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COURT FILE NO: FC-80-2022

IN THE COURT OF KING'S BENCH OF NEW BRUNSWICK

TRIAL DIVISION

JUDICIAL DISTRICT OF FREDERICTON

BETWEEN:

**DOUGLAS BOONE**,

Plaintiff/Moving Party,

- and –

**OBEYA MOTORS INC., dba FREDERICTON TOYOTA**

Defendant/Responding Party,

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# DECISION ON MOTION FOR SUMMARY JUDGMENT

Date of Hearing: February 20, 2025

Date of Decision: February 21, 2025

Before: Justice Richard G. Petrie

Representation of Parties at Hearing:

G. Robert Basque, K.C., Counsel for the Plaintiff/Moving Party;

Clarence L. Bennett, K.C. and Cathleen Stark, Counsel for Defendant/Responding Party,

**Petrie, J.**

## INTRODUCTION

[1.] The Plaintiff filed his Notice of Action with Statement of Claim attached on April 7, 2022, alleging wrongful dismissal against his employer, the Defendant.

[2.] The Defendant filed its Statement of Defence on May 24, 2022, denying the Claim and asserting that the Plaintiff had willingly resigned/retired from his employment.

[3.] The Plaintiff filed a motion for summary judgment on May 23, 2024.

[4.] The Court was told that the parties have exchanged their affidavits of documents but have not yet proceeded to an examination for discovery.

[5.] Both parties filed an affidavit (Mr. Boone as the Moving Party and Geoff Phinney as the General Manager of the Defendant/Responding Party) which purport to set out their respective assertions of facts and events leading up to the disputed termination of employment, said to have occurred on or about April 15, 2020.

## "SHORT FORM" FACTS

[6.] Mr. Boone is a long-term employee of the Defendant's car dealership. He worked as a service advisor directly for the Defendant or predecessor businesses for (likely) in excess of 35 years.

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[7.] On or about January 2020, Mr. Boone was presented by the Defendant with an amended contract of employment which he felt was not acceptable as, in his view, it represented, in the very least, potentially significant negative implications for his compensation. He refused to agree to it and continued to work.

[8.] The parties likely continued to have some discussions on the matter over the course of several weeks.

[9.] By April 8, 2020, the Defendant presented a letter that purported to change Mr. Boone's terms of compensation. The letter indicated it would take effect in five days. The terms of this letter were not identical to the employment agreement terms presented in January 2020.

[10.] Mr. Boone undoubtedly took exception to this letter. While there is much dispute over exactly what transpired at this time, Mr. Boone alleges he was ultimately terminated due to his unwillingness to agree to the new terms and his involvement of the Employment Standards office who had subsequently contacted the Defendant.

[11.] Mr. Phinney alleges that Mr. Boone simply would not agree to new terms even though Mr. Phinney had explained the new terms to not have a negative impact on him and that the company would guarantee his salary for the year 2020 regardless. Mr. Phinney denies any concern over Mr. Boone's involvement of Employment Standards.

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[12.] Mr. Phinney asserts that, at this point, Mr. Boone made it clear he no longer wished to work for the company and expressed his intent to retire.

[13.] Mr. Phinney also alleges that the Defendant agreed to "assist" Mr. Boone into retirement by implementing a layoff so that he could gain from receipt of employment insurance benefits. Further, after their expiry, the Defendant would then provide him a retirement allowance of 16 weeks pay on a "gratuitous basis".

[14.] Voluntarily or not, Mr. Boone left employment on or about April 15, 2020. The Defendant did issue a Record of Employment reflecting a "layoff for shortage of work".

[15.] Mr. Boone contacted the Defendant in January 2022 to inquire into any retirement allowance but when subsequently presented with it, he refused to accept.

**RULE 22 – SUMMARY JUDGMENT**

[16.] Rule 22 of the *Rules of Court* on summary judgment has become a widely used tool to adjudicate matters which do not disclose a genuine issue requiring trial. (See *Graysbrook Capital v. Viva Developments*, et al, 2023 NBKB 193)

[17.] Rule 22 must be appreciated in the context of the seminal Supreme Court of Canada decision *Hryniak v. Mauldin*, 2014 SCC 7 (CanLII), [2014] 1 SCR 87, which declared a "culture shift" favouring the widespread availability and use of summary judgment in cases where summary judgment "[…]can achieve a fair and just adjudication, if it

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provides a process that allows the judge to make the necessary findings of fact, apply the law to those facts, and is a proportionate, more expeditious and less expensive means to achieve a just result than going to trial."

