NOVA SCOTIA COURT OF APPEAL

Citation: *Halifax Herald Limited v. Clarke*, 2019 NSCA 31

Date: 20190426
Docket: CA 472717
Registry: Halifax

Between:

The Halifax Herald Limited

Appellant

v.

Calvin Clarke

Respondent

Judge:	The Honourable Justice Duncan R. Beveridge
Appeal Heard:	December 6, 2018, in Halifax, Nova Scotia
Subject:	Admissibility of *ex post facto* evidence; constructive dismissal; duty to mitigate
Summary:	The respondent concluded that he had been constructively dismissed. He refused to stay as an employee and sued. The trial judge ruled that the respondent could not be cross-examined on sales data that the appellant said would demonstrate the respondent's income as a Business Development Specialist (BDS) would have been more than that of his previous position as an account executive. The trial judge later rejected the appellant's attempt to introduce this evidence because she was convinced that it was irrelevant. She found the respondent had been constructively dismissed by way of the Herald's unilateral decision which negatively affected his compensation and changed his duties. She also concluded that the respondent had not failed to mitigate his losses by staying with the Herald in the new BDS position because his compensation would decrease.

Issues: (1) Did the trial judge commit reversible error in precluding cross-examination and introduction of the 2015 actual sales results?
(2) Did the trial judge err in her application of the tests for constructive dismissal and mitigation?

Result: The trial judge committed serious legal error in both her restriction of the cross-examination of the respondent on the 2015 actual sales results and her decision to bar their introduction. Those results were unknown at the time the respondent made his decision to quit the Herald. While the 2015 sales results may not have determinative of many of the key issues to be resolved, they were relevant. Either of these errors would be enough to require a new trial. However, the trial judge erred in her application of the legal tests for constructive dismissal and the duty to mitigate. The appeal is allowed, and the respondent's action dismissed with costs at trial and on appeal.

This information sheet does not form part of the court's judgment. Quotes must be from the judgment, not this cover sheet. The full court judgment consists of 27 pages.

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Date: 20190426
Docket: CA 472717
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The Halifax Herald Limited

Appellant

v.

Calvin Clarke

Respondent

Judges:	Beveridge, Oland and Bourgeois, JJ.A.
Appeal Heard:	December 6, 2018, in Halifax, Nova Scotia
Held:	Appeal allowed, per reasons for judgment of Beveridge, J.A.; Oland and Bourgeois, JJ.A. concurring
Counsel:	Sean Kelly and Killian McParland, for the appellant Colin Bryson, Q.C. and Thomas Morehouse, for the respondent

Reasons for judgment:

INTRODUCTION

[1] Constructive dismissal occurs when an employer unilaterally makes substantial negative changes to an employee's work. The employee is not actually fired without just cause, but the law says it is really the same thing.

[2] The employee has options. Generally, they can: accept the changes; resign and pursue a claim of wrongful dismissal; or, stay under protest in order to mitigate their losses but keep their powder dry to later sue for wrongful dismissal.

[3] But the employee has no option with respect to mitigation—they must take reasonable steps to mitigate their damages. Failure to do so can result in a dismissal of the action or a reduced damage award.

[4] In this case, Calvin Clarke had been a long time account executive with the Halifax Herald. He sold advertising space. Unidentified health issues caused him to be out on sick leave. His accounts were assigned to others. Universally, advertising and circulation revenues were in the decline. The Herald was not immune.

[5] The Herald created a new position of Business Development Specialist (BDS) to sell other Herald products to its clients. When Mr. Clarke returned from sick leave, the Herald wanted him to take on this new position. There were guarantees and assurances about compensation. Initially, he accepted.

[6] Mr. Clarke reflected on his prospects. His sales forecasts, and hence his income as the BDS, were pessimistic. The Herald's were optimistic. Rather than wait and see or stay under protest in order to mitigate his losses, Mr. Clarke quit and sued for wrongful dismissal.

[7] The Herald countered that Mr. Clarke was not constructively dismissed and he should have stayed in the BDS position to mitigate his damages. The Herald sought to cross-examine Mr. Clarke, and later tender actual sales records that it says would have demonstrated he would have earned more income in the new position.

[8] The trial judge was the Honourable Suzanne Hood. She refused to permit cross-examination on the actual sales records and later ruled that they were not

relevant. She found that Mr. Clarke was constructively dismissed and had taken reasonable steps to mitigate his losses.

[9] Justice Hood's oral decision is reported as 2017 NSSC 337. She fixed 16 months as the period of reasonable notice and ordered the Herald to pay Mr. Clarke $103,616, less monies he otherwise owed to the Herald, and $18,017.75 he had earned from a short-term position with another publication and his landscaping business. The trial judge also awarded prejudgment interest and costs of $19,687.50 plus disbursements.

[10] The Herald appeals. It complains that the trial judge erred in her application of the tests for constructive dismissal and mitigation and in her rulings that excluded the evidence of actual 2015 sales.

[11] With respect, I agree that the trial judge should not have excluded the 2015 actual sales. That error tainted her findings of fact and mixed law and fact that the respondent had been constructively dismissed and was not required to stay at the Herald in the new position in order to mitigate his damages.

[12] Quite apart from that error, the trial judge failed to apply the correct legal test to the facts. Mr. Clarke was not constructively dismissed and had failed to mitigate his damages. I would allow the appeal and dismiss the action.

[13] I need to delve into the facts to provide the necessary context to how the trial judge erred.

FACTS

[14] Mr. Clarke always worked at the Herald. He became an account manager in 1997. Compensation was a base salary of $24,000 per year plus commission on print advertising sales. The unchallenged evidence of the Herald was that the respondent's income was generally in decline, as was the case with other account managers, which in turn was consistent with broader trends in the traditional print media industry.

[15] The respondent's earnings for 2010 to 2014 were: $96,069; $95,082; $73,883; $93,330; $65,295. Nancy Cook, Vice-President of Administration at the Herald traced the increased income in 2013 to one large commission earned in May 2013 and a Herald payout to Mr. Clarke for loss of an account to another sales division.

[16] Mr. Clarke explained that the drop in his 2014 income was largely the result of the industry downturn in print media sales. The sick leave he took that year had only a nominal effect.

[17] Mr. Clarke was also on sick leave from January to March 1, 2015. When he returned to work on March 2, he was presented with the new BDS position by Alex Liot, Vice President, Sales. Mr. Clarke would work out of the same office, report to the same person and still work in sales. But rather than sell media advertising, his products were print orders for Bounty Print and promotional products with Headline Promotions.

[18] The base salary would be the same at $24,000/yr. Commission was at 1.5% of sales with current clients and 5% of new client business. The Herald guaranteed that his compensation for the first three months would be $66,500 per year.

[19] The responsibilities and compensation were set out in a written document. Mr. Clarke initially voiced no objection. He discussed the new position with his father, also a lifelong Herald employee. He decided to give it a shot—after all, he was a "Herald guy".

