**IN THE SUPREME COURT OF NOVA SCOTIA**
Citation: Burns v. Sobeys Group Inc., 2007 NSSC 363

**Date:** 20071210
**Docket:** S. K. 217352
**Registry:** Kentville

**Between:**

Deborah Irene Burns

Plaintiff

v.

Sobeys Group Inc., a body corporate

Defendant

**Revised decision:** The text of the original decision has been corrected according to the erratum dated December 13, 2007.

**Judge:** The Honourable Justice Gregory M. Warner.

**Heard:** June 26, 27, 28, and July 3, 2007, at Kentville, Nova Scotia

**Counsel:** Randall P. H. Balcome, Counsel for the Plaintiff
G. Grant Machum and Mark Tector, Counsel for the Defendant

**By the Court**:

## A. INTRODUCTION

[1] Was the Plaintiff, Deborah Burns, a seventeen year employee of the Defendant Sobeys, constructively dismissed?

[2] In her statement of claim, the Plaintiff alleged that from July 1986 until November 26, 2003, she served in a number of management positions with Sobeys. All these management positions required her to be responsible, at some times, for a number of employees (hiring, discipline and termination), and at other times, for the operation of a number of convenience stores, and at other times, for store audits, training, manual writing, Point of Sale (POS) installations, and pricing for convenience stores throughout Atlantic Canada.

[3] She alleged that in early November 2003 she was advised that "pricing" (fifty percent of her work at that time) was being removed, without explanation, but she was assured that other duties would replace it. She alleged, that, on November 26, 2003, the Vice President-Operations of TRA Atlantic at Middleton, Nova Scotia advised that her position with Sobeys' IT department had been terminated, and offered her a position at TRA Atlantic doing clerical work for twenty to twenty-five hours per week and other undetermined work to fill in her remaining time. She did not return to work, and says she was constructively dismissed.

[4] In its Defence, Sobeys denies the Plaintiff's version of events and says she was not constructively dismissed. It acknowledges eliminating her position as "Retail Technologist" due to a reorganization, but says it offered her a new position with no fundamental change in terms or conditions of employment, including no change in pay, benefits or hours of work. It pleaded that it gave the Plaintiff time to consider its offer of continued employment, but the next day the Plaintiff turned in her key, left and failed to return. It says she quit without cause and alternatively failed to mitigate her loss (that is, continue with the offered employment until she had other employment).

[5] At the opening of the trial on January 22, 2007, the Plaintiff was granted leave to amend her Statement of Claim to claim, in the alternative, that the

Defendant terminated the Plaintiff. The Defendant's request for costs and an adjournment was granted.

[6] The Plaintiff did not emphasize (but did not abandon) the pleaded claim that she was part of management in her post-trial oral submissions. Her submission was that, on the facts of this case, it did not matter whether she was management. The plaintiff said that she was dismissed by the defendant. Alternatively, her counsel characterized the circumstances as a "re-assignment". In this case, the description of the proposed alternate position was approximately fifty percent clerical (the leftover portion of another employee's job that was transferred to Stellerton) with the remainder of the job not described at all. Counsel submitted that there was confusion within Sobeys as to what the plaintiff's job was, and what was proposed for the plaintiff, when she was told on November 26, 2003, that her position was eliminated.

## B. FACTS

[7] The Plaintiff was born in 1953 in Toronto, Ontario. When she was young, her parents moved to Kingston, Nova Scotia. She attended and graduated from Middleton High School, followed by a one year secretarial course from a business college. For a short time thereafter she worked for a motel, and from 1976 to 1980 as assistant manager of the Officers' Club at C.F.B. Greenwood.

[8] She moved to California and lived there for approximately five years. From 1981 to 1984, she was a payroll clerk for 300 employees at Litton Mellonics Information Center. From 1984 to 1986 she performed payroll/personnel duties for about 400 employees at Rockwell Science Center as payroll supervisor. While in California, she also completed business and accounting oriented courses from a community college.

[9] In 1986 she returned home. In July 1986 was hired by the Defendant as a **junior accounting clerk** at the TRA Foods office in Middleton. Working under a supervisor, she provided accounting for the Defendant's group of convenience stores operating under the **Needs** banner.

[10] Around 1988/89, TRA bought out a group of convenience stores operating under the **Green Gables** banner. Ms Burns says that she was asked by Jim

Hawkes, TRA's President, and she agreed, to become a **supervisor** in charge of accounting for the group of 75 to 80 **Needs** and **Green Gables** convenience stores operated by the Defendant throughout the Maritime provinces. She worked at the Middleton office, supervising about 15 employees, and reported to the President, of TRA, and later on reported to the Controller as well.

[11] In 1991 she was asked by Jim Hawkes and agreed to "go on the road" as auditor of the convenience store group, under the title of **Retail Accounting Administrator**. Her duties involved travelling from store to store, dealing with (finding and correcting) inventory, cash flow, staff and other operating problems throughout the Maritime provinces. She reported initially to the President of TRA and later to Sam Hughes, General Manager in charge of the convenience store group at Stellarton. She did not supervise employees in this role. She did however create, maintain and update a training manual of store operating and accounting procedures for the convenience store group. Her role differed from **Retail Counselors**, each of whom was in charge of a group of convenience stores. She described her role as being the "eyes and ears" of the general manager of the convenience store group.

[12] In 1995, Sam Hughes asked and she agreed to become a **Retail Counselor** for a group of 15 convenience stores in the Annapolis Valley. As in prior job changes, she did not apply, but was asked, and had a choice as to whether to accept the new position. She looked on the job changes as opportunities to gain experience and advance her career with Sobeys. As Retail Counselor, she was responsible, through store operators, for the day to day operations of these stores. As in her last position, she remained "on the road".

[13] It was in this role that on August 15, 1996, the President of TRA Maritimes, Jim Hawkes, advised her by written memo that she qualified, as "Key Management Personnel", to participate in the "Management Incentive Compensation Program", and receive bonuses based on the sales and profitability of the convenience store group. No evidence was given at trial as to how often she received bonuses or in what amounts, with the exception of her last annual management incentive bonus, paid on July 9, 1999, in the amount of $3,111.10.