[18.] Consistent with this "culture shift", Rule 22.01(1) expressly allows a Plaintiff to move for summary judgment immediately after the Defendant has served its Statement of Defence.

[19.] These statements from the Supreme Court of Canada have also been repeatedly relied upon by our Court of Appeal in decisions in respect of Rule 22 and summary judgment.

[20.] In *Hobson v. Beattie*, et al, 2021 NBQB 118 at paragraph 5, J. Morrison helpfully discusses the New Brunswick Court of Appeal's decisions in *O'Toole v. Peterson*, 2018 NBCA 8, and *Russell et al v. Northumberland Co-Operative Ltd.*, 2019 NBCA 70. He summarizes the key principles as follows:

1. The only test for summary judgment is whether there is a genuine issue requiring a trial;

2. The burden of proof is on the moving party to establish there is no genuine issue requiring a trial and it is on the balance of probabilities;

3. The importance of the parties putting their best foot forward and leading trump or risk losing is more significant under the new Rule 22;

4. The rule provides for a two-step process to determine whether there is a genuine issue requiring a trial;

5. In step one the judge must determine if the evidence presented reveals a genuine issue requiring a trial. If, on the filed evidence alone, the judge can fairly and justly adjudicate the dispute there

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will be no genuine issue requiring a trial and the judge must grant summary judgment;

6. If the judge cannot adjudicate the dispute on the filed evidence he will proceed to step two. A judge only proceeds to step two if the assessment of the filed evidence leads to the conclusion that there may be a genuine issue requiring a trial. The judge will then determine if a trial can be avoided by resorting to the fact-finding powers of Rules 22.04(2) and (3) (the "mini-trial");

7. The guiding principle is that it will always be in the interest of justice for a judge to make use of the mini-trial where possible.

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[21.] In *Russell et al. v. Northumberland Co-Operative Limited*, J. A. LeBlond explains "step two" in more detail at paragraphs 23 and 24:

> [23] A judge only proceeds to step two if the assessment of the filed evidence leads to the conclusion that there may be a genuine issue requiring a trial. In that case, the judge then needs to determine if that trial can be avoided by resorting to the fact-finding powers of Rules 22.04(2) and (3). The guiding principle is that it will always be in the interest of justice for the judge to make use of these fact-finding powers if, applying the principles of timeliness, affordability and proportionality, the judge believes a trial can be avoided and a fair and just result can be obtained. The discretion vested in the judge under this second step will provide the flexibility required to fashion the appropriate course to follow.
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> [24] In the event a judge is required to proceed with step two, pursuant to Rule 22.04(3), an order for oral evidence may be issued which will typically include direct and cross-examinations of witnesses. This is what Rule 22.04(3) labels a mini-trial and its importance cannot be overstated as, perhaps more than any other aspect of Rule 22, it best reflects the culture shift called for in *Hryniak*.

[22.] At paragraph 26, J. A. LeBlond also makes the point that the need for conventional trials will not necessarily disappear, just that such a trial would no longer be thought of as the default procedure in order to obtain justice between the parties.

[23.] LeBlond, J.A. states at paragraph 27 and 28:

> [27] A by-product of the culture shift will be a reduction in the number of civil trials. Rule 22 motions, with or without mini-trials, will determine if judges have the level of confidence required to do what they have always done in conventional trials, i.e. find facts and apply relevant legal principles to those facts, with the difference that they will be doing so proportionally, fairly and in a much more timely and affordable fashion. The culture shift will benefit litigants and the court process. The Supreme Court was clear in *Hryniak* that the summary judgment motion, as an alternative model of adjudication, is no less legitimate than a conventional trial.
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> [28] The burden of proof to establish there is no genuine issue requiring a trial will always be on a balance of probabilities. That burden will more readily be met with fulsome use of the broad scope of admissible evidence now permitted under Rule 22. The old adage of putting one's best foot forward and leading trump or risk losing is far more significant under the new version of Rule 22 than it was under its previous iteration. This was fully canvassed in O'Toole at paras. 70-73.

**ISSUES**

*Is this an appropriate case for Summary Judgment?*

[24.] The guiding question is whether the moving party has established, on a balance of probabilities, that there is no genuine issue requiring a trial and that summary judgment is a fair process to deal with this dispute.

[25.] I am thus required to take a "hard look" at the evidence properly part of the Record, and the pleadings to determine if there is, or is not, a genuine issue requiring a trial.

