COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Mechalchuk v. Galaxy Motors (1990) Ltd.,*
2023 BCCA 482

Date: 20231201
Docket: CA49041

Between:

Todd Mechalchuk

Appellant
(Plaintiff)

And

Galaxy Motors (1990) Ltd.

Respondent
(Defendant)

Before: The Honourable Justice MacKenzie
The Honourable Justice Dickson
The Honourable Mr. Justice Abrioux

On appeal from: An order of the Supreme Court of British Columbia, dated April 20, 2023 (*Mechalchuk v. Galaxy Motors (1990) Ltd.*, 2023 BCSC 635, Victoria Docket S222631).

Oral Reasons for Judgment

Counsel for the Appellant: M. Sheard

Counsel for the Respondent: K. Wheelhouse
D.R. Robertson

Place and Date of Hearing: Vancouver, British Columbia
November 30, 2023

Place and Date of Judgment: Vancouver, British Columbia
December 1, 2023

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Summary:

This appeal arises from a claim for damages for an alleged wrongful dismissal which was dismissed at trial. The appellant argues that the judge erred in concluding that there was sufficient evidence to constitute just cause for the dismissal as well as in his credibility and reliability assessments. Held: Appeal dismissed. The trial judge is owed deference in this case and made no reviewable error in either the credibility analyses or the finding of just cause. The act in question went to the heart of the employer/employee relationship such that the defendant's loss of faith and trust in the appellant was justified.

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Introduction

[1] **ABRIOUX J.A.**: Mr. Mechalchuk appeals from the order of Justice G.C. Weatherill following the trial of an action which dismissed his claim for damages arising from an alleged wrongful dismissal. The judge found that the respondent ("Galaxy Motors") established just cause for the appellant's dismissal since he had submitted false business expense receipts (the "Parksville restaurant receipts") and was untruthful about having done so.

[2] The appellant challenges this conclusion, arguing that the judge erred by ruling that the Parksville restaurant receipts issue, standing alone, could constitute just cause for his dismissal when Galaxy Motors had instead pleaded and argued that the dismissal was based on a pattern of events none of which had been established but for the restaurant expenses. He also argues that the trial judge erred in his credibility and reliability assessment of both his evidence and that of the principal witness for Galaxy Motors, being Ms. Amy Jones, a co-owner of the business. He also challenges the judge's order pertaining to costs.

[3] Mr. Mechalchuk also applies to adduce fresh evidence, being his own affidavit, which relates to whether he received any personal benefit from claiming the Parksville restaurant expenses.

[4] For the reasons that follow I would dismiss both the application to adduce the fresh evidence and the appeal.

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Background

[5] The background is set out in some detail in the judge's reasons which are indexed as 2023 BCSC 635. The facts which are pertinent to the issues on appeal include the following.

[6] On May 19, 2020, Mr. Mechalchuk, accepted a senior employment position with Galaxy Motors and signed a contract of employment. Galaxy Motors was owned by Mr. Phil Dagger, and his niece, Ms. Jones, was employed as its assistant general manager. Between his hiring and his termination in July 2022, Mr. Mechalchuk was promoted on two occasions. His title at the time of his termination was President of Operations. He was the most senior non-owner employee of a business which had approximately 150 employees. His income for the year in which his termination occurred was between $750,000 and $1,000,000.

[7] On August 9, 2021, Mr. Dagger died unexpectedly. Galaxy Motors was inherited by Ms. Jones and her brother Mr. Mark Jones. Shortly thereafter, Mr. Mechalchuk was given signing authority for the company.

[8] On June 15, 2022, Mr. Mechalchuk was on a business trip to the Parksville area of Vancouver Island. He was accompanied by his wife and the two of them had dinner at a Parksville restaurant. Mr. Mechalchuk wrote the names of two employees on the receipt. The next morning, he had breakfast with his wife at the same restaurant and wrote another employee's name on the receipt. The Parksville restaurant receipts were then submitted for reimbursement to the company's in-house financial controller, Mr. Jay Lidder and Mr. Mechalchuk was reimbursed for both meals.

