**CITATION:** Hagholm v. Coreio Inc., 2017 ONSC 7713
**COURT FILE NO.:** C-305-17
**DATE:** 2017-12-27



**ONTARIO**

**SUPERIOR COURT OF JUSTICE**

| | | |
|---|---|---|
| **BETWEEN:** | | |
| Rosemary Hagholm | Plaintiff | Dennis G. Crawford & Madchen V. J. Funk - Counsel for the Plaintiff |
| **– and –** | | |
| Coreio Inc. | Defendant | Andy Pushalik & Rachel N. Kattapuram - Counsel for the Defendant |
| | | **HEARD:** December 21, 2017 |

**THE HONOURABLE JUSTICE JAMES W. SLOAN**

## REASONS FOR JUDGMENT

[1] The plaintiff brings this summary judgment motion in her claim for constructive wrongful dismissal against the defendant.

[2] The plaintiff commenced working in Toronto for Syspro Proven Systems Ltd. o/a as MicroAge, the corporate predecessor of the defendant, on April 15, 1982.

[3] She quit her job at MicroAge on April 15, 1992 when she moved to the Waterloo Region, because commuting into Toronto from the Waterloo Region each day was not feasible.

[4] In 1994, Mr. Prosser, a vice president at MicroAge, asked her if she would fill a contract for approximately six months, which she did.

[5] At the conclusion of the contract, Prosser recruited the plaintiff to come back to MicroAge full time. Based on an agreement between the plaintiff and MicroAge on or about January 9, 1995, she accepted the full-time employment offer on the basis that she could work from home three days a week.

[6] For 22 years the plaintiff continued to work for the defendant, working three days a week at home and two days in the defendant's office.

[7] The defendant is an information technology services company that provides clients with information and technology infrastructure and operations support. Put simply, the defendant is an outsourcing company.

[8] Near the end of 2015, MicroAge was sold to the defendant corporation.

[9] On January 16, 2017, the plaintiff was advised that she could no longer work from home three days a week and on March 1, 2017 she resigned, based on the new work schedule, new reporting requirements and a reduction in her bonus. As such she claims to have been constructively dismissed.

## Legal issues

[10] The legal issues in this case are:

A. Is this an appropriate case for summary judgment?

B. Was the plaintiff constructively dismissed by the defendant?

C. If the plaintiff was constructively dismissed, what is the appropriate notice period?

D. If the plaintiff was constructively dismissed, did she breach her duty to mitigate by not remaining at work with the defendant?

E. If successful, how should the plaintiff's damages be calculated?

## Plaintiff's Position

[11] The plaintiff is now 60 years of age, worked for the defendant for 35 years and was constructively dismissed.

[12] The plaintiff alleges that at the beginning of 2016 her job title was a Manager, Consulting Services. It was a management level position with supervisory responsibilities. She had been in that position for 15 years and was responsible for staffing and budgeting. Her compensation consisted of (i) a base salary of $112,000, (ii) a bonus worth $72,000, with an opportunity to earn more in bonuses, along with medical and dental benefits.

[13] The plaintiff submits that in January 2017 the defendant constructively dismissed her from her position of 35 years because:

a) they demoted her from Management Consulting Services to Resource Manager Advisory Services Division while at the same time increasing her workload;

b) they engaged in a pattern of unwanted criticism and micromanagement of her job performance;

c) they unilaterally reduced her bonus payment without having any basis to do so; and

d) they unilaterally removed her prerequisite of working from home three days a week.

### Demotion While Increasing the Plaintiff's Workload

[14] Prior to the change in ownership, the plaintiff worked with external recruitment agencies to fill vacancies at the defendant, however, she was instructed not to use outside agencies and to do all the work of recruiting, screening and on-boarding candidates herself.

[15] She was instructed to become more active and less passive. She submits her job changed significantly from calling an agency to see five resumes, to posting a resume and reading somewhere in the neighbourhood of 150 responses, sometimes to find one person.

[16] She states in effect that she was told to work harder with fewer resources and for the same compensation.

[17] Unlike in her previous position, the plaintiff no longer had responsibilty for budgeting or managing projects.

**Unjustified Criticism and Micromanagement**

[18] In January 2017 the plaintiff was given a performance improvement plan for the first time in her career, which outlined a litany of complaints, including poor punctuation and grammar.