[14] Towards the end of her tenure as Retail Counselor, Mr. Hughes asked Ms. Burns to assist in setting up computers for a new Point of Sale scanning system in her group of convenience stores. She agreed to this new responsibility. She was trained by an outside company that installed the first POS scanning

computers. Her job title changed from Retail Counselor to "**Scanning Coordinator**" after the scanning systems had been installed in her stores in 1998. Other Retail Counselors did not install the scanning systems; she was the only Scanning Coordinator with TRA. As Scanning Coordinator, Ms. Burns set up, and trained managers and staff in the operation of, the scanning systems in 75 to 80 stores throughout the Maritime Provinces. She averaged approximately one week at each store for set-up and training. She developed training materials and updated and expanded the manuals she had created as Retail Accounting Administrator. A job description prepared by Craig Pardy, her superior when she commenced the job in 1998, and the extensive and positive Performance Reviews dated June 26, 1998 and July 15,1999 describe the job, and how well she fulfilled it.

[15] By August or September 2001 Ms Burns' role had changed. The scanning systems were installed in all the convenience stores and the staff were trained. Her Middleton superior (Terry Balcome) prepared a written description of her job duties. She worked in the computer room in TRA's Middleton office "pricing" (making all retail price changes for convenience stores in the Maritimes, which she states constituted about 50% of her work), "troubleshooting", and related activities.

[16] About this time, as part of a corporate re-organization, Sobeys centralized technology matters at its Stellarton head office. Much of Ms. Burns' work came under a section of Sobeys' IT department known as "Retail Systems". Cathy MacRitchie was Director of the IT department, and Anne McCarten was "Lead" (after April 2003, Manager) of the Retail Systems section. Retail Systems was responsible for the computer hardware and software (processors, cash registers, and PLS) for all stores under the Defendant's many banners. Ms. McCarten was responsible for a group of employees known as Retail Technologists. These persons serviced the Defendant's in-store computer systems,, using technical expertise, and carried out renovations, new stores installations, and other projects related to in-store technology issues.

[17] In April 2002, Ms. Burns was assigned by Ms. MacRitchie to Ms. McCarten's section. Her job title was changed to **Retail Technologist**. Ms McCarten's evidence was that she interviewed Ms Burns to determine her "skill sets" when Ms. Burns was assigned to her section. Ms. Burns prepared for Ms. McCarten a description of her duties. The evidence contains handwritten notes of Ms. McCarten made during their initial interview. The duties described by Ms

Burns were not those of a Retail Technologist, but mostly those of a merchandiser or business support specialist. Ms McCarten concluded that Ms. Burns had the aptitude and skills of a business support specialist, but not the technical "skill set" of a Retail Technologist. As a result of the meeting, Ms. McCarten rewrote Ms. Burns' job description based on the Plaintiff's skills. It was not the job description of a typical Retail Technologist. One other person in the Retail Systems section had similar skill sets and performed similar "business support" work. Because the Defendant's reorganization also involved centralization of the pricing function - at least fifty percent of Ms Burns' work after the summer of 2001- Ms McCarten and Ms Burns talked about possible tasks that could keep Ms Burns fully occupied on behalf of the Defendant. This included discussions of expanding her role to the installation of scanning systems and training of employees for other banners (specifically, Foodland, PriceChoppers, and eventually Sobeys) when top management authorized these projects to proceed. Evidence differed as to how far in the future this work may have become available.

[18] Tasks, which Ms Burns was capable of performing, diminished significantly in late 2003 with the completion of the centralization of the "pricing" function at Stellerton.

[19] In early November 2003 Ms Burns and Ms McCarten met in Stellarton. During this meeting, Ms McCarten discussed the options available for Ms Burns. They disagreed on exactly what was said. Ms. Burns denied that McCarten expressed concern about keeping her busy, or that McCarten said any more than that she wished Ms. Burns lived in Stellerton. Ms. McCarten says she advised Ms. Burns that if she came to Stellarton there would be far more options for work for her. At the time of this interview, Ms Burns' work was diminishing and she was looking for more challenges. I find that Ms. McCarten suggested that if Ms. Burns came to Stellarton, Ms McCarten could use her more, and Ms Burns indicated she was not interested in coming to Stellarton. Ms Burns stated, and Ms McCarten acknowledged, that Ms McCarten did not make a specific or formal job offer at Stellarton. I accept that the history of Ms Burns' re-assignments within the defendant organization resulted from offers made by management, which she always accepted, but which she need not have accepted.

[20] In the weeks that followed, Cathy McRitchie (Director of IT), David Fearon, the Vice-President of Human Resources for Sobeys, and Michael Rex, TRA Atlantic's Vice-President of Operations (who ran the Middleton operation)

communicated about finding a role for Ms Burns to play with the Defendant organization at Middleton. The Defendant's evidence was that they considered her to be a valuable employee with well-rounded skill sets. Ms. Ross testified that Mr. Fearon considered her "a keeper"; Rex said they all did. This is corroborated by Ms. Burns' excellent performance reviews of 2001, 2002 and 2003.

[21] Shortly before this time, Peggy Leonard, a computer programmer with a university degree, who was working in the computer room at TRA's Middleton office, asked for and was offered employment as a programmer in Stellarton. Her responsibilities at Middleton had been partly as a programmer and partly as a "tester". The programming duties had been centralized at Stellarton; the "testing" duties had not. In transferring to Stellarton, Ms. Leonard became a full-time programmer. Ms. Burns was familiar with the "testing" duties as Ms. Leonard worked at an adjacent desk and Ms. Burns had assisted her on a few occasions when she needed help.

[22] Mr. Rex testified that he believed that he could find a job for Ms. Burns in Middleton that would meet her skill sets and keep her busy. He understood that discussions had taken place between Ms. McCarten and Ms Burns at Stellarton about moving to Stellarton as part of the re-organization; he erroneously believed that a job offer had been made to Ms. Burns, and that she had refused it. He was aware that Amy (Journeay) Ross, the Human Resources specialist at Middleton, had completed a "personnel information profile" for Ms. Burns, which profile indicated under the section "Relocatable for career development opportunity" that she was "not currently relocatable". Ms. Burns denies giving that information. I prefer Ms. Ross' evidence, which is consistent with Ms. McCarten's evidence, and find that Ms. Burns did advise the Defendant that she was not interested in relocating to Stellarton.

[23] Mr. Rex agreed to hold a meeting with Ms. Burns to advise her that her position had been eliminated and to offer her a new position with TRA Atlantic at Middleton.

[24] In preparation for the meeting, Amy Ross obtained Ms Burns' job description from Ms. McCarten and Mr. Balcome; because Mr. Rex was not certain that Ms Burns would accept a re-assignment, Ms. Ross also prepared a draft severance letter.

