

SUPREME COURT OF NOVA SCOTIA

Citation: *Avery v. Baker*, 2023 NSSC 239

Date: 20230721

Docket: *Halifax*, No. 485552

Registry: Halifax

Between:

Sharon Avery

Plaintiff

v.

Dana Baker

Defendant

Judge: The Honourable Justice Frank P. Hoskins

Heard: February 21, 2023 in Halifax , Nova Scotia

Final Written: July 21, 2023

**Decision on Motion for Revocation of Non-Party
Discovery Subpoena**

Counsel: Peter Rumscheidt, for the Plaintiff
Lisa Richards for the Defendant
Grant Machum and Killian McParland for the Non-Party,
Royal Bank of Canada

By the Court:

Introduction

[1] This is a motion by Royal Bank of Canada (“RBC”) to revoke a *non-party* discovery subpoena pursuant to Civil Procedure Rule 18.08 (3). The subpoena was issued for one of RBC’s senior executives, Mr. Rick Mirabelli, because he was the immediate supervisor of the Plaintiff, Sharon Avery. She only reported to him during her time working in a unique position at RBC. The Plaintiff’s personal injury claim arises from a June 12, 2017, motor vehicle accident (MVA). The Plaintiff is claiming total disability. She has also had numerous significant health issues unrelated to the MVA, both before and after the date of the MVA.

[2] The Defendant, Dana Baker, obtained a Discovery Subpoena (Non-party) directed at Mr. Mirabelli under Civil Procedure Rule 18.05. RBC brought this motion to revoke the subpoena.

[3] Both the Defendant and Plaintiff have been discovered. The trial is scheduled to begin on March 31, 2025.

[4] For the following reasons, the Discovery Subpoena for Rick Mirabelli will not be *revoked* pursuant to Civil Procedure Rule 18.08 (3).

Background:

[5] The Plaintiff was a high-income earner in the years leading up to, and at the time of, the MVA. She worked in a unique role at RBC. She was the only person in her position for all Atlantic Canada. Her compensation scheme was complicated. She was paid an annual salary coupled with an annual bonus that was dependent on several factors other than her own personal performance, including team and overall bank performance. She also received shares during some years of her employment.

[6] The Plaintiff travelled across Atlantic Canada three out of four weeks per month. She had offices in all four provinces, covering six branches and seven sub-branches. She had a support team located in Toronto, with reporting requirements. She was also required to perform administrative tasks.

[7] The Plaintiff reported directly to one person during her time in this position: her boss, Rick Mirabelli.

[8] RBC has provided relevant documents and information in its possession and control to the Parties. The Defendant, however, has repeatedly attempted through multiple means to obtain further information necessary to assess her income loss claim, including document disclosure and discovery of the Plaintiff, and

correspondence with legal counsel. A significant number of questions remain, some of which arise from RBC document production.

[9] RBC claims that it has gone to great lengths to provide relevant documents and information in its possession and control. Despite this, the Defendant wishes to compel Mr. Mirabelli for a discovery examination in his capacity as an executive with RBC.

Issues:

[10] There are two issues that must be decided in this proceeding. The first relates to whether the Court should permit RBC to bring the motion as a non-party in accordance with Civil Procedure Rule 22.11(2). If so, then the next issue that arises is whether the Discovery Subpoena (Non-Party) for Mr. Mirabelli should be revoked pursuant to Civil Procedure Rule 18.08.

The Preliminary Issue: Rule 22.11(2)

[11] I will briefly dispose of the preliminary issue, which is whether the Court must first grant permission for RBC to bring the motion under Rule 22.11, before it can bring a motion to revoke a Discovery Subpoena (Non-Party) under Rule 18.08. The Parties have only tangentially addressed it in their submissions, focusing

submissions on the principal issue of whether the Discovery Subpoena for Rick Mirabelli should be *revoked* pursuant to Civil Procedure Rule 18.08 (3).

[12] It is noteworthy that the dual purposes of the Discovery process are to understand the other side's case and to obtain admissions that can subsequently be used at trial or on a motion.

[13] Motions involving *non-parties* are addressed under Civil Procedure Rule 22.11. In particular, Rule 22.11(2) provides that a non-party generally requires a judge's permission to bring a motion:

(2) A person who is not a party to a proceeding, and is not appointed in the proceeding, may make a motion in the proceeding only if a judge permits, except the person requires no permission to make a motion to intervene under Rule 35 - Parties.

[14] In my view, Rule 22(11) provides a non-party standing to bring a motion to intervene in a proceeding which it would otherwise not have. For that reason, the rule requires the exercise of judicial discretion. This discretion is informed by the nature and circumstances of the motion, including the efforts of the parties to fulfil their respective obligations under the Rules.