[19] She was now required to fill in the chart and submit it to her immediate supervisor every week. In addition, she was required to attend weekly meetings with her supervisor and the manager of human resources to discuss her progress.

**Reduction of Bonus**

[20] In early 2017 the plaintiff was advised that her bonus for the fourth quarter of 2016 would be $6,739, rather than her maximum entitlement of $18,000.

[21] For the first time during her employment she was told that bonuses were discretionary, however, she had previously always been told that bonuses were linked to company revenue and she had always received close to her maximum bonus.

[22] The President of the defendant was unable to describe how the plaintiff's bonus entitlement was calculated.

**Working at the Office Verses From Home**

[23] The plaintiff's home in Waterloo Region is approximately 110 km. from the defendant's office in Vaughan, which is considered part of the GTA.

[24] On or about January 16, 2017, she was advised that she would have to do all of her work at the defendant's office, as opposed to working there two days a week.

[25] The plaintiff was not asked for input on this decision nor was there any discussion about it.

[26] The plaintiff was not offered any new compensation for this change to her employment, to offset her increased commuting costs, for mileage or a car allowance, for her 407 toll or for the 2 to 3 hours of commuting time three extra days a week.

**Summary**

[27] The plaintiff submits that in the first five weeks of 2017 the plaintiff was told she could no longer work from home, she would have to complete a performance improvement plan and discuss same with the supervisor and HR manager on a weekly basis and her bonus was reduced by about two thirds.

## Defendant's Position

[28] The plaintiff's claim rests primarily on the fact that the defendant advised the plaintiff that it was no longer able to accommodate her preference to work from home three days a week.

[29] The plaintiff's work from home arrangement was not a term and condition of her employment, but rather a preference which the defendant had accommodated.

[30] Upon being notified by the defendant of the change to her work schedule, the plaintiff took no steps to engage the defendant in a dialogue to discuss alternative arrangements. She simply resigned without even trying the new work arrangement.

[31] Rather than mitigate her damages by continuing to work for the defendant, she sought employment with companies located in the GTA where her commute time would exceed that of her commute from her home to the defendant's office.

[32] There is no employment contract or internal human resource's records of the defendant that contemplate recognition of the plaintiff's service with its predecessor from 1982 until 1992.

**Restructuring**

[33] Following the defendant's creation, its management team reviewed the company's operation, and with the assistance of an external human resources consultant, realigned titles of its employees for internal consistency.

[34] The defendant discussed its new operational model with the plaintiff and she had the opportunity to provide input on proposed changes.

[35] Since July 2016, the plaintiff worked with other members of the defendant's advisory services team to develop the new operating model to resource its client's mandates, which included the creation of the Manager, Resource Management role.

[36] As part of the change to the new operational model, the defendant instructed all management to work with the plaintiff to facilitate all short-term hiring in a centralized manner across the defendant.

**The Plaintiff's Duties and Work Volume**

[37] Despite her title change, there were no significant changes to the plaintiff's duties or her workload.

[38] Both before and after her transition to the Manager, Resource Management role, the plaintiff was responsible for staffing the defendant's client's projects.

[39] Following an operational review, the plaintiff was asked to reduce reliance on outside staffing agencies, but not to cease relying on external vendors. It was expected

that she would consolidate the current list of vendors and rely on her team to manage her workflow. This change in job focus did not result in a significant increase in the plaintiff's workload.

**Deterioration of the Plaintiff's Performance**

[40] The plaintiff's performance noticeably declined at the beginning of the summer of 2016.

[41] In about August 2016, the plaintiff presented two potential candidates to a prospective client without first having interviewed them. One candidate did not show up for his meeting and the other informed the prospective client that he was only interested in working nights so he can moonlight from his current day job.

[42] The defendant's prospective client was frustrated and complained. In addition, the defendant received a number of other complaints from clients about the plaintiff's failure to proactively address their needs.

[43] In a meeting on September 30, 2016, the plaintiff acknowledged that she had not interviewed either candidate. Despite this meeting, the plaintiff's performance did not improve.

[44] In about January 2017, the plaintiff prepared a LinkedIn Ad for a client, however, she proceeded to post the ad without reviewing the final content with the client and without receiving his approval to do so. The content of the ad did not reflect the client's requirement for the posting.

