

CANADA / JUDGMENT

Minenko v. Save-On-Foods Limited Partnership

2020 BCSC 1895

COURT

Supreme Court of British Columbia

DECIDED

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2020 BCSC 1895 Minenko v. Save-On-Foods Limited Partnership

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Minenko v. Save-On-Foods Limited Partnership,

2020 BCSC 1895

Date: 20201202

Docket: S1813692

Registry: Vancouver

Between:

Michael Minenko

Plaintiff

And

Save-On-Foods Partnership

Defendant

Before: Master Elwood

Reasons for Judgment

Counsel for the Plaintiff, appearing via telephone conference:

J. Fantini

Counsel for the Defendant, appearing via telephone conference:

K. Smith

Place and Date of Hearing:

Vancouver, B.C.

September 23, 2020

Place and Date of Judgment:

Vancouver, B.C.

December 2, 2020

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INTRODUCTION

- [1] Michael Minenko was a successful and well-compensated executive at Save-On-Foods. Beginning in 2016, Mr. Minenko became concerned a colleague was making mistakes, taking shortcuts and exposing the company to unacceptable risk. Mr. Minenko brought these concerns to the attention of senior executives. In response, he alleges, the company engaged in a pattern of inaction, broken promises and adverse changes to his employment.
- [2] Mr. Minenko left Save-On-Foods in 2018. He describes his departure as a forced retirement. He brings this action for constructive dismissal or, in the alternative, negligent misrepresentation.

- [3] Save-On-Foods applies for summary judgment dismissing all or some of Mr. Minenko's claims on grounds they are factually without merit. In the alternative, Save-On-Foods seeks an order striking out the claims based on the conduct of Mr. Minenko's colleague. Fundamentally, Save-On-Foods submits, this case is about legitimate corporate decisions that cannot form the basis of a claim of constructive dismissal.
- [4] I have concluded the evidence shows a genuine issue for trial on whether Mr. Minenko could treat Save-On-Foods' failure to respond, in a more substantive way, to his concerns about public health and safety and potential legal liability as constructive dismissal. This is a narrower issue than the claim advanced in the notice of civil claim. However, a factually complex case of this nature should not be parsed on an application for summary judgment. Having said that, I would dismiss the separate claim for negligent misrepresentation because it is without merit.
- [5] I have also allowed an application by Mr. Minenko for production of documents relating to public health and safety concerns and potential legal liability. I have dismissed the application as it relates to other categories of documents which are more removed from the issue Mr. Minenko has raised for trial.

BACKGROUND

- [6] Mr. Minenko is a non-practicing lawyer and business person with experience in real estate and retail store development. He was hired by Save-On-Foods in 2013 as a director in the company's real estate department, with a starting base salary of \$145,000.
- [7] Mr. Minenko's employment at Save-On-Foods coincided with a period of rapid expansion and growth, new store openings and strong revenues. He received a number of promotions, raises and incentive bonuses. By the time Mr. Minenko left the company in 2018, his total compensation exceeded \$460,000.
- [8] The events giving rise to this action began in September 2016. At that time, Mr. Minenko was promoted to the position of Vice President, Store Development. At the same time, Frank Picard was promoted to the position of Vice President, Real Estate.
- [9] Mr. Minenko's duties and responsibilities intertwined with Mr. Picard's duties and responsibilities. Essentially, Store Development was "downstream" of Real Estate in the process of acquiring, building and opening new stores. Real Estate identified the sites and negotiated leases with the landlords. Store Development was then responsible for delivering new stores that met the company's requirements.
- [10] Beginning in June 2017, Mr. Minenko became concerned by things Mr. Picard was doing in his role as VP Real Estate. Mr. Minenko alleges that Mr. Picard made Mr. Minenko's job more difficult and exposed the company to financial, scheduling and risk management problems, as well as potential legal liability. According to Mr. Minenko:

