IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Liivam v. MacKay Contracting Ltd.,*
2025 BCSC 582

Date: 20250331
Docket: S229834
Registry: Vancouver

Between:

Kristopher Kenneth Liivam

Plaintiff

And

MacKay Contracting Ltd. and Sherritt International Corporation

Defendants

Before: The Honourable Justice Veenstra

Reasons for Judgment

Counsel for the Plaintiff:	D.D. McWhinnie
Counsel for the Defendants:	J.T.E. Gelber E. Wyllie
Place and Dates of Trial:	Vancouver, B.C. October 1-2, 2024
Place and Date of Judgment:	Vancouver, B.C. March 31, 2025

Table of Contents

Introduction

[1] The plaintiff claims for breach of an employment contract. The primary claim is that he was wrongfully dismissed by being dismissed within his probationary period without a proper, good faith assessment of his suitability, and on the basis of accusations that were not (or were not properly) investigated. The defendants say that the investigation may have been "summary", but it was adequate in the circumstances and would not have made a difference in any event.

[2] The plaintiff also seeks damages in respect of the manner of his termination, by which he was confined to a hotel in Cuba without being told what allegations had been made against him. The defendants say there were *bona fide* safety concerns that led to the instruction that he remain at the hotel.

[3] The plaintiff claims against the first defendant, MacKay Contracting Ltd. ("MacKay"), as the named party on his employment agreement, and the second defendant, Sherritt International Corporation ("Sherritt"), on the basis that it was a common employer and is jointly and severally liable for damages.

[4] This trial involved only two witnesses, only one of which had personal knowledge of the primary material facts.

Facts

Background Facts

[5] The defendant MacKay is a civil construction contractor based in Cranbrook, British Columbia. It has experience on projects involving road construction, bridges, dams and railways, as well as work with the mining sector, largely (but not exclusively) focused on projects in British Columbia and Alberta. Its workforce ranges from 100 to 300 employees depending on the projects that it has on the go at any given time.

[6] The defendant Sherritt is a Canadian company, with a head office in Toronto, involved in various resource development projects including mining operations and

oil and gas exploration. It has a number of interests in Cuba, including the Moa Joint Venture which mines, processes and refines nickel and cobalt.

[7] In August 2022, Sherritt contracted with MacKay to provide on-site construction management, supervision, and health and safety services for a project that involved expansion of a tailings pond at the Moa Joint Venture site.

[8] MacKay's contract with Sherritt included a Schedule "D" titled "Company Deportment Policy for Contractors", and subtitled "Contractor Personnel Policy on Deportment and Responsibilities in the Republic of Cuba". Its provisions include the following introductory remarks:

> The reputation of [Sherritt] is one of its most valued assets and integrity is one of the cornerstones on which it rests. It is the responsibility of every Sherritt contractor to build on that foundation. This calls upon all of us individually, and as a company, to adhere to high standards and embrace open and honest dealings in all our relationships. The Company expects all contractors to commit their best efforts to the Company's success, to act prudently in their use of Company property and other resources, and to attempt in every way to uphold Sherritt's good name in all day-to-day business dealings within, outside of the Company and while representing the Company while in the Republic of Cuba. …
>
> Because the services are taking place in the Republic of Cuba, many unique legal, social and cultural differences exist that without proper knowledge or understanding, could present difficulties to both the individual and their family. You are expected to use good common sense and courtesy in your interaction with others while working in the Republic of Cuba.
>
> At your work location in Cuba, you will be exposed to the laws of the host country that may well be different from your own. As a contractor of Sherritt during the performance of services in Cuba, you will be expected to uphold the Company's reputation and comply fully with all such local laws and applicable Company policies and local work rules.
>
> Failure to comply with such laws, policies and rules may result in immediate repatriation and termination of your contract with Sherritt.

[9] The policy then listed certain specific rules, including the following:

> <u>Alcohol Use</u>
>
> - Alcohol is strictly banned from the Company work site.
> - Reporting to work under the influence of alcohol is strictly forbidden.

Drug Use

- The use of illegal drugs, both on and off Company property, is strictly forbidden.

Respect for the Local Community

- Commit to zero tolerance regarding all forms of sexual exploitation.
- Do not pay or hire people to provide sexual services of any kind.

Photography

- Taking pictures, video or sound recording of any non-Sherritt or non-Moa Joint Venture operating facility is not permitted.

Personal Behaviour and Accountability

- Respect for the culture and people of Cuba should be apparent in all behavior
- Maintain ethical standards and practices while conducting business and in relations with all stakeholders relating to the services that are being provided
- Respect and comply with all laws of the country as well as all Company policies
- Respect and comply with all laws of the country as well as all Company policies
- Reject all forms of discrimination and harassment on or off Sherritt and Moa Joint Venture property. Fighting or any other forms of violence will not be tolerated
- Reject all forms of bribery; specifically, know and strictly comply with Sherritt's Foreign Anti-Corruption Policy
- Inappropriate use of information technologies, such as pornography, is considered illegal in Cuba

[10] Another schedule to the contract between MacKay and Sherritt, Schedule "B", titled "Special Terms and Conditions", included the following:

> (c) In the event that any of [MacKay's] personnel breach any of [MacKay's] obligations under this Agreement, [Sherritt] has the right to request immediate termination of the work assignment of such personnel … For greater certainty, [Sherritt] may request immediate termination of the work assignment of [MacKay's] personnel upon the occurrence of any of the following events if [Sherritt] believes, acting reasonably, that … (iii) such personnel is not acting in compliance with [Sherritt's] policies for workers in the Republic of Cuba as communicated by [Sherritt] …

[11] The plaintiff has worked for over two decades in the construction industry, largely in safety-related roles and often with respect to industrial projects in the oil

and gas sector. He has also worked as a consultant with respect to wildland firefighting. Much of his work over the years was in Alberta and British Columbia, although he had also worked in places like Iraq and Afghanistan.

[12] In about August 2022, the plaintiff saw an employment advertisement posted by MacKay on LinkedIn with respect to the Cuba project. The positions available included both a safety advisor and a construction supervisor. The plaintiff initially reached out to MacKay about the safety-related position, but concluded that the rate of pay offered was too low. However, after their initial discussion, MacKay inquired of the plaintiff about a construction supervisor position. The plaintiff says he was told that the position was intended to be a secondary support position for the on-site construction superintendent, with specific responsibilities in ensuring that documentation was in place and in keeping track of subcontractor hours.

[13] The plaintiff at the time was working to provide safety support to various work being done to an oil refinery during a shutdown. The shutdown was scheduled to end on October 31, 2022, but the work would be gradually winding down in the weeks leading up to that. The plaintiff's evidence was that he was senior enough that he could have stayed to the end, but that he had the ability to leave the project early given that it was winding down.

[14] The plaintiff negotiated with a Mr. Bleier, who at the time was MacKay's Chief Financial Officer. Although Mr. Bleier was the plaintiff's main contact at MacKay's head office, they never actually met in person. The plaintiff's understanding was that he was being hired in the construction supervisor position to work indefinitely on a four weeks on, four weeks off basis, working six days a week, for which he would be paid $1,000 per day. He understood that the project was likely to last for about seven years.

The Employment Contract

[15] On August 23, 2022, the plaintiff signed a formal employment contract with MacKay (the "Employment Agreement"), using what appears to be a standard MacKay form of agreement with respect to the Cuba project.

[16] Section 1 of the Employment Agreement set out general provisions with respect to the plaintiff's employment, including:

> 1.1 The Employee will be employed in the position as detailed in Schedule A of this Agreement and commencing approximately four (4) weeks from signing of this Agreement and Issuance of a Cuban Work Permit, and continuing indefinitely subject to termination by either the Employer or the Employee in accordance with the terms of this Agreement.
>
> 1.2 In carrying out the Employee's duties the Employee will comply with the contents of the Employer's policies as they may exist from time to time (which policies are acknowledged by the Employee to be a constituent element of this Agreement) and with such instructions and assignments as may be provided by the Employer from time to time. …
>
> 1.4 The Employee acknowledges that the Employee will be employed for the Employer as specifically outlined in Schedule "A" (Position of Employment) and Schedule "C" (Job Description) attached and that the Employee's hours of work may vary and may be irregular but, in any event, will be all those hours required to meet the objective of the Employee's position. The remuneration identified on Schedule "B" (Remuneration) attached is in compensation for all hours worked, including those beyond the minimum day and week. The Employee acknowledges the understanding and scope of the project and will ensure compliance with Schedule "D" Project Management Proposal.

[17] It was common ground that the plaintiff at all material times was within a probationary period of employment. Section 1.6 of the Employment Agreement states:

> 1.6 The first 3 consecutive months of active employment shall constitute a period of probation during which the Employer shall have the opportunity to assess the suitability of the Employee's performance and conduct (the "Probation Period").
>
> (a) At any time during the Probation Period, the Employer may terminate the Employee's employment, on the grounds of unsuitability, without providing any working notice or payment in lieu thereof.
>
> (b) The Employee's performance and conduct during the Probation Period shall be assessed, primarily (but not necessarily exclusively), on: productivity, quality, completeness, accuracy, efficiency and timeliness of work; timely and regular attendance at work; and overall conduct, performance and attitude in the workplace.
>
> (c) The Employer shall provide one interim review of the Employee's performance and conduct during the Probation Period and a final decision on the Employee's suitability for ongoing employment prior to the completion of the Probation Period.