[20] That outlook changed. Mr. Clarke looked at the actual sales at Bounty Print. He developed concerns with the projected sales targets. He met with Mr. Liot on March 6, 2015 to discuss his disquiet. Clarke had prepared four scenarios. His income, based on what sales might be, varied from approximately $56,500 to $72,500.

[21] Mr. Liot listened to Mr. Clarke's concerns. According to Mr. Clarke, Mr. Liot was a good manager, he trusted and believed in him. Mr. Liot assured him it would work.

[22] After the three week introduction to the new position, Mr. Clarke turned to counsel. His lawyer wrote to Ms. Nancy Cook, Vice-President, Administration on March 27, 2015. Counsel asserted that the unilateral transfer to the BDS position with demonstrably lower earnings potential were clear constructive dismissal grounds. Notwithstanding this, counsel offered that Mr. Clarke would work in the new position, but only if he received a base salary of $50,000 per year plus the same commission structure. If the Herald did not agree, Mr. Clarke would resign and sue.

[23] Ms. Cook was upset on receipt of the letter. Mr. Clarke's income had been in decline, along with other account executives. They offered him the BDS job because he had the skill set to do it. The activities expected in the BDS position were the same type of activities they would expect from an account executive. It was not an entry level position, and his compensation was not being reduced.

[24] Ms. Cook and Mr. Liot met with Mr. Clarke on April 13, 2015. They presented revised terms to Mr. Clarke. As Mr. Clarke acknowledged, no one at the Herald in a sales position had a base salary of $50,000. That was not going to happen. Instead, they increased effective commission income by inclusion of sales generated by others and extended the $66,500 guaranteed income to six months as of April 13.

[25] In addition, they assured Mr. Clarke that they would monitor the sales and his income "continually" and would review it again in four months. But as of then, they could not change it until they saw how it would work. It was a new role for the Herald as well.

[26] They explained to Mr. Clarke that they wanted him to be successful. Mr. Clarke said he took the information with him and stepped away. He said that he knew there was going to be a problem. It was not going to work. Two weeks later, he wrote to Ms. Cook:

> After 21 years of service, and with a tremendously heavy heart, please consider this my official resignation from The Chronicle Herald, effective immediately.
>
> I have taken this step because of the unilateral reduction in compensation, which brings tremendous risk, instability, and significant loss in earning potential. As you know, I have sought legal counsel and intend to claim for constructive dismissal.

[27] I will add some further details about the prospects for decreased compensation later. First, I need to set out the basics of the pleadings as they shed light on what was relevant at trial and why the trial judge was wrong to preclude Mr. Clarke's cross-examination on actual sales from 2015 and her subsequent determination that they were inadmissible as part of the Herald's case.

THE PLEADINGS

[28] The Statement of Claim and Defence were uncomplicated. Mr. Clarke alleged that the unilateral change from account executive to BDS was, from an

objective standpoint, a demotion and would cause a 30% reduction in his overall salary and commission. Mr. Clarke had attempted to negotiate a more satisfactory employment package, but the Herald had rejected those out of hand. Thus, he was constructively dismissed which entitled him to 24 months reasonable notice and aggravated damages.

[29] The Herald denied the new position was, in any way, a demotion. Mr. Clarke's fundamental terms of employment were not changed. They pled they needed to target growth from non-media products in 2015. With Mr. Clarke off on sick leave, his accounts had already been assigned to other account managers.

[30] If he had returned to his account manager job, he would need time to ramp up sales to earn commission income, but with the BDS position he had a guaranteed income that at least matched his income from 2014. Rather than reject Mr. Clarke's concerns about his income "out of hand", they agreed to do performance reviews and to work with Mr. Clarke to "ensure that his compensation level was maintained and even exceed his previous level of compensation".

[31] The Herald specifically disputed that the new position would result in a 30% reduction in compensation. It pled that non-media product sales outpaced 2014.

[32] Lastly, the Herald pled that even if constructive dismissal were made out, Mr. Clarke failed to mitigate his damages in general, and in particular by his refusal to continue to work at the Herald.

[33] Before identifying the relevant legal principles and how they should have been applied, I will set out the appropriate standard of review.

STANDARD OF REVIEW

[34] On an appeal from a civil judgment, an appellate court generally owes no deference to a trial judge's legal rulings. They must be correct. But on findings of fact, and of mixed law and fact, without an extricable legal error, deference is owed. This means the Court must not intervene unless the findings are unreasonable, unsupported by the evidence or amount to palpable and overriding error (see *Housen v. Nikolaisen*, 2002 SCC 33 at paras. 25-26 and 36; *H.L. v. Canada (Attorney General)*, 2005 SCC 25 at paras. 55-56).

[35] A useful recitation of these principles is found in *McPhee v. Canadian Union of Public Employees*, 2008 NSCA 104 where Cromwell J.A., as he then was, wrote:

> [16] The main role of the Court of Appeal is to make sure that the trial judge applied correct legal principles: see, for example, *Housen v Nikolaisen*, [2002] 2 S.C.R. 235 at para. 9. If the trial judge misstates the law, or applies it in such a way as to show that he or she relied on a wrong legal principle, the appellate court must intervene and find that a legal error has been committed.
>
> [17] With respect to questions of fact and mixed questions of fact and law that do not reveal any underlying error of legal principle, the role of the appellate court is entirely different. An appeal to the Court of Appeal is not an opportunity for three judges to retry the case on the basis of a written transcript. Finding facts and drawing evidentiary conclusions from them are roles of the trial judge, not the Court of Appeal: see *Toneguzzo-Norvell (Guardian ad litem of) v. Burnaby Hospital*, [1994] 1 S.C.R. 114 at 121. An appellant cannot challenge a trial judge's findings of fact simply because the appellant does not agree with them: *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 at paras. 88 and 90. Findings of credibility are "... a vital aspect of the trier of fact's role.": see A.W. Mewett & Peter J. Sankoff, *Witnesses*, vol. 1 (looseleaf updated to Rel. 1 - 2008) (Toronto: Thomson Canada Limited,1991) at page 11-2.
>
> [18] Appellate intervention on questions of fact is permitted only if the trial judge is shown to have made a "palpable and overriding error": see, e.g. *Housen*, *supra* at para. 10. Sometimes the standard has been expressed in different words, such as "clear and determinative error", "clearly wrong" and "hav[ing] affected the result." (emphasis added): see, e.g. *H.L. v. Canada (Attorney General)*, [2005] 1 S.C.R. 401 at para. 55; *Delgamuukw v. British Columbia*, *supra* at paras. 78 and 88. However expressed, courts of appeal must accept a trial judge's findings of fact unless the judge is shown to have made factual errors that are clear and which affected the result.
>
> [19] This deferential approach on appeal applies to all of the trial judge's findings of fact, whether or not based on the judge's assessment of witness credibility and whether based on direct proof or on inferences which the judge drew from the evidence: see, e.g. *Housen*, *supra* at paras. 10-25; *H.L.*, *supra* at para. 54.
>
> [20] This deferential approach also applies to the judge's findings which apply the law to the facts - that is, to questions of mixed law and fact - unless the finding can be traced to a legal error: *Housen*, *supra* at paras. 26-37.
>
> [Emphasis added by Cromwell J.A.]