- a) Mr. Picard agreed to lease terms that did not satisfy environmental and geotechnical requirements;
 - b) Mr. Picard allowed landlords to deliver new store sites on short notice, and in many cases with significant deficiencies;
 - c) Mr. Picard negotiated multiple openings in a month;
 - d) Mr. Picard negotiated deals that were inconsistent with committee approvals and failed to inform Store Development of changes to approved deals;
 - e) Mr. Picard failed to ensure landlords complied with contractual commitments on matters such as parking lots, lighting, landscaping, utilities and building shells; and
 - f) Mr. Picard negotiated revised landlord turnover dates without regard for the consequences or informing Store Development of the changes.
- [11] Mr. Minenko raised these concerns with Blendle Scott, Executive Vice President, to whom Mr. Minenko reported. Mr. Minenko also raised his concerns in meetings of the Executive Committee and the Real Estate Committee.
- [12] From Mr. Minenko's perspective, the company failed to take any meaningful corrective action. This lack of response caused him significant distress and concern for his own reputation and personal liability. As a result, on July 1, 2017, Mr. Minenko relinquished his practising certificate to the Manitoba Law Society and resigned from Save-On-Foods.
- [13] In response, the company president, Darrell Jones, met with Mr. Minenko to discuss the situation. Mr. Minenko alleges that Mr. Jones made the following representations on behalf of Save-On-Foods:
- a) Mr. Jones would meet with Mr. Minenko and Mr. Picard to resolve the problems Mr. Minenko had identified;
 - b) Save-On-Foods would correct salary issues within the Store Development team; and
 - c) Save-On-Foods would allow Mr. Minenko to hire a director of Store Development.
- [14] Mr. Minenko retracted his resignation. He alleges that Save-On-Foods failed to follow through on the first and third of Mr. Jones' representations.
- [15] During this period of time, Mr. Minenko also noticed changes which he alleges were adverse changes in his employment. He stopped receiving offers to join Mr. Jones and other executives on the corporate jet for trips to store openings and marketing tours. He stopped being invited to Executive Team / Jim Pattison Group divisional meetings. And a process improvement committee, of which he was a member and had been asked to help resolve the real estate problems, was disbanded.

- [16] Mr. Minenko resigned for a second time on March 9, 2018. Mr. Scott met with him the following Monday morning, and convinced him to stay.
- [17] In March and April, 2018, Mr. Minenko reviewed the offers to lease for all 13 new store projects underway at the time. He discovered that Mr. Picard had failed to meet environmental and geotechnical report requirements in all but two instances. Mr. Minenko reported his findings in a lengthy memorandum to Mr. Scott. From Mr. Minenko's perspective, there was no effort to address the issues he raised.
- [18] At a meeting with Mr. Scott in April 2018, Mr. Minenko delivered an ultimatum: either Save-On-Foods fire Mr. Picard, or he would resign.
- [19] Save-On-Foods did not fire Mr. Picard.
- [20] In late April 2018, Mr. Minenko resigned for a final time. He left the company effective June 1, 2018, after helping train the new Director, Store Development.

ANALYSIS

A. Summary Judgment / Application to Strike

- [21] Save-On-Foods applies under Rule 9-6 for summary judgment dismissing the action, or in the alternative, dismissing one or more of the "Picard claims", the "adverse change claims" or the "negligent misrepresentation claims".
- [22] Further, or in the alternative, Save-On-Foods applies under Rule 9-5 to strike out the Picard claims. Assuming the facts pleaded are true, Save-On-Foods acknowledges the adverse change claims and the misrepresentation claims give rise to a cause of action. However, it submits, the Picard claims disclose no reasonable claim and are unnecessary or vexatious within the meaning of Rule 9-5(1)(a) and (b), respectively.
- i. The Test for Summary Judgment
- [23] An application for summary judgment asserts that a claim or a defence is factually without merit. On a summary judgment application, each side must "put their best foot forward". A defendant who seeks summary judgment bears the evidentiary burden of showing there is "no genuine issue of material fact requiring trial". This must be demonstrated on evidence. A plaintiff resisting summary judgment must also rely on evidence, and not allegations or pleadings: *British Columbia (Director of Civil Forfeiture) v. Liu*, 2018 BCSC 1518, at paras. 23-24; *McLean v. Law Society of British Columbia*, 2016 BCCA 368, at para. 36-39.
- ii. The Test for Constructive Dismissal
- [24] The test for constructive dismissal consists of the two branches described by the Supreme Court of Canada in *Potter v. New Brunswick Legal Aid Services Commission*, 2015 SCC 10:

