Court of King's Bench of Alberta

Citation: Johnson v Varsity Chrysler Dodge Jeep Ram Ltd, 2023 ABKB 544

Date: 20230928
Docket: 1901 06911, 1901 10356
Registry: Calgary

2023 ABKB 544 (CanLII)

Between:

Docket: 1901 06911

Ronnie Johnson

Plaintiff
(Respondent)

- and -

Varsity Chrysler Dodge Jeep Ram Ltd.

Defendant
(Appellant)

And Between:

Docket**:** 1901 10356

Tony Bedard

Plaintiff
(Respondent)

- and -

Varsity Chrysler Dodge Jeep Ram Ltd.

Defendant
(Appellant)

Reasons for Decision
of Justice April Grosse

Appeal from the Order by
The Honourable Applications Judge L. Mattis
Filed on the 5th day of May, 2022
Dated the 8th day of April, 2022

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INTRODUCTION

[1] This is an appeal from a decision of an Applications Judge granting partial summary judgment to two plaintiffs in their actions for constructive dismissal. The Applications Judge found that both plaintiffs had been constructively dismissed. The issues of reasonable notice and compensation were not before her.

FACTUAL AND PROCEDURAL CONTEXT

[2] The plaintiffs are Mr. Johnson and Mr. Bedard. At all material times, they were both employed by the defendant Varsity Chrysler Dodge Jeep Ram Ltd (Varsity) as Finance and Insurance (F&I) Business Managers (F&I managers or business managers). Their role was to sell products such as financing, insurance and service contracts to customers purchasing vehicles from Varsity. They did not sell vehicles.

[3] The plaintiffs did not have written employment agreements with Varsity. They were paid on commission. The precise terms of the commission structure are in issue.

[4] From time to time, Varsity management issued memos or other documents setting out a "pay plan" for the F&I managers. It is undisputed that the last such document issued prior to the events in issue was a memo to Varsity accounting personnel dated July 28, 2016, with the subject "Business Office Pay Plan". It referred to "Payroll for Tony Bedard, Shawn Nicholl, Scott Bright and Ronnie Johnson" and set out the following terms for August 1 forward:

> 20% Business Office Pool (Standard)
>
> Or 21% if NCD Monthly F&I Average is $2450 + and UCD Monthly F&I Average is $1750 +
>
> Or 22% if NCD Monthly F&I Average is $2650 + and UCD Monthly F&I Average is $2000 +
>
> Or 23% if NCD Monthly F&I Average is $2900 and UCD Monthly F&I Average is $2400.
>
> *Monthly Averages to be confirmed by Justin M or Steve K off the Month End First Canadian F&I Report.

[5] There is no dispute that the percentage references in the 2016 Memo are to percentages of the F&I department's gross revenues[1] less specific deductions, the net of which I will refer to for simplicity as the "F&I Gross". There is also no dispute that Varsity employed four F&I managers for at least most of the period following the 2016 Memo and that when four F&I managers were employed, Mr. Johnson and Mr. Bedard each received at least 5% of the F&I Gross.

[6] In February 2018, one of the four F&I managers resigned. On March 1, 2018, the general manager (Mr. Mignault) and one of the owners of Varsity (Mr. Bender) met with the remaining F&I managers, including the plaintiffs. While there are differing versions of what happened at the meeting, it is undisputed that the F&I managers were presented with a memorandum dated February 27, 2018, which included the following passages:

> Effective March 1, 2018, the Business Office will consist of 3 full time Business Managers on a 3 week rotation. The Business Managers will be compensated 5.0% each of the department gross less chargebacks and spiffs. Business Managers will follow the set schedule attached.
>
> …
>
> If and/or when the F&I Department expands to a 4th Business Manager, the schedule will be revised and commission will be based at 4.0% of department gross less chargebacks per Business Manager.

[7] Mr. Bedard resigned almost immediately. Mr. Johnson returned to work when next scheduled on or about March 5, 2018. However, he did not return after March 5. The legal characterization of his departure is in issue.

[8] In May 2018, the plaintiffs advised Varsity, through counsel, that they considered themselves constructively dismissed on the basis that the changes set out in the February 27, 2018 memorandum significantly decreased their compensation and increased their hours of work. Mr. Johnson filed a Statement of Claim on May 16, 2019, and Mr. Bedard's followed on July 25, 2019. Varsity filed a Statement of Defence in each action.

[9] The plaintiffs applied for partial summary judgment pursuant to Rule 7.3 of the *Alberta Rules of Court*, Alta Reg 390/68 "with respect to the claim of constructive dismissal." They sought only a finding that they had been constructively dismissed, leaving remedy to be determined later. On April 8, 2022, the Applications Judge granted the applications and found that Mr. Johnson and Mr. Bedard had been constructively dismissed.