[25] The language used in a draft severance letter prepared for the Plaintiff (but never delivered to her) described the position as “Application Developer within TRA Atlantic’s Support Services Department”. These words were not explained; on the contrary, Mr. Rex and Ms. Ross testified that they intended to work out a job description with Ms. Burns if she accepted the new position. Other than the “testing” duties, no evidence was given as to what Rex thought this other work might be. I am satisfied that he did not have a description of what Ms. Burns job would entail at that time, and intended to create one if she accepted their offer.

[26] On November 26, 2003 at about 4:00 p.m. Mr. Rex asked Ms Burns to stop by his office before going home. They met in his office shortly afterwards with Ms Ross in attendance.

[27] **Burns’ evidence re meeting.** Ms Burns’ memory of what was said at the meeting was not complete. She remembered that she was told by Mr. Rex that her position with Sobeys was being terminated. She was offered “Peggy Leonard’s desk”, which would give her about twenty hours per week in the computer room; the remaining twenty hours would be filled with “whatever”. Ms Burns testified that Terry Balcome had told her that there no longer was a “Peggy Leonard desk” because her role was being moved to Stellarton, so she asked for a job description. She was not given an answer, other than the “testing” duties, which, in her view, was clerical or menial. She asked if there was going to be a severance package, to which Mr. Rex replied that he did not know (he did know) but would find out. She was shocked when Ms. Ross asked what Ms. Burns expected to do within the company. She said that they explained that her benefits and salary would be the same. At the end of the meeting, which lasted 15 minutes, Rex told her to go home and think about it and give an answer in the morning. She had no other clear recollection of the meeting other than that her position with Sobeys was being terminated and she was asked to accept a job with no job description. She felt there was, in fact, no job for her.

[28] That evening she became upset, then sick, and did not sleep. Early the next morning, she went in to see Mr. Rex. She told him she was sick. She told him that her supervisor or someone from personnel should have met with her to advise that her position was terminated and asked him to contact her supervisor, Anne McCarten, or someone at Sobeys personnel, to have one of them contact her. She said he agreed to do so, so she left it at that. She said she was dressed in jeans. She handed Mr. Rex her office security card (her only access to the workplace). She

said that at no time did she say that she quit; rather she was dressed casually because she was too sick to work that day. She handed him the security card because Mr. Rex had said her job was terminated, and she did not want any repercussions from that. She went home and waited, expecting Anne McCarten or someone from Sobeys personnel to contact her to advise her of her options, but no one did. She did not intend to accept "Peggy's desk" because it was clerical work, and the other work was unspecified, and she figured she was more than clerical, and "this was going back down the ladder."

[29] **Defendant's evidence re meeting.** Ms. Ross made shorthand notes during the November 26th meeting, which she started to type up in her office immediately afterwards. Ms. Ross later talked to Mr. Rex "to clarify things", by which I understood she meant to compare recollections of the meeting. Ms Ross then revised her summary to reflect Mr. Rex's imput. The differences between the two documents are not significant. Based on these notes, Mr. Rex and Ms. Ross testified that Mr. Rex asked Ms. Burns whether Ms. Burns reported to Ms. McCarten, and Ms. Burns acknowledged this. Mr. Rex's evidence at trial appeared to depend upon referencing the typed record.

[30] Mr. Rex asked if she was aware that her job was becoming redundant and she said no. He asked if she was offered a position in Stellarton and she stated that she was not formally offered employment but it was not something she was willing to do. She was "not a spring chicken any more", was aware that Stellarton was where all of the action was, but was not in a position to move. She was asked if she had spoken to Terry Balcome about taking over Peggy Leonard's desk. She answered no. At this point, Mr. Rex or Ms. Ross advised that because she was not prepared to move to Stellarton and her job was redundant, they would attempt to accommodate her in Middleton by offering her Peggy's desk with the same salary, benefits, hours and work area, which might get her through to retirement, but with no guarantee of employment until retirement. I accept that Mr. Rex indicated that the work at Peggy's desk would involve approximately twenty hours per week of "testing" and that there was "lots to do" to keep her busy, and it was Rex's role to find, from managers who reported to him, what projects Ms. Burns could take on; he did not describe, or have a job description for, the other work. In answer to his counsel's question: 'Did you make clear what you offered?', Mr. Rex replied to the effect: 'The testing portion of Peggy Leonard's desk, and if that was not enough, we would find other employment within TRA'. He acknowledged there was no job description; that was for the legal or HR department. Ms. Ross said it was her job

to put together a job description if Ms. Burns accepted the offer that Mr. Rex was putting to her.

[31] Ms Burns asked if there would be a package if she did not take the position. Rex replied that there would be a package available but it would take into consideration the fact that the company had offered her two positions that they considered similar to her's. They asked her to think about the offer overnight, and Rex offered to prepare a package for her to look at the next day if she decided not to take Peggy Leonard's desk. Mr. Rex testified that he did not disclose the package was already prepared as he wanted her to consider his offer first.

[32] When asked what he thought Ms. Burns would do as a result of the November 26th meeting, he replied that he felt good about it and thought it went well. In contrast, Ms. Ross's testified that, during the interview, Ms. Burns was upset, felt animosity towards them ("her body language"), thought someone from Stellarton should be at the meeting, was skeptical of the proposed re-assignment and slighted by being asked to do "testing" which she thought was beneath her.

[33] **November 27th meeting.** The next morning Ms. Burns attended at TRA's office at about 7 a.m. wearing jeans. At 7:45 a.m. she met Mr. Rex in his office. Mr. Rex stated that she was very upset, could not believe the company would treat her [this way] because her husband (who worked for TRA) was on stress leave and they were going through difficulties at home, felt Anne McCarten should have talked to her, and was slighted that he was the messenger. It was a "very blunt meeting"; Ms. Burns "was not in a mood to talk", handed in her pass, said goodbye, and left the building. On cross-examination he acknowledged that she never said that she quit or resigned. At no time did he state that Ms. Burns stated that she was not accepting the offer. He was "dumbfounded" by her reaction and felt the offer was dead in the water.

[34] Ms. Ross testified that when she arrived at work the next morning she checked with Mr. Rex. He told her that Ms. Burns was in jeans, handed over her pass, and was unhappy. Both were surprised that she had handed in her pass and had not enquired about the other duties of the offered position or the contents of the severance package. Ms. Ross said they then had a conference call with Mr. Fearon, and possibly Ms. McRitchie.

