

Court of King's Bench of Alberta

Citation: Johnson v Country Hills Chrysler Dodge Jeep Ram Ltd, 2026 ABKB 629

Date: 20260908

Docket: 1901 06911; 1901 10356

Registry: Calgary

Between:

Ronnie Johnson

Plaintiff

- and -

Country Hills Chrysler Dodge Jeep Ram Ltd.

Defendant

Between:

Tony Bedard

Plaintiff

- and -

Country Hills Chrysler Dodge Jeep Ram Ltd.

Defendant

**Reasons for Decision
of the
Honourable Justice J R Ashcroft**

[1] Ronnie Johnson and Tony Bedard (the “Plaintiffs”) were long-time employees of a vehicle sales dealership, Varsity Chrysler Dodge Jeep Ram now known as Country Hills Chrysler Dodge Jeep Ram Ltd (referred to in this decision as “Country Hills” or the “Defendants”). At the time of the events in issue, both individuals were Finance and Insurance Managers (F and I Managers) wherein their full compensation took the form of commissions.

[2] An F and I Manager, as explained by the witnesses, receives the vehicle sale file from the front of house. The F and I Manager then addresses financing as well as selling the client value added products such as life and disability insurance, glass and paint protection.

[3] For the last year and a half of their employment, Mr. Johnson and Mr. Bedard operated under the “Business Office Pay Plan” dated July 28, 2016 (the “2016 memo”). This document purported to set out certain terms of their employment. The parties disagree on the interpretation of the compensation terms of this pay plan.

[4] Leading up to March 1, 2018, the four F and I managers rotated on a set four-week schedule. In February 2018, one of the F and I managers resigned.

[5] On March 1, 2018, the three remaining F and I Managers were presented with a memorandum (the “2018 memo”) which set out a compensation and work schedule that the Plaintiffs say substantially and unilaterally changed their terms of employment.

[6] The Plaintiffs allege that this memorandum effectively reduced their remuneration while at the same time increasing their hours of work. As such, they alleged that they were constructively dismissed. Mr. Johnson also alleges that his employment was terminated in a meeting a few days later and his signature on any purported resignation letter was forged.

[7] The Defendants respond that the commission structure under the 2018 memo was similar to or the same as the compensation structure under which the parties operated. The Defendants further state that the hours of work under the new schedule were flexible, as they always had been, and the schedule simply ensured F and I manager coverage at all times in the dealership. Accordingly, the Defendants maintain that there was no constructive dismissal. The Defendants also say Mr. Johnson resigned and deny that any resignation letter was forged.

Background

[8] In this streamlined trial, in addition to affidavit evidence, the Plaintiffs as well as Jason Bender, the General Manager of Country Hills, and Justin Migneault, the former General Sales Manager at Country Hills, gave evidence.

[9] The F and I managers’ compensation took the form of a percentage of commissions calculated as a pool, subject to chargebacks and spiffs. Chargebacks were deductions made if a customer paid out their financing in a certain period following a sale. Spiffs were cash incentives paid from the F and I Managers’ commissions to sales staff for pre-selling the various products offered by the F and I department.

[10] Prior to March 1, 2018, the F and I managers operated under a sliding scale of gross commissions pursuant to the 2016 memo.

[11] The terms of the 2016 memo are set out in the Bedard and Johnson affidavits and are as follows:

August 1 [2016], Forward

- 20 % Business Office Pool (Standard)
- Or 21 % if NCD Monthly F& I Average is \$2450+
+UCD Monthly F & I Average is \$1750+
- Or 22% if NCD Monthly F& I Average is \$2650 +
+UCD Monthly F& I Average is \$2000 +
- Or 23 % if NCD Monthly F & I Average is \$2900
+UCD Monthly F& I Average is \$2400¹

*Monthly Averages to be Confirmed by Justin M or Steve K Off the Month End First Canadian F&I Report

[12] The Plaintiffs submit that the amount paid on commission, pursuant to the 2016 memo, was not a specific percentage per person but rather was divided equally by the number of business managers in the F and I Department in accordance with the above percentages. Due to one business manager resigning at the end of February 2018, the Plaintiffs say the remaining F and I Managers would, going forward, receive a higher percentage because the total commission pool would now be divided by three instead of four managers.

[13] The Defendants say that the division was based on four managers and there was no term, implied or otherwise, which represented that the managers would be entitled to a higher percentage if one of the managers left.

[14] The witnesses all testified to a meeting which occurred on March 1, 2018. Justin Migneault, Jason Bender and the three F and I managers, including Mr. Johnson and Mr. Bedard, were present. A new memorandum setting out the commission structure and a work schedule was presented to the three F and I Managers (the “2018 memo”).

[15] The 2018 memo was as follows:

Effective March 1, 2018 the Business Office will consist of 3 full time Business Managers on a 3 week rotation. The Business Managers will be compensated 5.0% each of the department gross less chargebacks and spiffs. Business Managers will follow the set schedule attached.

Each Business Manager will receive \$5000 draw at month end and will paid [sic] the balance of the commission on the 15th of the following month.

If and/or when the F and I Department expands to a 4th Business Manager, the schedule will be revised and commission will be based at 4.0 percent of department gross less chargebacks per Business Manager.

[16] The attached shift schedule divided coverage for the dealership among three individuals over a three-week period.

¹ UC and NC means used car sales and new car sales

[17] The Plaintiffs submit that the new commission structure under the 2018 memo which was based on a flat 5 % instead of being divided by the number of managers, in addition to taking away the opportunity for a higher percentage if certain targets were reached, significantly decreased their compensation. Further, the mandatory reduction to 4% as set out in the 2018 memo when a fourth manager was hired would reduce their commission even further. The Plaintiffs say the new work schedule attached to the 2018 memo also increased their hours from an average of approximately 38 hours per week to over 50 hours per week.

[18] The Plaintiffs say the increased hours and the change in compensation both separately and cumulatively demonstrate that the employer made a unilateral and substantial change to the employment agreement without the employees' consent, constituting constructive dismissal.

[19] The Defendants say that there is no evidence that the dealership ever represented that the F and I managers would be entitled to a higher individual percentage if one of the managers left; there was also never any implied contractual term that the Plaintiffs were entitled to equally share in the 20% pool regardless of the number of employees. Further, the compensation was routinely restated and restructured as the staffing needs of the F and I department changed. As such, the Defendants argue that the changes were minor and operational which the dealership could make without notice. The Defendants said there was a declining sales volume and as such fewer F and I Managers were needed.

[20] The Defendants also say that the change in the working schedule was not significant and the Plaintiffs' calculation did not take into consideration the flexibility they had in their jobs, nor did it take into consideration their lunch hours. The Defendants say that the employees did not keep track of their hours and could leave early if the dealership wasn't busy. The Defendants also say that the 2018 memo was not intended as a directive but rather the employees were asked to try it and provide feedback.

