EYB 2019-305936 – Résumé

Cour supérieure

Papachristopoulos c. Medisca Pharmaceutique Inc.
500-17-091600-158 (approx. 25 page(s))
10 janvier 2019

Décideur(s)
Platts, David E.

Type d'action
DEMANDE en dommages-intérêts pour congédiement déguisé. REJETÉE.

Indexation
TRAVAIL; CONTRAT DE TRAVAIL; OBLIGATIONS DU SALARIÉ; CONTRAT À DURÉE INDÉTERMINÉE; OBLIGATIONS DE L'EMPLOYEUR; RÉMUNÉRATION; RÉSILIATION; PRÉAVIS; CONGÉDIEMENT DÉGUISÉ; DOMMAGES-INTÉRÊTS; DÉLAI DE CONGÉ; représentant dans le domaine pharmaceutique; démission après un peu plus de quatre ans de service; absence de nullité du contrat de travail malgré les mensonges contenus dans le CV réitérés lors des entretiens d'embauche; modifications du calcul des commissions en cours d'emploi; absence de modifications substantielles des conditions de travail; acceptation implicite des changements; délai entre le départ et le dernier changement

Résumé
Le salarié demandeur a occupé un poste de représentant aux ventes dans le domaine pharmaceutique pour l'employeur défendeur pendant quatre ans et trois mois avant de donner sa démission. Il soutient n'avoir jamais consenti à une réduction de ses commissions et avoir été empêché de protester en raison de la culture de peur et d'intimidation mise en place par l'employeur, ce qui ferait en sort qu'il aurait, en fait, été victime d'un congédiement déguisé. Il réclame une indemnité de 1 962 231,27 $ US.

Il ressort de la preuve que le salarié a menti dans son curriculum vitae (CV). Il n'a jamais obtenu les diplômes qui y sont mentionnés. Il a également menti lors des entretiens d'embauche effectués à la suite du processus de sélection. Or, les exigences de l'employeur quant au poste de représentant aux ventes semblent être relatives. Les candidats peuvent détenir soit une formation dans un domaine pertinent soit deux ans d'expérience en vente. Il n'est pas certain que les lacunes de formation et d'expérience que présentait le salarié n'auraient pas été jugées comme étant compensées par sa personnalité et ses compétences en communication par ceux qui l'ont rencontré dans le cadre du processus de sélection. Il est ainsi difficile de présumer que l'employeur ne l'aurait pas embauché sur la base de son expérience professionnelle. Il n'est pas non plus

possible de conclure que celui-ci aurait mis fin à l'emploi s'il avait découvert en cours de route la supercherie, vu les performances hors pair du salarié et l'argent que ce dernier lui rapportait. Bien que le comportement adopté ne soit aucunement acceptable, le contrat de travail n'est pas jugé nul *ab initio*.

Lorsque le salarié a été embauché, il ne connaissait pas la structure du calcul de ses commissions et le montant qu'il allait en tirer. Il ne peut donc soutenir qu'il y aurait eu modification substantielle de ses conditions de travail. Dans les faits, en raison de ses efforts, il a gagné beaucoup plus d'argent à la suite de toutes les modifications à la baisse apportées au calcul des commissions. Ce n'est que lorsque le marché a changé, peu avant son départ, que ses commissions ont commencé à chuter. Dès le départ, il savait qu'il allait pouvoir gagner de grosses commissions s'il exécutait un travail acharné. Cette perspective s'est effectivement réalisée. La modification du calcul des commissions faisait partie de l'emploi.

Malgré ce qu'il soutient, le salarié a accepté les modifications faites au calcul de ses commissions en cours d'emploi. Il n'a démissionné que 16 mois après le dernier changement effectué à son désavantage. Même s'il protestait lors de chaque modification, il continuait à exécuter son travail. Il n'a jamais clairement manifesté son refus d'accepter les changements effectués ni menacé de partir pour ce motif. Il tente de faire valoir que le milieu de travail était oppressant et toxique, de sorte qu'une vraie protestation était impossible. Cette proposition n'est pas retenue. Bien que l'ambiance ait pu être tendue et la réceptivité de la direction, limitée, il était possible de librement exprimer ses opinions.

Si le recours avait été bien fondé, il n'aurait pas été possible d'évaluer le montant des dommages en appliquant le calcul des commissions utilisé initialement lors de l'embauche. Compte tenu de l'âge du salarié (29 ans au moment de la démission), de son expérience et des circonstances de l'espèce, une indemnité tenant lieu de délai de congé équivalant à trois mois de salaire aurait été jugée suffisante. Il aurait également été tenu compte du fait qu'il s'est trouvé un nouvel emploi sept semaines après son départ à un salaire de base de 100 000 $. Aucune mauvaise foi de la part de l'employeur n'aurait été retenue et aucune indemnité n'aurait été accordée en lien avec la dispute survenue entre le salarié et son supérieur.

Pour ces motifs, la demande est rejetée.

Jurisprudence citée

1. *Farber c. Cie Trust Royal*, [1997] 1 R.C.S. 846, REJB 1996-00456, J.E. 97-774
2. *Joyal c. Hôpital du Christ-Roi*, EYB 1996-65598, [1997] R.J.Q. 38, J.E. 97-188 (C.A.)
3. *St-Hilaire c. Nexxlink inc.*, EYB 2012-210614, 2012 QCCA 1513, J.E. 2012-1738 (C.A.)

Doctrine citée

1. BENAROCHE, P.L., et FORTIN, J.-M., Le congédiement déguisé au Québec: fondements théoriques et aspects pratiques,Montréal, Éditions Yvon Blais, 2006, xxix, 523 p., p. 102
2. GAGNON, R.-P., *Le droit du travail du Québec: pratiques et théories,* 3e éd., Montréal, Éditions Yvon Blais, 1996, xvi, 682 p., p. 66
3. LECLERC, L. et LESAGE, L., « L'obligation précontractuelle de renseignement de l'employeur et du postulant » dans *Développements récents en droit du travail (1997),* Service de la formation permanente, Barreau du Québec, Montréal, Éditions Yvon Blais, 1997, EYB1997DEV58

Législation citée

1. *Code civil du Québec*, L.Q. 1991, c. 64, art. 1375, 1399, 1400, 1401, 2085, 2088

SUPERIOR COURT

CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

No: 500-17-091600-158

DATE: January 10, 2019

BY THE HONOURABLE DAVID E. PLATTS, J.S.C.

Pavlos Papachristopoulos
Plaintiff

v.

Medisca Pharmaceutique Inc.

And

Medisca Call Centre Inc.
Co-defendants

JUDGMENT

OVERVIEW

[1] The Plaintiff Pavlos Papachristopoulos was an employee of the Co-defendants (collectively, "**Medisca**") for approximately four years and three months, before resigning from his position. He has sued Medisca, claiming constructive dismissal, seeking the sum of $1,962,231.27.

[2] In a nutshell, a 25-year-old man with relatively little experience and purporting to hold a bachelor's of commerce degree from McGill University was hired as a sales representative in the field of compounding pharmaceuticals in the summer of 2011. He aspired to earn "over six figures" in his new position, although he did not know before accepting the job exactly what commissions accompanied his base salary of $30,000.