[18] Additional provisions with respect to termination are found in s. 4 of the Employment Agreement. Section 4.1 required six weeks' notice in writing for an employee to resign from employment. Section 4.2 provided for termination at any time without notice for reasons which amount, at law, to just cause. Section 4.3 provided that:

> 4.3 At any time after the conclusion of the Probation Period, the Employer may also terminate the Employee's employment at its sole discretion … on a not for cause basis …

Such termination required a minimum of two weeks' notice, which minimum notice period would increase after each completed year of service.

[19] The first schedule to the Employment Agreement, titled "Schedule A – Position of Employment", contained the following:

> Position with MacKay Contracting Ltd – Site Supervisor
>
> Project Assignment – Sherritt Int'l Cuba MOA
>
> Work Schedule – 6 days on 1 (Sunday) days off for a period of one month

[20] Schedule "B" confirmed the plaintiff's remuneration as $1,000 per day. Schedule "C" contained job descriptions, including the following for the "Site Supervisor" position:

> Will report to the Construction Superintendent and will be responsible for the following: Produce Daily Production Reports. Track Progress against established KPIs. Ensure all safety policies and procedures are adhered to. The Onsite Construction Superintendent will work closely with the Sherritt and MOA Contract Manager to coordinate activities, solve problems and ensure all objectives are achieved. The CS will be the senior MacKay employee in country, in their absence their duties will be delegated to the Site Supervisor to ensure seamless management of the project. They will be available on call while out of country.

[21] Although not part of the Employment Agreement document, the plaintiff acknowledged that he had seen and been told about Sherritt's Deportment Policy and understood that he was required to comply with it.

Preparation for Employment in Cuba

[22] On August 29, 2022, the plaintiff virtually attended an orientation meeting involving both Sherritt and MacKay personnel. Notes were kept by one of the Sherritt people, which included a section titled “Various Items Discussed (in random order)”. The discussion included a wide range of topics, including the following:

- After shifts, it is allowed to go to town but, due to Covid, there is some lockdown.
- There is zero tolerance for use of alcohol and drugs.
- Due to hazards, no one is permitted to drive after sunset.

[23] With respect to travel, there are notes that the airport in Holguin is a three-hour drive from Moa, and that:

- For safety reasons, when the sun sets early and arrival in Holguin is at approx. 4-5 p.m., travelers are required to overnight in Holguin and then drive to Moa the next day. Also if flights depart Holguin very early in the morning, travelers are required to overnight in Holguin the night before.

[24] These written notes of the meeting were prepared by a Sherritt employee and emailed to a MacKay employee who then circulated them on August 31, 2022 to the people that MacKay would be sending to Cuba (including the plaintiff). The plaintiff agreed that the document generally reflected the points that were discussed, although he recalled that there was also a discussion of whether photography was permitted – he understood that taking pictures in the town itself was acceptable, but that photography of police, military facilities or an attached separately owned mine was not permitted.

[25] The plaintiff ‘s recollection was that he left his prior project on about September 17, 2022, and began preparing to go to Cuba. He was to be a part of the second shift – with a first group of MacKay staff having previously gone down for their four-week shift.

[26] The plaintiff had decided that he would sell his house in Airdrie, Alberta, and relocate to Belize. He said this was something he had thought about from time to

time, but that the prospect of long-term work in Cuba provided extra impetus. He worked to fix up his house in Airdrie for sale, and made inquiries of real estate agents in Belize. However, he did not sell his house or make any firm plans with respect to Belize before leaving for Cuba.

Working in Cuba

[27] The plaintiff departed Calgary on October 13, 2022, flying initially to Toronto, and then from Toronto to Holguin where he spent the night of October 14, 2022, at a nearby resort – the Rio Paradisus. He paid for a taxi from the airport to the Rio Paradisus, which he said was what he was instructed to do on arrival at Holguin airport. The next morning, he was driven from the Rio Paradisus to Moa. His understanding was that the travel arrangements were made either by Sherritt or MacKay. He said that he was never reimbursed the cost of the taxi from the airport (CA $80).

[28] The plaintiff arrived at the Moa job site on Saturday, October 15, 2022, and went straight to work. He met with a Mr. Harvey (the construction supervisor on the outgoing shift) and Mr. Smith (the safety supervisor on the incoming shift). They did a tour of the project site and organized work stations that had been set up in a group of shipping containers. Mr. Harvey spent time with the plaintiff explaining many details of the project – the plaintiff said that he did not initially realize that this was in part because there would be a hiatus between the two construction superintendents, and Mr. Harvey was preparing the plaintiff to be in charge of the project during that hiatus. The plaintiff said that he had been assured by Mr. Bleier that he would be working with experienced construction superintendents, and would not be left having to “wing it”.

[29] The plaintiff said that the MacKay employee he spent the most time with was the safety supervisor, Mr. Smith. They worked together figuring out what safety policies and practices were and were not yet in place. The plaintiff said that he also spent time coaching Mr. Smith, whose technological skills were not strong, in the

use of Microsoft Office. He felt that for the most part he and Mr. Smith got along, although he found some of Mr. Smith's political views a bit extreme.

[30] The plaintiff said that he also interacted with Mr. Wojcichowsky, Sherritt's project manager on site. He recalled going to Mr. Wojchichowsky's office several times and estimated they had about 8-10 interactions.

[31] The plaintiff also had a number of interactions with a Cuban employee, Mr. Fuentes. The plaintiff was not sure whether Mr. Fuentes worked for Sherritt or MacKay, but said that he was in the office quite frequently, acted as an interpreter and intermediary with the local workforce, and also acted as a chauffeur from time to time. The plaintiff said he also had several discussions with Mr. Fuentes as he sought to learn about the culture of Cuba. The plaintiff said that at one point later on in his time in Cuba, one of the other expats suggested to him that Mr. Fuentes might be connected to the Cuban secret police, which led the plaintiff thereafter to be somewhat cautious as to the things he discussed with Mr. Fuentes.

[32] The plaintiff's work notes from Tuesday, October 18 through Friday, October 21, 2022 indicate that he was the supervisor on site. He recalled that Mr. Harvey had left two or three days after the plaintiff arrived on site, and that there were a few days before the new construction superintendent arrived after Mr. Harvey's departure. The plaintiff said that during those days, he reported to both Mr. Bleier, who was at the MacKay office in Cranbrook, and to Mr. Wojcichowsky at the Sherritt office on site. He sent them all electronic daily reports summarizing in writing the work that was going on, supplemented by photographs he had taken to document the work that was under way. The plaintiff said that he received positive feedback from both of them about his reports.

[33] The new construction superintendent, Mr. Hagerty, arrived on Saturday, October 22, 2022. The plaintiff recalled that when Mr. Hagerty walked into the office, he did not say hello but rather yelled at the plaintiff about his hard hat being on a table. The plaintiff said that was the only concern anyone expressed to him about his job performance during his time in Cuba. He said his relationship with Mr. Hagerty

did not improve from that first impression, and that Mr. Hagerty was the only person in Cuba that he did not get along with – although as will be seen, they only actually worked together for a day and a half.

[34] Sunday, October 23, 2022, was not a scheduled work day. The plaintiff and Mr. Smith went into town and were walking around. They ran into one of the Cuban employees, Walter, who was a member of Sherritt's emergency response team. He and the plaintiff shared an interest in firefighting techniques and equipment, and had previously had conversations (using Google translate) about such matters. The plaintiff and Walter decided to have lunch together. Mr. Smith chose to continue shopping.

[35] Later in the day, the plaintiff wandered by a local nightclub. The DJ was playing music outside the nightclub, which was not yet open. He spoke fluent English and the plaintiff began conversing with him. That led to the nightclub owner giving the plaintiff a tour. The owner eventually introduced the plaintiff to a woman in her twenties who was there, whose name was Dayana. The plaintiff and Dayana ended up having a conversation, using Google translate from the plaintiff's phone in order to communicate.

[36] The plaintiff's evidence was that he had taken the job in Cuba for multiple reasons. He thought the money was good, he was interested in travelling to see new places, and he was interested in meeting women. He had a Tinder profile and had been messaging with local women since he arrived. He was aware of other Sherritt staff who had relationships with local women, and did not understand the Deportment Policy to ban all such interactions.

[37] The plaintiff said that after he left the nightclub, he texted back and forth with Dayana. She sent him photographs, including some which were provocative. He said that they both expressed interest in spending time together, and that Dayana suggested to him that he check with the hotel about whether she could visit him there.

[38] The plaintiff said that during the work day on Monday, October 24, 2022, Mr. Fuentes had a strange conversation with him. The plaintiff recalled that Mr. Fuentes told him something to the effect that people were not what they seemed. He thought that perhaps Mr. Fuentes was suggesting that the nightclub he had been to the day before might have some involvement with the drug trade. The plaintiff said that he did not tell Mr. Fuentes he had been to the nightclub, but that Mr. Fuentes seemed to know about it.

[39] The plaintiff said that after work on the Monday, October 24, 2022, he asked the front desk clerk at the hotel if Dayana could visit him at the hotel. He said the response was that she could come to the dining area, but not to his room. His evidence was that the front desk clerk seemed pleasant about answering his question and did not seem upset.

[40] The plaintiff said that he had dinner with Mr. Smith in the hotel dining room that day. During the dinner, Mr. Hagerty came in and said “there’s trouble brewing with the secret police”, and that if either of them (the plaintiff or Mr. Smith) caused him to lose his job, he would “cause them harm”. The plaintiff said that he was very uncomfortable with the conversation, finished his meal, and got out of there quickly.

