IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Mechalchuk v. Galaxy Motors (1990) Ltd.,* 2023 BCSC 635

Date: 20230420
Docket: S222631
Registry: Victoria

2023 BCSC 635 (CanLII)

Between:

Todd Mechalchuk

Plaintiff

And:

Galaxy Motors (1990) Ltd.

Defendant

Before: The Honourable Justice G.C. Weatherill

Reasons for Judgment

Counsel for the Plaintiff:	M. Sheard T. Sanghera
Counsel for the Defendant:	K. Wheelhouse D.R. Robertson C.K. Kidd
Place and Dates of Trial:	Victoria, B.C. April 3–6, 2023
Place and Date of Judgment:	Victoria, B.C. April 20, 2023

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Introduction

[1] The plaintiff claims damages for wrongful dismissal. He also seeks aggravated and punitive damages based upon the manner in which the dismissal took place.

[2] The defendant says that it had just cause for the termination.

Evidence at Trial

[3] The 43-year-old plaintiff was born and raised in the Victoria area in BC. He married his high school sweetheart, Tarrah, in 2000. They have three sons together, currently aged 24, 17, and 13.

[4] The plaintiff began his career in the automotive retail business in 2003 as a salesman for a Dodge dealership in Edmonton, Alberta. In 2005, he was promoted to its sales manager. In 2008, he moved to a competitor's dealership in Edmonton as its New truck sales manager. In 2012, he became a sales manager for AutoCanada, a large automobile sales company with many dealerships throughout Canada and the United States.

[5] In 2015, he moved to another Dodge dealership as its sales manager and, several months later, to a dealership in Cranbrook as its general manager.

[6] In 2016, the plaintiff became the general manager of a dealership in Nanaimo, then of a dealership in Comox and later became the director of sales at an auto group in Alberta.

[7] In the spring of 2020, the plaintiff was looking to relocate back to BC and was offered a lucrative position for AutoCanada at one of its dealerships in Abbotsford. He was on the verge of accepting it when he heard that the defendant was looking for a general manager. The defendant has five used-car sales locations located in Langford, Colwood, Duncan, Nanaimo, and Courtenay. It also operates two recreational vehicle sales sites in Langford and Parksville.

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[8] The defendant was owned by Phil Dagger. His niece, Amy Jones ("Amy") began working for the defendant in 2001, initially, as its bookkeeper and, by 2020, as its assistant general manager.

[9] On May 16, 2020, the plaintiff met with Mr. Dagger and Amy. The plaintiff and Mr. Dagger agreed to terms that were similar to those being offered by the Auto Group but with the added advantage that he and his family would be able to return to live in the Victoria area.

[10] An agreement titled "Employment Contract" was prepared by Amy from a template the defendant had used for a previous general manager. It was signed by the parties on May 19, 2020 ("Contract Form 1"). It contained, *inter alia*, the following clauses:

> Compensation:
>
> 12. As the automotive industry is a fluctuating industry, Galaxy Motors reserves the right to change or alter various terms and conditions of employment including the Employee Compensation Plan described in Schedule B attached hereto.
>
> […]
>
> Termination by Company – Just Cause:
>
> 21. Galaxy Motors may terminate this Agreement for just cause at any time without notice to the Employee.
>
> Termination by Company – Without Cause:
>
> 22. Galaxy Motors may, in accordance with the *Employment Standard* [*sic*] *Act*, R.S.B.C. 1996, c. 113 ("*the Act*") or any amendments thereto, terminate this Agreement without cause:
>
> a. During the Probation Period, at any time;
>
> b. After the Probation Period, on one week's notice;
>
> c. After twelve (12) consecutive months of employment, on two (2) week' notice, or
>
> d. After three (3) consecutive years of employment, on three (3) weeks' notice, plus one additional week for each additional year of employment, to a maximum of eight (8) weeks' notice.
>
> 23. Galaxy Motors may, instead of giving notice as required above, give reduced or no notice, and pay the Employee severance pay for the portion of that notice period which Galaxy Motors will not require the Employee to work in accordance with *the Act* or any amendments thereto. This is the sole discretion of Galaxy Motors.

