

Court of King's Bench of Alberta

Citation: Rudko v Insight Canada Inc, 2025 ABKB 513

Date: 20250908
Docket: 1803 09162
Registry: Edmonton

Between:

Gordon Rudko

Plaintiff

- and -

Insight Canada Inc.

Defendant

**Reasons for Decision
of the
Honourable Justice L.M. Angotti**

Introduction

[1] Insight Canada, headquartered in Montreal, operates in the global technology field through the provision of information technology services. Gordon Rudko was a Sales Director for Insight Canada Inc. and worked out of his home office in Alberta. Insight Canada terminated Mr. Rudko's employment on October 30, 2017.

[2] Mr. Rudko claims wrongful dismissal damages and damages arising from entitlements to a restricted stock unit plan ("RSU Plan").

[3] Mr. Rudko takes the position that he was terminated without cause and is therefore entitled to 24 months of reasonable notice, as well as \$100,000 in aggravated and punitive damages for the

inappropriate manner of his dismissal. He also argues that he should have been awarded shares in the RSU Plan from 2011 to 2017 and during his reasonable notice period. He claims either shares in Insight Canada's parent company, Insight Enterprises, Inc. ("Insight Enterprises" or the "Company") or equivalent damages based on his entitlement to participate in the RSU Plan, as determined by the current share price of the Company.

[4] Insight Canada takes the position that Mr. Rudko was terminated for cause, because of insubordination in failing to address noted performance concerns in the manner directed by his manager. In the alternative, if just cause does not exist, Insight Canada argues that the proper range of reasonable notice is 12 to 15 months, but Mr. Rudko failed to properly mitigate his damages. The Defendant also denies that Mr. Rudko has any entitlement to shares or damages arising from the RSU Plan, as Mr. Rudko declined to participate in the equity program. Insight Canada alleges that certain documents, relied upon by Mr. Rudko with respect to his participation in the RSU Plan (the "impugned documents"), were fabricated and should not be admitted due to lack of authenticity. Insight Canada also raises a limitation defence to the RSU Plan claim.

[5] I find that Insight Canada established just cause for Mr. Rudko's termination, as he ignored or refused to obey the lawful and reasonable direction of his manager, despite Insight Canada engaging in progressive discipline. I also find that Mr. Rudko declined two grants issued to him under the RSU Plan, following which Insight Canada exercised its discretion under the RSU Plan to no longer issue such grants to him starting in 2013. Therefore, he was not a participant in the RSU Plan and is not entitled to damages. Further, Mr. Rudko's claim for damages under the RSU Plan is barred by the *Limitations Act*, RSA 2000, c L-12.

Background

[6] Insight Canada resells technology, both hardware and software, and assists in the deployment of those products to provide technology solutions to its customers. At all relevant times, Insight Canada's sales department included both inside sales and field sales. Inside sales involved employees in the Montreal or Winnipeg call centres, making cold calls to obtain clients. Field sales employees would engage the top client accounts in person, with such staff located in larger centres, such as Toronto, Montreal, Winnipeg, and Vancouver. Field sales also included territory sales representatives who were responsible for certain specific accounts and would work with inside sales staff to obtain new customers within the representative's sales territory.

[7] Mr. Rudko commenced employment with Insight Canada in 2003. He was promoted to Director, Field Sales, Canada on April 10, 2010. Mr. Rudko remained in that position until his termination on October 30, 2017. His length of employment was 14.5 years, with over 7.5 of those years as a Director. At the time of termination, Mr. Rudko was 54 years old. He had a base salary of \$104,488.80. In addition, he participated in Insight Canada's quarterly incentive bonus program. He received such bonuses in every quarter from the last quarter of 2015 to the second quarter of 2017. In addition, Mr. Rudko earned the 2017 Q3 incentive bonus before he was terminated, although it became payable after his termination. At trial, Insight Canada agreed that this should have been paid; the parties agreed the amount is \$29,437. At no time has Insight Canada provided Mr. Rudko with a reference letter and Mr. Rudko did not secure new employment within two years of his termination.

[8] Insight Enterprises is a Delaware corporation. The Company's common stock is traded on the NASDAQ Global Select Market under the ticker symbol NSIT. Insight Canada's employees, at a Director level or higher, are eligible to be invited to participate in the RSU Plan that was offered and operated by Insight Enterprises. In 2011, Insight Canada invited Mr. Rudko to participate in the RSU Plan. The RSU Plan was subject to specific terms and conditions, which the employee had to accept to receive a grant offered under the equity program. In both 2011 and 2012, the Company presented Mr. Rudko with an RSU grant. All other matters around the RSU Plan are disputed between the parties.

Issues

[9] There are two main issues arising from the trial.

[10] First, has Insight Canada proven that it had just cause to terminate Mr. Rudko for insubordination? If the answer to that question is no, then the issues of reasonable notice, mitigation, and damages based on the conduct of his dismissal must be dealt with. If the answer is yes, then Mr. Rudko's wrongful dismissal claim must be dismissed.

[11] Second, was Mr. Rudko entitled to the benefit of any vested shares under Insight's equity plan, such that he has suffered damages? This question also involves a consideration of the authenticity of certain documents proffered by Mr. Rudko and the impact of the limitation period. If entitlement exists and there is no limitation issue, then consideration of whether such damages also arise during the reasonable notice period and the expert evidence on quantification must be assessed. If entitlement does not exist, then his claim for damages with respect to the equity plan must be dismissed.

Credibility and Reliability of Witnesses

[12] The answers to both issues depend in large part on considerations of the credibility and reliability of the lay witnesses who testified at trial. Whether considering reliability or credibility, "...the validity of the evidence depends on whether the evidence is consistent with the probabilities affecting the case as a whole..." that would be considered reasonable in that place and in those conditions: *Faryna v Chorny*, 1951 CanLII 252 (BCCA) at p 357; *Dove v Destiny Media Technologies Inc.*, 2023 BCSC 1032 at para 55; *Hoang v Mann Engineering Ltd.*, 2014 ONSC 3762 at para 45.

[13] There were many aspects of Mr. Rudko's evidence that caused me concern. On multiple occasions, his evidence did not accord either with other evidence or common sense. He gave evidence with respect to his intentions during the performance management, which stated intentions were extremely difficult to reconcile with the content of emails he had written at the relevant time. When he was pressed during cross-examination about his performance management, Mr. Rudko sometimes gave inconsistent answers and frequently had an inability to recall specifics of what had occurred.

[14] Mr. Rudko testified in a very loose manner when describing his role, a matter upon which he should have been precise. He identified his responsibility as "all sales in Canada." It was not until his cross-examination that he acknowledged there were both field sales and inside sales, and he was only responsible for field sales across Canada, as there was another Sales Director

responsible for inside sales across Canada. Mr. Rudko's own titles reflected the boundaries of his responsibility. This overstatement was not only made at trial. In an email to an executive search firm, Mr. Rudko stated that he was "responsible for Canadian P&L" (profit and loss), without identifying his limited territory. This was knowingly inaccurate.

[15] Some emails entered into evidence were group emails to Insight's sales staff, including Mr. Rudko. On direct examination, Mr. Rudko testified that the recipients reported to him. However, only some of the individuals reported to Mr. Rudko. He made the same claim in respect of more than one email. At one point, he testified that the entire sales organization of Insight Canada reported to him. When he was challenged on cross examination whether specific individuals reported to him, his evidence changed significantly. He often replied, "don't recall" or that the individual reported to others "at the time."

[16] The email groups always included Fred Funkle, another Sales Director, who was on the same management level as Mr. Rudko. It is undisputed that Mr. Funkle and Mr. Rudko were both Directors in the sales department of Insight Canada, from 2010 to 2017, and that they had different areas of responsibility. Thus, they did not report to each other and would have different staff reporting to them. Not only were Mr. Rudko's claims with respect to the reporting structure illogical, they were also outright wrong.

[17] Carmela Orlando was the executive responsible for Insight Canada, as the General Manager and Senior Vice President. Ms. Orlando testified that, of the eleven recipients besides Mr. Rudko in one of the emails, only two reported to Mr. Rudko, while the remaining ten employees reported to others in the organization. Ms. Orlando retired in 2018, only a year after Mr. Rudko was terminated, yet she was able to identify the role and direct report of everyone in the email. I accept her evidence, as it was clear, detailed, and consistent with the organization of Insight Canada's sales teams.

[18] The inside sales area made up a significant part of Insight Canada's business during the relevant time period. There were more inside sales staff than field sales staff. At some point, Insight Canada reorganized the sales territory of Mr. Rudko and Mr. Funkle by geographic region, so that they now each had a mixture of inside and field sales staff. Mr. Rudko's evidence that he had less reports following this strategic planning change was inconsistent with the organization of sales staff both before and after the change. Ms. Orlando's evidence that the reorganization resulted in Mr. Rudko having about thirty salespeople reporting to him, including sales managers with sales teams, instead of ten individual salespeople reporting to him, accords with Insight Canada's business model. Mr. Rudko's evidence was inaccurate.

[19] I also have issues with his evidence around mitigation. He testified that he often contacted several executive search firms, yet he did not keep any documentation of such contacts. Individuals from five executive search firms testified. Between 2017 and 2020, there was either no record of him contacting the firm, or he had only contacted the firm in a preliminary way on one occasion, without providing a resume or similar information.

[20] I found Mr. Rudko not reliable and, in many instances, not credible.

[21] I found Ms. Orlando credible and generally reliable. She candidly acknowledged the good aspects of Mr. Rudko's employment, such as his good work with a particular client, positive remarks in his 360 Review feedback, and that he contributed to sales used for bonus calculations. She was also clear as to other people's roles in meeting financial performance metrics. She was detailed in her evidence on such matters as company processes, which individuals reported to whom, and specific situations giving rise to performance concerns of Mr. Rudko, without hesitation. She did not exaggerate her evidence and was careful not to speak to matters that were outside of her knowledge and role within the Insight group of companies.

[22] Mirabelle Mikhail, Insight Canada's Senior Human Resources Manager, was honest and straight forward in her evidence. She remained consistent in her evidence on cross-examination. She did not attempt to speculate and did not speak to matters outside of her personal knowledge. She did not have a history with Mr. Rudko prior to starting with Insight Canada in March 2017, when the progressive discipline of Mr. Rudko began. Therefore, she had objectivity in respect of Mr. Rudko's actions. I rely upon her evidence with respect to what occurred in the performance management meetings with Mr. Rudko.

[23] Both Georgia Hauglid and Betsy Eberg, who were employed with Insight Enterprises at the relevant time, provided clear and cogent evidence. Their evidence remained consistent throughout, both internally and externally to the documentary evidence and evidence of other witnesses. There was no basis for them to a) treat Mr. Rudko differently than the other 150 employees across the world receiving equity compensation, b) to create false information from a system and process designed for transparency and subject to strict auditing requirements, or c) to lie on the stand.

[24] Ms. Eberg was candid and detailed in her testimony. She spoke with solid knowledge of the RSU Plan and the processes within her department. She also provided believable explanations for why she did not receive or send the impugned documents.

[25] Ms. Hauglid gave straightforward and detailed testimony as to the RSU Plan and the executive compensation plan, the stringent requirements placed upon the Company by American securities legislation and rules, and the stringent internal financial reporting and record keeping requirements of her department. On the few instances where she was presented with an error in her evidence, she accepted that she had made an error and provided a plausible explanation.

[26] In all respects in which the parties' evidence conflicts, I prefer the evidence of Insight's witnesses to that of Mr. Rudko.

Did Insight Canada have just cause to terminate Mr. Rudko for insubordination and incompetence?

[27] Insight Canada submits that it had just cause to terminate Mr. Rudko's employment, on the basis of repeated insubordination, through his continued refusal to follow the direction of his superior as part of the performance management process.

[28] The onus is upon Insight Canada to establish just cause: *McKinley v BC Tel*, 2001 SCC 38 at para 36; *Cicalese v Saipem Canada Inc.*, 2018 ABQB 835 at para 14; *McDonald v Sproule Management GP Limited*, 2023 ABKB 587 at para 55.

[29] Misconduct does not automatically give rise to just cause; mere dissatisfaction with an employee's performance does not suffice: *Cicalese*, at para 17; *Milsom v Corporate Computers Inc*, 2003 ABQB 296 at para 55.