Law on Constructive Dismissal

[21] The primary burden is on the employee to establish constructive dismissal. Pursuant to the seminal case of *Farber v Royal Trust Co*, 1997 CanLII 387 (SCC), [1997] 1 SCR 846 at para 24 "where an employer makes substantial changes to the essential terms of an employee's contract of employment and the employee does not agree to the changes and leaves his or her job the employee has not resigned but has been dismissed."

[22] The case of *Potter v New Brunswick Legal Aid Services Commission*, 2015 SCC 10 did not change the *Farber* analysis; rather it fleshed out more specifically the framework:

[43] Thus, constructive dismissal can take two forms: that of a single unilateral act that breaches an essential term of the contract, or that of a series of acts that, taken together, show that the employer no longer intended to be bound by the contract.

Implementation of Memo

[23] First, I find that the 2018 memo was a directive from the employer and not simply some sort of pilot project subject to negotiation. While there may have been communications in the meeting for the employees to provide feedback, it is clear from the tone and the wording of the 2018 memo, objectively assessed, that no trial period was ever intended. The wording used is

mandatory and includes the statements “Business Managers will be compensated....”. “Business Managers will follow the set schedule attached”.

[24] I find that the 2018 memo was, as stated, mandatory and effective immediately and the F and I managers were subject to its terms without any notice. My interpretation of the text of the memo relying on contractual principles is consistent with the evidence of Bedard, which evidence I accept, who testified that the managers were told that this was the way Country Hills was going and that there was no room for negotiation.

Significant Unilateral Change to Work Hours

[25] Mr. Bender testified that the schedule attached to the 2018 memo was presented for the purposes of scheduling three people instead of four and that the number of shifts did not change. Mr. Bender stated there was flexibility in the shift and employees could leave early depending on how busy the dealership was on that particular day.

[26] I accept that Country Hills did not keep track of the hours of the F and I managers and senior employees Mr. Bedard and Mr. Johnson did not punch a clock in and out. However, both Mr. Bender and Mr. Migneault confirmed that the F and I Managers were expected to be on hand to service the needs of clients during their shifts and in this way provide coverage. Jason Bender also gave evidence in questioning that if the shift of an F and I manager started at noon they were expected to show up at noon. He also gave evidence that if an F and I Manager was sick they were expected to phone in. From this evidence I find that the F and I Managers were expected to be in the dealership available to carry out their duties in accordance with their shift and the schedule.

[27] Mr. Johnson and Mr. Bedard gave evidence that the schedule would typically be developed by the F and I team, particularly Mr. Johnson, and then Mr. Migneault would review and sign off on it. Mr. Bedard testified to a schedule which was attached to Mr. Johnson’s filing cabinet.

[28] Mr. Migneault stated that Mr. Johnson created the schedule and that he didn’t recall the F and I Managers running the schedule past him. Mr. Bender said he had not seen the schedule attached to the filing cabinet but testified that he believed it was not reflective of the hours worked by the F and I team. However, Mr. Bender was not involved in the day-to-day operations of Country Hills at that point in time. Mr. Migneault, in response to a question as to how many hours the F and I Managers worked, responded that it was tough to call and later gave what appeared to be a vague estimate as to 6 or 7 hours per day.

[29] I accept that the hours set out in the above referenced schedule attached to the filing cabinet, as confirmed by the evidence of Mr. Bedard and Mr. Johnson, who actually worked under the schedule, were reflective of the hours the F and I team worked in a typical week or rotation prior to March 1, 2018.

[30] This schedule set out an average of 38 hours per week moving to 45 hours per week depending on which week the employee was on. A comparison of this schedule with the one attached to the 2018 memo shows an immediate increase in the required hours working in the F and I department from an average of 50 hours per week moving up to 57 hours per week.

[31] While the number of shifts may not have changed significantly the actual hours worked did change.

[32] The Defendants have argued that both the old schedule and the new schedule were flexible, and that the Plaintiffs' assessment of the hours required to work under the new schedule did not take into consideration a meal break. However, neither the schedule in place prior to March 1, 2018 or after March 1 accounted for any standard lunch break. Accordingly, this variable does not affect the reliability of the comparison of hours I have just made.

[33] The Defendants also submit that the managers could leave early if the dealership was not busy; however, there was also evidence that they stayed later if it was busy.

[34] The fact remains that the time the Plaintiffs were expected to be at the dealership ready for work increased from an average of 38 hours per week to an average of 50 hours per week.

[35] The Defendants submitted *Hussey v Canadian Pacific Hotels Corp*, 2004 NLSCTD 77, *Vanelli v Sobeys Capital Inc.*, 2005 CanLII 4091 (ONCA), 38 CCEL (3d) 183; *Kucera v Qulliq Energy Corporation*, 2013 NUCJ 2; *Gillis v Sobeys Group Inc.*, 2011 NSSC 443; *Creighton v Fredericton South Nursing Home Inc.*, 2001 NBQB 239 as supportive of their position that the increased hours did not represent a substantial change. However, unlike those cases, the facts before me are not about changing a shift from night shift to day shift or declining an alternative position offered by the employer after the employer eliminated an employee's position. It is about a significant increase in work hours wherein the F and I Managers were expected to be at the dealership to ensure coverage for clients.

[36] I find that the schedule attached to the 2018 memo which the employees were required to follow constituted a unilateral and substantial increase in the Plaintiffs' scheduled work hours. I do not accept that the scheduling change was operational or administrative, or reflected such a flexible arrangement that the hours were not significantly altered.

[37] I find that the increased hours of work constituted a unilateral material change to the essential terms of their contract without notice and amounts to constructive dismissal. The increased hours of work showed an intention by the employer not to be bound by the contract.

[38] As will become clear, this finding is further reinforced when one views the change to the employee's work hours without notice together with the change to their compensation structure. Indeed, as will become clear, I agree with the position of the Plaintiffs that they were required to work longer hours for less money.

Significant Unilateral Change to Compensation

[39] The parties take different positions regarding how the commissions were to be paid out under the terms of the 2016 memo. Accordingly, it is necessary to undertake an exercise in contractual interpretation to determine if the 2018 memo constituted a substantial unilateral change in regard to compensation.

[40] Both parties presented some limited evidence regarding the subjective intentions of the parties when the 2016 memo was presented and implemented. Both Mr. Bedard and Mr. Johnson gave evidence that under the 2016 memo they were intended to continue to be paid the base 20% commission as divided by the number of managers at the time. Mr. Migneault gave evidence that under the 2016 memo the pool was 20% to be divided between the four managers with 5% to each manager.

[41] However, an exercise in contractual interpretation “is not to determine what the parties subjectively intended but what a reasonable person would objectively have understood from the words of the document read as a whole and from the factual matrix”: **IFP Technologies (Canada) Inc. v EnCana Midstream and Marketing**, 2017 ABCA 157 at para 79 citing Geoff R. Hall, *Canadian Contractual Interpretation Law*, 2nd ed (Markham: LexisNexis, 2012) at 33.