STANDARD OF REVIEW

[10] There is no dispute that the standard of review in an appeal from an Applications Judge is correctness with no deference: *Bahcheli v Yorkton Securities Inc*, 2012 ABCA 166.

[1] Some of the evidence refers to "gross commission" of the F&I department and some to "gross revenue". Whether the gross is straight revenue or is itself a form of commission assigned to the F&I department does not matter for the purposes of this decision.

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APPLICABLE LAW

[11] The parties agree that the general approach to summary judgment is set out in *Hryniak v Mauldin,* 2014 SCC 7 and *Weir-Jones Technical Services Inc v Purolator Courier Ltd*, 2019 ABCA 49. In *Hryniak*, the Supreme Court held that there would be no genuine issue requiring a trial where the judge could reach "a fair and just determination on the merits on a motion for summary judgment" and that this would be the case when the process "(1) allows the judge to make the necessary findings of fact, (2) allows the judge to apply the law to the facts, and (3) is a proportionate, more expeditious and less expensive means to achieve a just result": *Hryniak* at para 49. The Applications Judge was satisfied that she could make a fair and just determination in all respects.

[12] There is also general agreement on the test as to whether an employee has been constructively dismissed. An employee claiming constructive dismissal must demonstrate that the employer's conduct evinces an intention no longer to be bound by the employment contract: *Potter v New Brunswick Legal Aid Services Commission,* [2015] 1 SCR 500 at paras 30-31 (QL). Constructive dismissal may take two forms. First, if the court finds that an employer has imposed a unilateral change constituting a breach of the employment contract, and that such breach substantially alters an essential term of the employment contract, constructive dismissal is established: *Potter* at para 34. Second, conduct that more generally demonstrates that the employer no longer intends to be bound by the terms of the contract will also satisfy the test: *Potter* at para 42. In this case, the plaintiffs rely on the first branch in respect of what they say were substantial alterations in the terms of their compensation and hours of work.

DISCUSSION

The Case for Constructive Dismissal

[13] There are essentially four grounds that could, either individually or in combination, lead to a finding of constructive dismissal in this case. I start by reviewing the record in respect of each.

Commission based on three F&I Managers

[14] The main argument advanced by the plaintiffs is that Varsity substantially altered an essential term of their employment contracts by unilaterally imposing an individual commission of 5% effective March 1, 2018. According to the plaintiffs, it was a fundamental term of their employment contracts that they would be paid at least 20% of the F&I Gross divided by the number of F&I managers employed at any given time. When Varsity opted to employ only three F&I managers effective March 1, 2018, they were each entitled to one-third of at least 20%, ie., at least 6.7%.

[15] Varsity disputes both elements of the plaintiffs' allegation. First, Varsity denies that equal sharing of at least 20% of F&I Gross was a term of the plaintiffs' employment contracts. It argues that the contracts included an implied term that the compensation structure was subject to review and change from time to time based on the operational needs of the dealership. If an express or implied term permits the employer to make a change, then that change is not unilateral and does not amount to an actionable breach: *Potter* at para 37. Further, according to Varsity, the plaintiffs were in substance paid base commissions of approximately 5% of F&I Gross throughout their respective terms as F&I managers, including in the period leading up to March

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1, 2018. Varsity argues that regardless of the precise terms of the contracts, the pay plan set out in the February 27, 2018 memorandum was not a fundamental change to the detriment of the plaintiffs because they were each earning 5% of the F&I Gross prior to March 1, 2018 and they would continue earning 5% of the F&I Gross after March 1, 2018.

[16] I have little difficulty finding that for at least significant portions of each plaintiff's tenure as an F&I manager, the methodology behind the commission structure was an equal sharing of at least 20% of F&I Gross amongst the F&I managers. This was most explicit in the period between September 24, 2015 and July 28, 2016, when the operative pay plan read, "22% of the business office gross, net chargeback and expenses divided by the number of business managers employed." The July 28, 2016 pay plan memo was not as explicit. However, it referred to the 20% "Business Office Pool" and named four specific employees. Further, "Finance Commission" documents for December 2017 through February 2018 show a calculation of "Individual Commission" based on 20% "Total Commission" divided by "# of Managers".

[17] The more difficult question is whether this methodology itself was always, or at some point became, a fundamental term of the plaintiffs' employment that was not variable by Varsity. The pay plans of September 24, 2015 and July 28, 2016 provide some support for the plaintiffs' position.

