Court of King's Bench of Alberta

Citation: Nickles v 628810 Alberta Ltd., 2025 ABKB 212

Date: 20250404
Docket: 2301 06805
Registry: Calgary

Between:

Margaret Lynne Nickles

Plaintiff

- and -

628810 Alberta Ltd., Functionalab Group Inc., Demapure Canada Inc., FYI Doctors Independent Alliance Inc., FYI Medical Aesthetics Inc. and Natalie Anne Mary Watt Professional Corporation

Defendants

Reasons for Decision
of the
Honourable Applications Judge J.R. Farrington

The Application

[1] I heard this matter as a special chambers application on March 19, 2025.

[2] The applicant plaintiff seeks summary judgement in an alleged wrongful dismissal matter. The allegation is that there was a constructive dismissal which triggers an obligation for compensation on the part of the defendant 628810 Alberta Ltd. The application was only brought against that defendant, although there are other defendants.

The Law

[3] Modern summary judgement law encourages the resolution of disputes by the Court when it can be done in a fair way with confidence based upon the record before the Court. Confidence in the state of the record, and the ability to resolve the matter fairly based upon that record, is an important part of summary judgement law.

[4] The fundamental principles of summary judgment law are set out in ***Weir-Jones Technical Services Incorporated v Purolator Courier Ltd***, 2019 ABCA 49. At paragraph 47 the Court of Appeal held:

> [47] The proper approach to summary dispositions, based on the ***Hryniak v Mauldin*** test, should follow the core principles relating to summary dispositions, the standard of proof, the record, and fairness. The test must be predictable, consistent, and fair to both parties. The procedure and the outcome must be just, appropriate, and reasonable. The key considerations are:
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> a) Having regard to the state of the record and the issues, is it possible to fairly resolve the dispute on a summary basis, or do uncertainties in the facts, the record or the law reveal a genuine issue requiring a trial?
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> b) Has the moving party met the burden on it to show that there is either "no merit" or "no defence" and that there is no genuine issue requiring a trial? At a threshold level the facts of the case must be proven on a balance of probabilities or the application will fail, but mere establishment of the facts to that standard is not a proxy for summary adjudication.
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> c) If the moving party has met its burden, the resisting party must put its best foot forward and demonstrate from the record that there is a genuine issue requiring a trial. This can occur by challenging the moving party's case, by identifying a positive defence, by showing that a fair and just summary disposition is not realistic, or by otherwise demonstrating that there is a genuine issue requiring a trial. If there is a genuine issue requiring a trial, summary disposition is not available.
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> d) In any event, the presiding judge must be left with sufficient confidence in the state of the record such that he or she is prepared to exercise the judicial discretion to summarily resolve the dispute.
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> To repeat, the analysis does not have to proceed sequentially, or in any particular order. The presiding judge may determine, during any stage of the analysis, that summary adjudication is inappropriate or potentially unfair because the record is unsuitable, the issues are not amenable to summary disposition, a summary disposition may not lead to a "just result", or there is a genuine issue requiring a trial.

The Context

[5] The plaintiff was the office manager for a vein clinic for many years. She started in 1986, and her employment ended in 2023. For the duration of her employment, the plaintiff largely worked from home. There is no dispute that her position was a work from home position. Notwithstanding that generalization, the plaintiff attended at the office when needed, largely at

her own discretion, and by all accounts she was a faithful and loyal employee with many years of service, including through changes in ownership.

[6] Arising from a change in ownership, an effort was made by the defendant that was initially framed as a “return” to the office initiative requiring the plaintiff to transition to working from the office on a full-time basis. The notice given was less than three months.

[7] The plaintiff quite properly pointed out that this was not a “return to the office”. She had always worked from home and that is what her job permitted. A complicating factor was that at around the same time, the plaintiff’s husband had taken ill.

[8] The defendant was insistent that the plaintiff transition to working full time from the office.

[9] The plaintiff sought counsel. Counsel asserted that there had been a constructive dismissal with the requirement to work full-time in the office being a significant change to the plaintiff’s employment terms. After that, the defendant suggested that the plaintiff work in the office for 2.5 days per week, but there was a required proviso under the proposal to the effect that the parties would see how that went, with the employer reserving the right to require full-time office attendance if necessary in the future. Accordingly, the offer really was not strictly a 2.5 days per week in the office offer, but an offer of 2.5 days and perhaps more in the future. The plaintiff did not accept that offer.

[10] There was much debate and argument about the actual time that the plaintiff worked in the office, but in the end there is no dispute on the evidence that the prior employment was a work from home arrangement with the plaintiff attending in the office when she felt it was necessary. Those arrangements worked for 37 years. Presumably, if working in that fashion was problematical for carrying out job duties, that would have been revealed itself over the 37 year period of employment. The proposed new arrangements would either be exclusively in the office as first imposed (until the alleged wrongful constructive dismissal was called out), or some lesser amount in the office that would largely be mandated by the employer.

[11] There are three major issues that must be resolved in the litigation.

[12] The first is whether or not there was a constructive dismissal. That is a threshold issue, and it has been an impediment to resolution of the case. The second is a specific mitigation issue. The defendant argues that if the plaintiff was constructively dismissed, she was bound to accept the proposal of working 2.5 days in the office in mitigation of her damages. The third issue is that if there was a constructive dismissal, what is the appropriate notice period have regard to the commonly cited ***Bardal v. Globe & Mail Ltd.*** 1960 CanLII 294 (ON SC) factors and the other applicable law regarding notice periods?

[13] The plaintiff is entitled to a resolution of her claim within a reasonable period of time. The constructive dismissal issue is preventing a resolution, because as long as the issue is extant, it is difficult for serious settlement discussions to take place. A resolution of at least that issue would significantly assist the parties in resolution of the dispute.