- [32] . . . Most often, the court must first identify an express or implied contract term that has been breached, and then determine whether that breach was sufficiently serious to constitute constructive dismissal
- [33] However, an employer's conduct will also constitute constructive dismissal if it more generally shows that the employer intended not to be bound by the contract. In applying *Farber*, courts have held that an employee can be found to have been constructively dismissed without identifying a specific term that was breached if the employer's treatment of the employee made continued employment intolerable
- [25] Mr. Minenko's claims are under the second branch in *Potter*. The court's analysis under this branch of the test is "necessarily retrospective". It requires consideration of the cumulative effect of past conduct by the employer and whether those actions showed an intention not to be bound by the employment contract: *Potter*, at para. 33.
- [26] The conduct of the employer must constitute a significant breach going to the root of the contract of employment, such that a reasonable person would conclude the employer no longer intended to be bound:
- [42] [C]onstructive dismissal consists of conduct that, when viewed in the light of all the circumstances, would lead a reasonable person to conclude that the employer no longer intended to be bound by the terms of the contract. The employee is not required to point to an actual specific substantial change in compensation, work assignments, or so on, that on its own constitutes a substantial breach. The focus is on whether a course of conduct pursued by the employer 'evinces' an intention no longer to be bound by the contract...'
- [27] The *Potter* analysis involves an objective test, from the perspective of a reasonable person in the position of the employee, on the totality of the evidence:
- [63] [T]he perspective in the second branch of the test is that of a reasonable person in the same circumstances as the employee. There is no requirement that the employer actually intended no longer to be bound by the contract. The question is whether, given the totality of the circumstances, a reasonable person in the employee's situation would have concluded that the employer's conduct evinced an intention to no longer to be bound by it.
- [28] To be "intolerable" and grounds for constructive dismissal, the employer's conduct must be "beyond what an employee may reasonably be expected to bear" (*Danielisz v. Hurcules Forwarding Inc.*, 2012 BCSC 115, at para. 78), or "so obscene as to amount to a repudiation of the employment contract" (*Baraty v. Wellons Canada Inc.*, 2019 BCSC 33, at para. 132). Frustration, unfriendliness, confrontations between co-workers, and even some hostility and conflict, will not amount to constructive dismissal when an employee is still able to perform his or her job: *Baraty*, at para. 132; *Danielisz*, at para. 81, 84-5.

iii. The "Picard Claims"

- [29] Save-On-Foods characterizes Mr. Minenko's claim in this way: over time, Mr. Minenko became convinced Mr. Picard was bad at his job; when Mr. Minenko raised this complaint with his superiors, they did not respond in the way he wanted; Mr. Minenko then became frustrated by what he perceived to be management's inaction, and resigned; senior management convinced Mr. Minenko to stay, but when they did not follow up in the way he wanted, he issued the "ultimatum"; and, when the company did not fire Mr. Picard as he had demanded, Mr. Minenko chose to retire early.
- [30] Save-On-Foods submits the Picard claims are fundamentally flawed for a number of reasons: Mr. Minenko does not allege any change in the terms of his employment, only a growing dissatisfaction with how Mr. Picard did his job; Mr. Minenko does not assert Mr. Picard caused him any direct harm, only that Mr. Picard made his job more difficult; no reasonable person in Mr. Minenko's circumstances, earning \$460,000 per year, would consider the challenge of dealing with Mr. Picard intolerable; and no reasonable person in Mr. Minenko's circumstances would consider the company's response, including convincing him to stay, twice, obscene.
- [31] The inherent weakness of Mr. Minenko's case is best illustrated, Save-On-Foods submits, by the "ultimatum". Mr. Minenko's decision to leave Save-On-Foods came down to the company's refusal to fire Mr. Picard. Save-On-Foods argues that, to succeed in a claim for constructive dismissal, Mr. Minenko must prove the company had just cause to fire Mr. Picard and wrongfully refused to do so.
- [32] At its heart, Save-On-Foods submits, this case is about how an employer responded to complaints by one valued employee about the performance of another valued employee. How it chose to respond to those complaints were legitimate business decisions, Save-On-Foods argues, consistent with the terms of Mr. Minenko's employment and outside the scope of a claim for constructive dismissal.
- [33] Madam Justice Southin captured this general rule of employment law in *Stein v. British Columbia (Housing Management Commission)* (1992), 65 B.C.L.R. (2d) 181 (C.A.), at p. 185:
- ... an employer has a right to determine how his business shall be conducted. He may lay down any procedures he thinks advisable so long as they are neither contrary to law nor dishonest nor dangerous to the health of the employees and are within the ambit of the job for which any particular employee was hired. It is not for the employee nor for the court to consider the wisdom of the procedures. (emphasis added)
- [34] Generally, as Southin J.A. famously put it, "the employer is the boss". Employers are entitled to make management decisions with which not all of their employees may agree, but which fall within the range of acceptable employment decisions without giving rise to a claim of constructive dismissal.