[18] On the other hand, there is evidence supporting Varsity's assertion of an implied right to vary the pay structure to reflect the operational needs of the business. The record includes three different "pay plans" issued by Varsity between October, 2000 and February, 2018 (prior to the February 27, 2018 memorandum in issue). There is no evidence that any of these were negotiated, or that the plaintiffs questioned Varsity's right to unilaterally revisit the pay plan. The October 17, 2000 plan (which pre-dated Mr. Bedard's tenure) set individual commissions for each F&I manager based on F&I Gross, and they were not all equal. While the September 24, 2015 pay plan memorandum explicitly established equal sharing of 22% of F&I Gross, it also stated, "After December 2015 when month end and year end is completed, there will be an analysis of the departments [sic] performance and decisions will be made to whether w [sic] continue on pool or move to individual pay plans." Similarly, at some point, Mr. Johnson was receiving additional pay as a "senior" F&I manager, which Varsity later withdrew without negotiation. Mr. Johnson appears to have accepted that change. I do not suggest that past acquiescence to unilateral changes to their terms of employment precludes the plaintiffs' claim of constructive dismissal at this time. Rather, the history of unilateral changes without protest is some evidence that equal sharing amongst F&I managers of a pool of at least 20% F&I Gross was not an invariable fundamental term of employment.

[19] The plaintiffs' own evidence and argument does not consistently reflect an expectation of at least 20% F&I Gross divided by the number of F&I managers. For example, in questioning, Mr. Johnson agreed that under the September 24, 2015 pay plan, each F&I manager would individually receive a higher percentage of F&I Gross when there were three managers and a lower percentage when there were five managers. He agreed that was also the case for the 23% plan he claims was in place prior to September 24, 2015. However, when the same proposition was put to Mr. Johnson in respect of the July 28, 2016 pay plan, he disagreed. Mr. Johnson testified that while he expected to receive an equal share of at least 20% F&I Gross if there were three F&I managers (ie., greater than 5% individually), he did not expect any decrease to his individual percentage of F&I Gross if there were more than four managers because "the lowest was always 5%". In response to questions from the Court during argument, counsel for the

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plaintiffs acknowledged that if Varsity had employed seven F&I managers effective March 1, 2018 instead of three, and split the 20% F&I Gross amongst the seven, this could also be a constructive dismissal if it had the net effect of reducing the plaintiffs' compensation. For present purposes, it does not matter whether any of these interpretations were "correct". The point is that the plaintiffs' own case introduces some uncertainty as to the precise compensation terms of their contracts.

[20] There are also some gaps or inconsistencies in the contextual evidence that could be relevant to interpreting the various pay plan memos and to delineating the overarching implied terms governing the parties' employment relationship, including whether there was an implied term that Varsity could make unilateral changes to the pay structure and if so, to what extent. For example, neither party has tendered any evidence about what, if anything, the plaintiffs were told about compensation prior to accepting the F&I manager role. The intention of the parties at the time of hiring is often relevant: H.A. Leavitt, *The Law of Dismissal in Canada*, 3 ed (Toronto: Thomson Reuters, looseleaf) at §3:70.20.2.[2]

[21] Evidence about when there were less or more than four F&I Managers and what commissions were actually received during those periods could also be of assistance to the Court. For example, whether the September 24, 2015 and July 28, 2016 pay plans were issued coincident on a change of number of F&I Managers could shed light on both the interpretation of those plans and the overarching terms of the relationship. Based on the evidence of Mr. Bedard and the five-person schedule produced in response to undertakings, it appears that there were five F&I Managers employed for at least most of the period between September 2015 and July 2016. However, while Mr. Johnson initially stated that from 2015 forward, there were times when there were three, four and five F&I managers, he later testified that he was not sure if there was ever a fifth F&I manager.

[22] With respect to commissions actually received, Mr. Johnson initially agreed that pursuant to the September 24, 2015 pay plan, if five F&I managers were employed, each would receive less than 5% of F&I Gross. However, he later testified that he thought each manager may have received 6% when there were five managers. Perhaps more importantly, both plaintiffs testified that at some point or points during their employment, there were three F&I managers, though they did not know exactly when. Mr. Bedard did not give evidence as to what commissions were received during any periods with three F&I managers. Mr. Johnson first stated in questioning that he did not recall whether he ever received commissions of 7.3% of F&I Gross, but minutes later, said that he received 7.3% when there were three F&I managers.

[23] As is apparent in the foregoing, there are issues about the reliability or credibility, or both, of Mr. Johnson's evidence. Mr. Johnson may well be a credible and reliable witness. However, my ability to assess credibility in this context is limited, and in light of the contradictions on the face of the existing record, I am not comfortable relying on his evidence on any material point without corroboration.

[2] Both plaintiffs worked in other roles at Varsity before becoming F&I managers. The exact time at which each plaintiff started as an F&I manager is not clear. Mr. Johnson says he was promoted to that role sometime in 2000. Mr. Bender's evidence was that he left the dealership in 1999 and Mr. Johnson replaced him in the F&I Manager role. Mr. Bedard does not recall what year he became a F&I Manager. It was sometime after he started in sales at Varsity in January, 2005.