[41] It seems clear that Mr. Hagerty and Mr. Smith had a conversation after the plaintiff left, and presumably Mr. Hagerty spoke with Mr. Bleier very shortly thereafter. There followed in short order two emails to Mr. Bleier – one from Mr. Smith, and the other from Mr. Hagerty. The copies of the emails in the record show times of 5:38 p.m. and 5:47 p.m. – I assume that is either Mountain or Pacific time, and that the emails would have been sent at either 7:38 p.m. and 7:47 p.m. or 8:38 p.m. and 8:47 p.m. in Cuba.

[42] Both emails have a subject line of “Statement”. Mr. Smith’s email says that he had been asked by Mr. Hagerty to “give you a statement of my understanding of a situation” in Cuba. In the email, Mr. Smith accused the plaintiff of having displayed “very poor judgment on about everything”, including being rude to staff and engaging in inappropriate talk at the dinner table, as well as ordering that cigarettes be put out

during toolbox meetings. He said that the plaintiff had talked repeatedly about prostitution and drugs. Mr. Smith said that he had been approached that evening by the front desk clerk, who was upset because the plaintiff had asked her to get a girl for him and bring her to his room.

[43] Mr. Hagerty's email basically repeated what he had been told by Mr. Smith about what Mr. Smith had been told by the front desk clerk, and said that this was not the first time the plaintiff had talked about prostitutes.

[44] None of the people involved in these emails gave evidence at trial. The emails were admitted into evidence for limited purposes, which will be discussed below. The plaintiff was asked about the allegations made against him, and said:

a) He believed he was working well with the local staff;

b) He acknowledged that he is sensitive to cigarette smoke, and had asked a couple of times that people either stand back from him if they want to smoke while speaking with him or that they smoke after meetings had concluded;

c) His only conversation with Mr. Smith about drugs was about a time someone had drugged his (the plaintiff's) drink in a different foreign country in order to rob him;

d) He had no conversations with Mr. Smith or Mr. Hagerty about prostitution;

e) He did not believe that Dayana was involved in prostitution, and in particular there had never been any sort of discussion with her about payment in return for sex; and

f) He had not said anything to the front desk clerk about having a prostitute come to his room.

[45] Mr. Bleier replied to Mr. Hagerty with an email time-stamped 8:02 p.m. on October 24, 2022 – just over two hours after the two emails I referenced above. It says:

> We've discussed this situation both internally and with Sherritt. As of right now [the plaintiff] is not to be permitted to go to site. We are working on arranging flights for him as soon as possible. I (Robert) will call him tomorrow to let him know what is going on, but as of right now, please communicate the following with nothing more:
>
> "There has been a complaint. Mackay is currently investigating and that I will be in touch with him before the end of the day Cuba time tomorrow to update him. In the interim he is being asked to stay at the motel and wait for instructions."
>
> Please direct any questions to me.

[46] It seems clear from the documentary record that there was no investigation of any of the allegations made, and that a decision to terminate the plaintiff and have him return to Canada was made within just over two hours of the initial reports from Mr. Smith and Mr. Hagerty, without any inquiry being made of the plaintiff.

Termination

[47] The next morning at 4:58 a.m., Mr. Hagerty texted the plaintiff saying:

> iv been asked to ask you to stay at the via coral today and not come into site. As there has been a complaint that is under investigation by mackay and sherrit. I'm texting to keep this private as you know there is always someone around out there. Robert Blier will be able to take any questions you have in a couple hours when they are up in Canada. Thank You.

[48] The plaintiff replied at 4:59 a.m. saying "ok? May I ask what I did?", to which Mr. Hagerty responded:

> I'm not aware of the situation apologies. They've just asked that you stay at the via today and to not head to town or any where. To stay here at the coral till Robert Blier to phones.

[49] The plaintiff's evidence is that he was really put on edge by these texts, which he read in light of his discussion with Mr. Fuentes the previous morning and Mr. Hagerty's comment about there being issues with the secret police. He said that later in the day, Mr. Bleier called him and said that there were complaints about him,

but that he would not tell the plaintiff what they were. Rather, Mr. Bleier said that there were concerns about the plaintiff's safety, and that if he left the hotel, he might be arrested, but refused to give any further details. The plaintiff says that Mr. Bleier told him that direction came from Sherritt, and that arrangements were being made to get him back to a hotel in Holguin and then on a plane back to Canada.

[50] That afternoon, Mr. Wojcichowsky of Sherritt sent an email to Mr. Bleier:

> It has come to my attention that there has been some incidents with [the plaintiff] after hours that does not promote the Sherritt ethics and professionalism we agreed to follow. We will be doing an investigation and would not want him onsite until this investigation is completed. The alleged activity is not condoned in Cuba and defiantly not by Sherritt and will be investigated and if the investigation verifies the allegations this would be cause for immediate termination under our contract terms. Let me know if you have any questions or comments and would like you to follow up with your personnel to complete this investigation.

[51] This email is somewhat confusing, given that it is clear from earlier communications that a decision had been made the day before that the plaintiff was to be terminated. Although this email reflects an investigation to come, it seems clear that no further investigation occurred.

[52] The plaintiff said that Mr. Bleier had initially told him that he would be provided transportation to Holguin that same day, but that did not happen and it was then unclear what would happen. He was very nervous remaining in Moa given the unclear messages he had received about possible secret police involvement and the risk of arrest. There were numerous texts between the plaintiff and Mr. Hagerty on October 26, 2022, in which Mr. Hagerty said that there were no taxis available. The plaintiff ultimately found a taxi to take him to the same Holguin resort hotel he had stayed at on his arrival. Although Sherritt paid for the taxi, it did not pay for the hotel. The plaintiff spent $360 to stay at the hotel until the flight back to Canada that one of the defendants had booked him on, which was on the Friday, October 29, 2022. He was not reimbursed.

[53] On the Thursday night, the plaintiff became quite intoxicated and was intimate with a Canadian tourist who was staying at the hotel. The defendants did not learn of

this until the discovery process in this litigation, but at trial, they argued that this conduct formed further cause for the plaintiff's termination.

[54] The plaintiff arrived back in Alberta on Saturday, October 30, 2022. He said he had a telephone conversation with Mr. Bleier on his return. It was in this conversation that the plaintiff learned of the allegations that had been made in the emails sent by Mr. Smith and Mr. Hagerty. The plaintiff asked Mr. Bleier if he wanted to hear the plaintiff's side of the story – Mr. Bleier said that he did not, and that it did not matter. The plaintiff said that Mr. Bleier told him he was fired because of misconduct.

[55] At 1:18 p.m. on the afternoon of October 30, 2022, Mr. Bleier emailed Mr. Wojcichowsky of Sherritt, confirming that MacKay had terminated the plaintiff's employment effective that day.

[56] Five minutes later, Mr. Bleier emailed the plaintiff a termination letter. The subject line of the letter stated "termination of probationary employment", and the letter read as follows:

> This letter will confirm our discussion that your probationary employment will be terminated, effective immediately, on the grounds of unsuitability.
>
> You will be provided with the following items:
>
> i. payment for all accrued and outstanding wages, vacation pay, etc., up to and including your final day of work (less required deductions); and
>
> ii. a record of employment (ROE) indicating the without-cause nature of the termination.
>
> We require your immediate return of all of our organization's property you may have in your possession including, but not limited to keys, tools and equipment, clothing, paper and electronic documents, etc.
>
> We wish to remind you that as our former employee you will continue to be subject to a duty of confidentiality to refrain from disclosing information regarding the operation of our organization.
>
> Should you have any questions regarding the contents of this letter, please do not hesitate to contact us directly.

[57] In the cover email, Mr. Bleier stated:

> … attached is your letter of termination. Should you have any questions or require additional information, please email me directly.

[58] The next morning, the plaintiff emailed Mr. Bleier noting that he had only been paid for six days, and that he should have been paid for twelve days. Mr. Bleier responded:

> We made an error in not paying you for the 24th of October and will have that remedied. With regards to the other days, you were confined to your room and then banned from the Moa Nickel site, thus unable to work. This situation was due to your misconduct. As such, we will not be paying you for the 25th or the following days you were scheduled to work up until your termination on the 30th.

[59] The plaintiff was not paid for any work after October 24, 2022.

[60] The plaintiff's evidence was that he searched diligently for new work after his termination, but that it was five months before he found new employment. He was not challenged on this evidence in cross-examination.

[61] The evidence indicated that Mr. Hagerty and Mr. Smith both continued with MacKay for only a few months thereafter. As well, Mr. Bleier left the company around May 2023. None of them were brought by MacKay to be witnesses at the trial.

[62] The only witness for the defendants at trial was MacKay's Chief Operating Officer, Ms. MacKay, who recalled generally being advised by Mr. Bleier that an employee was being terminated in October 2022, but otherwise had no involvement in matters. Her evidence related to verifying MacKay policies and records, including the emails noted above.

Positions of the Parties

The Plaintiff

[63] The plaintiff submits that the employment contract, on its proper interpretation, was for an indefinite period. The plaintiff, in reliance on what he had

been told about the length of the project, had made plans to relocate and was planning his life accordingly.