- [35] In *Baraty v. Wellons Canada Corp.*, 2019 BCSC 33, the plaintiff formed the impression a junior colleague was doing other work unrelated to the business of the employer. His relationship with the co-worker deteriorated. He reported his concerns to his manager, and asked that the manager take disciplinary action. The manager concluded the co-worker was doing nothing wrong. Mr. Justice Wilson dismissed the plaintiff's claim of constructive dismissal, finding that, while the working relationship between the parties became strained, it did not deteriorate to the point it rendered the plaintiff's job intolerable.
- [36] In *Perron v. IG Image Group Inc.*, 2020 BCSC 171, the plaintiff's sales representative became convinced a colleague was selling products to her clients in breach of company rules. She complained repeatedly to her manager. The manager considered the complaints unfounded, but also sought to resolve the disagreement, emphasizing that the plaintiff was a valued employee. The plaintiff became increasingly upset by the situation, which she perceived as damaging to her reputation and status. Eventually, she resigned. Madam Justice Adair dismissed her claim for constructive dismissal:
- [174] In my view, there was nothing in Image Group's (and specifically, [the manager] Ms. Hansen's) treatment of Ms. Perron that showed any intention no longer to be bound by the employment contract. Ms. Perron was never treated in anything less than a respectful way. Ms. Hansen's expression of her frustration in her September 8 email was directed at both Ms. Perron and Ms. Fedorchuk. Most regrettably, Ms. Perron's perception that she was being mistreated and bullied by her employer was based on her incorrect interpretation of her contractual rights and her steadfast refusal to accept that what Ms. Hansen was telling her was true. Ms. Perron's mistrust was not justified. Ms. Fedorchuk did nothing to create or fuel conflict with Ms. Perron. Ms. Fedorchuk's conduct in dealing with the needs of her client Edelman upset Ms. Perron, but it cannot provide grounds to justify Ms. Perron's claim that she was constructively dismissed. It was business, and never personal. Ms. Perron's perception and mistrust cannot provide a basis to say that Image Group's conduct demonstrated an intention no longer to be bound by the employment contract. (emphasis added)
- [37] Constructive dismissal cases are inherently fact specific. It should be noted that the claims in *Baraty* and *Perron* were dismissed following trials on their merits.
- [38] In my view, the evidence in this case gives rise to a genuine issue as to whether Save-On-Foods' response to some of Mr. Minenko's concerns about Mr. Picard's conduct gives rise to a claim of constructive dismissal.
- [39] I do not agree with Save-On-Foods that a change in the employment relationship is a requirement of law under the second branch of the Potter test. Under the first branch, the employee must prove a unilateral change by the employer that is also a breach of an essential term of the employment contract. However, under the second branch:

- [42] The employee is not required to point to an actual specific substantial change in compensation, work assignments, or so on, that on its own constitutes a substantial breach. The focus is on whether a course of conduct pursued by the employer "evinces an intention no longer to be bound by the contract": Rubel Bronze, at p. 322. A course of conduct that does evince such an intention amounts cumulatively to an actual breach. (emphasis added)
- [40] In this case, Mr. Minenko describes a pattern of inaction by Save-On-Foods that escalated into an unwillingness to address concerns Mr. Minenko says rendered his continued employment intolerable.
- [41] Mr. Minenko's concerns involved more than complaints about the behaviour or performance of a co-worker. Mr. Minenko believed the actions of Mr. Picard were not only careless, but also illegal and potentially dangerous. Most concerning to Mr. Minenko was that Mr. Picard was removing, waiving or changing environmental and geotechnical conditions. Mr. Minenko was particularly concerned by projects in Dawson Creek and Saskatoon Cumberland. He asserted that Mr. Picard was in breach of regulatory laws by failing to obtain standard environmental and geotechnical reports. He detailed these concerns in meetings and in the memorandum to Mr. Scott.
- [42] In *Nethery v. Lindsey Morden Claim Services Limited*, [1999] B.C.J. No. 137 (S.C.), Mr. Justice Davies held that an employee was constructively dismissed when his employer refused to remedy improper actions of a supervisor.
- [43] The plaintiff in *Nethery* was an experienced claims adjuster and branch manager of a national insurance adjustment firm. A regional supervisor believed the plaintiff was under-billing his files, and instructed him to increase certain time entries. The plaintiff refused because he considered those instructions to be contrary to company policy and unethical. The supervisor then unilaterally changed some of the time and expense entries on client bills. The plaintiff complained to his superiors and asked that the employer make restitution to the affected insurers. The employer refused, and the plaintiff took this refusal as a repudiation of the employment contract.
- [44] Mr. Justice Davies found that the regional supervisor's actions were dishonest. He found that the employer was dishonest because it overcharged its clients by artificially increasing the actual time records. He found that the plaintiff had a sufficient personal and professional stake in the propriety of the bills to demand that his employer take appropriate steps to rectify the situation. He concluded that the employer's refusal to do so was a breach of a fundamental term of the employment contract:
- [89] In an industry where integrity and reputation are essential, it cannot be that one party to a contract can adversely effect the reputation of the other by its own dishonesty and lack of integrity.

