SUPREME COURT OF NOVA SCOTIA
Citation: Carrigan v. Berkshire Securities Inc., 2010 NSSC 373

Date: 20101015
Docket: Hfx No. 194833
Registry: Halifax

Between:

Glen Carrigan
Plaintiff

v.

Berkshire Securities Inc.
Defendant

Judge: The Honourable Justice John D. Murphy

Heard: February 2, 3, 4; 8, 9, 2010, in Halifax, Nova Scotia

Counsel: George MacDonald, Q.C. and Jane O'Neill, for the plaintiff
Colin M. Piercey and Rick Dunlop, for the defendant

By the Court:

[1] Glen Carrigan seeks to recover approximately $275,000 which he claims to have lost because Berkshire Securities altered terms of his employment and the basis of his compensation as a financial advisor.

BACKGROUND

[2] Many of the circumstances giving rise to this lawsuit are not disputed. The plaintiff worked as a financial advisor at Fortune Financial in Halifax from late 1995 until May 1998, when he sought and obtained a position with the defendant. He began as branch manager to establish an office for Berkshire in Halifax. Mr. Carrigan's relationship with his new employer was arranged orally, and managed by Kris Astaphan, Berkshire's senior vice-president who reported to its board chair, Michael Lee Chin.

[3] When the plaintiff joined Berkshire as a starting manager, he had the option to operate the Halifax branch and be compensated under either a "corporate model" or "associate model." Under the corporate model, Berkshire would pay most office-operating expenses and determine commission rates, and the branch manager would receive a personal payout percentage commission on his own sales, as well as an override of 2% of the commissions earned by the other financial advisors in the office. The plaintiff chose the associate model, on the basis that it was more entrepreneurial; and although it carried more risk, it was expected to yield him better returns. Under the associate model, most expenses were covered by Mr. Carrigan, who as branch manager received a personal payout percentage of commissions on his own sales, and 85% of gross commissions earned by other advisors selling from the Halifax branch, with Berkshire retaining the remaining 15%. Mr. Carrigan negotiated the portion of the 85% commission which he paid to those advisors, retaining an override of up to 10% for himself.

[4] Soon after assuming the branch manager position at the Halifax office on May 15, 1998, the plaintiff's role with Berkshire expanded. He became regional director, with territory including Nova Scotia by the end of 1998, New Brunswick in late 1999 or early 2000, and Prince Edward Island late in 2000 or during early 2001. At his own expense, he recruited advisors and developed and administered offices throughout the region. Mr. Carrigan testified that he spent approximately 25% of his time developing his own book of business, and devoted the remaining 75% to developing Berkshire's offices in the Atlantic region; as a result of his efforts approximately 30 representatives were recruited throughout Atlantic Canada, about eight of whom were in the Halifax office. As regional director, he received an override of up to 10% of the gross commission generated by each sale made by a financial advisor in an Atlantic Canada office for which he was responsible. Operating under the associate model throughout the region,

Mr. Carrigan expected that the overrides would exceed his overhead expenses and yield a return on his investment, and that as an entrepreneur he would earn more than he would have made by spending all his time on personal production under Berkshire's corporate model.

[5] In 2000, Berkshire became a member of the Investment Dealers Association, and its financial advisors were required to sign employment agreements. The plaintiff signed the standard form contract (the "Employment Agreement"), which contained a 30-day termination clause. It is the only document reflecting the arrangement between the parties; however, it addressed only Mr. Carrigan’s role as a financial advisor, and not his regional director duties.

[6] Berkshire was generally pleased with the plaintiff's performance as financial advisor, Halifax branch manager and regional director, and gave him support, encouragement and praise.

[7] During June 2001, Berkshire introduced a new management team. The plaintiff no longer reported to Mr. Astaphan, whose role was assumed by three people – Frank Laferriere, Geoff Charlton and Maureen Charlton. Soon after the transition the defendant eliminated its regional director structure, taking away the plaintiff’s duties outside Halifax, and affecting similar positions in Manitoba, Alberta, and British Columbia. As a result, the plaintiff was advised that he would no longer be recruiting or administering advisors outside the Halifax branch, would have no further responsibility for expenses associated with those advisors or their offices, and would not receive overrides generated by their activities. The defendant also advised that it intended to make Halifax a corporate office, which would mean that Mr. Carrigan's compensation would be limited to commissions generated by his personal production and a 2% override for financial advisors in the Halifax office only.

[8] The plaintiff anticipated that this change from the entrepreneurial associate model which he had chosen, to managing an office under the corporate model, would substantially reduce his income, and he requested compensation from Berkshire. There were extensive discussions throughout the Summer and Fall of 2001. Mr. Carrigan sought:

(a) compensation for lost personal production during the time he was developing the Atlantic region for Berkshire, based on the assumption that assets under his administration would have continued to grow at the same rate he experienced during his final 12 months with Fortune Financial; and

(b) repayment of all expenses he incurred related to development and support of the Atlantic region.

[9] Instead of compensating the plaintiff on the basis he requested, Berkshire paid him an amount slightly in excess of $100,000 consisting of:

(a) forgiveness of a $50,000 loan;

(b) $36,118 excess reimbursement with respect to employee salary and HST payment; and

(c) increased personal commission payout based upon higher associate rate after transition to corporate office, and continuation of override on other advisors’ production until October 31, 2001.