[64] The plaintiff says that he was wrongfully dismissed by being dismissed during his probationary period without a proper assessment of his suitability and on the basis of accusations that were not properly investigated. The plaintiff says that the law permits an employer to dismiss an employee during their probationary period, without notice and without giving reasons, provided the employer acts in good faith in the assessment of a probationary employee's suitability. That includes providing a reasonable opportunity for the employee to prove their suitability and a reasonable assessment by the employer. The plaintiff says that the defendants failed to do so, and that he was dismissed based on allegations unrelated to his work performance and to which he was given no opportunity to respond. The plaintiff says that the defendants cannot now, having dismissed on the basis of misconduct, say that he was dismissed for reasons of his inability to get along with other employees.

[65] The plaintiff submits that, as a result of the employer's breach, he should be awarded damages based on five months' notice. The plaintiff acknowledges that this is a longer period than the award in *Ly v. Interior Health Authority*, 2017 BCSC 42, which he relies on, but notes that he is older than the plaintiff in *Ly* and made more profound changes to his life in order to move to a new country to work. He notes as well that it took him five months to find new work. The plaintiff notes that, in many wrongful dismissal cases, the length of notice is based on the number of years of service. However, it is submitted that this case – like *Ly* – is within the category of short-service cases.

[66] The plaintiff does not advance any claim in respect of his early departure from his prior employment.

[67] The plaintiff also says that an employer has an obligation to conduct itself in good faith in the manner of termination of an employee, including by investigating complaints in a thorough and fair manner before acting on them, and that the defendants in this case failed to do so. The employer not only failed to conduct an

investigation, but went on to make accusations of conduct that was not only shameful but that both parties at the time thought was illegal, and then refused to pay the plaintiff, all based on incomplete and inaccurate information. The plaintiff says that it is incumbent on an employer making these kinds of allegations to engage in a proper review and investigation. As well, the plaintiff was left in limbo for several days and directed to remain at the hotel, notwithstanding the absence of any reason to give such a direction. Messrs. Bleier and Hagerty knew what was going on, but chose not to tell the plaintiff. The plaintiff notes as well that the defendants maintained the allegations of misconduct up to trial, knowing they had no admissible evidence to support the allegations from a witness with direct knowledge.

[68] The plaintiff seeks aggravated and punitive damages in respect of the manner of his firing, and suggests something in line with the $35,000 awarded in *Vernon v. British Columbia (Liquor Distribution Branch)*, 2012 BCSC 133 (discussed below).

[69] The plaintiff submits that his confinement to hotels over the course of several days, during which he was subject to a fear for his safety created by the defendants, amounts to false imprisonment. He advances this as an alternative claim, acknowledging that it arises from much the same conduct and thus overlaps with his claims for aggravated and punitive damages.

[70] Finally, the plaintiff submits that Sherritt is jointly and severally liable for any amounts found to be owing by McKay, on the basis that it was a common employer. The plaintiff says that notwithstanding that his written employment contract was with MacKay, Sherritt had and did exercise control over the plaintiff's employment, Sherritt was very involved in the orientation, the plaintiff's on-site supervisor for a part of his time in Cuba was Mr. Wojcichowsky of Sherritt, and the documents indicate that Sherritt had some role in the decision to terminate his employment. The plaintiff references the above-quoted provisions from Schedule "B" to MacKay's contract with Sherritt, which gives Sherritt the right to require MacKay to terminate employees.

[71] The plaintiff says that it does not matter in the circumstances of this case whether or not Sherritt actually exercised its power to direct the plaintiff's termination. The question of whether a party is a common employer is a matter of that party's status, rather than of any specific action it may have taken.

The Defendants

[72] The defendants say that one of the recognized purposes of a probationary period of employment is to assess the character of a new employee and determine whether the employee will work in harmony with the organization. The defendants acknowledge that the investigation of the plaintiff was "conducted in a summary manner" but say that it was sufficient in the circumstances. The defendants say that, even if they had interviewed the plaintiff to find out his side of the story, it would not have made any difference. They also say that an investigation into suitability does not have to entail soliciting feedback from the employee.

[73] In submissions, the defendants also allege after-acquired cause, based on what they learned after this action had been commenced about the plaintiff having become inebriated and his interactions with a Canadian tourist at the resort near Holguin. [I note that this claim was not referenced in the Response to Civil Claim. In reply submissions, the plaintiff asserted that a claim of after-acquired cause is of no assistance in a claim for failure in duty of good faith.]

[74] The defendants argue that the plaintiff's employment contract with MacKay was, on a proper interpretation, a contract with a one-month term. They said that, although the general provisions of the contract talked about it being indefinite, Schedule "A" to the contract referenced only a four-week time period in October-November 2022. The plaintiff submits that, as a result, the most the plaintiff could have earned had he stayed to the end of this contractual term was a further $17,000.

[75] In any event, the defendants argue that the plaintiff suffered no actual damages, in that:

a) The project he was working on prior to being hired by MacKay was winding down within a few weeks of his being hired , and in any event, income from that project was going to his company and not to him directly; and

b) He would have had to find new employment in any event, which is what he did after he returned from Cuba.

[76] The defendants argue that most probationary employee cases are brought either in Small Claims Court or at the Civil Resolution Tribunal, as awards are generally within their monetary jurisdiction. The defendant says that *Ly* is an outlier, and that the circumstances in this case are much different.

[77] The defendants argue that the plaintiff did not tender sufficient evidence of his efforts to mitigate, and say that even if a breach is found, the plaintiff should be awarded nominal damages only.

[78] With respect to the allegations related to requiring the plaintiff to remain confined to his hotel (both with respect to aggravated and punitive damages), the defendants submit that MacKay had *bona fide* concerns of potential criminal sanctions in Cuba, given what Mr. Smith had reported in his statement and, on the basis of these concerns, asked the plaintiff to refrain from leaving the hotel. They say that this was, in effect, a shared subjective concern that the plaintiff also had. They rely on the plaintiff's own evidence as to the apprehension that he felt.

[79] The defendants submit that this shared safety concern also gives rise to lawful justification, which is a defence at law to unlawful confinement. In any event, the defendants note that although they had instructed the plaintiff to remain at the hotel in Moa, he chose of his own volition to go to a resort hotel near Holguin (and the airport) and enjoyed the amenities of that establishment. The defendants say this shows that the plaintiff was not in fact confined.

[80] The defendants further say that the tests for aggravated and punitive damages are simply not met in the circumstances, and in particular, that there were

rational explanations for all the steps Mr. Bleier took and that none of his actions were contrary to fair dealing, or were harsh, vindictive, reprehensible, or malicious.

[81] With respect to the common employer claim, the defendants argue that such a claim only applies to related entities, and here, there is no doubt that MacKay and Sherritt are arm's-length entities.

Evidentiary Value of the Emails

[82] The parties came to agreement during trial that the emails between Mr. Bleier and others (Mr. Smith, Mr. Hagerty, and Mr. Wojcichowsky) were admissible for the fact that they were sent, but not for the truth of their contents.

[83] The parties had differing views on the extent to which further inferences could be drawn from the emails themselves, which to some degree tracked their differing views on what was really in issue. The plaintiff took the view that whether or not he engaged in the conduct alleged against him was in issue. The defendants took the view that all that matters is that Mr. Bleier received complaints about the plaintiff, and that it does not matter whether those complaints were true or not.

[84] The defendants noted the judgment of Justice Cromwell (as he then was) in *W. Eric Whebby Ltd. v. Doug Boehner Trucking & Excavating Ltd.*, 2007 NSCA 92 [*Eric Whebby*], in which a key issue was the extent to which various parties were aware that certain soil was contaminated. An email to one party from a neighbour of the source property commented that there was "foreign material" in the soil, and that "fill from previously used sites does have the potential to be dirty". At paras. 59-60, Justice Cromwell commented:

> [59] The e-mail from the neighbour was an out-of-court statement made by someone other than while testifying in the proceedings. It is hearsay if used as evidence of the truth of its contents, and inadmissible unless its admission is justified by either a traditional exception or by the principled approach to the admission of hearsay evidence: *R. v. Khelawon*, 2006 SCC 57, [2006] 2 S.C.R. 787. However, it is not hearsay if it is not used as evidence of the truth of its contents.
>
> [60] In my view, the judge's reasons disclose that he used this evidence for both hearsay and non-hearsay purposes. He used the existence of the complaint as relevant evidence of United's knowledge of it, which in turn went

> to the reasonableness of the time it took United to respond. This is not a hearsay use of this evidence because, for this purpose, the question to which the evidence is directed is United's knowledge of the complaint itself, not whether the complaint accurately described the soil. The judge, however, used the evidence for a second purpose for which it was inadmissible hearsay. The judge relied on the substance of the complaints – to use the language of the hearsay rule, their truth – in determining what the soil looked like at the relevant times.

Issues

[85] The following issues arise:

a) Was the plaintiff's contract of employment an indefinite one or for a four-week term only;

b) Did MacKay, in making its decision to terminate the plaintiff, properly observe its obligations to the plaintiff as a probationary employee;

c) If not, what damages arise for this breach;

d) Is the plaintiff entitled to other damages for unpaid wages or expenses;

e) Is the plaintiff entitled to damages arising from the manner of termination, either by way of aggravated damages, punitive damages or damages for false imprisonment; and

f) Is Sherritt jointly and severally liable for damages on the basis that it is a common employer?

Reliability and Credibility

[86] I found both witnesses who testified to be reliable and credible. The plaintiff frankly admitted to his various actions in Cuba, even when they were somewhat embarrassing to him. Ms. MacKay was frank in acknowledging that to the extent there was any investigation with respect to the allegations against the plaintiff, it was summary in nature. I accept the evidence of each of them.