[9] On June 22, 2022, Mr. Mechalchuk and his wife, together with several of Galaxy Motors' managers and their respective spouses, attended a dinner at a restaurant described in the reasons as "the Brewhouse". Ms. Jones was also present. Since this dinner figures prominently in the appellant's submissions on appeal, I shall describe it more fully.

[10] Mr. Mechalchuk testified that, when the dinner bill was presented he and Ms. Jones had a discussion during which they agreed it was a "team building event" that could be justified as a business expense. He paid the bill. In her testimony, Mr. Mechalchuk's wife confirmed her husband's account. Ms. Jones testified that she never considered this to have been a company event, believed Mr. Mechalchuk was simply being generous when he paid the bill, and thought it was ludicrous when she learned that he had submitted it as a business expense and she declined to approve it. Mr. Lidder testified that one of the other attendees at the dinner had told him that Ms. Jones had approved the dinner as a business expense. Ms. Jones agreed that Mr. Lidder had advised her of what the other employee had told him regarding the bill but denied having approved the expense.

[11] In any event, the Brewhouse event triggered Ms. Jones having a spot audit conducted of Mr. Mechalchuk's business expenses which revealed the Parksville restaurant receipts.

[12] On July 11, 2022, Mr. Mechalchuk attended a meeting with Mr. and Ms. Jones, which lasted 30–35 minutes, in which they questioned him regarding certain business expenses. They accused him of fraudulent conduct. Mr. Mechalchuk testified that during the meeting, he could not recall any discussion about the Parksville restaurant meals. Ms. Jones testified that "her concern about the plaintiff's integrity was bolstered by his failure to admit that the dinner and breakfast at [the] Parksville restaurant had been with his wife and not with other employees": at para. 39. Mr. Mechalchuk was then placed on a leave of absence.

[13] On July 13, 2022, there was a telephone conversation in which Mr. Jones advised Mr. Mechalchuk that he was being dismissed immediately for just cause. Ms. Jones was privy to the conversation but did not otherwise participate.

[14] The judge describes what then occurred:

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

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> 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. <u>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</u> <u>which has caused us to lose trust and faith in you.</u>
>
> […]

[Emphasis added.]

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<u>The Trial Reasons</u>

[15] The judge identified the legal framework which applied to the issues he had to consider and which included *McKinley v. BC Tel*, 2001 SCC 38 and *Roe v. British Columbia Ferry Services Ltd.*, 2015 BCCA 1.

[16] The challenge taken on appeal is to the manner in which the judge applied this framework to the circumstances of this case.

[17] The judge found Mr. Mechalchuk to be generally truthful but concluded that his evidence regarding the July 11, 2022 meeting was dishonest. He found Ms. Jones to be “generally a credible witness” although he did have some reservations about aspects of her evidence. I shall return to the credibility findings later in these reasons.

[18] Mr. Mechalchuk submitted that the court should draw an adverse inference against Galaxy Motors because it did not lead evidence from Mr. Jones or other employees, particularly in relation to the Brewhouse event, in that they had been on its witness list for the trial. The judge declined to draw this inference, commenting that the respondent “was entitled to decide as the trial unfolded to drop some of the witnesses it had listed”: at para. 58.

[19] The judge then turned to the issues of dishonesty and just cause. He found on the evidence that Mr. Mechalchuk submitted the Parksville restaurant receipts as

business expenses when he knew they were personal in nature, and tried to deceive Galaxy Motors into thinking they were for a business purpose. He was also dishonest about the expenses when he was confronted by Ms. and Mr. Jones about this during the July 11, 2022 meeting.

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[20] The judge observed that Galaxy Motors bore the onus to establish just cause, and concluded it had done so. He noted that dishonesty does not automatically comprise just cause for dismissal, but in these circumstances where Mr. Mechalchuk was in the most senior management position at the company, that position commanded authority, responsibility and trust, and he breached that trust. Accordingly, "his conduct was such that the defendant's loss of faith and trust in him was justified": at para. 65.

[21] The judge dismissed the action and although Rule 15-1(15) of the British Columbia *Supreme Court Civil Rules* (Fast Track) had been invoked, he awarded Galaxy Motors its costs in the trial court at Scale B.