[10] The parties continued to disagree concerning the plaintiff's compensation, and on May 21, 2002 Berkshire terminated Mr. Carrigan's employment effective July 16, 2002.

THE CLAIM

[11] The plaintiff's claim is advanced entirely as a result of the change in his relationship with Berkshire when the regional director role was eliminated and the Halifax branch changed from an associate to corporate office during 2001. No claim is made as a result of his termination as a financial advisor during July of 2002, and the damages sought relate only to alleged losses incurred during the time the plaintiff worked with Berkshire between 1998 and 2002.

[12] In his statement of claim, Mr. Carrigan alleges that Berkshire constructively dismissed him, breached contractual arrangements, and/or made negligent misrepresentations concerning how he would be compensated for building Berkshire's Atlantic Canadian offices. At trial, the plaintiff presented his case primarily based upon a claim that Berkshire failed to fulfill a contractual commitment that it made after the change in his employment status, allegedly to

compensate him for lost personal production and expenses incurred while he was developing its business in the Atlantic region. He did not, however, abandon other causes of action based upon the parties' dealings when their relationship began in 1998 and upon constructive dismissal principles. Mr Carrigan seeks "reliance damages" in principal amount $274,180 calculated in an analysis prepared by Michael D. Casey CA, CBV. (the "Casey Report"), plus aggravated damages, and compound interest. The Casey Report indicates that a loss of $274,180 represents the difference between what the plaintiff actually earned at Berkshire and what he would have earned had he not joined the defendant as regional director for the period May 10, 1998 to June 30, 2002.

ISSUES AND POSITIONS OF THE PARTIES

[13] *(A) Compensation Agreement*

> *During discussions between July and October 2001, did the defendant agree to reimburse expenses and compensate the plaintiff for lost personal production on the basis that after joining Berkshire in 1998 his assets under administration ("AUA") would have increased by the same annual amount as during his final year of employment with Fortune Financial, had he not been developing regional offices for Berkshire?*

[14] Mr. Carrigan maintains that the $7.5 million increase in AUA which he experienced during his last year at Fortune Financial would have continued annually had he not been developing the Atlantic region for Berkshire, and that the defendant agreed to pay compensation on that basis. Berkshire denies making any such agreement, takes the position that it would be unreasonable to expect to maintain such an increase in production, and asserts that the defendant fulfilled an alternate compensation arrangement to which the plaintiff agreed during October 2001.

[15] *(B) Negligent Misrepresentation*

> *Did Berkshire negligently represent that Mr. Carrigan could develop its business spending his own money in return for the right to receive a 10% override on the gross earnings of all financial advisers whom he recruited for the entire duration of their relationship?*

[16] The plaintiff claims that he relied upon this negligent statement to his detriment and left a lucrative position with Fortune Financial to work with the defendant; the defendant denies making any negligent misrepresentation.

[17] *(C) Breach of employment contract/constructive dismissal*

> *Did the defendant breach an oral employment agreement made when the plaintiff joined Berkshire in 1998 and/or constructively dismiss Mr. Carrigan in 2001 when it altered the basis of his employment relationship by changing from the associate model to the corporate model?*

[18] Mr. Carrigan maintains that his employment was governed by an oral agreement including terms that he would act as the defendant's regional director in Atlantic Canada for a sufficient time to allow him to recoup and profit from his significant personal investment in the defendant's business. Berkshire says the relationship was governed by the Employment Agreement, including the 30-day termination clause. The plaintiff says that he was constructively dismissed when the defendant unilaterally changed the conditions of his employment; the defendant denies constructive dismissal and maintains that the plaintiff accepted the model change and a revised compensation arrangement, and in any event did not suffer any loss.

[19] *(D) Damages*

> *Is the plaintiff entitled to recover damages, and if so on what basis?*

[20] Mr. Carrigan claims reliance damages. The defendant denies that the plaintiff has suffered a loss, and in the alternative maintains that he has already received compensation in excess of what his entitlement would be if damages were properly assessed as the amount required to put him in the position he would have

been if Berkshire had maintained his employment as regional director and Halifax branch manager under the corporate model.

ANALYSIS

(A) COMPENSATION AGREEMENT

[21] The plaintiff characterizes this dispute as an assessment of damages to give effect to an agreement he reached with Frank Laferriere, Geoff Charlton, and Maureen Charlton, who represented the defendant during negotiations in July and August 2001, and in particular during an August 8, 2001 conference call. Mr. Carrigan says he was invited to submit a compensation proposal when he was advised that Berkshire intended to alter their relationship, and the August 8th discussion was held after he submitted an initial proposal (Exhibit 1, Tab T-81). He testified that it was suggested that instead of using the formula employed in the initial proposal, he should use the last year of his production at Fortune Financial and assume the same annual increase in assets as a basis for calculating his commissions to determine lost production. He maintains that it was agreed on August 8th that he would receive compensation for lost production on that basis, and also recover the expenses he incurred related to regional issues. The plaintiff says it was in the context of agreed criteria and formula that he prepared a second proposal, (Exhibit 1, Tab T.-22) which he submitted to Berkshire on August 20, 2001 (the "August Proposal").

[22] The defendant denies that the August Proposal represents an arrangement to which it agreed.

