CITATION: Lancia v. Park Dentistry, 2018 ONSC 751
COURT FILE NO.: 16-59020
DATE: 2018/02/07

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:	
MICHELE LANCIA Plaintiff	Z. Lakhani for the Plaintiff
- and -	
PARK DENTISTRY PROFESSIONAL CORPORATION Defendant	P. Latimer for the Defendant
	HEARD: November 15 and 23, 2017, with additional written submissions filed.

A. J. GOODMAN J.:

REASONS FOR SUMMARY JUDGMENT

INTRODUCTION:

[1] While this summary judgment application was initiated by the defendant, Park Dentistry Professional Corporation ("Park Dentistry"), the plaintiff, Michele Lancia ("Lancia") and the defendant each seek an Order granting judgment in favour of their respective positions in relation to the plaintiff's former employment with the defendant.

[2] There was no substantial dispute amongst the parties that this matter could not be determined by way of a Rule 20.04 summary judgment motion.

[3] For the reasons that follow, summary judgment is granted substantially in favour of Park Dentistry, with one discrete exception related to Lancia's entitlement to recovery of vacation pay.

BACKGROUND:

[4] This action involves a claim by Lancia alleging that she was constructively dismissed from her employment with Park Dentistry due to a material change in the employment relationship amounting to repeated improper deductions of vacation pay as well as allegations of sexual harassment. Lancia seeks damages for wrongful dismissal and unlawful deductions from wages in the amount of $130,000, unpaid vacation pay and unlawful deductions from wages in the amount of $4000, general damages for bad faith and sexual harassment in the amount of $20,000, along with unspecified special damages.

[5] Initially, the parties proposed to proceed with the motion based on the Record, which included affidavits from the parties and other individuals along with transcripts of cross-examinations. While counsel agreed that the Record would stand as evidence on the summary judgment motion, very early on in the course of argument it became clear that with the lack of context and the competing facts within the affidavits filed, there was a necessity to call limited *viva voce* evidence. Thus, evidence was adduced from the parties on the discrete claim of sexual harassment and the poisoned work environment alleged to have infused Park Dentistry's business. Four witnesses testified, Lancia on her own behalf, and Marcia Botelho ("Botelho"), Maria Bucciarelli ("Bucciarelli") and Dr. Allan Park, ("Park"), the principal party, all on behalf of the defendant.

THE FACTS:

[6] At the time of her departing the employ of Park Dentistry, Lancia was a 48 year old restorative dental hygienist. Lancia had worked with Park Dentistry and its predecessor from November 1997 to February 9, 2016, with a single interruption of one year.

[7] In 2008, Park purchased a dental practice - Park Dentistry - from Dr. David Amato and inherited his staff, including Lancia. When he took over the practice, Lancia was earning $56 per hour as a Restorative Dental Hygienist. In 2010, Park increased her hourly wage to $59.

[8] In 2013, Park retained an employment law firm that specialized in transitioning health care office employees to written employment contracts. One of the required areas of review was Park Dentistry's vacation practices, which had been carried over from Dr. Amato.

[9] Park learned that Park Dentistry had been paying its employees their vacation pay before the pay was earned. It was calculated based on the assumption that an employee would work 40 hours a week throughout the year. This practice of paying vacation pay prospectively (before it was earned) could result in employees receiving a vacation pay windfall, because it was calculated on the erroneous assumption of hours worked rather than on actual hours worked.

[10] Lancia had been receiving such a benefit: her vacation pay amounted to 10.4% of her earnings, calculated on an assumed 40-hour week. She received this amount despite the fact that she worked significantly fewer than 40-hours per week in the years at issue.

[11] Park determined that the new written employment contracts would provide for vacation pay to be earned at a certain percentage of wages, and calculated on wages actually earned, pursuant to the *Employment Standards Act 2000,* S.O. 2000, c. 41 ("*ESA*").

[12] On August 14, 2014, Park presented Lancia with correspondence prepared by legal counsel ('the Cover letter") informing her that the office would be transitioning to new employment contracts for all staff. The Cover Letter made it clear that her current employment ("the Old Contract") was being terminated:

> We have received professional advice regarding how important it is to have proper, written contracts in place. We have been instructed that in order to introduce new contracts**,** we must bring our current largely unwritten contracts to an end. Unfortunately, the only way to do this is to terminate your existing employment contract. We say "unfortunately" because we are not terminating your existing contract because we want you to leave – we are terminating it because it is a necessary legal step to ensure that everyone is effectively transitioned to proper, written contracts.

[13] The Cover Letter also made an offer of continued employment on the terms set out in the new, written employment agreement ("the New Contract") attached:

> At this time, and following professional advice, we are transitioning our practice so that all staff will be on proper, written employment agreements. It is for this reason that we are offering you the Employment Agreement attached to this letter.

[14] In terminating her Old Contract, Park Dentistry provided Lancia with eighteen months working notice, in light of her age, position and years of service. The Cover Letter informed her in writing that, in the event that she chose not to sign the New Contract by the signing deadline of January 14, 2016, her Old Contract would end on February 14, 2016.

[15] Signing the New Contract meant the immediate termination of the Old Contract: “Upon your signing the attached Agreement, the terms of your current employment agreement with us (which is largely unwritten) will come to an end.”

[16] Park Dentistry provided Lancia with a signing bonus of $2,000 if she signed the New Contract by September 19, 2014.

[17] Despite providing her with a notice period and ample time to seek legal advice before the signing deadline, Lancia signed the New Contract a mere two days later, on August 16, 2014. Lancia did not raise an objection to any of the terms of the New Contract. Lancia did not try to negotiate any different terms prior to signing. As such, Lancia would continue to be paid her hourly wage of $59.

[18] Pay increases and bonuses were at Park Dentistry’s sole and unfettered discretion. Lancia’s vacation pay would be calculated at the rate of 10% of her wages, which was in excess of the *ESA* minimum and, notably, the highest rate of any Park Dentistry employee. This was consistent with Lancia’s rate of vacation pay under the Old Contract. Under the New Contract, she would earn 10% of the wages that she actually earned. Lancia retained her five weeks of vacation time. The New Contract made it clear that Park Dentistry could schedule her vacation, taking into consideration business needs.