[30] Insight Canada must establish that Mr. Rudko engaged in sufficiently serious misconduct that was fundamentally inconsistent with Mr. Rudko's obligations to Insight Canada. Such a violation of an essential condition of the employment contract must result in a breakdown of the employment relationship, so it is no longer viable for the relationship to continue. This requires a contextual assessment of the alleged insubordination, including the nature and extent of the misconduct, the surrounding circumstances, and whether dismissal is a proportional response: *Sproule*, at para 63-68; *McKinley*, at para 29, 48-49, 53; *Cicalese*, at para 18-20.

[31] For insubordination, Insight Canada must establish that Mr. Rudko intentionally defied the lawful, reasonable, and clear instructions of a superior, effectively repudiating the essential employment term that an employee must obey their employer's instructions: *Sproule*, at para 75; *Motta v Davis Wire Industries Ltd*, 2019 ABQB 899 at para 107-110.

[32] Where a single act of insubordination is not sufficient to warrant dismissal on its own, the employer must engage in progressive discipline. When engaging in the necessary progressive discipline of an employee who is failing to meet performance standards or is insubordinate, the employer must ensure that it provides written warnings that set out in clear terms how the employee must improve his performance and that failure to do so may result in termination: *Henson v Champion Feed Services Ltd.*, 2005 ABQB 215 at para 51, 61-63.

A. The Nature and Extent of the Alleged Misconduct

[33] Insight Canada alleged two overarching issues with Mr. Rudko's performance. One, Mr. Rudko failed to meet necessary performance standards. Two, Mr. Rudko demonstrated insubordination when his manager, Ms. Orlando, attempted to address these performance problems and directed him to provide a development action plan with detailed action items, which he failed to do despite numerous opportunities. The first allegation informs and provides the context for the second. Insight Canada terminated Mr. Rudko for the second allegation.

[34] Mr. Rudko submits that his performance was exceeding standards, based on financial sales measures for Insight Canada and improvements in other metrics of his performance. He argues that he provided a development plan as needed in January, which was updated in March. However, following a change in his sales group and territory, confusion over the impact on his role prevented him from complying with further requests for a development action plan.

[35] In 2010, Ms. Orlando was responsible for all facets of Insight Canada, in her position as Senior Vice President and General Manager (Canada) for Insight Enterprises. At that time, she had eight direct reports. This included Mr. Rudko, when he became the Director, Field Sales, Canada in April 2010. In this position, Mr. Rudko was responsible for the oversight and management of all field sales staff company wide, from Canada's west coast to Montreal. The field sales staff consisted of approximately eight to ten individual salespeople, all of whom reported directly to Mr. Rudko. At the time, Mr. Funkle was the Director, Inside Sales, Canada, responsible for the oversight and management of all inside sales staff company wide.

[36] As the manager of staff at the Director level, Ms. Orlando described her primary role as working with and coaching the staff to educate and develop them as contributors to the business. This included helping them understand Insight's business and making sure that they were leading and managing their own teams, through engagement, recognition, presence, and involvement in the business. Therefore, performance management was directed towards both financial and leadership performance.

[37] Ms. Orlando's management style allowed for multiple opportunities to interact with her Sales Directors, through bi-weekly one-on-one meetings, vendor meetings, staff meetings involving all her direct reports, and forecasting meetings. The one-on-one meetings with Mr. Rudko were intended to provide a mutual opportunity to share information about how Mr. Rudko's sales area was doing, the positive or negative performance of his staff, pertinent business issues, and Mr. Rudko's performance, including areas of improvement. Usually, the meeting ended with a list of action items to be completed.

[38] Insight Canada implemented a strategic planning change, where sales were grouped by territory rather than by types of sales. As a result of the change, Mr. Rudko was responsible for management and oversight of all field and inside sales staff in Western Canada, with a corresponding change in title to Director of Sales, Western Canada. Western Canada consisted of accounts in Manitoba, Saskatchewan, Alberta, and British Columbia, even though the inside sales staff for those areas were mainly located in Montreal. He now had 25 to 30 people reporting to him, which included the field sales staff and the sales managers of inside sales teams and their direct reports that came within his region. As he was now responsible for some inside sales, his duties required more of a presence in Montreal and more responsibility for vendor meetings. Mr. Finkle had corresponding responsibility in his territory, as the Director of Sales, Eastern Canada.

[39] The parties dispute when this strategic change occurred. Mr. Rudko testified that this change happened in May 2017, at the same time a new compensation plan for Insight Canada's Sales Directors was rolled out. Ms. Orlando testified that the change occurred sometime in 2015, despite which the Sales Directors continued to receive the same bonus compensation based upon overall Canada sales, until a new incentive compensation structure was rolled out in mid-2017. Mirabelle Mikhail testified that Mr. Rudko was in the Director, Western Sales position when she started with Insight Canada in March 2017. Three internal performance review documents between November 2016 and June 2017 state Mr. Rudko's title as Director Field Sales Canada, which appears to have been prepopulated by Insight Canada's systems. However, these documents use that title even after May 2017, so they are not of assistance. An email dated June 1, 2016, dealt with an inside sales representative, which email made it clear that she reported to Mr. Rudko. This reporting structure could only be in place after the strategic planning change. I find that, at least as of June 1, 2016, Mr. Rudko was in the position of Director, Western Sales.

[40] Regardless of which Director role Mr. Rudko was in, Ms. Orlando described his role as developing and coaching his team of salespeople, including enabling sales to clients, performance management, communication of organizational strategy, leading by example, having a presence in meetings, and leading meetings. She saw these as key sales and leadership functions. In fulfilling these responsibilities, Mr. Rudko had authority to hire and fire members of his sales team, although the expectation would be to follow the proper processes, including engaging human resources. Ms. Orlando described the Sales Director position as "prestigious", with a lot of responsibility and

exposure to the business. Insight Canada's expectations were that the Sales Directors perform at the highest levels to communicate with their teams and have their people perform.

[41] Insight Canada's established performance management process involved measures of performance, outside of sales numbers. One of the biggest was a yearly 360 Review, which solicited feedback for an employee from subordinates, peers, and superiors. Ms. Orlando testified that she considered the 360 Review important. Mr. Rudko agreed the 360 Review was considered an important process within the organization but could not recall how often it was done. He testified that executive members, such as himself, tried to "drive" the 360 Review initiative within the organization. He acknowledged that part of his role as Director was to fill out the 360 Review for his peers, subordinates, and superiors, just as others would fill out the survey in respect of him. However, it was apparent in late 2016 that he was not engaged in the 360 Review process, so I do not accept that he was working to promote and support this process within the organization as he was expected to do.

[42] Insight Canada also encouraged and expected leaders to use the "Recognition" platform, to recognize good work by their subordinates and others who supported their team. Leaders were assessed on their use of the Recognition platform; the evidence establishes that Mr. Rudko did not use this platform. There was also Teammate Pulse (TPS), which assessed the team's satisfaction with their leader and the organization overall. Net Promoter Score (NPS) was another benchmark of team engagement and happiness within Insight Canada, as an indicator of how likely an employee was to recommend Insight to others.

[43] Ms. Orlando testified that, looking back, there was some level of concern with Mr. Rudko's performance when he was the Director, Field Sales. However, it was not until after the sales department reorganization that the performance concerns became more visible to her, as other departments and employees started to provide feedback on Mr. Rudko. Her main concerns with Mr. Rudko were lack of responsiveness, lack of performance management of his staff, engagement, presence in Montreal or with other peers, and his lack of engagement on the 360 Review process. Ms. Orlando stated that, as the performance issues became more prevalent in 2016, she began to raise them with Mr. Rudko.

[44] In direct examination, Mr. Rudko denied that any issues with his performance were raised in 2016; he testified that no issues were raised until the final warning letter in October 2017. He outright denied that concerns were raised with his responsiveness or a failure to drive sales in his region and stated he could not recall concerns raised for failure to attend meetings, performance manage low performers, failure to award top performers, or attend often enough in Montreal. This position is contrary to the documentary evidence presented, such as multiple emails in 2016 or the first warning letter in August 2017, and his admissions on cross-examination. This was another example of Mr. Rudko's failure to give reliable or credible testimony.

[45] Several areas of improvement were identified in Mr. Rudko's 360 Review in November 2016. Mr. Rudko described the 360 Review as a basis to create a personal or career development plan, rather than a process to identify performance issues. That appears to be how it was treated in 2016, when he worked with Human Resources to create a personal development plan. However, Ms. Orlando's stated position in meetings and communications with Mr. Rudko in 2017 would

have made clear to him that the development action plan she was seeking was a result of performance issues, identified in part through the 360 Review.

[46] Ms. Orlando told Mr. Rudko that his Western team was disgruntled and struggling, so he needed to engage with them in a responsive manner. She considered his 360 Review and his failure to use the Recognition platform, as well as his below average TPS and NPS measures, in determining the performance gaps and coming to this conclusion. From the 360 Review in particular, she saw direct and honest feedback from many levels in the organization, which gave her a level of concern and urgency to address identified areas of improvement.

[47] In 2016, there were several emails that praised both inside and field sales staff, Canada-wide, for their work in achieving or beating Insight Canada's organizational sales targets. There were also emails to Mr. Rudko specifically, about his bonus payments, a particular customer account, or meeting a specific financial target, in which Ms. Orlando praised Mr. Rudko.

[48] However, as a result of concerns arising from her observations and the various metrics used to assess Mr. Rudko's ongoing performance, Ms. Orlando had conversations with him about the gaps in his performance during their regular one-on-one meetings. She described the conversations as pointed, clear and concise, telling him what she expected to change and that he needed to develop a plan of how he would accomplish the necessary changes.

[49] Between March 2016 and early 2017, Ms. Orlando emailed Mr. Rudko on multiple occasions with specific concerns about his performance and her expectations as to how he was to perform in the future. These included failure to be available to his staff to provide assistance; failure to be responsive in a timely manner after multiple requests for a response; failure to performance manage; failure to follow the proper performance management process; failure to be present in Montreal to engage with his inside sales staff and his peers; failure to engage in the 360 Review process despite multiple reminders to do so; and failure to engage with his staff to ensure staff concerns were fully dealt with and staff would not feel the need to go to others for answers. By September 2016, Ms. Orlando began asking Mr. Rudko to provide her with specific and measurable actions that Mr. Rudko would take to resolve some of the performance issues. Mr. Rudko testified that either he did not recall the particular email or situation or explained the background leading up to Ms. Orlando's email, without an explanation as to how he addressed her concerns.

[50] In November 2016, Mr. Rudko received a 360 Review. While working with Human Resources on his 2016 development plan, they discussed with him that there were concerns about responsiveness, follow-through, accountability, and presence that he needed to continue to work on. Human Resources also offered suggestions on how he might increase his presence within the organization. While this was in the context of a non-performance management process, he should have understood as Sales Director that such concerns were necessarily related to performance gaps, not simply issues related to the development of his career.

[51] The next step in the 360 Review process was for Ms. Orlando and Mr. Rudko to meet and discuss the results. This occurred on March 24, 2017.

[52] Prior to the meeting, Mr. Rudko provided an action plan by email, with the understanding that this plan would be discussed in the meeting. He listed eight areas of 360 Review actions to be addressed: responsiveness (withing 48 hours); perception – trust; active in meetings; vendor meetings in Montreal; seek feedback; travel to Insight Canada headquarters in Montreal every 6 weeks; Coach; Communicate. These were different action items than those from the 2016 development plan.

[53] He also provided comments for some areas: “I can’t respond, if I have not been included” for responsiveness; “I can’t participate, if I have not been included” for vendor meetings; and “altered planned travel – illness” for Montreal travel. Mr. Rudko did not provide any further explanation for these comments, either in his email or in his testimony at trial, nor comments for the other five areas.

[54] He rated himself as green (meeting expectations) in all areas except for travel to Montreal, which was yellow (needs improvement). Mr. Rudko agreed that the color ratings reflected only his own opinion of his performance, as there had not yet been any discussion with Ms. Orlando.