[23] The August Proposal, which included the plaintiff's calculation of lost production based on an anticipated $7.5 million annual increase in AUA as well as expenses incurred in relation to regional issues, was submitted under cover of an e-mail message which stated:

> The following attachment is my request for compensation using the criteria we discussed in our August 8, 2001 telephone call.

[24] The proposal stated as follows:

> The following proposal is based on the agreement made between myself and Frank Laferriere, Geoff Charlton and Maureen Charlton as discussed in a conference call on August 8, 2001. During that call it was agreed that my compensation for dismantling my regional processing center and giving up my overrides is based on the following two items:
>
> 1. Cost of lost production: It was agreed to in the August 8, 2001 conference call that my compensation would be based on the assumption that I would have continued to gather new assets at the same rate I was in my final 12 months at Fortune Financial (April 1997-April 1998) had I done only personal production at Berkshire.
>
> 2. Reimbursement of all expenses that were related to the development and support of the regional areas to which I was assigned.
>
> ...
>
> The proposal will show that the combined total of these two items is $403,070.00.

[25] The $274,180 claim advanced by the plaintiff at trial was based upon updated calculations in the Casey Report, which adopted formula and criteria similar to the August Proposal, but extended the lost income estimate to June 30, 2002 and credited compensation which the defendant paid.

[26] Documents presented at trial confirm that the plaintiff's AUA increased by $7.5 million during the 12 months before he left Fortune Financial to join Berkshire in May 1998. They also show that between October 1995 and April 1998, Mr. Carrigan had accumulated $1.1 million AUA; he attributes the more modest earlier growth rate to his need to establish a Halifax market, including offering investment seminars. The plaintiff testified that when he was with Berkshire and devoting approximately 25% of his time to personal production, his AUA increased to approximately $13 million by March 2000, and to $15 million when he left the defendant in July 2002.

[27] I reject the plaintiff's submission that the defendants agreed on August 8th to base his compensation for lost production upon the assumption that his AUA would have continued to grow at $7.5 million per year. The August Proposal was a position advanced during a negotiation, which did not become binding. I accept

Mr. Laferriere's testimony that the parties were exploring alternatives during the August 8th call, and that the $7.5 million annual growth premise in the August Proposal had to be supportable before agreement could be reached, because its source, sustainability, and composition were unknown to Berkshire and it exceeded the normal $2-5 million annual growth range for Defendant's advisors.
Mr. Laferriere's evidence was that while he agreed it would not be unreasonable for the plaintiff to base a proposal on his last year at Fortune Financial, it would be explored as one alternative in context of the defendant being able to question soft assumptions.

[28] Mr. Charlton testified that he agreed in principle that the plaintiff should be compensated and that negotiations took place during July and August 2001; however, he said Berkshire did not accept the August Proposal because the defendant did not think the plaintiff could justify the proposed production increase.

[29] The plaintiff suggests that I should draw an adverse inference because Maureen Charlton, who participated in the negotiations, did not testify. As there was no evidence that she continues an association with the defendant or is in its control, I do not make that inference.

[30] Communications between August 20th and October 16, 2001 demonstrate that, contrary to his position at trial, Mr. Carrigan was aware Berkshire had not agreed to terms of compensation.

[31] In an e-mail to Mr. Carrigan August 31st, Mr. Laferriere, in the context of advancing a loan, noted as follows:

> The following are the terms and conditions
>
> - This is to be considered a loan and is not to be construed as a deposit, payment, settlement of an agreement or consideration for an agreement, until such time as we review the arrangements and come to an agreement.
>
> - In the event an agreement cannot be reached, the loan will be called and payable on demand.
>
> - The loan is non interest bearing.

> - This has the right of offset with other monies you may be owed by Berkshire.
>
> In the mean time we can continue to talk. (Exhibit 1, tab T-26)

[32] On September 21st Mr. Carrigan inquired of Mr. Laferriere, "Have you come up with a number yet?" (Exhibit 1, Tab T-27) On October 2nd, the plaintiff wrote to the defendant as follows:

> To date we have not come to an agreement or a pay out date.
>
> ...
>
> From management to date I have only a suggestion of compensation, which amounts to between 25 and 38 cents on the dollar, which was communicated to me by Frank Laferriere in a telephone conversation on September 27th, 2001.
>
> ...
>
> Management, through Frank Laferriere, has brought to me in two telephone conversations further suggestions. The following is a summary of, and my response to, those suggestions:
>
> #1 - Management wishes to make the assumption that there would have been no growth on my book despite the fact that I was bringing in $7,500,000 per year.
>
> ...
>
> #2 - Management has stated that the overrides that I received are there to offset expenses and not as a form of direct compensation to the Regional Director. Therefore, management wishes to subtract my override expense from the $403,000.00 compensation request. (Exhibit 1, tab T-28)
>
> ...

[33] In a telephone conversation October 9th, which the plaintiff recorded without advising the other participants, Mr. Laferriere and Mr. Charlton questioned whether the $7.5 million annual production increase was sustainable, reiterated to the plaintiff that although they agreed in principle that he should be compensated,

they were not agreeing on the amount, and were unable to make a decision without Mr. Lee Chin's approval.