<u>On Appeal</u>

[22] Mr. Mechalchuk raises a number of grounds of appeal which include that the judge erred in:

1) Finding that it was sufficient for Galaxy Motors to establish just cause for his dismissal based only on the Parksville restaurant receipts when its pleadings alleged a broad pattern of misconduct;
2) Misapprehending the evidence and erroneously concluding that Ms. Jones' evidence was credible and reliable notwithstanding that she had "lied" regarding the Brewhouse event;
3) Failing to provide sufficient reasons which were responsive to his arguments at the trial;
4) Declining to draw an adverse inference against Galaxy Motors because it did not call Mr. Jones as a witness; and
5) Awarding costs in a manner contrary to the Fast Track Rule.

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Discussion

(1) Standard of review

[23] It is not this Court's role to re-do the work of the trial judge by allowing the parties to reargue the case, but to correct errors. The standard of review is deferential absent palpable and overriding error and we may interfere only where there is a material error, a serious misapprehension of the evidence, or an error of law: *Housen v. Nikolaisen,* 2002 SCC 33 at paras. 22–23; *Hickey v. Hickey*, [1999] 2 S.C.R. 518 at para. 12, 1999 CanLII 691.

[24] Furthermore, as was observed in *Khela v. Clarke*, 2022 BCCA 71:

> [6] A trial judge has an "overwhelming advantage" in making credibility assessments, which are entitled to deference absent a showing of palpable and overriding error: *Housen v. Nikolaisen*, …at para. 24, ..; *R. v. Gagnon*, 2006 SCC 17 at para. 20, [2006] 1 S.C.R. 621. It is not for this Court to reweigh the factors that were open to a judge to consider in making a credibility assessment. …

(2) Did the Judge err in finding that Galaxy Motors had established just cause to terminate Mr. Mechalchuk's employment without notice?

[25] Mr. Mechalchuk submits that we should allow the appeal and order a new trial since the judge misapprehended the evidence and committed reviewable errors in his credibility assessments in relation to both his evidence and that of Ms. Jones.

[26] Accordingly, it is of assistance to set out what I consider to be the key passages from the reasons dealing with this issue. First, the appellant:

> [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.

[27] Second, Ms. Jones:

> [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. <u>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>
>
> [Emphasis added.]

[28] The judge was well aware of the importance the appellant placed on the Brewhouse expense and that Ms. Jones' evidence was contradicted by others including Mr. Mechalchuk and his wife. It was entirely in his purview to accept all, part or none of a witnesses' evidence. The Brewhouse expense was referred to in some detail in the reasons and the phrase "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" can only mean that that the judge considered the submission on this point in his reasoning analysis. No reviewable error has been identified regarding the credibility analyses and the reasons are legally sufficient in that regard.

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[29] Mr. Mechalchuk argues that the judge erred, in law in finding that the dishonesty surrounding the Parksville restaurant expenses, standing alone, was sufficient to provide just cause for his dismissal since Galaxy Motors had pleaded a broader pattern of misconduct. I would not accede to this submission since if the act relied on by the judge went to the heart of the employer/employee relationship then that is sufficient to find that there was just cause for the dismissal: *Chura v. Batten Industries Inc.,* 2023 BCSC 1040 at para. 317.

[30] Bearing in mind the deferential standard of review, the key issue on appeal, in my view, is whether the judge erred when he concluded:

> [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.

[31] There was a considerable body of evidence upon which he could have reached that conclusion which included:

- Mr. Mechalchuk was in the most senior management position as the President of the company which commanded a high level of authority, responsibility and trust. His responsibilities included signing authority and his income and responsibilities were commensurate with Galaxy Motors' expectations of him;

- The employee handbook specifically provided that "falsifying records or information" was considered a serious offence that due to its severity would lead to dismissal from employment;

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- Mr. Mechalchuk submitted the Parksville restaurant receipts as being business-related when he knew that they were personal in nature;
- He submitted the receipts as business expenses by writing the names of other Galaxy Motors employees for the purposes of indicating the meals had been with them, when he knew that was not the case; and
- He breached his employer's trust by submitting false expense receipts and being untruthful about them when given an opportunity to explain. When confronted by his employer about the receipts during the July 11, 2022 meeting, instead of admitting what he had done, Mr. Mechalchuk repeated his account. Unbeknownst to him, Ms. Jones had contacted some of the persons identified on the receipts and was aware that they had not been present.