Analysis

[14] I find that the record is sufficient to determine the constructive dismissal issue. In particular, Exhibits F to Q of the plaintiff's affidavit sworn June 4, 2024 illustrate what happened from both sides. The record is largely based upon written communications rather than oral discussions.

[15] This was not a return to work arrangement of the type that was common after the COVID pandemic. The COVID return to work template does not fit this paradigm. This was an arrangement where the work was always from home. I am satisfied that the work from home arrangements were an integral part of the plaintiff's employment contract for the duration of her work and that she was entitled to reasonable notice of the change. The notice given was less than three months for a 37 year employee. I am satisfied that there was a constructive dismissal.

[16] With respect to the specific mitigation issue that was raised, the issue is whether the plaintiff ought to have reasonably been expected to take the offer of working in the office 2.5 days per week with the possibility of further in the office time being imposed in the future.

[17] At paragraphs 33 to 36 of ***Wronko v. Western Inventory Service Ltd***., 2008 ONCA 327 the Ontario Court of Appeal held:

> [33] In the cited passage, Mackay J.A. identifies three options that are available to an employee when an employer attempts a unilateral amendment to a fundamental term of a contract of employment. They may be summarized as follows.
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> [34] First, the employee may accept the change in the terms of employment, either expressly or implicitly through apparent acquiescence, in which case the employment will continue under the altered terms.
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> [35] Second, the employee may reject the change and sue for damages if the employer persists in treating the relationship as subject to the varied term. This course of action would now be termed a "constructive dismissal", as discussed in ***Farber***, although this term was not in use when ***Hill*** was decided.
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> [36] Third, the employee may make it clear to the employer that he or she is rejecting the new term. The employer may respond to this rejection by terminating the employee with proper notice and offering re-employment on the new terms. If the employer does not take this course and permits the employee to continue to fulfill his or her job requirements, then the employee is entitled to insist on adherence to the terms of the original contract. In other words, if the employer permits the employee to discharge his obligations under the original employment contract, then -- unless proper notice of termination is given -- the employer is regarded as acquiescing to the employee's position. As Mackay J.A. so aptly put it [at para. 45]: "I cannot agree that an employer has any unilateral right to change a contract or that by attempting to make such a change he can force an employee to either accept it or quit."

[18] This case engages consideration of the second option referenced above (paragraph 35 of ***Wronko***). The employer insisted that the new term be part of the contract (working fixed hours in the office), and the employee resisted. To foist that term upon the employee instead by way of a mitigation obligation would be to ignore the options available to the employee that arise from the fundamental change. The employer would indirectly get what it wanted notwithstanding the constructive dismissal.

[19] Having regard to the facts, I am satisfied that a reasonable bystander would not expect the plaintiff to accept the offer that was made after the constructive dismissal was effected.

[20] For those reasons, I am satisfied that the plaintiff was not required to accept the mitigation offer as part of her mitigation responsibilities. That is not to say that the traditional mitigation responsibilities in a wrongful dismissal action do not apply. They do.

[21] The remaining issue is damages. Normally that would consist of the ***Bardal*** factors as informed by any other mitigation facts. In my respectful view, that is what this case ought to be about. The primary issue in dispute should be determination of the reasonable notice period and assessing damages.

[22] This is a case where the notice period can be determined fairly based upon the record before the Court. The application made it clear that the plaintiff was seeking determination of quantum. The parties are presumed to have put their best foot forward. Having said that, the written arguments submitted could perhaps be more fulsome on the notice period and damages issues. Understandably, much of the argument to this point has been about constructive dismissal.

[23] I would respectfully extend to the parties an invitation for brief further written submissions (no more than 10 pages in the body plus any attachments) on the notice period, damages, and any other mitigation issues which might affect damages. I would ask for the plaintiff's notice period and damages brief within 4 weeks from release of these reasons, and for the defendant's quantum brief within 6 weeks from release of these reasons, and I will endeavour to render a decision on quantum or give further directions.

[24] ***Hannam v Medicine Hat School District No. 76***, 2020 ABCA 343 emphasizes the new litigation culture adopted by ***Hryniak*** and ***Weir-Jones***, and it encourages the use of the summary judgment rule to resolve cases, and I find that it applies in this case.

[25] I pause to discuss one more point briefly. I wrote in ***Coffey v. Nine Energy Canada Inc***, 2017 ABQB 417 (which was a wrongful dismissal case) about what, in my view, are the differences between summary (now streamlined) trials and summary judgment applications in matters of unliquidated claims. Justice Marion determined liability and assessed employment damages within a summary judgment context in ***McDonald v Sproule Management GP Limited***, 2023 ABKB 587. In light of the decision of Justice Marion in ***McDonald v. Sproule Management GP Limited***, and what appears to be a modern tendency to apply the summary judgment rule broadly to include assessments as a part of summary judgment applications in unliquidated damages cases such as wrongful dismissal settings, I have elected to deal with the damages assessment within the context of the summary judgment application rather than refer the matter to an assessment of damages hearing. I do, however, remain of the view that there is a difference between summary judgment and summary trial procedures, and how to define and delineate those differences will likely require further guidance and discussion.

Closing

[26] Thank you very much to the parties for their effective advocacy and for their service to their clients on this application in the best traditions of the bar, both so far, and through the anticipated submission of further argument on damages. If not agreed upon, costs may be addressed after the next phase of the proceedings.

Heard on the 19th day of March, 2025.
Dated at the City of Calgary, Alberta this 4th day of April, 2025.

J.R. Farrington
A.J.C.K.B.A.

Appearances:

Laura C. Snowball
for the Plaintiff

Neuman Thompson
Roger S. Hofer, K.C.
for the Defendant 628810 Alberta Ltd.