[3] Mr. Papachristopoulos was an excellent salesperson. And the Co-defendants' compounding pharmacy business grew tremendously. In his first complete year, 2012, Mr. Papachristopoulos earned almost $160,000 in commissions over and above his base salary, which had been increased to $35,000. In 2013, he made almost $180,000 in commissions, with an increased base salary of $40,000. The year 2014 was a banner one, with Mr. Papachristopoulos' total revenues topping $320,000. When he suddenly left the company one Friday afternoon in October 2015, his earnings for that partial year were approximately $200,000.

[4] These earnings came about despite the fact that on three occasions during Mr. Papachristopoulos' employment, Medisca adopted a new commission structure, lowering his (and all other sales representatives') commission rate. Quotas and territories changed as well during his employment.

[5] Mr. Papachristopoulos' departure was a surprise to his employer, but it was apparently not so surprising to him. His departure email stated that he had no choice but to leave, for reasons of never-agreed to decreases in commission payouts, a new employment policy and an ever present negative culture of fear and intimidation. Clearly, when he departed, Mr. Papachristopoulos had the intention of claiming constructive dismissal. A demand letter followed two weeks later, leading to this lawsuit.

[6] The Court must decide if Mr. Papachristopoulos's claim for constructive dismissal has been proven.

[7] The matter is complicated by the fact that Mr. Papachristopoulos lied on his résumé, presenting an educational background that he simply did not possess. The Co-defendants argue that he would never have been interviewed, let alone hired, without the dishonest curriculum vitae, thus vitiating the very employment contract under which he claims damages.

1. CONTEXT

1.1 The Hiring Process

[8] The Plaintiff's brother, George Papachristopoulos, was working for Medisca as a team lead on the Canadian sales team. George provided Pavlos' CV to Human Resources at Medisca.[1] Pavlos Papachristopoulos did not know

[1] George would have received $100 from Medisca for having successfully referred his brother: Exhibit P-1.1. For a discussion of the specific facts surrounding the résumé and the hiring process, see *infra*, for the section dealing with the alleged nullity of the employment

his brother's salary, or the commission rate, prior to applying. He thought he was applying for a position on the Canadian sales team.

[9] Four interviews later, Mr. Papachristopoulos was hired on to be an account executive in the United States sales team (known within the company as an "Inside Sales Representative MUS", for Medisca U.S.). An offer of employment dated June 21, 2011 proposed a base annual salary of $30,000, plus commissions paid monthly.[2] Mr. Papachristopoulos began work on July 4, 2011, attending a welcome and training session presented by an HR representative of Medisca. On that day, he signed an Employment Agreement[3], which contained the following paragraph on "Renumeration (sic)":

> " You will receive a gross annual salary of **$30,000** which will be paid in arrears biweekly, after deduction of taxes. Any commissions earned will be paid monthly, forty-five (45) days after the end of the month, less deduction of taxes. " [Emphasis in original]

[10] The Agreement superseded all prior written or verbal agreements and noted that "Whatever is not provided for in this letter shall be governed by any applicable provisions of law or MEDISCA practices concerning the matter". Mr. Papachristopoulos did not yet know his quota, his sales territory or the commission plan. Medisca did not disclose the existing commission plan during the hiring process or at the signing of the Employment Agreement.

[11] Mr. Papachristopoulos did not negotiate either salary or commissions. He states that he was told during the interview process that if he worked hard and met his quotas, with his commissions, he could earn a salary of six figures plus. This was substantially more than he had ever made.

1.2 The Commission Plans, Sales and Earnings

[12] Mr. Papachristopoulos was given his territory and quota several weeks into his employment. He was to sell $206,250 worth of goods monthly, and his territory included the greater Houston area and Dallas Fort Worth, Texas. At the time he was given his territory, he also received information on the commission plan entitled Commission Plan MUS 2010-2011 ("Plan 1"), effective October 1, 2010.[4] Before he started selling in August, his base salary was increased to $35,000.

[13] Plan 1 provided for a commission of 0% for sales under 75% of quota, 1% for 75 to 99.99%, and 2% for 100% and over. There were also a number of bonuses: Gross Profit Payouts of $750 and $1,000 for attaining 50% profit on 75% or 100% of quota; Monthly Overachievement Payouts of $2,000 for hitting 110% of quota; Dormant and New Client programs, which provided 2% on all sales for the 6 months after the opening order and 1% on all sales thereafter; and

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agreement. From testimony in Court, it appears that George did not know that his brother's CV contained false information.

2 Exhibit P-2.

3 Exhibit D-1.

4 Exhibit P-2.3.

Spiff payouts, providing a 50% split of cost plus 25% for short expiry, slow-moving and discontinued items.

[14] Plan 1 stated that "Quotas and territories subject to change without notice. Review of territory will be done if quota is not met."[5] Indeed, during the time Plan 1 was in force, Mr. Papachristopoulos' monthly quota changed to $325,000, $415,500, $419,000 and $412,000, while his territory also changed. He was given two underperforming territories, the States of Oklahoma and Kentucky, "as a reward for good work".

[15] Effective December 1, 2012, there was a new Commission Plan MUS ("Plan 2"), presented to the sales team by an email and in a meeting early that month.[6] It changed the existing commissions by cutting them in half (0.5% for 75 to 99.99%, 1% for 100%) and added two additional levels of commissions (1.25% for 110-119.99% and 1.5% for >120%) plus bonuses of $750 and $1,500 for attaining these last two levels. Other than these last two, which replaced the Overachievement Payout, Plan 2 no longer contained any of the prior payouts or bonuses (Gross Profit Payouts, Dormant and New Client programs or Spiff payouts).

[16] Plan 2 expressly stated "Quotas, territories and plan structure subject to change without notice. A performance review will take place on a quarterly basis." (Emphasis added.)

[17] Mr. Papachristopoulos states that he spoke out during the meeting against these changes, despite his relatively new status at the company. He was doing well and felt confident enough in his credibility to express himself. His new boss, Giuseppe (Pino) Bocchino, allegedly explained that the money saved would help fund expansion in Australia and Research and Development of new products. He invited Mr. Papachristopoulos and the other employees to come see him in his office, for a one-on-one discussion if needed, and told them that they would "all make more money due to this commission plan".

[18] Mr. Papachristopoulos, after receiving and studying the details of Plan 2 in writing, indeed went to visit Mr. Bocchino (as apparently did most of the team members). He noted that if the sales people made more money, it would result from them making more sales, through higher quotas, rather than because of the terms of the plan. Mr. Papachristopoulos states he would have told Mr. Bocchino that he had already put a deposit down on a new condo, and lease-hired a new car. The response would have been that there are no guarantees about what will happen tomorrow and that he had to "take it or leave it".

[19] Mr. Papachristopoulos stayed. In calculations presented at Court, he demonstrates that he earned 2.95% of his sales in commissions and bonuses from August 2011 through to November 2012, the time of the change to Plan 2.

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5 It also warned that "Failure to attain quota for a total of 3 months in the same fiscal year may result in severe penalty, up to and including dismissal."

6 Exhibit P-3.

[20] Medisca then took away Oklahoma from his territory on February 1, 2013. On a quota of $412,000, he had raised his sales to almost $725,000 by January 2013. The response of Medisca was to give Oklahoma to a new sales executive, and reduce the Plaintiff's quota to $375,000. Mr. Papachristopoulos complained. His sales dropped for two months (although never below quota) until recovering to their prior level and one month after that, Mr. Papachristopoulos informs the Court that he was the first sales person in the company to hit the mark of $1,000,000 in monthly sales, in May 2013. He earned an average of 1.73% of his sales in commissions and bonuses from December 2012 through May 2013, the duration of Plan 2.