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[24] Turning to the related issue of whether the February 27, 2018 memorandum actually changed the plaintiffs' compensation, there is no dispute that at the time of the alleged constructive dismissal, each plaintiff was ultimately receiving 5% F&I Gross as their base commission. They were each entitled to 5% F&I Gross under the February 27, 2018 memorandum. To be an actionable breach amounting to constructive dismissal, any unilateral change to the pay plan by Varsity must be detrimental to the employee: *Potter* at para 37.

[25] The plaintiffs argue, and the Applications Judge accepted, that the 5% base commission set out in the February 27, 2018 memorandum was not equivalent to the 5% that each plaintiff received as one of four F&I managers under the July 28, 2016 pay plan because in order to maintain the amount in the "pool", they would have to increase their workload by having three F&I Managers do the deals previously done by four. If each F&I Manager maintained the same deal level as prior to March 1, 2018, there would be less F&I Gross from which to take their respective 5% shares, leading to an overall decrease in compensation. This argument is related to, but distinct from, the plaintiffs' argument relating to their scheduled hours of work, which I will address below.

[26] With respect, I do not find the plaintiffs' argument about the increased number of deals required to maintain the "pool" as persuasive as the Applications Judge did. It ignores the evidence of Mr. Johnson and Mr. Bender that in the period leading up to March 1, 2018, the four F&I managers were working at significantly less than capacity. In other words, they were doing less deals than each of them was capable of doing in the hours they were scheduled to work. Further, F&I managers do not bring in their own business. Their deal flow is dependent on the number of vehicles sold by the dealership. In these circumstances, I am unable to conclude that the F&I Gross was likely to change in a material way based on there being three F&I Managers instead of four. It is equally likely that the dealership would sell the number of vehicles it was going to sell, and that those deals could be handled by the team of F&I Managers, whether three or four. Any increased deal flow handled by an F&I manager after March 1, 2018 by comparison to the period prior to March 1, 2018 would simply bring that manager up to their reasonable deal capacity. In that event, the plaintiffs could have made the same net commission after March 1, 2018 as they did prior to March 1, 2018, assuming similar sale activity by the dealership.[3]

[27] The existing record does not permit the Court to substantively compare the general sales or F&I activity at Varsity prior to and after March 1, 2018. This is largely, if not entirely, due to Varsity's failure to produce sales records for the period after March 1, 2018 as part of the partial summary judgment proceedings. Varsity had a duty to produce relevant and material records, and to put its best foot forward. Accordingly, this gap on its own does not prevent partial summary judgment.

[28] However, my ability to look substantively at the overall income previously made by the plaintiffs and how that would have compared to their likely income on the pay plan set out in the February 27, 2018 memorandum is also limited by the limited information on the record about the plaintiffs' respective incomes prior to March 1, 2018. The plaintiffs refused to produce past pay stubs on the basis that the information was not relevant to the partial summary judgment application. Apparently, Varsity does not have all the relevant pay information from prior to

[3] The number of deals that an F&I Manager is able to complete may also be affected by scheduled hours of work, but there is no evidence at this time as to the correlation between the two. The issue of scheduled hours of work is addressed below.

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2018 due to a change of payroll systems. Counsel for the plaintiffs advised the Court that even if the undertaking to produce past pay stubs had not been refused, the plaintiffs do not have paystubs to produce. It is not clear to me whether, or to what extent, each party has had an opportunity to test the other on these assertions of lack of availability of records. The plaintiffs acknowledge that three years of past income information will be relevant on quantum but have not tendered tax records in this application.

Commission based on four F&I Managers

[29] The February 27, 2018 memorandum stated, "If and/or when the F&I Department expands to a 4th Business Manager, the schedule will be revised and commission will be based at 4.0% of department gross less chargebacks per Business Manager." This supports the plaintiffs' contention that the effect of the February 27, 2018 memorandum was to decrease their compensation. Even if the 5% commission that took immediate effect on March 1, 2018 is seen as substantively the same remuneration as prior to March 1, 2018, 4% is clearly less. The limited information available as to actual sales and commissions prior to March 1, 2018 suggests that 1% of F&I Gross is material in the context of the plaintiff's income. Further, by tying the decrease in percentage commission to the hiring of another F&I Manager, Varsity arguably recognized some relationship between the two.

[30] Varsity has not provided a specific response in respect of the 4% commission part of the February 27, 2018 memorandum. In fairness, this was not a significant part of either the plaintiffs' application or the Application Judge's decision.