[19] The contract provided that Lancia could resign by providing thirty days’ notice. Park Dentistry could terminate Lancia’s employment by providing her with the *ESA* minimum notice.

[20] On February 9, 2016, Lancia resigned from Park Dentistry, hand delivering a resignation letter of the same date (the “Resignation Letter”), which stated:

> I regretfully hand in my resignation. I feel that Dr. Park is done with his staff and especially with me.
>
> Last year I had to pay back my vacation that was over paid to me the year before, which meant I only had 64 hours paid holidays for the entire year, for over 15 years I had 200 hours . I have not had even a 2% cost of living increase in at least 5 years. I think that when Dr. Park decided not to give anything to his staff over Christmas that made it clear to me that Dr. Park would like me to leave. I'm sure it will be better for the practice if you can find someone to do my job with less pay.
>
> I would appreciate an immediate start with Neve, it will be too emotional for me to work here for two weeks.
>
> I wish you all the best in the new office!!
>
> Kind regards,
>
> Michele

ISSUES:

[21] The issues for this summary judgment motion are as follows:

1. Is the employment agreement invalid for lack of consideration?
2. Did Park Dentistry breach the employment contract with respect to its administration of Lancia's vacation pay?
3. Did Park sexually harass Lancia or was there a poisoned work environment?
4. Did Lancia resign or was she constructively dismissed? What are the damages?

POSITIONS OF THE PARTIES:

[22] Park Dentistry submits that Lancia quit her job. She delivered a letter of resignation that unambiguously documented her intention to terminate the employment relationship. She made no attempt to retract her resignation. The plaintiff's subjective intention to resign and her words and actions, objectively viewed, support a finding of resignation.

[23] Park Dentistry says that Lancia quit her job because she was dissatisfied with her compensation. Regretting her decision, she now claims that she was constructively dismissed as a result of a poisoned workplace environment.

[24] Park Dentistry submits that there is no air of reality to this claim, as, prior to issuing her Statement of Claim, she failed to raise a single such allegation in her eight years of employment with Park. Lancia also failed to raise any such allegation in her Resignation Letter – a highly conspicuous oversight if one is now asked to believe that she resigned because of a poisoned work environment. When pressed about her failure to reference these complaints in her Resignation Letter, she admitted that they were not the "absolute key issue" when she decided to resign. Instead, she admitted that it was the comments made by Dr. Park at a lunch almost seven weeks after she quit, that "[set her] off" and made her decide that she had been sexually harassed.

[25] Park Dentistry says that it was surprised to learn of Lancia's resignation based on constructive dismissal and disputes that there was a toxic work environment. Nonetheless, Park Dentistry submits that they provided Lancia with more than a reasonable amount of notice. Accordingly, the employer submits that it fulfilled all of its obligations to Lancia in respect of the employment contract.

[26] Lancia pleads that she had been constructively dismissed. Lancia submits that there was a poisoned work atmosphere, she was subjected to sexual harassment and a complete breakdown in the employment relationship such that she could no longer be expected to continue to provide service to Park Dentistry.

[27] Lancia submits that Park's decision to provide her with working notice of the termination of her employment in favour of signing the new contract related to her continued employment was nothing more than a disingenuous attempt on her employer's part to pressure or persuade her into signing the contract.

[28] Lancia argues that she received no consideration for signing the New Contract. She received a one-time signing bonus of $2,000, but the contract reduced her pay by more than $4,000 annually. The situation would have been identical had there been no signing bonus at all, but if instead, Lancia's pay had been reduced by $2,000 in the first year and by $4,000 in each subsequent year. Therefore, Park Dentistry's attempt to characterize the signing bonus as consideration is entirely artificial.

[29] Lancia submits that the contract's terms were imposed as soon as she signed it on August 16, 2014 and did not receive the 18 months' notice. Furthermore, Park Dentistry never gave Lancia notice that if she failed to sign the contract, its terms would be imposed on her after 18 months. She was only given notice that if she did not sign the contract, in 18 months her employment would be terminated.

[30] Lancia concedes that the underpayment relative to her contractual entitlement amounts to only approximately a 4.8% reduction in her 2015 wages. However, the contract was not valid in the first place due to lack of consideration. Therefore, in 2015 Lancia continued to be entitled to vacation pay of $11,800, as she had since at least 2011. As Lancia was paid only $3,776.00, she was underpaid, amounting to a 10.5% reduction in her compensation.

[31] In the alternative, Lancia pleads that Park's unilateral decision to attempt to impose those terms as contained in the 2014 Agreement and the recapture of vacation monies duly owed to her was a fundamental breach of the contract and was one of the culminating events in a series of events which resulted in her constructive dismissal.

[32] Lancia submits that summary judgment ought to be granted in her favour, as constructive dismissal can be established on the vacation pay issues alone. In

the alternative, the cumulative effect of the vacation pay dispute and sexual harassment constitute constructive dismissal, and merit damages in her favour.

LEGAL PRINCIPLES:

[33] As mentioned, the parties concede that this matter is ripe for disposition under Rule 20.04.

[34] The Supreme Court of Canada in the seminal case of *Hryniak v Maudlin* 2014 SCC 7, overturned the "full appreciation" test promoted by the Ontario Court of Appeal in summary judgment matters. The Supreme Court held that there will be no genuine issue requiring a trial when the judge is able to reach a fair and just determination on the merits. A trial is not required if a summary judgment motion can achieve a fair and just adjudication, if it provides a process that allows the judge to make the necessary findings of fact, apply the law to those facts, and is a proportionate, more expeditious and less expensive means to achieve a just result than going to trial.

[35] Rule 20.04(2.1) provides:

> (2.1) [Powers] In determining under clause (2) (a) whether there is a genuine issue requiring a trial, the court shall consider the evidence submitted by the parties and, if the determination is being made by a judge, the judge may exercise any of the following powers for the purpose, unless it is in the interest of justice for such powers to be exercised only at a trial.

[36] In summary judgment matters, a motions judge may evaluate the credibility of a deponent and draw any reasonable inference from the evidence. As the Supreme Court endorsed at paras. 44 and 45 of *Hryniak*:

> The new powers in Rules 20.04(2.1) and (2.2) expand the number of cases in which there will be no genuine issue requiring a trial by permitting motion judges to weigh evidence, evaluate credibility and draw reasonable inferences.