[45] As a result of the plaintiff's declining performance, a performance improvement plan (PIP) was presented to the plaintiff on or about January 2017. The PIP was designed to recognize the plaintiff's capability to improve and was intended to guide her towards better performance.

[46] Given the expectation of the defendant's clients for clear and cogent communication, the plaintiff's challenges with English punctuation and grammar were relevant.

[47] The PIP also detailed other specific issues of concern, set out an action plan for improvement, and identified internal support available to her. In the initial PIP meeting, the plaintiff acknowledged her errors and need for improvement.

[48] The plaintiff agreed to meet with the defendant's Vice President, Advisory Services and Manager, Human Resources, on a weekly basis to discuss her progress.

[49] At no time did the plaintiff raise a concern about her participation in the PIP. In fact, the plaintiff acknowledged that her performance needed improvement and worked with the defendant to adhere to the terms of the PIP.

[50] Prior to the plaintiff abandoning her employment, both the plaintiff's supervisor and the plaintiff acknowledged that her performance was improving.

**No Significant Change in the Plaintiff's Compensation**

[51] The plaintiff's total taxable income fluctuated significantly over the last seven years, with the last full calendar year, 2016, being the plaintiff's highest income.

[52] There was no change in the formula or method used to determine the quantum of the plaintiff's bonus. It was tied to the defendant's profitability with the defendant retaining an overall discretion to adjust the bonus depending on the employee's personal performance.

[53] The loss of a significant client, coupled with the plaintiff's lower quality performance in the latter part of 2016, meant that the plaintiff's fourth quarter bonus was lower than her previous bonuses.

[54] In any event, the year-over-year change of the plaintiff's bonus from 2015 to 2016 was 4.5% which was slightly less than $9,000.

**No Significant Change to the Terms and Conditions of the Plaintiff's Employment**

[55] The plaintiff's work from home arrangement was not a term and condition of her employment, but simply the plaintiff's preference which the defendant accommodated.

[56] Like the issue about her previous service with MicroAge, the subject employment contract makes no reference to the plaintiff being allowed to work from home three days per week.

[57] The plaintiff is the only employee of the defendant who had this type of work from home arrangement and there is no documentation in her personnel file that in any way includes a reference to recognizing, or creates a commitment by the defendant or his predecessor to maintain a work from home arrangement.

[58] Because of the defendant's new operational model and recent acquisition of Gallardo Group Inc., the plaintiff's in-person availability to respond to a heightened scale of collaborative activity, increased interviewing requirements and in-person attendance at group working sessions, required her to attend full time at the defendant's place of business.

[59] The plaintiff was advised of the requirement that she work only from the defendant's office on January 16, 2017, which changes were to be effective March 1, 2017.

[60] The plaintiff continued to report to work as usual, subsequent to the January 16, 2017 meeting, and at no time did the plaintiff raise any concerns about working in the office five days per week.

[61] On March 1, 2017, the day that the plaintiff's new work arrangement was to become effective, she resigned her employment without providing any notice or warning.

**Findings**

[62] I find that the facts of this case are not seriously in dispute, notwithstanding that each party has their own perception of how the facts should be interpreted.

[63] Likewise there are little, if any, credibility issues on the main facts.



**Working from Home**

[64] By far the biggest factor to consider in deciding whether or not the plaintiff was constructively dismissed, is the fact that after 22 years of being allowed to work three days out of five at her home in the Waterloo Region, and two days at the defendant's office in Vaughan, Ontario, she was ordered to work only from the defendant's office.

[65] On the evidence before the court, there is approximately 110 km. of driving distance between the plaintiff's residence and the defendant's office. In both directions the plaintiff would be driving on the incredibly busy 401 highway (the court is taking judicial notice of the traffic volumes on the 401 particularly between six in the morning and seven at night) between highway 8 and the toll highway 407. She would then have to travel north from Highway 407 to get to Vaughan.

[66] Because of the traffic volumes she would undoubtedly encounter in her daily commute, it would likely add approximately three hours to her working day. In addition, because of the volume of car and large truck traffic on the 401 and the speed with which the traffic moves, it is simply a dangerous road to spend a lot of time on. There would also be a not insignificant cost to operating a vehicle each day for 220 km, in addition to a toll charge to drive on Highway 407.

[67] The defendant submits that there is nothing in the plaintiff's contract, or in the defendant's corporate records, that would allow the plaintiff to work at home. It therefore categorizes the situation as a preference of the plaintiff not a contractual term.