[15] In this case, to deny RBC's motion would, in essence, deny them the ability to invoke Rule 18.08 (3). For that reason, I grant the applicant permission to make the motion, mindful that Rule 18.03 does contemplate such a motion. As the Court

of Appeal said in *Homburg v. Stichting Autoriteit Financiële Markten*, 2016 NSCA 38:

38 When considering the proper interpretation and application of rules to the procedures, rights, obligations and remedies embraced by our *Civil Procedure Rules* it is not particularly helpful to “cherry pick” a provision or a sub-section, here and there. **To understand how discovery works and the limits placed on its availability, one needs to consider CPR 18, as a whole.**

[Emphasis added]

The Principle Issue: Whether the Discovery Subpoena (Non-Party) should be Revoked Pursuant to Rule 18.08

[16] As stated, the principal issue to be decided is whether the Discovery Subpoena (Non-Party) for Rick Mirabelli should be revoked pursuant to Rule 18.08.

The Positions of the Parties

The Applicant’s Position

[17] The moving party, RBC, argues that it is not necessary or productive to compel the discovery of Mr. Mirabelli. RBC claims it has offered to work with the Defendant to obtain the additional information sought through other reasonable means, but the Defendant has refused to engage in that process and, in particular, has refused to particularize the outstanding requests.

[18] RBC submits that the discovery of a non-party is an *exceptional measure* and that the subpoena is, at best, premature because the Defendant has failed to first

explore all other *reasonable means* for obtaining the information sought. Thus, RBC argues, the discovery of Mr. Mirabelli would not promote the *just, speedy, and inexpensive resolution* of the proceeding.

The Respondent's Position

[19] The Respondent/Defendant argues that Ms. Avery's compensation scheme was complicated, in that, she was paid an annual salary, coupled with an annual bonus dependent on several factors other than her own performance, including team and overall performance. Her duties included reporting requirements and administrative tasks. Ms. Avery reported directly to Mr. Mirabelli during her time in this position at RBC.

[20] The Respondent/Defendant has repeatedly attempted to obtain relevant employment information necessary to assess Ms. Avery's income loss claim, through multiple means, including document disclosure, discovery of Ms. Avery, and correspondence with RBC's legal counsel.

[21] The Respondent/Defendant submits that during the discovery of Ms. Avery, when she was asked about employment details, her compensation scheme, and inconsistencies between employment records and her subjective evidence, Ms. Avery referred to Mr. Mirabelli as someone who could possibly provide relevant

information. Moreover, neither of the principle parties object to the discovery of Mr. Mirabelli.

[22] The Respondent/Defendant agrees with RBC's contention that RBC management, including senior executives such as Mr. Mirabelli should not be routinely compelled to attend discovery when an employee has a personal injury claim for lost income. However, the Respondent argues, this is not a routine case. Ms. Avery was a high-income earner, in a unique role, and is claiming total disability as a result of the MVA. Mr. Mirabelli was not a senior executive far removed from Ms. Avery's day-to-day work. Rather, he was her direct supervisor. Ms. Avery reported directly to Mr. Mirabelli during the entire time (over six years) she worked for RBC.

[23] RBC's counsel argues that enforcing the discovery subpoena would pose an undue burden on Mr. Mirabelli and RBC. However, the Respondent/Defendant points out that neither Mr. Mirabelli, nor anyone else from RBC, has submitted an affidavit explaining how Mr. Mirabelli's attendance at a half- day virtual discovery, paid for by the Defendant, would pose an undue burden on Mr. Mirabelli or RBC. Further, the Respondent/Defendant argues that RBC's suggestion of multiple meetings to review numerous questions, (with answers to be drafted by counsel with

the likelihood of further follow up questions and requests for elaboration) would be an inefficient means of dealing with this situation.

[24] Additionally, the Respondent/Defendant argues she's attempting to assess Ms. Avery's income loss claim, which is complicated by numerous factors outlined above, and move forward to possible settlement ahead of trial. A full understanding of Ms. Avery's employment and compensation, the Respondent/Defendant submits, is crucial to the assessment of the claim by both parties. An accurate assessment will promote settlement prospects and define the issues for trial. This is to the benefit of both the Plaintiff and Defendant.

[25] In summary, the Respondent /Defendant argues, given the efforts made to date and the outstanding questions related to Ms. Avery's employment, the most reasonable step in pursuit of the just, speedy, and inexpensive resolution of the Plaintiff's claim is to conduct a half-day virtual discovery of Mr. Mirabelli.

Civil Procedure Rule 18

[26] The Nova Scotia *Civil Procedure Rules* are designed to achieve a *just, speedy* and *inexpensive* determination of every proceeding. The rules are applied within an adversarial context which imposes an *overriding obligation* on the Parties to exercise diligence and cooperativeness. Indeed, the Court must further the overriding

objective of the rules by actively managing cases, which includes encouraging the Parties to co-operate with each other in the conduct of the proceedings in an effort to deal with cases justly and at proportionate cost. As Justice Saunders stated in *Homburg*:

85 The overarching purpose of our *Civil Procedure Rules* is to ensure the just, speedy and inexpensive determination of every proceeding.