[42] Under **Sattva Capital Corp. v Creston Moly Corp.**, 2014 SCC 53 and **IFP**, the goal of contractual interpretation is to determine the objective intent of the parties at the time the contract was made: **IFP** at para 79 citing **Sattva** at para 49.

[43] Consideration of surrounding circumstances may be used as an objective interpretive aid to determine the meaning of the words the parties used: **Sattva** at paras 46, 59-61. Surrounding circumstances must be considered to ensure the written words of the contract are not looked at in isolation or divorced from the background context against which the words were chosen: **IFP** at para 81. The goal is to deepen the trial judge’s understanding of the mutual and objective intentions of the parties as expressed in the words of the contract: **IFP** at para 81.

[44] Ultimately, the surrounding circumstances can include “absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man”: **Sattva** at para 58 citing Lord Hoffman in **Investors Compensation Scheme Ltd. v West Bromwich Building Society**, [1998] 1 WLR 896 (UKHL), 1 All ER 98 at 114.

[45] I agree with the Defendants that the former pay plans or documents cannot be viewed as forming part of a larger composite agreement. However, they are part of the objective background and surrounding circumstances that may be considered as part of the exercise in contractual interpretation.

[46] A prior memo, dated October 17, 2000 (the “2000 memo”), addressed Ronnie Johnson’s compensation by setting out specific percentages for each F and I Manager: 7 % for Ron Johnson, 6% for Justin and 6% for Jamie. This memo is admittedly from quite some time ago; however, I find it still has some relevance for two reasons. First, as will be discussed later, it supports certain reasonable expectations of the parties given the alleged ambiguity in the later payment memos. Secondly, it also demonstrates that if Country Hills wished the parties, particularly Mr. Johnson, to be limited to a certain percentage individually in the memo, there was a precedent for doing that.

[47] The 2011 memo recognizing Mr. Bedard’s promotion to the business of Business Manager indicated “an equal 25% partner in the 22% gross generated”. The reference to the 25% indicates that the division of the pool was predicated on an equal division between 4 individuals. The 2011 memo then reflected an intention to move away from individual pay plans to a commission pool, albeit limited to a cohort of 4.

[48] More significantly, the 2015 business pay plan, dated September 24, 2015 (the “2015 memo”), specifically set out a payment structure of “22 % of the business office gross, net chargeback and expenses divided by the number of business managers employed”.

[49] The 2016 memo is silent with respect to whether the business office gross was to be divided equally between a set number of managers or whether the profits were to be divided equally regardless of the number of managers. It does give me pause that the specific wording “divided by the number of business managers employed”, which was included in the 2015

memo, was not in the 2016 memo. An inference could be drawn that this omission was deliberate.

[50] However, in the end result, I prefer the interpretation of the 2016 memo as urged by the Plaintiffs. The actual wording of the text which states “20 % of the business office pool” implies an equal division between the number of managers. This wording is quite different than providing for 5% per manager regardless of the number of managers.

[51] Further, the Finance Commission Statements generated by Country Hills in their accounting department until March 1, 2018, clearly state that the total commissions were “divided by # of Managers”. These finance sheets were generated every month and, in my view, confirmed in writing a representation from management that the total commissions were divided by the number of managers, and not simply by either four managers or 5%.

[52] I acknowledge the argument that the 2016 memo specified the names of four managers which could be interpreted as an employment compensation contract applicable to and limited to the four named managers. However, Lanette Andreas came on board as an F and I Manager during this time and received commissions under this pay plan, supporting my finding that the pay plan was not limited to the named cohort of 4 but rather governed any manager in the F and I department. There was also no specific percentage division in the 2016 memo as there was, for example, in the 2011 memo with Mr. Bedard (a 25% division in the gross generated) which would, on its face, limit the division to the cohort of 4.

[53] I also note that the 2015 payment plan stated that “there will be an analysis of the departments performance and decisions will be made as to whether to continue on pool or move to individual pay plans.” From this I infer that any change to the pool commission plan to individual payment plans in any subsequent document would be clear and unambiguous. However, the 2016 memo did not signal any clear change from a pool percentage to individual payment plans.

[54] I accept the evidence from the witnesses that an equal division of the pool was designed to promote teamwork among the F and I Managers. However, this purpose is also easily accomplished by specifying equal percentages: e.g. 5%.

[55] Alternatively, to the extent the 2016 Memo is unclear, I find that Country Hills did not make it sufficiently clear at the time the 2016 Memo came into play that the employees were limited to a 5% commission, notwithstanding the number of managers.

[56] I agree with the Defendant that any interpretation of an employment contract adopted by an employee cannot be said to be binding on the employer. However, in this case, I find that a lack of clarity led to the employees developing reasonable expectations that the pool would be divided between the three remaining managers. This is particularly so given the division of the compensation pool by the number of managers pursuant to the 2015 memo. Accordingly, I find that the employers imposition of its interpretation in these circumstances resulted in constructive dismissal: Ellen Mole in, *Wrongful Dismissal Practice Manual*, 2nd ed (Toronto: LexisNexis Canada Inc, 2004) (loose-leaf revision 85) at § 3.88 citing *Nyveen v Russell Food Equipment Ltd.*, 1987 CanLII 6632 (QCCS), AZ-88149052, *Cardwell v Young Manufacturer Inc* [1988], OJ No 2932 (ONSC) 30 CCEL 112 at paras 66-67, *Lynch v Mac Carter Ltd.*, [1995] 17 CCEL (2d) 292n(NBQB), NBJ No 484 at para 15.

[57] Viewed this way and accepting, in this alternate finding, that there was a lack of clarity in the 2016 memo which may have lead to a misunderstanding, Country Hills' "imposition of its interpretation" through the March 1, 2018 memo still results in constructive dismissal.

[58] There was conflicting evidence by all parties regarding how many managers were employed over the years prior to the alleged termination of Mr. Bedard and Mr. Johnson. Mr. Bender said between two and five. Mr. Johnson said between three and four, later acknowledging there may have been up to five. Mr. Bedard noted that there may have been five for a short period of time. The inconsistency on this point in witness testimony is not unexpected given the passage of time and demonstrates some unreliability in their testimony.

[59] The evidence supports that there were five managers hired for the period of time between September, 2015 and March, 2016. During this period of time the parties were governed by the 2015 memo which clearly indicated a division of the commissions between the number of managers. I understand the argument that if there were five managers or more, then the division by the number of managers should result in the Plaintiffs receiving less than 5%; however, the evidence was that they did not receive less than the 5% despite the specific wording in the 2015 memo.

[60] However, I do not find this evidence to provide any significant elucidation on the objective intent with respect to the 2016 memo. Simply because the parties seemed to abide by a base of 5% does not mean that the amounts were not intended to be divided by the number of F and I Managers. Indeed, on this point, I accept the evidence of Mr. Bedard. He testified that the word "Standard" in the 2016 memo beside 20% Business Office Pool was intended as a minimum baseline. This meaning is consistent with including the word "Standard" in the memo.