- [45] In this case, Save-On-Foods did not require Mr. Minenko to do anything illegal or dishonest. It did not direct Mr. Minenko to adopt Mr. Picard's approach to new store development. It did not explicitly endorse illegal or dishonest behaviour.
- [46] However, in my view, evidence of dishonesty or illegal conduct by the employer is not necessary for a claim of constructive dismissal. Mr. Minenko's claim is that Save-On-Foods did nothing meaningful to address very serious concerns, including potential health and safety risks to workers and the shopping public. In an industry where public health and safety are important values, an employee in Mr. Minenko's position can argue that the employer must take concerns of this nature seriously and respond appropriately, if it is committed to the employment contract.
- [47] As a senior executive of the company, Mr. Minenko had a sufficient personal and professional stake in the concerns he raised about public health and safety to treat the company's failure to respond in a more substantive way as constructive dismissal.
- [48] Mr. Minenko's concerns were, of course, subjective in nature. The question is whether they were reasonably held, and whether a reasonable person in his position would have considered the situation intolerable.
- [49] Mr. Minenko was very well paid compared with most British Columbians. Despite his concerns, Mr. Minenko continued to receive promotions, raises and bonuses from the company. However, it is also clear from Mr. Minenko's evidence that compensation could not provide a complete answer to his concerns.
- [50] By all indications, Mr. Minenko is a highly ethical and diligent person. He was deeply troubled by the possibility a Save-On-Foods' store could be geotechnically unsound or built on a contaminated site. He was also concerned for his own reputation and potential personal liability.
- [51] Save-On-Foods argues that Mr. Minenko's claim in this regard is undermined by his ultimatum: had the company fired Mr. Picard, Mr. Minenko would not have resigned. In other words, his concerns about public health and safety were not so intolerable that Mr. Minenko could no longer do his job. Mr. Minenko responds that the ultimatum was an act of desperation. Had Mr. Picard been fired, he says he could have mitigated the damage.
- [52] I do not think Mr. Minenko's case can be reduced to the ultimatum. Nor do I think Mr. Minenko must necessarily prove the company had just cause to fire Mr. Picard. In my view, Mr. Minenko's ultimatum was simply the culmination of a course of conduct that may have given rise to a constructive dismissal. Evidence that Mr. Minenko was willing to carry on if the company fired Mr. Picard may weaken his assertion the work had become intolerable; but it does not demonstrate the claim is factually without merit.

- [53] Save-On-Foods also relies on the facts around Mr. Minenko's final departure. The evidence reflects genuine appreciation and collegiality on both sides. Mr. Minenko told people he enjoyed working for Save-On-Foods. Mr. Scott circulated a warm e-mail announcing Mr. Minenko's retirement and thanking him for his service. The company organized a lunch for Mr. Minenko. He received a congratulatory send-off, cards with warm wishes and personalized retirement gifts.
- [54] I do not think the outwardly gracious conduct of the company and senior management provides an answer to Mr. Minenko's claim, either. I would not expect executives with the stature of Mr. Jones and Mr. Scott to be openly hostile to Mr. Minenko. Nor would I expect Mr. Minenko to openly rebuff the consideration shown to him by his colleagues, even if he found the overall situation intolerable.
- [55] In the final analysis, I am not convinced by the evidence that Mr. Minenko's concerns about public health and safety and personal liability were objectively unreasonable. Nor am I convinced that a reasonable executive in his position would have found management's response tolerable.
- [56] Some of the Picard claims fall short of the legal test for constructive dismissal. Aspects of Mr. Picard's performance that simply made Mr. Minenko's job more difficult do not rise to the level of requiring a different response from the company and grounds for constructive dismissal.
- [57] However, I should not parse the issues on an application for summary judgment by allowing some aspects of the Picard claims to proceed to trial and dismissing others. Those aspects of the Picard claims that fall short of establishing a triable claim on their own are part of the narrative of this factually complex case.
- [58] It follows that I would not strike out the Picard claims for failing to disclose a cause of action. Nor would I strike out individual allegations of fact as being unnecessary or vexatious. In my view, the Picard claims properly plead facts in support of a reasonable claim.