[21] Mr. Papachristopoulos states that the work environment had become less convivial. Not all of the sales people were making quota; he was an outlier in this regard, he explains.

[22] Commission Plan 3 became effective June 1, 2013. It created a new division in accounts, between "A Targets", also known as "Top 10 Accounts", and "Growth Accounts", all accounts from the 11th to the last one on the list. A Targets were paid commission at 0.25% of sales, moving to 0.75% if the Growth Accounts quota was reached. A bonus of $500 would be paid when 100% of A Target quota was hit. Growth Accounts were paid at the same commission rates as under Plan 2 (0% for under 75% of quota, 0.50% for 75 to 99.99% of quota, 1% for 100 to 109.99%, 1.25% for 110 to 119.99% and 1.5% for >120%). Bonuses of $750 and $1,500 would be paid upon attaining 110% and 120% of Growth Quota.

[23] The contents of Plan 3 were delivered during a meeting in June 2013, just after year-end, with the entire sales team, discussing the record sales year for the company. They were confirmed by email shortly thereafter. At the same time, quotas were raised by 26% over achieved sales figure averages.[7] Mr. Papachristopoulos testified that Mr. Bocchino did not get an opportunity to finish his presentation, such was the uproar in the boardroom. Seven or eight sales people would have spoken out against the changes. Mr. Bocchino ended the meeting, inviting people to once again visit him privately in his office.

[24] Mr. Papachristopoulos did so, with the printed plan in hand, informing the Court that he told Mr. Bocchino that he did not accept the changes. Mr. Bocchino would have spoken of an opportunity to become manager, one day, for the Plaintiff, and would have asked him to funnel discontented employees to management for discussion, rather than indulging their complaints.

[25] Mr. Papachristopoulos stayed, once again. He states that he felt like Mr. Bocchino wanted him to grow, to move up, and to be a positive voice, entrusted with trying to keep up morale in the company. He later states that he

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[7] There was much discussion in Court about this 26% figure. Mr. Antonio Dos Santos, the President of Medisca, explained that he had learned that in order to grow business ten times over ten years, revenues had to rise 26% annually. Leadership raised either quotas or real sales by this amount at least annually in June, after the close of the fiscal year, and sometimes more than once a year.

also stayed because he was to be taking possession of his condo in the fall of 2013.

[26] In February 2014, the sales people's quotas were raised by another 26%. This was the first time this had been done during Mr. Papachristopoulos' employment at a time other than fiscal year end. The explanation was that the company and its sales force were victims of their own success.

[27] Mr. Papachristopoulos describes the work environment as more tense, as a lot of employees were not hitting their targets. His own sales, however, from June 1, 2013 to May 31, 2014 went from just over $1 million a month to over $2.2 million a month. He made almost $290,000 in commissions, amounting to 1.4% of his overall sales for that period.

[28] In June 2014, on the first selling day of the new fiscal year, there was an additional 26% increase in quota, and a new commission plan, Plan 4.[8] The distinction in commission rates for the Top 10 and the Growth Accounts was eliminated. A new combined commission plan granted 0.5% of sales from 90% up to 99.99%, and then 0.75 of the overage sales from 100 to 109.99%, 1% of the overage from 110 to 119.99%, 1.1% of the overage from 120 to 129.99% and 0.1% increases of the percentage of the overage earned for each 10 percent increase above that, up to a maximum of 1.5% of the overage for 160% and more. The threshold for the minimum percentage of quota to be obtained in order to be paid a commission was raised from 75% to 90%. Bonuses were eliminated.

[29] When this was explained in a team meeting by Mr. Bocchino, mayhem apparently ensued. The sales team was displeased overall, although pleased to have the Top 10 and Growth Account distinction eliminated. Individuals were invited again to visit Mr. Bocchino in his office. Mr. Papachristopoulos did so. He complained. He would have asked to have the original 2% commission restored. This was refused. He was told to stay positive and that he would better understand once he was a manager.

[30] Mr. Papachristopoulos stayed.

[31] In February 2015, there was again a 26% increase upon the prior year sales, resulting in a new quota. The explanation from Mr. Bocchino was that by increasing mid-year, it would avoid the shock of a huge increase at the end of the fiscal year. The Plaintiff's monthly quota went from $1,993,185 to $2,789,000. Unusually, Mr. Papachristopoulos missed attaining 100% of quota for the months of February, March and May 2015, but still hit 90%.

[32] Then in June and July 2015, Mr. Papachristopoulos did not even hit 50% of his quota, despite Medisca not having raised quota on June 1st, 2015, as it would normally have done at the beginning of a new fiscal year.

[33] On August 5, 2015, almost the entire MUS sales team signed a letter addressed to the Human Resources manager of Medisca, which she received and signed on August 6, 2015. It was a "formal complaint due to the lack of

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[8] Exhibit P-5.

communication between management and the MUS sales team in order to come to a mutually beneficial resolution". Issues they were looking to address included lack of motivation due to now unattainable goals based on 26% increase on 2014's record performances, revision of base salaries and the commission structure and a timeline for changes to take place. A notable fact contained in the letter was that 14 of the 18 inside sales representatives were going to receive zero dollars in commission for their sales in July 2015.

[34] On August 7, 2015, the MUS sales team met with the President of Medisca, Antonio Dos Santos. Everyone around the table was given a full chance to speak and vocalize frustrations. A second meeting was held later that day. The result was that quotas were significantly decreased (for example, the Plaintiff's quota went from $2.789M to $1.389M) and a bonus of $750 was put in place for attaining 75% of quota. Mr. Papachristopoulos recognizes that this result made the representatives feel they would be able to make more income and increased motivation.

[35] In the meanwhile, on July 30, 2015, HR sent out a new Employee Policy Manual by email, asking Medisca employees to sign off on it by August 21, 2015. Employees were responsible for reading it, asking questions about elements not understood or unclear and clicking to accept the new manual and its policies. On September 2, 2015, Mr. Papachristopoulos sent an email to HR and to Mr. Bocchino, asking for an outline of everything that was added or changed, and the reasons for the changes. An email exchange ensued, which resulted in Mr. Papachristopoulos signing the document after an extension had been granted until September 8th. He did so, protesting that he did not "have time to review it all, but in any case I understand that in order to keep working here I must sign. I will do so because I need to continue working."[9]

1.3 End of Employment

[36] On October 16, 2015, after close of business, Mr. Papachristopoulos sent an email to HR. He noted the many changes to his employment at Medisca since he was hired. He referenced the new employment policy and ever changing commission plans, "all of which I never agreed to", resulting in a severe decrease in commission payouts, despite much higher sales. Mr. Papachristopoulos also wrote of an "ever present negative culture of fear and intimidation throughout [his] tenure here, especially when voicing [his] concerns on these issues and others". He stated that he had no choice but to leave Medisca effective immediately.[10]

[37] In testimony, Plaintiff described a number of elements that drove his decision: he had become a completely different person, more pessimistic and bitter, who felt like a pawn; he had been promised he would become a manager eventually and there was no movement on that; and there was no upside to remaining, as sales were declining and commissions were also declining. He

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9 See Exhibit P-9, in particular the email of September 10, 2015.

10 Exhibit P-6.

later noted, in regards to his decision to consult an attorney[11] that Medisca was making millions in revenue and was cutting out money from the sales representatives who were making this possible. He felt he could only take so much from a "bully".

