

**CITATION:** McCoubrey v. Salesfloor Inc., 2025 ONSC 3739  
**BARRIE COURT FILE NO.:** CV-22-00001640-0000  
**DATE:** 20250624

**ONTARIO**

**SUPERIOR COURT OF JUSTICE**

**BETWEEN:** )  
 )  
Dianne McCoubrey )  
 )  
 ) Plaintiff ) Matthew J.R. Chapman, for the Plaintiff  
 )  
 )  
– and – )  
 )  
Salesfloor Inc. )  
 ) Defendant ) Christopher Gibson, for the Defendant  
 )  
 )  
 ) **HEARD:** January 20, 21 and 23, 2025  
 ) (virtually)

2025 ONSC 3739 (CanLII)

**REASONS FOR DECISION**

**REGIONAL SENIOR JUSTICE M.L. EDWARDS**

**Overview**

[1] The plaintiff is a former employee of the defendant. The plaintiff sues for unpaid commissions. The defendant argues that the plaintiff's employment agreement precludes any entitlement to unpaid commissions. To the credit of the lawyers for both parties the factual matrix of this case is largely not in dispute.

**The Facts**

[2] The plaintiff was employed by the defendant from November 23, 2020 to September 2, 2022. Prior to her employment with the defendant the plaintiff worked for a number of companies including positions as vice president of sales.

[3] The plaintiff was gainfully employed with another corporation when she was introduced by an executive recruiting firm to an employment opportunity with the defendant. The plaintiff had several telephone calls and Zoom meetings with the defendant's Chief Executive Officer, Oscar Sachs, (Mr. Sachs). There were also multiple emails setting forth the details of the plaintiff's possible employment with the defendant and terms of her employment.

- [4] As the plaintiff had a secure position of employment, she was concerned that any employment agreement she negotiated with the defendant would lock in a compensation structure for a period of three years. The plaintiff's concern in this regard was she might invest considerable time and effort in developing a sales pipeline only to find out that the sales commission structure had changed.
- [5] A formal offer of employment was provided to the plaintiff by Mr. Sachs on October 23, 2020. The offer letter provided that there would be no changes in her commission structure for a period of two years. The plaintiff had been requesting that there would be no changes in her compensation package for a period of three years. There then ensued further communications between the plaintiff and the defendant that resulted in a revised offer being sent by Mr. Sachs on October 29, 2020. In this revised offer Mr. Sachs indicated that the employment agreement would provide that there would be no commission changes for three years. The revised offer further stated in paragraph 2.3:

Commission shall be calculated based upon the company's official commission policy outlined in Schedule A. SALESFLOOR agrees not to change the current policy for a period of 3 years for Employee unless Employee consents.

- [6] The revised offer also included at paragraph 8.4:

This Agreement contains the full and complete understandings of the parties and supersedes all prior oral or written, express or implied understandings or agreements. It may only be modified in writing signed by Employee and SALESFLOOR senior management.

- [7] The revised offer contained in Mr. Sachs's email of October 29, 2020, was accepted by the plaintiff on October 30, 2020. The plaintiff commenced her employment with the defendant on November 23, 2020.
- [8] Beginning in late 2020 and into the early part of 2021 the plaintiff and Mr. Sachs were engaged in discussions as it relates to the commission structure for the defendant. Ultimately this resulted in what has been described in the evidence as the 2021 Commission Policy. It is significant and noteworthy that in the Agreed Statement of Facts the parties agreed as follows:

Salesfloor made no express written request to Ms. McCoubrey for her to consent to amend the terms of her employment agreement and be bound by the 2021 Commission Policy and did not expressly ask her to consent to amend the terms of her employment agreement.

### **Chico's Renewal**

- [9] Chico's FAS Inc (Chico's) was a client of the defendant. On July 14, 2021, the defendant and Chico's renewed their agreement effective August 1, 2021. There is a factual dispute between the parties as to when the Chico's account was assigned to the plaintiff. The

defendant takes the position that the Chico's account was assigned to her in June 2021, i.e., prior to Chico's renewal on August 1, 2021. The plaintiff takes the position that she was asked to take over the Chico's account in August 2021, i.e., a date after Chicos had renewed the agreement with the defendant.

[10] On August 27, 2021 Mr. Sachs emailed the plaintiff stating:

I know you will do a great job with them (Chico's) and I also wanted to recognize all the work you are doing to develop your territory.