[61] In terms of whether the change in compensation was a type of operational decision which the parties accepted throughout their tenure, and as such was not an essential term of their contract, I do not accept this position. There was no written document which allowed the employer to change the commission structure without notice. While I accept that the compensation was changed from time to time, the changes reflected give and take between the employer and the F and I Managers. For example, the change to move, under the 2016 memo, to a sliding scale up to 23% over a 22% flat rate was a change which offered some advantages for the F and I Managers in terms of an opportunity for a higher percentage of commissions. I also do not accept the proposition that because the F and I Managers may have acquiesced to other compensation changes, this prevents them from contesting substantial future changes to their compensation and hours.

[62] Remuneration is at the heart of employment. I cannot find any implied operational right of Country Hills to make substantive changes to remuneration without notice which must be accepted by employees, notwithstanding its magnitude or impact.

[63] The Plaintiffs' witnesses gave evidence regarding how much commission they earned in terms of percentage and their reliance on the First Canadian Sheets to develop these numbers. The uncontroverted evidence was that the First Canadian sheets were developed by the employees to track their commissions and then these sheets were submitted to the accounting department. From the First Canadian sheets Mr. Bedard and Mr. Johnson calculated approximately six times in the last 12 months prior to March 2018 when their commissions would have reached numbers resulting in a 21% share of the profits to be divided as opposed to the 20%.

[64] The Defendants provided finance sheets from October 2017 through to February 2018 as well as a gross profit analysis from 2017. The numbers summarized from the First Canadian sheets were not entirely consistent with the numbers from the finance sheets which were relied on at the end of the day to pay out commissions to the employees. Mr. Bender gave evidence that the First Canadian sheets were simply for self reporting. I do not accept this minimization of the reports as the 2016 memo explicitly states that monthly averages were to be confirmed by Justin M and Steve K off the month end first Canadian reports. However, I do accept that the final numbers for commission pay outs were those from the Country Hills accounting department. The Plaintiffs would likely have taken issue with their commission pay outs if the accounting department had underpaid them.

[65] I also acknowledge that Mr. Johnson gave conflicting evidence regarding whether or not he ever received 7.3 %. I find this to be an unreliability in his memory. He had a long history with Country Hills especially considering that the question pertains to remuneration through every month he was an F and I Manager. I note that he would have received 7% pursuant to the 2000 memo he was initially hired under.

[66] However, even if practically the Plaintiffs had not yet earned, on a regular basis, a higher amount of commission than the 5 % they would have earned upwards of 7% pursuant to the terms of the 2016 memo when the fourth manager resigned. A difference between 7% and 5% (under the new 2018 Memo) translated into a significant reduction in remuneration.

[67] The Defendants have argued that there are no grounds for inserting an implied term, indicating a division of the commissions by the number of managers, into the Agreement citing *Canadian Pacific Hotels Ltd. v Bank of Montreal*, 1987 CanLII 55 (SCC), [1987] 1 SCR 711; *M.J.B. Enterprises Ltd. v Defence Construction* (1951) Ltd., 1999 CanLII 677 (SCC), [1999] 1 SCR 619; *Machtinger v HOJ Industries Ltd.*, 1992 CanLII 102 (SCC), [1992] 1 SCR 986

[68] As set out by the Defendant's these three cases advance the proposition that the Court may imply a contractual term in three circumstances:

- i. custom or usage;
- ii. as a legal incident of a particular class or type of contract; and
- iii. as a matter of fact based on the presumed intention of the parties, where the term is necessary to give the contract business efficacy or is so obvious that it satisfies the officious-bystander test. (*M.J.B. Enterprises* at para 27 citing *Canadian Pacific*).

[69] The Defendants submit that the Plaintiffs assertion that there existed an implied term of a fourth F & I manage fails because it does not fall into the aforementioned three circumstantial scenarios.

[70] As noted in HG. Beale, ed, *Chitty on Contracts: General Principles*, vol 1, 36th ed (London, UK: Sweet & Maxwell, 2026) at 1324 [*Chitty on Contracts*], that while there is overlap, the implication of a term into a contract is a distinct exercise from the interpretation of a contract.

[71] Further, *Chitty on Contracts* at 1325 notes that “the process of interpretation generally precedes implication and has been described as the precursor of implication so that at least in most cases it is only after the process of interpreting or construing the express words of an

agreement has been completed that the issue of whether a term is to be implied will be considered by the court”.

[72] I accept the Defendant’s submission that there are only limited circumstances in which a term should be implied into the contract. However, I have already found through an interpretative exercise that the wording of the memo and a consideration of the surrounding circumstances, including prior memos and the finance commission statements generated by Country Hills, support an objective intention by the parties that the pool, as a percentage, at the time of the 2016 memo was to be divided among the number of managers. Given these findings, an implied term analysis is neither necessary or appropriate.

[73] Again, remuneration goes to the root of the contract. The parties earned compensation solely through this commission type structure. The new memo effective immediately, unilaterally and substantially changed the division structure for both compensation and work hours, both essential terms of the employment contract for the three remaining F and I managers. As such the Plaintiffs were constructively dismissed.

[74] Mr. Bedard formally provided a letter on March 2, 2018; however, that letter references constructive dismissal and a resignation that only came about because of that constructive dismissal.

[75] With respect to Mr. Johnson, while he did give evidence that he intended to continue working and indeed he did come into work on March 5, 2018, after the weekend, I still find that Mr. Johnson was constructively dismissed. Mr. Migneault gave evidence in the March 5, 2018, meeting that Mr. Migneault told Mr. Johnson that he “had given him the weekend”. This statement appears to indicate that Mr. Migneault had given Mr. Johnson the weekend to either accept the terms or leave.

[76] Mr. Johnson was a long-standing employee of some 20 years, the meeting changing the compensation and hours for the F and I managers had occurred only a few days prior with fellow F and I managers resigning, and tensions were extremely high. I find in these circumstances Mr. Johnson has not condoned the constructive dismissal and can still maintain a position of constructive dismissal notwithstanding his actions in coming into work after the weekend and his position that he was willing to continue working at that time. Indeed, the jurisprudence supports that employees are entitled to a reasonable amount of time to adjust to changes and decide whether to accept them: *Farquhar v Butler Brothers Supplies Ltd.*, 1988 CanLII 185 (BCCA), 23 BCLR (2d) 89 at 3-4.

[77] Given my findings of constructive dismissal based both on the newly implemented compensation structure and the increased hours, it is not necessary for me to address whether the 4% reduction in compensation if four managers were hired constitutes constructive dismissal based on anticipatory breach.