iv. The "Adverse Changes Claims"

- [59] Save-On-Foods argues that the adverse changes Mr. Minenko describes in his evidence relate to status aspects of his executive position, rather than conditions of his employment: getting to fly on the corporate jet; being invited to a prestigious meeting with the owner; serving on a senior leadership committee.
- [60] Save-On-Foods argues that a perception that he was denied these "perks", as the company puts it, would not cause a reasonable person in Mr. Minenko's position to conclude continued employment was intolerable, or that the company no longer intended to be bound by the employment contract.

- [61] Save-On-Foods relies on *Robbins v. Vancouver (City)*, 2014 BCSC 872, in which Madam Justice Baker dismissed a claim of constructive dismissal where the plaintiff perceived that she had lost "status", but did not suffer a change to her title, position, remuneration or benefits.
- [62] Mr. Minenko argues that the evidence of the nature of the changes he experienced is in conflict, rendering the claim inappropriate for summary judgment.
- [63] There is some disagreement in the evidence. Mr. Jones deposes that Mr. Minenko was never consciously excluded from travelling on the corporate jet. Mr. Jones says that the purpose of the flights was more social than business. On the other hand, Mr. Minenko asserts that executives received important information and instructions from Mr. Jones on the flights. Mr. Jones responds that, if it was necessary to provide Mr. Minenko with important information, he could do that anywhere and it was not necessary for Mr. Minenko to fly on the jet.
- [64] With respect to the divisional meetings with the Pattison Group, Mr. Jones and Mr. Minenko agree attendance varied between "big years" and "small years". Mr. Minenko was not one of the group of four or five executives who attended every year. 2018 was a small year, but Mr. Minenko says he expected to be invited because Mr. Picard, who normally attended every year, was unable to make it. Mr. Minenko took the fact he was not asked to attend as a signal he had fallen out of favour with Mr. Jones and was being replaced. Mr. Jones denies this, and deposes that there was no deliberate decision to exclude Mr. Minenko.
- [65] Mr. Minenko asserts that the Process Improvement Committee was "unceremoniously disbanded" in February 2018. Mr. Jones explains it was disbanded because the company intended to put together a new committee with an overlapping focus that rendered the existing committee redundant. He says Mr. Minenko was not singled out; other members of the exiting committee also did not receive positions on the new committee.
- [66] Regardless of these conflicts in the evidence, I agree with Save-On-Foods that the changes Mr. Minenko experienced did not go to the root of the employment contract. Decisions about whom to invite on a corporate jet, to a meeting, or on a new committee, are the kinds of decisions employers make routinely. Looked at in isolation, a reasonable person in Mr. Minenko's circumstances would not find these changes intolerable or obscene.
- [67] However, the court must assess the totality of the evidence to determine whether an employer's course of conduct amounted to a constructive dismissal. The changes in this case came at a time when Mr. Minenko was pressing Save-On-Foods to address his concerns with Mr. Picard. There is evidence Mr. Jones was losing patience with Mr. Minenko's concerns. Taken collectively and in context, a reasonable person in Mr. Minenko's position might conclude from these actions the company was marginalizing his concerns. In other words, the adverse changes were part of the same continuum of conduct that culminated in the ultimatum and Mr. Minenko's departure.

[68] If the adverse changes claims stood alone, I would dismiss them for being factually without merit as grounds for constructive dismissal. However, they do not stand alone. In combination with the Picard claims, they give rise to a genuine issue for trial.

v. The "Negligent Misrepresentation Claims"

[69] Mr. Minenko relies on two of the three statements by Mr. Jones for an alternative claim of negligent misrepresentation: Mr. Jones said he would meet with Mr. Minenko and Mr. Picard to resolve the problems Mr. Minenko had identified; and Mr. Jones told Mr. Minenko he would be allowed to hire a Director, Store Development.

[70] Save-On-Foods submits the negligent misrepresentation claims are without merit because the company complied with the substance of Mr. Jones' representations and Mr. Minenko suffered no damages.

[71] Again, Mr. Minenko submits the evidence is in conflict, making the negligent misrepresentation claims inappropriate for summary judgment.