[26.] At the risk of repetition, there will be no genuine issue requiring a trial if I determine that the process allows me to make the necessary findings of fact, apply the law to those

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facts, and that the summary process is a proportionate, more expeditious, and less expensive means to achieve a just result then going to trial (see *Hryniak v. Mauldin*).

[27.] Clearly even a dispute about a material fact does not lead to the necessary or inevitable conclusion that summary judgment is not appropriate.

[28.] However, summary judgment may not be appropriate if, after reviewing the Record and the issues as framed by the parties, I cannot fairly determine the dispute in accordance with applicable principles. Sometimes significant discrepancies or uncertainties in the material facts, as per the Record including conflicting statements as to critical events, may raise serious questions about the reliability of the evidence and may reflect a genuine issue requiring a trial.

[29.] In those instances, I also have to ask whether, through the use of some of the evidentiary tools available under Rule 22 - summary judgment, i.e. oral evidence (mini-trial), I may still be able to determine those outstanding issues without the need for a "conventional" trial.

[30.] In *Kitchen v. Brandt Tractor Ltd.*, 2021 NBQB 064, J. Morrison addresses the availability of summary judgment in the specific context of a wrongful dismissal case, at paragraph 20:

> It is clear that summary judgment is available in cases of wrongful dismissal (MacWilliams v. AMEC Americas Ltd., 2012 NBCA 46). It is not only available but encouraged as a means of adjudicating such disputes. In Patterson v. IBM Canada Ltd., 2017 ONSC 1264, the court stated at paragraph 4:

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> **Wrongful dismissal cases lend themselves particularly well to resolution through summary judgment proceedings. Cause is seldom at issue and the criteria to assess damages typically involve few disputed facts.** The difference between the low and high end of likely damages is seldom as great as the costs of finding the answer following a full trial with all the trimmings. **In my view, the practice of resolving wrongful dismissal damages cases in a co-operatively managed summary judgment proceeding is to be strongly encouraged**: *Arnone v. Best Theratronics Ltd.*, 2015 ONCA 63 (CanLII), *Fraser v. Canerector Inc.*, 2015 ONSC 2138 (CanLII).
>
> [**Emphasis added**]

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[31.] My review of the affidavit evidence and the pleadings before me allows me to conclude that the Plaintiff's case is principally premised on having been terminated without cause by way of the employer's unilateral layoff. Mr. Boone also alleges, as part of the contextual background to that layoff, that the Defendant had unilaterally imposed substantial and unfavourable changes to the compensation terms of his employment and for which he was not in agreement. In stark contrast, the Defendant says that Mr. Boone chose to voluntarily retire/resign.

[32.] Some of the evidence put forward by Mr. Boone, on his own behalf, and Mr. Phinney, on behalf of the Defendant, is significantly contradictory. In particular, each of their assertions over their various discussions in April 2020 regarding, generally, the new changes to Mr. Boone's compensation, their impact on his continued employment and related events along with any inferences to be drawn from those, are significantly at odds.

[33.] It falls upon the Plaintiff to prove his claim that he was wrongfully dismissed and did not voluntarily resign.

[34.] A resignation must be clear and unequivocal, the resignation must objectively reflect an intention to resign, or conduct evidencing such an intention (see *Skidd v. Canada Post Corp.*, (1997) CarswellOnt 1019 (Ont. C.A.); and *Nagpal v. IBM Canada Ltd.*, 2021 ONCA 274). Similarly, there is authority for the proposition that a dismissal by an employer requires a clear and unequivocal act as objectively viewed (see *Beggs v. Westport Foods Ltd.*, 2011 BCCA 76 and more recently *Khangura v. Lumberwest Building Supplies Inc.*, 2023 BCSC 1053).

[35.] In my review of various New Brunswick summary judgment decisions involving wrongful dismissal cases, often times, "cause" is not at issue and, therefore, Courts felt less inhibited by major factual discrepancies allowing them to proceed to determine the matter by way of summary judgment (see for instance *MacWilliams v. AMEC Americas Ltd.*, 2012 NBCA 46; *Kitchen v. Brandt Tractor Ltd.;* and *Abrams v. RTO Asset Management*, 2020 NBCA 57).

[36.] While "cause" is not an issue here, the issue of termination vs. retirement/resignation, similarly poses a highly fact and context driven determination. There is an issue of significant credibility between the parties that is central to a determination of this type of dispute. While the Court has the authority to make findings of credibility based upon the affidavit evidence alone, I must keep in mind whether that approach, in this

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instance, gives me the confidence to make the decision and in a way that is fair to both sides.