[55] Ms. Orlando’s expectation was that Mr. Rudko would create a plan setting out items needing improvement, as identified in the 360 Review, and specific actions he would take to improve in each area. Mr. Rudko denied that there was an expectation that he set out specific actions to address these issues. Rather, he intended to identify potential problems, to be part of the review of his first quarter in the year. I accept that Mr. Rudko may not have understood at the time he sent the email that he was being performance managed due to these concerns, based on his experience in 2016 with the 360 Review and resulting development plan that was not part of performance management. But even in the 2016 process, he was required to create specific action items to address areas that required development or improvement, so his denial that this would be an expectation now was illogical. It was this latter failure, his refusal to set out specific actions he would take to improve, that persisted throughout the progressive discipline that followed.

[56] The main agenda for the March meeting was to discuss the gaps identified in the 360 Review and how Mr. Rudko would address them. Ms. Orlando testified that, during the meeting, she made it clear to Mr. Rudko that he was not meeting expectations in the eight areas. She also did not find his comments on his emailed action plan to be acceptable for a director. This is reflected in the brief notes of the meeting that Mr. Rudko provided afterwards, which stated that identified areas of improvement were responsiveness and coaching, with brief comments on addressing those two areas. Both Ms. Orlando and Mr. Rudko testified that Ms. Orlando was candid and straight forward with him in the meeting.

[57] I reject Mr. Rudko’s testimony that, following the meeting, he understood Ms. Orlando was satisfied with the progress he had made and that she did not want him to develop additional action items or see further results. This is not consistent with his own notes of the meeting. I find that Ms. Orlando told Mr. Rudko that he was not meeting expectations, she was looking for progress from him, and he was required to provide her, in writing by April 4, 2017, a written plan with specific action items to gain improvement in each area. Mr. Rudko acknowledged these expectations during the meeting, with a clear understanding about Ms. Orlando’s expectations and exhibited a receptiveness to improve.

[58] However, the sparse notes of the meeting provided by Mr. Rudko did not meet expectations. They were not a clear action plan with specific items that were measurable, achievable, relevant, and time bound. Mr. Rudko did not provide a development action plan by April 4, 2017.

[59] Despite a 360 Review in June 2017 that showed some improvement in Mr. Rudko's overall score, Ms. Orlando continued to have the same concerns with his performance. Ms. Orlando had earlier engaged Ms. Mikhail to provide human resources support to address Mr. Rudko's lack of performance. Ms. Orlando and Ms. Mikhail had a meeting with Mr. Rudko on July 27, 2017.

[60] I do not accept Mr. Rudko's evidence that there was no discussion in the July meeting about his development action plan, communication issues, or leadership, as it was contrary to his answers in questioning and Ms. Mikhail's presence. Mr. Rudko was obtuse in giving his evidence, stating that Ms. Mikhail's presence suggested there was a human resources issue, but not a performance issue. He did not provide an explanation as to what was discussed in the meeting. Ms. Orlando set up the meeting for the purpose of discussing performance issues. I accept the evidence of Ms. Mikhail and Ms. Orlando that Ms. Orlando discussed his lack of performance, requested he improve on specific matters, and requested he provide a written action plan. I further find that Mr. Rudko was receptive to this discussion, he understood that these were serious performance issues which management believed required urgent action, and he did not express any disagreement or confusion about what was expected of him or how to create the plan. It would have been clear that he needed to provide a written plan for how he would improve to meet the behavioural standards.

[61] And even if it wasn't clear to Mr. Rudko at July meeting that Ms. Orlando was treating the areas of improvement as performance issues, it became clear on August 7, 2017, when Ms. Orlando gave Mr. Rudko a warning letter. The letter identified that, in the meeting on March 24, Mr. Rudko committed to a deadline of April 4 to provide a development action plan, which was never provided. It also confirmed the second meeting on July 27, where the performance issues were again discussed. The warning letter set out nine specific areas to improve, such as "respond to emails or calls within 24/48 hours" and "reward and recognize your top performers". Ms. Orlando saw these as "key elements" in his role as a Sales Director. The letter warned Mr. Rudko that a failure to meet the expectations set out in the letter could result in a final written notice or dismissal. He was required to provide a "detailed development action plan" by August 23, 2017 and was given 45 days to show significant improvement in his performance. Ms. Orlando was also clear in her email that attached the warning letter, saying in part:

As per our multiple conversations, I am now putting in writing my expectations. There are critical areas of your performance that are of concern, and I am trusting you to understand the urgency and severity in addressing them, and seeing immediate improvement. I truly believe you have the potential to address each of these areas, but it is clearly up to you now...

[62] Mr. Rudko testified that he did not understand why he was getting this list, given his performance and accolades received. He suggested in his evidence that he needed a clear understanding of his role, so he could address these concerns and build a plan. Mr. Rudko stated he was confused by the ninth expectation listed, "drive sales for the region," as he was exceeding financial targets. However, that should not have created any confusion for him with respect to the

other eight items, given the meetings that had already occurred. If he was confused, he should have reached out to Ms. Orlando to clarify. Even accepting Mr. Rudko's evidence that he was shocked to receive this email and letter despite the previous two meetings, he should have realized at this point the seriousness of Ms. Orlando's request for a development action plan and taken the necessary steps to complete one. He did none of these things.

[63] Following a later discussion about the impact of vacation schedules on the August 23, 2017, deadline, Ms. Orlando confirmed in an email on August 14, 2017, that Mr. Rudko had committed to having the action plan to her by August 18, 2017 and she offered to review the plan or answer any questions, if he needed help.

[64] Mr. Rudko sent an email on August 15, 2017, to Ms. Orlando. He stated that the warning came as a shock, given the financial numbers he had achieved, and he would be seeking advice from third parties. He requested documentation relating to a contract of employment, conditions of employment, and any changes to those conditions from Insight Canada. Contrary to Mr. Rudko's explanation during trial, this was not a request for clarification of the warning letter or for help with the development action plan. In no way can this be construed as a request for a discussion with Ms. Orlando to discuss the details of the performance concerns or his role change or Mr. Rudko seeking to build a good foundation to move forward from.

[65] A reasonable interpretation of the email is the one that Ms. Orlando and Ms. Mikhail initially had. He was seeking advice from outside the organization, because he realized his job was in jeopardy, and the email exhibited a lack of understanding as to what he was expected to do. They were also confused, as there had been no indication in the meetings that he did not understand the performance concerns. Ms. Mikhail therefore called Mr. Rudko to seek clarity on his email. Mr. Rudko advised her that his email was intended to send a message that "I really want this to work, I understand there are things I need to work on" and apologized. Ms. Mikhail advised him to call Ms. Orlando and clarify his intentions. He did not express any confusion or seek clarification from Ms. Mikhail on the performance concerns.

[66] Mr. Rudko phoned Ms. Orlando on August 15, 2017. He then confirmed by email that he would book time to "review the plan" upon his return from vacation on September 6. I do not accept that the plan to be reviewed in September was his change in role and change in compensation, as that was not consistent with the content of previous discussions and the purpose of his call. Mr. Rudko testified that, despite his request in the call for clarity, Ms. Orlando did not provide any clarity or offer any suggestions on his performance plan. He confirmed that he did not get back to Ms. Orlando on the items in the warning letter, as it was not something he felt was discussed on the phone call. I find that at no time did Ms. Orlando tell Mr. Rudko that he did not have to provide the development action plan that she had requested on multiple occasions. Whether it was discussed on the August 15 phone call or not, the expectation was set out clearly in writing for him to provide a development action plan in August. He did not do so.

[67] Ms. Mikhail, Ms. Orlando, and Mr. Rudko met again on October 5, 2017, to discuss performance expectations and the development action plan. As stated at trial, Mr. Rudko's goal in the meeting was to address his confusion over his role, understand why the current situation was not consistent with the 2016 development plan, understand what the targets were, and establish a base to build a plan for next steps. During the meeting, Ms. Orlando asked Mr. Rudko to provide

her with a written development action plan, as his performance was not up to her standards and a new plan was required to change the results. She explained to him in the meeting what she wanted to see in the plan. Among the concerns discussed was the unacceptable 360 Review results and not responding in a timely manner. Mr. Rudko was also advised that the next disciplinary action may be a final notice. Mr. Rudko testified that he understood things were getting serious with his employment and Ms. Orlando was upset that he had not provided a development action plan, but he was not concerned given his request in mid-August. However, he understood from the meeting that if he did not provide a development action plan, there might be further action in respect of his employment, including termination.

[68] Ms. Orlando asked Mr. Rudko to recap the conversation and next steps in an email. Nine days later, on October 14, 2017, Mr. Rudko provided the recap, including noting the discussion about the performance concerns. But he then wrote that the development action plan had not been discussed, despite having just noted that a plan was expected. From his perspective, Insight Canada's first priority was revenue generation. He expressed that he was perplexed to be cited for lack of performance when his ultimate role was to drive sales in his region and he had done so with "stellar" performance. Therefore, he demanded data to back up the performance concerns and set "reasonable parameters" going forward, as he considered Ms. Orlando's concerns "unjustified or moot."

[69] There was no evidence that a failure to drive sales had previously been raised as a concern. Mr. Rudko received accolades in the emails advising him of each quarterly bonus. I accept that this would create some confusion on the "drive sales in your region" concern listed in the warning letter. However, this does not detract from the force of the warning letter in respect of the other performance concerns, which had been raised with him over the course of the previous 18 months.

[70] Mr. Rudko's October 14 email created frustration for Ms. Mikhail and Ms. Orlando, as Mr. Rudko was not moving forward to creating the development action plan and improving his performance. Ms. Mikhail testified that he would not express concerns or confusion in the meetings but then would express concerns afterwards. Shea also stated that Mr. Rudko was receptive in meetings to what Ms. Orlando was telling him and then, after the meeting, he would not comply with what Ms. Orlando told him to do.

[71] Given the seriousness of the situation, Ms. Orlando was justified in being upset at the delay in receiving the email recap of the meeting. Ms. Orlando's concerns were not unjustified or moot. Over the past year and a half, Mr. Rudko had exhibited the behaviors that led to her concerns; here was another obvious instance of a failure to respond in a timely manner. As a result, she was making reasonable directions to improve performance to an employee based on the employee's behavior. Mr. Rudko's email amounted to a refusal to provide the development action plan, because Mr. Rudko disagreed that he needed to improve his performance.

[72] On October 19, 2017, Ms. Orlando provided Mr. Rudko with a final warning by email. Again, the warning letter was clear as to what performance standards required improvement. There was also some data provided on financial performance, low NPS scores, and a failure to use the Recognition platform. In the email, Ms. Orlando rephrased her concerns in the form of questions to help guide Mr. Rudko in creating a development action plan. She required the two warning letters to be signed by him and returned to her by October 20, 2017, as well as the written

development action plan to be provided to her by October 26, 2017, at 9 am. He was also given 30 days to improve on the performance concerns.

[73] I accept Ms. Orlando's explanation of the praise contained in the emails regarding Mr. Rudko's quarterly bonus, which was based on sales for Canada overall. He attained large bonuses, because Insight Canada would have fantastic financial quarters and he was part of meeting those metrics. However, this was not necessarily a reflection of how his own region had performed. Further, any compliments on the bonus or the daily number would be in response to the financial performance, not praise directed at his leadership performance.

[74] While the final warning letter was the first time in the disciplinary process Mr. Rudko was provided with his region's financial numbers, Ms. Orlando testified that these numbers would be discussed in budget, sales, and staff meetings. Such data was available to Mr. Rudko at any time, including for the purpose of managing and directing his own sales staff. It defies common sense that Mr. Rudko, as a Sales Director for seven years, would only measure his performance by his bonus payments, which were based on different financial numbers, and not understand or use other data available to him to assess sales performance in his region.

[75] Regardless, I view these numbers as simply a response to Mr. Rudko's statement that he was a "stellar" performer. Ms. Orlando's concern was not about his sales performance, but about gaps in his leadership performance. The presentation of sales statistics at this stage does not detract from the finding that leadership performance issues existed, but Mr. Rudko refused to accept their existence and the direction to create a development plan.