[36] There is no controversy that these principles apply to cases that wrestle with whether an employee has been wrongfully dismissed (see: *Ocean Nutrition*

Canada Ltd. v. Matthews, 2018 NSCA 44; *Evans v. Teamsters Local Union No. 31*, 2008 SCC 20).

[37] The admissibility of evidence is a question of law, and as such it is generally assessed on a correctness standard. That means a trial judge must be correct in his or her identification and application of the law on the admissibility of evidence. However, deference should be afforded to trial judges' factual findings that may impact on ultimate admissibility or where admissibility requires a discretionary determination that bears on admission, such as assessment of probative versus prejudicial effect (see *R. v. West*, 2010 NSCA 16 at para. 155; *Sable Mary Seismic Inc. v. Geophysical Services Inc.*, 2012 NSCA 33 at para. 116).

[38] I will now turn to the relevant principles on constructive dismissal and mitigation of damages.

RELEVANT LEGAL PRINCIPLES

[39] A safari through texts, articles and appellate authorities is unnecessary. We need only consider three Supreme Court of Canada cases: *Farber v. Royal Trust Co.*, [1997] 1 S.C.R. 846; *Evans v. Teamster Local Union No. 31, supra*; and, *Potter v. New Brunswick Legal Aid Services Commission*, 2015 SCC 10. Each of these cases is important.

[40] In *Farber*, the Supreme Court formally accepted that, despite some semantic diversity, the common law construct of constructive dismissal was consistent with Quebec Civil Law with respect to employment contracts. Gonthier J., for the Court, described the civil law approach:

> [23] … In the context of an indeterminate employment contract, one party can resiliate the contract unilaterally. The resiliation is considered a dismissal if it originates with the employer and a resignation if it originates with the employee. If an employer dismisses an employee without cause, the employer must give the employee reasonable notice that the contract is about to be terminated or compensation in lieu thereof. [authorities omitted]
>
> [24] Where an employer decides unilaterally to make substantial changes to the essential terms of an employee's contract of employment and the employee does not agree to the changes and leaves his or her job, the employee has not resigned, but has been dismissed. Since the employer has not formally dismissed the employee, this is referred to as "constructive dismissal". By unilaterally seeking to make substantial changes to the essential terms of the employment contract, the employer is ceasing to meet its obligations and is therefore terminating the

> contract. The employee can then treat the contract as resiliated for breach and can leave. In such circumstances, the employee is entitled to compensation in lieu of notice and, where appropriate, damages.

[41] After reference to the ability of an employer to alter contractual terms, Justice Gonthier set out the test to assess when an employer's unilateral changes amount to constructive dismissal. The changes must objectively amount to a substantial alteration to the essential contractual terms:

> [26] To reach the conclusion that an employee has been constructively dismissed, the court must therefore determine whether the unilateral changes imposed by the employer substantially altered the essential terms of the employee's contract of employment. For this purpose, the judge must ask whether, at the time the offer was made, a reasonable person in the same situation as the employee would have felt that the essential terms of the employment contract were being substantially changed. The fact that the employee may have been prepared to accept some of the changes is not conclusive, because there might be other reasons for the employee's willingness to accept less than what he or she was entitled to have.

[42] Justice Gonthier then referred to the common law principle of constructive dismissal, which was tied to the concept of fundamental breach of contract:

> [33] …Thus, it has been established in a number of Canadian common law decisions that where an employer unilaterally makes a fundamental or substantial change to an employee's contract of employment -- a change that violates the contract's terms -- **the employer is committing a fundamental breach of the contract that results in its termination and entitles the employee to consider himself or herself constructively dismissed**. The employee can then claim damages from the employer in lieu of reasonable notice. [authorities omitted]
>
> [34] In an article entitled "Constructive Dismissal", in B. D. Bruce, ed., *Work, Unemployment and Justice* (1994), 127, Justice N. W. Sherstobitoff of the Saskatchewan Court of Appeal defined the concept of constructive dismissal as follows at p. 129:
>
> > A constructive dismissal occurs when an employer makes a unilateral and fundamental change to a term or condition of an employment contract without providing reasonable notice of that change to the employee. Such action amounts to a repudiation of the contract of employment by the employer whether or not he intended to continue the employment relationship. Therefore, the employee can treat the contract as wrongfully terminated and resign which, in turn, gives rise to an obligation on the employer's part to provide damages in lieu of reasonable notice.
>
> [35] The common law rule is therefore similar to that applicable in Quebec civil law when it comes to the concept of constructive dismissal. Thus, although

> decisions from the common law provinces are not authoritative, it may be helpful to refer to them to see what types of changes the courts have considered fundamental changes to an employment contract resulting in the termination of that contract. However, each constructive dismissal case must be decided on its own facts, since the specific features of each employment contract and each situation must be taken into account to determine whether the essential terms of the contract have been substantially changed.
>
> [Emphasis added]

[43] I will return later to the facts and outcome in *Farber*, as this was the case relied upon by the respondent to convince the trial judge that the actual 2015 sales results were irrelevant and inadmissible.

[44] In *Evans*, the central issue was a wrongfully dismissed employee's duty to stay with his employer in order to mitigate damages. Mr. Evans was the Union's Whitehorse business agent. He had worked in that position for 23 years. The only other employee in the office was his wife. A new Union executive decided to fire Mr. Evans and other business agents. Negotiations ensued.

[45] Mr. Evans asserted 24 months was reasonable notice of termination. He wanted 12 months "working notice", and then 12 months pay in lieu of notice or a settlement where he could retire and his wife be appointed business agent in his stead. Other demands were exchanged. No deal resulted.

[46] The Union seemed to accept that 24 months was reasonable notice, and requested that Mr. Evans return to work to serve out the balance of his notice period of 24 months. Evans refused to return and sued.

[47] The trial judge found that Mr. Evans had been wrongfully dismissed and that although Evans' stated fears about his relationship with his employer may have been overstated, they were not without foundation—and therefore not unreasonable. He had not breached his duty to mitigate by his refusal to return to work (para. 18).

[48] The British Columbia Court of Appeal reversed. The trial judge had overlooked relevant evidence and applied a subjective rather than an objective test (para. 47). The evidence did not support the conclusion that the circumstances, viewed objectively, justified Mr. Evans' refusal to resume employment with the union. Evans had failed to act reasonably—this constituted a failure to mitigate, and his action failed.

