *Sylvite v. Parkes*, 2020 ONSC 5569 at para. 16. A self-serving affidavit is not sufficient in itself to create a triable issue in the absence of detailed facts and supporting evidence: see *Guarantee Co. of North America v. Gordon Capital Corp.*, [1999] 3 S.C.R. 432 at para. 31 (***Gordon Capital***").

[41] The principles governing the admissibility of evidence on a summary judgment motion are the same as those that apply at trial, save for the limited exception of permitting an affidavit made on information and belief found in Rule 20.02(1) of the *Rules of Civil Procedure*. See *Sanzone* at para. 15.

ii. Positions of the parties and application to this case

[42] Ms. Wilds' position is that this case is appropriate for summary judgment. She notes that Ontario courts have approved the use of summary judgment in wrongful dismissal cases on multiple occasions where the principal issue was the reasonable notice period. She also notes that Ontario courts have awarded moral and aggravated damages on motions for summary judgment where the employer failed to provide all of the employee's statutory entitlements.

[43] Gibson's position is that there are genuine issues requiring a trial with respect to whether:

a. the termination provision is illegal and voided due to an alleged breach of the *ESA*;

b. Ms. Wilds is entitled to notice pay, if any;

c. Ms. Wilds acted reasonably in mitigating her damages;

d. Ms. Wilds is entitled to additional damages; and

e. the claim was brought in the correct court or jurisdiction.

[44] In particular, Gibson submits that a motion for summary judgment is inappropriate given Ms. Wilds' pursuit of mental distress damages.

[45] I find that this is an appropriate case for summary judgment. As set out in *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53 at paras. 57-58, contractual interpretation is an exercise based on objective, not subjective, evidence. Therefore, the record before me provides the evidence required to adjudicate the issues related to the interpretation and enforceability of the

termination provisions. The record also provides the evidence required to determine the appropriate notice period. With respect to mitigation and mental distress damages, as discussed further below, unsupported and self-serving allegations are insufficient to raise a genuine credibility issue or a genuine issue requiring a trial because parties have an obligation to put their best foot forward and to lead trump or risk losing. Finally, the point raised by Gibson regarding the court's jurisdiction is not relevant at this stage as it is really an issue related to costs, which can be argued at the relevant time.

[46] Thus, I conclude that there is sufficient evidence before the court to adjudicate fairly and justly the dispute between the parties, and that it is appropriate to make dispositive findings on this motion. Providing a timely, affordable and proportionate procedure to the parties is also an important consideration in this case.

[47] I now turn to the issue of the enforceability of the termination provisions in the Employment Agreement.

2. Whether the termination provisions are enforceable

[48] Ms. Wilds' position is that the termination provisions in the Employment Agreement are unenforceable because they violate the *ESA*. Gibson argues that the termination provisions comply with the *ESA*.

i. General legal principles regarding the enforceability of termination provisions

[49] At common law, there is a longstanding presumption that an employer cannot terminate employment without reasonable notice. This presumption is rebutted if the contract of employment clearly specifies some other period of notice, whether expressly or impliedly. To rebut this presumption, employers and employees are free to contractually agree to any notice period, provided the agreement respects the minimum standards stipulated in the *ESA*. If the contractual notice period runs afoul of the *ESA*, then the presumption is not rebutted, and the employee is entitled to reasonable notice of termination, i.e., to pay in lieu of notice for the reasonable period under the common law. See *Rossman v. Canadian Solar Inc.*, 2019 ONCA 992 at para. 17 ("***Rossman***").

[50] A termination clause will rebut the presumption of reasonable notice only if its wording is clear because employees should know at the beginning of their employment what their entitlement will be at the end of their employment. Termination clauses should be interpreted in a way that encourages employers to draft agreements that comply with the *ESA*. If the only consequence employers suffer for drafting a termination clause that fails to comply with the *ESA* is an order that they comply, then they will have little or no incentive to draft a lawful termination clause at the beginning of the employment relationship. Faced with a termination clause that could reasonably be interpreted in more than one way, courts should prefer the interpretation that gives the greater benefit to the employee. See *Wood v. Fred Deeley Imports Ltd.*, 2017 ONCA 158 at para. 28 and *Waksdale v. Swegon North America Inc.*, 2020 ONCA 391 at para. 7 ("***Waksdale***").

[51] The enforceability of a termination provision in an employment agreement is determined as at the time that the agreement was executed. The wording of the agreement alone should be considered, not what the employer might have done on termination. Further, the fact that the employer may not be relying on a provision in the employment agreement or that the provisions may accord with the minimum employment standards in certain circumstances is irrelevant. See *Waksdale* at paras. 8, 11 and *Rossman* at para. 29.

[52] If a provision within a termination clause conflicts with the minimum standards prescribed by the *ESA*, it is not open to the court to strike out only the offending provision. See *Rossman* at para. 18. In *Waksdale*, the Court of Appeal explained (at para. 10) how termination provisions in an employment agreement should be approached and interpreted:

> […] An employment agreement must be interpreted as a whole and not on a piecemeal basis. The correct analytical approach is to determine whether the termination provisions in an employment agreement read as a whole violate the *ESA*. Recognizing the power imbalance between employees and employers, as well as the remedial protections offered by the *ESA*, courts should focus on whether the employer has, in restricting an employee's common law rights on termination, violated the employee's *ESA* rights. While courts will permit an employer to enforce a rights-restricting contract, they will not enforce termination provisions that are in whole or in part illegal. In conducting this analysis, it is irrelevant whether the termination provisions are found in one place in the agreement or separated, or whether the provisions are by their terms otherwise linked. […]

[53] A severability clause in an employment agreement does not have any effect on clauses of the agreement that have been made void by statute, and cannot be used to rewrite, read down or interpret the terms of the agreement so as to provide for the minimum standard imposed by the *ESA*. See *Waksdale* at para. 14 and *North v. Metaswitch Networks Corporation*, 2017 ONCA 790 at para. 44.