[35] Mr. Rex denied that Ms. Burns had told him she was sick, or that she had asked, or that he agreed to request that someone from Stellarton contact her. He said that Ms. Burns told him that she would be home if anyone from Stellarton wanted to speak to her. I concluded from the manner in which Mr. Rex answered questions that he had limited independent memory of the events of November 26th and 27th, and relied on Ms. Ross' notes for some of his recollection. I accept Ms. Burns' evidence that she was sick and had not slept, and she had requested that someone from Stellarton contact her. Ms. Ross acknowledged on cross-examination that nothing in her notes indicated that Ms. Burns said she quit or resigned; only that she knew that Ms. Burns was unhappy and had handed in her card. Despite knowing that Ms. Burns, supposedly a valuable employee, was unhappy ("a keeper"), no one contacted her. Nor did anyone give her the severance letter prepared before the November 26th meeting.

[36] Mr. Rex spoke of the telephone debriefing with David Fearon. He testified that "from the debriefing, it was determined that she resigned." In Mr. Rex's discovery examination about the meeting and debriefing of November 27th, he stated that during the debriefing "we just took it that she resigned, so no . . . [someone from Stellarton did not call her]."

[37] On November 28, 2003, Ms Burns consulted a lawyer, Randall Balcome. He wrote to Mr Rex on the same day stating that he had been retained by Ms. Burns "with respect to employment difficulties she is having with Sobeys/ TRA Foods. . ." and that at the meeting "you were not clear as to exactly the type of alternative position being offered. . ." The letter continued as follows:

> "At this time, before we can properly access Ms Burns legal position, it would be necessary for you to respond to the following:
>
> 1. Would you please provide us with a specific job description and duties for the alternative position being offered to Ms. Chute-Burns;
>
> 2. What specifically did you mean by your comment that by taking this position it would "help finish your time at TRA Foods";
>
> 3. You also indicated to Ms. Chute-Burns that you would provide her with the terms of an alternative severance package, and at this time would like to, on a without prejudice basis, review a severance package with our client.
>
> I should mention that at this point, based on the information that we have, your treatment of Ms. Chute-Burns, specifically the elimination of her job as Retail

> Technologist, constitutes a constructive termination of her employment. However, as mentioned above, before we can property assess this situation, we need answers to the above questions. I look forward to your reply." (Emphasis added)

[38] It appears that the Defendant treated the lawyer's letter of November 28th as if it contained a conclusive statement that she considered that she had been constructively terminated, as opposed to a letter requesting answers to the questions posed so that she could properly assess what to do about the offer. The Defendant did not reply to the November 28th letter, or otherwise communicate with Ms. Burns, for almost two weeks. On December 11th, David Fearon wrote to the lawyer. He recited the Defendant's understanding of the events of November 26th and 27th. This included a statement that Ms. Burns advised Mr. Rex that she was not prepared to accept his offer. He wrote: " . . . it is the Company's position that Ms. Chute-Burns was not constructively dismissed as she was offered suitable, alternate employment when she was provided the opportunity to assume Ms. Leonard's position. . . . It is also our position that by not accepting the above noted offer made by Mr. Rex and by turning in her key and leaving the office with no further notice, Ms Chute-Burns, in fact, resigned her position with Sobeys." I find that Ms. Burns did not decline the offer or quit.

[39] The Plaintiff's lawyer replied to the December 11th letter on December 17th. He attached a copy of Ms Burns' written response to the factual statements in Fearon's letter, and stated: " You did not reply to my first question as to the specific job description and duties for the alternate position being offered to Ms Burns. Would you please provide this to me." The letter goes on to state that "at this time Ms Chute-Burns is treating her demotion as a constructive dismissal of her employment."

## C. The Law

[40] An accurate statement of the law of constructive dismissal is contained in the leading text, **Quitting for Good Reason: The Law of Constructive Dismissal in Canada** by Randall Scott Echlin (now Justice Echlin) and Jennifer M. Fantini (2001: Canada Law Book Inc.: Aurora). An intuitive analysis of the difference between a resignation and termination, and the rationale behind the law of constructive dismissal is set out in the text, **Employment Law in Canada**, 4th Edition, by Geoffrey England (looseleaf to release 8,10/06: Butterworths), Chapter 13. Their analyses is supported by the decisions cited in the texts and are relied

upon by me, whether cited in this decision or not. They include the decisions cited by counsel in their memoranda.

[41] Two legal issues arise in this case. First is whether the plaintiff quit. Second is whether, if she quit, she quit for good cause.

## C.1 What is a "quit"?

[42] England's analysis at Chapter 13 is most helpful. He categorizes three (3) ways in which termination of the employment relationship at the initiative of the employee can arise. One is where "the employee has given no notice at all, but simply failed to come to work in circumstances such that the employer may reasonably treat the failure to come to work as a manifestation of an intention to no longer be bound by the contract of employment." (Paragraph 13.1) "There will be a "quit" only if the employee genuinely intends to sever the employment relationship and a reasonable person in the position of the employer would believe that such is the employee's intent." (Paragraph 13.2)

[43] They observe that it is sometimes difficult to determine whether there is a "quit" by the employee or a "dismissal" by the employer and note that valid resignation must have a subjective and objective component.

> "The former requires conduct on the employee's part that unequivocally manifests that he or she had the subjective intention of quitting. The latter requires conduct on the employee's part that would lead a reasonable person in the position of the employer to believe that the employee had carried out his or her subjective intention." (Paragraph 13.12)

[44] The objective component is significant in situations where the employee leaves the job following an emotional confrontation with the employer. In effect courts usually find, applying an objective analysis, that an employee should not have been considered to have quit in emotional circumstances even if the employee gives "clear and unequivocal evidence of resignation" until he or she has had a reasonable opportunity to either cool off or to consider, for example, the changes in employment duties imposed or proposed by the employer. (Paragraph 13.13 - 13.14)

[45] Finally, in circumstances where the employee is effectively given an ultimatum - for example, to discuss the different position or to resign - courts may not consider the employee to have quit until the employee "genuinely and without duress" signifies an intention to terminate the contract after a "reasoned assessment". (Paragraph 13.16)

## C.2 What constitutes quitting for good cause?

[46] The current state of the law begins with **Farber v. Royal Trust Co.** [1997] S.C.R. 846 at paragraphs 24 to 27:

> "[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. . .
>
> [25] . . .an employer can make any changes to an employee's position that are allowed by the contract, ***inter alia*** as part of the employer's managerial authority. Such changes to the employee's position will not be changes to the employment contract, but rather applications thereof. The extent of the employer's discretion to make changes will depend on what the parties agreed when they entered into the contract. . .
>
> [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. . .
>
> [27] . . . for the employment contract to be resiliated, it is not necessary for the employer to have intended to force the employee to leave his or her employment or to have been acting in bad faith when making substantial changes to the contract's essential terms."