> These new fact-finding powers are discretionary and are presumptively available; they may be exercised unless it is in the interest of justice for them to be exercised only at a trial; Rule 20.04(2.1). Thus, the amendments are designed to transform Rule 20 from a means to weed out unmeritorious claims to a significant alternative model of adjudication.

[37] In defining the concept of constructive dismissal, in *Farber v. Royal Trust Co.*, [1997] 1 S.C.R. 846, at para. 34, (in reference to a quote from Sherstobitoff J. of the Saskatchewan Court of Appeal, Gonthier J. stated:

> A constructive dismissal occurs when an employer makes a unilateral and fundamental change to a term or condition of an employment contract without providing reasonable notice of that change to the employee. Such action amounts to a repudiation of the contract of employment by the employer whether or not he intended to continue the employment relationship. Therefore, the employee can treat the contract as wrongfully terminated and resign which, in turn, gives rise to an obligation on the employer's part to provide damages in lieu of reasonable notice.

[38] Following the *Farber* decision, in *Potter v. New Brunswick Legal Aid Service Commission*, 2015 SCC 10, at paras. 36 to 43, the Supreme Court of Canada articulated a two-pronged test to determine if constructive dismissal has occurred. Satisfaction of either branch of the test is sufficient. A court must determine objectively whether such a breach occurred. The employer's conduct must be found to constitute a breach of the employment contract, and the conduct must be found to substantially alter an essential term of the contract: *Potter*, at para. 34.

[39] The first branch of the test requires a review of the specific terms of the contract. Did the employer’s unilateral change constitute a breach? If so, does it substantially alter an essential term of the contract? The second branch allows for constructive dismissal to be made out, when viewed in light of all the circumstances, would lead a reasonable person to believe that the employer no longer intended to be bound by the contract: *Potter,* at para. 42. The focus of

enquiry on the second branch is on the cumulative effect of past acts by the employer, rather than a single act: *Potter*, at para. 33. On both branches, it is "the employer's perceived intention no longer to be bound by the contract" that gives rise to the constructive dismissal: *Potter*, at para. 43.

[40] It is settled law that constructive dismissal also occurs where the employer's conduct amounts to an effective repudiation of the entire employment relationship, rather than a change in specific terms of the employment contract. Such repudiation occurs where the employer's conduct creates a hostile work environment which renders the employee's continued employment intolerable.

[41] Recall that once it has been objectively established that a breach has occurred, the court must turn to an analysis and inquire whether, "at the time the [breach occurred], a reasonable person in the same situation as the employee would have felt that the essential terms of the employment contract were being substantially changed: *Farber*, at para. 26.

[42] An employee is not required to point to an actual specific substantial change in compensation, work assignments, or terms of employment that on its own constitutes a substantial breach. The focus is on whether an employer's conduct manifests an intention to no longer to be bound by the employment contract. The employee has the choice of either accepting that conduct or changes to the employment relationship made by the employer, or treating the conduct or changes as a repudiation of the contract by the employer and suing for wrongful dismissal.

[43] In employment law, damages for dismissal are compensation for the notice required because of termination. The award for damages is for the loss of income during the notice period: In the authoritative loose leaf service entitled "*The Law of Dismissal in Canada"*, 3rd Ed. 2016, the author, H. Levitt suggests

that contrary to popular belief, an action for wrongful dismissal is not a suit based on the fact of the dismissal. It is, rather, for the fact of dismissal without adequate notice or payment in lieu of notice. Consequently, an employee cannot claim damages for constructive dismissal when there is no causal link to the reason for resignation, even if there has been a unilateral change to an essential term of the contract.

[44] A breach that is minor in that it could not be perceived as having substantially changed an essential term of the contract, does not amount to constructive dismissal: *Longman v. Federal Business Development Bank* (1982), 131 D.L.R. (3d) 533 (B.C.S.C.), *Robins v. Vancouver (City)*, 2014 BCSC 872.

ANALYSIS:

The New Contract and Consideration:

[45] As mentioned, the test for whether the employer's conduct amounts to constructive dismissal is an objective one, considered from the perspective of a reasonable person in the same situation as the employee. The burden rests on the employee to establish that he or she has been constructively dismissed. If the employee is successful, he or she is then entitled to damages in lieu of reasonable notice of termination.

[46] In order to succeed in her claim that she was constructively dismissed, Lancia must establish that she resigned because of the various issues raised in the pleadings and not for another reason.

[47] Lancia claims damages for constructive dismissal based on Park Dentistry’s conduct in that the defendant’s conduct amounted to repudiation of her employment contract by not only instituting the new agreement but also failing to adhere to its terms. Lancia does not appear to allege that the

termination clause is invalid; her only basis for attacking the agreement's validity is her contention that she received no consideration in exchange for signing it.

[48] Lancia claims that the one-time signing bonus of $2,000 when she signed the contract, did not come close to offsetting the annual pay decreases imposed by the contract. Despite Park Dentistry providing her with a notice period and ample time to seek legal advice before the signing deadline, Lancia signed the New Contract a mere two days later. Lancia admits that she did not try to negotiate any different terms prior to signing.

[49] In terminating her Old Contract, Park Dentistry provided Lancia with 18 months' working notice in view of her age, position and years of service. The Cover Letter informed her that in the event that she chose not to sign the New Contract by the signing deadline, her Old Contract would end on February 14, 2016.

> Our offer to you of this Employment Agreement will remain open until 4 pm on January 14, 2016, unless circumstances arise that require us to withdraw it sooner. It is important for you to understand that we are transitioning all staff to proper, written employment agreements and if you decide not to sign the attached Agreement by 4 pm on January 14, 2016, your employment with us will end on February 12, 2016. This date was determined by our employment law firm and takes into account such factors as your age and how long you have been with us.

[50] The Cover Letter explicitly stated that signing the New Contract meant the immediate termination of the Old Contract: "Upon your signing the attached Agreement, the terms of your current employment agreement with us will come to an end."

[51] Lancia's argument must fail for two reasons: First, she received some consideration in the form of a $2000 signing bonus. I do not accept the argument

that Lancia was not provided with 18 months' notice that the new contract terms would be imposed. These new terms were imposed as soon as Lancia signed the New Contract on August 16, 2014. Furthermore, had she not signed the New Contract, I accept that its terms would not have been forced on her after 18 months; instead, her employment would have been terminated and she would never be subject to the new terms.