[54] Further, "saving provisions" in termination clauses cannot save employers who attempt to contract out of the *ESA*'s minimum standards, and cannot reconcile a provision that is in direct conflict with the *ESA* from the outset. Holding otherwise creates the risk that employers will slip sentences into employment contracts in the hope that employees will accept the terms. This outcome exploits vulnerable employees who hold unequal bargaining power in contract negotiations. Moreover, it flouts the purpose of the *ESA* – to protect employees and to ensure that employers treat them fairly upon termination. Employers cannot be permitted to draft provisions that capitalize on the fact that many employees are unaware of their legal rights and will often refrain from challenging notice provisions in court. Attempting to reconcile the provisions of a termination clause with the benefit of hindsight runs counter to the remedial purpose of the *ESA*. See *Rossman* at paras. 35, 40-41.

ii. Relevant provisions of the ESA

[55] No employer and no employee may contract out of or waive a requirement or prohibition under the *ESA* that applies to an employer for the benefit of an employee, and any such contracting out or waiver is void. See subsections 5(1) and 1(1) ("employment standard") of the *ESA*.

[56] The *ESA* provides that no employer shall terminate the employment of an employee who has been continuously employed for three months or more unless the employer:

a. has given to the employee written notice of termination and the notice has expired, or

b. has paid to the employee termination pay in a lump sum equal to the amount the employee would have been entitled to receive had notice been given, and continued to make whatever benefit plan contributions would be required to be made in order to maintain the benefits to which the employee would have been entitled had they continued to be employed during the period of notice that they would otherwise have been entitled to receive.

See sections 54 and 61 of the *ESA*.

[57] If an employee's period of employment is less than one year, at least one-week notice of termination must be given: see subsection 57(a) of the *ESA*.

[58] Subsection 60(1) of the *ESA* states as follows:

> During a notice period under section 57 or 58, the employer,
>
> (a) shall not reduce the employee's wage rate or alter any other term or condition of employment;
>
> (b) shall in each week pay the employee the wages the employee is entitled to receive, which in no case shall be less than his or her regular wages for a regular work week; and
>
> (c) shall continue to make whatever benefit plan contributions would be required to be made in order to maintain the employee's benefits under the plan until the end of the notice period.

[59] "Wages" is defined in the *ESA* as including the following:

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

b. any payment required to be made by an employer to an employee under the *ESA*; and

c. any allowances for room or board under an employment contract or prescribed allowances.

However, the word "wages" does not include expenses and travelling allowances and bonuses that are dependent on the discretion of the employer and that are not related to hours, production or efficiency: see subsection 1(1) of the *ESA* ("wages").

[60] Subsection 35.2(a) of the *ESA* requires an employer, in relation to an employee who is entitled to vacation and whose period of employment is less than five years, to pay to the employee vacation pay that is equal to at least four percent of the wages, excluding vacation pay, that the employee earned during the period for which the vacation is given.

[61] Pursuant to sections 55 and 64(3) of the *ESA*, "prescribed employees" are not entitled to notice of termination, termination pay or severance pay under the *ESA*. The disentitlement provisions are found in a regulation to the *ESA*, *Termination and Severance of Employment*, O. Reg. 288/01 ("***Regulation***"). Among other things, an employee who has been guilty of wilful misconduct, disobedience or wilful neglect of duty that is not trivial and has not been condoned by the employer is not entitled to notice of termination, termination pay or severance pay under the *ESA*: see subsections 2(1)3 and 9(1)6 of the *Regulation*. These provisions require more than what is required for just cause for dismissal at common law. In order to be disentitled from the *ESA* entitlements under the "wilful misconduct" standard in the *Regulation*, the employee must do something deliberately, knowing they are doing something wrong: see *Render v. ThyssenKrupp Elevator (Canada) Limited*, 2022 ONCA 310 at paras. 79-80.

iii. Application to this case

[62] I find that the termination provisions in the Employment Agreement – i.e., both the termination without cause provision and the termination with cause provision – violate the *ESA* and are unenforceable. Consequently, Ms. Wilds is entitled to reasonable notice of termination under the common law.

[63] There are many problems with the termination provisions. Among others:

a. The termination without cause provision states that if pay in lieu of notice is provided, Ms. Wilds "will receive only [her] base salary and employment-related health and dental benefits for the applicable period". As stated above, pursuant to section 60 of the *ESA*, an employer cannot reduce wages or alter any other term or condition of employment during the notice period. Employees are entitled to their regular wages and the continuation of all employee benefits. Pursuant to section 61, where an employee is provided with termination pay in lieu of notice, they must receive all entitlements required by section 60, which includes all wages and benefits without reduction or alteration. *See Groves v. UTS Consultants Inc.*, 2019 ONSC 5605 at para. 56 ("***Groves***"). The termination provision in this case, which only uses the "base salary" to calculate the pay in lieu of notice as well as health and dental benefits, does not include vacation pay, bonus and the other benefits that Ms. Wilds was entitled to under the Employment Contract, i.e., life insurance and

accidental death and dismemberment insurance. This constitutes a breach of sections 60 and 61 of the *ESA* (read in conjunction with sections 1(1) and 57). See *Groves* at para. 57.