[27] In considering the respective positions of the Parties, it is useful to consider the purpose of the discovery process, as stated in Claire E. Choate, *Discovery in Canada* (1977) at pp. 4-5, cited in *Upham v. You* (1986), 73 N.S.R. (2d) 73 (S.C.A.D.) at para. 6:

A desirable aim of any procedural system of law is to delineate at as early a stage as possible the particular area of controversy so that in the ensuing litigation, if indeed the litigation is not avoided by that delineation, the searchlight can be focused on the particular and remaining issues which will be dispositive of the case. Pre-trial discovery procedures assist in this delineation in the following manners: (a) there is removal before trial of issues over which there is no real contest. Discovery will often reveal the essential weaknesses of a specific allegation, and its non-reliability. Clear delineation of the remaining issues which are often clarified through discovery makes it possible to present evidence at the trial more clearly and succinctly leading to an earlier and better appreciation of the real issues in dispute. The trial will be shortened accordingly; (b) there is greater likelihood of all pertinent and relevant evidence being presented. It helps ensure that all the evidence will be unearthed and that concealment will be minimized. Surprise at the trial can be avoided thereby; (c) discoveries permit the earlier recording of testimony while memories are fresher. This recording is valuable also in the eventuality of the evidence not being available at the time of trial; (d) the exposure of groundless or fraudulent claims is quickly brought to light through discovery; (e) finally, and possibly most important of all, by early disclosure of the cases of both sides, an out-of-court settlement is encouraged with the opportunity also being granted for an exchange of views in determining the amount of the settlement.

[28] In the case at bar, the Parties explicitly recognized the importance of the overriding purpose of the Civil Procedure Rules in their respective submissions, as they both claim that they have been exercising diligence in their preparation. Put differently, they believe that are acting in compliance with the rules in responding to the request.

[29] As Justice Saunders stated in *Homburg*, “when considering the proper interpretation and application of the rules to the procedures, rights, obligations and remedies embraced by our *Civil Procedure Rules* ... one needs to consider CPR 18”(para. 38).

Civil Procedure Rule 18 – Discovery

[30] The overall objectives of the *Civil Procedure Rules* are set out in Rule 1.01:

Object of these Rules

1.01 These Rules are for the just, speedy, and inexpensive determination of every proceeding.

[31] The process for discovery of both party and non-party witnesses is set out in Rule 18. Rule 18.02 provides, in part:

Duties of party in an action

18. 02 (1) After pleadings close in a defended action, a party must do all of the following:

- (a) in deciding whether a witness needs to be discovered, consider whether the discovery would promote the just, speedy, and inexpensive resolution of the proceeding;

...

Discovery subpoena in an action (non-party)

18.05 (1) A party to an action who provides required representations and undertakings may obtain a discovery subpoena directed to a witness who is not a party, an officer of a party, or an employee of a party.

(2) A party requesting a discovery subpoena directed to a non-party witness must provide both of the following representations to the court and file all of the following undertakings:

(a) representations that

- (i) the party is in compliance with Rule 15 - Disclosure of Documents, and Rule 16 - Disclosure of Electronic Information,

the party believes the discovery would promote the just, speedy, and inexpensive resolution of the proceeding, including a concise statement of the grounds for the belief and an explanation of why a discovery subpoena is required instead of, or in addition to, an interview or a discovery by agreement;

[32] The circumstances in which a judge may revoke a discovery subpoena are set out in Rule 18.08:

Revoking a discovery subpoena in an action

18.08 (1) A judge may revoke a discovery subpoena that results from, or would lead to, an abuse of process in an action.

(2) A judge may revoke a discovery subpoena (party) issued in an action to an officer or employee of a corporate party, if both of the following apply:

(a) two of the corporate party's employees or officers have already been discovered;

(a) the further discovery would not promote the just, speedy, and inexpensive resolution of the proceeding.

(3) A judge may revoke a discovery subpoena (non-party) that would lead to a discovery that does not promote the just, speedy, and inexpensive resolution of an action.

[Emphasis added]

[33] The grounds for revoking the subpoena relied upon by RBC appear to be those arising under Rule 18.08(3), which provides that a judge may revoke a discovery subpoena (non-party) that would lead to a discovery that does not promote the just, speedy, and inexpensive resolution of an action.

[34] Rule 18.24 gives guidance with respect to circumstances in which holding a discovery would promote the object of the Rules:

Examples of just, speedy, and inexpensive discovery

18.24 (1) The following are examples of circumstances in which, depending on the circumstances as a whole, holding a discovery would promote the just, speedy and inexpensive resolution of a proceeding:

- (a) a non-party witness has information properly obtained by discovery and there are no other reasonable means for obtaining the information, such as conducting an interview;
- (b) a designated manager was ill-informed on discovery and discovery of other corporate officers or employees is necessary to obtain information the designated manager should have provided;
- (c) a party gave undertakings at a previous discovery that have not been fulfilled as promised and, as a last resort, the information is sought through further discovery;
- (d) because of illness, the court will not be able to compel a witness to attend trial or to answer questions, and commission evidence is inappropriate without discovery.