[76] Mr. Rudko understood from the October 19, 2017, email and warning letter, that his employment was in jeopardy. Despite this, he sent an email on October 23, 2017, that simply stated "Email received. I respectfully disagree." He then sent another email on October 25, 2017, that stated "Be advised I'm not in a position to respond to your 26th deadline. The file request is currently under review by counsel. ETA mid next week." Mr. Rudko testified that these emails were expressions of confusion and requests for help from Ms. Orlando. The emails do not support such an interpretation.

[77] Mr. Rudko acknowledged at trial that he understood what he was being asked to do by Ms. Orlando. Despite having months to work on a development action plan, Mr. Rudko never provided a development action plan. Given the past refusal to provide a plan in the October 14 email, a reasonable interpretation of the October 23 and 25, 2017 emails, with the same tone as the earlier email, was that Mr. Rudko did not accept that he had performance issues and again refused to provide the requested development plan. He was not prepared to accept or participate in the performance management process.

[78] Mr. Rudko, both in October 2017 and at trial, remained focused on financial performance. When asked to explain the basis for describing his performance as "stellar," he cited the bonus emails with accolades and attainment of sales above target. However, the sales giving rise to the bonuses included both Mr. Rudko and Mr. Funkle's regions. It is a stretch to conclude that such bonuses support a stellar performance by one individual. The data provided to him later in October shows that his region was, in fact, not reaching targets or producing significantly lower than expected. This focus on sales, rather than on the people who need to make the sales and the people

in support roles, appears to have blinded him to what his manager was clearly telling him. Regardless of his financial performance, Mr. Rudko's leadership skills and interactions with people in the organization required improvement. Mr. Rudko simply ignored Ms. Orlando's position, because he believed that his sales team's results from a revenue perspective were all that mattered.

[79] Although the 30-day timeline had not yet elapsed, the deadline to provide the signed warning letters and the development plan had passed. Mr. Rudko had expressly stated his position, contrary to that of his manager. Insight Canada decided that the employment relationship had been irreparably broken. Mr. Rudko was terminated on October 30, 2017.

B. The surrounding circumstances

[80] Mr. Rudko was a long-time employee at Insight Canada, who had risen within the sales department ranks to the position of Director. It was a position he had held for over seven years, so he was experienced in both the sales industry within which Insight Canada operated and the culture that Insight Canada strove to build amongst its employees. He was informed on the importance of various Insight Canada initiatives, such as its core values, the Recognition platform, and the 360 Review process. While Insight Canada's business was based on sales, it was built on relationships with its vendors, its clients, and internal relationships amongst its staff. He reported to the top executive within Insight Canada. People management is a critical aspect of any business, yet Mr. Rudko demonstrated throughout that his focus was on financial results, not the people who produce such results.

[81] As a Director, Mr. Rudko would be expected to demonstrate high performance as a leader and set examples of compliance with various performance standards, including responsiveness, communication, and presence within the organization.

[82] Ms. Orlando testified that both Mr. Funkle and Mr. Rudko were supportive of the change in the configuration of sales territory, as it would be easier for each of them to manage business in each area as a whole and also provide greater value to Insight Canada's vendors. She denies that this strategic change created any confusion. Both inside and field sales remained integral to the organization, and both Directors knew what their responsibilities were. Mr. Rudko denies that he was a proponent of this change, and that he was confused as to how the transition impacted on his role. Yet he was satisfied that he was exceeding expectations at driving sales; it would be difficult to drive sales if you did not know who you were managing as a sales team. The evidence does not support that he was confused as to his role. Regardless, the transition did not impact on his ability to be responsive to others in his communication and establish a presence in the business, especially when he was being encouraged to do so.

[83] Ms. Orlando described her approach to performance management. She used the 360 Review and her own interactions and observations in the workplace, as well as the various sales metrics and other non-numeric performance measures, to evaluate if an employee had gaps in their performance. If there were gaps identified in the performance, she would discuss them with the employee and ask the employee what actions they would take to improve. This was a coaching process, where she worked with the employee, but the employee was expected to take the initiative to identify ways to improve their performance. After these discussions, action items were formalized in writing in a development plan. Employees could also get assistance from the

Learning and Development Department or Human Resources to complete the development action plan. If the employee failed to make progress after this coaching process, then Ms. Orlando would engage with Human Resources to start progressive discipline, ultimately moving towards termination if necessary. The performance management process she described aligns with an employer's legal requirements of ensuring the employee is aware of issues so that they can be given a reasonable opportunity to improve and proceed with progressive discipline if improvement is not made. It was this established process that Ms. Orlando expected Mr. Rudko to follow with his own staff and that she followed with Mr. Rudko.

[84] It was noted by Ms. Orlando on more than one occasion that Mr. Rudko was not engaging his own staff members in preparing development plans to help them improve their performance. Yet, her communications to Mr. Rudko made it apparent that this was an expectation of his role, for both himself to cover his performance gaps and his staff to cover their performance gaps. All that can be concluded is that Mr. Rudko simply refused to engage in this expected process, as there is no evidence that he was unable to or misunderstood the process. As a result, he should have appreciated the importance of complying with Ms. Orlando's repeated requests for a development action plan containing detailed and specific actions he would take to improve his performance as a leader, separate and apart from his performance in driving financial results.

[85] Ms. Orlando addressed performance concerns directly with Mr. Rudko over an 18-month period, following a progressive discipline model. Her determination of performance concerns was based upon feedback from others in the organization, her own observations, and various measures of performance. Despite the multiple opportunities to seek clarification or help with the performance concerns, Mr. Rudko did not engage in such steps, even when he understood that his employment was in jeopardy. He did communicate a refusal to accept both the performance concerns and the reasonable directive to provide a development action plan.

[86] An implied term of an employment contract is that the employee must accept and implement proper direction from their superior. As a result of his senior management position, any insubordination by Mr. Rudko would be of a more serious character, with a greater potential damaging impact upon the organization, than insubordination by a lower-level employee: *Motta*, at para 117; *MacFarlane v Westfair Foods Ltd*, 1994 CanLII 9048 (ABKB) at para 93.

C. Was dismissal the proportionate response?

[87] Insight Canada submits that Mr. Rudko's termination is the result of repeated insubordination, through the continued refusal to follow the clear direction of Ms. Orlando as part of his performance management. Mr. Rudko failed to comply with the implied term in his employment contract to provide honest and faithful service, by accepting proper orders and implementing those orders. This obligation is heightened for those in management. Ms. Orlando's requirement of Mr. Rudko was not a large ask. However, in the overall context, a small refusal can represent a greater insubordination as a total refusal of the performance management process and the employment contract. Therefore, a contextual analysis of all the surrounding circumstances is important. Mr. Rudko was a very senior employee, whose employment was more than just sales; it involved all elements of leadership. Ms. Orlando had legitimate performance concerns. Mr. Rudko provided nothing substantive in response to her direction. Consistent progressive discipline was followed. The progressive discipline provided clear and appropriate warnings. Mr. Rudko did not ask questions or express confusion. Mr. Rudko understood his job was in jeopardy, but he still

did not comply with the reasonable direction. This communicated a more serious concern that he did not agree with Ms. Orlando about the performance concerns and would not follow her directions. Therefore, Insight Canada argues that termination was justified.

[88] Mr. Rudko submits that he was a good performer, for which performance he received praise and congratulations throughout 2016 and 2017. These accolades did not change while he was being performance managed and the accolades send the message that he is performing well. Further, his change in role to Director, Western Sales is not well communicated. The 360 Review showed there were some issues but also had many positive comments. He argues that all of these factors resulted in confusion in the few months leading up to his termination, and Insight Canada did not take the necessary steps to address his confusion through discussion or offers of help. It was not until the final warning letter that contained financial performance metrics he had never seen before that Mr. Rudko saw clarity. Mr. Rudko submits that he did participate in the performance management process, specifically in March 2017, to which Insight Canada did not respond. He did not refuse or engage in defiance towards Ms. Orlando. He also argues that Insight Canada's failure to provide him with the full 30 days to comply with the warning letter requirements was inappropriate and undermines its ability to rely upon just cause. Therefore, Mr. Rudko argues that just cause did not exist and his termination was wrongful.

[89] As stated in *Henson* at para 62:

The question is whether a reasonable employee in Mr. Henson's boots in August of 2002 would have known that he was at the end of the line; and that one toe over the line would result in his dismissal. Fundamental fairness in the workplace requires that a methodical approach be employed by management in dealing with performance and conduct issues.

[90] In contrast to the situation in *Henson*, and *Bogden v Purolator Courier Ltd*, 1996 CanLII 10572 (ABKB), Insight Canada followed a methodical and respectful approach to the progressive discipline of Mr. Rudko for leadership performance issues. There was no confusion as to what the performance issues were or that Insight Canada took such performance issues seriously.

[91] The question must be answered in the affirmative. As Mr. Rudko himself recognized, he knew what Ms. Orlando was asking him to do and that his job was in jeopardy if he did not comply. While he did not agree that there were performance issues, he failed to use the meetings and email exchanges in which his performance was discussed to express his own position, ask for clarity, or seek help. Regardless of his position on the priority of financial performance over leadership performance, management was clear as to the importance of leadership performance, what the performance issues were, and the standard that he was to meet. Management provided clear and unequivocal instructions that Mr. Rudko had to address these substandard behaviours, starting with providing a written development action plan. Management laid out to Mr. Rudko the seriousness of the repercussions of Mr. Rudko's poor performance to Insight Canada and its staff. He was told the impact of losing his job, should he fail to meet the requirement to provide a plan. All of this was done in a fair, frank, consistent, and coherent manner.

[92] Through the progressive discipline process, he was provided a total of seven months to create and present a plan. He simply ignored that direction. But an employee cannot choose to ignore a lawful and reasonable direction and question the wisdom of that direction. If they choose

to do so, then they have not complied with their duties as an employee and face the serious possibility of termination: *Macfarlane v Westfair Foods Ltd.*, 1994 CarswellAlta 240 at para 117-119.

[93] A reasonable employee in Mr. Rudko's shoes in October 2017 would have known that he was at the end of the line and a failure to positively and actively address the reasonable directive of his manager to provide such a plan by the required deadline would result in his dismissal. He was given 30 days to improve his performance, but he was required, in conjunction with the final warning letter, to provide a development action plan by October 26. He did not and he gave no indication that his communicated refusal to do so on October 14 had changed. The employment relationship had been irrevocably broken. Therefore, Insight Canada had just cause to dismiss Mr. Rudko for insubordination on October 30, 2017 and his wrongful dismissal claim is dismissed.

Is Mr. Rudko entitled to any damages arising from participation in the RSU Plan?

[94] The RSU Plan was an equity plan provided by Insight Enterprises, which Mr. Rudko claims as part of his compensation prior to termination. The onus is upon Mr. Rudko to prove on a balance of probabilities that the RSU Plan was part of his compensation package from 2011 to October 30, 2017, that he participated in the RSU Plan according to its terms and conditions, and that he would be entitled to either common shares in Insight Enterprises or their equivalent value as of the date of trial.

[95] It is not disputed that Insight Enterprises did not provide Mr. Rudko with any grants after February 2012. It is disputed whether Mr. Rudko accepted grants in 2011 and 2012, or whether the Company should have provided such grants from 2013 to 2017 under the RSU Plan.

[96] Mr. Rudko submits that Insight Enterprises' internal and unwritten policy to not continue providing an Award under the RSU Plan, once an employee had declined a grant, was not effective against Mr. Rudko. It was not communicated to him and not followed after he declined the 2011 grant, as he was awarded the 2012 grant. Mr. Rudko states that he continued to participate in the RSU Plan and that Insight agreed to manage his RSUs for him, as evidenced by the impugned documents. The evidence of Insight Canada's expert that the impugned documents are forgeries should be given little weight, due to the expert using improper methodology. Therefore, he should have been provided with RSUs to the date of termination.

[97] Insight Canada states that Mr. Rudko only received one grant in 2011 and one grant in 2012, both of which he declined. Insight Canada argues that Mr. Rudko no longer participated in the RSU Plan after Mr. Rudko declined his 2012 grant, that Insight Canada acted within the provisions of the RSU Plan to exclude him from further participation, and that the impugned documents were falsified. Insight submits that Mr. Rudko has not met his burden of proof to establish entitlement to damages for compensation under the RSU Plan.