b. The termination without cause provision requires that Ms. Wilds execute a full and final release in a form acceptable to Gibson in exchange for pay in lieu of notice. The employer's obligation to provide the *ESA* entitlements is not contingent on the execution of a release or anything else. Making the employer's compliance with the *ESA* subject to the execution of a release violates the *ESA*, notably section 54.

c. The termination with cause provision contains categories of "just cause" for termination without notice that fall short of the statutory exemptions set out in the *Regulation*, i.e., they include instances where the employee would not necessarily have done something deliberately, knowing that they were doing something wrong. For example: "a material breach of this Agreement or our employment policies"; "unacceptable performance standards"; "repeated, unwarranted lateness, absenteeism or failure to report for work"; "personal or off-duty conduct (including online conduct) that prejudices the Organization's reputation, services or morale"; and "any conduct that would constitute just cause pursuant to the common law". See *Perretta v. Rand A Technology Corporation*, 2021 ONSC 2111 at paras. 44-45 ("***Perretta***").

   The first paragraph of the termination with cause provision contains the following words: "other than any notice, pay in lieu of notice or severance required pursuant to the applicable employment standards legislation". In my view, these words are insufficient to save the termination provision. Among other things, these words are immediately followed by categories that clearly do not comply with the *ESA* and the requirement for deliberate conduct. As was the case with the termination provision in *Perretta*, the termination provision in Ms. Wilds' Employment Agreement states that it is subject to the *ESA*, but the inclusion of a number of categories of "just cause" flies in the face of the *ESA*. At a minimum, this creates confusion and ambiguity. As stated in *Perretta*, the test of validity of a termination provision is not to struggle to find a way that the provision can be read consistent with the *ESA*, however convoluted. When the clause is ambiguous, it must be read in a manner that provides the highest benefit to the employee. Here, the ambiguity must be resolved in favour of Ms. Wilds by finding that the termination with cause provision violates the *ESA*. See *Perretta* at paras. 54-56.

[64] The last paragraph of section 15.1 of the Employment Agreement is a "saving provision". For convenience, I reproduce this paragraph again:

> It is intended that this termination provision includes any entitlements you have pursuant to the *Act*. In the event that your entitlements pursuant to the *Act* exceed these contractual provisions, those statutory provisions shall replace these contractual provisions and no further payments are required. You agree that the

> provision of notice, pay in lieu, or a combination of both as set out above will fully satisfy all obligations of the Organization to you, whether arising pursuant to statute, common law or otherwise, and that you will have no further entitlement to notice, pay in lieu, or severance arising out of your employment or the termination thereof. To be clear, these provisions replace any common law entitlement that you would otherwise have.

[65] Gibson's attempts to contract out of the *ESA* in the termination provisions cannot be saved by this paragraph: see *Perretta* at para. 58. This paragraph cannot reconcile the parts of the termination provisions that are and have been in direct conflict with the *ESA* from the outset. See *Rossman* at paras. 35, 40-41. The statement at the beginning of the paragraph that the intention of the termination provisions is to include any entitlement that the employee has pursuant to the *ESA* is contradicted by clear violations of the *ESA* in the termination provisions. Such language creates ambiguity and confusion for an employee and does not constitute clear wording that allows an employee to know at the beginning of their employment what their entitlement will be at the end of their employment. In my view, the termination provisions in the Employment Agreement were not drafted with strict compliance with the *ESA* as their main objective. See *Waksdale* at para. 7.

[66] In support of its position that the termination provisions in the Employment Agreement comply with the *ESA*, Gibson relies on *Kielb v National Money Mart Company*, 2015 ONSC 3790 ("***Kielb SCJ***"); aff'd 2017 ONCA 356 ("***Kielb CA***"). In addition to having been decided before key decisions of the Court of Appeal referred to above, this case involved a termination clause that was structured differently than the one before this Court. In *Kielb SCJ*, the *ESA* entitlements were clearly maintained in the first part of the termination clause, and the requirement for a full and final release only applied to any additional payments made by the employer. See *Kielb SCJ* at paras. 9, 14, 60 and *Kielb CA* at para. 11. In the present case, the termination provisions do not ensure in clear and unambiguous language that Ms. Wilds' statutory entitlements under the *ESA* would be paid. Further, the requirement for a full and final release is not limited to payments over and above Ms. Wilds' statutory entitlements under the *ESA*.

[67] *Burton v. Aronovitch McCauley Rollo LLP*, 2018 ONSC 3018, another case relied upon by Gibson, is also distinguishable. Like in *Kielb SCJ*, the termination clause in that case maintained the *ESA* entitlements and did not attempt to reduce them, for instance, by limiting the pay in lieu of notice to base salary and some (but not all) benefits.

[68] In light of the foregoing, I conclude that the termination provisions of the Employment Agreement, read as a whole, violate the *ESA*. Therefore, they are unenforceable and do not rebut the presumption that Gibson cannot terminate Ms. Wilds' employment without giving her reasonable notice under the common law: see *Waksdale* at para. 10 and *Rossman* at para. 17.

3. Notice period

[69] Ms. Wilds' position is that the appropriate period of reasonable notice in the circumstances of this case is five months, i.e., more than her actual period of employment.