Contract Term

[87] As noted above, the Employment Agreement provided in s. 1.1 that the plaintiff's employment would be "commencing approximately four (4) weeks from signing of this Agreement and the issuance of a Cuban Work Permit and continuing indefinitely".

[88] The plaintiff's evidence was that the project he was working was on a monthly shift rotation, where MacKay staff would work four weeks of Monday to Saturday rotations, then leave the project while a second shift comes on, then return again a month later. This was the "work schedule" he had been told to expect.

[89] The wording of the third line of Schedule "A" of the Employment Agreement is, as noted above:

> Work Schedule – 6 days on 1 (Sunday) days off for a period of one month

[90] Nothing in this line identifies this as providing a different term than the indefinite term identified in the text of the contract. The subject matter of this line is clearly identified as the "Work Schedule". It is contained in a schedule to the Employment Agreement that otherwise focuses on project-specific details such as job title and project location.

[91] I cannot see how this provision could be reasonably interpreted by a person with knowledge of the nature of the project, its length, and the anticipated work schedule, as providing anything other than the anticipated work schedule. In my view, it was not intended to derogate from the provision in s. 1.1 that the plaintiff's employment was for an indefinite term.

[92] I conclude that the Employment Agreement between the plaintiff and MacKay was, as identified in s. 1.1, "continuing indefinitely subject to termination".

Probationary Employees/Good Faith Investigation

Legal Context

[93] Generally speaking, it is an implied term of an employment contract that an employer may terminate the employment of an employee either for just cause or by giving reasonable notice. In the absence of just cause, an employee is generally entitled to compensation for what would have been a reasonable period of notice, which is determined with regard to such matters as the character of the employment, the length of service, the age of the employee and the availability of similar employment having regard to the experience, training, and qualifications of the employee: *Bardal v. Globe & Mail Ltd.* (1960), 24 D.L.R. (2d) 140, 1960 CanLII 294 (Ont. H.C.).

[94] These principles operate differently where an employee is within their probationary period. The parties referenced two primary judgments dealing with termination of probationary employees.

[95] In *Jadot v. Concert Industries Ltd.* (1997), 44 B.C.L.R. (3d) 327, 1997 CanLII 4137 (C.A.), aff'g (1995), 4 B.C.L.R. (3d) 311 (S.C.), the trial judge had concluded that the plaintiff was in a probationary period at the time of her termination. At para. 29 of the Court of Appeal judgment, Justice Rowles commented:

> [29] After a careful review of the authorities, the trial judge concluded, correctly in my view, that an employer, during a probationary period "has the implied contractual right to dismiss a probationary employee without notice and without giving reasons provided the employer acts in good faith in the assessment of a probationary employee's suitability for the permanent position".

[96] What is required in order to "to act in good faith in the assessment" of a probationary employee has been developed in subsequent cases. In *Ly*, the trial judge concluded that the plaintiff's employment contract included a probationary term of employment, and that it was terminated during the probationary period, but that the defendant did not meet its legal obligation to carry out a good faith assessment of the plaintiff's suitability for continued employment. At paras. 57-58, Justice Morellato set out the applicable general principles:

> [57] As addressed above, the test for dismissal in the context of probationary employment is suitability. Just cause need not be established. An employer needs only to establish that it acted in good faith in its assessment of the probationary employee's suitability: *Jadot.*
>
> [58] In determining whether an employer acted in good faith, courts have examined the process through which the employer determines whether the employee is suitable for permanent employment. While an employer is not required to give reasons for the dismissal of a probationary employee, that employer's conduct in assessing the employee is reviewed by the court in light of various factors such as: 1) whether the probationary employee was made aware of the basis for the employer's assessment of suitability before, or at the commencement of, employment; 2) whether the employer acted fairly and with reasonable diligence in assessing suitability; 3) whether the employee was given a reasonable opportunity to demonstrate his suitability for the position; and 4) whether the employer's decision was based on an honest, fair and reasonable assessment of the suitability of the employee, including not only job skills and performance but also character, judgment, compatibility, and reliability …

[97] Justice Morellato cited a number of cases for this proposition, including *Jadot*. I note that an Ontario judgment, decided a few months after *Ly*, was to similar effect; in *Nagribianko v. Select Wine Merchants Ltd.*, 2017 ONCA 540, the Court confirmed that:

> [6] … The status of a probationary employee has acquired a clear meaning at common law. Unless the employment contract specifies otherwise, probationary status enables an employee to be terminated without notice during the probationary period if the employer makes a good faith determination that the employee is unsuitable for permanent employment, and provided the probationary employee was given a fair and reasonable opportunity to demonstrate their suitability.
>
> [Citation omitted.]

[98] In *Ly*, Justice Morellato concluded at para. 87 that Mr. Ly entered a challenging environment, made a concerted effort to understand the expectations of his position, and "when he expressly asked his employer for the opportunity to clarify the basis upon which his suitability was being assessed, IHA did not act fairly or with reasonable diligence in providing that opportunity or in assessing his suitability." Thus, IHA did not provide Mr. Ly a reasonable opportunity to demonstrate his suitability, and IHA did not meet the requisite standard of good faith.

[99] With respect to damages, Justice Morellato noted that Mr. Ly found alternative employment within about three months. Mr. Ly sought damages based on five or six months' salary, while IHA argued that, in light of the probationary term, the plaintiff was only entitled to two weeks of notice. Justice Morellato concluded that:

> [91] Having considered the length of Mr. Ly's employment, including the probationary term of his employment, along with his age, the character of his employment, the availability of his employment, and his experience, training and qualifications, I am of the view that a three-month notice period is reasonable in this case. In British Columbia, the logical measure for damages when a probationary employee is wrongfully dismissed is a measure of pay in lieu of reasonable notice: …

[100] As noted above, the plaintiff relied on the concept of "short service" employment, and suggested that this concept underlies the award made in *Ly*. It is generally accepted by BC courts that "short service" employees are entitled to a proportionately longer period of notice: *Saalfeld v. Absolute Software Corporation*, 2009 BCCA 18 at para. 15; *Ostrow v. Abacus Management Corporation Mergers and Acquisitions*, 2014 BCSC 938 at para. 41; *Sciancamerli v. Comtech (Communication Technologies) Ltd.*, 2014 BCSC 2140 at para. 35; *Chapple v. Big Bay Landing Ltd. (Inc. No. 0764163)*, 2018 BCSC 1666 at paras. 28-29.

[101] In *Saalfeld*, the Court of Appeal provided guidance at para. 15 with respect to fixing an appropriate notice period for short-service employees:

> …[T]he respondent submits that the recent jurisprudence supports a notice period of five to six months in short service cases. While B.C. precedents are consistent that proportionately longer notice periods are appropriate for employees dismissed in the first three years of their employment, I see little support for the proposition that five to six months is the norm in short service cases for employees in their thirties or early forties whose function is significant for their employer, but not one of senior management. I further see no support for a floor of six months as the trial judge appears to have understood the respondent's counsel to have suggested to her. That proposition was not put to us. Absent inducement, evidence of a specialized or otherwise difficult employment market, bad faith conduct or some other reason for extending the notice period, the B.C. precedents suggest a range of two to three months for a nine-month employee in the shoes of the respondent when adjusted for age, length of service and job responsibility: *Zeidel v. Metro-Goldwyn Mayer Studio Inc*., 2004 BCSC 1415; *Duprey v. Seanix Technology (Canada) Inc*., 2002 BCSC 1335; 20 C.C.E.L. (3d) 136; *Woolard v. Unum Life Insurance Co. of Canada*, 2002 BCSC 1178, 4 B.C.L.R. (4th) 333; *Mitchell v. Paxton Forest Products*

Inc., 2001 BCSC 1802, aff'd 2002 BCCA 532, 174 B.C.A.C. 205; *Kussman v. AT & T Capital Canada, Inc.*, 2000 BCSC 268, 49 C.C.E.L. (2d) 124.

[102] The Court of Appeal held that although the five-month notice period fixed by the trial judge was "on the very high end of an acceptable range", the award was not unreasonable in the circumstances and was consequently upheld.

Analysis

[103] Adopting the factors set out in *Ly*, I will consider the conduct of MacKay in light of factors that include:

a) Whether the plaintiff was made aware of the employer's assessment of suitability before or at the commencement of employment;

b) Whether the employer acted fairly and with reasonable diligence in assessing suitability;

c) Whether the plaintiff was given a reasonable opportunity to demonstrate his suitability for the position; and

d) Whether MacKay's decision was based on an honest, fair, and reasonable assessment of the plaintiff.

[104] It seems clear that the plaintiff understood that his suitability would be assessed over the first three months of his employment with MacKay. It was clear from his evidence that he was working hard to learn what was expected of him and was happy with the positive feedback he received from the daily reports he sent to Mr. Bleier and Mr. Wojchichowsky.

[105] The final three of these criteria were not met in this case. MacKay did not act fairly, it did not act with reasonable diligence in assessing the plaintiff's suitability, and its decision was not based on an honest, fair, and reasonable assessment of the plaintiff. The result of MacKay's actions was to deprive the plaintiff of a reasonable opportunity to display his suitability.

[106] It is clear that the plaintiff was terminated based on MacKay's acceptance of allegations of misconduct that came from Mr. Smith and Mr. Hagerty. MacKay's decision was made within roughly two hours of receiving those allegations. Based on the evidence at trial, those allegations were false.