[52] Second, in any event, no consideration was required to make the New Contract enforceable, because her old employment was terminated with sufficient notice – eighteen months – and she was offered re-employment on new terms with no substantial change in job description or tasks.

[53] It is settled law that an employer may transition an employee to a new contract without consideration by providing reasonable notice. In *Farber,* the Supreme Court of Canada made it clear that reasonable notice vitiates the concept of termination. The Divisional Court recently confirmed in *Kafka v. Allstate Insurance Company of Canada* [2012] ONSC 1035 at para. 45, that, "a fundamental change does not amount to a constructive dismissal where the employer provides the employee with reasonable notice of the change."

[54] While Park Dentistry readily concedes a reduction in Lancia's net compensation, I agree that this was permissible by law and does not nullify the New Contract's enforceability. Park Dentistry was not required to offset the reduction in compensation by providing monetary consideration of an equal amount. Indeed, it is trite law that courts will not inquire into the adequacy of consideration – a "peppercorn" will do. As long as there is consideration, contracts may be varied or superseded by new agreements.

[55] In my view, the case relied upon in support of the plaintiff's position, *Wronko v. Western Inventory Services Ltd*., 90 O.R. (3d) 547 (C.A.) is

distinguishable on its facts. Lancia received reasonable notice – 18 months – of the changes to her employment. If Lancia did not wish to accept the changes, she could have used the notice period to seek new employment. There was no rush to sign the New Contract. Lancia could have waited the 18 months prior to signing the contract. She could have obtained legal advice. Instead, she signed the New Contract within two days and proceeded to work for the next 17 months. Moreover, when I consider the relevant documentation that goes to the parties' intent and understanding, I reject any assertion that the new terms would not be effected immediately.

[56] I find that Lancia executed the New Contract freely, without duress, having been provided ample time to consider its terms and to seek legal advice. The conditions to the establishment of a valid contract were met. The New Contract is therefore valid and its termination provisions are legally enforceable.

[57] In asserting a claim for wrongful dismissal, the jurisprudence provides that an employee may decide to act on a breach of the employment contract committed by the employer and end their employment. Or an employee may opt to continue with the employment. If an employee decides to treat the breach as a constructive dismissal, he or she must communicate that decision to the employer in a reasonable time: *Farquhar v. Butler Brothers Supplies Ltd. (1988)*, 1988 CanLII 185 (B.C.C.A.), 23 B.C.L.R. (2d) 89, at paras. 92 and 93.

[58] Lancia's delay in asserting her claim of constructive dismissal is illuminating. Here, Lancia delayed advising or alleging constructive dismissal until some 13 months after she resigned. Moreover, she failed to communicate to Park Dentistry in a reasonable time that she was treating the repayment of her vacation pay as a breach of the contract. She never complained of any discomfort with her work environment – not to the office manager, not to Park,

not even in her Resignation Letter. Rather, the reasons she eventually gave for resigning were financial and related to her compensation.

[59] I accept that Lancia's duties and responsibilities remained substantially the same. Some of the terms of her contract were going to be altered in accordance with the prevailing industry standards.

[60] I do not accept the plaintiff's suggestion that somehow her employment was not "firmly ended" until after her March 28, 2016 meeting with Park. Lancia quit when she delivered her resignation letter, which unambiguously documented her intention to terminate her employment relationship with Park Dentistry. She made no attempt to retract her resignation and never returned to work. Her subjective intention to resign and her words and actions, objectively viewed, indisputably supports a finding of resignation. Upon receiving the email from Park, in which he explained her vacation pay, Lancia realized that she was not going to be rehired by Park Dentistry. Lancia admitted that it was after the meeting and receiving the email from Park that she decided to commence this action for constructive dismissal.

[61] Consistent with the prevailing jurisprudence, an employer has the right to impose fundamental changes to an employment contract, and if so, is required to give reasonable notice of the change to the employee. Park Dentistry did exactly that and they met this requirement by providing 18 months' working notice.

[62] Accordingly, in the event that Lancia were to establish that she was constructively dismissed, her claim for wrongful dismissal damages equivalent to the common law notice period is legally untenable. The New Contract limited her pay upon termination to the minimums prescribed by the *ESA* and rebuts the presumption of common law notice. This ground of the plaintiff's claim must fail.

The vacation pay recapture:

[63] In January 2015, Lancia raised repeated concerns with Bucciarelli about the changes and deductions of monies related her vacation pay. Lancia argues that she was paid only $3,776 in vacation pay in 2015, despite her contractual entitlement to approximately $7,254. The remainder, approximately $3,478 was unlawfully deducted without her authorization to recover the alleged overpayment.

[64] Park Dentistry argues that they did not breach the contract with respect to the plaintiff's vacation pay or alleged overpayment for 2014. Prior to executing the New Contract in August 2014, Lancia had already been paid her vacation pay, even for those months that she had not yet worked.

[65] In January 2015, Park Dentistry calculated Lancia's 2014 vacation pay in accordance with the terms of the New Contract. The amount paid to her was premised on the assumption that she had worked, and would continue to work, 40 hours per week throughout the entire year. Considering her actual wages earned in 2014, the employer believed that Lancia had been overpaid by approximately $4,400. Lancia admitted that, had she not unilaterally reduced her hours, she would not have seen a decrease in her vacation pay.

[66] It seems that Park Dentistry deemed the $11,800, which Lancia received before the contract was ever signed, to be improper; retroactively deemed her vacation pay entitlement for the entire year 2014 (not just the period from August 16, 2014 onward) to be 10% of her wages or $7,539; and, on that basis, sought to recover from her the difference. The employer also prevented her from accruing any vacation pay in 2015 until the overpayment from 2014 had been paid off.

[67] Based on the evidence, the following material facts are not in dispute: Lancia signed the New Contract on August 16, 2014 and prior to signing the contract she had already been paid $11,800 in respect of 2014 vacation pay, which was her entitlement under the then-prevailing terms of her employment. In fact, this amount had been her annual entitlement since at least 2011. The New Contract would have changed her vacation entitlement to 10% of her wages excluding vacation pay: approximately $7,539 in 2014 and $7,254 in 2015.