[78] For completeness, however, I will address this point. An essential change to the contract or fundamental breach can be present or anticipatory: *Davies v Canadian Satellite Radio Inc.*, 2010 ONSC 5628 at para 53. I acknowledge that the memo purported to set out an event in the future, the reduction from 5% to 4% if a fourth manager was hired.

[79] The Defendants’ argue that there was no anticipatory breach because there was “no fixed implementation date, no defined notice or transitional period, and, most importantly, no certainty that the 4% compensation structure would ever become operative.” The Defendants cite four

cases to advance this proposition: *Wronko v Western Inventory Service Ltd.*, 2008 ONCA 327, 90 OR (3d) 547; *Kafka v Allstate Insurance Company of Canada*, 2012 ONSC 1035; *Nufrio v Allstate Insurance Company of Canada*, 2017 ONCA 948.

[80] The Defendants submit that *Wronko* demonstrates the relevant threshold for determining an anticipatory breach which requires an unequivocal communication that the employer intends, at a future time, to cease performing an existing contractual obligation. The Defendants further rely on *Kafka* and *Matheson* to demonstrate that a change must be certain to occur on a future date and the potential seriousness of a proposed compensation change is insufficient where the adverse circumstance relied upon never arises. In sum, the Defendants submit that the hiring of a fourth manager was never certain to happen and therefore, there was only a potential change of an essential term of the employment contract which does not amount to an anticipatory breach.

[81] The Plaintiffs point to an advertisement wherein Country Hills was looking for another F and I Manager. Johnson says his review of the website on Indeed confirmed that the position had been posted 30 plus days ago around the time Lanette Andreas resigned in February, 2018. The advertisement indicates that the notice has been active for more than 30 days.

[82] Jason Bender and Justin Migneault testified that they had no knowledge of hiring a fourth manager at this time. However, they did not dispute that Country Hills had posted the advertisement.

[83] I also note as per questioning and undertaking evidence, that Country Hills would not provide any information regarding the number of managers working, following the introduction of the 2018 memo, including a fourth person, for a two-year period, on a month-to-month basis.

[84] The Plaintiffs urge me to make an adverse inference against the Defendants' refusal in regard to this undertaking. The Defendants say that given that the whole F and I department had resigned, any hirings would not be an indication of whether a fourth manager was going to be imminently hired.

[85] I am prepared to draw an adverse inference that a fourth F and I Manager was hired resulting in a reduced commission to 4% and constituted an anticipatory breach. While I must be cautious about drawing adverse inferences, I find that the refusal by the Defendants to provide this information was not reasonable and the information would have exposed facts unfavourable to the Defendants: *Howard v Sandau*, 2008 ABQB 34 at para 39. Accordingly, I find that the Defendants did hire managers, including a 4th manager, on or around April, 2018 limiting the plaintiffs to a 4% commission. This constituted a unilateral change without notice impacting an essential employment term.

[86] Further, if only three managers were working, I have found that under the new schedule the number of hours worked at the dealership significantly increased. Either the F and I Managers accepted a three-person operation with increased hours or a four-person operation with less hours but a reduction in compensation to 4%. Both scenarios resulted in additional essential changes to the terms of the contract. The plaintiffs gave evidence that they were being required to work more for less money. I find that this evidence supports that the 4% reduction of commission compensation when a 4th manager was hired supports that the plaintiffs resigned, at least in part, due to reduction to 4% commission.

[87] Lastly, the Defendants have argued that the new memo did not have any practical effect in terms of bonuses as the Plaintiffs only rarely hit the bonuses. The Defendants point to Mr.

Bedard's calculations being different than the accounting department's calculations which included chargebacks and spiffs. I accept that the opportunity for the bonus was less practically significant than the change in commissions being divided by the number of managers. On its own, the change in the bonus structure would not have been sufficient to support constructive dismissal.

[88] Country Hills has argued business was down. However, there is insufficient evidence that Country Hills was in such a state financially that the employees could not be properly given notice of the change in compensation structure or increase in work hours in accordance with the employment contract. Country Hills could substantially change their commission and work structure in response to business needs; however, they must provide employees adequate notice of these changes. Adequate notice was not provided.

[89] The 2018 memo caused a significant increase in hours and paid each manager only 5%, assuming only three managers instead of an equal sharing divided by the number of managers. The 2018 memo unilaterally and substantially changed essential employment terms and failing to provide reasonable notice breached these essential terms. Taken either separately or cumulatively, I find that the employer no longer intended to be bound by the contract and Mr. Bedard and Mr. Johnson were constructively dismissed.

Mr. Johnson's purported resignation and alleged termination

[90] I have found above that Mr. Johnson was constructively dismissed even though he attended work on March 5. However, if Mr. Johnson's actions could be said to have accepted or acquiesced in the constructive dismissal between March 1 and March 5, 2018, I would still find that Mr. Johnson did not resign on March 5, 2018. I find that he did not intend to resign; rather he was pushed out of his employment on March 5, 2018, through the words and actions of Mr. Migneault.

[91] Mr. Migneault and Mr. Bender had attempted to contact Mr. Johnson over the weekend after the March 1 meeting, given the resignations from the F and I department. Mr. Johnson was not scheduled to work and did not respond to Mr. Bender and Mr. Migneault's attempts to call him in to work. Mr. Johnson was upset after the March 1 meeting and wanted to decompress over the weekend.

[92] Mr. Johnson did, however, go into the dealership early on Monday morning despite not being scheduled until 2 p.m. He had anticipated that his assistance would be needed after the weekend, there would be deals to be done, and he was handling the files of other F and I Managers.

[93] After the daily meeting Mr. Johnson was called to Mr. Migneault's office. The testimony as to what was said during that meeting is fairly similar as between the witnesses, until the last few moments of the meeting. Both Mr. Johnson and Mr. Migneault testified that Mr. Migneault asked Mr. Johnson where his head was at. Mr. Migneault also testified to telling Mr. Johnson that he had the weekend, and Mr. Johnson still had not responded to his calls or texts. Mr. Migneault also testified that staff had indicated Mr. Johnson was acting checked out, his body language was negative, and he wasn't saying anything.

[94] Mr. Johnson then testified that Mr. Migneault told him "no one wants him here" to which Mr. Migneault responded that he said "well that's your choice not mine". Mr. Johnson then

testified that Mr. Migneault slid across the desk a blank page which had bullet points and lines at the bottom as well as three areas for signatures. Mr. Migneault also gave him a pen. According to Mr. Johnson's affidavit and in cross examination Mr. Migneault also allegedly said, around this time, for Mr. Johnson to "get the fuck out". Mr. Johnson said he understood the paper to be some sort of resignation letter but instead of signing he scribbled a bit as if trying to make a pen work, but he was adamant that he did not sign a resignation letter.

[95] Mr. Johnson said the resignation letter which was tendered at the trial is a forgery.