[98] An Award under the RSU Plan is a grant¹ of restricted stock units or RSUs. An RSU, when vested, provides the employee with ownership of an equivalent number of common shares in Insight Enterprises.

[99] Ms. Hauglid, the current Director of Equity and Executive Compensation for Insight Enterprises, is a Certified Public Accountant with about 20 years of experience in equity administration. During Mr. Rudko's employment, she was responsible for the proper administration of Insight Enterprises' equity plans and executive compensation plans. Ms. Eberg is a Certified Equity Professional, with about 30 years experience in equity administration. She worked under Ms. Hauglid as the Stock Plan Administrator for the equity plans. Collectively, I refer to them as the Stock Plan Administration.

[100] E*TRADE is a third-party securities brokerage company. Stock Plan Administration used the software program Equity Edge Online to track equity information and interact with E*TRADE to offer grants to employees. Employees would activate their own personal online brokerage account with E*TRADE, through which they could accept and manage their RSU grants and vested shares. Once a grant was accepted, the employee was the only one with access to the RSUs and any vested shares; Insight Enterprises could not access that employee's personal brokerage account. However, the company could access information as to whether and when a grant was accepted, as well as data about the grants that were offered to employees.

A. What were the terms and conditions of Mr. Rudko's participation in the RSU Plan?

[101] It is undisputed that Mr. Rudko, upon becoming a Director within Insight Canada, was eligible to be offered and, in 2011, was offered the opportunity to participate in the RSU plan. There is little else that the parties agree upon with respect to Mr. Rudko's participation in the RSU plan.

[102] There was no documentary evidence that showed Mr. Rudko was entitled to be granted RSUs as part of his Director compensation package, but Ms. Orlando testified that the RSU Plan was an incentive compensation plan. Mr. Rudko testified that he understood that the RSU Plan was a component of his Director compensation and that an RSU grant would be automatically received as a percentage of his base salary and bonus once per year. His offer letter of July 6, 2010 only references a base salary and bonus compensation, but he testified that his understanding with respect to the RSU Plan was based upon conversations at the time he was offered the position. He did not understand that he was not guaranteed to receive a grant every year. I find that the RSU Plan was a part of Mr. Rudko's compensation plan as a Director, subject to the RSU Plan's terms and conditions.

[103] The terms and conditions of the RSU Plan are set out in Insight Enterprises' 2007 Omnibus Plan. The Omnibus Plan and its related documents were the only documents placed into evidence regarding the terms of participation in a plan.

¹ The RSU Plan documents refer to an "award". During testimony, the lay witnesses, including the administrators of the RSU Plan, refer to a "grant". They have the same meaning. I use these terms interchangeably to refer to an offer of RSU's to an employee under the RSU Plan.

[104] The Compensation Committee, as defined under the Plan, had the exclusive authority and thus full discretion to determine who would participate in the RSU Plan, whether any Award would be issued under the RSU Plan, and how many common shares would be covered by any Award made. Ms. Hauglid testified that this was the practice followed with respect to the RSU grants for all Insight entities, including Insight Canada.

[105] Further, the Omnibus Plan states at s. 18.1:

No individual or Participant shall have any claim to be granted any Award under the Plan, and the Company has no obligation for uniformity of treatment of Participants under the Plan.

[106] The 2012 Award Agreement was entered at trial. Ms. Hauglid confirmed that the 2011 Award Agreement would have been very similar, as there were no significant changes between those two years. Therefore, I find that the 2012 Award Agreement is reflective of the terms and conditions in place for the grants in 2011 and 2012.

[107] The Award Agreement is between the employee and Insight Enterprises. The Award Agreement that an employee must agree to, in order to accept the grant, is specific to that employee, including their name, ID identifier, grant number and date, the number of RSUs awarded, and the vesting schedule for those RSUs. It states:

The Award is a one-time, discretionary award made by the Company, and the Company has no obligation to make a like award or any other award in any future period, and no such obligation will arise by reason of your availing yourself of the benefits of the Shares issued under the Award. Future awards, if any, will be at the discretion of the Company.

The Award Agreement does not set out specific future participation consequences, should a grant be declined. However, both the Award Agreement and the Omnibus Plan clearly set out that the Compensation Committee has complete discretion as to the granting of RSUs. Both Ms. Hauglid and Ms. Orlando confirmed that there was no guarantee of a grant in any one year. I find that Insight Enterprises had full discretion to determine what, if any, Award was made to any individual employee in any given year.

[108] Insight Enterprises invested a lot of resources and effort into the RSU Plan, including obtaining shareholder approval of annual grants, as a means of rewarding their employees. While Insight Enterprises wanted to provide such grants, it would not put this effort forward to an individual who had evidenced an intention to not participate in the RSU Plan by not accepting a grant. Therefore, Insight Enterprises had an unwritten policy that an employee who declines a grant will not be offered a future grant unless the employee initiates a request to participate again with the Stock Plan Administration. Ms. Hauglid would advise employees who declined a grant, including Mr. Rudko, of the consequence of doing so, consistent with this policy. Such a policy would be an exercise of the Company's discretion under the RSU Plan.

[109] Mr. Rudko has not established that the terms and conditions of the RSU Plan included a guarantee that he would receive grants in future years, even if he had declined a grant.

[110] The Plan, in s 10.2, sets out that the RSUs in an Award do not become the property of the employee, until the employee has satisfied “any terms, conditions and restrictions prescribed” within the Award. Therefore, acceptance of the “award agreement online” is necessary to accept and receive a grant. Three things are required under the Plan to receive an Award:

- a) The Compensation Committee of Insight Enterprises must approve the issuance of the award;
- b) The employee who is to receive the award must receive a written communication evidencing the granting of the award; and
- c) The employee must accept the terms and conditions of the Restricted Stock Unit Award Agreement.

[111] These requirements are reflected in the standard communication via email from Stock Plan Administration to all first-time grant recipients. In 2011, the email stated that the employee had been granted an RSU award, which needed to be accepted by specified deadline. To accept the grant, the employee was required to 1) activate an E*TRADE account upon receipt of an email from E*TRADE (a presentation on setting up the E*TRADE account was attached to the email); and 2) accept the terms and conditions of the grant, which could only be viewed, reviewed, and accepted through the E*TRADE account.

[112] Therefore, these were the terms and conditions required by Mr. Rudko to participate in the RSU Plan. He was to accept any grants given to him in writing, by complying with the two requirements of activating an E*TRADE account and accepting the terms and conditions of the grant. If he declined a grant, then the Company could exercise its discretion to not issue grants to him in future years.

B. What was the level of Mr. Rudko’s participation in the RSU Plan in 2011 and 2012?

[113] The parties agree that Insight Enterprises provided Mr. Rudko with grants in 2011 and 2012, although they dispute how many grants were awarded.

[114] One grant was issued on February 20, 2011, being Grant 32094 for 522 shares. This was the equivalent of 10% of his base salary, converted to US dollars. The acceptance date for the grant was August 19, 2011.

[115] Ms. Hauglid and Ms. Eberg would discuss daily which employees had not yet accepted their grant. Ms. Eberg would keep a schedule of when to contact such employees, usually every month or so, and she would contact the individual’s manager as well if they had not accepted within a certain time frame. The last time to contact a person was at the 180-day deadline.

[116] Further, once a grant was declined and cancelled, that could not be reversed at a later date. Therefore, it was Ms. Hauglid’s standard practice not to cancel a grant, until she had a call with the individual to ensure they understood the grant, the process to accept a grant, the potential tax liability, and the consequences of not accepting the grant.

[117] Stock Plan Administration’s records showed that Mr. Rudko had not accepted the 2011 grant and the August 19, 2011 deadline for acceptance was approaching. Ms. Hauglid attempted

to contact Mr. Rudko multiple times without response. She was finally successful in organizing a call with him well after the acceptance deadline. On September 27, 2011, she had a detailed discussion by phone with Mr. Rudko. In accordance with her standard practice, she explained the process related to accepting the grants and options of how to pay withholding tax requirements upon vesting of the RSUs and offered to answer any questions Mr. Rudko may have. She specifically recalled explaining the tax consequences to Mr. Rudko, as he was insistent that accepting the RSU would result in a negative tax consequence greater than the value of the RSU. This was the first time she had ever heard such a thing, which tax liability she believed to be impossible. Therefore, she explained the tax withholding requirement for Canadian employees, which would be under 50% of the RSU value. Mr. Rudko was unmoved from his conviction that he would suffer a tax disadvantage and told her that he would be declining the grant. Ms. Hauglid advised Mr. Rudko that if he declined the grant, he would not be eligible for future grants, unless he communicated a willingness to accept the grant. Mr. Rudko confirmed he was electing to decline the grant and did not communicate any interests in participating in the RSU plan.

[118] Mr. Rudko tells a different version of events. Mr. Rudko understood that to accept the RSU grant, he needed to sign into an account with E*TRADE. He testified that he signed into the account in March and accepted the RSU grant. However, shortly after signing into the account, there was a problem with the account. He was required to complete a W8BEN form (a US tax form for non-US residents) and his address was not accepted in the form. After attempting unsuccessfully to resolve the issue, a second grant appeared in his account, Grant 32094. Mr. Rudko conferred with Stock Plan Administration and Ms. Orlando about the issue and was told not to accept the second grant. The first and second grants were identical in value, but he declined Grant 32094. However, he further testified that he did accept “something” and was not aware that he needed to do anything further to accept the first grant, though he continued to have challenges with his E*TRADE account.

[119] Mr. Rudko testified that he had a phone call with Ms. Hauglid, but he did not recall the full conversation. He remembered discussing the W8BEN form challenges and that there was a duplicate grant in the account. However, he did not recall having a discussion with Ms. Hauglid about tax consequences. He did not recall Ms. Hauglid explaining that declining the grant could result in no future grants being offered, although he was certain he did not have that understanding after the phone call. He denies that anyone ever advised him that declining an RSU grant would affect his eligibility to participate in future RSU offerings.

[120] Both parties agree that Mr. Rudko did not accept Grant 32094, as confirmed by an email exchange with Ms. Hauglid on September 28, 2011. Ms. Hauglid’s email does not make any mention of the consequences of failing to accept an RSU grant on future participation in the RSU program or the issuance of future grants. Mr. Rudko responded to the confirmation that the grant was cancelled:

Good afternoon Georgia, thank you so much for your persistence, effort, and tenacity to bring closure to this file. I trust you understand my challenges. Once again I appreciate your time.

[121] Although there is no detail in the emails as to what those challenges might be, Mr. Rudko testified that this was in reference to his W8BEN issue with the E*TRADE account. Ms. Hauglid

testified that Mr. Rudko did not raise any issues or struggles with the W8BEN form or his E*TRADE account. She understood the reference to challenges was his concern over taxes.

[122] The second grant was issued on February 20, 2012, being Grant 32339, in the amount of 435 RSUs. This was the equivalent of 10% of his base salary, converted to US dollars.

[123] Ms. Hauglid testified that, although Mr. Rudko had declined the 2011 grant, she made an error including him on the 2012 grant budget and a process had not been implemented to catch such errors, resulting in the 2012 grant offer. Ms. Eberg confirmed this grant was an error by the Stock Plan Administration. It was determined by Insight Enterprises to proceed with the grant offer. As the deadline for acceptance was again approaching without action by Mr. Rudko, Ms. Eberg “chased him down by email”.

[124] A June 4, 2012 email from the Stock Plan Administrator advised Mr. Rudko that he was receiving a grant of RSU’s, but he was required to review and accept the Award Agreement by August 8, 2012, which could only be done by logging into his E*TRADE account. It also stated, “*If you wish to decline the grant, please state so in writing by replying to this email*” (emphasis in original). He emailed Ms. Hauglid and Ms. Eberg on June 6, 2012, saying “Good evening Betsy I appreciate the offer. Let this email serve as confirmation, I am declining the current grant of 435 RSUs” (emphasis in original). Ms. Hauglid replied with confirmation that Grant 32339 was cancelled.