[68] On the facts of this case which are not seriously in dispute, this is virtually an impossible position for the defendant to succeed on.

[69] Firstly, Mr. Prosser, who at the time he hired the plaintiff in 1995, was the Vice President of the defendant, swore to the following in paragraphs 6, 7 & 8 of his affidavit of June 14, 2017:

> 6. When I contacted Rosemary about this position at MicroAge, I understood that she would need flexibility to work from home some of the time, due to the considerable distance of her home from the MicroAge offices. This was not a problem, as the position that Rosemary was being considered for would not require her to be in the office all the time, and much of the work could be done from outside the office.
>
> 7. As we negotiated the terms of Rosemary's employment, it was eventually agreed that she would work from home three (3) days a week, and attend at the MicroAge offices two days a week. I understood, from speaking with Rosemary at the time, that this was essential for her, and without an agreement that she could work from home a significant amount of the time, she would not have accepted the offer of employment.
>
> 8. At the beginning of 1995, Rosemary accepted the offer to rejoin MicroAge. As agreed, she worked from home three (3) days a week and worked at the MicroAge offices two (2) days a week. Rosemary reported directly to me.

[70] It was therefore acknowledged by the defendant that there was a considerable distance between the plaintiff's home and the defendant's office, and that it was essentially a condition precedent to the plaintiff agreeing to the employment contract, that she would be able to work from her home office three days a week.

[71] Therefore, it appears that even if there is nothing in writing between the parties, there was an oral agreement that induced the plaintiff to go to work for the defendant in 1995, and the performance of that term of the agreement, continued until January 2017.

[72] The defendant takes exception to the fact that the plaintiff did not see fit to discuss her concerns with respect to the new term of her continued employment. With respect, that is a two-edged sword and one that falls more heavily on the defendant employer, than on the plaintiff employee.

[73] The letter dated January 16, 2017, from the defendant to the plaintiff changing her right to work at home, is set out in the Motion Record at Tab 2–H. There is nothing in that letter which would lead anyone to think that they could remain working for the company and also work from their home office.

[74] Likewise, the March 2, 2017, letter from the defendant's solicitors, which is set forth in the Responding Motion Record at Tab I, makes it abundantly clear that the defendant was not prepared to consider allowing the plaintiff to continue with her employment, while at the same time working from her home office.

[75] The defendant's suggestion that her ability to work from home is a red herring because she applied to other companies situated in the GTA as part of her attempts at mitigation, does not have any traction.

[76] Unfortunately, based on the plaintiff's evidence, while sending out approximately thirty resumes, she was not invited to any interviews. Even if she had obtained an offer for employment, based on her position as set forth in this proceeding and the fact that she lives in the Waterloo Region, it is likely that she would have sought the same accommodation, i.e. to be able to work at home, before accepting any offer for employment.

[77] With respect to the issue concerning the plaintiff's ability/right to perform 60% of her work from her home office, I am able to make my findings without the necessity of a trial, since in essence there is no conflict regarding the evidence that the plaintiff was allowed for 22 years to do so. In addition there is no evidence to contradict Mr. Prosser's independent evidence.

[78] On the evidence before me, I find that the plaintiff's ability to perform her work from her home office 60% of the time was an essential term of her employment agreement with the defendant. There is no doubt on the evidence before me that the defendant unilaterally breached this term of the agreement, thereby constructively dismissing her.

**Bonus Calculation**

[79] The plaintiff had always done well with respect to obtaining between 90% to slightly over 100% of her bonus. The bonus appears to be paid quarterly and in the last quarter of 2016, rather than receiving close to $18,000, she received $6,739 which is 37.44% of $18,000.

[80] There does not appear to be a pure mathematical formula for calculating the bonus and the defendant in part states that there is discretion in management to award the bonus. In addition, in 2016 the defendant lost a major client which would likely impact negatively their earnings in 2017.

[81] Mr. Naiman, in his examination, confirmed that bonus payments are done quarterly. At question 81 he stated that bonuses were calculated on the basis of the percentage of profit between a base amount of profit and a target profit.

[82] He agreed at question 84, that there was nothing in the plaintiff's employment contract that spoke to the bonus being tied to individual performance.