[96] Mr. Migneault however testified that it was Mr. Johnson that said "no one wants him", meaning Mr. Johnson, to which Mr. Migneault responded that Mr. Johnson was not leading; he was not being professional; he was not giving off positive energy. Mr. Migneault testified that he then asked Mr. Johnson if he wanted to be here, if he wanted to work here, there was silence, so Mr. Migneault asked again "do you want to work here?" Mr. Johnson said "no" to which Mr. Migneault replied "well, looks like you made up your mind or made your decision". Mr. Migneault then testified that he told Mr. Johnson that he then "needed to sign here". According to Mr. Migneault, Mr. Johnson waited a few seconds and then signed it. Mr. Migneault denied terminating Mr. Johnson, swearing at him or belittling him.

[97] With respect to the forgery allegation, the plaintiff has also asked that I draw an adverse inference against the Defendants given that the Plaintiffs have requested throughout the litigation for the production of the original purported resignation letter. The Defendants say they must have scanned the original with their production, but they could not find it. Later the Defendants' counsel advised that he found the original letter on the Friday prior to the start of the trial on a different file, and advised that the original was at the Defendants' counsel's office. Mr. Johnson says they have been prejudiced because if they had an opportunity to look at it well in advance of the trial, they may have called a handwriting expert. The Defendants said there was no talk of a handwriting expert until now.

[98] I will address the alleged forgery first.

[99] Mr. Johnson says he was certain that he never signed the resignation letter. He said the document he signed was much different in structure and form than the disclosed copy of the resignation letter. He also found it suspicious that in email correspondence with Mr. Bender in requesting the purported resignation later, Mr. Bender said he would only provide if Mr. Johnson sent a handwritten letter with Mr. Johnson's signature. Mr. Johnson also says that he always signs with two dots which the signature on the resignation letter does not have. He also says that he is left-handed so he doesn't write downwards as reflected in the signature. Rather, he writes upwards.

[100] With respect to Mr. Bender's request for a handwritten letter, I note that the initial email from Mr. Johnson requesting the letter was somewhat ambiguous, in terms of origin, as it came from an email address referencing the names of first names of Mr. Johnson and his wife. However, it still seems curious, in this day and age of email communication, to demand that the request be made in a handwritten letter which would allow Mr. Bender to, as stated, to "verify his signature". I also note that in other handwritten samples provided in the evidence there does always seem to be two dots, as maintained by Mr. Johnson, placed near his finished signature, unlike in the resignation letter signature. The resignation letter signature is also shaky unlike Mr. Johnson's more confidently written signature in other documents. However, that could be accounted for by the emotional and distressing state Mr. Johnson was in at the time of the

meeting. In terms of Mr. Johnson's submission that he writes downwards, this does not seem to be clearly reflected in his other signatures as the slant appears to be upward.

[101] However, as argued by the Defendants, it just does not make sense that Mr. Johnson would scribble his name on a document he did not intend to sign. There was no plausible reason put forward for Mr. Johnson to scribble on the document.

[102] Given this admitted action of Mr. Johnson writing on a document put forward by Mr. Migneault in the meeting, I do not find, on the balance of probabilities, that the Plaintiffs have proved a forgery.

[103] This is so even though I do find it concerning that the original resignation letter was never provided to the Plaintiffs or made available until the eve of trial.

[104] Mr. Johnson fully believes he did not sign the tendered resignation letter and was absolutely certain of that when he gave evidence. Credibility and reliability are two related but distinct concepts. Credibility addresses whether the witness is honestly attempting to tell the truth: *Faryna v Chorny*, 1951 CanLII 252 (BCCA), [1952] 2 DLR 354. Reliability is about whether the witness's evidence is inadvertently affected by other factors such as the witness' memory, the passage of time and other circumstances which were present at the time the events occurred: *FDM v EGM*, 2021 ABQB 420 at para 22. An honest and credible witness can still give unreliable testimony: *R v Morrissey*, 1995 CanLII 3498 (ONCA), 22 OR (3d) 514 at 17.

[105] I find Mr. Johnson's memory with respect to this part of the meeting on March 5 is simply unreliable. I note Mr. Johnson's evidence was that he was upset during the meeting and later had to pull his car over as he was so distressed.

[106] However, I find that the signing of the resignation letter does not end the analysis. Rather, as set out in *Carroll v Purcee Industrial Controls Ltd*, 2017 ABQB 211 at para 25 that:

[...] the law recognizes that an effective and binding resignation must be clear and equivocal. In determining whether an employee has resigned, the court applies a subjective and objective test: subjectively did the employee intend to resign; and objectively, viewing all the circumstances, would a reasonable employer have understood that the employee had resigned.

[107] I find that Mr. Johnson did not intend to sign a resignation document. He was upset, he had only a few seconds to decide whether to sign and there was no evidence he read the letter.

[108] The undisputed evidence was that Mr. Johnson came into work on Monday well before his 2 p.m. shift to try and sort out weekend sales. He attended the morning organizational meeting. I find, consistent with his evidence, that he intended to work at least that day.

[109] However, I find any decision Mr. Johnson made to continue working was pre-empted by the meeting in Mr. Migneault's office on March 5, 2018

[110] Mr. Johnson was upset in terms of what had happened in the March 1, 2018 meeting. No doubt his body language on March 5 was consistent with that state of upset. Mr. Migneault, in turn, was also upset as Mr. Johnson had not been in touch with the dealership to assist over the weekend.

[111] The level of preparation which Mr. Migneault had done prior to his meeting with Mr. Johnson, however, is in my view, telling. Mr. Migneault testified that he had the resignation

letter in the meeting with Mr. Johnson on March 5 given what had occurred on March 1, 2018. The resignation letter was dated March 1, 2018.

[112] Mr. Migneault testified that he told Mr. Johnson that the staff felt he was “checked out”, that Mr. Johnson’s body language was bad, that he had to lead, he wasn’t giving off positive energy; in other words Mr. Migneault felt compelled in the meeting to give Mr. Johnson a long list of how Mr. Johnson’s performance was found to be lacking. This within a context wherein two business days ago, two managers with whom Mr. Johnson worked resigned after being presented with a memo that decreased their compensation and increased their hours. Prior to this meeting, there was no evidence that Mr. Johnson’s performance was lacking or that he had any problem with his impression to coworkers, body language or a lack of positive energy. The words said to Mr. Johnson with Mr. Migneault having the resignation letter in hand are supportive of conduct wherein Mr. Johnson was being pushed to resign.

[113] The Termination Report albeit filled out after the termination is also supportive of Mr. Migneault’s intention to terminate Mr. Johnson. Mr. Johnson was an almost 21-year employee and as noted above there was no evidence he was a substandard employee. The amount of Unsatisfactory check marks ticked off is inconsistent with Mr. Johnson’s work performance and with Mr. Migneault wanting to retain Mr. Johnson as an employee. To the contrary, the Termination Report filled out by Mr. Migneault is consistent with Mr. Migneault being extremely unhappy with Mr. Johnson.