> 24. By signing this Employment Agreement, the Employee acknowledges and agrees that the notice of termination and the payment in lieu of notice constitute reasonable notice and reasonable compensation for the termination of your employment, and upon Galaxy Motors providing you with either you shall not be entitled to any further notice (common law or otherwise), payment in lieu of notice, termination pay, severance pay, damages, costs or compensation in respect of the termination of you employment.
>
> […]

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[11] On May 26, 2020, Amy sent an email to the plaintiff enclosing various documents related to his new employment, which included a document entitled "Employee Handbook" which stated, in part:

> **SECURITY**
>
> **Confidentiality**
>
> - Unauthorized disclosure of company information is not allowed and all business activities of Galaxy Motors (1990) Ltd./ Car Giants of Canada are strictly confidential. All customer files (including names, addresses, purchase details, etc.) and all other information, systems and data, regardless of the format (i.e. electronic, paper copy or other) are the property of Galaxy Motors (1990) Ltd./Car Giants of Canada and/or a third party. Should your employment with Galaxy Motors (1990) Ltd./Car Giants of Canada be terminated for any reason, you will not copy, remove from the dealership, or in any other way violate the right of ownership of these materials and will forthwith return any such materials or property to the dealership. The name Galaxy Motors (1990) Ltd./Car giants of Canada, is a registered Trade Name and no employees are authorized to use it without the approval of the President.
>
> […]
>
> **PERSONAL CONDUCT**
>
> […]
>
> **B. Serious Offenses**
>
> These infractions are extremely serious and are strictly prohibited. Due to their severity, the employee will be subject to immediate dismissal.
>
> […]
>
> - Falsifying records or information.
>
> […]
>
> - Intentional disclosure of confidential company information.
>
> […]

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> **RESIGNATION AND TERMINATION OF EMPLOYMENT**
>
> **Termination of Employment**
>
> At the discretion of management, any serious breach of ethics or trust will result in immediate termination of employment as well as those stated under paragraph 38 – Personal Conduct [sic]. Under these conditions, no warning will be given and you will be terminated for just cause and provided no termination pay or severance pay.
>
> […]

[12] The effective date of the plaintiff's employment as the defendant's general manager auto operations was June 2, 2020. Contract Form 1 set out a compensation plan for the plaintiff in a "Schedule B" ("Compensation Plan 1") that included a monthly salary of $10,000 plus a percentage of the defendant's "Net Income", with a guaranteed minimum of $25,000 per month to be paid during the first six months. Compensation Plan 1 also provided that the plaintiff would have the use of two company demonstration vehicles with fuel for one of them being paid for by the defendant. The plaintiff was provided with a gasoline credit card in the defendant's name. The charges were invoiced to and paid by the defendant ("Fuel Charges").

[13] Shortly after the plaintiff started work on June 2, 2020, he was advised by Mr. Dagger and Amy that, given the way the defendant and its related companies were structured, it was not going to possible to determine the defendant's "Net Income" for the purpose of the Compensation Plan 1. The plaintiff was advised that the defendant would come up with a fair solution.

[14] By October 2020, the plaintiff had demonstrated significant success as the defendant's general manager for its used car business. He expressed concern to Mr. Dagger that he was still not receiving a share of the net income as had been agreed. Rather, the plaintiff was only being paid the guaranteed minimum of $25,000 per month.

[15] Shortly thereafter, the plaintiff was promoted to VP of Operations of both the defendant's Auto and RV businesses. A new compensation package for the period of November 1, 2020 to July 31, 2021 (the defendant's fiscal year) was agreed to

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and signed by the parties ("Compensation Plan 2"). It provided for payment of $10,000 as a "onetime net alignment payment from previous agreement" and a salary of $35,000 per month. Compensation Plan 2 also provided that the plaintiff would be paid a year end bonus based on the defendant's (Auto and RV) "net", equal to 1% of "total Company Net" between $2 million and $3 million, 1.75% between $3 million and $4 million, and 2.5% above $5 million. The plaintiff's entitlement to usage of two demonstration vehicles continued. There was no mention in Compensation Plan 2 of fuel for the vehicles but the defendant continued to receive and pay for the Fuel Charges as it had done previously. The plaintiff testified that Compensation Plan 2 was intended as a "bridge agreement" until Jav Lidder ("Jav"), the defendant's chief financial officer, was able to implement a payment plan based on the defendant's net profits. Compensation Plan 2 was attached as a schedule to a document entitled "Employment Contract" that was itself unsigned ("Contract Form 2").