[11] Attached to Mr. Sachs's email of August 27, 2021 was a commission statement for the Chico's account which indicated that the plaintiff was paid a commission in connection with the 2021 Chico's renewal.

[12] It is an agreed fact that the plaintiff was paid approximately \$33,000 in connection with the 2021 Chico's renewal. It is agreed that this payment was based on 2% of Chico's contract renewal amount. It is an agreed fact that the amount paid to the plaintiff was inconsistent with the 2020 Commission Policy. It is an agreed fact that the plaintiff never protested the amount she was paid in connection with the 2021 Chico's renewal.

### **Matters in Dispute**

[13] It is the defendant's position that the plaintiff agreed that the 2021 Commission Policy would apply to her and be binding on her as a result of negotiations between the plaintiff and Mr. Sachs in October 2020 as well as further discussions in December 2020. It is the plaintiff's position that she never agreed that the 2021 Commission Policy would apply to her. Rather her position is that the 2021 Commission Policy only applied to the other salespeople employed by the defendant.

[14] It is the position of the plaintiff that she did not object to the changes reflected in the 2021 Commission Policy because she had nothing to object to as the terms of the 2021 Commission Policy were never intended to apply to her. The defendant takes the position that the plaintiff did not object to the changes because she had consented to them as applying to her.

[15] As it relates to the amount paid to the plaintiff for the 2021 Chico's renewal the parties dispute whether the amount paid was consistent with the 2021 Commission Policy. The defendant takes the position that the payment was consistent with the 2021 Commission Policy. The Plaintiff takes the position that the Chico's payment was not a commission payment as she had not been the effective cause of the sale and had only been assigned the Chico's account after the Chico's renewal on August 1, 2021. As such, the plaintiff takes the position that she would not have been owed anything pursuant to the 2021 Commission Policy and that the payment was made to her by Mr. Sachs effectively as a bonus to recognize the work that she was doing to develop her territory.

[16] The plaintiff argues that the terms of her employment agreement are reflected in the agreement agreed to between the parties dated October 30, 2020. The defendant argues that

the employment agreement is reflected in the 2021 Sales Commission Policy that the defendant argues the plaintiff either agreed to or alternatively consented to by accepting the payments that she received in 2021 with respect to Chico's and GNC. These payments the defendant argues were calculated in accordance with the 2021 Commission Policy.

- [17] The defendant argues that the plaintiff's written consent to the 2021 Commission Policy was not needed as she verbally consented to the 2021 Commission Policy applying to her. In the alternative the defendant argues that if the court finds that there was no verbal or written consent by the plaintiff to be bound by the 2021 Commission Policy that the plaintiff condoned the 2021 Commission Policy by accepting the payments made to her for the Chico's and GNC accounts, payments that were based on the 2021 Commission Policy.
- [18] As it relates to the GNC Contract the parties dispute whether the payment made to the plaintiff in 2021 was consistent with the 2021 Commission Policy. The defendant takes the position that the payment was consistent with the 2021 Commission Policy; the plaintiff takes the position that the payment was not consistent with the 2021 Commission Policy because she was paid a 10% commission on the pilot fee and a 5% commission on the core set up fee. The plaintiff argues that pursuant to the 2021 Commission Policy both payments would have needed to be 10% to be consistent with the 2021 Commission Policy. It is an agreed fact that the plaintiff never protested the amount that she was paid in connection with the pilot fee under the 2021 GNC Contract.

### **The 2020 Employment Agreement**

- [19] The employment agreement that was negotiated between the claimant and Mr. Sachs was signed on October 30, 2020 by the plaintiff and Mr. Sachs on behalf of the defendant. The relevant terms of the agreement are as follows:

Paragraph 1.1 **HIRING**. SALESFLOOR (“**Employer**”) hereby employees **Dianne McCoubrey (“Employee”)** as Vice-President of Sales and Employee hereby accepts employment with SALESFLOOR, upon such terms and conditions set forth hereunder. Employee shall perform such services and duties customarily incident to such position.