[34] The parties spoke by telephone again October 16th, another call which the plaintiff recorded without the defendant's knowledge. At that time, the defendant communicated clearly to the plaintiff that his proposal was not accepted. Mr. Laferriere, Geoff Charlton and Maureen Charlton advised that although the defendant recognized that the plaintiff was owed compensation, Mr. Lee Chin had decided that no amount would be paid for lost opportunity or lost production. Mr. Laferriere acknowledged during his testimony that Berkshire first informed the plaintiff on October 16th that his request for payment based on lost production and expense reimbursement was rejected. I do not, however, accept the plaintiff's claim that the message was inconsistent with a prior commitment. Although Mr. Carrigan may have felt Berkshire would compensate him based on the formula in the August Proposal, no such commitment was made, and the communications which took place between presentation of the August Proposal and October 16th do not evidence an agreement. Although the plaintiff was pressing hard for acceptance of his proposal he has not established that the defendant committed to compensate him by paying reliance damages based upon lost production and expense reimbursement.

[35] I do not accept the plaintiff's submission that an agreement was concluded based upon the criteria and formula in the August Proposal, and I do not find that a compensation agreement based upon payment of reliance damages was made between the parties.

(B) NEGLIGENT MISREPRESENTATION

[36] Mr. Carrigan alleges in his statement of claim that during negotiations leading to his employment Berkshire made the untrue, inaccurate and misleading statement that he could develop its business in return for a 10% override on the gross earnings of all financial advisors whom he recruited. The plaintiff says this statement was made negligently, and that he relied on it to his detriment by leaving a lucrative position with Fortune Financial to work with the defendant.

[37] I have concluded that Mr. Carrigan's claim based upon negligent misrepresentation fails. The plaintiff did not advance evidence which established a

negligent misrepresentation, and I accept the defendant's submissions that this aspect of the claim is without merit.

[38] The plaintiff’s claim is based on a statement that the override would last into the future; however, a negligent misrepresentation must relate to an existing fact and does not arise from a promise as to future conduct or a future event (**Arrow Construction Products Ltd. v. Nova Scotia (Atty. Gen.)**, 1996 Carswell NS149 (C. A.); **Northern Petroleum v. Sydney Steel Corp.**, 1997 Carswell NS341, affirmed 2000 Carswell NS253 (C. A.)).

[39] Negotiations between the parties during 1997-1998 led to an oral agreement which provided that the plaintiff would receive an override on the production of advisors whom he recruited and administered. Under that associate model, the plaintiff was responsible for expenses associated with those advisors. Mr. Carrigan did receive that override (either 10% or a lesser amount which he negotiated with the adviser) pursuant to the terms of the agreement; the alleged negligent misstatement was not untrue, inaccurate or misleading. As the override was a term of the oral agreement, and was co-extensive with any alleged negligent misrepresentation, there is no basis for no tort liability (**Queen v. Cognos Inc.** 1993 Carswell Ont 801).

[40] In any event, the basis of Mr. Carrigan's damages claim is inconsistent with the negligent misrepresentation which he says the defendant made. The plaintiff seeks to recover damages incurred during 1998-2001, a period during which he received the overrides which he claims to be the subject of the misrepresentation.

(C) BREACH OF EMPLOYMENT CONTRACT/CONSTRUCTIVE DISMISSAL

(i) Oral Employment Agreement

[41] Mr. Carrigan claims in paragraph 12 of his statement of claim that by unilaterally changing his conditions of employment during 2001, the defendant breached an oral agreement which included a term (which I will sometimes refer to as "Duration Term") that the plaintiff would act as the defendant's regional director in Atlantic Canada for a sufficient period of time to allow him to recoup and profit from his personal investment developing the defendant’s business following the associate model. The plaintiff maintains that pursuant to his employment under the associate model he was entitled to receive overrides from

the production of an advisor whom he recruited for as long as that person remained with Berkshire.

[42] The parties dispute what, if any, Duration Term, express or implied, the employment arrangement contained, and the evidence is conflicting. The plaintiff maintains the oral employment contract contained a Duration Term, but he admitted during cross-examination that when the arrangement was being established there was no discussion concerning how long the override under the associate model would last. Mr. Astaphan testified that no end was contemplated or expected when the agreement was made, and he did not understand there was a set time for overrides. Although Mr. Laferriere acknowledged that overrides were generally intended to be long-term arrangements, the defendant suggests that the 30-day termination provision in the Employment Agreement supersedes the oral contract. Mr. Carrigan admitted that he did not object to that provision, but maintained the Employment Agreement did not govern his regional activities which generated the overrides in question.

[43] I have concluded that the relationship between the parties was governed by an oral contract, which did not contain a Duration Term. The evidence does not reveal any discussion concerning how long overrides would be paid at the time the parties made the initial agreement that Mr. Carrigan would operate an associate office in Halifax; similarly, when the plaintiff's responsibilities expanded to include the regional director role, no commitments concerning the life of the associate model relationship were made.

[44] The circumstances leading to the execution of the Employment Agreement demonstrate that its termination provision was not intended to address the present dispute. That agreement was executed more than two years after employment began in order to meet regulatory requirements, and to the extent it governs the relationship between Mr. Carrigan and Berkshire, its application is limited to Halifax branch activities. The 30-day termination provision in the written agreement does not supersede a Duration Term in the oral agreement, as no such provision existed; nor is it a new contractual term applicable to the primary subject of this dispute, the parties' relationship with respect to regional activities.