[16] The plaintiff agreed on cross-examination that the "onetime net alignment payment" of $10,000 in Compensation Plan 2 was intended to compensate him for his share of the defendant's net income for the period of June 2 to October 31, 2020.

[17] In late June 2021, the plaintiff and Mr. Dagger had a discussion regarding what the plaintiff perceived was his "annual dollar value" for the services he was providing to the defendant. On June 29, 2021, the plaintiff sent Mr. Dagger a lengthy email in which he stated, *inter alia*:

> […]
>
> I would like to request a permanent title change to either "President or CEO" which is the duties, by job description, I currently am fulfilling for you now. I think moving forward, it's important that our head office staff, managers, employees, customers, our community involvement, dealer partners and vendors understand they are dealing with the clear leader in the company when I am involved. I have had a couple customers ask me to speak to the "President" or my boss when dealing with them, thinking they can still go higher up the corporate ladder or around me because my title does imply that. This isn't nearly as important to me as the remuneration, but I feel the title should be one of those moving forward. Of course, I have no problem involving you, or you involving yourself in anything you feel you need or want to be involved in. I feel I have demonstrated to you my good judgement of knowing when you need to be informed or involved with anything of

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> importance involving the company or our staff. I know this was the original title we chatted about last year before making a last minute change for reasons I agreed with at the time.
>
> Here's my proposal for the structure of the permanent pay plan.
>
> The bonus levels will be set and adjusted every year based on growth and projections.
>
> Title: President or CEO
>
> Effective Aug 1st 2021
>
> […]
>
> Net to gross bonus
>
> 1% bonus of division net total at fiscal year end. Separate targets per division .5% per division…
>
> […]
>
> 4 weeks of approved vacation time away from the offices a year.
>
> […]

[18] On July 9, 2021, the plaintiff, as "President of Operations", and Mr. Dagger, as "Owner Galaxy Group", signed a document titled "President of operations Galaxy Motors (1990) Ltd. Compensation Plan", effective on August 1, 2021 ("Compensation Plan 3").

[19] Compensation Plan 3 was put in evidence as having been attached to a form of Document entitled "Employment Contract" between "Galaxy Motors Ltd." and "Todd Mechalchuk" ("Contract Form 3"). Contract Form 3 was similar, if not identical, to Contract Form 2, both of which had apparently been derived from a precedent or "template" used by the defendant for "Finance Manager" and "Sales Manager" positions because they contained references to those positions that were obviously unrelated to the plaintiff's employment. The plaintiff testified on cross-examination that his focus was on Compensation Plan 3 and not on the language of Contract Form 3 that it was attached to. He testified that he simply "skimmed" Contract Form 3. He also testified that he signed Compensation Plan 3 but did not sign Contract Form 3 because both Jav and Mr. Dagger told him he was not required to sign the latter document. Jav agreed on cross-examination that it was "probable" and "very likely" that the plaintiff had only been asked to sign the last page.

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[20] Compensation Plan 3 provided, *inter alia*, as follows:

President of operations

Galaxy Motors (1990) Ltd.

Compensation Plan

Effective August 1st, 2021

Plan Expires July 31st, 2022

$30,000 per Month salary

Year end bonus on total company (Auto and RV) net to gross % at fiscal year-end July 31/22:

- 0% - 15.49% = 8.00%
- 15.5% - 8.25%
- 16% - 8.50%
- 17% - 9.00%
- 17.5% - 9.25%
- 18% - 9.50%
- 18.5% - 9.75%
- 19% - 10.00%
- 19.5% - 10.25%
- 20% - 10.50%
- 20.5% - 10.75%
- 21%+ -11.00%

Total Net Bonus as at fiscal year July 31/22:

$4.25M – 1% Bonus Available

Year End Inventory Bonuses:

Auto - $40K Bonus if 0 stock over 150 Days (FLR Units Only)

RV - $40K Bonus if 0 stock over 400 Days (FLR Units Only – excludes consignments)

[…]

IN ADDITION:

Vacation Pay and Statutory Pay are included in the percentage calculated above.