(2) The examples in Rule 18.24(1) are to assist both of the following:

(a) a party who determines whether a discovery would promote the just, speedy and inexpensive resolution of a proceeding, for the purpose of Rules 18.02(1)(a), 18.04(2)(b), or 18.05(2)(a)(ii);

(b) a judge who hears a motion to revoke a discovery subpoena under Rules 18.08(2) or 18.08(3).

[35] In this case, pursuant to Civil Procedure Rule 18.05(2) a discovery subpoena issued by counsel for the Respondent/Defendant contained the following representation:

I believe the discovery of Rick Mirabelli would promote the just, speedy, and inexpensive resolution of this proceeding because the issue of income loss and the basis for amounts claimed by the Plaintiff for the loss of income and employment bonuses are in issue. The Plaintiff's compensation appears to have been based on a complex system including a bonus determined by multiple factors which have not been adequately explained to date.

The time taken off by the Plaintiff following the accident and the accommodations her employer provided to her are also unclear, within descriptions of these in medical and employment documents. Clarification and elaboration from her employer is therefore required.

The Plaintiff's employment related documents also contain business related language and terminology which the Plaintiff is unable to explain, and which require explanation from her employer.

The Plaintiff's employment related documents also contain references to changes in her job duties and description which are not adequately explained and which require clarification and elaboration from her employer.

The disclosure provided by Mr. Mirabelli on this issue has so far been insufficient. An interview is not sufficient alternative to discovery because of Mr. Mirabelli would not be under oath and there have been issues regarding his compliance with requests for disclosure prior to this: (Affidavit of Brian Francis, at Tab U).

[36] As stated above, Civil Procedure Rule 18.08 (3) provides that a judge *may* revoke a discovery subpoena (non-party) that would lead to a discovery that does not promote the just, speedy, and inexpensive resolution of an action.

[37] As Saunders J.A. stated in *Homburg*, members of Judiciary and the Bar recognized that the approach taken in the new *Civil Procedure Rules*, which came into effect on January 1, 2009, were necessary to reduce cost and delay and to better provide access to timely and affordable justice (para. 66). He further observed:

[69] Advocates for change now viewed liberal and far-ranging discovery as part of the problem, rather than part of the solution. In many cases the frequency of discovery -- especially involving experts -- was seen to be a waste of time and resources. The money spent on discovery, and the months taken to complete it, did not measure up on any cost-benefit analysis. While such sentiments were not universally held, the idea that the time had come for a substantial revision in the rules relating to discovery ultimately prevailed. Eventually, after a lengthy process of consultation, significant reform was achieved. Instead of permitting discovery of "any person" with potentially relevant evidence to give (however remote), new Rules were written which were clearly intended to limit, or foreclose, the availability of discovery, except as specifically authorized under the 2009 Rules. **The interpretation and application of the present Rule 18 should be seen in the context of this important historical and procedural shift.** (Emphasis added)

[38] Rule 18.05 permits a party to obtain a subpoena to discover a non-party. The requesting party must make certain representations and provide undertakings. Rule 18.05 embodies the *exceptional nature* of the non-party discovery in Nova Scotia.

Evidence

The Moving Party's Evidence

[39] The moving party, RBC, proffered the Affidavit of A. Benjamin Currie, a solicitor, sworn on February 3, 2023, as evidence in support of its motion. That affidavit includes the following evidence:

RBC was first contacted by counsel for the Plaintiff, Peter Rumscheidt. The Plaintiff is an employee of RSC and her counsel provided a signed consent and requested various documents related to her employment (at paras. 7, 10, Exhibit A, pp. 1-3, 80, 85).

On November 4, 2021, RBC provided a written response to the requests and attached various supporting documents. The attached disclosure included the Plaintiff's job description, HR Profile (including historical compensation details), pension and benefit statements, performance review documents, record of recorded absences, workplace accommodations documents, and disability benefits memos (at para. 10 and Exhibit A).

On March 24, 2022, Plaintiff's counsel forwarded an email from counsel for the Defendant, Lisa Richards, dated March 21, 2022, wherein she stated that the disclosure from RBC was inadequate and advised that she wished to discover Mr. Mirabelli as the Plaintiff's supervisor at RSC. This request was forwarded to RSC by Plaintiff's counsel (at para. 11, Exhibit B).

Mr. Mirabelli is Vice President, National Estate Services with RBC and resides in British Columbia (at para. 9).

In April 2022, RBC's counsel contacted counsel for the parties, noted his understanding that RBC had already produced substantial documentation related to the Plaintiff's employment, and requested that Defendant's counsel provide a list of the outstanding requests and the basis for relevance, so that RBC could review and determine what else it could produce to address the requests. RBC's counsel even provided a draft list based on the forwarded email from Defendant's counsel. RBC's counsel also stated that any request for a non-party discovery subpoena at that time was, at best, premature (at para. 12, Exhibit C).

On May 2, 2022, Defendant's counsel replied to RBC's counsel stating simply that they were clearly "not on the same page" proposed scheduling a time to discuss the requests and relevance. Defendant's counsel did not particularize the outstanding requests (at para. 13, Exhibit D).