[68] However, it is common ground that the New Contract was not intended to have retroactive effect.

[69] Nonetheless, Park Dentistry applied the New Contract retroactively. As a result, throughout 2015, Park Dentistry made deductions from Lancia's wages to recover the difference between the $11,800 she was paid earlier in 2014, and the approximately $7,539 of vacation pay to which she would have been entitled had the contract applied for the entire year; even though Lancia was entitled to be paid under the prevailing terms of her employment contract at the time of the payment. Lancia never authorized the deductions from her wages. Lancia often complained about Park Dentistry's administration of her vacation pay during that time.

[70] Lancia submits that notwithstanding a portion of her monthly vacation pay accruing for 2015 was unilaterally withheld to recover the overpayment for 2014, it regarded the $11,800, which Lancia received before the contract was ever signed, to be improper; retroactively deemed Lancia's vacation pay entitlement for the entire year 2014 (not just the period from August 16, 2014 onward) to be 10% of her wages or $7,539. And on that basis, sought to recover from the difference. In total, Ms. Lancia was paid only $3,776 for vacation pay in 2015, despite her contractual entitlement to approximately $7,254.

[71] Park Dentistry submits that on a pro-rated calculation, Lancia would have accrued vacation pay for 2014 in the amount of $9,809. As she had already received $11,800 in vacation pay, she was overpaid $1,990 ($11,800 - $9,809). As Park Dentistry actually recovered $3,200, it would owe Lancia the difference ($3,200 - $1,990), or $1,209.

[72] I find that Park Dentistry improperly withheld and recapture vacation pay credits from Lancia in 2015.

[73] That said, I am persuaded that an employer's failure to pay an employee a nominal amount, such as arises in this case, cannot be tantamount to a fundamental breach of contract justifying a claim of constructive dismissal. Amongst other reasons, the Ontario Court of Appeal recently held that an employer's failure to pay a $329,687 bonus did not constitute constructive dismissal: *Chapman v. GPM Investment Management*, [2017] ONCA 227. A breach that is minor in nature, in that it does not substantially change an essential term of employment, does not amount to a constructive dismissal: *Potter* at paras. 37 and 39).

[74] At no point did Lancia indicate that she would consider resigning over the handling of her vacation pay.

[75] As mentioned, despite Park Dentistry's assertions, it did not administer Lancia's vacation pay and the recapture of vacation credits in good faith and in accordance with any contractual provision or authority. When it was determined that Lancia was overpaid for her vacation pay in 2014, the decision to withhold a monthly amount from her accruing vacation pay in order to recover the overpayment was neither permissible under the Old nor the New Contract.

[76] I agree with Lancia's calculations to the extent that she is owed the difference of the amounts that ought not to have been recaptured in 2015 by Park Dentistry; in this case the amount of $3,763.

Sexual Harassment and the poisoned work environment:

[77] Workplaces become poisoned for the purposes of constructive dismissal only where serious wrongful behaviour is demonstrated. The employee bears the onus of establishing a claim of a poisoned workplace. The employee's genuinely held beliefs are insufficient to discharge this onus. There must be evidence that an objective, reasonable person would support the conclusion of a poisoned workplace environment. Except for particularly egregious stand-alone incidents, a poisoned workplace is not created as a matter of law unless serious wrongful behaviour sufficient to create a hostile or intolerable environment is persistent or repeated.

[78] Lancia submits that she was subjected to the various forms of sexual harassment in the workplace, including:

> a. Park engaged in sexualized behaviour toward younger female staff such as touching and stroking their hair and shoulders, putting his arm around them and attempting to give them backrubs. Although this behaviour was not normally directed at Lancia, it created an uncomfortable work environment for her as a woman in the workplace.
>
> b. Park called Lancia into his office and showed her a video in which a woman was knitting with a spool of wool inserted in her vagina, which Lancia found disturbing.
>
> c. Park showed Lancia a video and then informed her that the song in the video was "about a guy giving oral sex to a woman for so long that his face gets numb."
>
> d. Park advised Lancia that he could not attend hot yoga because "all the girls dress in skimpy outfits and [he] would get an erection."

e. In November 2015, Park invited Lancia to join him on a men-only golfing vacation in Florida, which Lancia states was a sexual solicitation.

f. After Lancia's employment ended, she and Park had lunch near her home at his invitation. After the lunch, Park abruptly said to her, "Hey Michele, you look good, really good." He then asked whether Lancia's husband was home and whether Park could "come upstairs" with her.

[79] Park Dentistry has also accused Lancia of inappropriate behaviour, which is firmly denied.

[80] The Court of Appeal has made it clear that a poisoned workplace is not created as a matter of law unless "serious wrongful behaviour sufficient to create a hostile or intolerable environment is persistent or repeated."

[81] The employee bears the onus of establishing a claim of a poisoned workplace. Importantly, the test is an objective one. Her subjective feelings or genuinely held beliefs are insufficient to discharge the onus. There must be evidence that, to the objective reasonable bystander, would support the conclusion that a poisoned workplace environment had been created.

[82] Various courts routinely reference the Supreme Court of Canada's case of *Janzen v. Platy Enterprises Ltd.*, [1989] 1 S.C.R 1252, 1989 CanLII 97, wherein it was determined that sexual harassment in the workplace includes a broad range of conduct and this would include an environment where employees are subject to "sexual gestures, sexual posturing and sexually-oriented practices, which negatively impact the work environment." It is necessary to also consider factors such as the balance of power between the parties.

[83] As mentioned, *viva voce* evidence was adduced during this motion.

[84] Succinctly, I do not find Lancia to be a credible witness. In examination-in-chief, her evidence was specked with conjecture. Testimonial references to

various conversations with other persons over the last few years of her tenure were without substantiation or unclear. In cross-examination, Lancia was repeatedly evasive to numerous questions posed by defendant's counsel.

[85] Lancia's versions of events also are contrary to the testimony proffered by Park Dentistry's witnesses. While appreciated that there may be a level of bias or motivation in favour of the employer, I prefer the evidence of the defendant witnesses, Botelho, Bucciarelli ("Bucciarelli") and Park over that of Lancia.