[45] I reject the plaintiff's claim that the defendant breached a Duration Term in an oral contract by changing the relationship from the associate to the corporate model. There was no term in a contract between the parties which determined how

long the associate compensation arrangement would last. Accordingly, if the plaintiff is to receive compensation as a result of the defendant's actions, the amount payable will be determined by following principles of contract and employment law, but not by enforcing a Duration Term.

(ii) Constructive Dismissal

[46] The plaintiff claims in paragraph 9 of his statement of claim that he was constructively dismissed when the defendant unilaterally changed the conditions of his employment during 2001. As I have rejected the plaintiff's claim that Berkshire breached a compensation agreement, and found that there was no negligent misrepresentation or breach of an oral employment contract, Mr. Carrigan can only succeed if I determine that he was constructively dismissed and is entitled to damages in excess of the compensation that the defendant has paid.

[47] The plaintiff pleads that constructive dismissal occurred on October 16, 2001; however, I agree with the defendant's acknowledgment that Mr. Carrigan's terms of employment were changed effective July 1, 2001. Although he was invited to continue as a financial advisor and Halifax branch manager, and indeed remained with Berkshire in that capacity until July 2002, any constructive dismissal claim arises from the elimination of Mr. Carrigan's role as regional director and change of his compensation model from associate to corporate, which occurred as of July 1, 2001.

[48] The defendant characterizes the claim as one based upon constructive dismissal principles, but maintains that the plaintiff's position is without merit because:

(a) Mr. Carrigan accepted the model change and the compensation that the defendant provided to him; and

(b) Mr. Carrigan suffered no loss as a result of the elimination of the regional director position or the change from associate to corporate model, as the expenses he incurred as regional director exceeded the value of his overrides.

[49] I have concluded that the defendant’s July 1, 2001 elimination of the plaintiff's duties outside the Halifax branch and imposition of the corporate model

on Mr. Carrigan's remaining relationship constitute constructive dismissal. Although the plaintiff retained compensation payments totaling approximately $100,000 (previously described in paragraph 9) and continued his employment under the corporate model until July 2002, he did not in my view accept the model change and agree to the compensation received, and he did not forego his right to pursue a constructive dismissal claim.

[50] Berkshire correctly emphasizes that an employee who accepts new employment terms, whether express or implied, is prevented from successfully bringing a constructive dismissal action because the unilateral nature of the alterations will be lacking (Eclin, <u>The Law of Constructive Dismissal in Canada</u>, (Aurora, Canada Law book, 2000 p. 57)). One cannot accept the beneficial aspects of the new compensation plan and reject disadvantageous terms (**King v. Solna Offset of Canada Ltd.** (1984) Carswell Ont904 (C.A.), para.10). I find in this case, however, that Mr. Carrigan did not accept benefits offered under the corporate model in 2001, while rejecting only the reduced override and elimination of regional activities. Just as the defendant did not enter a compensation agreement on the plaintiff's terms as contained in the August Proposal, Mr. Carrigan did not accept the Berkshire compensation formula advanced in October as a complete resolution of any claim for constructive dismissal. The transcript of the October 16th telephone conference between the plaintiff and the defendant's representatives indicates that Mr. Carrigan continued to protest Berkshire's position; absence of a final agreement is also evident from the correspondence and telephone discussions which continued until the Spring of 2002. Although the plaintiff retained the amounts the defendant advanced as compensation, I find that he did not accept settlement terms, but rather treated them as advances or partial payments while he continued to try to negotiate. No release documentation was signed, and the defendant's view that the dispute was concluded was not shared by Mr. Carrigan. In the circumstances of this case, the plaintiff is not barred from advancing a constructive dismissal claim based upon the changes Berkshire imposed upon his employment status effective July 2001.

(D) DAMAGES

[51] Although I have rejected the submission that the August Proposal constituted a compensation agreement, I must nevertheless consider, in the absence of an agreement, Mr. Carrigan's position that damages arising from the defendant's activity, whether characterized as constructive dismissal or otherwise, should be

determined as advanced in that proposal – "reliance damages" of $274,180 as calculated in the Casey Report representing compensation for lost personal production and expenses incurred while developing the Atlantic region for Berkshire.

[52] The defendant maintains the plaintiff suffered no loss, or alternatively that the compensation he has received exceeds any proper damage award, which should be assessed by quantifying what the plaintiff would have earned from the regional director component of his work under the associate model during a reasonable notice period. A critique of the Casey report prepared for the defendant by Paul F. Bradley, CA IFA CBV. (the "Bradley Report"), suggests at paragraph 31 that a proper quantification of the plaintiff's loss, if any, would be:

> ..the difference between: (i) what Mr. Carrigan would have earned if he had remained in his position at Berkshire, under the new corporate model, as Halifax branch manager and (ii) Mr. Carrigan’s estimated earnings assuming continuation under the existing associate model. That is, the loss would be calculated as the amount required to put Mr. Carrigan in the position he would have been, had Berkshire’s Halifax office not transitioned from an associate model to a corporate model.

[53] When addressing the damages issue, I will sometimes refer to the plaintiff's approach as the "reliance method", and the defendant’s as the "expectancy method.”