[114] Mr. Migneault testified that he not only signed the resignation letter as Manager of the F and I department but also signed as a witness. Given that there were places for two signatures on the page, the inference is that any resignation was intended to be signed off or witnessed by two individuals. Requiring two signatures from the company would also avoid the suspicions and allegations that we have seen in this lawsuit.

[115] I find that the failure to require another witness to sign the resignation and instead proceeding to sign off in two roles with respect to this important interaction is additional evidence that the meeting was hurried, high conflict and that Mr. Migneault intended to push Mr. Johnson to resign in short order. I also find that Mr. Migneault’s failure to provide Mr. Johnson with a copy of the resignation letter at or shortly after the meeting also supports that the circumstances leading to the signing were intemperate and rushed.

[116] It is clear that the discussion in the March 5 meeting was not pleasant and when Mr. Johnson responded with words to the effect “it’s your decision”, I find that Mr. Migneault acted precipitously and used vulgar language directing Mr. Johnson to leave. While Mr. Migneault denies swearing at Mr. Johnson, I accept Mr. Johnson’s evidence on this point. The evidence is very specific and consistent with Mr. Migneault’s testimony in terms of the pointed criticism he levelled at Mr. Johnson and the termination report indicators.

[117] I find that the words and actions of Mr. Migneault were intended to either terminate Mr. Johnson or push Mr. Johnson to sign the letter.

[118] The texts between Mr. Nicol and himself as well as with Mr. Bedard indicate a state of mind wherein Mr. Johnson was deciding whether to accept the constructive dismissal or not. I do not accept that it meant he was going to resign. I also do not place significant weight on Mr. Johnson’s response as “Yes” in the written text when asked if he walked out when placed within the context of the other evidence.

[119] I find that Mr. Johnson did not intend to resign and objectively, viewing all the circumstances, I do not find that a reasonable employer would have understood that he had resigned.

The Bardal Factors and Mitigation

[120] I have found that Mr. Johnson and Mr. Bedard were constructively dismissed and additionally, to the extent necessary, I find that Mr. Johnson's employment was terminated in the meeting with Mr. Migneault. Accordingly, both Plaintiffs are entitled to damages representing salary including bonuses they would have earned during a notice period: **Matthews v Ocean Nutrition Canada Ltd.**, 2020 SCC 26nat para 49

[121] The notice period should consider the factors set out in **Bardal v Globe & Mail Ltd.**, 1960 CanLII 294 (ONHCJ), 24 DLR (2d) 140 at 145 which include the character of employment, length of service, age of the employee at the time of termination, and the availability of similar employment having regard to the experience, training and qualifications of the employee.

[122] The onus is on the Defendants to prove lack of mitigation. The standard is also not perfection.

[123] Both Mr. Johnson and Mr. Bedard were long term employees. Mr. Johnson was approaching 21 years at the time of the events in March 2018 and Mr. Bedard around 13. This long service supports a longer notice period.

[124] Mr. Johnson was almost 52 years old at the time of the dismissal with Mr. Bedard being 49 years old. Their ages also support a longer notice period in recognition that obtaining a job which is similar in remuneration and benefits would likely take longer. Of course, the actual time it took to obtain a similar job is relevant.

[125] The character of the employment, whether higher earnings requiring higher education or not, has taken on less importance in terms of the notice period framework in recent years. However, I do believe their job of the Plaintiffs in sales required particular knowledge and people skills such that it could be said to be somewhat specialized.

[126] Both Johnson and Bedard became employed within fairly short order, Bedard within one month and Mr. Johnson within three months. However, it did take them both some time to settle into longer term positions.

[127] With respect to Mr. Johnson's first job, he was not offered a position past his probationary period. I accept the reasons why this came about which related to safety concerns with that particular dealership. Mr. Johnson provided evidence in his affidavit supporting a genuine and reasonable search for employment between September 2018 and March 2019 ultimately finding employment in a job where he remains today.

[128] Mr. Bedard commenced work almost immediately after the constructive dismissal, was employed for shorter periods of time by a few dealerships and then ultimately settled in at Advantage Ford. Similar to Mr. Johnson, I find Mr. Bedard made diligent and reasonable efforts to find comparable employment.

[129] In short, I find that both employees reasonably mitigated their damages.

Remedies and Damages

Reasonable Notice

[130] I have reviewed the numerous cases provided by both counsel which set out notice periods for individuals with similar service records, ages and in some cases jobs.

[131] With respect to Mr. Johnson, I find the case of **Hogan v 1187938 B.C. Ltd.**, 2021 BCSC 1021 similar. In **Hogan**, the plaintiff was 52 years old and was an assistant service manager for an automotive dealership with 22 years of service. A 22-month notice period was found to be appropriate: **Hogan** at para 54. From the Defendants' cases, I find the facts in **Inskip v Jacobson Ford Mercury Sales Ltd.**, 1999 CanLII 5484 (BCSC), 13 BCTC 75 (SC) similar to the case at hand. In **Inskip** at para 10, a 19-year employee, aged 42 years, a sales manager, was granted a 22-month notice period.

[132] The cases of **Scott v Domtar Sonoco Containers Inc.**, [1987] 20 CCEL 292 (ONSC), 17 ACWS (3d) 731 and **Earl v Canada Bread Company, Limited**, 2007 BCSC 1574 involved long term employees of 18 and 19 years which resulted in notice periods of 16 month and 15 months respectively. However, these employees earned significantly less remuneration on an annual basis. From this, I infer that the job was not as specialized as the F and I Manager job held by Mr. Johnson and Mr. Bedard.

[133] In considering the **Bardal** factors, I find a notice period of 22 months for Mr. Johnson is appropriate. The notice period will continue throughout this time with employment earnings ascertained from his T4's deducted from what he would have earned at Country Hills. I will return to the earnings at Country Hills shortly.

[134] With respect to Mr. Bedard, while considering the **Bardal** factors, similar cases include **Smart v McCall Pontiac Buick Ltd.** 1999 CanLII 6255 (BCSC), [1999] BCJ No 2111, which involved an employee of similar age with similar work years at a similar job. In that case the appropriate notice period was found to be 18 months: **Smart** at para 112. In **McCarthy v Motion Industries (Canada) Inc.**, 2014 ONSC 7556, a salesperson with an admittedly higher income than the circumstances in this case, was aged 46 years and employed 14 years. A notice period of 16 months was directed: **McCarthy** at para 80. In **Gordon v Abbott Laboratories Ltd.**, 1995 CanLII 7286 (ONCTGD), 14 CCEL (2d) 95, a sales manager earning 100K aged 46 years with a work tenure of 12 years was awarded 15 months notice period. In **McPhee v Torino Motors (1975) Ltd.**, [1989] BCWLD 2233 (BCCC), 16 ACWS (3d) 375 and **Torreadell v Dave Buck Ford Sales Co.**, [1987] 4 ACWS (3d) 273 (BCSC), 1987 CarswellBC 3068 work tenures of 11 years and 14 years both attracted 12-month notice periods.