[86] Park Dentistry submits that in a brazen attempt to bolster her claim of constructive dismissal, Lancia raises, *for the first time ever*, baseless allegations of sexual harassment and a poisoned work environment. Lancia failed to raise any such allegation in her Resignation Letter – a highly conspicuous oversight if one is now asked to believe that she resigned because of a poisoned work environment. When pressed about her failure to reference these complaints in her Resignation Letter, she admitted that they were not the "absolute key issue" when she decided to resign. Instead, she admitted that it was the comments made by Dr. Park at a lunch almost seven weeks after she quit, that "[set her] off" and made her decide that she had been sexually harassed. It is not lost on me that Lancia failed to raise a single such allegation in her eight years of employment with Park Dentistry.

[87] I also do not accept the explanation, if any, for Lancia's tardiness or delay in bringing this issue to Park's attention. I agree with Park Dentistry that it strains credulity that Lancia would have had such complaints, yet failed to raise a single such allegation in her eight years of employment with Park. She also failed to raise any such allegation in the Resignation Letter – a highly conspicuous oversight if one is to believe that she resigned in light of a poisoned work environment.

[88] By all accounts Park and Lancia had, up until her resignation, a friendly working relationship despite Lancia's behaviour at work. They shared friendly banter via text and socialized outside the office with their spouses. While they sometimes would share risqué jokes and videos in the office; they were both willing participants, with Lancia herself often the instigator. Lancia never complained of any discomfort - the evidence belies any suggestion that she found the work environment intolerable.

[89] I observe that in her Statement of Claim, Lancia relies on only three incidents to ground her claim of a poisoned workplace, two of which occurred after she resigned and thus could not have had any impact on her work environment: Comments Park made at a post-resignation lunch; Park's text suggesting dinner; and Park allegedly invited her to join him on a golf trip to Florida in 2015. In her reply, Lancia raised additional allegations to support her claim of a poisoned work environment: Park showed her an inappropriate video at work; Park's comments about hot yoga; Park's comments about the meaning of the song, "I can't feel my face when I'm with you"; and Park touching other female staff's hair and backs.

[90] On their face, these incidents could support the conclusion that a poisoned workplace environment had been created, albeit they are neither persistent nor repeated behaviour. However, a further review of each allegation demonstrates that they do not withstand scrutiny.

[91] The cordial and friendly text messages between Park and Lancia between February 24 and March 28, when they actually meet for lunch, contradict any suggestion that Lancia felt uncomfortable with Park or that she considered him a sexual harasser who had created a poisoned work environment. In fact, it is Lancia who first suggested that they meet in person, rather than speak over the phone about the vacation issue. If Park's treatment of her was so harassing that

it had created a poisoned workplace, she would not have agreed to meet with him – let alone follow up the lunch with a friendly text after the fact, to wit: “Hi Allen, it was nice to see you too. Thank you for lunch and for taking the time to listen.”

[92] Even if Lancia genuinely believed that Dr. Park was making a sexual solicitation, the test is an objective one. A reasonable person would not find that the innocuous comment made by Park was sexual in nature.

[93] It is also unclear how inviting Lancia to join Park and his wife (Christine) for dinner amounts to sexual harassment. The evidence is that the two couples socialized on occasion and that Christine Park and Lancia were friends. I am persuaded that Lancia again misrepresents an innocent, friendly gesture into a sexual proposition in an attempt to boost her claim for constructive dismissal. In any event, the dinner invitation cannot amount to “further constructive dismissal” as claimed, as it occurred seven weeks post-resignation. It had nothing to do with Lancia’s work environment or her decision to resign. It was clearly not harassment.

[94] Lancia claims that Park invited her to join him on a golf trip to Miami where he was travelling without his wife or children. She claimed that it was an “unwelcome invitation” and testified that, although she made no formal complaint of harassment, she mentioned the incident to both Botelho and Bucciarelli. Neither Botelho nor Bucciarelli recall Lancia ever mentioning this golf trip invitation to them.

[95] Park also denied that he had invited her to join him on his annual men’s only golf trip. I accept his evidence that he understood Lancia had been planning a trip to Miami with her partner, at the same time that Park was going on a

men's-only golf trip in Orlando. He understood that Lancia's partner cancelled the trip. He suggested that she should still go to Florida.

[96] Even if Lancia believed this comment was a genuine invitation to drop everything and join him in Florida, the test is an objective one. I do not accept that Park would invite Lancia on a men's only event, during which he would play two rounds of golf every day and share a room with a male friend, ostensibly to have a sexual dalliance with Lancia. No reasonable person would conclude that this was his intention or that such a comment would contribute to a poisoned workplace environment. To mischaracterize this comment as a sexual overture, is extremely misleading. I find that Lancia has taken an innocent comment and manipulated it to fit her claim of a poisoned work environment.

[97] In the alternative, even if the comment was intended as an invitation to join him in Florida, Lancia did not make a complaint at the time, she did not raise it as a reason for her resignation and did not seek redress before the Human Rights Commission. As stated in the case of *Persaud v. Telus Corp.,* [2016] O.J. No. 1770 (S.C.), "the failure to advance a complaint can be considered by the court in determining whether impugned conduct constitutes constructive dismissal."

[98] Overall, I accept the defendant's evidence that all employees enjoyed a close working environment, where people bantered and were comfortable together; colleagues who considered each other like a second family.

[99] For example, Lancia sent a photo to Park of a patient wearing an apron with a fake penis attached. She testified that she sent it because she thought it was funny and she thought Park would find it funny. She agreed that it was the kind of humour that was common in the office and noted that "it's a bunch of women; I'm not saying that there's never a dirty joke or anything, you know."

Park agreed that it was funny and that it was “something in line that, with what we shared, you know; funny jokes and pictures and things like that”.

[100] Contrary to Lancia’s claims that she was disgusted when Park showed her the “knitting” video, the evidence of Botelho and Bucciarelli was that Lancia laughed at the video and shared it and discussed it with others. Bucciarelli’s evidence is that: “ …Know, knowing the relationship we all had, as a group – if it was, it wouldn’t have surprised me because we had that type of relationship as a group. It was a lot of joking around and, ah, these types of things – if, a video like that wouldn’t have been taboo. We all joked and laughed about it”. Bucciarelli was asked: In that environment, the video would not be considered inappropriate? Her response was “No. Like she [Lancia] showed me, and I thought it was funny, and she thought it was funny”.