Hours of Work

[31] Along with the pay plan, the February 27, 2018 memorandum established a "3 week rotation" for the three remaining F&I Managers. It stated that "Business Managers will follow the set schedule attached." The February 27, 2018 memorandum contemplated that the schedule would be revised if and/or when a fourth manger was employed.

[32] The schedule attached to the February 27, 2018 memorandum contemplated 146 hours of coverage each week by the F&I managers as a group. The hours worked by each manager each week would vary, but the average was 48.7 hours per week.

[33] The plaintiffs' evidence is that prior to the February 27, 2018 memorandum, they were following a four week rotation for four F&I managers. The hours worked per week by each manager also varied, with the plaintiffs working an average of 37.25 hours per week each. The schedule contemplated coverage of 149 hours per week by the group as a whole. Varsity has not tendered evidence of a different schedule.

[34] The parties generally agree that the plaintiffs were senior employees and that they did not keep time or clock in and out. They had discretion to take breaks as they saw fit and to leave early if their services were not required. By the same token, they also worked through lunch and worked late or otherwise outside of scheduled hours as needed to serve Varsity and its customers. It is uncontested that Varsity management decided how many F&I managers were required from time to time based on the needs of the business.

[35] The plaintiffs argue that the increase in their average scheduled weekly hours of work by 30% is either on its own, or in combination with the other changes, a breach of a fundamental term of their employment contracts. Their evidence is that even though they had some flexibility, they still generally followed the schedule of shifts.

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[36] Varsity's position is that as members of senior management, it was a term of the plaintiffs' employment that they would work as needed to meet the needs of the dealership and its customers. If Varsity was only busy enough to employ three F&I managers in 2018, then it was entitled to schedule the plaintiffs accordingly. Further, Varsity argues that because of the nature of the F&I manager role, the previous schedules tendered by the plaintiffs are not reflective of the hours actually worked. In other words, a comparison of the three-person schedule to the four-person schedule is insufficient on its own to support a conclusion that the February 27, 2018 memorandum and attached schedule imposed a material increase to the plaintiffs' hours of work. Mr. Bender's evidence was that when the dealership was very busy in 2016 or 2017, the plaintiffs would have been working more than 37.25 hours per week, and that since the dealership was less busy in 2018, even with more scheduled hours, they would not actually have worked any significant amount more.

[37] Both parties agree that there are no time records that would show how many hours the plaintiffs actually worked in any given period prior to March 1, 2018. Sales records may shed some light on how busy Varsity was at any particular point. Again, Varsity has refused to produce those to date.

[38] Mr. Bender also averred that the schedule attached to the February 27, 2018 memorandum was proposed to the plaintiffs on a trial basis and that the plaintiffs were told that they should try it for a few weeks and then adjustments could be made. The plaintiffs deny that there was any suggestion of the schedule being a trial or open for discussion. Their evidence is consistent with the wording of the February 27, 2018 memorandum itself.

[39] The Applications Judge found that she could not make the necessary findings of fact regarding hours actually worked prior to March 1, 2018 and those required under the February 27, 2018 memorandum to grant summary judgment on the basis that the change in hours amounted to constructive dismissal.

Bonus

[40] The plaintiffs also point out that the February 27, 2018 memorandum did not mention any performance bonus equivalent to the opportunity they had under the July 28, 2016 pay plan to increase the commission pool to 21%-23% of F&I Gross. Even if looked at from an individual perspective, the plaintiffs say that their compensation under the July 28, 2016 pay plan, with four F&I Managers, ranged from 5% to 5.75% F&I Gross each, whereas the February 27, 2018 memorandum held them at 5% each. Varsity argues that the performance bonus was still in place even though not expressly referenced in the February 27, 2018 memorandum. There is no evidence that Varsity made any mention of the "bonus" in the meeting where the February 27, 2018 memorandum was presented nor that the plaintiffs ever asked for clarification about the bonus.

[41] The plaintiffs do not rely on the elimination of the "bonus" as an independent ground of constructive dismissal, but they argue that it supports their overall position, and their claimed damages include "bonus" amounts.

Whether Summary Judgment is Appropriate

[42] The most significant issue in this case with respect to the appropriateness of summary judgment arises from the partial nature of the plaintiffs' application. Varsity argued before the Applications Judge that proceeding in a piecemeal fashion by considering constructive dismissal

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without damages would not shorten or expedite the trial in any material way because the issues were intertwined. On appeal, Varsity goes further, taking the position that "partial summary judgment is distinct from summary judgment generally" and that it should be a "rare procedure", reserved for cases in which an issue or issues can be cleanly bifurcated from the outstanding matters without overlapping evidence that could lead to inefficient prosecution, duplication of effort or a risk of inconsistent findings or outcomes. In this regard, Varsity relies on *DIRTT Environmental Solutions Ltd v Falkbuilt Ltd*, 2021 ABQB 252, which adopted the approach of the Court of Appeal for Ontario in cases such as *Butera v Chown, Cairns* LLP, 2017 ONCA 783; *Mason v Perras*, 2018 ONCA 978; *Service Mold + Aerospace Inc v Khalaf*, 2019 ONCA 369; and *Malik v Attia*, 2020 ONCA 787. To my knowledge, the Applications Judge was not asked to consider any of these decisions.