[47] Simplifying the law to its barest essentials, Echlin and Fantini observed that constructive dismissal consists of the unilateral imposition by the employer of a fundamental change to the employee's position or remuneration.

[48] In what was probably a reflection of the economic circumstances of the day, Echlin and Fantini note that the employee - oriented subjective approach of the 1970's gave way to the employer - oriented subjective approach of the 1980's and 1990's. Commencing with **Farber**, the current approach involves an objective standard that downplays the importance of the employer's ***bona fide*** business interest. At page 31, they note:

> "It is now generally accepted that the test for determining whether a change to an employee's position is sufficient to constitute a fundamental breach of the employment contract is an objective one. That is, would a reasonable person in the same position as the employee have considered the essential terms of the employment contract to have been substantially changed? Despite the degree of latitude once granted to employers to reorganize in pursuit of ***bona fide*** business interests, there is evidence of a shift back towards a stricter objective approach. Legitimate business interests will not always justify the imposition of new terms, particularly where the degree of the change is undeniably substantial. A constructive dismissal may exist, regardless of the employer's motives for impositing changes to the employment relationship. The current test focuses primarily upon the breach itself and its impact upon both the employee's position and the broader employment relationship."

[49] The legal principles applicable to this area of the law are not complex; however, their application is sometimes difficult. The analysis of whether a change amounts to constructive dismissal is a question of fact. The analysis, as described by Echlin and Fantini, is as follows: first, a court will determine the express and implied terms of the contract; second, a court will decide whether the original terms have been breached by the imposed change; and third, a court will determine whether the breach is fundamental in nature. This is the approach described by Easson J. A. in **Reber v. Lloyd's Bank** [1985] BCJ No. 2341 (BCCA), and adopted by Hallett J at paragraph 5 in **Stacey v. Consolidated Foods** 1987 CarswellNS 125 (NSSC).

[50] As a general rule the employee has the onus of proving, on a balance of probabilities, that constructive dismissal has occurred; that is, the unilateral imposition of a fundamental change in the employment relationship. An exception arises where the employee's "resignation" is forced as opposed to voluntary, in which case the onus of showing a resignation to be voluntary is on the employer. In addition, the employer has the onus of proving, on a balance of probability, that the employee failed to mitigate any damages claimed.

[51] Echlin and Fantini organize their analysis of the types of employer conduct that might lead to constructive dismissal into five categories. Their categories are:

1. change in job duties;
2. geographical relocation;
3. cessation of employment (e.g. forced resignation);
4. changes in working conditions;
5. inappropriate employer conduct (e.g. harassment).

General categories are useful analytical tools when applied with caution. Most fact situations, such as those in the case at bar, involve factors that overlap any single category.

[52] The first category is the most relevant. In chapter 9, Echlin and Fantini make the following points (the highlighting is mine). These points are also found in Geoffrey England's text at paragraphs 13.42 to 13.58.

a. ". . . it is not the direction of the change but the degree of the change which is critical to assessing whether altered job duties amount to a fundamental breach of the employment contract. . . . Courts may take into account whether there has been a reduction or broadening of duties, a change in the nature of the work to be performed by the employee, altered reporting relationships, a change in job title, or a loss of status, prestige or authority. Usually, a change in job duties is assessed with reference to its impact upon the entire employment relationship. . . . A job reorganization or transfer will often be justified on efficiency grounds. That is, an employer may be allowed the latitude to restructure its workforce, with certain limits, in order to remain competitive." (p.196)

b. "Where the parties have a history of negotiating new terms, this may act as a precedent to limit an employer's right to institute unilateral variations affecting an employee's duties. In several cases, courts have found that a history of negotiation gave rise to an implied term that changes may not be made without the employee's prior consultation. . . . [but] Courts may be willing to imply into the employment contract a term that the employee accept reasonable reassignments where there is a history or expectation of such among the parties, or where reassignment is supported by industry custom." (p.199)

c. "Where the offer of a new position is vague, the employee may not be required to accept it." (p.200).

d. " Both in the case of a transfer and a job reorganization, the primary issue is not the form in which the changed terms have introduced, but whether those changes result in a fundamental breach going to the root of the employment contract. . . .The distinction . . . becomes significant with respect to the doctrine of condonation and the employee's duty to elect whether or not to accept a variation in job responsibilities. ... where an employee is transferred to a new position, not only is the timing of the alleged constructive dismissal identifiable, but the employee is given a clear opportunity to elect whether or not to accept the new position. However, even where this is the case, the employee will be allowed a reasonable period of time to assess the impact of the transfer." (p.203)

e. "Employees are generally entitled to reject fundamental changes to the terms of their employment, particularly where those alterations result in a downgrading of their duties or status. A distinct problem arises in the case of lateral transfers and job reassignments of a similar nature, where a proposed position is of a comparable level and status in the organization. ... However, in specific circumstances, a lateral transfer may result in a finding of fundamental breach. ... a finding of constructive dismissal in a particular incidence involves the consideration of the degree of the change, rather than its direction." . . . .A lateral transfer does not generally amount to a constructive dismissal. Similarly, a job reassignment falling short of a demotion does not normally give rise to a finding of fundamental breach." (p.206-207) The last sentence is explained in ***Canadian Bechtel Ltd. V. Mollenkopf*** (1978) 1 C.C.E.L. 95(OCA), on the basis that an employee has "no vested right in the particular job initially given to him". Courts diverge on the fluidity with which an employer may make these kinds of changes. Some look to the employer's motives. Others attempt to ascertain and protect the employee's core job duties (p.216); said differently, courts may find constructive dismissal in some circumstances where an employee is required to perform dissimilar job functions (p.226), or the change deprives the employee of job satisfaction (p.229-232). The authors cite ***Fisher v. Eastern Bakeries Ltd.*** (1986) 14 C.C.E.L. 123 (NSSC) and other cases for the proposition that this approach is more tenable when an employer is confronted with unusual or extreme economic circumstances (p.208). Ultimately the exercise is fact-driven.