[72] Mr. Jones recalls telling Mr. Minenko that, if he had concerns with Mr. Picard's performance, he needed to first sit down with Mr. Picard and try to work the issues out directly. Mr. Jones says he would have been prepared to meet with the two men; however, following his meeting with Mr. Minenko, he received an e-mail from Mr. Minenko stating that he and Mr. Picard had a "very good meeting" and they were "on the same page". Mr. Jones understood from this e-mail that a meeting was no longer required.

[73] Mr. Minenko responds that he took the initiative to meet with Mr. Picard on his own only after Mr. Jones failed to arrange the three-way meeting as promised. Mr. Minenko deposes that the problems continued after the "very good meeting" with Mr. Picard, which he says Mr. Jones would have known because Mr. Minenko told Mr. Scott. He argues that Mr. Jones ought to have followed through and met with Mr. Picard and him for the purpose of resolving the problems.

[74] As to the second representation, Save-On-Foods points out that Mr. Minenko was part of the team that reviewed the applicants for Director, Store Management, and recommended the successful candidate.

[75] Mr. Minenko responds that he was completely excluded from the hiring process after March 2, 2018. Further, he says, he was not consulted on the terms of the offer to the successful candidate.

[76] In my view, the negligent misrepresentation claims do not raise a genuine issue for trial.

- [77] On Mr. Minenko's own evidence, Mr. Jones said only that he would meet with Mr. Picard and Mr. Minenko with a view to finding a mutually agreeable resolution. Mr. Jones did not promise to deliver any particular solution that would have eliminated Mr. Minenko's concerns. The representation was too general - and more of a statement of present intention than fact - to give rise to a claim of negligent misrepresentation.
- [78] As to hiring a director, there is no evidence of any breach. Save-On-Foods hired the Director, Store Management. There is no evidence Mr. Minenko was told he would have sole authority over the hiring decision. He would have known that others, including Mr. Scott and Mr. Jones, would be involved in the final decision. The new director was only hired after Mr. Minenko gave notice he was resigning.
- [79] Moreover, even assuming a breach, there is no evidence of compensable damages from either alleged misrepresentation. The only evidence of reliance by Mr. Minenko is that he rescinded his first resignation. Had Mr. Minenko resigned in July 2017, he would have earned less money. There is no evidence he would have earned more money if he had left Save-On-Foods sooner. Accordingly, there is no evidence of any pecuniary damages.
- [80] Mr. Minenko says he suffered mental distress at the thought of store buildings collapsing. A claim for mental distress would normally require some medical evidence on a summary judgment application. However, even assuming Mr. Minenko obtained expert evidence for trial, the claim is bound to fail. Mr. Minenko's distress was not caused by the alleged misrepresentations. Mr. Jones did not bully or harass Mr. Minenko; nor did he promise to rectify any building defects. A new director hired by Mr. Minenko would not have eliminated the building defects. In short, the alleged misrepresentations could not have caused Mr. Minenko's distress over potential building collapses.
- [81] The alleged misrepresentations are relevant facts in the pattern of conduct by Save-On-Foods on which Mr. Minenko relies for the claim of constructive dismissal. They may also be relevant to Mr. Minenko's claim for aggravated damages. But they are not independently actionable.
- [82] Accordingly, Mr. Minenko's claim in damages for negligent misrepresentation must be dismissed.

B. Application for Production of Documents

- [83] Mr. Minenko applies for eight categories of documents defined as the "real estate documents". Broadly speaking, the real estate documents are documents relating to the 13 new stores that were opened, under construction or about to start construction between July 2017 and May 2018, and three additional stores with earlier opening dates.