[37.] The allegations and disputes over events, in particular in April, 2020 raised before me, call for findings of credibility and reliability which I am not confident making based only on the affidavit and documentary evidence. The evidence before me conflicts on substantive points, i.e. retire/resign vs. dismissal (constructive or actual); whether the parties reached an agreement on any layoff/retirement terms; and potentially mitigation issues. This is not a case where the parties agree on the material facts, but only differ as to their interpretation.

[38.] There is substantial agreement on many of the underlying facts but disagreement as to the primary facts or inferences to be drawn from those facts. The evidence is at times diametrically opposite.

[39.] I am simply not confident that I can fairly determine the dispute between the parties on the written record alone. To repeat, serious and genuine issues of credibility remain and are central to this case. Absent, *in the very least*, cross-examination, I have little basis for preferring the evidence of Mr. Boone or Mr. Phinney. For instance, I certainly recognize Mr. Basque's argument that the employer-issued Record of Employment, on its face, supports the Plaintiff's allegation of being laid off (terminated). However, based solely upon the affidavit evidence, I do not have the confidence to conclude what actually occurred here and at the most critical time. The Record of Employment may

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also be consistent with the employer agreeing to providing Mr. Boone with a layoff resulting in certain retirement benefits or entitlements.

[40.] While admittedly well before the culture shift brought on by *Hryniak*, Justice Doherty in *Masciangelo v. Spensieri*, 1990 Carswell Ont. 341, at paragraph 14, appropriately captures my view on the matter before me:

> Where the outcome of a law suit hinges on the assessment of credibility, a trial in which evidence is called and the competing stories are told and challenged before the trier of fact has traditionally been viewed as the ideal forum. This is so, not only because the trier of fact has the advantage of hearing and seeing the witnesses, but also because the parties are given their day in court during which they have the opportunity to present their entire case, face their judge, and tell their story. The quality of justice is measured not only by the accuracy of the result reached but by the way that result is reached. That quality may suffer if litigants are judged unworthy of belief by someone who has never seen them or heard them, but instead has examined only written material.

[41.] Having reviewed the pleadings, the affidavits and other evidence, along with the issues framed by the parties in this matter, I am of the view that there remain significant credibility and evidentiary conflicts which, preclude the Court from confidently proceeding with summary judgment, based upon the written record alone. I find the termination vs. retirement/resignation question to be a genuine issue for trial.

[42.] In these circumstances, I then must turn my mind as to whether a mini-trial (or similar) would be sufficient to determine the issues. As part of my deliberation on this issue, I have considered the important factors of proportionality, expense, and the overall interests of justice for both parties.

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[43.] As I have said, much of this Court's uncertainty in terms of a genuine issue is focused on the credibility issues as between Mr. Boone and Mr. Phinney. However, I also recognize Mr. Bennett's argument that there remains significant discrepancies in Mr. Boone's own evidence as to his ability to have actually worked throughout any claimed reasonable period of notice, in the event this Court finds he was terminated.

[44.] Regardless of whether I order a mini-trial or a conventional one (with or without modifications) the parties will face potentially significant time before they can be brought back to Court, as no further dates are scheduled. This will also understandably require additional resources to be expended by both parties. I regret this.

[45.] If I were to order a mini-trial, I have little doubt it would assist in my credibility assessments, but I remain uncertain, in these specific circumstances, to, even that, being a sufficient basis to justly determine all outstanding issues as presented in the Record before me.

[46.] Given my lack of confidence in such a process, and having regard to both parties submissions, I am of the (reluctant) view that a mini-trial under Rule 22 is not an appropriate outcome. In my view, it is necessary and in the interests of justice for both parties, to have the matter proceed to trial.

[47.] As discussed with Counsel, I am prepared to "case manage" this proceeding with the goal of expediting, in the least costly manner, this dispute to be set for trial.

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[48.] The parties are directed to consult each other and attempt to outline a reasonable timeline for arranging discovery, fulfilling any (expected) undertakings, with the goal of having the matter set down for trial at the last Motion's Day in 2025 (December, 2025).

[49.] The Clerk's Office will schedule a case management call with Counsel in approximately 4-6 weeks to allow me to follow-up on this direction and unless both Counsel advise they have reached agreement on an acceptable timeline.

**DISPOSITION**

[50.] For the above reasons, the motion for summary judgment is denied.

[51.] The Defendant is entitled to an award of costs, which in the circumstances, I will set at $1,250.00 inclusive of HST and disbursements.

**DATED** at Fredericton, N.B. this 21st day of February, 2025.

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Richard G. Petrie, J.C.K.B.

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