[125] Mr. Rudko’s version of events is similar to his 2011 version. He accepted an RSU grant in 2012. Then a second grant, being Grant 32339, was provided and he declined that grant. He testified that he declined the grant because W8BEN form issue from 2011 had still not been resolved, despite numerous attempts to do so. Those attempts included engaging with E*TRADE, meeting with Ms. Orlando on July 19, 2011, and discussions with Ms. Eberg. Again, throughout this process, no one advised him that declining an RSU grant would affect his eligibility to participate in future RSU offerings. Therefore, by June 2012, Mr. Rudko believed that he had accepted a grant in 2011 and 2012, rejected a duplicate grant in 2011 and 2012, and would participate in future RSUs offerings.

[126] Ms. Hauglid and Ms. Eberg deny that duplicate grants were issued in 2011 and 2012, as none of the Stock Plan Administration records reflect such an error and they don’t recall such an error occurring, with Mr. Rudko or anyone else.

[127] An Award of RSUs must be set out in writing. The only documents produced evidencing the issuance of grants in 2011 and 2012 were produced by Insight Canada, from Stock Plan Administration. Those reports only show the issuance of two grants to Mr. Rudko, Grant 32094 in 2011 and Grant 32339 in 2012. The issuance of grants by Stock Plan Administration is subject to strict checks and balances, as well as auditing requirements. Had duplicate grants been provided, there would have been evidence within the Stock Plan Administration records that such an error had occurred. Emails reference the rejection of the same two grants; there is no mention of duplicate grants in these emails. There is no documentation evidencing either the issuance to or acceptance of any other grants by Mr. Rudko. The notations made in Stock Plan Administration’s system indicate that Grant 32094 was cancelled in 2011 for not being accepted prior to the deadline

and that Grant 32339 was cancelled in 2012 because Mr. Rudko declined the award in writing by email. Like the emails, there is no mention of duplicate grants.

[128] It is impossible to accept a grant without first logging into an activated E*TRADE account to review and accept the Award Agreement. On cross examination, Mr. Rudko confirmed that agreeing to the terms of the Award Agreement was required and was done so online by clicking on “it,” which he did to accept both an Award Agreement and a grant in each of 2011 and 2012. However, he did not have a paper copy of the Award Agreement for either year.

[129] If an Award Agreement is accepted, there would be a record of that acceptance on E*TRADE’s system. Stock Plan Administration could access both the status of an employee’s E*TRADE account and records of acceptance. There is no record in the E*TRADE system or Stock Plan Administration’s reports of an acceptance of an Award Agreement, RSUs, or shares that would have vested over time from grants in 2011 and 2012. The records only show two grants being issued, both of which were declined. E*TRADE’s system showed, that as of 2024, Mr. Rudko had never activated his E*TRADE account. Mr. Rudko explained that, despite the issue with the W8BEN form, his E*TRADE account was activated, and he was able to use it to accept the grants. His evidence is contrary to the documentary evidence provided, which documentary evidence was not undermined in any way.

[130] After accepting the RSUs granted, the employee receives Insight Enterprises shares equivalent to the number of RSUs, in accordance with the vesting schedule. Upon receipt of the shares, tax withholding consequences are immediately imposed. As set out at s 13 of the Plan, Insight would not issue any shares to settle an Award under the Plan until the tax withholding obligations had been satisfied. There should also be evidence related to the tax consequences, including inquiries to Mr. Rudko of how he wanted to pay his taxes (through payroll or share sale) and remittance of taxes, for those shares that would have vested under the grants accepted by him. There are no records of shares vesting or tax withholdings as a result, in respect of Mr. Rudko.

[131] The onus is upon Mr. Rudko to prove that he was issued the two grants. Other than his oral evidence, Mr. Rudko provided minimal documentation, being the impugned documents. The authenticity of that documentation is dealt with below. However, even assuming those documents were authentic, they do not assist Mr. Rudko with respect to 2011 and 2012, as they do not provide evidence of him accepting any grants received.

[132] Mr. Rudko testified that he printed off the documents in 2013 and kept them in a paper file in his house. He explained that he did not have more documentation with respect to his participation in the RSU program, because of the loss of access to emails prior to 2015 from archiving processes and the replacement of his work laptop. However, if he were printing off important documents in 2013, it would be expected that, at the very least, he would print off the important documents from 2011 and 2012 for tax purposes, being the confirmation of a grant being issued to and accepted by him. Such documents would be important for him to track his investment and confirm when he needed to pay taxes, which tax requirement is addressed in detail in the Award Agreement, which Award Agreement must be accepted to obtain the grant. One document was from February 2012, an email from Ken Lamneck advising him that he was receiving a grant. The email provided grant details that mirror Grant 32339 but does not have a grant number in it. This email does not establish that Mr. Rudko received duplicate grants in 2012.

[133] I conclude that Mr. Rudko was awarded one grant in 2011 (Grant 32094) and one grant in 2012 (Grant 32339), both of which he declined. He did not receive nor accept different grants (duplicate in kind to those declined) in either March 2011 or Spring 2012.

C. Is Mr. Rudko’s documentary evidence surrounding the RSU Plan authentic?

[134] Mr. Rudko tendered the following documents, which Insight alleges are not authentic on the basis that Mr. Rudko fabricated the documents (the “impugned documents”):

- a) A series of emails dated January 15 to 16, 2013 between Ms. Eberg and Mr. Rudko, regarding a “Phishing Email Alert” and the management of Mr. Rudko’s RSUs by Stock Plan Administration.
- b) A series of emails dated January 16, 2013 between Mr. Rudko, Ms. Eberg, and Ms. Orlando regarding the value of Mr. Rudko’s current shares and his entitlement to RSUs;
- c) Two emails dated September 22, 2011 between Ms. Orlando and Mr. Rudko regarding his failure to accept his 2011 RSU grant;
- d) Insight 2014 Total Rewards Statement for Gordon Rudko.
- e) An email dated February 24, 2012 from Mr. Lamneck, the CEO of Insight Enterprises, to Mr. Rudko regarding a grant of RSUs for 2012; and
- f) An email dated March 9, 2011 from E*TRADE Financial Corporate Services to Mr. Rudko regarding his employee stock plan account.

[135] To the extent that the documents are printouts of emails, they fall within the definition of “electronic record” under s 41.1 of the *Alberta Evidence Act*, RSA 2000, c A-18. In determining the authenticity of electronic documents, the Court will consider whether there is evidence as to the integrity of the electronic records system or the electronic record itself: *Alberta Evidence Act*, s. 41.4. Regardless of whether the document is electronic or not, Mr. Rudko bears the onus of establishing the authenticity of these documents. He must prove that the document is what he claims it to be and the Court will consider evidence that calls into question the substantive content of the document: *Alberta Evidence Act*, s 41.3; *Tieu v. Layeghpour*, 2024 ABKB 396 at para 22-33, 37; *Lenihan v Shankar*, 2021 ONSC 330 at para 220-221, 253.

[136] Mr. Rudko alleges that Ms. Eberg, on behalf of Stock Plan Administration, agreed in January 2013 to manage his RSU grants for him going forward without any involvement from him, as a result of Mr. Rudko being unable to set up his E*TRADE account due to the issues with the W8BEN form. He also alleges that these emails establish that his entitlement under the RSU Plan was guaranteed and would be the equivalent of 100% of his salary.

[137] This was denied in no uncertain terms by Insight Canada’s witnesses. Ms. Hauglid and Ms. Eberg state that the alleged issues and agreement are contrary to any discussions they had with Mr. Rudko and the agreement would be contrary to the terms of the Omnibus Plan. Ms. Eberg also denies that she authored any of the emails attributed to her. Ms. Orlando denies authorship of one of the emails attributed to her and finds Mr. Rudko’s claims of account management and benefit entitlement to be preposterous, given the terms and conditions of the RSU Plan and the manner in which it was administered.

[138] Insight therefore alleges that Mr. Rudko faked these documents for the purposes of the litigation. Mr. Rudko denies that allegation.

[139] If I accept Mr. Rudko's documents as authentic, I must necessarily find that Ms. Orlando, Ms. Hauglid, and Ms. Eberg lied in their evidence. In addition, I would have to find that Ms. Hauglid and Ms. Eberg either knowingly did not produce certain documentation or they doctored their Stock Plan Administration records.

[140] As stated earlier in this decision, I had several concerns with Mr. Rudko's evidence. In contrast, I found Ms. Eberg, Ms. Hauglid, and Ms. Orlando to be reliable and credible witnesses. These same concerns inform my consideration of the authenticity of the impugned documents.

[141] To assist the Court in determining the authenticity of the impugned documents, Insight Canada also called Scott Polus, a certified computer examiner who was qualified as an expert in forensic imaging processes, the analysis of email artifacts and printed documents from emails in relation to computer operating systems and applications, and analysis of data contained on the Windows operating system. Mr. Polus's analysis in his written report only addressed documents b), c), d) and f) above, although he provided oral evidence at trial with respect to these same documents and document a).

[142] Mr. Polus did a forensic examination of Mr. Rudko's laptop, by making verified duplicates of the hard drive and then examining the duplicates. He confirmed that the only user profile on the device was "GRudko", which was created in 2015 and last used the laptop on November 27, 2017. The laptop was not used by any other user profile. However, the computer had data going back to 2005 that had not been created on Mr. Rudko's laptop. Therefore, he concluded that the older data had been copied from another laptop onto Mr. Rudko's laptop in 2015, although it also only related to GRudko user profile. There were some archived emails and email data on the laptop. Mr. Polus testified that the archiving system used here, Enterprise Vault, still leaves behind header information and the first portion of the body of the email, as well as metadata and a pointer of information that allows searching of archived emails.

[143] Mr. Polus found documents predating 2013, including PDFs, Word documents, other user created documents, and emails. The earliest email he found was from 2011 and he found emails on the same dates as the impugned documents. He was unable to find any of the impugned documents on the laptop, in email, PDF, or some other form, despite engaging multiple variations of search filters and types of searches. He concluded that the impugned documents were never in Mr. Rudko's mailbox or on the hard drive of his laptop.

[144] On cross-examination, he explained that an alternative explanation as to the absence of an email on the laptop is that the email had been deleted. However, Mr. Rudko did not testify that he had deleted the impugned documents. Therefore, his evidence with respect to the impugned documents is not consistent with the alternative explanation Mr. Polus provided.

[145] Mr. Rudko testified that he was unable to access the documents as he received a new computer in 2015 and could not access archived emails prior to 2015. Mr. Polus's evidence refutes this claim. The absence of any record, archived or otherwise, of the impugned documents on Mr. Rudko's laptop significantly undermines a claim that the impugned documents are authentic, as

there is no evidence with respect to the integrity of the electronic versions of the impugned documents. In fact, there is no evidence as to the electronic version of the impugned documents at all, despite the presence of metadata on Mr. Rudko's laptop before, during, and after the relevant time frame.

[146] Mr. Rudko submitted that Mr. Polus's methodology was faulty, as he did not do an analysis of Insight's email servers to see if the emails existed on those servers. Based upon Mr. Polus's detailed explanation of the analysis run on Mr. Rudko's hard drive, I am satisfied that he used industry standard processes. Given the information found that predated, or had the same date as, the impugned documents, I find that his methodology chosen was sound and does not generally undermine his findings.

[147] As none of these documents could be located on Mr. Rudko's hard drive, Mr. Polus was unable to analyse the underlying metadata for the documents. Therefore, he conducted a review of visual cues for his analysis as to whether the documents were genuine.