[38] During the time under Plan 4, from June 2014 to the end of September 2015, Mr. Papachristopoulos earned $217,417.71 in commissions, amounting to 0.53% of his sales. Since the reduction to quota in August 2015, he had made roughly $8,500 a month in commissions, less than half of his average commission in the prior fiscal year.

1.4 The Loophole

[39] An element stood out in the evidence, in regards to the growth of the compounding pharmacy supply industry. There was a significant amount of evidence concerning a change in reimbursement policy that had a huge impact on pharmacists and their suppliers.

[40] A group of companies, known as Pharmacy Benefit Management companies ("PBMs") changed the way they reimbursed pharmacists for compounding medication. PBMs exist to administer or manage the prescription drug components of health plans, principally in the United States. Each product sold by a company like Medisca has an Average Wholesale Price ("AWP"), one that is chosen by the company, listed in a data base available to pharmacists. Reimbursement was based on AWP. Originally, only the highest-priced active ingredient in a compound or a cream would be reimbursed by the PBMs. Pharmacists were unhappy with this, as they wished to be able to charge for other ingredients and expenses. They successfully lobbied for change.

[41] A new version of an existing software came about on January 1, 2012 allowing pharmacists to enter on a claim the AWP for every single ingredient and component. Known as D.0 (point zero), this marked the beginning of the increased value of compounded pharmaceuticals.

[42] The President of Medisca, Mr. Dos Santos, said that when the policy changed, pharmacists were then allowed to charge for everything they put into a compounded product: active pharmaceutical ingredients, inactive ingredients, dispensers, labels, labour, etc.

[43] Some pharmacists started to test the system, to see what the maximum reimbursement they could receive would be. It seemed almost unlimited. Mr. Dos Santos explained that traditionally, the company would mark up the AWP perhaps three times the catalogue price. However, companies started to increase the AWP to ten times or more the catalogue price, and met no resistance from the pharmacists or the PBMs. On the contrary, Mr. Dos Santos explained that for a period of time, Medisca lost money to competitors because it did not sufficiently increase the AWPs on its products. (Pharmacists who paid more for ingredients

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[11] Which had already happened prior to his resignation email, as it was forwarded 10 minutes later to his current attorney, Mtre Jonathan Cohen.

would be reimbursed even more for the compounded product.) Testimony indicated that as a consequence of increasing the AWPs of all ingredients, a 30 gram or 100 gram tube of specially mixed medication could cost $5,000 to $16,000 per tube.

[44] Medisca hired a Harvard-educated economist to do a study on AWPs, the market situation and the legality of what was occurring. The report was available at the end of August 2012. It concluded that Medisca had to raise its AWPs to stay competitive, so that pharmacists would pay more for them, and be reimbursed at consequently higher rates by the PBMs. Medisca did so on October 1, 2012, and regained market share.

[45] Testimony of various witnesses seemed to confirm that the loophole was not exploited in all territories at the same time and with the same fervour. One thing is clear: the State of Texas, home to one of Medisca's principal competitors, was front and centre exploiting the loophole, be it for manufacturers, suppliers or pharmacists. Mr. Papachristopoulos was well placed to benefit from this reality in his territory (which included parts of Texas), in addition to his own sales' ability.

[46] A certain PBM called TriCare, working for the U.S. military, in reaction to greatly increased claims for reimbursement, eventually investigated and closed the loophole. Their decision was communicated to the industry in May 2015. Others followed suit rapidly. The market dropped considerably, as confirmed by monthly sales figures for the MUS team, which decreased from a high of $16.6M in March and April 2015 to being steadily under $10M from August to the end of the year.

2. ISSUES IN DISPUTE

[47] The following questions must be answered in this case:

[48] By falsifying his educational credentials, did Mr. Papachristopoulos vitiate and render void *ab initio* the Employment Agreement, Exhibit D-1, thereby barring his claim for damages resulting from the end of his employment?

[49] If not, has the Plaintiff's claim for constructive dismissal been proven?

[50] The analysis to come will include a discussion of whether changing a commission rate within a sales employment context, where the change is likely to not lower overall income earned, is a unilateral and material change to an essential element of the employment contract. In addition, the Court must decide if Mr. Papachristopoulos's actions amounted to working under protest and whether he took action in a reasonable time to contest the changes. The backdrop of allegations of a culture of fear and intimidation will also be discussed.

[51] Finally, if this Court decides that a constructive dismissal occurred, the question of the appropriate amount of damages is then raised.

3. ANALYSIS

3.1 Misrepresentation of Qualifications to Obtain Employment

[52] As previously mentioned, Mr. Papachristopoulos provided his CV to Medisca through his brother. This résumé, Exhibit D-8, contains false information in regards to the Plaintiff's education. Contrary to what he writes in the CV, he does not have his *Diplôme d'études collégiales* (DEC) in Commerce from John Abbott College; nor did he graduate with a bachelor of commerce from McGill University, with a major in finance and a minor in statistics.

[53] This information only came to light at Mr. Papachristopoulos' examination on discovery on January 18, 2016[12].

[54] Medisca argues the falsified credentials vitiate the Employment Agreement.

[55] This argument appears to be based on the vitiation of consent by error (or perhaps by fraud), although no written argument and very little case law was submitted to the Court on this point by Medisca's attorneys.

[56] Medisca does not seemingly make the argument either in its pleadings or in written or oral argument that the Plaintiff's falsehoods amount to fraud and/or dishonesty leading to a breach of the relationship of trust necessary to his continued employment.[13]

[57] According to the *Civil Code of Quebec*, *"[t]he parties shall conduct themselves in good faith both at the time the obligation arises and at the time it is performed or extinguished."*[14] The exchange of consent necessary to rise to a contractual obligation must be "*free and enlightened*" and consent can be "*vitiated by error, fear or lesion*".[15] Moreover, Articles 1400 and 1401 C.C.Q. read as follows:

> "**1400.** Error vitiates consent of the parties or of one of them where it relates to the nature of the contract, the object of the prestation or anything that was essential in determining that consent.

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12 At the time of the examination, an HR representative of Medisca then checked Mr. Papachristopoulos' LinkedIn page, noting that McGill University was indeed still listed there (Exhibit D-11). A day after the examination, the reference to McGill had been deleted. The Plaintiff testified that for a number of years, he would pretend to his family to be leaving and arriving from school. He also stated that his brother and mother still do not know to this day that he never even went to university, let alone graduated. This lawsuit, and the ensuing judgment, will probably change that reality.

13 For example, based on Article 2088 C.C.Q. This too is a possible means of attacking the validity of the employment agreement, when the fraud leads to an error inducing the party to conclude a contract. For an interesting discussion on the two possible avenues employers may use to justify firing an employee for fraudulent declarations during the hiring process see Louis Leclerc and Laurent Lesage, "*L'obligation précontractuelle de renseignement de l'employeur et du postulant*", EYB1997DEV58, in *Développements récents en droit du travail (1997)*, Cowansville, Yvon Blais, 1997, under the heading of *Le congédiement du salarié fondé sur un manquement à son obligation précontractuelle de renseignement*.

14 Article 1375.

15 Article 1399 C.C.Q.

> An inexcusable error does not constitute a defect of consent.
>
> **1401.** Error on the part of one party induced by fraud committed by the other party or with his knowledge vitiates consent whenever, but for that error, the party would not have contracted, or would have contracted on different terms.
>
> Fraud may result from silence or concealment. ”

[58] In an employment contract, an error as to the personal qualities of the candidate may be considered as an essential element of the consent of the employer. Where it is proven that a certain level of education is a condition to obtaining a position, false declarations by the employee in this regard can be fatal to the employer's consent.[16]

[59] Jennifer Pinsky, who was the Human Resources Manager at the relevant time at Medisca, testified about the hiring process in place in 2011 and more specifically, about the process as it concerned the Plaintiff. She noted that there were internal recruiters at Medisca who made the initial phone calls with potential candidates. Their job was to screen for minimum requirements regarding educational background, years of experience, language skills and salary expectations.