(i) The Reliance Method

[54] As indicated in paragraph 4, the plaintiff worked as regional director with Nova Scotia responsibilities from late 1998 until mid-2001 (approximately 2.5 years); his territory included New Brunswick from late 1999 or early 2000 (approximately 1.5 years), and activity extended to Prince Edward Island after late 2000/early 2001 (approximately half a year). His constructive dismissal claim arises from termination of that activity, and the simultaneous change from associate to corporate payment model.

[55] The Casey report calculates the plaintiff's actual earnings (combined commission income reported on his personal and corporate income tax returns) during the period May 1, 1998 through July 1, 2001, while he worked under Berkshire's associate model. I accept Mr. Casey's determination that net of

unrelated income amounts and after deducting incremental costs incurred as a result of his duties as regional director, Mr. Carrigan's actual earnings from all his activities under the associate model at Berkshire, were as follows:

1998	$98,206 (8 months)
1999	$150,637
2000	$217,635
2001	$76,900 (6 months)

[56] Mr. Casey then calculated the plaintiff's loss by deducting those earnings from the commission income that he estimated Mr. Carrigan would have earned from May 1998 until June 2001, had he not assumed the role of regional director with Berkshire and instead focused his time and efforts building his own book of business as a producing branch manager. In doing so, Mr. Casey projected an annual net AUA increase of $7.5 million, adopting the assumption underlying the plaintiff's August Proposal that he would be able to sustain the same growth as experienced during his last year with Fortune Financial. Mr. Casey has also calculated what the plaintiff's shortfall would have been from July 1, 2001 to June 30, 2002 assuming the same production at Berkshire as during the year 2000 and the same $7.5 million annual growth in AUA. Mr. Casey concluded that the plaintiff's loss was $274,180 on a net basis, excluding any consideration for HST or income tax.

[57] I agree with the plaintiff's submission that, as an alternative to awarding compensation in the traditional manner based on expectation, damages for breach of contract may in appropriate cases be assessed as the amount required to put the plaintiff in the position occupied before the contract was made, rather than in the situation the plaintiff would have been if the contract had been performed (**Ramey v. Wilder Mobility Liability**, [2004] O.J. number 2674 (SCJ); S. M. Waddams, <u>The Law of Contract</u> (4th edition) p. 515). I have concluded, however, that this is not a case where damages should be awarded on a "reliance" basis.

[58] In my view, the authorities upon which the plaintiff relies to support the basis upon which he seeks a damage award are distinguishable. Those decisions did not award reliance damages for breach of a contractual employment

arrangement to which the parties had adhered for more than three years, as in this instance. Rather, a plaintiff's claim for loss of capital in the context of a unilateral contract was dismissed in **Hubrisca Enterprises Ltd. and Shotco Ammunitions Corporation v. the Atty. Gen. of Canada** [2001] B.C.J. No 246 (S.C.); in **Granitile Inc. v. Canada** [1998] O.J. No. 5028 (O.C.J.) reliance damages were awarded where the breach occurred prematurely before the project reached production; in **Ramey v. Wilder Mobility Ltd.**, *supra* the court determined that it would be very difficult, if not impossible, to assess damages for breach of contract in the traditional manner as there was no evidence with respect to the cost of putting the plaintiffs in the position they would have been had the contract been performed as agreed.

[59] I have not been referred to any case where the reliance method has been followed to assess damages in an employment law context. In **Spurway v. Royal Le Page Real Estate Services Ltd.** (1987), 77 N.S.R. (2d) 156, this court declined to use a real estate's agent's highest earning years as a measure of damages for wrongful dismissal, ruling at paragraph 52 that the plaintiff should be compensated by a monetary amount equal to what she could reasonably have expected to earn during the two-month notice period that the court found she was entitled to receive.

[60] Even if reliance damages were the proper basis to determine Mr. Carrigan's compensation, I would not conclude that he has established the quantum of loss claimed, which is based on the analysis in the Casey Report. That report accurately reviews the plaintiff's employment arrangements and his income while at Fortune Financial and Berkshire, and clearly explains the assumptions used and method adopted to project what he would have earned had he not moved to Berkshire in 1998. However, I am unable to adopt its conclusions, because I do not find that the evidence supports the underlying assumptions.

[61] The Casey Report presumed Mr. Carrigan would continue to have the annual AUA increase of $7.5 million which he experienced in his final year with Fortune Financial – the same assumption upon which the August Proposal was based. Although I have rejected the plaintiff's primary position that the parties reached a compensation agreement according to the August Proposal, that is not the only reason for my conclusion that damages should not be determined according to the analysis in the Casey Report. Independently of my finding that there was no compensation agreement, I have concluded, based on the evidence at trial as well as the assessment in the Bradley Report, that the assumed $7.5 million annual

AUA increase, which is so fundamental to the Casey analysis, has not been established as a reasonable basis to project the plaintiff's losses using the reliance damages approach. I have considered the following:

- the plaintiff’s AUA increase during his final year with Fortune Financial was much higher than during his previous years with that employer

- when analyzing the Fortune Financial data, Mr. Casey was unaware of the breakdown among investment categories (stocks, mutual funds, transfers in-kind), and he acknowledged that a change in that mix could reduce the plaintiff’s claim

- Mr. Casey did not have information to compare the plaintiff's projected increase with production rates for other financial advisors, and he could not assess whether the plaintiff's assumed performance was typical for Berkshire personnel or in the industry