Paragraph 2.3 **SALES COMMISSION**. Commission shall be calculated based upon the company's official commission policy outlined in Schedule A. SALESFLOOR agrees not to change the current policy **for a period of 3 years for Employee unless Employee consents**. [emphasis added]

Paragraph 8.3 **WAIVER AMENDMENT**. Except as expressly provided in this Agreement, **no amendment or waiver of this Agreement shall be binding unless executed in writing** by the party to be bound thereby. No waiver of any provision of this Agreement shall constitute a waiver of any other provision nor shall any waiver of any provision of this Agreement constitute a continuing waiver unless otherwise expressly provided. [emphasis added]

Paragraph 8.4 **COMPLETE AGREEMENT AND SEVERABILITY**. This Agreement contains the full and complete understandings of the parties and supersedes all prior oral or written, express or implied understandings or agreements. **It may only be modified in writing signed by Employee and SALESFLOOR senior management.** ... [emphasis added]

[20] As it relates to Schedule A of the employment agreement it provides:

This document provides a summary of Salesfloor's ("the Company") sales compensation structure as of January 01, 2020. If you have any questions, please contact your manager.

Paragraph 5 Payments Eligibility

Paragraph 5.1 AE should be employed by the Company **at time of disbursement** to be eligible for commissions as outlined in section 1 and 2. (emphasis added)

Paragraph 5.2. Upon resignation or termination for cause, AE will no longer be eligible for future disbursements related to commissions.

Paragraph 5.3. If terminated without cause, AE is eligible for pre-payment of disbursements expected in the three-months following the date of termination and as outlined in section 1 and 2.

### **The 2021 GNC Contract**

[21] As a result of work done by the plaintiff GNC Holdings LLC (GNC) became a customer of the defendant. On September 24, 2021, GNC and the defendant entered into a contract (the 2021 GNC Contract).

[22] A commission statement for the GNC Contract was generated in 2021 and on its face it suggests that the plaintiff was paid a commission at the rate of 10%. In total the plaintiff was paid approximately \$7,000. The amount paid to the plaintiff was inconsistent with the 2020 Commission Policy.

### **The Chicos 2022 Deal**

[23] On July 30, 2022, Chico's agreed to renew its contract with the defendant. It is an agreed fact that the plaintiff was the effective cause of the contract renewal between Chico's and the defendant. The defendant prepared an invoice for the Chico's deal which is dated August 1, 2022. The defendant's invoice to Chico's for the 2022 Chico's deal had a due date of September 15, 2022.

### **The GNC 2022 Deal**

[24] The plaintiff had been working on the GNC contract prior to her resignation. On August 31, 2022, GNC signed a one-year contract with the defendant. It is an agreed fact that the plaintiff was the effective cause of the GNC deal. The defendant prepared an invoice for the GNC deal dated September 1, 2022. The defendant's invoice to GNC had a due date of October 31, 2022.

### **The Plaintiff's Resignation**

[25] On August 22, 2022, the plaintiff contacted her immediate supervisor to advise that she intended to leave her employment with the defendant. Her immediate supervisor advised the plaintiff that the defendant only required two weeks notice and requested that she provide written notice of her resignation. On August 23, 2022, the plaintiff submitted her formal written resignation to the defendant confirming that her employment would be ending on September 2, 2022. The plaintiff's last day of work was September 2, 2022.

[26] While the defendant disputes any entitlement to unpaid commissions the mathematical calculation for the commissions is not in dispute. As it relates to the Chico's deal at 4% the amount potentially owed to the plaintiff is \$55,228.28 USD. As it relates to the GNC deal the mathematical calculation at 8% of \$75,000 USD is \$6,000 USD. The plaintiff therefore seeks payment in the amount of \$61,228.28 USD.

### **Position of the Plaintiff**

[27] The plaintiff's position is relatively simple. She argues that when she negotiated her employment agreement, she wanted to make sure that the terms of the agreement and the commission that she would be entitled to, would be fixed for a period of three years. The plaintiff did not want to put the time and effort into developing potential sales only to find out that the commission structure might be changed by the defendant. The plaintiff argues that she never agreed that the three-year term reflected in the employment agreement was changed in the manner suggested by the defendant.

[28] As it relates to the commissions claimed in relation to the Chico's and GNC contracts the plaintiff argues that she earned commissions on these contracts pursuant to the terms of the employment agreement as the defendant had submitted invoices to these companies prior to the effective date of her resignation.

### **Position of the Defendant**

[29] The defendant argues that the plaintiff either expressly or by implication consented to a change in her employment agreement as it relates to the defendant's 2021 Commission Policy when she accepted the monies paid to her in 2021 in relation to Chico's and GNC. The defendant argues that by accepting these payments she condoned the 2021 Commission Policy and thus became bound by the 2021 Commission Policy.