[148] Overall, his opinion was that the documents were not authentic. This opinion rested in part on the absence of key markers. For example, the Subject line not having an "RE:" for reply or an "FW:" for a forward or a lack of line breaks. I accept that such things can be easily altered by an individual whether they are attempting to create a false document or simply doing so for the innocent purposes, such as adjusting the email communication going forward. This includes changing the content of the Subject line. Some of the emails produced by Insight and entered as authentic emails at trial show similar issues, such as the August and October emails from Ms. Orlando, attaching the warning letters. The August email shows a line for "Attachments:" right under the Subject line and the October email does not have such a line. I noted other examples in the authenticated documents where the indentation of previous emails or the use of "Forwarded Message" or special characters are not present. Insight Canada attempted to explain the differences, because Insight Canada used a program called One Note to organize some or all of its electronic documents. However, Mr. Polus had not been asked to analyse the use of One Note or make that comparison, such that the Court cannot assess whether there is an acceptable alternative explanation for the issues with Insight Canada's documents. Therefore, while I accept Mr. Polus's explanation of how Microsoft Outlook would, by default, cause an email to look, I proceed with caution in placing weight on his analysis around key markers when determining whether a document is authentic. I would not use this analysis as the sole or main reason for determining a document was not authentic, although it is a factor to be considered.

i. Emails dated January 15 to 16, 2013 between Mr. Rudko and Ms. Eberg

[149] The first email is from "Stock Plan Admin", an email address assigned to Ms. Eberg. It was a warning to all Non-US Stock Plan Participants about a Phishing Email that appeared to be from the IRS advising of how the recipient was exempt from US tax withholdings and asking the individual to provide a completed W-8BEN Form and a copy of their passport to ensure that the individual's records were up to date to avoid paying taxes. Both Ms. Hauglid and Ms. Eberg confirmed that, even if an employee had no grant equity or was no longer participating in the RSU Plan, they would receive this email as it was a phishing email and so it would be important to ensure that they received the information. Insight acknowledges that this email is authentic.

[150] The second email is from Mr. Rudko to Ms. Eberg. Mr. Rudko thanked her for sending him the phishing email alert and then asked “In regards to my RSUs, I want to ensure there is nothing I need to do in the future?” In the third and final email, Ms. Eberg responds “Gordon thanks for your call. Don’t worry we will manage your RSUs. Let us know when you want to realize their value and they will be available.” Insight alleges that the second and third emails are not authentic.

[151] Mr. Rudko testified that the conversation with Ms. Eberg referenced in the email occurred, although he did not provide any evidence as to the nature and content of the conversation. Ms. Eberg initially denied having any conversations with Mr. Rudko about the W8BEN form, although she allowed on cross examination the possibility that he raised the account issue with her.

[152] Ms. Hauglid testified that there have been times when people had issues activating their E*TRADE account and they would contact Stock Plan Administration for assistance. When it was necessary, Ms. Eberg would engage with E*TRADE’s customer service, to ask them to assist the employee. Both Ms. Eberg and Ms. Hauglid agreed that E*TRADE required non-US residents to have a current W8BEN form on file, in the absence of which, E*TRADE would be required by law to withhold US taxes when the individual sold their shares. Although an account must first be activated to initiate the W8BEN form, the form is not part of the activation or grant acceptance process so that grants can be accepted and managed without such a form. If Mr. Rudko’s challenge was his W8BEN form, it does not make sense that Ms. Eberg would agree to manage his RSU grants as a result, because she would not expect this issue to prevent him from accepting and managing his RSU grants with his E*TRADE account.

[153] Ms. Eberg remembered that Mr. Rudko was the only person in her 30-year career, until just prior to trial, who had ever declined an equity award. The last time she had communicated with Mr. Rudko, was in 2012 when he declined the grant. Therefore, Ms. Eberg was quite certain she did not receive the second email from Mr. Rudko. Ms. Eberg also testified that there had never been duplicate grants issued to Mr. Rudko or any other employee, because of the strict audit protocol in place for Stock Plan Administration’s work. In the event a duplicate grant had been awarded, Stock Plan Administration would simply delete the duplicate; they would not provide instructions to an employee not to accept.

[154] One of the checks in place for Stock Plan Administration was the different access Ms. Hauglid and Ms. Eberg each had to the Equity Edge software used to administer the RSU Plan. Ms. Hauglid’s primary responsibility was to ensure compliance with the Omnibus Plan. She could review data in Equity Edge and print reports but could not enter data. Ms. Eberg maintained the information in Equity Edge through her data entry responsibilities. Ms. Hauglid was involved in the process of determining what a grant offer would be to an individual employee. Ms. Eberg’s only involvement in that process was to enter the final decision into the database and ensure the data was accurate. Ms. Hauglid would then audit the data entry of Ms. Eberg. The RSU Plan was a carefully and meticulously managed program within the Company, as it involved the granting of publicly traded securities subject to tight regulation by the laws of the United States and strict requirements under the Omnibus Plan.

[155] Ms. Hauglid was firm that the Company does not manage RSUs for employees. Insight Enterprises only processes grants, updates vesting information, and deals with taxes. The employee

manages their own E*TRADE account. Given their split responsibilities and access to the program, any steps taken by Ms. Eberg to manage Mr. Rudko's account for him would have become evident to Ms. Hauglid within a short timeframe. Ms. Hauglid would have either taken steps to halt it or also had to agree that Stock Plan Administration would manage Mr. Rudko's account. Under the latter scenario, Ms. Eberg and Ms. Hauglid would have conducted themselves contrary to the requirements of their profession and contrary to the strict requirements of Insight Enterprises' RSU Plan. Doing so would put both their employment with the Company and any future career in their field in significant jeopardy.

[156] Those two individuals worked in an environment which was subject to various checks and balances, which was a heavily audited process. Audits were done both internally and externally, with the latter done on a quarterly basis. The external auditors could request any information with respect to the RSU Plan, in particular information around the provision of each individual grant, to audit for accuracy. Ms. Eberg would know that any agreement to manage Mr. Rudko's accounts would need to be reflected in the records.

[157] Even if Stock Plan Administration had agreed to manage the account on Mr. Rudko's behalf, there is no reason that the department would treat Mr. Rudko any differently than other employees in a) recording the awards that were granted to him; b) ensuring that he received written evidence of his award as required under the Omnibus Plan; c) providing him with a copy of the agreement for his confirmation; d) dealing with the tax consequences of a vesting option; or e) any other matters surrounding this. There is no evidence with respect to any such actions having occurred in respect of Mr. Rudko.

[158] Ms. Hauglid also testified that Ms. Eberg, whom she worked with for many years, was very specific in the language she would use. This is consistent with the environment and processes within which the Stock Plan Administrator worked. Aside from any consideration of whether Ms. Eberg would agree to manage Mr. Rudko's account, Ms. Eberg denied sending the third email as it contained incorrect phrasing of "let us know when you want to realize their value and they will be available". Both she and Ms. Hauglid testified that this had no meaning within the context of the RSU Plan. Further, Ms. Eberg stated the email was not in her writing style, as she is very careful in her use of grammar and punctuation, having been a legal secretary for a decade before becoming an equity professional.

[159] I put weight upon the results of Mr. Polus's review of Mr. Rudko's laptop, which showed that none of the emails existed. Mr. Polus was able to find emails as late as 2011. The fact that Mr. Polus was unable to find these emails on Mr. Rudko's laptop creates a concern with the authenticity of them. Of the key markers noted by Mr. Polus, I also put some weight on the fact that Ms. Eberg's answer to Mr. Rudko does not have "RE:" in the Subject line. There would have been no reason for Ms. Eberg to change the Subject line and the emails regarding cancellation of the grants show that "RE:" was a standard email marker in the email system of the Stock Plan Administration.

[160] I harken back to the test in *Faryna v Chorney*, where the court stated that "...the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions." That test applies here, when determining whether an email is what it is purported to be. The email allegedly sent by Ms. Eberg is so out of harmony with the

preponderance of probabilities that would be reasonable in the circumstances of the administration of the RSU Plan, it is unbelievable that she sent it. I find that the email attributed to Ms. Eberg is fake. In this same context and understanding that the email sent by Mr. Rudko would have engendered a very different response, I also find that the email attributed to Mr. Rudko is fake.

ii. Emails dated January 16, 2013 between Ms. Orlando, Ms. Eberg, and Mr. Rudko

[161] In the first email, Mr. Rudko makes an inquiry as to the value of his shares, stating that the last communication was that he had “\$390K USD of RSUs for the period 2010-2012”. In the second email, Ms. Orlando advises Mr. Rudko that as a director, he is “a named executive officer of Insight” and, as such, he receives “shares and RSUs equal to the value of [his] annual income. Insight manages the RSUs and holds your shares for you to a future date when you decide to receive them.” She asks him to keep this information confidential. In the third email, Ms. Eberg writes “Gordon, yes, approximately \$100,000 US at the share strike price. Present value is determined daily by the closing stock price.” Ms. Orlando and Ms. Eberg deny sending the emails respectively attributed to them or receiving the other emails. Insight alleges that all three emails are inauthentic and fake.

[162] The biggest issue from Insight Canada’s perspective is the use of the term “named executive officer” in the second email. That phrase has significant meaning for a publicly traded company in the United States. Executive compensation at Insight Enterprises was exclusive to section 16 officers. Subject to the US Securities and Exchange Commissions rules and legislation, a section 16 officer is an individual in the company who is responsible for signing off on financial statements and public securities filings, which would only be those individuals at the highest levels of the business. The Board of Directors for Insight Enterprises are also considered s 16 officers. This was independently explained by Ms. Orlando, Ms. Eberg, and Ms. Hauglid. Both Ms. Orlando and Ms. Eberg knew that Mr. Rudko’s role as a Sales Director was not the equivalent of a director of the Company. Even without knowing what a s 16 officer is, anyone with some level of corporate knowledge in Canada would know that a Sales Director is not the same as being a named director of a corporation.

[163] Nothing in Mr. Rudko’s offer letter or any of the other documents related to his position of employment suggest that he is a “named executive officer”. He was provided with the position of “Director-Field Sales Canada”. Yet, in his email to one of the executive search firm principals, he advised that he was a “named executive Director”. I agree with Insight Canada that this suggests the emails are written more in Mr. Rudko’s style than the style of Ms. Orlando or Ms. Eberg.

[164] Another significant issue is the value of the equity spoken to in the emails. Ms. Orlando denied she would tell Mr. Rudko that the RSUs would equal his annual income. Ms. Orlando herself did not receive that amount. She was involved in determining the amount of RSUs Mr. Rudko would receive and she was restricted to a range of 8% to 10% of his salary. Ms. Orlando, Mr. Rudko’s superior, did not have anything close to that level of equity in the same time period. The budgeting process for determining the level of awards to be offered to each individual under the RSU Plan goes through many levels of approval, with final approval provided by the Compensation Committee for the Board of Directors. I find that, with such a process, it would be impossible that Mr. Rudko’s share values and RSU values, had they existed, would be at the amounts set out in the three emails.

[165] Ms. Eberg was clearly careful and precise in her job. Her job demanded that of her. I find that she would not have suggested such outrageous values for RSUs granted to Mr. Rudko, had he accepted them. There is no evidence that Mr. Rudko was even offered a grant in 2010. Based upon information provided by Ms. Hauglid at trial as to when and how many of the shares would have vested had Mr. Rudko accepted the RSUs in 2011 and 2012, his share value for that period would only be approximately \$20,000 by 2013. This is not even close to the amounts he mentions in his email.

[166] Both Ms. Eberg and Ms. Orlando testified that their responses would have been very different, had they received the emails in this document. They would have escalated the email within the Stock Plan Administration and possibly to Insight Enterprises' legal department.

[167] In cross-examination, Mr. Rudko stated that he did not recall if the grant offered in 2011 was valued at approximately 10% of his salary. He testified that he understood from conversations when he was hired as Director, that the RSU plan was an annual entitlement valued at his annual income. The evidence establishes that the grants he declined in 2011 and 2012 were for 10% of his salary, at approximately \$9,500 each year. Even if I had found that he accepted duplicate grants, his means they would only have been approximately \$9,500 each. Had Mr. Rudko truly understood his entitlement to be equivalent to his annual salary, it would have been expected that he would have inquired as to such a significant discrepancy. He did not even testify to such a concern. Thus, the level of investments set out in the emails are contrary to the other evidence at trial.

[168] Again, the language attributed to Ms. Eberg is inaccurate. Ms. Hauglid and Ms. Eberg testified that "share strike price" is a term only related to stock options and is not related to the RSU Plan in any manner. Given Ms. Eberg's credentials and the meticulous nature of her work, I agree that she would not use that phrase.

[169] Mr. Polus testified that, while this impugned document was not part of his analysis in his written report, he had done some analysis on the document. Specifically, he looked for it on the verified duplicate hard drive and there was no data related to the document, either in whole or in part. With respect to the key markers discussed by Mr. Polus, Ms. Eberg noted in her evidence that she also would not have added to the subject line in her email so that it read "Phishing Email Alert – Department of Treasury Internal Revenue Service", as compared to the other two emails that read only "Phishing Email Alert". – Department of Treasury Internal". There is also another anomaly identified by Mr. Polus, which I give weight to as something that a frequent user of Outlook would understand is not possible within the program. The subject line and cc: line read together on the same line as "CC: Subject: Phishing Email Alert".