[135] Considering the **Bardal** factors as applied to Mr. Bedard as well as similar cases I find that a notice period of 15 months is appropriate.

[136] How then should the actual damages be calculated? The Plaintiffs submit a 5-year or 3-year historical average is an appropriate method for determining damages pursuant to notice periods and has provided some authority for same. The Defendants say that the Court should calculate compensation by asking what Johnson and Bedard would likely have earned during the reasonable notice period, in the actual market and dealership conditions that existed in March 2018.

[137] I find the most appropriate method of calculation which aligns as best as possible with the principles of damages in wrongful dismissal cases, is to assess damages based on the 2015,

2016 and 2017 average income throughout the forward-looking notice period. While the trajectory for compensation in 2016 and 2017 was decreasing, it is also appropriate to include 2015. The Defendants have not provided their sales figures for the 2018 and 2019 years when the notice period would be in effect. Given this information gap, I find that the higher earning year of 2015 should also be included in the average.

[138] I am satisfied that Mr. Bedard's income from Moxie's, as testified to on the stand and reflected in his income tax returns, would have been earned in any event. It is only his income from his employment that is to be deducted.

Vacation Pay

[139] Vacation pay, as indicated on the pay stubs, shows that vacation pay was included at a rate of 6% as part of the plaintiff's gross pay. Vacation pay is, however, owed throughout the notice period: **Matthews**. The gross employment income as calculated should include a 6% apportionment for vacation pay.

Benefits

[140] Both Johnson and Mr. Bedard indicated in their affidavits that they were without benefits for the periods they were either on probation or not working. Mr. Johnson testified that during the relevant period of time he was covered through his wife's plan. The Plaintiffs were covered through Great West Life Benefit Group Plan while at Country Hills.

[141] However, there was limited evidence regarding loss suffered due to lack of benefit plans while they were unemployed or on probationary periods.

[142] Without any specific evidence regarding loss of coverage which resulted in payment out of pocket for health or dental benefits etc., I am not in a position to award any damages for loss of benefits.

Aggravated and Punitive Damages

[143] Separate and apart from damages representing salary during the notice period, the Plaintiffs seek aggravated and punitive damages.

[144] As set out in **Matthews** at para 87:, "... this Court has been emphatic in recognizing that, in addition to whatever financial dimension work entails, a person's employment is "an essential component of [their] sense of identity, self-worth and emotional well-being" (**Reference re Public Service Employee Relations Act (Alta.)**, 1987 CanLII 88 (SCC), [1987] 1 S.C.R. 313, at p. 368).

[145] Aggravated damages are meant to compensate for actual harm and have originally been said to arise from the manner of dismissal itself; however, in **Matthews** at para 81, the Court commented that there can be a manner of dismissal, particularly in constructive dismissal cases, where there is a series of events preceding the moment of dismissal which could be found to be a component of the dismissal.

[146] For aggravated damages to be compensable, however, they "must be grounded in proof of actual damages resulting from the unfair or bad faith conduct": **Elgert v Home Hardware Stores Limited**, 2011 ABCA 112 at para 75. Further, "if actual damages are shown, a determination of whether an employee is entitled to aggravated damages must focus on whether the methods used were unfair or in bad faith, by being for example untruthful, misleading or unduly insensitive": **Elgert** at para 77 citing **Honda** at para 57.

[147] In *Merrill Lynch Canada Inc v Soost*, [2010 ABCA 251](#) at para 16, the Court of Appeal listed examples of insensitive methods used by an employer during termination that could result in aggravated damages:

[A] boss who tells all the fellow employees, or the employee's spouse and children, that the dismissed employee is stupid or incompetent. It is hard to think of circumstances where there would be any need to do that. Another example might be dismissing the employee within a day or two of a daughter's wedding, or of the death of a parent. Another example would be insincerely alleging to others embarrassing or demeaning (but unfounded) reasons for the dismissal (whether or not they would be just cause if true), when the employer does not honestly believe those grounds exist.

[148] I have reviewed the cases where aggravated damages were awarded. I do not countenance Mr. Migneault's choice of words, and I accept that Mr. Johnson was affected by what was said and done in the meeting causing him to pull over on the way home as he was so upset. However, as above, actual damages for mental distress resulting from the unfair or insensitive conduct must also be proved: *Elgert* para 75. See also para 16 in *Cottrill v. Utopia Day Spas and Salons Ltd.*, 2018 BCCA 383 (CanLII) citing *Lau v. Royal Bank of Canada*, [2017 BCCA 253](#) and other authorities therein.

[149] While the Supreme Court in *Matthews* seemed to indicate a willingness to award some sort of compensatory damages in the situation where the mistreatment by the employer caused Mr. Matthews "anxiety" as mental distress, Mr. Matthews had not requested this relief and it was not awarded.

[150] Accordingly, on the jurisprudence before me, while I have no doubt Mr. Johnson was upset and distressed, there was no evidence that he suffered more prolonged injury constituting mental distress by the dismissal. Accordingly, no aggravated damages will be awarded.

[151] Punitive damages, as distinct from aggravated damages, are meant to punish an employer who engages in conduct to employees which is found to be extremely harsh, vindictive, malicious or reprehensible: *Elgert v Home Hardware Stores Limited*, 2011 ABCA 112 at para 78; *Whiten v Pilot Insurance Co*, 2002 SCC 18 at para 36. In some of the cases an employer has made outrageous unfounded allegations of theft and fraud. I have found in this case that the allegation of forgery has not been proven. I also find, that the manner of dismissal of Mr. Johnson, does not rise to the level where an award of punitive damages would be appropriate.

Conclusion

[152] Mr. Bedard was constructively dismissed on March 1, 2018.

[153] Mr. Johnson was constructively dismissed on March 1, 2018; alternatively his employment was terminated in the meeting on March 5, 2018 by Mr. Migneault.

[154] The notice period for Mr. Bedard is 15 months, for Mr. Johnson 22 months.

[155] Damages will be calculated to represent a loss of earnings on an average over the last three years prior to the construction dismissal, that being 2015, 2016 and 2017 with T 4 earnings from their current employment subtracted as appropriate mitigation.

[156] 6% vacation pay reflected already in the gross pay is to be calculated throughout the forward looking notice period.

[157] No additional monies for benefits are to be paid given the lack of proof of specific loss.

[158] Neither aggravated or punitive damages are awarded.

[159] If parties cannot agree on costs, written Costs submissions of no more than 5 pages are to be provided within 45 days.

[160] I am grateful to the submissions and advocacy shown by both counsel, in particular, their supplemental submissions which were of assistance.

Heard on the 5th and 6th day of May, 2026.

Dated at Calgary, Alberta this 8th day of September, 2026.

J. R. Ashcroft
J.C.K.B.A.

Appearances:

Cassandra Sutter and David Pope
for the Plaintiff

Peter Osadetz
for the Defendant