[30] As it relates to the commissions now claimed by the plaintiff, the defendant argues the plaintiff has no entitlement to such payments given her resignation and the wording of the 2021 Commission Policy.

**Analysis**

- [31] The first question that this court must answer is whether or not the employment agreement incorporates the 2020 Commission Policy or the 2021 Commission Policy. If this court determines that the plaintiff either expressly or by implication consented to the application of the 2021 Commission Policy then the plaintiff's claims must fail.
- [32] What is fundamental to the court's determination begins with the process by which the plaintiff became an employee of the defendant. Prior to becoming an employee of the defendant, the plaintiff was gainfully employed with another employer. There is no indication in the evidence that the plaintiff was seeking to move from that former secure position of employment. The plaintiff was approached by an executive recruiting firm and introduced to the defendant. It makes logical sense that the plaintiff, prior to moving from a secure position of employment to employment with the defendant, would want an agreement that could not be changed for three years unless all parties agreed to any changes in writing. I accept the plaintiff's evidence that she wanted to negotiate an employment agreement that would provide security for a period of three years.
- [33] The evidence supports such a conclusion given the evidence as it relates to the negotiations between the parties. The plaintiff was presented with an agreement that had a two-year term. The plaintiff made clear that she was not willing to sign an agreement that had anything less than a three-year term.
- [34] The evidence establishes that during the period of negotiation the plaintiff was involved in negotiating her own agreement as well as providing input as it relates to the commission policy for other employees. It makes no sense that the plaintiff would on the one hand seek an agreement with a three-year term and then accept the 2021 Commission Policy. The employment agreement incorporated as Schedule A the defendant's compensation structure as of January 1, 2020. Schedule A to the employment agreement was an integral part of the total employment contract and could only be varied with the written consent of the plaintiff.
- [35] The employment agreement entered into between the parties is the employment agreement of October 29, 2020 signed by the parties on October 30, 2020 attached to which is Schedule A evidencing the defendant's sales compensation structure as of January 1, 2020.
- [36] There remains the issue of whether or not, subsequent to the signing of the employment agreement on October 30, 2020, the plaintiff either expressly or by implication agreed to a change in the employment agreement such that she was bound by the defendant's 2021 Commission Policy.
- [37] The employment agreement signed on October 30, 2020 provides that any waiver of, or amendment of, the agreement is not binding unless executed in writing. There is nothing in the evidence that the plaintiff ever waived in writing the terms of the employment agreement. It is particularly noteworthy in this regard that the Agreed Statement of Facts specifically provides as noted in paragraph 7 above that the defendant never made any express written request to the plaintiff to consent to any amendment to the employment agreement. In his

evidence Mr. Sachs when presented with the Agreed Statement of Facts suggested that it was poorly worded. I have no doubt that the Agreed Statement of Facts was something that was the matter of much discussion and negotiation between counsel. I also have no doubt that the Agreed Statement of Fact was agreed to with the instructions of the clients. The Agreed Statement of Facts was filed with the court and is binding on the court.

- [38] The employment agreement also contains a complete agreement clause (paragraph 8.4) which specifically states:

This Agreement contains the full and complete understandings of the parties and supersedes all prior oral or written, express or implied understandings or agreements. It may only be modified in writing signed by Employee and SALESFLOOR senior management.

- [39] The employment agreement was drafted by the defendant. If there is any ambiguity with respect to the application of the employment agreement the law of *contra proferentem* would apply.
- [40] The defendant argues that the plaintiff implicitly consented to the 2021 Commission Policy when she accepted payment for GNC and Chico's sales made in 2021.
- [41] In order for this argument to be successful there must be evidence that the plaintiff was aware of the full implications of the changes in the commission structure before it can be said that she consented to them. See *Greaves v. Ontario Municipal Employees Retirement Board*, 1995 CanLII 7288 (ON SC) at para 63.
- [42] I accept the evidence of the plaintiff that she never had actual knowledge that the change in the commission structure now argued by the defendant would in fact apply to her. A review of the email correspondence between the plaintiff and Mr. Sachs is far from establishing that the 2021 commission payment structure was to apply to her. I accept the evidence of the plaintiff that her sole belief was that the new commission structure would apply to her sales team and not to her. There was no reason for the plaintiff to dispute what would appear to be an apparent breach of contract because she was never aware that there was in fact a breach to dispute.
- [43] The employment agreement specifically provides that any change to the agreement required her consent. There is no written consent or for that matter implicit consent in the evidence to establish that the plaintiff ever acquiesced to any change in her employment agreement.