On July 5, 2020, RBC's counsel attended a teleconference with counsel for the parties to better understand the Defendant's additional requests (at para. 14).

Following this teleconference, RBC's counsel made additional inquiries with RBC and met with Mr. Mirabelli on or about June 29, 2022, to review the Defendant's additional requests (at para. 15).

On July 13, 2022, RBC's counsel sent a letter to counsel for the parties setting forth additional information from RBC, including the specific responses of Mr. Mirabelli. The letter advised that, given the time that had passed since Ms. Avery had actively worked at RBC, Mr. Mirabelli's recollection was limited, and he did not believe he had anything additional of value to offer the parties other than what was set forth (at para.16, Exhibit E).

On August 7, 2022, Defendant's counsel replied to RBC's counsel taking the position that the July 13, 2022, letter was "insufficient given the complexity of the income related issues in this matter" and advising that the Defendant's instructions were to have a non-party discovery subpoena issued for Mr. Mirabelli (at para. 17, Exhibit F).

On the same day, RBC's counsel responded to Defendant's counsel noting that RBC had gone to considerable effort to provide the additional information and requesting an explanation as to why the responses were insufficient (at para. 18, Exhibit G).

On August 9, 2022, Defendant's counsel responded to RBC's counsel with a list of reasons the Defendant considered the letter insufficient. Among other things, Defendant's counsel broadly stated that the issues were "complex, the requests previously identified were not intended to be exhaustive, she had follow-up questions, responses directly from the witness were preferable, and the letter was not a signed statement from Mr. Mirabelli or evidence given under oath (at para. 19, Exhibit H).

On September 15, 2022, RBC's counsel responded highlighting that RBC was not a party, had gone to significant efforts to date, and that Mr. Mirabelli was a senior executive. RBC's counsel advised that RBC's position was that a discovery subpoena was not appropriate as there remained other reasonable means to obtain any additional relevant information. To address Defendant counsel's concerns, RBC's counsel requested that she set forth any further specific questions and provide RBC with an opportunity to respond. In addition, RBC's counsel offered to provide the responses in a statement or sworn affidavit if necessary. RBC's counsel reiterated that RBC remained prepared to discuss any other reasonable means for obtaining the additional required information (at para. 20, Exhibit I).

Approximately five minutes later, Defendant's counsel responded to RBC's counsel stating that her instructions were to issue a non-party discovery subpoena for Mr. Mirabelli and the matter could be addressed by motion. There was no response to the options proposed by RBC's counsel (at para. 21, Exhibit J).

On September 26, 2022, RBC's counsel responded to Defendant's counsel repeating the request that the Defendant particularize any further specific requests and consider the reasonable alternatives. Again, no response to the options proposed by RBC's counsel was received (at para. 22-23, Exhibit K).

On October 11, 2022, Defendant's counsel served an issued Discovery Subpoena (Non-Party) for Mr. Mirabelli on RBC's counsel (at para. 23, Exhibit L). Accordingly, RBC filed this motion.

On February 1, 2023, in advance of filing RBC's motion materials, Defendant's counsel again contacted counsel for the parties requesting that they reconsider their position, consider the reasonable alternative options, and set forth any specific outstanding requests (at para. 25, Exhibit K).

The trial in this proceeding has been scheduled for March 2025, more than two years from now (at para. 26).

The Respondent's Evidence

[40] The Respondent submits that obtaining relevant employment information from the Plaintiff and her employer. RBC, has not been a straightforward process. The Defendant has had limited success through document production, Plaintiff discovery, and correspondence between counsel, in obtaining relevant employment information required to assess the Plaintiff income loss claim, including the following evidence from the Affidavit of Brian Francis, a legal analyst at Ritch Williams Richard, counsel for the Defendant in the action, sworn on February 10, 2023:

Four days before filing the Notice of Action, Plaintiff counsel wrote to Mr. Mirabelli, seeking employment information, further to the recent exchange of emails between Sharon, me and you (Exhibit M). Those emails have never been disclosed and it is unclear what was discussed at that time. In that letter to Mr. Mirabelli, Plaintiff counsel sought specific information, as opposed to asking for her complete file.

In March 2019 RBC wrote in response to Plaintiff counsel, advising they were providing the Plaintiffs "employee file", which could "assist" with the questions submitted by Plaintiff counsel. These documents, which were included in the Plaintiffs ADD, dated February 2020, included:

- A six page "employee profile" that listed: standard details (position, salary); 2013-2018 bonus payments, which varied year to year; and sick/vacation time used between 2013-2018;
- Employment benefits "profile", the table of contents for the employee benefits booklet, and a January-February 2019 pension statement.

In April 2020, Plaintiff counsel again wrote to RBC, seeking information on the Plaintiffs short-term disability benefits between June-October 2018, as well as on RBC's subrogation interests. In a May 2020 response, RBC advised on the Short-Term Disability amount received by the Plaintiff, as well as subrogation interests (at Exhibit E (AVE1854-1855)).