[60] If these were met, there was then a first in-person meeting to discuss the résumé in more detail and, if appropriate, they moved on to a second in-person interview, where Ms. Pinsky was personally involved.

[61] Ms. Pinsky explained that as job requirements for sales representatives, Medisca was looking for two years of sales experience and/or an educational background in a relevant field, in addition to language skills and personal qualities.

[62] Sabrina Fernandez Vazquez, the HR Supervisor at the time of the Plaintiff's hiring, also testified. She confirmed the pre-screening done by the recruiter on the telephone, which would have included validating education and/or sales experience. Only if the screening demonstrated that the candidate met this requirement would he or she then come to an interview.

[63] Ms. Fernandez Vazquez also confirmed that she did the first in-person interview with Mr. Papachristopoulos and would necessarily have asked about his education, confirming that the CV's contents matched the company's expectations. She expressly denied in cross-examination that she might not have asked Mr. Papachristopoulos the usual questions, because he had been referred by another employee at Medisca.

[64] There is no question that Mr. Papachristopoulos lied on his résumé, intentionally. The remaining question is would Medisca have hired him in the absence of this lie?

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[16] See the discussion in Leclerc & Lesage, *supra*, note 13, under the heading of “*Renseignements relatifs aux études accomplies, qualifications professionnelles et expériences antérieures de travail”*.

[65] The burden of proof is on the employer in such a case to demonstrate that a certain level of education was a requirement and that the employee would not have been hired without the misrepresentation.

[66] The Court notes that Medisca did not produce documentation confirming the job requirements for an internal sales representative. It heard from two HR specialists from Medisca. Even after their testimony, it is not crystal clear what level of education, in which field, would have satisfied Medisca's education requirement for this position.[17]

[67] An additional difficulty regarding the burden of proof arises from the fact that the education requirement was an alternative proposition. Candidates required an educational background in a relevant field or two years of sales experience.[18]

[68] Medisca argued that Mr. Papachristopoulos would not have made it past the screening process without the easy pass of the CEGEP and university education, as it was not obvious from the CV alone that he had two years of relevant sales experience.

[69] However, Medisca did not strongly argue that once a recruiter (or indeed the two experienced HR representatives who interviewed him subsequently) spoke to Mr. Papachristopoulos about his job experience that the alternative condition – sufficient sales experience – would not have been met.

[70] Mr. Papachristopoulos' description of his discussion with Mr. Ralph Valen, the recruiter, in his examination on discovery on January 18, 2016, was of a 30-minute phone call. During this, he described his work at a property management company and an investment firm, which included making cold calls and seeking lease properties. He also would have communicated that his significant experience working in restaurants facilitated any future work in sales, as it assisted him in developing an out-going personality.

[71] Mr. Valen did not testify.

[72] Moreover, from the descriptions of the interactions between Mr. Papachristopoulos and HR representatives, and from his portrayal of the other interviews in the process, as well from Mr. Papachristopoulos's personality and communication skills, as presented in Court, it is difficult to presume that Medisca would not have hired him based on his work experience alone, with a year of CEGEP.

[73] Finally, there is the issue that Mr. Papachristopoulos' brother was a successful salesperson for the company, well liked and respected. Although Medisca argued that Mr. Papachristopoulos failed to make evidence that this would have somehow contributed to his success in the hiring process, the Court wonders if it is not more the contrary: the failure by Medisca to directly confront

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[17] This is relevant because the Plaintiff did indeed attend CEGEP in commerce, completing two semesters; he just did not graduate.

[18] Again, the Court notes the lack of documentation regarding the number of years of sales experience required.

this question and positively assert that the Plaintiff's candidature did not benefit from this fact contributes to the Court's refusal to find a presumption on its behalf.

[74] Not without some reluctance[19], the Court finds that Medisca has not met its burden on this argument in this case.

3.2 Constructive Dismissal

[75] We now turn to an analysis of the Employment Agreement, its essential content and whether the changes to the commission structure amounted to a constructive dismissal, in view of Mr. Papachristopoulos' resignation. The burden of proof in this section of the legal analysis shifts to the Plaintiff, who is claiming that he has been forced to resign from his employment with Medisca.

3.2.1 Legal Framework

[76] The seminal case on constructive dismissal in Quebec is the Supreme Court of Canada case of *Farber* v. *Royal Trust Co.*[20] Justice Gonthier's analysis therein provides much of the framework for any discussion on this issue. [21]

[77] First, it is a fundamental tenet of employment law in the context of an employment contract for an indeterminate term that either party can resiliate the contract unilaterally. It is termed a resignation when initiated by the employee and a dismissal when it originates with the employer. Employees are not supposed to resign without notice. Similarly, an employer is not to dismiss an employee without notice, unless it has serious reason to do so. An employer can decide to end an employee's contract without any reason, however, if it provides him or her with sufficient prior notice or pays an indemnity in lieu thereof.

[78] If an employer unilaterally makes substantial changes to the essential terms of the employment contract, an employee can chose to treat the contract as breached and can leave, but generally must put the employer on notice that he or she does not accept the changes prior to resigning. If he or she does, "[i]n such circumstances, the employee is entitled to compensation in lieu of notice, and where appropriate, damages".[22]

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19 It is an axiom in law that one must come with clean hands when seeking the assistance of the Court. Lying on one's résumé in such a bald-faced way is not to be condoned. Mr. Papachristopoulos presented an explanation as to how his family came to believe that he had attended and graduated from a three-year university program. It is an explanation, at best, and not an excuse. Mr. Papachristopoulos surely must feel that his record of successful sales speaks for itself. (Indeed, this probably explains why Medisca did not advance the argument that the fraud was a breach of trust that when discovered would have lead it to fire him). In fact, he turned out to be more than capable of doing the job. Medisca did well by him. And he did very well by Medisca. This does not, however, absolve him of the fraud he perpetrated. In the presence of better evidence, it would have been fair to confirm that Mr. Papachristopoulos should not seek the Court's assistance in such circumstances. Ultimately, given the decision of the Court based on other elements unaffected by this issue, the outcome of the misrepresentation issue has no effect on the overall result of this case.

20 [1997] 1 S.C.R. 846.

21 See pp. 857 and ff. of *Farber* for the relevant discussion.

22 *Ibid.* p. 858.