[170] The content and intention of the emails is so contrary to the RSU Plan, that it stretches the imagination to believe that the General Manager and Senior Vice President of Insight Canada and one of the two individuals tasked with administering the RSU Plan would have written such emails. These documents also fail to meet the preponderance of probabilities. I find that all three emails are fakes.

iii. Emails dated September 22, 2011

[171] In the first email, Ms. Orlando expresses her dismay that Mr. Rudko had not accepted the RSUs, which were part of his compensation. She expressed that Mr. Rudko's failure to do so

reflected poorly on her for authorizing a grant of RSUs to him. However, her bigger concern was that four people had followed up with Mr. Rudko and he had still not accepted the grant after multiple reminders. Insight accepts that this email was sent to Mr. Rudko by Ms. Orlando, on the date set out and with the content contained in it.

[172] In the second email, Mr. Rudko responded that he was shocked by her position, as he briefed her on July 19 regarding the challenges he was facing, as per an attachment which was not included in the document proffered in Court. He states “again” that his E*TRADE account has unresolved issues regarding his address, that he has no intention of declining valid RSUs, and that he had received two identical RSU grants in 2011, one that was accepted in March and the second unclaimed one which he was instructed not to accept. He then states, “I recommend Insight manage the RSUs, if in my case E*TRADE can’t.” Insight alleges this email is not authentic. Mr. Rudko testified that the meeting on July 19 was an attempt to resolve the W8BEN form issue.

[173] Ms. Orlando testified that she sent the first email to Mr. Rudko, as she was trying to gather an understanding of why he was not accepting his RSUs. She said that there had been several attempts made by various people to follow up with Mr. Rudko about the status of his RSUs as unaccepted, without response. Mr. Rudko had indicated to her after her September email that he could not accept the RSU for personal tax or financial reasons, so she advised him to get in touch with Stock Plan Administration to advise that he would not be accepting them. This is consistent with Ms. Hauglid’s evidence of her efforts to get in touch with Mr. Rudko and the reasons why Mr. Rudko told her he was declining the 2011 grant.

[174] With respect to the second email, Ms. Orlando was certain that she did not receive the email. Because her judgment was being questioned for recommending his participation in the equity plan, she had a vested interest in assisting him in accepting a grant. Therefore, had she known he was having difficulties, she would have taken action to assist him. She also would have rejected Mr. Rudko’s suggestion that Insight manage the RSUs for him, as Insight did not manage the RSUs for anyone. Employees who received RSU grants were to manage them in the E*TRADE platform on their own.

[175] I do not put any weight on some of the issues Mr. Polus raised with the email, such the lack of an “Attachment:” line when the email indicated there was an attachment, the lack of indentation, or the absence of a forwarded message. There are multiple explanations for these perceived issues. However, I do put some weight on the lack of a “RE” in Mr. Rudko’s reply. He was replying to Ms. Orlando, not forwarding a message. So, the message should have showed either “RE: FW:” or “RE:”. This raises a concern with the authenticity of the document.

[176] I find that Ms. Orlando would have remembered this email, as Mr. Rudko’s failure to accept the 2011 grant was memorable for her. Mr. Rudko’s explanation would have been very troublesome to Ms. Orlando. Her evidence is also externally consistent with Ms. Hauglid’s evidence. Further, I have rejected Mr. Rudko’s evidence that he had duplicate grants. Therefore, I find that Mr. Rudko’s email in September 2011 is a fake.

iv. Insight 2014 Total Rewards Statement for Gordon Rudko

[177] The 2014 Total Rewards Statement outlined the total cash and benefits provided to Mr. Rudko by Insight, and their value to him as part of his total compensation. It included his paid time

off allotment in hours and dollar value for 2015. It also included his health and insurance benefits, setting out the annual amount of contributions by Mr. Rudko and Insight. Most importantly, it set out his base salary, incentive pay including bonuses, and the value of RSUs that had vested in the calendar year 2014. The value for those RSUs was listed as \$132,468.14.

[178] Mr. Rudko testified that he received this document by mail in paper form, which he subsequently requested in electronic form. It was from Insight Canada's Human Resources. Ms. Orlando confirmed that this type of document was sent to employees and she had received a similar statement.

[179] The 2015 Total Rewards Statement for Gordon Rudko, which Insight agreed was authentic, did not have a value beside the "Restricted Stock Units Vested (RSUs)" line. Mr. Rudko testified that he contacted Human Resources to query why it was blank, and he received a subsequent update, which he lost. He did not testify to what the update showed.

[180] Ms. Hauglid testified that the numbers for the RSU line on the Total Rewards Statement would come from her department, based upon a report out of Equity Edge showing the value of shares that had vested in that year. The report for that time period was presented in evidence. The value of Mr. Rudko's RSUs in the Equity Edge program was zero, as he had not accepted any grants and so had no vested shares.

[181] For the same reasons when analyzing the emails dated January 16, 2013 that contained significant dollar values for Mr. Rudko's equity benefit, it is not consistent with the evidence at trial that Mr. Rudko would have \$132,468.14 in shares vest in 2014. Even he had participated in the RSU Plan in 2011, 2012, and 2013, the value of his shares that would have vested in 2014 would be less than \$10,000.

[182] As a result, I cannot accept that the 2014 Total Rewards Statement submitted at trial by Mr. Rudko reflects what Insight Canada would have entered into the Statement. Therefore, I find that the "Restricted Stock Units Vested (RSUs)" line was altered for the purposes of this litigation.

v. Email dated February 24, 2012

[183] The email from Mr. Lamneck has no subject line. But the content advises Mr. Rudko that, in recognition of his contributions in 2011, he was being presented with an RSU grant in the amount of 435 shares, equivalent to \$9,561.30, subject to the terms and conditions of the Omnibus Plan. It also advised that he would receive an email notice of the grant from E*TRADE and he would be required to review and accept the terms and conditions of the Grant Agreement within 180 days to receive any shares from the grant.

[184] Other than Mr. Rudko testifying that he received this email from Mr. Lamneck, there was no evidence presented by any lay witnesses with respect to this email. Ms. Hauglid and Ms. Eberg did not testify as to whether such emails from Mr. Lamneck had occurred in 2012 specifically or in any other year, or whether the language used was appropriate. While parts of the email are consistent with Grant 32339 that Mr. Rudko received and declined in 2012, the email does not contain a grant number. Mr. Rudko did not speak to how this email may have related to the duplicate grant he testified to receiving.

[185] Mr. Polus stated in his report that he was able to find emails from Mr. Lamneck on Mr. Rudko's laptop, with dates both before and after February 24, 2012, but was unable to find any trace of this email. He also noted a concern with the spacing in the "From" and "To" lines. I place weight on these two findings, as it is troubling that other emails from Mr. Lamneck prior to 2012 were available and the spacing issue did not appear in other emails.

[186] The only evidence to support the authenticity of this email is that of Mr. Rudko, whose evidence is inherently unreliable and, on this email, sparse. While I cannot be sure if this email was faked, I find that its authenticity has not been established. I place no weight on this document.

vi. Email dated March 9, 2011

[187] This email from E*TRADE contained an explanation that "you have not resolved your address Form W-8BEN for your new INSIGHT ENTERPRISES employee stock plan account. It is important that you access and manage your valuable company benefits." It then provides "3 easy steps" to get started on resolving the issue, beginning with going to the website for activation of an account.

[188] Mr. Polus determined that there was no evidence of the email in the data from Mr. Rudko's laptop. He was unable to provide any other detailed analysis to assist in determining the email's authenticity.

[189] Mr. Rudko testified that this email reflects his issue of the W8BEN form not accepting his address and causing issues with his E*TRADE account, which issue was never resolved. However, he had also testified that his account was activated and he was able to accept grants in his account, despite the error on the form. This email suggests that his account had not yet been activated.

[190] However, as there was no evidence of the email on the laptop, Mr. Rudko cannot meet the requirements of s 41.4. The evidence with respect to what this email is insufficient to consider it authentic, given the placement of the E*TRADE footer and the lack of authenticity of other documents provided. I am unable to determine whether this email is a fake. But I do not place any weight on the email.

vii. Conclusion on the authenticity of the impugned documents and the impact on Mr. Rudko's claim

[191] As I do not accept any of the impugned documents as authentic, I do not put any weight on them. As a result, Mr. Rudko has been unable to establish that he continued to participate in the RSU Plan, after declining the 2011 and 2012 grants. He did not enter into an agreement with Insight Enterprises, for the Stock Plan Administration to manage his E*TRADE account and his RSU benefits. Following June 2012, there was no further communications between the Stock Plan Administration and Mr. Rudko with respect to the RSU Plan.

[192] The Company maintained, through the Omnibus Plan, full discretion as to what awards would be made under the RSU Plan. The Company exercised that discretion with respect to Mr. Rudko, as a result of his declining grants two years in a row. In September 2011, Ms. Hauglid made it clear to Mr. Rudko what the potential consequence was of declining a grant. Despite this, he declined both the 2011 and 2012 grants offered to him. When he was not offered a further grant in 2013, he did not take any steps to determine why or to ask to be put back onto the RSU Plan.

[193] Mr. Rudko did not evidence any intention to participate in the RSU Plan and does not now have a claim for benefits arising from it. Mr. Rudko exercised his right to decline the RSUs rather than his right to accept and participate in the program. His claim for damages under the RSU Plan is dismissed: *Gordon v Abbott Laboratories*, 1995 CanLII 7286 (ONSC) at para 89; *McCallion v Canadian Manoir Industries Ltd.*, 1991 CarswellOnt 937 at para 11.

D. Is Mr. Rudko's claim for damages under the RSU Plan barred by the *Limitations Act*?

[194] Even if Mr. Rudko had established his claim entitlement to benefits under the RSU Plan, Insight argues that he is barred from pursuing that claim by the *Limitations Act*.

[195] When an employee does work and does not receive compensation they think they are owed, the limitation period will begin to run at the point where the compensation would have been provided in the normal course of their employment: *Eberle v Terroco Drilling Ltd.*, 2021 ABQB 207 at para 30. For the RSU Plan, the compensation was always made on February 20 of each year.

[196] Mr. Rudko had access to his E*TRADE account and would have been able to check whether he had been issued any grants. He would also have expected to receive written notice, as he had in 2011 and 2012. Claimants are expected to exercise reasonable diligence when they have sufficient knowledge of a possible claim, by making reasonable inquiries as to their rights: *Lay v Lay*, 2019 ABCA 21 at para 30. The lack of further communication from Site Plan Administration should have led Mr. Rudko to make reasonable inquiries. Had he done so, he would have determined that the grants were not being issued. He should have known within a reasonable time of February 20, 2013 that he was no longer a participant in the RSU Plan. He filed his Statement of Claim on May 7, 2018, at least three years after the expiry of the two-year limitation period. Therefore, his claim for damages under the RSU Plan during his employment is barred by the *Limitations Act*.

Conclusion

[197] Insight Canada had just cause to terminate Mr. Rudko for insubordination. Therefore, his wrongful dismissal claim is dismissed.

[198] Mr. Rudko has not established that he was entitled to benefits from the RSU Plan during his employment. Therefore, his claim for damages under the RSU Plan is dismissed.

[199] Insight Canada has established that Mr. Rudko tendered some documents that were fake and other documents that were not authentic.

[200] Insight Canada agreed that Mr. Rudko did not receive his third quarter bonus in 2017 and that such bonus is payable. Therefore, Mr. Rudko has judgment in the amount of \$29,470, less appropriate withholdings. He is entitled to pre-judgment and post-judgment interest on this bonus payment, in accordance with the Judgment Interest Act, RSA c. J-1.

[201] Insight Canada is entitled to its costs. If the parties are unable to agree on the amount of those costs, they may advise the Court within 60 days and I will direct a process for submissions.

Heard on the 3rd to 12th day of September and 22nd day of November, 2024.

Dated at the City of Edmonton, Alberta this 8th day of September, 2025.

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

Appearances:

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