[43] The plaintiffs respond that granting partial summary judgment in these circumstances resolves a discrete issue of liability, applicable to both plaintiffs, which is severable from the individualized quantification of damages. They say that a finding of constructive dismissal significantly reduces the complexity of the disputes, has not unreasonably delayed progress towards trial and significantly advances the policy objectives of proportionate, timely and cost-effective resolution of disputes by permitting the plaintiffs to efficiently resolve a common threshold dispute. With the common issue between them resolved, each plaintiff would be able to pursue his action as he sees fit without the need to consider consolidation or related procedures.

[44] Varsity has not questioned whether the plaintiffs' applications fall within the scope of relief available under Rule 7.3 and I have proceeded on the assumption that they do.

[45] The Court of Appeal of Alberta has not set out specific considerations for granting partial summary judgment: for example, see *Stankovik v 1536679 Alberta Ltd*, 2019 ABCA 187; *JBRO Holdings Inc v Dynasty Power Inc*, 2022 ABCA 140; *Baim v North Country Catering Ltd*, 2017 ABCA 206. However, the summary judgment application and its consequences must still be considered in the context of the litigation as a whole: *Hryniak* at para 60 and *Stankovik* at paras 54-55. Also, the analysis of whether a matter is suitable for summary judgment is not sequential: *Weir-Jones* at para 47. Each of the applicable factors must be considered in light of the others.

[46] On some issues, I could go further than I have above in making findings of fact and applying the law to the facts. On many points, the evidence is not seriously contested. On others, the record is unlikely to be much better at trial than it is now, if at all. I accept that both parties have had an opportunity to put their best foot forward. The parties only have the records they have, and they only remember what they remember. Mr. Bender has no personal knowledge of much of the period in issue because he was not employed at Varsity between 1999 and the fall of 2017. Sadly, the owner of Varsity through the relevant period, Mr. Morris, has passed away. Whether there are other Varsity employees with relevant evidence, such as Mr. Mignault, I do not know. I certainly cannot find triable issues based on speculation about who might testify at trial.

[47] *Hryniak* and *Weir-Jones* confirm that the court should not insist on the best possible record. Often, justice for the parties means deciding the case summarily even where not all questions have been answered.

[48] On the other hand, granting the plaintiffs' applications will not resolve the litigation. Unless there is a settlement, trials on applicable notice period, mitigation, quantum of damages and any other outstanding issues would be required in each case in any event. This diminishes

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some of the usual benefit associated with summary disposition and gives rise to additional risks such as duplicity or inconsistent findings: *Hryniak* at para 60.

Commission based on three F&I Managers and Bonus

[49] I see reasonable connectivity between the question of whether the February 27, 2018 memorandum reduced the plaintiffs' compensation in a material way and the question of damages. The plaintiffs apparently intend to base their damages quantification on an average of their respective earnings during the three years prior to March 1, 2018. However, this is not necessarily the only available approach to damages. The underlying principle is that "the employee is entitled to receive the commission that the employee would probably have earned during the period of reasonable notice": J.R. Sproat, *Wrongful Dismissal Handbook*, 8th ed (Toronto: Thomson Reuters, 2018) at p 6-100. Accordingly, the trial judge could end up considering the actual sales or F&I activity of Varsity during the applicable notice period, the amount the plaintiffs would have earned under the July 28, 2016 pay plan based on that activity, or a comparison of that activity to the level prior to March 1, 2018.

[50] If I were to grant summary judgment on liability now on the basis that the February 27, 2018 memorandum amounted to an impermissible, unilateral and material decrease to the plaintiffs' compensation, there is a risk the judge determining damages, with the benefit of evidence as to the plaintiffs' past income, the sales and F&I activity that led to that income and the actual sales and F&I activity at Varsity during the applicable notice period for either plaintiff, would conclude that the plaintiffs' income would not actually have been materially different as a result of the February 27, 2018 memorandum. I make no comment on what impact that would or could have on the plaintiffs' case. The point is that there is a material potential for overlap between the two issues.