[101] Botelho testified that although she wasn’t interested in watching the video, Lancia talked about it and laughed about it on a general anesthetic day (when the patients were not awake) in front of the anesthesiologists. In Botelho’s opinion, Lancia did not seem upset by the video, as she was laughing about it and talking about it like a joke. Lancia herself acknowledged that she showed the video to others, though when asked why, she responded “I’m not sure. Probably to show them how disgusting it was.”

[102] Lancia argues that it is “disingenuous” to suggest that she ought to have made a formal complaint to Bucciarelli about the video, when Bucciarelli “is complicit to the behaviours condoned in the workplace.” I am persuaded that it was Lancia who was complicit and a willing participant in the behaviour now complained of. The evidence is overwhelming that Ms. Lancia laughed about the video, showed it to others and discussed it in a joking manner. All three of Park Dentistry’s witnesses were unequivocal on this point and Lancia herself admitted that she showed it to others. Had she genuinely been offended by the video and

considered it harassing material, why would she show it to others? To now claim she was offended by the video and that it contributed to a poisoned work environment is simply without merit.

[103] While Lancia suggested Park attend hot yoga because she thought it would be good for him, he clarified that part of the reason she was suggesting he go was because there were “lots of pretty girls there in yoga outfits.” As Park testified, Lancia was aware of his erectile dysfunction, and it was a joke between them that perhaps hot yoga would help with it, too. Park testified that Lancia did not express any discomfort when he made the comment about getting an erection. Park does not deny making the quip. However, I am convinced that it was in keeping with the spirit in which Lancia was recommending he attend hot yoga in the first place.

[104] Botelho and Bucciarelli both testified that Lancia felt comfortable showing off her exposed breasts to her co-workers after the latter’s breast reduction surgery. Bucciarelli testified that Lancia had squeezed her breasts, but “that was just Michele, in, in her joking manner”. Bucciarelli and Botelho claim that Lancia exposed her breasts to them. Lancia explained that with their consent, she showed them the results of a breast reduction surgery. Both Botelho and Bucciarelli confirm that these incidents carried no sexualized connotation and was simply about revealing the effects of her surgery to her work colleagues.

[105] Bucciarelli accuses Lancia of making a false sexual harassment allegation in the past against a Dr. Amato, the prior owner of the dental clinic, which Lancia denies. She expressed that the plaintiff was often flirtatious.

[106] Bucciarelli and Botelho each testified that they had never witnessed Park engaging in inappropriate conduct. Botelho said she had never witnessed

Park touching in a sexual manner nor experienced it herself. He has put his hand on her shoulder “in an endearing way, but, never sexually.” She testified that Park was very respectful and he never made any sexual advances towards her or to others.

[107] Again, the evidence belies any suggestion that Lancia found the work environment intolerable. To the contrary, it appears that she enjoyed working with Park. Lancia and her partner socialized with Park and his wife. The Parks’ gave her gifts, and in her text messages Lancia wrote voluntary expressions of affection toward Park – as she did after receiving gift and bonuses from Park and Mrs. Park: “I am so lucky to have you as my boss and friend. I think that since David left it has been hard to get close to someone I work for. But over the years we have grown to be more than co-workers. I am so happy to know both you and Christine. Wally and I love you both. All the best in the new year.…I’m entering my 18th year and I have never received such a generous gift. I’m crying while writing this. You and Christine are forever in our hearts. Love Wally and Michelle”.

[108] As another example of the friendship between employer and employee, in December 2013, Park and his wife gifted Lancia a watch and $500. After having received the gift, Lancia texted:

> OMG!!! Allen. Thank you very much. The watch is so beautiful. Wally and I can’t say thank you enough. I am so lucky to have you as my boss and friend. I think that since David left it has been hard to get close to someone I work for. But over the years we have grown to be more than co-workers. I am so happy to know both you and Christine. Wally and I love you both. All the best in the new year.

[109] Similarly, in October 2015, Park and his wife purchased a designer gift for Lancia’s birthday. By text, Lancia thanked them, stating: “Allen & Christine, You spoil me rotten!! Thank you, thank you, thank you!!!!” “I love Hermes. What

a great night. Thank you for having dinner with us and thank you for the beautiful gift. We (Wally and I) love you both!! XOXO”

[110] These messages are entirely inconsistent with the allegations she has made as part of this claim. Like her reliance on the post-resignation contact with Park, Lancia’s allegations of sexual harassment have been misrepresented in an attempt to bolster her claim for constructive dismissal, rather than the reasons contained in her own resignation letter.

[111] As mentioned, I find Park’s testimony to be entirely credible and reliable. Park had a clear and consistent recollection of the matters about which he provided evidence, and he provided a straightforward account of events, without apparent embellishment.

[112] I do not find that the working relationship was to the point of being strained by the events alleged by the plaintiff. I also reject Lancia’s assertion that the atmosphere at Park Dentistry was toxic or that she was subjected to harassment. I do not consider Park’s conduct, taken as a whole, to be needlessly provocative, harassing or demeaning. The corporate atmosphere was far from toxic. Overall, I do not find that Lancia was treated in a demeaning or humiliating manner or that the defendant acted in a manner intended to humiliate or belittle the plaintiff.

[113] Quite the contrary. To the objective, reasonable bystander, the evidence presented does not support a conclusion that a poisoned workplace environment had been created, persisted or repeated: *General Motors of Canada Ltd. v. Johnson*, 2013 ONCA 502.

[114] I reject the plaintiff’s submission that it is necessary to find a breach under the first or second branches of the *Potter* test, without having to establish

that the reason for resignation was related to the breach. In my view, the decision in *Potter* does not change the requirements for causation. Without a causal link between her allegations of a poisoned workplace or sexual harassment and the true reason for her resignation, damages do not flow. Even if the plaintiff could establish that she suffered from a poisoned work environment, or was subjected to sexual harassment, I find that she did not resign for those reasons.

[115] In my opinion, none of the actions complained of, either individually or cumulatively, provide sufficient reason to conclude that Park dentistry intended to repudiate the employment contract and therefore constituted grounds for a claim of constructive dismissal. Lancia has not discharged her onus of establishing that she was subject to sexual harassment.