[70] Gibson's position is that, in the event the termination provisions are found to be unenforceable, the appropriate notice period ranges between one and two months.

i. General legal principles regarding reasonable notice

[71] At common law, an employer has the right to terminate the employment contract without cause subject to the duty to provide reasonable notice. The failure to provide reasonable notice is a contractual breach that leads to an award of damages in lieu thereof. This breach does not turn on whether or not the employer acted honestly or in good faith. The remedy for a breach of the implied term to provide reasonable notice is an award of damages based on the period of notice which should have been given, with the damages representing what the employee would have earned in this period. The damages are compensation for the income, benefits and bonuses that the employee would have received had the employer not breached the implied term to provide reasonable notice. The employment contract effectively "remains alive" for the purposes of assessing the employee's damages, in order to determine what compensation the employee would have been entitled to but for the dismissal. See *Matthews v. Ocean Nutrition Canada Ltd.*, 2020 SCC 26 at paras. 43, 49, 53, 54 ("***Matthews***").

[72] In wrongful dismissal actions, the following factors are to be considered when determining the reasonable notice period: (a) the character of the employment; (b) the length of service of the employee; (c) the age of the employee; and (d) the availability of similar employment, having regard to the experience, training and qualifications of the employee. See *Bardal v. Globe & Mail Ltd.*, 1960 CanLII 294, 24 D.L.R. (2d) 140 at 145 (Ont. H.C.). Determining the period of reasonable notice is an art, not a science, and there is no one "right" figure for reasonable notice: *Lowndes v. Summit Ford Sales Ltd.*, 2006 CanLII 14 at para. 9 (Ont. C.A.) ("***Lowndes***"). Judges must weigh and balance all relevant factors and no one factor should be given disproportionate weight. I note, however, that the factor of the character of the employment has been found to be a factor of declining relative importance: see *Lowndes* at para. 9, *Arnone v. Best Theratronics Ltd.*, 2015 ONCA 63 at para. 11 and *Di Tomaso v. Crown Metal Packaging Canada LP*, 2011 ONCA 469 at para. 27.

[73] Notice is to be determined by the circumstances existing at the time of termination and not by the amount of time that it takes the employee to find employment. The time it takes to find a new job goes to mitigation of damages, not to the length of notice. See *Holland v. Hostopia Inc.*, 2015 ONCA 762 at para. 61. However, with respect to terminations that occurred during the COVID-19 pandemic, some courts have taken into account "the prevailing economic uncertainties" at the time of the termination "which had a negative impact on [the employee's] ability to secure similar alternative employment." See, e.g., *Pavlov v. The New Zealand and Australian Lamb Company Limited*, 2021 ONSC 7362 at paras. 16, 19 and *Lamontagne v. J.L. Richards & Associates Limited*, 2021 ONSC 2133 at para. 64.

ii. Application to this case

[74] Looking at the relevant factors in the context of this case, at the time of her termination Ms. Wilds: (a) worked as an executive assistant; (b) had been employed by Gibson for

approximately 4.5 months; (c) was 52 years old; (d) was dismissed during the COVID-19 pandemic but was able to apply for over 245 positions in the eight months following her termination; and (e) had a Grade 13 diploma and was employed in various administrative positions over the years. Ms. Wilds' resume suggests that prior to starting at Gibson in June 2020, her last employment had ended in April 2017, more than three years earlier. There is no evidence before me that Ms. Wilds left another position to go work for Gibson. I agree with Gibson's submission that Ms. Wilds' skills were easily transferable to a comparable role.

[75] Ms. Wilds states the following in her affidavit with respect to the impact of the COVID-19 pandemic on her search for employment:

> Given the extensive lockdowns, stay-at-home orders, and other pandemic-related restrictions, it was incredibly difficult to find reasonable, alternative employment.
>
> I believe that the government restrictions that were intended to curb the COVID-19 pandemic had a direct and meaningful impact on my ability to find replacement employment.

[76] These statements are unparticularized and self-serving. They are also contradicted to some extent by Ms. Wilds' mitigation journal which shows that she applied for over 245 positions during an eight-month period. Without any explanation or evidence as to any actual difficulty encountered by Ms. Wilds as a result of the pandemic, I only give limited weight to this factor. See *Nassar v. Oracle Global Services*, 2022 ONSC 5401 at para. 32. Further, and in any event, this factor is only one of the factors to be considered and balanced against other factors when determining the appropriate notice period. See *Iriotakis v. Peninsula Employment Services Limited*, 2021 ONSC 998 at paras. 19, 22. I also note that Ms. Wilds obtained her position at Gibson during the COVID-19 pandemic.

[77] I have considered all of the cases referred to by the parties in support of their respective positions with respect to the length of the notice period. Ultimately, each case is fact-specific. I note that the two cases relied upon by Ms. Wilds where the notice period was equal to or higher than the period of employment involved representations or assurances made to the employee that the job would not change in the immediate future and the amount of notice was increased to some extent to take this factor into account: see *Pollock v. Patrick Cotter Architect Inc.*, 2005 BCSC 1799 and *Oakley v. Astra Pyrotechnics Canada Ltd.*, 1989 CarswellOnt 774 (Dist. Ct.). There is no evidence before me of any similar representations or assurances.

[78] In light of the foregoing, after reviewing the relevant case law and considering the relevant factors, I find the appropriate notice period to be two months.

4. Damages for wrongful dismissal, including bonus and benefits

i. General principles applicable to wrongful dismissal damages

[79] The basic principle in awarding damages for wrongful dismissal is that the terminated employee is entitled to compensation for all losses arising from the employer's breach of contract

in failing to give proper notice. The damages award should place the employee in the same financial position the employee would have been in had such notice been given and the employee had worked to the end of the period of reasonable notice. In other words, in determining damages for wrongful dismissal, the court will typically include all of the compensation and benefits that the employee would have earned during the notice period. The employment contract effectively "remains alive" for the purposes of assessing the employee's damages, in order to determine what compensation the employee would have been entitled to but for the dismissal. See *Matthews* at paras. 49, 53, 54, *Paquette v. TeraGo Networks Inc.*, 2016 ONCA 618 at para. 16 ("***Paquette***") and *Lin v. Ontario Teachers' Pension Plan*, 2016 ONCA 619 at para. 84 ("***Lin***").