[83] For someone who would likely have prepared for his examination, he was essentially unable, in any intelligible way, to describe how the plaintiff's fourth-quarter bonus was calculated. This inability to the above answer, continued to the answer he gave with respect to his undertaking at question 95. The court draws a negative inference from Mr. Naiman's inability to articulate how the bonus was calculated in the last quarter of 2016.

[84] It was clear, on the evidence before the court, that although the defendant lost a significant client in 2016, the loss of that client would not impact the defendant's bottom line until after 2016.

[85] Therefore, I find that the plaintiff's fourth-quarter bonus for the year 2016, was not calculated as it should have been, and had previously been, but was arbitrarily set by the defendant in contravention of the plaintiff's employment contract.

[86] In addition to the plaintiff's ability to work at home, which was taken away by the defendant, the non calculation of her bonus was likewise sufficient for the court to find that she had been constructively dismissed.

**Others Issues Raised**

[87] Although other issues were raised with respect to the plaintiff's contention that she was constructively dismissed, based on my findings with respect to her ability to work at home and the impropriety in calculating her bonus, I not do not intend to deal with them.

**Mitigation**

[88] The plaintiff, at the time of her leaving the defendant's employ, was a 59-year-old female employee in a management position, with between 22 and 35 years of service for the same company.

[89] After waiting approximately six weeks, she applied for 30 positions after leaving the defendant's employ, however she did not receive any interviews.

[90] The defendant takes the position, bolstered by some case law that the plaintiff, as part of her mitigation, was obligated to return to work for the defendant as part of her obligation to mitigate.

[91] Without specifically going into the cases referred to, this is not one of those cases which would obligate an employee to return to a former employer from a mitigation standpoint.

[92] Since I have found that the defendant breached a major term of the plaintiff's employment agreement, which was that she could work from her home office 60% of the time, and based on the defendant lawyer's letter of March 2, 2017, this was not an option.

[93] This letter is a carefully worded letter and if the plaintiff was prepared to allow the defendant to continue working from her home office 60% of the time, the letter should have said so, it did not.

**Damages**

[94] The defendant takes the position that the plaintiff's length of service is 22 years and not 35 years, because she resigned for 2 ½ years in May 1992.

[95] Based on 22 years of service, the defendant drew the court's attention to a 62-year-old senior manager with 18 years of service was awarded 18 months and 57-year-

old general manager with 19 years of service was also awarded 18 months. This appears to be one month of damages for each year of service.

[96] In addition, the defendant agrees the plaintiff would be entitled to compensation for the appropriate benefits for that period of time, however, takes the position that the plaintiff is not entitled to any bonus.

[97] The plaintiff submits that her tenure between 1982 and 1992 should be taken into account and that her damages should therefore be 24 months. Plaintiff's counsel did not refer me to any case that I found sufficiently on point for the proposition that the two periods of employment should be added together.

[98] Therefore, based on her 22 years of service, I find that the plaintiff is entitled to 22 months of salary in lieu of notice, less 1.5 months for a net 20.5 months' salary as damages. Because there is some possibility that the plaintiff may find employment before the expiry of the 20.5 month period, I deduct 10% of 10.5 months' salary from this award for that contingency.

[99] In addition, I award the plaintiff $11,261 as compensation for the underpayment of her 2016 fourth-quarter bonus.

[100] I am not prepared to award the plaintiff any bonus for the time that she worked in 2017.

[101] In addition, she shall be compensated for the benefits that she has lost, based on the time period of 20.5 months.

[102] If the parties are unable to agree on costs, Mr. Crawford shall forward his **brief** submissions on costs to me by January 10, 2018. Mr. Pushalik shall forward his **brief** response to me by January 17, 2018. Mr. Crawford shall then forward his reply, if any, to me by January 24, 2018. Cost submissions may be sent to my attention by email, care of Kitchener.Superior.Court@ontario.ca

"James W. Sloan"

James W. Sloan J.

**Released:** December 27, 2017



**CITATION:** Hagholm v. Coreio Inc., 2017 ONSC 7713
**COURT FILE NO.:** C-305-17
**DATE:** 2017-12-27

**ONTARIO**

**SUPERIOR COURT OF JUSTICE**

**BETWEEN:**

Rosemary Hagholm

Plaintiff

**– and –**

Coreio Inc.

Defendant

**REASONS FOR JUDGMENT**

J.W. Sloan J.

**Released:** December 27, 2017