### **The 2021 Chico's Commission Claimed by the Plaintiff**

- [44] On August 22, 2022, the plaintiff called her direct supervisor, Mr. Haitham Ghadiry (Mr. Ghadiry), to tell him that she intended to leave her employment with the defendant. The plaintiff told Mr. Ghadiry that she felt bad attending an upcoming team building retreat being organized by the defendant, when she knew that she would be leaving the company. It is admitted in the Agreed Statement of Facts that Mr. Ghadiry told the plaintiff that the defendant only required two weeks' notice and asked that she provide written notice of her resignation.

On August 23, 2022, the plaintiff submitted her formal written resignation to the defendant that confirmed her employment would be ending on September 2, 2022 even though she had been willing to work until October 2022.

- [45] On July 30, 2022, Chico's agreed to renew its contract with the defendant for \$1,380,707.00 USD (the "Chico's Deal"). The defendant prepared an invoice for the Chico's Deal, dated August 1, 2022. On August 31, 2022, GNC signed a one-year contract with the defendant for \$75,000.00 USD (the "GNC Deal"). The defendant prepared an invoice for the GNC Deal, dated September 1, 2022. The Agreed Statement Facts indicates that the Plaintiff was the effective cause of both the Chico's and GNC deals.
- [46] The defendant argues that when the plaintiff delivered her resignation letter of August 23, 2022 she was no longer eligible to receive commissions. The defendant argues that the 2021 Commission Policy only required it to pay commissions during the month in which the first invoice was sent to its client (i.e., Chico's and GNC).
- [47] The 2020 Sales Commission policy which is attached as Schedule A to the employment agreement provides that the plaintiff "should be employed by the Company at the time of disbursement to be eligible for commissions". It goes on to provide that "upon resignation" the plaintiff "will not longer be eligible for future disbursements related to commissions". The terms of Schedule A were drafted by the defendant. The words "at the time of disbursement" are not defined. The defendant argues for an interpretation that it is only obligated to pay a commission in the month in which the first invoice is sent to the customer.
- [48] An employee who voluntarily resigns his or her employment with their employer, without any undue influence on the part of the employer, does so knowing of the implications that a resignation may have as it relates to the employee's entitlement to commissions. The employee who resigns in those circumstances cannot complain when they lose commissions for which they have worked hard in developing and maintaining a customer. The employee does so with their eyes open.
- [49] In this case the plaintiff worked hard to develop and maintain both Chico's and GNC. The first invoice to Chico's was delivered by the defendant on August 6, 2022. The first invoice was delivered to GNC on September 1, 2022. The plaintiff was still an employee of the defendant on August 6 and September 1, 2022. The question for this court is whether the plaintiff was an employee "at the time of disbursement" - the language used in Schedule A. Any ambiguity in the language used must be resolved against the drafter of Schedule A - i.e., the defendant.
- [50] Rhetorically the question I ask is "at the time of disbursement" of what? Did the parties intend that the employee was only entitled to a commission when the customer paid the defendant's invoice? Did the parties intend that the employee was only entitled to commission after the customer renewed its contract or entered into a contract with the defendant? Did the parties intend that the employee was entitled to a commission when the defendant rendered an invoice to the customer? These and other permutations may have been within the contemplation of the parties.

- [51] It was open to the defendant to have drafted Schedule A in clearer language. The plaintiff had offered to work until October 2022. The invoices for GNC and Chico's were delivered prior to the last day worked by the plaintiff. Fairness dictates in the absence of clear language in Schedule A precluding entitlement, that the plaintiff be paid for the commissions earned on the Chico's and GNC deals.
- [52] The mathematical calculation of the commissions due on the Chico's and GNC invoices is not in dispute. The plaintiff for the reasons set forth above shall recover \$61,228.28 (USD). The plaintiff shall recover \$61,228.28 (USD) payment to be calculated in accordance with s. 121 of the *Courts of Justice Act*. The plaintiff is also entitled to pre-judgement interest in accordance with s. 129 of the *Courts of Justice Act*.
- [53] I encourage the parties to resolve the issue of costs. If costs cannot be resolved, I will receive written submissions from the parties limited to two pages in length to be received no later than July 25, 2025. If submissions are not received by then the court will assume the issue of costs has been resolved.

---

EDWARDS, R.S.J.

**Released:** June 24, 2025