[49] The Supreme Court dismissed the appeal. Bastarache J., for the majority, accepted that the same principles about mitigation, by continuing to work for the same employer, apply to both constructively dismissed and wrongfully dismissed employees (paras. 26-27). He went on to explain:

> [28] In my view, the courts have correctly determined that in some circumstances it will be necessary for a dismissed employee to mitigate his or her damages by returning to work for the same employer. Assuming there are no barriers to re-employment (potential barriers to be discussed below), requiring an employee to mitigate by taking temporary work with the dismissing employer is consistent with the notion that damages are meant to compensate for lack of notice, and *not* to penalize the employer for the dismissal itself. The notice period is meant to provide employees with sufficient opportunity to seek new employment and arrange their personal affairs, and employers who provide sufficient working notice are not required to pay an employee just because they have chosen to terminate the contract. Where notice is not given, the employer is required to pay damages in lieu of notice, but that requirement is subject to the employee making a reasonable effort to mitigate the damages by seeking an alternate source of income.
>
> [Emphasis in original]

[50] What are the potential barriers and how is the dismissed employee's decision to be assessed? Fundamentally, it is when the interpersonal and work environment make continuation or return to work unreasonable on an objective basis. Bastarache J. reasoned:

> [29] There appears to be very little practical difference between informing an employee that his or her contract will be terminated in 12 months' time (i.e. giving 12 months of working notice) and terminating the contract immediately but offering the employee a new employment opportunity for a period of up to 12 months. In both situations, it is expected that the employee will be aware that the employment relationship is finite, and that he or she will be seeking alternate work during the 12-month period. It can also be expected that in both situations the employee will find that continuing to work may be difficult. **Nonetheless, it is an accepted principle of employment law that employers are entitled (indeed encouraged) to give employees working notice and that, absent bad faith or other extenuating circumstances, they are not required to financially compensate an employee simply because they have terminated the employment contract. It is likewise appropriate to assume that in the absence of conditions rendering the return to work unreasonable, on an objective basis, an employee can be expected to mitigate damages by returning to work for the dismissing employer.** Finding otherwise would create an artificial distinction between an employer who terminates and offers re-employment and

> one who gives notice of termination and offers working notice. In either case, the employee has an opportunity to continue working for the employer while he or she arranges other employment, and I believe it nonsensical to say that when this ongoing relationship is termed "working notice" it is acceptable but when it is termed "mitigation" it is not.
>
> [Emphasis added]

[51] It is the employer who has the onus to demonstrate that an employee has failed to mitigate their damages by reasonable efforts. They need not return to the former employer where the work would be demeaning, or in an atmosphere of hostility, humiliation or acrimonious relationships. Justice Bastarache discussed these principles as follows:

> [30] … Where the employer offers the employee a chance to mitigate damages by returning to work for him or her, the central issue is whether a reasonable person would accept such an opportunity. In 1989, the Ontario Court of Appeal held that a reasonable person should be expected to do so "[w]here the salary offered is the same, where the working conditions are not substantially different or the work demeaning, and where the personal relationships involved are not acrimonious" (*Mifsud v. MacMillan Bathurst Inc.* (1989), 70 O.R. (2d) 701, at p. 710). In *Cox*, the British Columbia Court of Appeal held that other relevant factors include the history and nature of the employment, whether or not the employee has commenced litigation, and whether the offer of re-employment was made while the employee was still working for the employer or only after he or she had already left (paras. 12-18). In my view, the foregoing elements all underline the importance of a multi-factored and contextual analysis. The critical element is that an employee "not [be] obliged to mitigate by working in an atmosphere of hostility, embarrassment or humiliation" (*Farquhar*, at p. 94), and it is that factor which must be at the forefront of the inquiry into what is reasonable. Thus, although an objective standard must be used to evaluate whether a reasonable person in the employee's position would have accepted the employer's offer (*Reibl v. Hughes*, [1980] 2 S.C.R. 880), it is extremely important that the non-tangible elements of the situation -- including work atmosphere, stigma and loss of dignity, as well as nature and conditions of employment, the tangible elements -- be included in the evaluation.

[52] The most recent case that guides a court's analysis is *Potter*. Mr. Potter was the Executive Director of the New Brunswick Legal Aid Commission. While he was on sick leave, the Commission recommended to the Minister of Justice that Mr. Potter be dismissed for cause. On the same day, the Commission indefinitely suspended Mr. Potter with pay. It directed him not to return to work until further notice. Eight weeks later, Mr. Potter sued for constructive dismissal.

[53] The trial judge dismissed the action. He found that Mr. Potter had not been constructively dismissed, but in case this finding was reversed on appeal, he made a provisional damages award. The New Brunswick Court of Appeal agreed that constructive dismissal had not been made out.

[54] The Supreme Court of Canada unanimously reversed and awarded Mr. Potter the damages as assessed by the trial judge. Wagner J., as he then was, wrote for the plurality of five. He clarified the *Farber* constructive dismissal analysis.

[55] For both the common law and civil law, the aim of the inquiry is to determine if the employer's act or conduct evinced an intention to no longer be bound by the employment contract (para. 31). There are two ways an employee can prove constructive dismissal. He or she can establish: the employer breached an express or implied term that was sufficiently serious to constitute constructive dismissal; or the cumulative acts by the employer demonstrate its intention to no longer be bound by the contract. The two approaches or branches focus on the employer's intention with respect to the employment contract. They are set out by Wagner J. as follows:

> [32] Given that employment contracts are dynamic in comparison with commercial contracts, courts have properly taken a flexible approach in determining whether the employer's conduct evinced an intention no longer to be bound by the contract. There are two branches of the test that have emerged. Most often, the court must first identify an express or implied contract term that has been breached, and then determine whether that breach was sufficiently serious to constitute constructive dismissal: J. R. Sproat, *Wrongful Dismissal Handbook* (6th ed. 2012), at p. 5-5; P. Barnacle, *Employment Law in Canada* (4th ed. (loose-leaf)), at §§13.36 and 13.70. Typically, the breach in question involves changes to the employee's compensation, work assignments or place of work that are both unilateral and substantial: see, e.g., G. England, *Individual Employment Law* (2nd ed. 2008), at pp. 348-56. In the words of McCardie J. in *Rubel Bronze*, at p. 323, "The question is ever one of degree."
>
> [33] However, an employer's conduct will also constitute constructive dismissal if it more generally shows that the employer intended not to be bound by the contract. In applying *Farber*, courts have held that an employee can be found to have been constructively dismissed without identifying a specific term that was breached if the employer's treatment of the employee made continued employment intolerable: see, e.g., *Shah v. Xerox Canada Ltd.* (2000), 131 O.A.C. 44; *Whiting v. Winnipeg River Brokenhead Community Futures Development Corp.* (1998), 159 D.L.R. (4th) 18 (Man. C.A.). This approach is necessarily retrospective, as it requires consideration of the cumulative effect of past acts by

> the employer and the determination of whether those acts evinced an intention no longer to be bound by the contract.