f. "An employee will not normally be required to accept a subordinate position, as this usually constitutes a breach of the essential term of the employment contract. ... This is generally the case, even if the employer is properly motivated in imposing the demotion. As a result, determining whether a change results in a demotion ... is critical. ... A slight . . . demotion, or a temporary downgrading of status has, in some cases, escaped being characterized as a fundamental breach. ( p.236-237) . . . . Although often associated with a reduced scope of responsibilities, a demotion can result from an increase in responsibilities. Where an employee is asked to perform duties which are both a downgrading of responsibilities and different in nature from the employee's previous duties, a demotion may be found ... Reduced responsibilities need not be accompanied by a pay loss ... Reduced responsibilities may alter an employee's status.". . . . Even where an employee's duties are reduced significantly as a result of the employer pursuing legitimate business objectives, this change may result in a demotion and, accordingly, in a fundamental breach. . . Greaves v. Ontario Municipal Employees Retirement Board (1995) 15 C.C.E.L.(2d) 94" (p.246-248).

g. "A constructive dismissal may exist where the nature of the employee's job duties is significantly modified." (p. 251)

h. "A change in job title alone will not usually be sufficient to constitute a fundamental breach of the employment contract going to its root. However . . . cumulative changes in an employee's position, including a change in job title, amount to fundamental breach." (p.290)

i. "A change in reporting relationships may form the basis, in whole or in part, for a finding of constructive dismissal." (p.295)

j. "The concepts of position, status, prestige and authority are inextricably interwoven within the case law. . . a loss of prestige may cause an employee to suffer humiliation or embarrassment [but]. . . A loss of prestige alone will not generally result in a finding of fundamental breach." The subjective nature of prestige and status are incompatible with the objective test for finding constructive dismissal, absent a fundamental contract variation, but it has been found to contribute to the finding when combined with other serious breaches. (p. 307-309)

[53] The second category - geographic relocation - results in the finding of constructive dismissal, where the relocation exceeds the scope of the agreed-upon terms governing the employment relationship. In this case the plaintiff was always

based out of Middleton, but throughout her employment has worked in different locations, frequently “on the road”, and reported to superiors at Middleton and at the defendant’s head office in Stellarton. Geographic relocation to Stellarton would not have been valid cause to decline a reassignment. I concluded that, while the defendant explored the possibility of the plaintiff relocating to Stellarton in early November 2003, the defendant did not make an offer of employment requiring a move to Stellarton; consequently, this category is not particularly relevant to the circumstances of this case.

[54] The third category - cessation of employment - includes forced resignation. The parties are not in agreement as to whether in fact the plaintiff resigned, and if so, whether it was voluntary or involuntary. This category is relevant to the case at bar.

[55] Beginning at page 361, Echlin and Fantini state that the test for determining whether an employee’s resignation is voluntary is an objective one. They state that the test is whether, given all the surrounding circumstances, a reasonable person would understand the plaintiff’s statements to the defendant constituted a resignation. Factors to be assessed include: words and conduct, whether the employee was under duress or subject to undue influence, whether the employee’s resignation was rendered ineffective by illness or incapacity, whether it followed a demand or request for resignation, and the course of conduct of the employer. This analysis is primarily fact-driven.

[56] The fourth category - change in working conditions - overlaps, to some degree, the first category (changes in job duties). Echlin and Fantini refer to significant changes in working conditions in terms of the employee’s work schedule, hours of work, requirement for increased travel and overnight stays, changes in workplace, changes in support staff, and similar types of changes. None of them are particularly relevant to the case at bar as there was no proposed changes to the plaintiff’s historical working hours or work location.

[57] The fifth category is not relevant to this case.

[58] The Defendant argues that, if the Plaintiff was constructively dismissed, she failed to properly mitigate her loss by failing to work with the Defendant in the position offered to her while seeking alternative employment. These circumstances are dealt with in Chapter 4 of Echlin and Fantini’s text. They note that when faced

with a unilateral and fundamental change to the employment relationship the employee may chose one of three options: (1) She may decide to accept the changes and continue working. (2) She may chose to reject the changes and quit her employment in which case she must make the election in a timely manner. (3) She may object to the changes by voicing a clear rejection of them, but continue working under protest. The latter is more likely to be regarded as mitigating her damages.

[59] When faced with a unilateral fundamental change in the terms of employment, an employee may not reject it outright without attempting to salvage the relationship. The fact that the employer had a policy of making transfers or re-assignments optional rather than mandatory, can affect the Court's view on the obligation of the employee to negotiate with the employer.

[60] Also relevant to this case is the duty of the employee to make a timely election to accept or repudiate, and the doctrine of condonation. These are analyzed at pages 48 to 61 in Echlin and Fantini's text. Particularly relevant is the observation at page 58: "Employees with longer service records may be entitled to more time in which to consider whether or not to accept an employer's repudiation. The rationale behind this principle appears to be that a long-service employee has relatively more to lose by terminating his or her employment than does a short-service employee. An employee's length of service may carry considerable weight when new terms or a new position have not been clearly communicated by the employer."

[61] The leading cases with respect to mitigation appear to be **Mifsud v. MacMillan Bathurst Inc.** (1989) 70 O.R. (2 d) 701 (OCA), and **Farquhar v. Butler Brothers Supplies Ltd.** [1988] 3 W.W.R. 347 (BCCA). The test of what steps should be taken are those that a reasonable person would take. An often-cited quote from **Mifsud** reads: "Where 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, it is reasonable to expect the employee to accept the position offered in mitigation of damages during a reasonable notice period, or until he finds acceptable employment elsewhere."

[62] At page 70, the writers state that an employee is not required to accept a vague or tenuous offer in fulfilment of the duty to mitigate.

[63] At page 73, they note that it appears that many courts are reluctant to place too heavy a burden on the employee, restricting the situations where it would be reasonable for employees to remain in a diminished position in order to mitigate their losses.

[64] At page 81, they write that an employee may not be obligated to accept a position in mitigation where it would result in different working conditions.

## D. ANALYSIS

### D.1 **Whether Ms. Burns Quit**

[65] Late on November 26, 2003 Michael Rex and Amy Ross advised Ms. Burns, without any prior notice, that her position as Retail Technologist under the Retail Systems Section of the IT Department was terminated. They offered to continue her employment in a different job at the same salary, benefits and work place. Part of the new job would be the "testing" job carried out by Peggy Leonard until her programming duties were centralized at head office in Stellarton and she moved to Stellarton to be a full-time programmer. To the extent that the testing job did not fully occupy Ms. Burns time (estimated to occupy about one-half her time), Mr. Rex stated that he would find other undefined and undetermined work to fill her time at the TRA Atlantic division of the Defendant.