[79] Justice Gonthier refers as well to the notion of an employer's managerial authority to make those changes to an employee's working conditions that are allowed by the contract.[23] He states that the extent of an employer's discretion in this regard will depend on what the parties agreed to when entering into the contract and cites R.P. Gagnon as follows:

> "Dans quelle mesure, par ailleurs, l'employeur peut-il changer la nature du travail confié au salarié, les fonctions et responsabilités de ce dernier? Cette question est de plus en plus importante, notamment en raison du fait que pour le salarié l'exercice de l'occupation pour laquelle il a été engagé s'avère souvent une considération essentielle de l'emploi, eu égard à la fois à la satisfaction qu'il veut légitimement en tirer et à son souci de conserver et de développer ses qualités et son habileté dans son champ d'activités professionnelles. La réponse tient compte de la nature et des circonstances de l'engagement et, ainsi, de la discrétion laissée explicitement ou implicitement à l'employeur dans l'exercice de son pouvoir de gérance à ce sujet." [Citation omitted.][24]

[80] Justice Gonthier goes on to state that determining whether essential terms are substantially changed is done by an objective test: that of a reasonable person in the same situation as the employee.[25]

[81] There is no need to find any intention to force the employee to leave or bad faith on the part of the employer in making the change.[26]

[82] Doctrine and case law, whether in France, Quebec or in the Canadian common law, would generally agree that if an employer substantially modifies remuneration – be it through salary or commissions – this touches an essential element of the contract.[27]

3.2.2 Application to the Facts of this Case

[83] The facts of this particular case must be analysed though this framework.

[84] What did Mr. Papachristopoulos know, expect or indeed receive as guaranties in regards to his salary or the payment of his commissions? And what would another reasonable salesperson expect going forward?

[85] The Plaintiff's salary expectation when applying was $35,000.[28]

[86] From the Context related above, it is clear that at the moment of hiring and the signing of his Employment Agreement, Mr. Papachristopoulos had no idea of the commission structure itself. The Employment Agreement does not mention it: it only refers to the payment of "any commissions earned".[29] From testimonies, it

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23 This managerial discretion finds its source in Article 2085 C.C.Q.

24 *Le droit du travail du Québec: pratiques et théories*, (Cowansville, 3rd éd. Yvon Blais 1996), at p. 66.

25 *Farber*, *supra*, note 20, p. 859.

26 Neither of which are alleged in the present case. These would only affect damages, if so.

27 See discussion on p. 860 and following of *Farber, supra*, note 20.

28 See D-8, p. 5.

29 Exhibit D-1, p. 1.

seems that Medisca's practice at the time was to not discuss commissions in detail during the hiring process, as these earnings were uncertain and variable. What Mr. Papachristopoulos did have, however, was an understanding that with hard work, a sales representative could make more than six figures.[30]

[87] Until he received his territory, his quota and Plan 1 sometime after his hiring, Mr. Papachristopoulos could not have even estimated a probable commission for the coming year.

[88] As noted above, Plan 1 was for 2010-2011. Even its title meant that a new plan would come about for a following term. Other sales representatives who testified confirmed that new commission plans, with changing terms, were a norm within Medisca.[31]

[89] It is thus not clear that a specific commission structure should be deemed in the circumstances of this case as an essential element of the employment contract.

[90] Moreover, Plan 1 explicitly stated that territories and quotas could change.[32] Commission Plans 2 and 3 explicitly stated that quotas, territories and plan structures were subject to change without notice, while somewhat bizarrely, Plan 4 dropped the word "territories" from this list. [33]

[91] Mr. Papachristopoulos does not appear to argue that on its face, the changing of territories and quotas amounts to a change of an essential element of his Employment Agreement. His territories changed often, as did his quotas. This is not raised as a unilateral change to an essential element of employment, nor cited as a reason for departure.[34]

[92] The Court of Appeal has recently cited with approval the authors Benaroche and Fortin on this issue, holding that the modification of the criteria for an annual bonus in circumstances when the employment agreement expressly stated that bonuses were subject to change by the Board of Directors meant an employee could not base his claim for constructive dismissal on this point:

> "De même, certaines modifications pourront être expressément ou implicitement permises par le contrat de travail, selon l'intention des parties lors de la formation du contrat. Le contrat de travail n'est pas stagnant et doit permettre une certaine flexibilité pour s'adapter aux différents impondérables susceptibles de se présenter durant la vie d'une relation employeur-employé. Dans un tel cas, l'on justifiera généralement les modifications apportées au contrat de travail par l'exercice légitime des droits de direction de l'employeur. Ainsi, le fait de perdre certains

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30 Examination on discovery of Mr. Papachristopoulos, dated January 18, 2016, p. 29.

31 For example, Ryan MacDonald, who testified that quota changes and commission plan changes were like death and taxes. Jessica Courey confirmed this.

32 Exhibit P-2.3, p. 2.

33 See Exhibits P-3, P-4 and P-5.

34 And on the contrary, less than two months prior to his departure, the company drastically lowered the quotas of all sales representatives in an effort to appease concerns that commissions had become unattainable.

> avantages ne peut être assimilé automatiquement à un congédiement déguisé. ”[35]

[93] Medisca argues that this Court should defer to its exercise of managerial discretion when evaluating the evolution of its commission plans in comparison to the evolving market of its industry. It argues that flexibility to set quotas and commission plans and modify them as required is essential to its business, due to frequent regulatory and market changes in the pharmaceutical and compounding industries.

[94] While this seems to make sense, the Court notes the paucity of evidence on industry-wide practices and does not consider that the facts of this case require such an analysis.

[95] Overall, the Court cannot find strong evidence in the hiring circumstances or in the employment documents at Medisca to support Mr. Papachristopoulos' position that he was somehow entitled to the benefits of Plan 1 throughout his tenure at the company.

[96] Moreover, there is also the issue of whether the change amounts to a substantial modification.

[97] The basic argument on both sides is that one must look at the decreasing percentage rate of commissions earned in comparison to the monies earned through commissions generally increasing as a whole.

[98] There is case law confirming that a change to a commission structure that will foreseeably lead to a significant diminution of revenue can amount to a substantial modification.[36]

[99] Medisca argues that it is the overall amount of commissions (or the ability to earn them) that is an essential part of the contract. Thus if Mr. Papachristopoulos continued to make more and more money each year, despite the percentage rate of commissions dropping, this is a proper exercise of managerial authority to provide an overall salary, given changing market conditions/sales, that is within its powers of direction.

[100] The facts do appear to speak for themselves: Mr. Papachristopoulos made substantially more money under each of Plans 1, 2 and 3.[37] Only when the market shifted during Plan 4 did overall commissions earned begin to drop for him. However, at all times, if indeed he had an expectation of making more than $100,000 with hard work, this deal was kept on both sides.

[101] One must be careful when analysing the foreseeability of the effect of a change to only consider the information available at the time of the proposed change.[38] Mr. Papachristopoulos thus insists that this Court cannot examine the

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35 P.L. Benaroche and J.M. Fortin, *Le congédiement déguisé au Québec*, (Cowansville, Yvon Blais, 2006) p. 102, in *St-Hilaire* v. *Nexxlink Inc.* 2012 QCCA 1513 par. 61-62.

36 See, for example, *Simsilevich* v. *GSA Management Inc.*, 2006 QCCS 513 at par. 51-52.

37 See Exhibit D-20 and the calculations of the Plaintiff at Exhibits P-2.4, P-3.1, P-4.1, P-5.1 and P-5.2.

38 The Court acknowledges the reasoning of the S.C.C. in *Farber*, *supra*, in this regard.

actual commissions earned in the months following the changes to a given Plan, as this would contravene the warning in *Farber* about the use of after the fact evidence.

[102] This is not accurate for two reasons. The first is that contrary to the situation in *Farber*, Mr. Papachristopoulos did not resign right away. This means that what happened in the months following a Plan change is not, strictly speaking, after the fact evidence. Moreover, if the after the fact evidence is supported by evidence existing at the time of the proposed change so that it is reasonably foreseeable that the change will not constitute a substantial diminution of revenues, a court should indeed take this into account.