[80] Damages for wrongful dismissal may include an amount for a bonus or other benefit that the employee would have received had they continued in their employment during the notice period, or damages for the lost opportunity to earn a bonus or benefit. This is generally the case where the bonus or benefit is an integral part of the employee's compensation package. This can be the case even where a bonus or benefit is described as "discretionary". It is important to remember that the employee's claim is not for the bonus or benefit itself, but for common law contract damages as compensation for the income (including bonus and benefit payments) that the employee would have received had the employer not breached the employment contract by failing to give reasonable notice of termination. See *Paquette* at paras. 17, 23.

[81] A two-step approach applies to determine whether the appropriate quantum of damages for breach of the implied term to provide reasonable notice includes bonus payments and certain other benefits:

a. Would the employee have been entitled to the bonus or benefit as part of their compensation during the reasonable notice period?

b. If so, do the terms of the employment contract or bonus plan unambiguously take away or limit that common law right?

See *Matthews* at para. 55 and *Paquette* at paras. 30-31.

[82] The Supreme Canada stated the following with respect to the second step:

> [65] To this end, the provisions of the agreement must be absolutely clear and unambiguous. So, language requiring an employee to be "full-time" or "active", such as clause 2.03, will not suffice to remove an employee's common law right to damages. After all, had Mr. Matthews been given proper notice, he would have been "full-time" or "actively employed" throughout the reasonable notice period […]. Indeed, the trial judge and the majority of the Court of Appeal agreed that an "active employment" requirement is not sufficient to limit an employee's damages […].
>
> [66] Similarly, where a clause purports to remove an employee's common law right to damages upon termination "with or without cause", such as clause 2.03, this language will not suffice. Here, Mr. Matthews suffered an *unlawful* termination

> since he was constructively dismissed without notice. As this Court held in *Bauer v. Bank of Montreal*, [1980] 2 S.C.R. 102, at p. 108, exclusion clauses "must clearly cover the exact circumstances which have arisen". So, in Mr. Matthews' case, the trial judge properly recognized that "[t]ermination without cause does not imply termination without notice" (para. 399; see also *Veer v. Dover Corp. (Canada) Ltd.* (1999), 120 O.A.C. 394, at para. 14; *Lin*, at para. 91). Yet, it bears repeating that, for the purpose of calculating wrongful dismissal damages, the employment contract is not treated as "terminated" until after the reasonable notice period expires. So, even if the clause had expressly referred to an unlawful termination, in my view, this too would not unambiguously alter the employee's common law entitlement. [Emphasis in the original.]

[83] Thus, a term that requires active employment when the bonus or benefit is paid, without more, is not sufficient to deprive an employee terminated without reasonable notice of a claim for compensation for the benefit they would have received during the notice period, as part of their wrongful dismissal damages. See *Paquette* at para. 47.

[84] A provision that no bonus or benefit is payable where employment is terminated by the employer prior to the payout of the bonus or benefit is, in effect, the same as a requirement of "active employment" at the date of payout. Without more, such wording is insufficient to deprive a terminated employee of the bonus or benefit they would have earned during the period of reasonable notice, as a component of damages for wrongful dismissal. A reference to the termination of employment must be taken to refer to an employee's lawful termination absent clear language to the contrary. See *Lin* at paras. 89-91.

ii. Application to this case

[85] Ms. Wilds is entitled to $7,500.00 for lost salary for the two-month notice period.[1] She is also entitled to the reimbursement of the two 407 ETR highway invoices in the total amount of $46.93, and to accrued but unpaid vacation pay in the amount of $726.92.

[86] With respect to benefits, Gibson has not provided any evidence with respect to the cost or value of benefits. In such circumstances, the approach usually adopted by courts for determining the employee's entitlement to benefits is to fix it at 10% of the employee's base salary. See *Groves* at paras. 95-97, *Ruston v. Keddco Mfg. (2011) Ltd.*, 2018 ONSC 2919 at paras. 114-117, and *Andros v. Colliers Macaulay Nicolls Inc.*, 2019 ONCA 679 at para. 65.

[87] Gibson has not formulated any arguments in opposition to such an approach to calculate Ms. Wilds' entitlement to benefits.

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[1] Ms. Wilds' annual salary was $45,000.00, i.e., approximately $3,750.00 per month ($45,000.00 / 12).

[88] Accordingly, I find that Ms. Wilds is entitled to $750.00 for benefits during the two-month notice period.[2]

[89] I now turn to the issue of Ms. Wilds' bonus.

[90] Ms. Wilds gave evidence in her affidavit regarding the agreed-upon criteria and schedule for her bonus and stated that she had completed two of the "bonus tasks" prior to her termination. In response to Ms. Wilds' evidence, Gibson had to "lead trump or risk losing". It failed to do so. Gibson filed an affidavit of its Controller/HR Manager, who had no personal knowledge of the facts relevant to Ms. Wilds' bonus and who included in his affidavit a number of bare statements/denials that were later contradicted by Gibson's CEO in answers to undertakings. As for Gibson's answers to undertakings on the issue of the bonus, they were provided after all the evidence was already in, and they could not be tested under cross-examination. Further, they were equivalent to a self-serving affidavit that did not contain detailed facts and supporting evidence. Consequently, I find that Gibson's answers to undertakings are insufficient to create a triable issue with respect to the bonus issue: see *Gordon Capital* at para. 31. Again, Gibson failed to put its best foot forward.