[…]

[21] The plaintiff testified that the phrase “net to gross %” referred to the ratio of the defendant’s net profit to total gross profit for the year. He testified that an

additional 1% would be added to his bonus if the defendant's net profit was greater than or equal to $4.25 million.

[22] The plaintiff testified that his proposal of four weeks vacation had also been approved as part of Compensation Plan 3.

[23] Mr. Dagger died suddenly and unexpectedly on August 9, 2021.

[24] Shortly thereafter, the plaintiff was given signing authority for the defendant.

[25] The defendant was inherited by Amy and Mark Jones ("Mark"), Amy's brother and Mr. Dagger's nephew.

[26] The plaintiff testified that throughout his employment with the defendant, he submitted receipts for expenses that he claimed were for the defendant's business. He testified that he was never advised that there were parameters or policies regarding reimbursement for alcoholic beverages consumed during business-related meetings or events. He testified that, although his compensation package covered fuel expenses for only one of the two demonstration vehicles, both vehicles were used by him for both business and personal purposes and he used his judgment to determine whether a fuel purchase was justified as a business expense. He testified that, during Mr. Dagger's tenure, he was never questioned about these claims and that they were always paid.

[27] Jav testified that the process by which the plaintiff's business expense claims were processed was that he reviewed the receipts that were submitted and, if "nothing was out of line", they were paid. He testified that he established a policy under which the names of all people the expense related to had to be written on the receipt. He testified that he reviewed all of the plaintiff's expense claims and none were declined. He testified that he assumed that the names on the receipts were accurate.

[28] On June 22, 2022, the plaintiff and Tarrah attended an event at the "Brewhouse" along with Amy and several of the defendant's managers and their

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respective spouses. The plaintiff testified that, when the dinner bill came, he and Amy had a discussion during which they agreed it was a "team building event" that could be justified as a business expense. The plaintiff paid the bill. Tarrah testified that she had been sitting beside the plaintiff during the dinner and that she heard the discussion between the plaintiff and Amy and that Amy agreed it was a business expense. Amy testified that she never considered it to have been a company event, thought that the plaintiff was simply being generous when he paid the bill, thought it was ludicrous when she learned that he had submitted it as a business expense and she declined to approve it. Jav testified that one of the other attendees at the dinner, Phil Garnett, told him that Amy had approved the dinner as a business expense. Amy agreed that Jav told her what Mr. Garnett had said, but denied having approved the expense.

[29] Amy testified that the Brewhouse expense submission caused her to investigate the plaintiff's expense claims generally. She testified that a number of them "stood out":

a) A Parksville restaurant receipt dated June 15, 2022 on which the plaintiff had indicated that he had had dinner with two of the defendant's other employees, "Luke" and "Scott".

b) A Parksville restaurant receipt dated June 16, 2022 on which the plaintiff had indicated that he had had breakfast with another of the defendant's employees.

c) A Browns Social House dinner receipt for an employee event. Although the event had been pre-approved, the amount of the charge was considered excessive. Mr. Melanchuk, a manager employed by the defendant, testified that he was not aware of any policy limiting the number of drinks that would be reimbursed as a business expense.

d) A Beach House Restaurant receipt that Amy believe was for a meal with Tarrah and her relatives.

e) Gasoline purchases for the demonstration vehicle used by Tarrah. The two demonstration vehicles provided to the plaintiff and Tarrah were regularly "swapped out" by the defendant when they had been sold. Tarrah testified that when a vehicle she had been using was swapped for another that had less fuel in it, she topped it up with fuel to the same level as the vehicle that had been taken away. She testified that this expense

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was claimed through the plaintiff, although “not very often”. Amy testified that five receipts were of concern because she had never seen a policy of such payments.

f) Gasoline purchase by the plaintiff’s son: The plaintiff’s oldest son worked for the defendant and used the plaintiff’s corporate gasoline credit card for fuel for his own vehicle. The plaintiff testified that he did not reimburse the defendant for this fuel because he understood his son had used his vehicle for purpose of the defendant’s business.