[51] I have considered Varsity's obligation to put its best foot forward in response to the partial summary judgment application, and the fact that a significant part of my inability to compare actual income prior to March 1, 2018 and likely commissions after March 1, 2018 arises from Varsity's failure to produce the sales or F&I records for the period after March 1, 2018. There can be no triable issue based on speculative future evidence. However, the potential that this evidence will be presented to another judge in the damages stage of the proceeding is distinct. Not only does this risk an inconsistent finding, it also diminishes the benefit of me proceeding on the question of constructive dismissal without this evidence now.

[52] Similarly, the tax records that the plaintiffs plan to tender in the damages phase of the action may lead to more information about the commission they received during any periods where there were three or five F&I Managers, which in turn could bear on the determination of what the terms of the employment agreements were, as set above. In other words, records that the plaintiffs have refused to produce to date but that they intend to rely on in a trial on damages could reasonably shed light on the issue that I am now asked to determine without those records. Part of the reason for which *Hryniak* and *Weir-Jones* encourage summary decisions even when the record is not as robust as the court might like is because the time and expense of enhancing the record outweighs the likely benefit. In this case, the parties and a judge are going to have to deal with some of that evidence in any event.

[53] I also note that while it was not a focus of either party's arguments in the context of summary judgment, on the face of the pleadings, there are issues relating to terms of the plaintiffs' employment such as vacation, life insurance and disability benefits. The plaintiffs will

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have to give at least some evidence (even if uncontested) as to the contractual terms they allege in respect of these other benefits and how they came to be part of their unwritten agreements with Varsity. If the plaintiffs are going to later provide some evidence as to the development of at least some terms of their employment contracts, this again partially overlaps with one of the key issues now before me, being a determination as to what the terms of the contract were. Nothing in the existing record suggests that terms on vacation, life insurance or otherwise were agreed to in isolation from the terms in issue in this summary judgment application.

[54] The issues identified above with respect to the reliability and credibility of Mr. Johnson's evidence are also relevant to assessing the appropriateness of summary judgment. They affect some issues more than others and I accept that I could make some findings without resolving them. However, a judge hearing the totality of the evidence, particularly if they had the benefit of oral evidence, would be better placed than me to resolve credibility and reliability and determine whether or how they affect all matters in issue. It is not as though granting summary judgment now will eliminate Mr. Johnson's credibility or reliability as issues at trial, given his claim for punitive damages based on disputed allegations that Varsity forged his resignation letter.

[55] For the foregoing reasons, there are material points of likely connectivity between the issues that the plaintiffs have left for trial, and the summary judgment issues relating to the alleged unilateral change in commission based on three F&I Managers.

Commission based on four F&I Managers and Hours of Work

[56] I have considered the degree to which the imposition of base commission of 4% upon the hiring of a fourth F&I Manager or the alleged increase in hours is a discrete issue that could and should be considered in isolation for the purposes of summary judgment. The likelihood of the record improving at trial on either of these issues is less than in respect of the other issues, there are less gaps in the record as it now exists, and they are less directly affected by challenges on reliability and credibility. If I were in a position to grant summary judgment on one or both of these bases, it could, at least in theory, obviate the need for further proceedings on the larger compensation issues.

[57] The challenge with respect to the 4% issue is that the 4% commission was forward-looking and may never actually have come into effect. This gives rise to a number of potential arguments and issues, including whether part of the plaintiffs' obligation to mitigate involved continuing to work at Varsity at least temporarily while they looked for other work.[4] Part of that analysis could depend on whether the 5% commission during the period with three F&I Managers was in itself a breach. The 4% issue is not readily isolated from either the 5% commission issue or from the mitigation issue left for trial.

[58] With respect to the alleged increase in hours, the plaintiffs' own position links it to the commission issue in a material way. They claim that commission was tied to the number of F&I Managers. They also accept that the hours they were required to work would vary to some degree. One inference available on the existing record is that the plaintiffs were prepared to work the additional hours set out in the three-person schedule attached to the February 27, 2018 memorandum if they received at least 6.7% each of the F&I Gross plus performance bonus. In that case, the breach is arguably the unilateral change in commission, or some combination of the commission and hours, but not the hours in isolation. In light of the connection between

[4] For example, see Leavitt, *supra* at §5:10.40.

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commission and hours in respect of the determination of the terms of employment and any breach, and the overlap between the commission issue and the damages issues set out above, I would be cautious about deciding the hours issue in isolation.

Bonus

[59] The issue relating to the plaintiffs' entitlement to a "bonus" (ie., a share of more than 20% of F&I Gross upon meeting performance targets) and whether it was reasonable to interpret the February 27, 2018 memorandum as terminating any such bonus, also overlaps with the issues that the plaintiffs propose go to trial. Varsity argues that if the plaintiffs had only asked a few questions, they would have known that the "bonus" was going to be available after March 1, 2018.[5] This overlaps with the issue of mitigation because both involve evidence about what the plaintiffs did or ought to have done following receipt of the February 27, 2018 memorandum. In questioning relating to the summary application, the plaintiffs refused to answer a number of questions relating to what they did following receipt of the memorandum, including questions as to discussions that Mr. Johnson may have had with Varsity's ownership.