After assuming carriage of this file, I emailed Plaintiff counsel in April 2021 seeking further disclosure ahead of discovery, including the complete employment file (Exhibit A and E). Plaintiff counsel followed up, and in May 2021 he disclosed "additional materials" from RBC, which included 2013- 2019 performance reviews (at Exhibit H).

At discovery in August 2021, the Defendant had limited success getting further employment information from the Plaintiff on her pay structure/bonuses, time off, work accommodations, company outlook for her role, etc. (at Exhibit I: August 19, 2021, discovery transcript, at pp. 73-103, 139-144, 187-194). Inconsistencies between evidence produced by RSC regarding sick/vacation time, and other evidence on file, added to the challenge of getting accurate information. The Plaintiff was unable to provide clear answers on her pay structure, time off, work accommodations, etc.:she repeatedly referred to her boss. Rick Mirabelli, as someone who may have relevant information with regards to compensation and HR issues (at Exhibit I: Aug. 19, 2021, discovery transcript, at 76, 92-94, 96-103, 139-144, 190-192).

At that discovery, the Plaintiff undertook to inquire about the production of her complete employment file, and I agreed to write a letter outlining further employment information being sought (see Undertaking #13; Aug. 19, 2021, discovery transcript at ps. 90-92).

In September 2021, I wrote to Plaintiff's counsel outlining further RBC disclosure being sought prior to the next day of the Plaintiff's ongoing discovery (at Exhibit K). Information sought included: offer of employment/contract; information on the Plaintiff's pay structure/bonuses, as well as performance targets; records to clarify inconsistencies in records related to time off before and after the accident; work accommodations, etc.

Six days before the Plaintiff discovery continued in October 2021 (the Plaintiff was unable to complete full days of discovery due to health concerns), Plaintiff's counsel disclosed the Plaintiff second supplementary affidavit of documents, which included two documents from RBC: a one-page offer of employment; and a pay statement from July 2021(Exhibit L).

At the October 2021 discovery, the Plaintiff:

- was again unable to give information on her pay scale, bonus, total rewards package, and was unsure about accommodations and time off after the subject MVA (Exhibit M, October 19, 2021, Discovery Transcript at pp. 14-17, 34-36, 55-57, 61-63). Again, she repeatedly referred to her boss. Rick Mirabelli, as someone who may have

relevant information (at Exhibit M, October 19, 2021, at pp. 32-36, 38-39, 42-45, 55-57, 61-63, 73-74).

- gave an undertaking to ask for an explanation of her pay scale, and another to provide any communication with Rick Mirabelli/his assistant regarding duties, hours, or time taken off work after the accident (see Undertakings 2 and 7).

After that discovery, I emailed Plaintiff counsel noting the extensive missing information regarding the Plaintiff employment and that, based on the Plaintiff's discovery, it appeared the one link was Mr. Mirabelli, and that his discovery might be the most efficient way to seek the missing information (Exhibit N).

Discovery of the Plaintiff was completed on November 1, 2021, during which:

- when asked about her reported use of the Employee Assistance Program through work after the subject *MVA*, she said she got the contact information for same from Mr. Mirabelli (Exhibit O: Nov 1, 2021, discovery transcript at pp. 66, 89-90);
- she said the person at RBC she would have talked to most recently would have been Mr. Mirabelli (Exhibit O: Nov 1, 2021, discovery transcript at pp. 86-87);
- the Plaintiff undertook to determine what the items on the July 2021 pay statement were referring to (see undertaking# 1)

Three days after the discovery of the Plaintiff was completed, RBC provided a response to the further information I had sought in my September 2021 letter to Plaintiff counsel (Exhibit P: November 4, 2021, email correspondence from Jeena Tom to Peter Rumscheidt).

In their response, RBC:

- Claimed they were "unable to provide" a response to 8 of the 14 information requests; requests which were related to bonus calculations, manager ratings, terms contained in the performance review, in-house communications regarding the Plaintiff's performance, and the number of meetings the Plaintiff attended in 2017 and 2018. RBC did not provide any reason, legal or otherwise, as to why they are unable to provide this information, which is relevant to the Plaintiff's income loss claim.
- With regards to the other information requests:
 - When asked for documentation/communication between Ms. Avers; and RBC related to performance expectations/targets, hours, or sick/vacation/time, RBC referred us to her performance reviews and other documents already produced. Despite the Plaintiff reporting directly to Mr. Mirabelli during her time with RBC (more than six years), RBC has not produced a single

email between the two. although the Plaintiff stated at discovery that it was Mr. Mirabelli she communicated with regarding all HR and compensation issues (Exhibit I: August 19, 2021 discovery transcript, at ps. 92-93).

- When asked for further documentation relating to work accommodations, bonuses, sick/vacation time used by the Plaintiff after the accident (inconsistencies in the records noted), RBC simply referred the Defendant back to previously produced documents, despite the fact the lack of clarity in those documents helped form many of the outstanding questions.