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[30] The plaintiff conceded during cross-examination that the June 15, 2022 dinner and the June 16, 2022 breakfast had been with Tarrah, not with the defendant’s employees whose names (Luke and Scott) he had written on the receipts. He testified that the expenses he submitted were incurred during a business trip he had made to various of the defendant’s locations on Vancouver Island, that he had discussed the basis of the trip with Jav, that he had had dealings with the individuals whose names were on the receipts, that the meals in question had been with his wife, and that there were other meals he had paid for that were not expensed. He testified that Jav suggested that there were “too many receipts” and “let’s keep it simple” and to submit the receipts as expenses for meals with the defendant’s employees. Jav testified that he was not advised by the plaintiff that the Parksville restaurant dinner and breakfast had been with Tarrah.

[31] Amy testified that, on July 7, 2022, she had dinner with John Temple, an employee of First Canadian Insurance, one of the defendant’s insurance vendors. She testified that Mr. Temple showed her an electronic transmission that the plaintiff had sent to him that contained some financial information that Amy considered to be confidential to the defendant.

[32] The plaintiff testified that Mr. Temple’s company, First Canadian Insurance, was in fact a “business partner” which whom the defendant had a profit-sharing program regarding warranty, insurance, and related products and that it was routine for Mr. Temple to be provided with such information. Amy agreed on cross-examination that a profit-sharing plan did exist between the defendant and

Mr. Temple's company and she was unable to say whether it had access to this information.

[33] On July 11, 2022, the plaintiff attended a meeting with Amy and Mark by way of video conference. It commenced at 7 a.m. and lasted 30 to 35 minutes. The plaintiff was questioned by them about some of the business expense claims that he had previously claimed. During the meeting, Amy and Mark presented a slide show which included clauses from Contract Form 3 (after a header slide that reads "Employment Contract") as well as slides from the news media of an individual who had recently been convicted of fraud in connection with business expense claims. They accused the plaintiff of fraud.

[34] On cross-examination, the plaintiff testified that he could not recall if the Parksville restaurant dinner and breakfast receipts were discussed during the meeting. However, he acknowledged that he had not had dinner with Luke and Scott on June 15 but rather the dinner had been with Tarrah. He also acknowledged that he did not tell Amy and Mark that the dinner had been with Tarrah, but stated he had not been asked the question. He denied telling Amy and Mark during the meeting that he had in fact had dinner with Luke and Scott on June 15, 2022.

[35] At the end of the meeting, the plaintiff understood that his employment had been "suspended".

[36] At 8:12 a.m. on July 11, 2022, Amy sent an email to the defendant's employees stating:

> Good Morning
>
> Effective today Todd is on a temporary leave of absence. We ask that during this time you do not reach out to him.
>
> We will provide further information later this week. In the meantime, should you have any questions or concerns, please reach out to myself or Mark.
>
> Amy
>
> Amy Jones
>
> Chief Administrative Officer (CAO)

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[37] Later that same morning, the plaintiff received an email notification from Facebook stating:

> Hi Todd,
>
> You're getting this email to confirm that you're no longer an admin on Galaxy Motors. You were removed on July 11, 2022 at 11:44 am.

[38] On July 11, 2022, the defendant changed the locks on the plaintiff's office.

[39] Amy testified that her concern about the plaintiff's integrity was bolstered by his failure to admit that the dinner and breakfast at Parksville restaurant had been with his wife and not with other employees of the defendant. On cross-examination, Amy conceded that the "internal investigation" that was conducted regarding the plaintiff's conduct did not include her having any discussions with Jav or with the employees that were named on the Parksville dinner and breakfast receipts to confirm they had not been present. She testified that "there was no point" and "it didn't matter" because she knew they had not been present. She testified that she and Mark gave the plaintiff a chance to explain but he failed to be honest with them.

[40] She testified that she and Mark spoke and concluded they could not trust the plaintiff, would not be able to move forward in the relationship with him, and decided to terminate his employment.

[41] On July 13, 2022, the plaintiff had another meeting with Amy and Mark, again via video conference. The audio portion of the meeting was recorded. A transcript of the recording was put in evidence. During the meeting, Mark advised the plaintiff that:

- the defendant had conducted an investigation and had uncovered numerous incidents of fraudulent conduct, mainly related to expense claims;
- the defendant considered the plaintiff's conduct to be a fundamental breach that had caused it to lose faith and trust in him; and
- the plaintiff's employment was terminated effective immediately.