[91] I also note that the "evidence" of Gibson's CEO in the answers to undertakings that Ms. Wilds had not completed any of the bonus tasks prior to the termination of her employment is contradicted by Gibson's own Termination Letter which states that "[a]n additional bonus of 1% equivalent to $450.00 less applicable taxes will also be provided". This constitutes an implicit acknowledgement that at least one bonus task had been completed and that this part of the bonus was owing.[3]

[92] In the absence of an appropriate evidentiary response by Gibson, I accept Ms. Wilds' evidence that she had completed two of the bonus tasks prior to her termination and that the agreed-upon bonus schedule was that she would be paid the appropriate portion of her bonus upon completing each of the bonus tasks. Thus, $900.00 of the bonus was earned before her termination and is owed to her pursuant to the bonus criteria/schedule that were mutually formulated by Gibson and Ms. Wilds in accordance with section 7.1 of the Employment Agreement.

[93] The remaining issue is whether Ms. Wilds is entitled to damages for the lost opportunity to earn further parts of her bonus during the notice period.

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[2] $45,000.00 x 10% = $4,500.00, representing the value of benefits for one year. $4,500.00 / 12 x 2 = $750.00, representing the value of benefits for two months.

[3] I do not accept Gibson's position that the Termination Letter is inadmissible because it is protected by settlement privilege. The Termination Letter was not an offer to settle anything. It simply followed section 15.1(c) of the Employment Agreement, including the requirement for a full and final release.

[94] Section 7.2 of the Employment Agreement purports to exclude the "payment of any bonuses that might otherwise have been paid after the date of your […] dismissal, even if it would have been payable during the applicable period of notice."

[95] It is unnecessary for me to determine whether section 7.2 of the Employment Agreement validly takes away or limits Ms. Wilds' entitlement to a bonus as part of her compensation during the notice period because I am not satisfied on the balance of probabilities that Ms. Wilds meets the first step of the applicable test, i.e., whether she would have been entitled to the remaining parts of her bonus as part of her compensation during the two-month notice period. See *Matthews* at para. 55.

[96] The three bonus tasks that remained uncompleted at the time of Ms. Wilds' termination were the following:

a. completion of onboarding and offboarding policies and procedures;

b. assisting with moving office locations in March 2021; and

c. fulfilling any other task required at the Company's discretion.

[97] With respect to the task related to onboarding and offboarding policies and procedures, there is no evidence before me about what this task involved. Among other things, there is no evidence as to whether Ms. Wilds had started working on that task prior to her termination and how much time would have been required to complete that task. Aside from the bald statement in her affidavit that she would have had the opportunity to complete the remaining bonus tasks had Gibson not terminated her employment, Ms. Wilds does not provide any other information/evidence about the bonus tasks. Given the absence of evidence on this point, I cannot conclude that Ms. Wilds would have been able to complete this task during the two-month notice period.

[98] The task related to an office move in March 2021 would clearly not have been completed during the two-month notice period which would have ended many weeks before March 2021.

[99] The last task had not yet been formulated and could have taken place at any time prior to the end of Ms. Wilds' first year of employment, i.e., prior to June 15, 2021. Given the absence of evidence as to what this task might have entailed and without more information regarding the discussion related to this task between Ms. Wilds and Gibson's CEO, I cannot conclude that Ms. Wilds would have been able to complete this task and earn this part of her bonus during the two-month notice period.

[100] As stated above, it is unnecessary to discuss the second step of the test, i.e., whether the terms of the Employment Agreement unambiguously take away or limit Ms. Wilds' common law right to damages with respect to the bonus. However, it is my view that they do not because the terms of the Employment Agreement do not contemplate an unlawful termination, i.e., a termination without notice. See *Lin* at paras. 90-91 and *Matthews* at para. 66. Ms. Wilds' termination was unlawful as she was not provided any reasonable notice or pay in lieu of notice.

[101] In light of the foregoing, I find that Ms. Wilds is entitled to damages for wrongful dismissal in the total amount of $9,923.85 for lost salary ($7,500.00), benefits ($750.00), earned bonus ($900.00), accrued but unpaid vacation ($726.92) and reimbursement of expenses ($46.93).

5. Mitigation

[102] Gibson argues that Ms. Wilds failed to mitigate her damages. It also argues that it is entitled to a set-off for any amounts that Ms. Wilds received in respect of employment insurance. Ms. Wilds' position is that she fulfilled her duty to mitigate.

i. General legal principles regarding mitigation

[103] To mitigate any damages arising from dismissal, an employee must make reasonable efforts to seek comparable employment. It remains the employer's burden to prove the employee's failure to do so. The employer bears the onus of demonstrating both that an employee has failed to make reasonable efforts to find work and that work could have been found. "Comparable employment" does not mean "any employment" but comprehends employment comparable to the dismissed employee's employment with their former employer in status, hours and remuneration. See *Evans v. Teamsters Local Union No. 31*, 2008 SCC 20 at para. 30, *Dussault v. Imperial Oil Limited*, 2019 ONCA 448 at para. 5 and *Carter v. 1657593 Ontario Inc.*, 2015 ONCA 823 at para. 6.