[107] I appreciate that the termination letter referred to unsuitability. I accept the plaintiff's evidence that he was told he was terminated because of misconduct. Clearly, his termination was a reaction to the allegations of misconduct – the timing is such that no other inference can be drawn. I accept the plaintiff's evidence that throughout the previous week he had been receiving positive feedback on the work he was doing. The sudden turnaround in the plaintiff's position has no other apparent cause. The fact that MacKay refused to pay the plaintiff for his time in Cuba – saying it was doing so because of his misconduct – puts this question beyond doubt.

[108] I have difficulty with the proposition that MacKay can point to the emails in its business records and say that those emails provided a basis for it to terminate the plaintiff's employment. It is my view that MacKay must, in order to base its decision to terminate on misconduct, rely on the truth of the allegations. In my view, that is the sort of purpose for which Justice Cromwell in *Eric Whebby* said that an email would be inadmissible.

[109] More importantly, however, it is my view that the allegations made against the plaintiff are the sort of allegations for which MacKay was required to seek a response from the plaintiff before acting. Instead, MacKay made a decision almost immediately, refused to tell the plaintiff what was going on until he was back in Canada (and only in the course of a telephone call telling him he had been terminated), and then told him that it did not matter what the truth was as to what had happened in Cuba.

[110] Finally, I do not accept that the plaintiff's interactions with a Canadian tourist at the Rio Paradisus would give rise to cause for termination.

[111] In my view, the plaintiff was not given a proper assessment of his suitability, and he was wrongfully dismissed.

[112] With respect to damages, I adopt the approach in *Saalfeld* that the starting point for short-service employees is two to three months' notice. I note that the plaintiff's work cycle was to be a month on and month off cycle. He was half-way through the first such cycle when he was dismissed. I accept *Ly* as the most appropriate comparator with respect to length of service, and that the termination occurred during a probationary period, but note that the plaintiff is older than Mr. Ly and had uprooted his life in Canada to take the new position. I find that the plaintiff made a reasonably diligent effort to find alternative employment and indeed did so within five months of his termination. In my view, these factors, and the totality of the circumstances of this case, justify an extension of what was described in *Saalfeld* as the usual range for short-service employees. I find an appropriate award of damages would be based on the remainder of the plaintiff's initial work cycle, plus two further cycles. By my count, that would be a period of roughly 4½ months.

[113] The plaintiff is also entitled to be paid from October 25 to 30, 2022, and to reimbursement for the two expenses for which he presented receipts (the taxi on his initial arrival in Cuba and the hotel near Holguin as he was awaiting a return flight to Canada).

Manner of Termination

Legal Context – Aggravated and Punitive Damages

[114] The plaintiff relied, as a helpful summary of the principles governing awards of aggravated and punitive damages, on the judgment of Justice Goepel (as he then was) in *Vernon*. In that case, a long-term employee who had advanced over the years to become a store manager was dismissed without notice. The defendant argued that the plaintiff had engaged in gross workplace misconducting including bullying, harassing, and intimidating subordinates, and that there was just cause for termination. A store employee had made a complaint, that led to an investigation of

the plaintiff that Goepel J. described at para. 278 as “flawed from beginning to end” and “neither objective nor fair”.

[115] With respect to aggravated damages, Goepel J. noted at paras. 369-373 that:

> [369] Aggravated damages in wrongful dismissal cases are compensatory in nature. It is an implied term of an employment contract that an employer will act in good faith in the manner of dismissal: *Beggs v. Westport Foods Ltd.*, 2011 BCCA 76, 14 B.C.L.R. (5th) 1 at para 48.
>
> [370] In *Honda [Canada Inc. v. Keays*, 2008 SCC 39], the Supreme Court of Canada reviewed the history of the law relating to damages in case of employment termination, noting that aggravated damages must be considered in the context of a breach of the employment contract. The court held that aggravated damages were recoverable for breach of contract if such damages were contemplated by the parties at the time they entered the contract. As an employment contract is inherently subject to cancellation on notice, or payment in lieu of notice, damages for mental distress caused merely by the dismissal are not recoverable since dismissal is a clear legal possibility.
>
> [371] In *Honda*, Bastarache J. summarized the discussion of aggravated damages at paras. 57-59:
>
> > [57] Damages resulting from the manner of dismissal must then be available only if they result from the 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).
> >
> > [58] The application of *Fidler* makes it unnecessary to pursue an extended analysis of the scope of any implied duty of good faith in an employment contract. *Fidler* provides that “as long as the promise in relation to state of mind is a part of the bargain in the reasonable contemplation of the contracting parties, mental distress damages arising from its breach are recoverable” (para. 48). In *Wallace*, the Court held employers “to an obligation of good faith and fair dealing in the manner of dismissal” (para. 95) and created the expectation that, in the course of dismissal, employers would be “candid, reasonable, honest and forthright with their employees” (para. 98). At least since that time, then, there has been expectation by both parties to the contract that employers will act in good faith in the manner of dismissal. Failure to do so can lead to foreseeable, compensable damages. As aforementioned, this Court recognized as much in *Fidler* itself, where we noted that the principle in *Hadley* “explains why an extended period of notice may have been awarded upon wrongful dismissal in employment law” (para. 54).
> >
> > [59] To be perfectly clear, I will conclude this analysis of our jurisprudence by saying that there is no reason to retain the distinction between “true aggravated damages” resulting from a separate cause of action and moral damages resulting from conduct in the manner of

> termination. Damages attributable to conduct in the manner of dismissal are always to be awarded under the *Hadley* principle. Moreover, in cases where damages are awarded, no extension of the notice period is to be used to determine the proper amount to be paid. The amount is to be fixed according to the same principles and in the same way as in all other cases dealing with moral damages. 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 not through an arbitrary extension of the notice period, but through an award that reflects the actual damages. 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, or dismissal meant to deprive the employee of a pension benefit or other right, permanent status for instance (see also the examples in *Wallace*, at paras. 99-100).
>
> [372] In this case, for reasons I have already set out, the investigation of the complaint was unfair. Ms. Vernon was given no real opportunity to deal with the allegations in the complaint and no opportunity at all to deal with the allegations made in the course of the interviews. The unfair investigation, however, does not give rise to aggravated damages.
>
> [373] The foundation of the claim for aggravated damages is the manner of dismissal. The meeting of April 19, 2010, could not have been handled in a more insensitive manner. Ms. Vernon, a 30-year employee with an unblemished record, was summoned to a meeting where she was told her conduct was shameful and that she was an embarrassment to the LDB. When she asked for additional time to consider her position she was told she only had until noon on Friday because Mr. Branham was not prepared to wait around until 4:00 p.m. on a Friday to learn her decision. Having told Ms. Vernon that she was to be terminated, the LDB then suspended her without pay and left her in limbo from April 19 to May 31 when they finally got around to telling her she was fired.

[116] Justice Goepel accepted evidence that the manner of dismissal caused the plaintiff mental distress over and above the normal distress and hurt feelings resulting from the dismissal itself (at para. 377), and awarded aggravated damages of $35,000 (at para. 380).

[117] Justice Goepel concluded at para. 386 that, for the most part, his award of aggravated damages adequately compensated the plaintiff such that an award of punitive damages would lead to double punishment. He did, however, award $50,000 in respect of conduct in respect of a potential letter of reference. With respect to the legal principles governing punitive damages, he noted that punitive damages are directed towards punishment, and that:

[382] The three objects of punitive damages are retribution, deterrence and denunciation. The Supreme Court of Canada has directed trial courts to approach punitive damages with caution and restraint and to resort to them only in exceptional circumstances: *Whiten* [v. Pilot Insurance Co., 2002 SCC 18] at para. 69.

[383] An award of punitive damages is rational only when compensatory damages do not adequately achieve the objectives of retribution, deterrence and denunciation: *Performance Industries Ltd. v. Sylvan Lake Golf & Tennis Club Ltd.*, 2002 SCC 19, [2002] 1 S.C.R. 678 at para. 87.

[384] In *Whiten*, at para. 94, the Court set out the factors that should be taken into account when considering an award for punitive damages:

> (1) Punitive damages are very much the exception rather than the rule, (2) imposed *only* if there has been high-handed, malicious, arbitrary or highly reprehensible misconduct that departs to a marked degree from ordinary standards of decent behaviour. (3) Where they are awarded, punitive damages should be assessed in an amount reasonably proportionate to such factors as the harm caused, the degree of the misconduct, the relative vulnerability of the plaintiff and any advantage or profit gained by the defendant, (4) having regard to any other fines or penalties suffered by the defendant for the misconduct in question. (5) Punitive damages are generally given only where the misconduct would otherwise be unpunished or where other penalties are or are likely to be inadequate to achieve the objectives of retribution, deterrence and denunciation. (6) Their purpose is not to compensate the plaintiff, but (7) to give a defendant his or her just desert (retribution), to deter the defendant and others from similar misconduct in the future (deterrence), and to mark the community's collective condemnation (denunciation) of what has happened. (8) Punitive damages are awarded *only* where compensatory damages, which to some extent are punitive, are insufficient to accomplish these objectives, and (9) they are given in an amount that is no greater than necessary to rationally accomplish their purpose. (10) While normally the state would be the recipient of any fine or penalty for misconduct, the plaintiff will keep punitive damages as a "windfall" in addition to compensatory damages. (11) Judges and juries in our system have usually found that moderate awards of punitive damages, which inevitably carry a stigma in the broader community, are generally sufficient.