[42] Later that day, the plaintiff received a formal termination letter from the defendant. The letter stated, in part:

> Further to our discussion today, this letter confirms the decision to end your employment with Galaxy Motors (1990) Ltd., effective immediately.
>
> We have become aware of numerous instances of fraudulent and improper conduct relating to expense claims made by you during your employment. When questioned about these irregularities, you were unable to provide a reasonable explanation. As President of Operations, you are expected to exercise good judgment and uphold the trust inherent in your management and fiduciary position. We consider your conduct to be a fundamental breach of your obligations to Galaxy Motors which has caused us to lose trust and faith in you.
>
> […]

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[43] Amy testified on cross-examination that, after the plaintiff was terminated, she and Mark arranged for bonuses to be paid to both herself and Mark in the amounts of $108,000 and $250,000 respectively.

[44] The plaintiff testified that his character changed after his termination. He became depressed, angry, and reclusive. His mood caused friction in his marriage. He consumed more alcohol than was normal and became “hard to deal with”. He described the summer of 2022 as “the hardest summer of my life”.

[45] Tarrah’s narrative of the change in the plaintiff after his termination was more ominous. She testified that she and the plaintiff had always wanted to end up in Victoria where they had both been born and raised and considered “home”. She testified that, with the plaintiff’s job at the defendant, they finally had the good life they had wanted. She testified that, prior to the plaintiff’s termination, the family had been excited about the summer and the plans they had made for a vacation. She testified that, after the termination, the family’s relationship with the plaintiff “went completely sideways”. She testified that the plaintiff was not the person he was before. He became angry, stressed, could not sleep, started drinking alcohol more heavily than he had previously and they fought frequently. He became more impatient with the children and was not as active with them as he had been previously.

[46] In late September 2022, the plaintiff accepted a position as general manager of an automobile dealership in Chilliwack, which was part of Auto Canada for whom he had previously been employed.

[47] Tarrah testified that the parties' youngest son enjoyed attending school in Victoria but is not nearly as engaged at his new school in Chilliwack.

Credibility and Reliability

[48] The plaintiff's testimony was generally given in a truthful and convincing manner. He responded to the questions that were put to him, both during his direct and cross-examination, directly, succinctly and without embellishment. However, I found his evidence regarding his discussion with Jav about the Parksville restaurant dinner and breakfast receipts as well as his evidence regarding what was discussed during his July 11, 2022 meeting with Amy and Mark to have been dishonest. In marked contrast to the rest of his testimony, his recall of that meeting and his evidence regarding what was discussed became vague, equivocal, and lacked genuineness and veracity. He became noticeably uneasy and defensive when asked on cross-examination about the Parksville restaurant dinner and breakfast receipts. His testimony that he could not recall any discussion about the Parksville restaurant dinner and breakfast during the July 11, 2022 meeting defied credulity, as did his evidence that Jav told him to falsely put the names of Luke and Scott on the receipts to "keep it simple". I do not believe his evidence that during the meeting he was "struggling to recall" the reason for the receipts. Rather, I find that, if anything, he was struggling to find a way around his having been caught in a deception of his employer.

[49] Tarrah was an excellent witness who gave her evidence in a sincere and authentic fashion. I accept it in its entirety.

[50] Each of Jav and Mr. Melanchuk gave his evidence in an honest and credible manner. I accept their evidence in its entirety.

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[51] Counsel for the plaintiff submits that Amy was not a credible witness. He points to examples in an affidavit she swore on November 7, 2022 in this proceeding in which she deposed that several concerns prompted the defendant's review of the plaintiff's expense claims and that the plaintiff "could not provide reasonable explanation for why he submitted these expenses for reimbursement". One of the expenses referred to was the plaintiff's annual subscription for LinkedIn in respect of which the plaintiff tendered evidence at trial that the expense had been authorized by Mr. Dagger. Amy readily conceded that she had been mistaken in her Affidavit.

[52] Despite plaintiff counsel's assertions, to the contrary, I find that Amy was generally a credible witness although, at times, her testimony strayed from personal knowledge to hearsay in an obvious attempt to bolster the defendant's corporate narrative that it had just cause to terminate the plaintiff's employment. She occasionally obfuscated on cross-examination when she was asked questions that were critical of the level of investigation that was conducted into the plaintiff's expense claims prior to July 13, 2022. In those areas, I found her evidence to be unreliable. However, her evidence of what was discussed during the July 11, 2022 meeting was presented convincingly and its credibility was enhanced during cross-examination. I accept it.