- Mr. Laferriere testified that a sustained $7.5 million AUA increase was unheard of at Berkshire, where the normal annual increase is in the range of $2-5 million

- the plaintiff did not provide evidence to establish that he would develop the asset mix at Berkshire necessary to generate the projected performance

- the Casey Report, in addition to projecting performance based on an advisor’s production during a particular year, did not address general industry performance and economic environment, which the Bradley Report identified as important considerations

- if the reliance method were still followed and other aspects of Mr. Casey's analysis not altered, varying the primary assumption by reducing the $7.5 million AUA increase production to $5 million annually would eliminate any loss sustained by the plaintiff

[62] I am not satisfied a projected $7.5 million annual AUA growth for Mr. Carrigan was a reasonable assumption; accordingly, I would be unable to

accept the Casey Report's calculation of the plaintiff's loss, even if I were to adopt the reliance damages theory.

(ii) Expectancy Method

[63] Under the law of personal services contract, an individual is entitled to reasonable notice of termination. Damages for failing to provide that notice are determined as payment in lieu of notice – the income the employee would have earned during a notice period, sometimes described as “payment of remuneration for the notice period” (**Vorvis v. Insurance Corporation of British Columbia**, [1989] 1 S.C.R. 1085 at para.13).

[64] Berkshire maintains that Mr. Carrigan cannot recover damages for constructive dismissal because he insisted upon entitlement to reliance damages, and did not provide evidence to quantify a claim for expectancy damages. Alternatively, the defendant says the plaintiff was losing money in his position as regional director because his expenses exceeded overrides.

(a) Change in plaintiff’s income

[65] Although the plaintiff did not direct evidence toward establishing expectancy damages, sufficient information is available from the Casey Report and testimony about the plaintiff’s income to determine the approximate amount generated from regional activity/overrides which would be lost after the model change. The evidence did not establish, in addition to the regional impact, any diminution in the plaintiff's income from Halifax office activities as a result of the model change. I will therefore review the evidence which addressed the effect of the model change upon regional income/overrides, and determine whether an expectancy damage award for constructive dismissal would exceed the compensation which Mr. Carrigan has already received; in other words, whether he is entitled to recover damages in this action.

[66] Mr. Carrigan's net earnings were calculated in the Casey Report and have been summarized in paragraph 55. That report does not identify what portion of net income was derived from overrides and regional activities, as distinct from personal production and Halifax office activities not affected by the change to the corporate model; however, Appendix A shows regional director expenses incurred by the plaintiff to be approximately $88,000 between May 1998 and June 2001.

[67] There is conflicting evidence concerning the relationship between overrides received and expenses incurred by Mr. Carrigan, and the extent to which regional activities contributed to the income he earned between 1998 and 2001. During negotiations, the plaintiff took the position in an October 16, 2001 phone call with the defendant that, "My overrides didn't come close to reimbursing my expenses." (Exhibit 1, Tab T-30, p.2)

[68] The documentation suggests, however, that he benefited by earning additional net income from regional overrides. For example, Exhibit 3, Berkshire's consolidated commission income and expense statement for 2000, illustrates that Mr. Carrigan earned $47,847 override income (including from Halifax advisors) in a year during which he claimed at page 6 of the August Proposal to have incurred expenses of $30,671. Those figures suggest that the plaintiff would lose approximately $18,000 per year or $1,500 monthly as a result of constructive dismissal.

[69] Exhibit 1, Tab T-82 shows Mr. Carrigan earned overrides totalling $118,377 during 2001. During cross-examination, Mr. Casey indicated overrides of $36,196 were received between July 1st and October 31st, and Exhibit 1, Tab T-82 shows Mr. Carrigan received override payments after October 31st totalling $2971. Accordingly, overrides earned during the first half of 2001, including from financial advisors in the Halifax office, were $118,377, less $36,196 and $2,971, being approximately $80,000. In the August Proposal Mr. Carrigan claimed regional issues expenses of $46,657.91 for January 1, 2001-July 15, 2001. Total override income therefore exceeded “regional” expenses during the first half of 2001 by approximately $33,000 or $5,557per month. To find overrides from "regional" activity outside Halifax, the income generated for the plaintiff by Advisors Stewardson, Wright and Gillis (shown on Exhibit 1, Tab T-82 to average a total of approximately $1,900 per month) must be subtracted, yielding monthly regional override in excess of expenses of approximately $3,650.

[70] Although Mr. Carrigan did not introduce evidence to establish or quantify expectancy damages, his counsel commented in summation that a substantial part of the plaintiff's income was derived from regional overrides, noting that Mr. Charlton acknowledged when referred to Exhibit 1, Tab T-82 that during 2001 the plaintiff was receiving regional overrides at an annual rate in excess of $100,000. Mr. Carrigan’s counsel suggested that net annual regional override

income could therefore be determined by deducting $30,000 regional expenses from approximately $110,000. However, extrapolating the regional expense figure of $46,657 for the first six and one-half months of 2001 which the plaintiff advanced in the August Proposal, or, for his advantage using the regional expenses of $29,654 shown in Appendix A of the Casey Report for the first half of 2001, I find that the offsetting annual 2001 expense should be closer to $60,000, yielding a net annual regional override income in the $50,000 range. Other alternate methods of determining the plaintiff's regional override income suggested during his counsel's submissions were either speculative or based on assumptions which were not tested during the trial.