[56] Wagner J. went on to emphasize that the first branch of the test has two steps: the employer's unilateral change must amount to a breach of the employment contract; and, it must be found to have been a substantial change to an essential contractual term:

> [34] The first branch of the test for constructive dismissal, the one that requires a review of specific terms of the contract, has two steps: first, the employer's unilateral change must be found to constitute a breach of the employment contract and, second, if it does constitute such a breach, it must be found to substantially alter an essential term of the contract (see *Sproat*, at p. 5-5). Often, the first step of the test will require little analysis, as the breach will be obvious. Where the breach is less obvious, however, as is often the case with suspensions, a more careful analysis may be required.
>
> [35] In *Farber*, Gonthier J. identified such a change as a "fundamental breach". The term "fundamental breach" has taken on a specific meaning in the context of exclusionary or exculpatory clauses: see, e.g., *Tercon Contractors Ltd. v. British Columbia (Transportation and Highways)*, 2010 SCC 4, [2010] 1 S.C.R. 69, at paras. 104-23. To avoid confusion, I will therefore use the term "substantial breach" to refer to breaches of this nature. The standard nevertheless remains unchanged – a finding of constructive dismissal requires that the employer's acts and conduct "evince an intention no longer to be bound by the contract": *Rubel Bronze*, at p. 322, citing *General Billposting Co. v. Atkinson*, [1909] A.C. 118 (H.L.), at p. 122, per Lord Collins, quoting *Freeth v. Burr* (1874), L.R. 9 C.P. 208, at p. 213.

[57] With these principles in mind, we can turn to the trial judge's decisions.

THE TRIAL JUDGE'S REASONS

[58] As noted earlier, the trial judge's reasons on the issues of constructive dismissal and mitigation are reported (2017 NSSC 337). Her reasons to preclude cross-examination and introduction of the actual sales for Bounty Print and Headline Promotions were delivered orally. I will address these first.

[59] During Mr. Clarke's cross-examination, Herald's counsel introduced the topic of the actual 2015 sales on Mr. Clarke's previous advertising accounts in an attempt to demonstrate his income if he had stayed as an account manager, and what his income would have been based on the actual 2015 sales results for Bounty Print and Headline Promotions. The respondent's counsel objected. He claimed

that they were completely irrelevant to both the issue of constructive dismissal and Mr. Clarke's duty to mitigate by staying at the Herald in the new BDS position.

[60] The respondent's position was based entirely on the Supreme Court of Canada's comments in *Farber* that evidence about what occurred after constructive dismissal is not relevant unless it could reasonably have been foreseen at the time of the dismissal. The trial judge was convinced. She precluded any examination of Mr. Clarke on actual 2015 sales after he left the Herald in April. She expressed her ruling as follows:

> THE COURT: But based upon what Mr. Clarke has already testified about he did not know obviously what was going to happen in the future. He had spent a fair bit of time talking about his projections and they were pretty dismal.
>
> MR. BRYSON: Correct.
>
> THE COURT: And therefore it seems to me to be an obvious conclusion that in his own mind it wasn't foreseeable. And so therefore it seems to me that it's not appropriate for him to be asked anything further about those numbers and then when the Defendant produces its evidence it may well be that I will -- that I'll say oh well on the other hand apparently he was wrong.
>
> He -- you know it was foreseeable or he should have known.
>
> …
>
> THE COURT: So I think all I can do is say that there can -- there won't be any Cross-examination on those figures. Cross-examination of Mr. Clarke but then when the Defendant brings its witnesses this evidence will have to be considered and it's my final ruling about whether it's admissible or not will depend upon the evidence of the Defendant's witnesses.

[61] Alex Liot disagreed with Mr. Clarke's pessimistic outlook for sales at Bounty Print and Headline Promotions. When he attempted to discuss the actual 2015 sales, the respondent again objected. Ironically, it was the respondent during the discovery process that had demanded production of these numbers, obviously in the hope they would bear out Mr. Clarke's pessimistic outlook. Apparently, they did not.

[62] In any event, the trial judge ruled the evidence inadmissible:

> THE COURT: It seems to me that based upon the law in *Farber* and in *Potter* and notwithstanding that it -- that apparently this ex-post facto evidence was considered in *Haglan* it really didn't make any difference to the decision that was made because Justice Brown concluded that there wasn't -- there weren't substantial changes in the terms of the employment.

> So the issue of whether or not the targets were subsequently met becomes unimportant because the decision had already been made that this was not going to be -- this evidence was [*sic*] going to be helpful.
>
> So it seems to me that going back to the Supreme Court of Canada cases that the foreseeability or the knowledge has to be judged at the time that the decision was made to leave.
>
> MR. KELLY: My Lady but is that not an objective determination and we have Mr. Liot's evidence that you know he disagreed. We have Mr. Clarke and Mr. Liot's evidence and isn't the ultimate question was he or was he not constructively dismissed based on a reduction of his income and what better evidence to inform that than the actual sales results in the role that he was offered and it was hoped that he would fill?
>
> THE COURT: My ruling is that this evidence is not relevant, can't go in.

[63] With respect, the trial judge erred to preclude cross-examination and in her later exclusion of this evidence. The actual 2015 sales were relevant to both whether Mr. Clarke had been constructively dismissed and to mitigation.

[64] The circumstances in this case were nothing like those in *Farber*. Mr. Farber started employment with Royal Trust as a real estate agent. He received a series of promotions, first as sales manager at various branches, then for different regions. In 1982, he was made regional manager for Western Quebec. He supervised 21 branch offices with 400 real estate agents and 35 secretaries. This region generated more than $16M in gross revenue. In 1983, he earned $150,000 a year made up of guaranteed base salary, commissions and benefits.

[65] In 1984, Royal Trust decided to restructure. Eleven of twelve regional manager positions would be eliminated. Mr. Farber's position was one of the eleven. Royal Trust offered Mr. Farber a lump sum allowance and transfer to the Dollard branch as sales manager with some time-limited override commission income, but no guaranteed base salary.

[66] Mr. Farber naturally viewed this as a demotion. He had been the sales manager of the Dollard branch eight years earlier. It was in the Quebec Western region. By 1984, Dollard was known to Royal and to Mr. Farber as the most problematic and least profitable in the province. It was not meeting sales targets. There was some question of closing it.

[67] Mr. Farber was insulted. The offer was not acceptable. He estimated that his income would be cut in half. He asked to be appointed as manager of a

different branch or have a guaranteed base salary for three years. Negotiations failed. Mr. Farber sued.

[68] Royal introduced evidence of the actual sales at the Dollard branch after June 1984. It showed that Mr. Farber's income would not have fallen with his new position. The trial judge found that Royal's offer was reasonable and adequate in terms of renumeration and prestige. The Quebec Court of Appeal's majority found no error in admission of the 1984 sales and the dismissal of the action.

[69] Fish J.A., as he then was, would have allowed the appeal. On the basis of the facts accepted by the trial judge, Mr. Farber had been reassigned new duties that involved such a disparity in status, advantages, duties and modalities as to constitute substantially new conditions of employment. He further concluded that the trial judge had erred by an examination of the new offer in light of the *ex post facto* evidence.