[103] From the state of affairs of the Defendants, the territories of Mr. Papachristopoulos, his own description of his work habits and abilities, the sales patterns pursuant to the loophole explained above and the evidence of the other sales representatives heard, the Court concludes that an objective salesperson in Mr. Papachristopoulos' position would not have concluded that the changes as they occurred amounted to a substantial modification of the Employment Agreement.

[104] The Court underlines the fact that the analysis must reflect the point of view of a reasonable person in the circumstances of Mr. Papachristopoulos. As such, his prior history of lower paying jobs, his strong personality, his apparently natural sales ability, his age and his desire to obtain valuable work experience all play a role in this finding.[39] While most employees expressed concern when the Plans changed, it was not foreseeable for Mr. Papachristopoulos at the time of changes that he would stand to make substantially less money overall at the end of subsequent year.

[105] This reasoning is comforted by events that occurred after each change, as well as by Mr. Papachristopoulos' conduct.

[106] The Court will examine these in conjunction with the next portion of the test for constructive dismissal, whether Mr. Papachristopoulos worked under protest or resigned within a reasonable amount of time, so as to be able to claim he was constructively dismissed.

[107] For him to succeed, the Court has to conclude that Mr. Papachristopoulos acted in such a way so that Medisca could not have concluded that he had accepted the proposed changes.

[108] An employer is entitled to be made aware by the employee of his or her chosen course of action, when confronted with an alleged substantial change of an essential element of employment. If the employee claims to be working under protest (i.e., not accepting the change in conditions), he or she needs to let the

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[39] In regards to his sales ability, the Court notes his evidence on being a top sales person and recognizes the effort and talent brought to the table. Change can affect different people differently. The Court also notes that even his fabricated education credentials should come into consideration, as this too should inevitably taint an employee's consideration of what is reasonable for him to expect from an employer.

employer know. The employer could chose at that point in time to let the employee go and pay out the notice period or to continue to pay the employee under the prior terms for the length of the notice period. For a young employee with little seniority, this foreseeable amount of notice to be paid factors into the decision an employer could legitimately take.

[109] Mr. Papachristopoulos carefully testified that each time there was a change to the Plans, he protested. He states that he did not accept the modifications. He even adds that when protesting Plan 3, he would remind management that he had not accepted Plan 2.[40] He further states that if he accepted to keep working, it was because he had undertaken financial obligations that meant he had no choice.[41]

[110] There certainly appeared to be grumbling from within the sales team whenever changes to a commission plan were announced.[42] However, has Mr. Papachristopoulos met his burden of proving that he was effectively refusing the changes and working under protest? The Court must conclude that he has not.

[111] He took no formal action to protest or claim or leave. He admits that he would have complained in the meetings, and to his boss, but then would have done or said nothing more. There is indeed no convincing evidence that Mr. Papachristopoulos would have said that the changes were unacceptable to him and that he would only stay pursuant to the terms of Plan 1. This is despite the fact that he had no trouble expressing himself readily, speaking up while still an unexperienced employee and playing somewhat of a leadership role within the sales team in following years.[43]

[112] Mr. Papachristopoulos admits that each time he would have discussed the changes individually, management would have told him that he should either leave or accept them. When he claims he insisted upon being given the initial 2% anew, he would have been clearly informed that it was not going to happen. Management would have also confirmed, tellingly, that he would be making more money in any event under the new Plans.[44]

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40 Although by this time, it was over a year later.

41 A lease-hire car and a condo, for example.

42 The Court does not doubt this testimony, but cannot conclude that such grumbling – or even a sales meeting suddenly ending because of the general commotion caused by an announcement of substantial change – amounts to an employee putting his employer on notice that he has not accepted the change.

43 There are disciplinary warnings produced in the file concerning Mr. Papachristopoulos's language or comportment. The Court does not consider them to be evidence of the Plaintiff's wrongdoing. However, they are evidence that he is able to speak up on subjects, such as inadequate supply chain management or sales support, when they are important to him.

44 Mr. Papachristopoulos strongly argues that the position taken by management that he could make more money under the new Plan(s) was specious, as he would have made even more money had the plan stayed the same. This is quite frankly not the position in law from which the Court must examine a change. If indeed it was foreseeable to an objective observer that overall compensation dollars would increase, despite the decrease in percentage commission, this is a relevant consideration.

[113] There are no written exchanges about Mr. Papachristopoulos' level of unhappiness with the proposed commission structures, except when he signed a group protest letter on August 5, 2015.[45] The evidence suggests that the letter came about a result of changing market conditions, the closed loophole and now-impossible-to-meet quotas. This letter promptly brought about a meeting with upper management and change.

[114] The passage of time subsequent to each change militates against a finding that Mr. Papachristopoulos was somehow working under protest.[46] He cashed ever-increasing paycheques without an additional word of dissent. While new quotas and commission structures were undoubtedly challenging, Mr. Papachristopoulos was able to meet and exceed expectations at almost all times.

[115] He attempts to argue that the work environment at Medisca was oppressive and toxic and that Human Resources was only there to support management. The suggestion is that true protest would have been impossible. There is also an underlying current that this hostile work environment would somehow excuse Mr. Papachristopoulos' failure to give notice when resigning or even justify the repudiation of the employment relationship itself.

[116] Various former employees came and testified. Terms like disgruntled and demotivated were used to describe the mood of the sales force in 2015 and the environment was deemed unpleasant, while management did not appear to be sufficiently concerned.

[117] There was a meeting in February 2015 where Mr. Papachristopoulos would have made some angry accusations of institutional incompetence in other departments and where his supervisor would have called him some unpleasant names. The discussion was heated. Mr. Papachristopoulos received a disciplinary citation from the event.

[118] Other employees also received disciplinary citations for various matters.

[119] Overall, the work environment at Medisca during the relevant times is admittedly not a model of how to keep your employees content and feeling like they are a vital part of the success or failure of the company.

[120] However, in that same period, sales went from $48 million a year to almost $500 million a year. Sales people worked hard. They and the company made significant amounts of money.

[121] However poor some of the leadership may have arguably been, the Court cannot conclude that the working environment made it impossible for Mr. Papachristopoulos to protest the changes in a clear and cogent way. Many employees voiced their opinions freely regarding proposed changes to Plans.

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45 Exhibit P-5.3.

46 The case of *Joyal* v. *Hôpital du Christ-Roi*, [1997] R.J.Q. 38 is an example of someone who stayed on while working under protest and the contrast in the written documentation of the choice is stark. One can also compare the departure date for Ryan MacDonald, a long-term employee who chose to leave in August 2014, two months after Plan 4 came into effect.

Most chose to stay and continue under the change. Other employees chose to leave along the way, some seeking compensation, while others just moved on.[47]

[122] Mr. Papachristopoulos also had privileged access to a member of the HR team, through friendship. He regularly sought her advice informally, he said. She apparently told him to not rock the boat if he wished to stay. At no point did he seek to have his friend pass on a message of working under protest or complain of the impossibility of dissent. [48]

[123] Mr. Papachristopoulos was aware that the Employee Handbook contained policies and information regarding harassment. He received training therein. He did not seek to read them, nor to have them applied to his case, not even at trial.

[124] Mr. Papachristopoulos was apparently unhappy for a certain time before deciding to resign. He had been thinking about resigning for some months. This information was shared with his friend. However, there is little evidence to support that the environment was sufficient reason to claim constructive dismissal without working out the appropriate notice period.