[116] Accordingly, I find that Lancia has not established that Park's conduct was likely to cause a reasonable person in the same position as the plaintiff to find that continued employment with Park Dentistry was intolerable, which would have allowed Lancia to treat the employment relationship as at an end. It was Lancia who unilaterally terminated the employment relationship. Accordingly, Lancia's constructive dismissal claim has no merit and summary judgment must be granted in favour of Park Dentistry.

REASONABLE NOTICE PERIOD:

[117] The oft-quoted authority on this issue is found in the case of *Bardal v. The Globe and Mail*, [1960] O.J. No. 149, 24 D.L.R. (2d) 140.

> The reasonableness of the notice must be decided with reference to each particular case, having regard to the character of the employment, the length of service of the employee, the age of the employee and the availability of similar employment, having regard to the experience, training and qualifications of the employee.

[118] Although I have determined that the plaintiff has not established a constructive dismissal, it is incumbent on me to calculate the required notice period and damages.

[119] Various courts have properly taken a flexible approach in determining whether the employer's conduct evinced an intention no longer to be bound by the contract and what the appropriate notice period is required to remedy the breach of the contract or employment relationship. In my view, in the circumstances of this case, the reasonable person would have remained at Park for the balance of the working notice period.

[120] In the event that damages ought to be awarded, in light of her age at the time of the dismissal, (48 years old), the character of her employment (Restorative Dental Hygienist, a professional position requiring greater training than a regular hygienist), and her length of service (approximately 19 years, 17 of them continuous), Lancia is entitled to a reasonable notice period of 18 months.

DUTY TO MITIGATE:

[121] In *Evans v. Teamsters Local Union No. 31*, 2008 SCC 20, [2008] 1 S.C.R. 661, at para. 30 the Supreme Court of Canada stated:

> This Court has held that the employer bears the onus of demonstrating both that an employee has failed to make reasonable efforts to find work and that work could have been found (*Red Deer College v. Michaels*, [1976] 2 S.C.R. 324). Where the employer offers the employee a chance to mitigate damages by returning to work for him or her, the central issue is whether a reasonable person would accept such an opportunity. In 1989, the Ontario Court of Appeal held that a reasonable person should be expected to do so "[w]here the salary offered is the same, where the working conditions are not substantially different or the work demeaning, and where the personal relationships involved are not acrimonious". (*Mifsud v. MacMillan Bathurst Inc.* (1989), 70 O.R. (2d) 701, at p. 710).

[122] Consistent with the principles set out by the Supreme Court of Canada in *Evans,* the question to be determined is whether a reasonable person would have remained at Park Dentistry for the balance of the notice period, taking into account the critical element that an employee is not "obliged to mitigate by working in an atmosphere of hostility, embarrassment or humiliation". An employee's obligation to mitigate by remaining with his/her employer for the period of working notice is described as "efficient breach".

[123] Courts ought not to discourage efficient breach: *Bank of America (Canada) v. Mutual Trust,* 2002 SCC 43. See also *Farwell v. Citair Inc*., 2014 ONCA 177, at paras. 19-21. The authorities provide that the onus is on the employer. I agree with Park Dentistry that even if Lancia was constructively dismissed, she suffered no damages since she failed to mitigate her damages.

[124] I agree with Park Dentistry that Lancia would have been obliged to mitigate her damages, and in any event, did continue to work past the notice period, with the result that her damages would have been nil. Her working conditions were substantially no different than previously and there was no fundamental alteration to the terms of the relationship.

[125] Park Dentistry offered Lancia eighteen months' notice. Upon signing the New Contract, Lancia agreed that her notice period would be limited to eight weeks. Lancia's mitigation argument presupposes that the employer has offered the employee a chance to mitigate damages by returning to work. To trigger this form of mitigation duty, Park Dentistry was therefore obliged to offer Lancia the clear opportunity to work out the notice period. Such is the case here.

[126] I am persuaded that Lancia failed to mitigate her damages by not commencing her job search until almost seven months after she resigned. Lancia failed to provide any cogent reason for the delay in a timely manner and until

filing her Affidavit of Earnings, which she did not swear until the second day of the hearing. I have some concerns about the reliability of any alleged disability claim and note that Lancia did not mention such a claim in her affidavit, or in her cross-examinations. She failed to provide supporting documentation for the claim. Based on the evidence, I am not convinced that Lancia properly mitigated her damages.

CONCLUSION:

[127] In my opinion, there is no genuine issue requiring a trial. I find that Lancia was not constructively dismissed on any heads of claim advanced in this action and motion. In this case, Park Dentistry had a right to make unilateral changes to terms in the employment arrangement in the manner that it did, upon providing reasonable notice of that change to Lancia. With the New Contract and 18 months of working notice being offered, this constituted reasonable notice.

[128] For all of the aforementioned reasons, summary judgment is granted in favour of Park Dentistry with one caveat.

[129] For greater certainty, all of Lancia's claims are dismissed with the exception of reimbursement of vacation monies recovered or withheld by Park Dentistry in 2015 that were due and owing to the plaintiff. It is ordered that Park Dentistry pay Lancia the sum of $3,763 plus interest for the vacation pay wrongfully deducted from her salary during her last year of employment.

[130] If the parties cannot agree on the issue of costs, I will consider brief written submissions. These cost memoranda shall not exceed three pages in length, (not including any bill of costs or offers to settle). Park Dentistry shall file its costs submissions within 15 days of the date of this judgment. Lancia may file her costs submissions within 15 days of the receipt of the respondent's materials.

Park Dentistry may file a brief reply within five days thereafter. If submissions are not received by March 9, 2018, the file will be closed and the issue of costs considered settled.

_____
A. J. Goodman J.

Date: February 7, 2018

CITATION: Lancia v. Park Dentistry, 2018 ONSC 751
COURT FILE NO.: 16-59020
DATE: 2018/02/07

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:

MICHELE LANCIA

Plaintiff

- and -

PARK DENTISTRY PROFESSIONAL CORPORATION

Defendant

REASONS FOR SUMMARY JUDGMENT

A.J. Goodman J.

DATED: February 7, 2018