[70] In a unanimous judgment, the Supreme Court allowed the appeal. Gonthier J. discussed the principles that guide the utility of *ex post facto* evidence—it must be relevant, which in turn is determined by what must be proven in the proceedings:

> [41] *Ex post facto* evidence is admissible only if relevant to the case. In *Cie minière Québec Cartier v. Quebec (Grievances Arbitrator)*, [1995] 2 S.C.R. 1095, L'Heureux-Dubé J. applied precisely this principle when reviewing an arbitrator's decision on an employee's dismissal grievance. (By way of example, see also the Quebec Court of Appeal's decision in *Bertucci v. Banque Toronto-Dominion* (1994), 65 Q.A.C. 17.)
>
> [42] **Relevance is determined on the basis of what must be proved in an action. In the case at bar, the court had to determine whether the respondent's offer substantially changed the essential terms of the appellant's employment contract**. However, since the appellant had to decide whether this was the case at the time he received the offer, the court had to revert to that time to determine whether a reasonable person in the same situation as the appellant would have considered that the offer substantially changed the essential terms of the employment contract. Thus, what is relevant is what was known by the appellant at the time of the offer and what ought to have been foreseen by a reasonable person in the same situation. **Evidence of events that occurred *ex post facto* is not relevant unless the sales figures achieved subsequent to the offer could reasonably have been foreseen at the time of the offer**.
>
> [Emphasis added]

[71] In a civil case, pleadings set out the facts in issue against the backdrop of the substantive law that defines the cause of action in issue, subject to the caveat that unnecessary or immaterial allegations in the pleadings cannot make evidence relevant that is not (see: *Sopinka, Lederman & Bryant: The Law of Evidence in Canada*, 5th ed (Toronto: LexisNexis Canada, 2018) at pp. 57, 59).

[72] Here, the respondent alleged in his statement of claim that he would suffer a 30% reduction in his income at the new BDS position. The appellant pled that this was incorrect. It expected growth in the sales of non-media product, and sales outpaced 2014.

[73] The proposed evidence of the 2015 actual sales for Bounty Print and Headline promotions were by no means determinative whether the appellant's conduct did or did not breach the substantial terms of the employment contract. But the 2015 results were relevant to assess whether Mr. Clarke's subjective beliefs were reasonable and whether a reasonable person could reasonably have foreseen the growth. They were also relevant to demonstrate what his 2015 income would likely have been as an account executive.

[74] The trial judge prevented the appellant from challenging the respondent's pessimistic outlook on sales with what actually happened.

[75] It is well-accepted that cross-examination is fundamentally important in civil and criminal litigation. Wide latitude is afforded opposing counsel to challenge a witness's testimony. *Sopinka, supra*, describes the principles as follows:

> §16.130 The oft-quoted words of Wigmore that cross-examination is "beyond any doubt the greatest legal engine ever invented for the discovery of truth" indicate its great value in the conduct of litigation. Three purposes are generally attributed to cross-examination:
>
> (1) to weaken, qualify or destroy the opponent's case;
>
> (2) to support the party's own case through the testimony of the opponent's witnesses;
>
> (3) to discredit the witness.
>
> To accomplish these ends, counsel is given wide latitude and there are, accordingly, very few restrictions placed on the questions that may be asked or the manner in which they may be put. Any question which is relevant to the substantive issues or to the witness' credibility is allowed. It appears that the scope of cross-examination is wide enough to permit questions which suggest facts which cannot be proved by other evidence. …

[76] The only basis that the trial judge offered to justify denial of cross-examination on the actual 2015 sales was Mr. Clarke's direct evidence that he subjectively believed he would not be able to meet the 2015 sales targets for Bounty Print and Headline Promotions. This restriction on cross-examination alone amounts to serious error that would justify a new trial.

[77] Furthermore, the trial judge also erred when she disallowed Mr. Liot's attempt to introduce the 2015 results. Mr. Liot described the history of the Herald's involvement with Bounty Print. The company had just installed new equipment for wide format printing in 2014. The Herald had decided it needed to integrate their product lines. The BDS position was one of their initiatives.

[78] Mr. Liot explained why he was optimistic and why Mr. Clarke's pessimistic view was flawed. If Mr. Clarke achieved 90% of the sales targets, his income would be $67,000 per year. If he met the sales targets, his income would be $93,000 per year.

[79] As I described earlier, Mr. Clarke had prepared four scenarios that demonstrated what his income would be based on different sales revenue at Bounty Print and Headline Promotions. Two of those showed an income of approximately $56,000 per year. Mr. Liot agreed that that income would be unacceptable to Mr. Clarke. It would also be unacceptable to the Herald.

[80] As to Mr. Clarke's third and fourth scenarios, Mr. Liot observed that this meant Clarke's sales efforts would be producing little to no new sales growth. In Liot's view, this was unrealistically pessimistic.

[81] The fact that 2015 sales results were apparently in line with Mr. Liot's views and contrary to those of Mr. Clarke, tends to demonstrate that Mr. Clarke's pessimistic outlook was wrong. After considering all of the evidence, the trial judge could then determine objectively if a reasonable person could have foreseen the results.

[82] An oft quoted definition of relevance is that of Sir Stephen's from *A Digest of the Law of Evidence*, 12th ed (London: MacMillan & Co., 1936), Art. 1:

> … any two facts to which it is applied are so related to each other that according to the common course of events one either taken by itself or in connection with other facts proves or renders probable the past, present, or future existence or non-existence of the other.

[83] Hallett J., as he then was, referred to these principles in deciding if certain documents were relevant and hence producible in *Sydney Steel Corp. v. Mannesmann Pipe and Steel Corp.* (1985), 69 N.S.R. (2d) 389 (T.D.). He referred with approval to the same quote by Sir Stephen, and added:

> [16] P.K. McWilliams, Q.C., in *Canadian Criminal Evidence*, Second Edition, at p. 35, in a section dealing with the meaning of relevance, makes reference to this quotation from Stephen's *Digest* and goes on to state: "Relevancy is also defined simply as whatever is logically probative or whatever accords with common sense." McWilliams goes on to state that one must keep in mind that the decisions on issues of fact are left to the common sense of the jury and therefore it is pointless to attempt to arrive at a precise or philosophical definition of relevancy.
>
> [17] In *The Law of Evidence in Civil Cases* by Sopinka and Lederman, at p. 14 the authors also make reference to the quotation from Stephen's *Digest* as to the meaning of relevance and make the following statement that is applicable and worthy of consideration when assessing the relevancy of the documents that are before me on this application.
>
> > "The facts in issue are those facts which the plaintiff must establish in order to succeed together with any fact that the defendant must prove in order to make out his defence. It is seldom possible to prove a case or establish a defence solely by direct evidence as to the facts in issue and, therefore, the law admits evidence of facts, which, although not themselves in issue, are relevant in the sense that they prove or render probable the past, present or future existence (or non-existence) of any fact in issue.
> >
> > The facts in issue are controlled by the date of the commencement of the action. All facts essential to the accrual of a cause of action must have occurred prior to commencement of the action but evidence may be tendered as to facts occurring after the commencement of the action if they merely tend to prove or disprove the existence of the facts in issue. On the other hand any fact giving rise to a defence need not have occurred before the commencement of the action. An admission after the issue of the writ by one of the parties is admissible and conduct which is tantamount to an admission is equally admissible.
> >
> > …
>
> [Emphasis Hallett J.'s]