[125] Two months prior to his resignation, the MUS sales team protested as a group and obtained a rapid, directed response to their concerns. The letter does not refer to a toxic work environment, except as it relates to unreasonable quotas given market realities. Nor was Mr. Papachristopoulos able to testify that he or anyone else would have spoken of the culture of intimidation when given the chance to meet the President in person to express their concerns.[49]

[126] Subsequently, Mr. Papachristopoulos was seemingly more concerned with proposed changes to the Employee Handbook.[50] Regarding the sufficiency of the management's response to the team's concerns, Mr. Papachristopoulos testified that he preferred to approach his boss separately on this issue, rather than deal with HR. While he may not have admired his boss, he felt they got along well and that he was able to obtain information from him.

[127] The alleged change reproached by Mr. Papachristopoulos in regards to the Employee Handbook – the ability of the company to review and modify commissions – was not in effect new.[51] In addition, it did not create an urgent situation that forced his hand to resign without notice.

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47 The Court notes that different employment histories may very well explain individual choices in this regard.

48 Ms Fernandez Vasquez states that he never requested a meeting to discuss matters as an HR professional or asked her to do anything on his behalf. Had he done so, she would have approached the employer on his behalf. She does not recall him asking for any advice. She recalls him being somewhat unhappy but cannot recall any specific elements of unhappiness. His biggest complaint was how draining it was to work with his boss.

49 Others who testified confirmed that no comments were made at this meeting about the alleged toxic work environment. Mr. Papachristopoulos was not even able to remember the additional change made subsequently to this meeting, at the request of the employees, to provide a $750 base bonus for hitting 75% of quota.

50 See the email exchange at Exhibit P-9.

51 As it was contained in each of the later Plans.

[128] As to his claim that he only stayed working because he had financial obligations, the Court finds this difficult to accept. At 25 years of age, to be able to plan the purchase of a condo and lease hire a car is a privilege based on the expectation of good employment and hard work. Even at the end, when Mr. Papachristopoulos left, his monthly commission of roughly $8,500 exceeded his initial expectations and more than enabled him to meet his obligations.

[129] Finally, there is a suggestion that Mr. Papachristopoulos was encouraged to stay, pacified by promises of a managerial position. This same promise when seemingly broken would even be raised by the company as an explanation for the timing of his letter of resignation.[52]

[130] There is insufficient evidence on both sides for this issue to play a significant role in the Court's reasoning. In any event, such a promise and the failure to meet it in this case would not qualify as reasons to leave without providing notice.

[131] Mr. Papachristopoulos had very little to say about the final aspect of the test for constructive dismissal: whether the employee took action within a reasonable time frame. His resignation occurred 16 months after the final change to commission plans, the adoption of Plan 4 occurring in June 2014. There was another change in August 2015, but this time to the benefit of the employees, further to their collective letter.

[132] The Court has examined the new proposed Employee Handbook and Mr. Papachristopoulos' opposition to same. This situation at least has temporal proximity to the resignation. However, it is very difficult to find a footing in the proposed changes that would justify his concerns, let alone an employee's claim for constructive dismissal.

[133] For all of the above reasons, the Court finds that Mr. Papachristopoulos did not take action in a reasonable time. As such, his claim for constructive dismissal must fail.

3.3 Damages

[134] Given the above conclusion, the Court could decide to not discuss the issue of damages. However, it chooses to, as the damages sought are problematic on a number of levels.

[135] Mr. Papachristopoulos claims a total of $1,962,231.27.

[136] This is based on $564,730.37 in suppressed commissions from actual sales throughout his employment, but based on the terms of Plan 1. He seeks another $313,820.80 in suppressed bonuses (which were substantially eliminated after Plan 1, in December 2012).

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[52] Mr. Papachristopoulos claimed in court that the "promotion" given to another sales person was not a real promotion and that he would not have wanted it in any event. However, he also stated that he left because he felt he had no future at Medisca, as he had been unable to move up during his time there.

[137] He then claims $40,000 for the salary of an extra year of work, together with an additional $943,680.10, based on Commission (and Bonus) Plan 1, as damages in lieu of notice.

[138] Finally, Mr. Papachristopoulos claims $100,000 in moral damages, for having been poorly treated by Medisca, in particular for the insult proffered by his boss in February 2015.

[139] On its face, this amount of damages sought is convincing evidence, given the prior discussion on the respective rights of employers and employees, as to why an employee cannot claim constructive dismissal several years after an alleged substantial change. Proceeding in such a manner would effectively stymie the employer's basis right to dismiss without reason and pay damages in lieu of notice.[53]

[140] There can be no claim based on Plan 1, given the findings above that Mr. Papachristopoulos did not act in a reasonable timeframe after changes to that Plan.

[141] Moreover, the notice period requested of one year is not in line with theory or case law, considering Mr. Papachristopoulos' age, experience and circumstances. Had the Court found constructive dismissal, it would have provided approximately three months of damages in lieu of notice. However, the Court would have expected an employee in the position of Mr. Papachristopoulos to work out this notice period. As decided above, the environment did not render this impossible or impracticable.[54]

[142] The Court notes as well that Mr. Papachristopoulos did work more than one year following the change from Plan 3 to Plan 4.

[143] In fact, each time there was a change, he made substantially more the following year, effectively eliminating the usual claim for damages, which should be calculated objectively using the known figures of the prior year.

[144] The Plaintiff began working some seven weeks after his departure from Medisca, in a new employment where his base salary was $100,000. This too would be a factor in damages in lieu of notice.[55]

[145] There is no evidence of bad faith in Medisca's dealings with Mr. Papachristopoulos. A significant portion of his sentiment of having been bullied stems from his false belief that as an employee he is entitled to profit sharing in this privately-held company.

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53 And given that this notice can be given before or after a substantial change, Medisca contends that it has indeed already paid out.

54 This is confirmed by the aura of general surprise that surrounded Mr. Papachristopoulos's sudden resignation. None of his fellow employees or his superiors saw this coming. Only his close HR friend had any idea that a departure was in his mediate future.

55 As an aside, there was some discussion of a non-compete clause and its effect on Mr. Papachristopoulos' decision-making. The Court notes that if constructive dismissal had been found, a Court could have found the resiliated contract did not bind him from finding new work.

[146] Finally, the Court does not consider the events of February and March 2015, where strong words were exchanged between Mr. Bocchino and Mr. Papachristopoulos, of such a nature as to ground a claim for moral damages. As a stand-alone claim, it would never have reached a trial. In the context of the overall claim, and on the basis of the evidence heard, the Court does not find the conduct reaches the level of reprehension required so as to give rise to moral damages.

[147] Moreover, any alleged humiliation must be counterbalanced by the fact that Mr. Papachristopoulos was an award-winning employee, well-respected by management and by the other employees.[56]

4. CONCLUSIONS

[148] For all of the above reasons, the Court holds that Mr. Papachristopoulos resigned from his position at Medisca in October 2015 and that no damages should be awarded to him.

WHEREFORE, THE COURT:

[149] **DISMISSES** the Plaintiff Pavlos Papachristopoulos' Amended Motion to Institute Proceedings;

[150] **THE WHOLE** with judicial costs.

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DAVID E. PLATTS , J.S.C.

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Hearing dates: June 13, 14, 15, 18, 19 and 20, 2018

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[56] Despite his self-description before the Court as bitter, pessimistic and a changed person, the Court cannot help but conclude that Mr. Papachristopoulos's time at Medisca provided him with significant professional and monetary rewards, and that his real résumé has been significantly enriched by the experience.