Potential Benefits

[60] Along with the above challenges, I have also considered the potential benefits of dealing with constructive dismissal summarily, assuming for the moment that I could make the necessary findings of fact on the existing record, imperfect as it may be, and that I could apply the law to those facts. I accept that doing so would reduce the time required for any ultimate trial(s) to some degree by taking the threshold issue of liability off the table. However, the evidence before me now consists of three relatively short affidavits, less than 100 pages of exhibits and undertaking response once duplication is accounted for, and no more than two hours of questioning of each witness. Even if all of this evidence could be avoided at trial by proceeding summarily at this time, the time saving would be measured in days not weeks. More importantly, given the outstanding issues and overlap discussed above, it is likely that material portions of the evidence now before me would be adduced again at trial, whether on substantive issues, on credibility or to set context. This reduces the potential time savings of summary disposition.

[61] I also accept that deciding the threshold issue of constructive dismissal would present a benefit to at least the plaintiffs in that they could then proceed separately with their damages claims. This may be a particular benefit to Mr. Bedard, given that there are issues between Mr. Johnson and Varsity that do not exist between Mr. Bedard and Varsity. It is not clear to me whether Varsity would also consider that to be an efficiency given that it would have to participate in both trials. I must consider efficiencies from all standpoints. I am not in a position to assess whether there would likely be contested applications to have the trials heard one after the other or separately any other similar procedural issues.

[62] I have noted several times that granting partial summary judgment would not save the parties a trial, subject to settlement. The *Rules of Court* require the parties to resolve and narrow litigation as much as possible. I accept that in some circumstances, partial summary judgment could detangle issues, render the matter less complex or otherwise facilitate resolution in an objective way. For the reasons set out above, I am not convinced that granting the application would result in any material reduced complexity in this case. I understand the plaintiffs'

[5] There is at least some authority for the proposition that in some cases, an employee must negotiate or ask questions. For example, see Leavitt, *supra* at §5:10.30. The issue was not argued in any depth before me.

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contention that if only damages remained on the table, a settlement would be more likely. However, given what I have said about complexity, this becomes more an issue of bargaining positions and leverage. It is not my role to assess the parties' settlement positions or to try to measure how any decision of the court might affect their willingness to settle.

CONCLUSION

[63] *Hryniak* and *Weir-Jones* direct me to consider whether summary judgment is a proportionate, more expeditious and less expensive means to achieve justice. For the foregoing reasons, I am not satisfied that it is proportionate, more expeditious or less expensive in this case.

[64] I have two concerns about the effect or potential effect of my conclusion. First, I find it difficult to accept that the parties have spent almost three years and (I presume) significant funds litigating the summary judgment applications, and they now have not much to show for it. This result is incongruous with the foundational *Rules of Court* and the principles that underpin *Hryniak and Weir-Jones.* I have considered whether I am in a similar situation to the one in which the Ontario Court of Appeal found itself in *Malik v Attia*, 2020 ONCA 287 and whether the outcome should be similar. However, in this case, I am more concerned about the potential for inconsistent findings than the Court was in *Malik* and the advantages of one judge[6] hearing all the issues are greater. I am also applying a different standard of review.

[65] My second concern is that Varsity will take the decision as supporting its position on the merits of the constructive dismissal case. To do so would be an error. Because the plaintiffs bear the burden of proof of demonstrating not only the merits of their case, but also that summary judgment is a proportionate, more expeditious and less expensive way to achieve a just result, this decision focuses more on the plaintiffs' position than on the specifics of Varsity's anticipated defence. The plaintiffs' concerns are not unfair. My finding is simply that the issues raised by both parties are better addressed as a whole.

[66] I am not in a position to seize myself with this matter as suggested in some of the jurisprudence. However, given the time I have spent thinking about the issues, given the scheduling challenges in the Court of King's Bench and given my concerns about the parties being back at square one, if both parties agree, I would be pleased to conduct a JDR with them in the near future to try to assist in advancing the action.

[67] If the parties are unable to agree on costs, they may write to my office within 30 days of today's date. Similarly, if they would like me to assist with a JDR, they may also write to me within that time period.

Heard on the 17th day of February, 2023.
Dated at the City of Calgary, Alberta this 28th day of September, 2023.

April Grosse
J.C.K.B.A.

[6] One judge or one judge in each of the plaintiff's cases. I make no findings about whether the plaintiffs' cases should be tried separately or together.

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