[84] The facts here are a far cry from those of *Farber*. In that case, the employer never disputed or even commented on the dismal projected earnings for Mr. Farber at the faltering Dollard branch. The employer never foresaw that sales would

increase significantly. Its own records showed it anticipated sales to fall even further in 1984. Gonthier J. set out why he agreed with Fish J.A.:

> [43] In the instant case, it is clear that the subsequent sales figures could not reasonably have been foreseen. It was proved that the Dollard branch was in an extremely precarious financial position at the time the offer was made. There was even some question of closing it because its sales were below the minimum set by the respondent. **Moreover, when the appellant received the offer, he calculated his projected earnings using documents prepared by the respondent and told the respondent of his projections. The respondent never disputed or even commented on them. Nor is there any evidence in the record that the respondent foresaw that sales at the Dollard branch would increase significantly over the following months. Rather, the evidence shows that the respondent itself anticipated that sales at the Dollard branch would not increase in 1984. An operating report dated May 1984 shows that the respondent expected sales at that branch to fall in 1984** (Exhibit P-16, Case on Appeal, at p. 360; see also Diane Brunette's testimony explaining Exhibit P-16, at pp. 253-59 of the Case on Appeal). The appellant therefore did not make a mistake by not foreseeing a substantial increase in sales at the Dollard branch. On the contrary, in light of the facts in evidence, he was fully justified in making the projections he made. I agree with Fish J.A.'s conclusion on this point at p. 13:
>
> > Royal Trust therefore cannot now rely on an unexpectedly strong performance by the Dollard office to demonstrate that its offer, viewed years later through the prism of hindsight, looks much better than it did in June, 1984 – in the contemporaneous light of day.
> >
> > [Emphasis added]

[85] In addition, in *Farber* it was not the admission of the evidence that demonstrated error, it was the trial judge's use of it. Based on the mere fact that the income at the Dollard branch improved, the trial judge *presumed* that the improvement was reasonably foreseeable (para. 44). Gonthier J. explained the impact of the trial judge's reliance on the *ex post facto* evidence:

> [45] The trial judge therefore erred in admitting the *ex post facto* evidence when its relevance to the case had not been established. Moreover, its admission prejudiced the appellant since, in my view and with the utmost respect, it distorted the trial judge's analysis. On the basis of the sales figures of the Dollard branch subsequent to the offer, the judge concluded that the respondent's offer did not substantially change the appellant's employment contract from a salary point of view. However, those figures were not known at the time of the offer and would not have been foreseen by a reasonable person.

[86] Here, the appellant fully expected sales to increase and gave reasons why. This evidence was not disputed by the respondent. The 2015 evidence was admissible as being relevant to the issue of reasonable foreseeability of Mr. Clarke's income in the new position and what his 2015 income could have been as an account executive in his previous position.

[87] The evidence was also plainly relevant to the issue of mitigation since the trial judge actually made positive findings of fact that had the respondent remained his income would have declined and hence he had not failed to mitigate by staying at the Herald to work out his notice period (paras. 75 and 86).

[88] At a minimum, the award must be quashed and a new trial ordered. However, that is not the appropriate disposition. The trial judge's reasons demonstrate that she misapplied the tests for constructive dismissal and mitigation.

Constructive Dismissal

[89] The trial judge accurately recited the uncontested evidence. She made no adverse or positive findings of credibility or reliability about any of the evidence she had heard. She then referred to the two branch test described in *Potter*. She purportedly applied the first branch to conclude that the respondent had been constructively dismissed. With respect, I am satisfied that the trial judge did not apply the correct legal standard to the uncontested facts. This is an error in law.

[90] The trial judge correctly set out some aspects of the two-step test. She described it as follows:

> [55] In para. 32, Wagner, J. referred to two branches of the test. First, the express or implied term of the contract of employment which was breached must be identified. Then the court must determine whether the breach was serious enough to equal constructive dismissal. He went on to say:
>
> > Typically, the breach in question involves changes to the employee's compensation, work assignments or place of work that are both unilateral and substantial. (para. 32)
>
> [56] Wagner, J. went on in para. 37 to say that in the first step the court has to determine objectively if a breach has occurred. If there was an express or implied term that allows the change, or if the employee acquiesces, the change is not a unilateral one and therefore not a breach. He also noted the change must be detrimental to the employee.

[91] The trial judge then paraphrased the second step:

> [57] In the second step, he said the court must ask whether a reasonable person in the same situation as the employee would have felt there was a substantial change to the essential terms of the employee contract. (paraphrasing para. 39)

[92] The judge then applied the test without further elaboration. As to the first step, she reasoned:

> [59] In this case, there was no written contract of employment. I conclude it was not an implied term of the contract that Calvin Clarke could be transferred from his position as account executive for 18 years to a newly created position. This was a unilateral decision of the Herald which breached the employment contract viewed on an objective basis. It affected his compensation and changed his duties and responsibilities.

[93] As to the second step, she rationalized her conclusion as follows:

> [60] With respect to step two of the test, I must determine whether these changes were substantial, based upon a determination of whether a reasonable person in Calvin Clarke's position would consider them to be a substantial change to his contract of employment.
>
> [61] I am satisfied that Calvin Clarke's income would be reduced and that his duties changed. The Herald said he was still in sales and dealing with clients face-to-face with the same benefits available to him. However, I am satisfied that the nature of Calvin Clarke's duties changed from those he had as an account executive. Instead of selling print ads in the newspaper and related publications, he was to sell printing materials such as Bounty Print's business cards and brochures, and Headline Promotions' logo'd sports apparel and equipment.

[94] There are several problems. First, the trial judge's reasons demonstrate that she failed to understand and carry out the necessary analysis that *Farber* and *Potter* require. Missing from her approach is any appreciation of the magnitude of the unilateral change in terms of employment that satisfy the test for constructive dismissal—it must be such that the employer demonstrates an intention to no longer be bound by the employment contract.