[385] As noted in *Honda*, in the context of damages for conduct in the course of dismissal, care must be taken when aggravated damages have been awarded to avoid the pitfall of double compensation or double punishment for the same actions. Punitive damages are restricted to advertent wrongful acts that are so malicious and outrageous that they are deserving of punishment on their own.

Legal Context – False Imprisonment

[118] The plaintiff advances his claim for false imprisonment as an alternative claim to his claim of breach of duty of good faith with respect to the manner of termination. The plaintiff acknowledges that this is an unusual claim in the circumstances, but submits that the established requirements of the tort are made out in this case.

[119] In *Jeeves (Guardian of) v. Swanson*, 1995 CanLII 520 (B.C.S.C.), an employee of a jewelry store locked a customer into the store when there was a dispute over payment. Justice Low noted that:

> [19] I think that in describing this tort the word "imprisonment" simply means "confinement". It need not be the equivalent of placement in a gaol cell. The word "false" does not mean there must be some deception or misrepresentation of the facts. It simply means that the confinement must be unauthorized or legally wrong.
>
> [20] I rely upon the following statement of the law in Linden, *Canadian Tort Law*, 5th ed., pp. 46 -47:
>
> > Anyone who intentionally confines another person within fixed boundaries is liable for the tort of false imprisonment.
> >
> > ...
> >
> > There can be no false imprisonment without a total confinement. The restraint must be complete within definite boundaries. It is insufficient to block another person's way if another route can be taken. One can be imprisoned in a room, in an automobile, or in a boat set adrift on the water.
> >
> > ...
> >
> > Restraint may be accomplished by direct force or by the threat of force to which the plaintiff submits. A plaintiff, who reasonably perceives that force may be employed is imprisoned if deciding to submit and not to risk violence. It will also be imprisonment if the plaintiff goes along with another, in a suspected shoplifting case for example, in order to avoid a "scene which would be embarrassing". This has been described as a type of psychological imprisonment, but it is as real as if one were physically overpowered. It is also possible to confine someone by retaining control of that person's valuable property, or perhaps even by holding hostage someone's child or a beloved pet. <u>If, as a result of the defendant's intentional conduct, a person reasonably feels totally restrained, however that result is obtained, it amounts to an imprisonment and is actionable unless it is justifiable.</u>
>
> [21] The sentence I have underlined is particulary applicable to the present case. Mrs. Jeeves reasonably felt that the defendants were preventing her from leaving of her own free will and that the defendants had called the police

> to deal with her. The defendants treated her as an offender of some law, not as the justifiably aggrieved customer they knew her to be. It appears from Cst. Rosvold's evidence that Mrs. Swanson emphasized the refusal of Mrs. Jeeves to pay for the engraving. That is a further indication that the purpose of the defendants was to detain Mrs. Jeeves so the police could deal with that issue. The tort of false imprisonment is proven.

[120] Justice Low awarded general damages of $3,500 and aggravated or punitive damages of $1,000.

[121] In *Veeken v. British Columbia*, 2023 BCSC 943, aff'd in part 2024 BCCA 80, the plaintiff had been convicted of sexual interference and sentenced to two years' incarceration. His conviction was overturned by the Court of Appeal, and ultimately a stay of proceedings was entered by the Crown. He commenced legal claims against the trial judge, the RCMP, and various government employees. The defendants applied successfully to strike out the claim. In the course of reviewing the governing legal principles, Justice Young noted that:

> [89] The Province and the Defendant Hughes state that unlawful detention or false imprisonment is described as the "intentional and total confinement of a person against his or her will without lawful justification": *Joseph*, at para. 38, citing *Hanisch v. Canada*, 2003 BCSC 1000 at para. 88, rev'd in part on other grounds 2004 BCCA 539.
>
> …
>
> [94] The plaintiff relies on *Frey v. Fedoruk*, [1950] S.C.R. 517, 1950 CanLII 24 for the principle that the onus lies on the defendants to prove justification for an arrest. Justice Cartwright, writing for the majority, stated the following at 523:
>
> > The claim being one for damages for false imprisonment, in my opinion, the following short passage from Halsbury's Laws of England, Second Edition, Volume 33, page 38 correctly states the law:
> >
> > > The gist of the action of false imprisonment is the mere imprisonment; the plaintiff need not prove that the imprisonment was unlawful or malicious, but establishes a *prima facie* case if he proves that he was imprisoned by the defendant; the onus then lies on the defendant of proving a justification.

[122] In *Hanisch* (cited in *Veeken*), the plaintiff had rescued a Zodiac boat belonging to Parks Canada in a storm. A Parks Canada warden communicated false information to the RCMP which led to the plaintiff's arrest. The trial judge awarded general damages of $25,000 and punitive damages of $35,000 as against the Parks

Canada warden. Those awards were upheld on appeal (a separate award against the RCMP officer was reduced on appeal).

Analysis

[123] In my view, the conduct of MacKay in requiring the plaintiff to remain at the hotel in Moa, in all of the circumstances, gives rise to a claim for aggravated damages. The relevant circumstances are that:

a) Mr. Bleier refused to tell the plaintiff what issues required him to stay at the hotel;

b) Mr. Bleier did tell the plaintiff that there were concerns about his safety, and that if he left the hotel, he might be arrested;

c) Mr. Hagerty had previously told the plaintiff that there were issues with the secret police; and

d) All of this took place in Cuba, a country that was new to the plaintiff with unknown (to him) standards of conduct for law enforcement.

[124] I accept the plaintiff's evidence that this conduct caused him significant stress and mental strain. That strain lasted until he was on an airplane back to Canada, which, as noted in the chronology above, was several days.

[125] The damages suffered by the plaintiff as a result of this conduct on the part of MacKay are above and beyond the mental distress that arises from dismissal generally.

[126] In my view, an award of $25,000 for aggravated damages is appropriate.

[127] In my view, it is important to separately recognize and denounce one other aspect of MacKay's conduct: that being its refusal to pay the plaintiff for his work after October 24, 2022, notwithstanding that he had not been terminated and remained in Cuba subject to and following the directions of his employer.

[128] In my view, that is the sort of high-handed and malicious conduct that properly attracts an award of punitive damages. I would award punitive damages of $20,000.

[129] As noted above, the plaintiff characterized his claim of false imprisonment as an alternative to his claims for aggravated and punitive damages, and acknowledged that it was essentially relief in respect of the same conduct. Having awarded aggravated damages, it is unnecessary for me to consider the claim of false imprisonment.

Common Employer

Legal Context

[130] It was common ground that the legal test is set out in *Linza v. Metric Modular*, 2023 BCSC 1196 at paras. 61-65:

> [61] The common employer doctrine has traditionally been an allegation by an employee that he or she is employed by more than one related corporation. Mr. Linza alleges that in addition to being employed by Modular, the proposed class members were also employed by Housing.
>
> [62] The leading BC case is *Sinclair v. Dover Engineering Services* (1987), 11 B.C.L.R. (2d) 176, 1987 CanLII 2692 (S.C.), aff'd [1988] B.C.J. No. 265, 1988 CanLII 3358 (C.A.). In that case, the plaintiff alleged that both of two closely related companies were his employer. While the employee did work for one company and the public would have been led to believe he was an employee of that company, the alleged common employer had for years paid and issued T4 slips in its name to the plaintiff, contracted with or enrolled in extended health and government programs for the benefit of the plaintiff, and invoiced the other company for the plaintiff's services. The Court found that all the circumstances supported an inference that the plaintiff was employed by both companies. The issue was not one of piercing the corporate veil or vicarious liability, but whether in all of the circumstances the plaintiff and the alleged common employer had entered into a contract of employment: *Sinclair* CA at para. 9.
>
> [63] Simply being a related corporation does not make a corporation a common employer. A related corporation will be found to be a common employer only where it is established that there was an intention to create an employer/employee relationship between the employee and the related corporation. This is a question of contractual formation. The parties' subjective thoughts are irrelevant. The question is assessed objectively: "did the parties objectively act in a way that shows they intended to be parties to an employment contract with each other, on the terms alleged?". What is relevant is "how each party's conduct would appear to a reasonable person in

> the position of the other party.": *O'Reilly v. ClearMRI Solutions Ltd.*, 2021 ONCA 385, at paras. 2, 49–65, leave to appeal to SCC ref'd, 39834 (10 March 2022).
>
> [64] Relevant factors in determining whether there was the intention to create an employment contract include "conduct that reveals where effective control over the employee resided", and "the existence of an agreement specifying an employer other than the alleged common employer(s)": *O'Reilly* at paras. 53, 65.
>
> [65] The test for common employer has been described as having two prongs: (1) whether a corporation had sufficient interrelationship and common control with the nominal employer; and (2) whether the employee held a reasonable expectation that the other company was party to the employment contract, meaning the evidence shows that there was an objective intention to create an employer/employee relationship between the employee and the related corporation: *Scamurra v. Scamurra Contracting*, 2022 ONSC 4222 at paras. 65, 71–73.

[131] While *Linza* is the most recent comprehensive discussion of the common employer issue in British Columbia, I have reviewed three other judgments that provide insight into the common employer doctrine. In *Shoolestani v. Ichikawa*, 2016 BCSC 347, the plaintiffs alleged that they had been wrongfully dismissed from a small engineering firm, Amnis. Their pleadings initially asserted that two groups of entities (one group related to a large engineering firm known as Knight Piésold, the other related to a large construction firm known as Peter Kiewit) were clients of Amnis. They amended their claim to allege that Amnis was their "perceived employer" and that Knight Piésold and Peter Kiewit were the "common employers". Knight Piésold and Peter Kiewit applied to strike out these claims and for summary dismissal.