- [84] Save-On-Foods argues that the real estate documents are irrelevant. These documents do not relate to the employment relationship between Mr. Minenko and Save-On-Foods. Rather, the documents relate to alleged errors or omissions by Mr. Picard. For substantially the same reasons it sought summary judgment, Save-On-Foods argues that documents relating to Mr. Picard's performance are irrelevant to a claim that Mr. Minenko was constructively dismissed.
- [85] This application follows a series of requests by Mr. Minenko for additional documents under Rule 7-1(11). Mr. Minenko's requests provided specifics of the documents sought and set out the reasons why he said those documents should be produced. Accordingly, it is appropriate to consider this application under the second stage of document production pursuant to Rule 7-1(14).
- [86] Under Rule 7-1(14), the court may order a party to amend its list of documents to include additional documents that are in the listing party's possession, power or control "relating to any or all matters in question in the action".
- [87] Documents relate to matters in question if they may properly be said to advance a litigant's case or damage the case of one's adversary: *Global Pacific Concepts Inc. v. The Owners, Strata Plan NW 141*, 2011 BCSC 1752, at para. 8.
- [88] An application for production of documents under this broader scope of discovery requires some evidence to support a connection between the documents sought and the matters in question: *Araya v. Nevsun Resources*, 2019 BCSC 511, at paras. 90-97.
- [89] An order for production of documents under Rule 7-1(14) is also subject to the governing concept of proportionality: *More Marine Ltd. v. Shearwater*, 2011 BCSC 166, at para. 9. Proportionality promotes conducting a proceeding in ways that are proportionate to the amount involved in the proceeding, the importance of the issues in dispute, and the complexity of the proceeding: Rule 1-3(2).
- [90] In my view, many of the real estate documents may assist Mr. Minenko to advance his case by demonstrating that Mr. Picard's actions required a more substantive response from senior management on concerns relating to public health and safety and potential legal liability. Referring to paragraph numbers of the notice of application:
- 1(a) Save-On-Foods standard form offer to lease / purchase: these documents are relevant to the standard geotechnical, environmental, inspection and due diligence terms the company required.
- 1(b) Waivers signed by Mr. Picard: these documents are relevant to whether Mr. Picard waived any geotechnical, environmental, inspection or due diligence requirements.
- 1(c) Specific Offers to Lease and Notice of Possession: these documents are relevant to whether Mr. Picard changed or removed any geotechnical, environmental, inspection or due diligence terms.

1(e) A list prepared by Mr. Minenko of "VP Real Estate's Environmental and Geotechnical Failures": this document is relevant to the failures by Mr. Picard noted by Mr. Minenko.

1(f) Mr. Minenko's typed notes from Real Estate Committee meetings between October 2016 and May 2018: these documents are relevant to show that Mr. Minenko raised these concerns with the REC.

[91] In my view, these documents should be produced. Mr. Minenko's affidavit on the summary judgment application provides an evidentiary link between the documents sought and the matters in issue. With the exception of 1(e), which is a single document, the documents were all listed in Mr. Minenko's requests. The scope of the documents sought is limited to the 16 store projects about which Mr. Minenko raised concerns. The requests are proportionate to the amount in dispute, the important issues raised by both parties, and the complexity of the proceeding.

[92] On the other hand, some of the categories of the real estate documents appear to relate only to the allegations that Mr. Picard made Mr. Minenko's job more difficult:

1(d) Real Estate Committee ("REC") and Jim Pattison Group ("JPG") approval packages.

1(g) Project status reports for the year end 2017.

1(h) Rollout Plans for 2017 and 2018.

[93] I have not dismissed or struck out the allegations that Mr. Picard made Mr. Minenko's job more difficult, because those allegations are part of the narrative. However, documents that could only be used to advance an allegation that Mr. Picard made Mr. Minenko's job more difficult are too far removed, in my view, from the triable claim of constructive dismissal to require production at this time. Mr. Minenko will need to be more specific if he seeks documents of this nature. On the current application, these documents fail the proportionality analysis.

C. Additional Time for Examination for Discovery

[94] Mr. Minenko also applied for an order that Save-On-Foods' representative, Mr. Jones, attend for one day of additional examination for discovery.

[95] Mr. Jones has attended one day, for 3.5 hours, of examination for discovery.

[96] I agree with Save-On-Foods that the application for additional time is premature. There is no evidence Mr. Jones' conduct at the discovery to date was anything less than responsive and candid. It is not possible at this stage to say that it will be necessary to add additional time beyond the remaining 3.5 hours to provide Mr. Minenko with an adequate opportunity to discover Save-On-Foods.

[97] I expect that, if additional discovery time is required in light of the outcome of the summary judgment application and the documents that must be produced, counsel will come to a reasonable accommodation. Failing such agreement, Mr. Minenko may apply for additional time on evidence that seven hours is inadequate.

CONCLUSION

[98] The application by Save-On-Foods for summary judgment is dismissed, with the exception of the claim in damages for negligent misrepresentation, which is dismissed.

[99] The application by Mr. Minenko for production of documents is allowed with respect to paragraph 1(a), (b), (c), (e) and (f) of the notice of application.

[100] The application by Mr. Minenko for additional time for the examination for discovery of Save-On-Foods is adjourned generally.

[101] Mr. Minenko was substantially successful on the first two applications. He is entitled to costs of those applications in the cause. There will be no costs of the application for additional discovery time.

"Master Elwood"

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