<u>Adverse Inferences</u>

[53] Relying on the decision of our Court of Appeal in *Lau v. Royal Bank of Canada*, 2017 BCCA 253, counsel for the plaintiff submitted that the Court should make adverse inferences against the defendant because it did not call Mark or any other of the defendant's employees to testify, despite them having been listed in its trial brief as witnesses to be called.

[54] I decline to draw an adverse inference in this case.

[55] The decision in *Lau* does not stand for the proposition that a party must call all possible witnesses to an event. Further, it is notable that there was no issue on appeal in *Lau* relating to adverse inferences made against the employer.

[56] The following passage from *R. v. Jolivet,* 2000 SCC 29 neatly summarizes the applicable law:

> [25] The general rule developed in civil cases respecting adverse inferences from failure to tender a witness goes back at least to *Blatch v. Archer* (1774), 1 Cowp. 63, 98 E.R. 969, where, at p. 65, Lord Mansfield stated:
>
> > It is certainly a maxim that all evidence is to be weighed according to the proof which it was in the power of one side to have produced, and in the power of the other to have contradicted.
>
> [26] The principle applies in criminal cases, but with due regard to the division of responsibilities between the Crown and the defence, as explained below. It is subject to many conditions. The party against whom the adverse inference is sought may, for example, give a satisfactory explanation for the failure to call the witness as explained in *R. v. Rooke* (1988), 40 C.C.C. (3d) 484 (B.C.C.A.), at p. 513, quoting *Wigmore on Evidence* (Chadbourn rev. 1979), vol. 2, at § 290:
>
> > In any event, the party affected by the inference may of course *explain* it away by showing circumstances which otherwise account for his failure to produce the witness. There should be no limitation upon this right to explain, except that the trial judge is to be satisfied that the circumstances thus offered would, in ordinary logic and experience, furnish a plausible reason for nonproduction. [Italics in original; underlining added.]
>
> [27] The party in question may have no special access to the potential witness. On the other hand, the "missing proof" may lie in the "peculiar power" of the party against whom the adverse inference is sought to be drawn: *Graves v. United States*, 150 U.S. 118 (1893), at p. 121. In the latter case there is a stronger basis for an adverse inference.
>
> [28] One must also be precise about the exact nature of the "adverse inference" sought to be drawn. In J. Sopinka, S. N. Lederman and A. W. Bryant, *The Law of Evidence in Canada* (2nd ed. 1999), at p. 297, § 6.321, it is pointed out that the failure to call evidence may, depending on the circumstances, amount "to an implied admission that the evidence of the absent witness would be contrary to the party's case, or at least would not support it" (emphasis added), as stated in the civil case *of Murray v. Saskatoon*, [1952] 2 D.L.R. 499 (Sask. C.A.), at p. 506. The circumstances in which trial counsel decide not to call a particular witness may restrict the nature of the appropriate "adverse inference". Experienced trial lawyers will often decide against calling an available witness because the point has been adequately covered by another witness, or an honest witness has a poor demeanour, or other factors unrelated to the truth of the testimony. Other jurisdictions also recognize that in many cases the most that can be inferred is that the testimony would not have been helpful to a party, not necessarily that it would have been adverse: *United States v. Hines*, 470 F.2d 225 (3rd Cir. 1972), at p. 230, *certiorari* denied, 410 U.S. 968 (1973); and the Australian cases of *Duke Group Ltd. (in Liquidation) v. Pilmer & Ors*, [1998]

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A.S.O.U. 6529 (QL), and *O'Donnell v. Reichard*, [1975] V.R. 916 (S.C.), at p. 929.

[Emphasis added.]

[57] In this case, there was no need for the defendant to call all the witnesses originally listed in its trial brief because the evidence they would have proffered was adequately covered by Amy, whose evidence I accept.

[58] The defendant was entitled to decide as the trial unfolded to drop some of the witnesses it had listed. Both Amy and Mark were in attendance during the July 11, 2022 and July 13, 2022 meetings. A recording and transcript of the latter was put in evidence. The defendant presented through Amy its version of what took place at the July 11, 2022 meeting. The Court is fully capable of assessing what was said during the July 11, 2022 meeting based on its findings of credibility and reliability of the witnesses who testified.