Along with these non-responsive answers, RBC produced three reports from the Plaintiffs optometrist, as well as LTD information, all of which the Plaintiff had already produced (at Exhibit P: AVE3538-3551).

Through email correspondence with Plaintiff counsel in February /March 2022:

- I advised I had instructions to move forward with a discovery of the Plaintiffs employer, and that I would draft a letter regarding same, which Plaintiff counsel would forward to RBC;
- Plaintiff counsel noted the most logical candidate to be discovered at RBC would be Rick Mirabelli, and that such a request would likely trigger the involvement of RBC counsel;
- I wrote to Plaintiff counsel, as promised, advising I would like to discover the Plaintiffs supervisor, Mr. Mirabelli, and noting the inadequacy of RBC document disclosure in providing relevant information required to assess the Plaintiffs income loss claim;
- At the end of March, Plaintiff counsel advised he had not received a reply from RBC regarding discovery of Mr. Mirabelli by consent, thought a subpoena would be required, and wanted to schedule date for Mr. Mirabelli's discovery (at Exhibit Q).

After a further follow up request for an update by Plaintiff counsel on April 26, 2022, counsel for RBC provided a response to the request for discovery of Mr. Mirabelli:

- Much of the response discusses document production and RBC's issues with producing any more records, even though the request to discover Mr. Mirabelli was made just after that reason – to clarify issues with, and pursue information not found in, RBC documents/correspondence;
- Counsel for RBC claimed: senior management should not be "routinely subject" to Non-party discovery, NS courts only sanction non-party discoveries as a "last resort", and the request to discover Mr. Mirabelli was premature. Counsel did not explain how the

request was premature, or cite any caselaw in support of their position (at Exhibit R).

In July 2022, Counsel for RBC drafted a letter after meeting with their client, including Mr. Mirabelli, to review and discuss the outstanding information requests. The Defendant submits that this letter is an inadequate response for a number of reasons:

- It is unclear what documents Mr. Mirabelli reviewed, or if he was taken through the Plaintiffs discovery transcripts, in which she repeatedly refers to Mr. Mirabelli;
- The letter claims "many years have now past since Ms. Avery was last actively employed at RBC and Mr. Mirabelli's specific recollection dating back to those years is limited", Furthermore, that Mr. Mirabelli didn't remember specifically how much time the Plaintiff missed after the MVA, her job performance after the MVA, what accommodations may have been put in place after the MVA, or how her total bonus was arrived at. Yet Mr. Mirabelli was able to provide information about the Plaintiffs employment years before the MVA, including workload management, client demand, and Ms. Avery's performance.
- The letter claims Mr. Mirabelli was able to confirm that there were no issues with the Plaintiffs workload management prior to the MVA, but he "did not particularly recall" her job performance after the MVA. Furthermore, it was his general recollection that after the MVA it was the volume of the work that may have been an issue for the Plaintiff;
- The letter notes the Covid pandemic but provides no details on whether there was an impact on employee performance targets or compensation packages/bonuses. Furthermore, it notes a significant change in the Plaintiff's role - virtual meetings as opposed to extensive travel- but claims the role is essentially the same as it was when the Plaintiff went on leave of absence in 2018 (at Exhibit S).

I responded to the July 2022 letter drafted by counsel for RBC, noting the complexity of the Plaintiffs income loss claim, and outlining my numerous concerns with the letter drafted by counsel, including that the letter:

- addressed only general areas of concern, and not the multitude of outstanding questions related to the Plaintiffs employment;
- was not a substitute for reviewing relevant document and discovery transcript references with the witness;
- did not provide sufficient legal reasoning for RBC's refusal to provide information relevant to the Plaintiffs income loss claim;
- was not a signed statement, and even if it were, it would not be a sufficient replacement for a discovery, given the many outstanding questions and the need to review documents and discovery transcript references with the Plaintiff;

- is not evidence under oath (at Exhibit S).

In September 2022:

- Counsel for RBC, offered to provide a statement or sworn affidavit from RBC, or else it would seek a motion to set aside any discovery subpoena issued for Mr. Mirabelli. In doing so, counsel for RBC did not mention my earlier correspondence advising that a sworn statement would not suffice. Nor was it explained how a statement or affidavit would not simply lead to further back-and-forth between counsel;
- I advised my instructions were to move forward with the subpoena (at Exhibit T).

In October 2022 the discovery subpoena for Mr. Mirabelli was issued and sent to counsel for RBC (counsel agreed that, the date on the subpoena aside, Mr. Mirabelli would not be found in contempt while awaiting the outcome of this motion). In support of the subpoena, I gave representations:

- outlining the issues with obtaining employment information included;
- affirming my belief that the discovery of Mr. Mirabelli would promote the just, speedy, and inexpensive resolution of the Plaintiff;
- noting the insufficiency of the interview process, as Mr. Mirabelli would not be under oath;
- acknowledging that the Defendant will pay for all discovery expenses, as well as pay an attendance fee (at Exhibit U).