[71] Based on all of the evidence, and in my view being generous to the plaintiff, I attribute a maximum reduction of $60,000 per year in net pre-tax income to constructive dismissal occurring during July 2001. Mr. Carrigan has not provided evidence to support assessing expectancy damages based on any greater loss.

(b) Reasonable notice

[72] The plaintiff, focusing his claim on reliance damages, did not address reasonable notice, except by suggesting during final submission that under an expectancy formula the plaintiff should receive damages based on annual income loss in the range of $90-135,000 "going for a number of years." The defendant suggested damages for constructive dismissal should be based on one month's notice according to the Employment Agreement, or otherwise determined in the context of a range having a top end of 24 months, with the appropriate notice period being six months in this case.

[73] Reasonable notice should not be determined based on the Employment Agreement. As indicated in paragraph 42 its 30-day termination provision does not apply in this case, and there is no evidence that it reflects any industry standard for reasonable notice.

[74] The first task when assessing damages for constructive dismissal is usually to determine the appropriate notice term, and then assess what a plaintiff's remuneration for that period would have been. In this case, however, a different approach can be adopted, as the evidence indicates that Mr. Carrigan has already received $100.000 compensation (see paragraph 9), which can be deemed remuneration in lieu of notice. Because I have found that the maximum reduction

in the plaintiff's income attributable to the constructive dismissal is $60,000 annually, or $5,000 per month, the $100,000 which he has already received represents payment in lieu of notice for a period of 20 months.

[75] Mr. Carrigan can only recover additional compensation from the defendant in this lawsuit if he is entitled to notice of termination exceeding 20 months.

[76] I have not been provided with any authority suggesting that an employee in the plaintiff's circumstances should have more than 20 months notice. Mr. Carrigan's employment relationship with the defendant prior to the constructive dismissal was relatively short less than 3.5 years; he was not recruited by Berkshire but had vigorously sought the associate model position, and he was able to mitigate his loss, at least to some extent, by continuing to work under Berkshire's corporate model until July 2002, when he moved immediately to a position with a different employer in the same industry. The change from the associate to corporate model occurred when the plaintiff was less than 40 years old, and he has been able to pursue alternate career options.

[77] Reasonable notice to an employee terminated in these circumstances does not approach 20 months. Indeed, evidence at trial indicated that Mr. Carrigan's initial demand to Berkshire, set out in correspondence from his counsel dated October 31, 2002, suggested "...a reasonable notice period in the circumstances is 12 months..."

[78] Our Court of Appeal has consistently determined the notice period to be below 20 months for employees with less than four years service who are dismissed in circumstances more egregious than in this case (**Schimp v. RCR Catering Ltd.**, 2004 NSCA 29; **Jessen v. CHC Helicopters International Inc.**, 2006 NSCA 81; **Mourant v. Amherst (Town)** (1999), 177 N.S.R. (2d) 75 (C.A.); **Barakett v. Levesque Beaubien Geoffrion Inc.**, 2001 NSCA 157). This court in **Musgrave v. Levesque Securities Inc.** (2000), 183 N.S.R. (2d) 349 doubled the appropriate notice to 16 months on account of extreme bad faith when an investment dealer who had worked for four years was dismissed without any notice or offer of severance, and was denied commission. The employer in that case sold the employee's investments at a loss and defamed him to clients and prospective employers.

[79] There is also authority that the notice period in this case could be reduced because the parties' associate relationship fell in the intermediate area between pure employee/employer, entitling a dismissed employee to reasonable notice, and principal/agent or independent contractor, which allows either party to terminate the relationship at will without notice. (See **Spurway v. Royal LePage Real Estate Services Ltd.** *supra*; **Carter v. Bell & Sons (Can) Ltd.**, [1936] O.R. 290 (CA); **Paper Sales Corp. v. Miller Brothers Co. (1962) Ltd.** (1975), 55 D.L.R. (3d) 492 (Ont. CA); and **Mabry v. Avercan International Inc.**, 1999 BCCA 172.)

[80] Although Mr. Carrigan was unhappy working under the corporate model with Berkshire after July 2001 and subsequently while working with Assante, and he left the investment industry less than two years after the defendant imposed the corporate model, I am not convinced that his decision to make a career change resulted from improper conduct by the defendant. I find no basis to award the aggravated damages he claims to augment an expectancy damages amount determined under the general rules relating to damage assessment.

[81] The compensation which Mr. Carrigan received from Berkshire exceeds the award that this court would make following a determination that he was constructively dismissed in the circumstances disclosed by the evidence.

CONCLUSION

[82] The plaintiff has not established that Berkshire agreed to compensate him and reimburse expenses on the basis which he alleged, nor has he shown that the defendant made a negligent misrepresentation or breached a Duration Term in an employment contract. The plaintiff's claim can only succeed on the basis that he was constructively dismissed when Berkshire altered his employment arrangement. Damages arising from Mr. Carrigan's constructive dismissal should be assessed using the expectancy method and not the reliance approach. The compensation already provided by Berkshire exceeds the amount to which he is entitled, based upon reasonable notice of termination. The plaintiff's claim is accordingly dismissed.

[83] If the parties are unable to resolve costs, counsel may make written submissions within 30 days, a deadline which may be extended by agreement if necessary.

J.