Analysis

Was the Plaintiff dishonest to his Employer?

[59] On the whole of the evidence, I have no difficulty finding that the plaintiff submitted the Parksville restaurant dinner and breakfast receipts under the guise of having been business-related when he knew that they were personal. He attempted to deceive the defendant into believing they were business expenses by writing the names of other defendant employees (Luke and Scott) for the purpose of indicating the meals had been with them when he knew it was not true. Finally, I find that, when confronted by Amy and Mark about these receipts during the July 11, 2022 meeting, instead of confessing what he had done, he perpetuated his dishonesty by repeating it.

Was There Just Cause for the Plaintiff's Termination?

[60] The issue to be decided is whether the nature and circumstances of the plaintiff's dishonesty regarding the Parksville restaurant dinner and breakfast receipts rose to the level of just cause for his termination. The onus is on the

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defendant to establish that it did: *Nishina v. Azuma Foods (Canada) Co., Ltd.,* 2010 BCSC 502 at para. 191.

[61] Dishonesty is not automatically just cause for dismissal. The entire circumstances must be taken into account: *McKinley v. BC Tel*, 2001 SCC 38 at paras. 51, 57. As was stated by this court in *Porta v. Weyerhaeuser Canada Ltd.*, 2001 BCSC 1480 at para. 14:

> [14] In my view, the requirement of a contextual approach and an analysis of the nature and circumstances of the misconduct established by *McKinley* places an onus on a defendant asserting just cause to take a similar contextual approach in its investigation of misconduct and in its determination of the appropriate sanction. Where the investigation conducted in the first instance by a defendant asserting just cause is insufficiently broad to establish the full nature and circumstances of the misconduct and thereby the ability of the court to conduct the sort of analysis envisaged in *McKinley* is impaired, it follows that the defendant will similarly be impeded in discharging its onus of proof in connection with its claim of just cause.

[62] In *Roe v. British Columbia Ferry Service Ltd.*, 2015 BCCA 1, our Court of Appeal considered whether a senior manager's conduct in giving food and beverage vouchers to his daughter's volleyball team valued at approximately $70, contrary to the company's policy, was an act of deception justifying his dismissal. It determined that it did, even though Mr. Roe had confessed what he had done when he was confronted. In doing so, the Court of Appeal noted that, despite the small monetary value, Mr. Roe had:

a) received a personal benefit unrelated to the company's business;

b) failed to obtain prior approval or report what he had done; and

c) attempted to conceal his actions.

[63] The Court of Appeal in *Roe* held that the application of the contextual approach in *McKinley* required an analysis of the following factors (as they existed in that case):

(i) the high standard of conduct expected of Mr. Roe given the responsibilities and trust attached to his senior management position;

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(ii) the essential conditions of integrity and honesty in his employment contract; and

(iii) the deliberate concealment of his actions which he later acknowledged were wrong and unethical.

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[64] In my view, Amy's reaction to what she perceived was improper conduct on the part of the plaintiff was justified in the circumstances. Although she may have misconstrued and made assumptions about some of the underlying facts and could have conducted a more thorough investigation into them, she had sufficient information at her disposal to be confident that her concerns regarding the Parksville restaurant dinner and breakfast receipts being personal in nature were well-founded.

[65] I agree with the submissions of counsel for the defendant that the facts in *Roe* are analogous to those before me in this case. Although the total amount of the Parksville restaurant dinner and breakfast receipts (approximately $250) was relatively small, the misconduct went to the very root of the plaintiff's employment relationship with the defendant. He was in the most senior management position at the defendant. His position commanded a high level of authority, responsibility, and trust. He breached that trust by submitting false expense receipts and thereafter being untruthful about them when given an opportunity to explain them on July 11, 2022. Moreover, he failed to "come clean" when he had a second opportunity to do so during the meeting on July 13, 2022. His conduct was such that the defendant's loss of faith and trust in him was justified.

Conclusion

[66] I conclude that the defendant has met its onus of proof in establishing just cause for its dismissal of the plaintiff.

Costs

[67] Subject to any submissions the parties may wish to make, the defendant is entitled to its costs at Scale B.

"G.C. Weatherill J."