[66] Ms. Burns had assisted Ms. Leonard with "testing" on a few occasions and was therefore familiar with what it was. She considered it to be menial and beneath anything she had done in her 17½ years at Sobeys. The testing job was not clearly described at trial. I accept Ms. Burns' evidence and find that the testing job was a clerical function and more menial than any job function that Ms. Burns had performed in her career at Sobeys. I further accept that it was reasonable for her to be skeptical about the job being offered to her by Mr. Rex because of her prior conversation with Terry Balcome and because most of "Peggy's Leonard desk" had be transferred to Stellarton; there was no job left in Middleton except the testing work.

[67] Notably there was never any description of what the remaining work that Ms. Burns was to perform would be.

[68] It was unreasonable to expect Ms. Burns to accept, then or the next morning, a job which had not been reasonably described to her, or for which there was no description. On all previous occasions that Ms. Burns had changed her position with Sobeys, a job description was given and she was afforded the option of accepting the new position or staying where she was. The procedure followed by the Defendant on November 26th was itself a significant change in the (implied) terms of the employment contract between the parties.

[69] Ms. Ross testified that Ms. Burns was upset during the meeting of November 26th for more than one reason. She felt that her boss (Ms. McCarten) or someone from personnel should have advised her of the termination of her employment with the Retail Systems section of the IT department. In addition, it appears from the opening cross-examination of defence counsel that Ms. Burns' husband had been a truck driver with TRA and had left the employment of TRA in acrimonious circumstances, claiming harassment by Mr. Rex. This would cause any reasonable person in Ms. Burns' position to be uncertain and "on edge" about the manner in which her position was terminated, and by which she was offered vague alternative employment.

[70] I accept the evidence that Ms. Burns was upset and not thinking clearly when told on November 26th about the vague job reassignment which, on its face, constituted a fundamental and substantial change from anything she had done in her previously 17½ years with the Defendant. I accept that she believed, with good reason, that the work would be menial and demeaning.

[71] I accept Ms. Burns' evidence that she did not sleep during the night of November 26th, became sick, and was in no condition to work the next morning, but came to work for the purpose of speaking with Mr. Rex as he had requested.

[72] When she left the meeting on November 26th, and when she spoke to Mr. Rex early on the morning on the 27th , I find that it was reasonable for her to believe that the job was simply a "make work" job that was not guaranteed to keep her with the company until her retirement.

[73] Recognizing the dangers of relying on demeanour, and cognizance of the cautious guidance offered by O'Halloran J.A. of the British Columbia Court of Appeal in **Faryna v. Chorney**, 1951 CarswellBC 133, at paragraphs 9 to 11 as to determining credibility on the basis of "its harmony with the preponderance of

probabilities", I accept Ms. Burns' evidence to the effect that on the morning of November 27th she told Mr. Rex that she was sick, was going home, and that she requested that Ms. McCarten or someone from personnel in Stellarton call her. I do not accept Mr. Rex's evidence that she did not say she was not sick, and that she said to him words to the effect that if Ms. McCarten or someone in Stellarton wanted to call her she would be home.

[74] At trial the Defendant took the position that Ms. Burns quit or resigned during her interview with Mr. Rex on the early morning of November 27th. This is the conclusion that Mr. Rex, Mr. Fearon, Ms. Ross, and possibly Ms. McRitchie, reached in a debriefing conference call held on November 27th. They reached this conclusion despite Mr. Rex's acknowledgment that Ms. Burns did not say that she quit or resigned.

[75] Ms. Burns' words and actions indicated that she was upset with the manner in which she was offered the new employment, and upset with Mr. Rex advising her - as opposed to her immediate supervisor or personnel advising her. On the morning of November 27th, she turned over her pass to Mr. Rex. She testified that she did so because she was told that she had be dismissed from her prior position and she did not want to get into trouble. It was not unreasonable for Mr. Rex to assume that passing in the card was one indication that she may have intended to quit. However, this act alone was not unequivocal. It is but one event, among many communications and acts, which must be examined to determine whether Ms. Burns unequivocally manifested a subjective intention to quit. The totality of the circumstances simply demonstrate that Ms. Burns was upset with the news and the manner in which she received it. Mr. Rex stated that he was shocked by Ms. Burns' words and actions during his "abrupt" meeting with Ms. Burns. Ms. Burns' words and conduct were out of character. She was likely too upset to be seen to have made, by early November 27th, a clear decision, after a rational and reasoned assessment, respecting the unexpected offer made the night before. It was not reasonable for the Defendant, in light of the manner in which she had been advised of the termination of her position and the obvious upset that she was in on the night of the 26th and the morning of the 27th, to have concluded that Ms. Burns had made a reasoned assessment of their offer (she had not asked for more particulars of the job, or what the contents of the severance package were - which both Mr. Rex and Ms. Ross expected she would inquire about). If Ms. Burns was as valuable an employee as the Defendant testified, I would have expected that such an employer would have assessed her reaction more objectively.

[76] The length of Ms. Burns' employment with the Defendant is a factor in determination how quickly she should be considered, by a reasonable person in the employer's position, to have to reasonably assessed her situation. If Mr. Rex was shocked by the "abrupt" and brief January 27th meeting, it is simply a reflection of how Ms. Burns was not acting rationally and reasonably.

[77] On November 28th (within 24 hours) Ms. Burns had attended at the office of a lawyer, and the lawyer had written an articulate letter to Mr. Rex asking him to answer three questions. The first was for the specific job description and duties offered to Ms. Burns. The second was to clarify the term of employment; that is what he meant by "help finish your time at TRA". The third was for the terms of the severance package that he referred to in the meeting. These were the questions that Mr. Rex and Ms. Ross testified that they had expected Ms. Burns to have asked the day before. A careful reading of the November 28th letter shows that Ms. Burns had not yet taken the position that she had quit. Instead she was asking clarification of the position offered and the length of the employment. If the letter had come from her directly and not from her lawyer I cannot help but believe that any reasonable person in the position of her employer would have instantly realized that she had made no decision, but was making a reasoned assessment of the offer.

[78] Because the Defendant, in a debriefing conference call on November 27th , assumed that Ms. Burns had quit (even though Mr. Rex acknowledges that she did not say so), it would appear that the Defendant either misread the letter of November 28th - assuming wrongly that the letter stated that Ms. Burns had in fact quit, or, alternatively, that the employer did not want to acknowledge that she had not quit. The question for the court is whether the evidence of Ms. Burns' conduct unequivocally manifested a subjective intent to quit and conduct that would lead a reasonable person in the position of the employer to believe that Ms. Burns had carried out that intent. The November 28th letter clearly stated that Ms. Burns was assessing her situation and needed the questions answered to carry out that assessment. These were the same questions that Mr. Rex and Ms. Ross expected her to ask the day before. If there was ambiguity on November 27th, it was removed by the November 28th letter - Ms. Burns was assessing the vague offer and the alternative severance package.