[32] I will now turn to Mr. Mechalchuk's application to adduce fresh evidence, being his affidavit of July 17, 2023. The affidavit seeks to explain and provide documentary evidence in order to establish that he did not receive a benefit from the Parksville restaurant meals in question since he did not submit receipts for other expenses that he could have legitimately claimed for reimbursement.

[33] The test to determine whether additional (or "fresh") evidence should be admitted on appeal when adduced for the purpose of reviewing the decision below is set out in *Palmer v. The Queen* (1979), [1980] 1 S.C.R. 759, 1979 CanLII 8 as follows:

> (1) The evidence should generally not be admitted if, by due diligence, it could have been adduced at trial…
>
> (2) The evidence must be relevant in the sense that it bears upon a decisive or potentially decisive issue in the trial.
>
> (3) The evidence must be credible in the sense that it is reasonably capable of belief, and
>
> (4) It must be such that if believed it could reasonably, when taken with the other evidence adduced at trial, be expected to have affected the result.

[34] The *Palmer* test "is purposive, fact-specific, and driven by an overarching concern for the interests of justice": *Barendregt v. Grebliunas*, 2022 SCC 22 at para. 31.

[35] Mr. Mechalchuk acknowledges that this evidence was available at the time of the trial. He argues, however, that it was not adduced since it was his position that it was for Galaxy Motors to establish that he had received a benefit and his position at the trial was it had failed to do so.

[36] This falls short of satisfying the due diligence requirement. Furthermore, the evidence is neither relevant nor would it have affected the result; this is because although the issue of whether Mr. Mechalchuk had received a benefit was an issue at the trial, the judge's decision that just cause had been established did not turn on this point.

[37] On a consideration of the *Palmer* criteria, I would not admit the fresh evidence since it is not in the interests of justice to do so.

[38] I would also not accede to the argument that the trial judge erred in declining to draw an adverse inference against the respondent because it did not call Mr. Jones as a witness. It is evident from the reasons that he considered counsel's submissions on this issue and concluded he was able to assess what was said at the July 11, 2022 meeting based on his own findings of credibility and reliability of the witnesses who testified. He correctly applied the applicable legal principles and found that the respondent was entitled to decide as the trial unfolded not to call some of the witnesses it had listed on its trial brief. I would add that the appellant could also have called Mr. Jones as a witness had it chosen to do so. No reviewable error has been demonstrated in this regard.

[39] In conclusion I am of the view that there is no principled basis upon which this Court could or should interfere with the judge's conclusions, in particular that Mr. Mechalchuk's conduct was such that Galaxy Motor's loss of trust and faith in him was justified. The judge correctly applied the contextual analysis which was required

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in considering Mr. Mechalchuk's position and level of responsibility. He assessed the severity of the misconduct, that is submitting false expense receipts and being untruthful when given a chance to explain and found that in all the circumstances, termination of employment for cause and without notice was a justifiable response by the employer.

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Disposition

[40] I would dismiss the appeal.

[41] Galaxy Motors applied at the commencement of the trial to have the action removed from the Fast Track Rule on the basis that both the amount involved and the estimated length of trial warranted an order to that effect.

[42] The judge did not rule on the application and awarded costs to Galaxy Motors at Scale B "subject to any submissions the parties may wish to bring".

[43] In my view, any submissions pertaining to the costs in the trial court should be made to the trial judge and I would remit this issue to him for his consideration.

[44] **MACKENZIE J.A.**: I agree.

[45] **DICKSON J.A.**: I agree.

[46] **MACKENZIE J.A.**: The appeal is dismissed and the issue of costs is remitted to the trial judge for his consideration.

"The Honourable Mr. Justice Abrioux"