Later that month, counsel for RBC filed its Notice of Motion to revoke the subpoena (Exhibit U). Despite the earlier offer to provide a sworn affidavit, RBC did not submit its own affidavit in support of this motion.

On February 1, 2023, counsel for RBC asked that the decision to discover Mr. Mirabelli be reconsidered (Exhibit V). In asking for reconsideration in favour of further questions and a statement/ affidavit from RBC, counsel for RBC offered no explanation as to how their suggested approach would not simply lead to further back-and-forth between counsel. Counsel for RBC also mentioned drafting intentions of Nova Scotia's Civil Procedure Rules ("the Rules") but offered no explanation as to why they thought a half-day, virtual discovery of Mr. Mirabelli would not promote the just, speedy and inexpensive of the Plaintiffs claim, as is the purpose of the Rules.

In my response to this request, I again reiterated the reasons why a discovery of Mr. Mirabelli was required in this specific circumstance, which relate to both the efficiency and the quality of Mr. Mirabelli's evidence (Exhibit V).

[41] There was no cross-examination of the affiants.

Analysis

[42] Having considered the totality of the evidence, the relevant *Civil Procedure Rules*, and the able submissions of counsel, I am not satisfied that the subpoena for Mr. Mirabelli should be revoked. I am satisfied that the discovery of Mr. Mirabelli would promote the just, speedy, and inexpensive resolution of the action (Rule 18.08 (3)), for the following reasons.

[43] Clearly, Mr. Mirabelli is a material witness who would be able to provide relevant and probative evidence regarding the Plaintiff's employment situation, as he was her direct supervisor. The Plaintiff reported directly only to Mr. Mirabelli during her time in her unique position with RBC. The Plaintiff was a high-income earner in the years leading up to, and at the time of, the MVA. Her compensation scheme was complicated, and her position was dynamic; in the sense, that she travelled extensively across Atlantic Canada three of four weeks per month; had offices in all four provinces, covering six branches and seven sub-branches; had a support team located in Toronto; had reporting requirements, and was also required to perform administrative tasks. The Plaintiff was paid an annual salary, coupled with an annual bonus

dependent on a number of over all bank performance, and she received shares during some years of her employment.

[44] Based on all the evidence, I find that the Defendant has repeatedly attempted to obtain relevant employment information necessary to assess the Plaintiff's income loss claim, through multiple means, as outlined above, including document disclosure, discovery of the Plaintiff, and correspondence with RBC's legal counsel. Notwithstanding that, there are a significant number of questions that remain, some of which stem from RBC document production.

[45] While it might be fair to say there is always some element of "fishing" for evidence in every discovery, it cannot be said that in this case that the proposed discovery of Mr. Mirabelli is a "fishing expedition" given his direct supervision of the Plaintiff during her employment with RBC. The Plaintiff reported directly to Mr. Mirabelli during her entire time (over six years) with RBC. Therefore, it is reasonable to infer that he would be able to provide relevant and probative evidence regarding her employment compensation scheme, and other employment related issues during discovery. In fact, the Plaintiff acknowledged this when she could not adequately explain her

compensation scheme and other employment related issues at discovery. She repeatedly stated that Mr. Mirabelli would be able to explain her compensation scheme as well as other employment related issues. Mr. Mirabelli is in possession of highly relevant and probative evidence that the Defendant requires to properly assess the Plaintiff's income loss claim, which is complicated by numerous factors outlined above, for the purposes of possible settlement.

[46] The moving party also argues that enforcing the discovery subpoena would pose an undue burden on Mr. Mirabelli and RBC. However, neither Mr. Mirabelli, nor anyone from RBC, has proffered evidence explaining how Mr. Mirabelli's attendance at a half-day virtual discovery, paid for by the Defendant, would pose an undue burden on Mr. Mirabelli or RBC. As suggested by the Respondent, a virtual discovery may be a more efficient means of dealing with the situation rather than having multiple meetings to review numerous questions and request for elaboration. However, the central issue here is not whether the discovery subpoena would pose a undue burden on Mr. Mirabelli, but whether it would lead to a discovery that promotes the just, speedy, and inexpensive resolution of the action. In my view it would, because the Defendant's

employment and compensation are critical to the assessment of the claim by both Plaintiff and Defendant, neither of whom objects to the discovery of Mr. Mirabelli. An accurate assessment could promote settlement prospects and define the issues for trial. This is to the benefit of both the Plaintiff and Defendant.

[47] It might be parenthetically noted that the circumstances of this case do not support any concern about a “floodgates” argument because of the unique circumstances of this case.

Conclusion

[48] Based on the evidence and submissions, I am satisfied that the discovery of Rick Mirabelli would likely promote a just, speedy, and inexpensive resolution of the proceeding because he has relevant and probative evidence that could be obtained by discovery and there are no other means for obtaining the information.

Cost

[49] The parties shall have 30 days to agree on costs for this motion. If the parties cannot agree I will accept submissions from the parties on costs.

Hoskins, J.