[132] In the course of his analysis, Justice J. Sigurdson set out a two-paragraph general statement of the law governing common employers:

> [25] The common employer doctrine or concept does not appear to have broad reach in the jurisprudence, but it appears that it is a concept that was established to avoid injustice in a wrongful dismissal action involving complex corporate structures. A representative scenario might be this: a wrongfully terminated employee pursues damages against their employer. However, that employer lacks assets and the employee seeks to establish more than one corporation as their employer for the purposes of recovery. Courts have recognized that "for the purposes of determining the contractual and fiduciary obligations which are owed by employers and employees, an individual can have more than one employer": Stacey Ball, *Canadian Employment Law*.,

> (Aurora: Canada Law Book) (loose-leaf updated 2013) at 4:10. The leading BC case on the common employer concept or doctrine is *Sinclair v. Dover Engineering Services* (1987), 11 B.C.L.R. (2d) 176, affirmed [1988] B.C.J. No. 265 Court of Appeal. There the plaintiff held himself out to be an employee of Dover Engineering Services, but was at all times paid by Cyril Management. Mr. Justice Wood held that Dover and Cyril should be considered jointly as the plaintiff's employers. Where a sufficient degree of relationship between the corporate entities exists, "there is no reason in law or in equity why they ought not all to be regarded as one for the purpose of determining liability for obligations owed to those employees ..." (para. 18).
>
> [26] What constitutes a sufficient connection to establish a common employer it appears will depend on the details of each relationship. The essential characteristic appears to be an element of common control. A court may consider "such factors as individual shareholdings, corporate shareholdings and interlocking directorships" (para. 18). In *Downtown Eatery (1993) Ltd. v. Ontario,* [2001] O.J. No. 1879 (C.A.) [*Downtown Eatery*], the court held that the question is "where effective control over the employee resides" (para. 33). Examples of where a common employer relationship have been established include: where there was a "paymaster" company closely connected with another corporate entity (*Sinclair*, *Jacobs v. Harbour Canoe Club Inc.,* [1999] B.C.J. No. 2188 (S.C.), *Jones v. CAE Industries Ltd.*, [1991] O.J. No. 2295); "a highly integrated or seamless group of companies" (*Downtown Eatery*); and where there were common shareholders and directors between the corporations (*Bartholomay v. Sportica Internet Technologies Inc. et al.,* 2004 BCSC 508). In sum, and in very general terms, where there is a sufficient degree of proximity between business entities, the common employer doctrine may operate to ensure that corporate structures do not circumvent legitimate employee rights.

[133] He concluded that:

> [31] I do not think that the plaintiffs' claim against the Knight Piésold and Peter Kiewit defendants can be dismissed under 9-5 on the pleadings or under 9-6, the summary judgment rule. The pleadings are very general and far-reaching in the allegations of factual circumstances relevant to the concept of common employment. The plaintiffs' claim at best appears to be on the periphery of the common employment concept, a rather imprecise doctrine in any case. But on the pleadings, it is not plain and obvious that the claim would fail on the common employment allegation, and on the summary judgment application, considering the evidence that has recently been filed by the plaintiffs, I find that there is at least a triable issue on the issue of common employment.

[134] In *Liebreich v. Farmers of North America*, 2019 BCSC 1074, Justice Russell quoted paras. 25-26 from *Shoolestani*, then continued :

> [139] To hold two defendants as common employers, there must be a sufficient connection between them. Such a connection can most readily be found in evidence of common control between the two entities. The more

> proximate or intertwined the operations are between the entities, the greater the probability they are sufficiently connected for the purposes of being found to be common employers.
>
> [140] As noted in *Downtown Eatery* at para. 36, the driving rationale of the common employer doctrine is to prevent "complex corporate structures" from defeating the legitimate entitlements of wrongfully dismissed workers; sophisticated corporate structuring is, of course, permissible but it cannot be permitted to work an injustice by way of turning the seeking of proper legal recourse into an elaborate shell game. See also: *Freeman v. PetroFrontier Corporation*, 2017 ABQB 340 at paras. 44-46.

[135] Ms. Leibrich had performed work for six entities other than her nominal employer. She had business cards showing the names of different entities. The same individual controlled three of them, while that individual was a director of but did not control the other three. Justice Russell concluded that the first three entities were common employers, while, with respect to the other three, she could "not find sufficient evidence of corporate connection or common control".

[136] In *Davis v. Amazon Canada Fulfillment Services, ULC*, 2023 ONSC 3665, it was alleged that Amazon and its 126 delivery service partners (called DSPs) were common employers. Justice Perell described the corporate affiliation between the entities as follows:

> [173] In the immediate case, it may be noted that as pleaded (and as shown by the evidence on the certification motion and the stay motion), Amazon and the 126 autonomous DSP logistics companies are not an integrated or seamless group of companies operating together as one business. The 126 autonomous logistics companies are not involved in owning or exercising control over Amazon's online consumer business, and Amazon is only involved in the business of the logistics companies to the extent that it sets performance standards for the delivery of Amazon's goods to consumers. Either way, it cannot be said that Amazon and the 126 autonomous logistics companies were carrying on a singular enterprise. Amazon and each of the 126 autonomous logistics companies were not carrying on business together; they were doing their own respective businesses. It is true that Amazon's contracts with the DSPs affect how the 126 autonomous logistics companies carry out their role as employer, but Amazon's role is different, it is a client of the 126 autonomous logistics companies that demands a level of performance to complete its own business as an online retailer.

[137] Justice Perell concluded that there was an insufficient relationship of control and that the common employer doctrine did not apply.

Analysis

[138] The cases to which I have been referred, in which there has been found to be a common employer, have all involved employers that were under common ownership and direction. That is not the situation in the present case. There is no dispute that McKay and Sherritt are separate legal entities with entirely separate ownership and management structures.

[139] The plaintiff's theory, rather, is that a different kind of control exists in this case. The plaintiff says that this different control can also give rise to a finding of common employer. In particular, the plaintiff argues that:

a) Sherritt had mandated employee conduct policies that MacKay has agreed to observe; and

b) MacKay and Sherritt agreed that Sherritt would have the right to request the "immediate termination" of the involvement of a MacKay employee in the Sherritt project.

The plaintiff submits that this latter factor reflects a degree of control that should appropriately be considered to make Sherritt a common employer – particularly combined with the fact that he was instructed to do some day-to-day reporting to Mr. Wojcichowsky of Sherritt.

[140] This is somewhat akin to the situation in *Shoolestani*, where a large international engineering firm had retained Amnis, the Shoolestanis' employer, to provide engineering services and was alleged to have a degree of control. Justice Sigurdson described this as being "on the periphery of the common employment concept", which itself was an "imprecise" rule.

[141] There are similarities as well to the circumstances in *Davis*, where Amazon set performance standards for the delivery of its goods to consumers, which affected how the delivery service partners carried out their role as employer to delivery

drivers. Justice Perell characterized Amazon as merely a "client" that demanded a level of performance from its service partners in order to complete its own business.

[142] In *Liebreich*, Russell J. suggested that a connection giving rise to common employer status is "most readily" found in evidence of common control, but that there is a "driving rationale" rooted in fairness to employees.

[143] In light of the reasoning in these cases, I do not accept the defendants' submission that the common employer doctrine applies only to related entities. The cases indicate that the category of circumstances to which this doctrine might apply is not closed, and I would not want to foreclose further development of the common employer doctrine in appropriate cases: see *James McCallum & Associates Ltd. v. Courchene*, 2025 BCCA 82 at para. 22.

[144] In my view, however, this is not the case in which to further extend the doctrine. Sherritt did not have a contractual right to, and did not in fact, exercise day-to-day control over MacKay's employees. This is not a case where a group of what would otherwise be considered regular Sherritt employees were placed in a separate corporate entity but otherwise functioned as Sherritt staff. MacKay was hired to undertake a specific project in an area in which it had its own independent expertise. The rights Sherritt reserved to itself to set minimum standards of deportment not only set out specific and mostly clear rules, but also set out a rationale for those rules. That rationale related to the importance of reacting responsibly to the "many unique legal, social and cultural differences" of working in a different country than that in which Sherritt is based. This was a limited carving out of rights to meet what was in essence a common mutual goal of the construction management contract between Sherritt and MacKay.

[145] In my view, Sherritt was not a common employer of the plaintiff.

Conclusion

[146] I award the plaintiff the following as against MacKay:

a) Damages reflecting the outstanding amount of his salary from October 25 to 30, 2022;

b) Damages for wrongful dismissal based on the remainder of his initial rotation in Cuba plus two further rotations (approximately 4½ months overall);

c) Special damages of the amount paid for the taxi from Holguin airport ($80) and the amount paid for the hotel in Holguin ($360);

d) Aggravated damages of $25,000; and

e) Punitive damages of $20,000.

[147] The claim against Sherritt is dismissed.

[148] The parties are at liberty to make submissions as to costs. Should either party seek an order of costs, they should provide their submission to me in writing through Supreme Court Scheduling within 60 days of the date of this judgment. The other parties may reply within 30 days thereafter. I will advise whether I believe a hearing is necessary – although the parties are welcome to indicate in their submissions whether they believe a hearing would be appropriate.

"Veenstra J."