[95] I earlier set out the relevant principles from *Potter*. For convenience, I repeat them here. Wagner J., as he then was, wrote:

> [34] **The first branch of the test for constructive dismissal, the one that requires a review of specific terms of the contract, has two steps: first, the employer's unilateral change must be found to constitute a breach of the employment contract and, second, if it does constitute such a breach, it must be found to substantially alter an essential term of the contract** (see Sproat, at

> p. 5-5). Often, the first step of the test will require little analysis, as the breach will be obvious. Where the breach is less obvious, however, as is often the case with suspensions, a more careful analysis may be required.
>
> [35] In *Farber*, Gonthier J. identified such a change as a "fundamental breach". The term "fundamental breach" has taken on a specific meaning in the context of exclusionary or exculpatory clauses: see, e.g., *Tercon Contractors Ltd. v. British Columbia (Transportation and Highways)*, 2010 SCC 4, [2010] 1 S.C.R. 69, at paras. 104-23. **To avoid confusion, I will therefore use the term "substantial breach" to refer to breaches of this nature. The standard nevertheless remains unchanged -- a finding of constructive dismissal requires that the employer's acts and conduct "evince an intention no longer to be bound by the contract"**: *Rubel Bronze*, at p. 322, citing *General Billposting Co. v. Atkinson*, [1909] A.C. 118 (H.L.), at p. 122, per Lord Collins, quoting *Freeth v. Burr* (1874), L.R. 9 C.P. 208, at p. 213.
>
> [36] **The two-step approach to the first branch of the test for constructive dismissal is not a departure from the approach adopted in *Farber*. Rather, the situation in *Farber* was one in which the identification of a breach required only a cursory analysis. The emphasis in *Farber* was on the second step of this branch, as the evidentiary foundation for the perceived magnitude of the breach was the key issue in that case.** However, the identification of a unilateral act that amounted to a breach of the contract was implicit in the Court's reasoning. In many cases, this will be sufficient. The case at bar, however, is one in which the claim can be properly resolved only after both steps of the analysis have been completed.
>
> [Emphasis added]

[96] The second branch of the test is not tied to a single unilateral act, but is based on a series of employer actions that show the employer no longer intended to be bound by the contract.

[97] However, it is clear that to found constructive dismissal, the magnitude of the single breach or multiple incidents must demonstrate the employer's intent to no longer be bound by the employment contract. This is confirmed by Justice Wagner's summation of the guiding principles:

> [43] Thus, constructive dismissal can take two forms: that of a single unilateral act that breaches an essential term of the contract, or that of a series of acts that, taken together, show that the employer no longer intended to be bound by the contract. The distinction between these two forms of constructive dismissal was clearly expressed by Lord Denning M.R. in a leading English case, *Western Excavating (ECC) Ltd. v. Sharp*, [1978] 1 All E.R. 713 (C.A.). First of all, an employer's conduct may amount to constructive dismissal if it "shows that [he] no longer intends to be bound by one or more of the essential terms of the contract":

> p. 717. **But the employer's conduct may also amount to constructive dismissal if it constitutes "a significant breach going to the root of the contract of employment": *ibid*. In either case, the employer's perceived intention no longer to be bound by the contract is taken to give rise to a breach.**
>
> [Emphasis added]

[98] Absent from the trial judge's analysis is an assessment whether the employer's unilateral changes to the terms of employment were so serious or substantial as to demonstrate an intention not to be bound by the employment contract.

[99] The trial judge did not expressly, or by implication, reject the uncontested evidence of the Herald witnesses. The key elements of their evidence was:

- Its business plan in 2015 was to commence integration of the sales of all of its products to its customers. One way to do so was to create the BDS position.
- They chose the respondent because he was naturally suited to take on the role and was available as his accounts had already been assigned to other account executives.
- It would take several months for the respondent, as an account executive, to build up sales and start earning commission income.
- In the BDS position, he had guaranteed income of what he had made as an account executive in 2014 for three months, and when he expressed concern, they increased that guarantee for a full six months from April 13, 2015.
- The Herald wanted the respondent to be successful in this new role, both for them in terms of sales and for him in terms of his income; they increased the override commission and promised to revisit the commission formula in four months.
- The respondent's pessimistic income projections would not only be unacceptable to the respondent, but also to the Herald.
- The respondent would sell products to the same Herald customers.
- The respondent would work out of the same office and report to the same person as he had as account executive.
- If he met the sales targets, he would earn $93,275.00.

[100] The trial judge did not refer to any of this evidence in her analysis because she focussed solely on Mr. Clarke's subjective views. Viewed objectively, the appellant evinced no intention to no longer be bound by the employment contract. On the uncontested evidence, the Herald did not constructively dismiss the respondent.

Mitigation

[101] In light of this conclusion, I need not address the issue of mitigation. If it were necessary to do so, I agree with the appellant's submissions—the trial judge did not apply the correct legal test and ignored plainly relevant evidence. Both are errors of law (see: *Evans* at para. 47).

[102] The critical focus of the mitigation analysis is that an employee should not be obligated to mitigate by working in "an atmosphere of hostility, embarrassment or humiliation". But where the atmosphere is not tainted, an employee is generally required to work in the changed position in order to mitigate damages (see: *Evans* at paras. 30-31).

[103] In this case, there was no evidence of a poisoned atmosphere. The Herald witnesses stressed that they wanted to maintain the employment relationship with Mr. Clarke, who was a highly-valued, skilled and well-liked employee. Mr. Clarke did refer to his subjective feelings of loss of stature but would have attempted to work through it [the BDS position] had he believed there was "light at the end of the tunnel". No concerns about stature or atmosphere were ever voiced to the Herald witnesses or in his letter of resignation.

[104] Importantly, the trial judge expressly recognized the absence of acrimony in the workplace. Nevertheless, she focused on one factor, income reduction. She reasoned:

> [75] In this case, Calvin Clarke had expressed his concerns to the Herald. Some concessions were made, that is, including a third Bounty Print employee's commission in Calvin Clarke's commission structure as well as increasing the guarantee period from three to six months. In spite of these, Calvin Clarke believed his income would be reduced. I have found as a fact that that would be the case. Had he stayed on in the position, the income reduction would have occurred.
>
> [76] There is no evidence that there was any acrimony with Nancy Cook, Alex Liot or the Bounty Print principals. However, Calvin Clarke felt he had been

> demoted. Both Nancy Cook and Alex Liot said they wanted Calvin Clarke to remain with the Herald and be successful.
>
> [77] **However income is a critical issue in determining whether a reasonable person would stay on.**
>
> [Emphasis added]

[105] The trial judge cited decisions where the duty to mitigate had and had not been made out. She then concluded Mr. Clarke's decision was not unreasonable:

> [85] I conclude that it was not unreasonable for Calvin Clarke not to continue in the BDS position. As I have found, his compensation would decrease. I therefore find that there was not a failure to mitigate on his part.

[106] As I have already noted, the trial judge's determination that Mr. Clarke's income would have decreased is flawed by her refusal to permit cross-examination of Mr. Clarke on the actual 2015 sales, and exclusion of that evidence. Quite apart from those errors, the trial judge's reasons demonstrate a failure to apply the correct legal test for mitigation.

[107] I would allow the appeal and dismiss the respondent's action. The result is that the damage and costs awards are quashed. If any of those amounts have been paid to the respondent, I would order their return and award the appellant costs at trial in the amount of $17,250.00 and $5,000.00 on appeal, both inclusive of disbursements.

Beveridge, J.A.

Concurred in:

Oland, J.A.

Bourgeois, J.A.