[104] Employment insurance benefits are not deducted from wrongful dismissal damages: see *Jack Cewe Ltd. v. Jorgenson*, [1980] 1 S.C.R. 812 at 818, *IBM Canada Limited v. Waterman*, 2013 SCC 70 at paras. 44, 51, and *Brake v. PJ-M2R Restaurant Inc.*, 2017 ONCA 402 at paras. 101-107.

ii. Application to this case

[105] Based on the governing authorities set out in the previous paragraph, I reject Gibson's argument that it is entitled to a set-off for any amounts that Ms. Wilds received in respect of employment insurance.

[106] Gibson was required to put its best foot forward to show that Ms. Wilds had failed to make reasonable efforts to find work and that work could have been found during the notice period. Gibson failed to do so. There is no evidence before me that Ms. Wilds would likely have obtained comparable employment in the two months following her termination if she had taken certain steps. The only evidence filed by Gibson is two lists of job searches for executive assistant positions dated November 26, 2020 and November 15, 2021. Given its date, the second list is irrelevant. While the first list is within the relevant time period, it is simply attached to an affidavit, without any evidence being given about it, including how it was obtained. Further, the manner in which the list was printed: (a) does not show the full description and/or the full list of requirements of many positions; and/or (b) provides very limited information about the positions. Accordingly, based on the information provided in the list, it is not possible to determine whether the positions in the list were comparable to Ms. Wilds' position at Gibson. For instance, some of the positions do not indicate the salary offered. In addition, some positions in the list did not constitute

comparable employment (e.g., salary not comparable) or had requirements that Ms. Wilds could not meet, e.g., a bachelor's degree.

[107] In light of the evidence contained in Ms. Wilds' mitigation journal, which I accept, the list attached to Gibson's affidavit is insufficient to establish anything. I also note the fact that, despite Ms. Wilds' requests, Gibson failed to provide Ms. Wilds with any type of reference letter or a letter confirming her employment, which could have assisted her in her search for employment.

[108] Gibson failed to put its best foot forward with respect to its allegation that Ms. Wilds failed to mitigate her damages. Based on the evidence before me, which I am entitled to assume represents the evidence that the parties would present at trial, there is no merit to Gibson's argument regarding mitigation and no genuine issue requiring a trial on this point.

6. Mental distress damages[4]

[109] Ms. Wilds' position is that she is entitled to aggravated and moral damages (which I describe as mental distress damages – see footnote 4). She seeks $25,000.00 for such damages in her Statement of Claim. Gibson's position is that Ms. Wilds is not entitled to such damages because, among other things, the elements for mental distress damages are not made out.

i. General legal principles applicable to mental distress damages

[110] The contract of employment is, by its very terms, subject to cancellation on notice or subject to payment of damages in lieu of notice without regard to the ordinary psychological impact of that decision. At the time the contract was formed, there would not ordinarily be contemplation of psychological damage resulting from the dismissal since the dismissal is a clear legal possibility. Thus, the normal distress and hurt feelings resulting from dismissal are not compensable. See *Honda Canada Inc. v. Keays*, 2008 SCC 39 at para. 56 ("***Honda***").

[111] However, an employee can allege mistreatment in the manner of dismissal by the employer. A breach of the duty to exercise good faith in the manner of dismissal is independent of any failure to provide reasonable notice. It can serve as a basis to answer for foreseeable injury that results from callous or insensitive conduct in the manner of dismissal. See *Matthews* at para. 44.

[112] Damages resulting from the manner of dismissal are available only 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. See *Honda* at para. 57. Examples of conduct in dismissal resulting in compensable damages are attacking the employee's reputation by declarations made at the time of dismissal, misrepresentation regarding the reason for the decision,

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[4] The discussion under this heading covers the Plaintiff's claim for moral and aggravated damages: see *Matthews* at footnote 1 and *Honda Canada Inc. v. Keays*, 2008 SCC 39 at para. 59.

or dismissal meant to deprive the employee of a pension benefit or other right, permanent status for instance. See *Honda* at para. 59.

[113] Awards for damages for psychological injury resulting from conduct in the manner of termination are intended to be compensatory. See *Honda* at para. 60. Thus, if the employee can prove that the manner of dismissal caused mental distress that was in the contemplation of the parties, those damages will be awarded through an award that reflects the actual damages. Damages must be appropriately made out and causation must be established. See *Honda* at para. 59 and *Matthews* at para. 39.

ii. Application to this case

[114] It is unnecessary for me to decide whether Gibson's conduct in this case meets the threshold to grant mental distress damages because Ms. Wilds has failed to establish that Gibson's conduct caused her any mental distress.

[115] The only evidence in the record before me regarding Ms. Wilds' alleged mental distress is this one sentence in Ms. Wilds' affidavit: "I suffered mental and financial distress because of Gibson's reprehensible conduct." This conclusory and self-serving statement is insufficient to prove anything. It is not supported by facts, particulars or evidence. During her cross-examination, Ms. Wilds confirmed that she did not produce any documents on this motion with respect to any financial distress that she alleges she suffered as a result of her termination. Ms. Wilds also confirmed that she did not seek any medical attention for any mental distress. While it is not necessary to provide medical evidence of psychological injury to be granted moral/mental distress damages, some external evidence of mental distress is typically required to make out a successful claim. See *Groves* at para. 113. Ms. Wilds has failed to adduce such evidence in this case.

[116] Further, in the absence of any description of the mental distress that was allegedly suffered, it is not possible for this Court to determine whether the mental distress in question goes beyond the normal distress and hurt feelings resulting from dismissal, which are not compensable.

[117] Ms. Wilds relies on *Pohl v. Hudson's Bay Company*, 2022 ONSC 5230 ("***Pohl***") in support of her position that she should be granted mental distress damages. However, in that case, the employee had adduced evidence that the employer's conduct had caused him mental distress beyond the understandable distress and hurt feelings normally accompanying a dismissal. See *Pohl* at paras. 61-64, 73, 113. That was also the case in *Russell v. The Brick Warehouse LP*, 2021 ONSC 4822 at paras. 56, 58, another case relied upon by Ms. Wilds.

[118] Ms. Wilds has failed to put her best foot forward with respect to her claim for mental distress damages. Based on the evidence before me, which I am entitled to assume represents the evidence that Ms. Wilds would present at trial, there is no merit to Ms. Wilds' claim for mental distress damages and no genuine issue requiring a trial on this point.

7. Punitive damages

[119] While Ms. Wilds' focus was mainly on mental distress/moral damages during the motion, she also claims punitive damages in her Statement of Claim, and the issue of punitive damages was raised on the motion and discussed in Gibson's Factum. Both in her Statement of Claim and on the motion, Ms. Wilds tended to "bundle" moral damages and punitive damages together, which should not be done given that different legal principles apply to these two different types of damages.

i. General legal principles applicable to punitive damages

[120] To obtain an award of punitive damages in a claim for breach of contract, a plaintiff must meet three basic requirements. First, the plaintiff must show that the defendant's conduct was reprehensible; other descriptions include "malicious, oppressive and high-handed", and "a marked departure from ordinary standards of decent behaviour". Second, the plaintiff must show that a punitive damages award, when added to any compensatory award, is rationally required to punish the defendant and to meet the objectives of retribution, deterrence and denunciation. Third, the plaintiff must show that the defendant committed an actionable wrong independent of the underlying claim for damages for breach of contract. Punitive damages are the exception rather than the rule. See *Boucher v. Wal-Mart Canada Corp.*, 2014 ONCA 419 at paras. 79-80 and *Whiten v. Pilot Insurance Co.*, 2002 SCC 18 at paras. 36, 94 ("***Whiten***").

[121] A failure to comply with the provisions of the *ESA* constitutes an independently actionable wrong for the purpose of the test for punitive damages: see *Giacomodonato v PearTree Securities Inc.*, 2023 ONSC 3197 at para. 201.

ii. Application to this case

[122] I find that Gibson's conduct was a marked departure from ordinary standards of decent behaviour and sufficiently reprehensible to merit an award of punitive damages. Gibson repeatedly failed to comply with the *ESA* and committed flagrant breaches of the minimum statutory employment standards in Ontario. Among other things, it failed to pay Ms. Wilds her minimum entitlements under the *ESA*, it issued Ms. Wilds' Record of Employment very late, and it failed to reimburse Ms. Wilds for the legitimate business expenses properly incurred during her employment.

[123] In addition, Gibson failed to take any steps to correct its various failures despite the fact that they were repeatedly brought to its attention before and after the litigation was commenced. What I find particularly egregious is the fact that Gibson's affiant showed up for his cross-examination without knowing whether or not Gibson had paid Ms. Wilds her *ESA* minimum entitlements, including vacation pay, and whether or not Gibson had reimbursed Ms. Wilds for the 407 ETR highway charges that she had incurred. In its answers to undertakings, Gibson stated that these payments had been approved but had not been paid to date "due to clerical error". However, this alleged clerical error was never corrected because Gibson had not yet paid anything to Ms. Wilds at the time of the hearing. Such an error – if in fact it was an error – should have

been discovered months earlier given that it was brought to Gibson's attention numerous times that Ms. Wilds had not been paid anything.

[124] Such conduct is unacceptable on the part of an employer and a litigant. I note that the factual situation in this case is very similar to the situation in *Pohl* where punitive damages were awarded: see *Pohl* at paras. 116-121.

[125] In my view, a modest award of punitive damages in addition to the award of wrongful dismissal damages is rationally required to punish Gibson and to meet the objectives of retribution, deterrence and denunciation. Given the vulnerable position of dismissed employees, the remedial and protective policy reflected in the *ESA* and the need for employers to comply with their legal obligations in situations of power imbalance, it is important to deter Gibson and others from similar misconduct in the future and to mark the community's collective condemnation of what happened: see *Whiten* at para. 94.

[126] In light of the extent of the misconduct, the degree of culpability of Gibson and the award of wrongful dismissal damages, I have come to the conclusion that an appropriate quantum of punitive damages is $10,000.00, like in *Pohl*.

C. CONCLUSION

[127] The action and the motion for summary judgment are granted, in part.

[128] Ms. Wilds is awarded damages for wrongful dismissal in the total amount of $9,923.85, comprised of the following:

a. $7,500.00 for lost salary during the two-month notice period;

b. $750.00 for benefits during the two-month notice period;

c. $900.00 for earned bonus;

d. $726.92 for accrued but unpaid vacation pay; and

e. $46.93 for the reimbursement of expenses (i.e., the two 407 ETR highway invoices).

[129] Ms. Wilds is also awarded punitive damages in the amount of $10,000.00.

[130] Ms. Wilds' claim for aggravated/mental distress/moral damages is dismissed.

[131] Prejudgment and postjudgment interest are granted in accordance with sections 128 and 129 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43.

[132] If costs cannot be agreed upon, Ms. Wilds shall deliver submissions of not more than three pages (double-spaced), excluding the costs outline, by June 28, 2024. Gibson shall deliver its responding submissions (with the same page limit) by July 12, 2024. Ms. Wilds may deliver reply

submissions of not more than 1.5 pages (double-spaced) by July 26, 2024. The submissions of all parties shall also be sent to my assistant by e-mail and uploaded onto CaseLines.

Vermette J.

Date: June 14, 2024