[79] As telling as the clarity of the letter written for Ms. Burns by her lawyer within 24 hours of her meeting with Mr. Rex, was the tardy reply from Mr. Fearon

of December 11th - sent almost two weeks later. The reply did not attempt to explain the job offered or the term of the employment under that offer. Instead it clearly closed the door to any further discussion between the parties about the vague and undefined job offer, or Ms. Burns continued employment with the Defendant. It further suggested that her refusal to accept the job (by implication on November 27th) constituted a failure in her obligation to mitigate damages. At the risk of repetition, nothing in the December 11th letter answered the reasonable questions asked in the November 28th letter about the offer. The reply demonstrated an intention to ignore the November 28th letter, or a misunderstanding of it. In either event, it left no further opening for the Plaintiff to consider the offer.

[80] Applying the analysis of Geoffrey England in **Employment Law in Canada**, supra, I conclude that Ms. Burns did not voluntarily quit on the morning of November 27th.

[81] In chapter 11 of their text, Echlin and Fantini note that whether the cessation of employment may constitute constructive or an actual dismissal depends on the circumstances of each case. They then proceed to analyse circumstances that I (following England's analysis) have concluded to constitute an actual dismissal. It makes no difference in the end, since the circumstances categorized by Echlin and Fantini as constituting a forced or involuntary resignation are those which form the basis for my first conclusion that Ms. Burns did not quit on November 27th, or at any time before the Defendant's December 11th letter.

**D.2 If Ms. Burns quit, did she do so for good reasons?**

[82] If I am wrong in the above conclusion, that is, if Ms. Burns unequivocally resigned on the morning on November 27th - genuinely and without duress after a reasoned assessment (or, in any event, before the December 11th letter which foreclosed the possibility of her return to work) - I find that Ms. Burns quit for good reason.

[83] The job offered to her was ill and vaguely defined. The "testing" job, to the extent that it was described to the court, was a clerical job requiring lesser skill and ability than Ms. Burns had used in the many jobs and duties that she carried out for the Defendant over 17½ years. The remaining portion of the job was not defined and from the evidence at trial had not yet been determined by the Defendant.

[84] It was Ms. Burns' uncontradicted evidence that she had, on prior occasions, been offered unique jobs for which there were no existing job descriptions, but she was offered the jobs on the basis of descriptions that were given at the time of the job offers, and she was given the option of remaining where she was or taking the new job. In each case she accepted the new jobs - some of which were created to fulfill special needs of the Defendant. In each case Ms. Burns believed or was lead to believe that the new job would give her new skills which would benefit her in her future employment with the company. While not all the moves involved promotions, they were accepted by her on the basis that they were interesting, within her skill-set, and would add to her value to the Defendant.

[85] To the extent that the job, other than the testing job, was not defined, it is impossible to determine whether it was a fundamental change in her prior job functions. This, however, is solely the making of the Defendant who did not describe it initially, or in response to the November 28th inquiry, or in negotiations with Ms. Burns in response to the November 28th letter. It would be unfair to place the onus on the Plaintiff to prove that a job offer was a fundamental change in her employment contract that the Defendant had not described to her. I agree with the analysis of Echlin and Fantini, at pages 200 to 202, that an employee may not be required to accept a vaguely described position. That analysis applies to this case.

[86] Having the same salary, benefits and work location is relevant, but it is not the whole story. The caselaw is clear that is a fundamental unilateral change in the job, such as occurred here, can constitute a constructive dismissal.

[87] In closing argument, counsel for Ms. Burns abandoned the position that she was management at the time relevant to this action and described the change as a job reassignment. It is difficult in a large organization, such as the Defendant, to identify who exactly is management. There are many levels or hierarchies in large organizations. During the three or four year period in the late 1990s Ms. Burns received bonuses under the "Management Incentive Compensation Program", which were described to her as Management Bonuses. In my view, it was reasonable for her to assume that she was a part of the management of the Defendant during that period, even if at the very lowest levels. Having said that, it is, as Plaintiff's Counsel argued, unnecessary to determine whether she was part of management in November 2003. The essential question is what her position was - more than merely clerical, and whether the new job offer, in the context of the implied employment contract between them, constituted a fundamental change. I

accept that the various positions held by Ms. Burns were more than mere clerical jobs, whether or not they were part of management. At various times, she supervised a group of convenience stores, supervised the accounting section of the group of convenience stores, audited stores, set up in-store computer systems, trained staff in the new POS systems, wrote and revised training manuals, provided trouble-shooting duties, and carried out many other support services. She was at different times the eyes and ears of the general manager and/or President of her division. These jobs required greater skill and more ability than mere clerical jobs. The proposed job was a lesser job than anything she had held and, to the extent that the job was described, was a fundamentally different position than any she had held over 17½ years. The annual performance reviews show that she was an excellent and valuable employee. The job offer of November 26th did not fit within the framework of her prior positions, nor reflect her capacities and skills as described in those evaluations.

[88] I accept that whether the change offered to her was up, down or sideways, it was a fundamental unilateral change in the terms of her employment. She was entitled to a better explanation of what the job description was before considering her options, or accepting it. If it was a resignation, it was forced or involuntary. Furthermore, it was reasonable for her to assume that it was a lesser and more demeaning job that would embarrass her in the Defendant's organization. To the exist that it was described, it was a lesser position that her prior positions, in a significant way.

## E. Damages

### E.1 Mitigation

[89] The Defendant submitted that Ms. Burns was obligated to remain on her job while looking for other work. It cited **Mifsud v. MacMillan Bathurst Inc**, 1989 CarswellOnt 770 (OCA).

[90] The Plaintiff, citing paragraph 32 of **Mifsud,** and Justice Moir's decision in **Anderson v. Tecsult**, 1999 CarswellNS 373 (NSSC), submitted that there are many situations in which it is unreasonable to expect an employee to continue working for the employer. Counsel argued that it was unreasonable in this case, because (1) if there was a new position open and available for her no one had an idea of what it was; (2) the stated new responsibilities were demeaning and a loss of status and

prestige ( **Cayen v. Woodwards Stores Ltd.** [1993] BCJ 83 (BCCA)); and (3) Ms. Burns' boss would have been Mr. Rex, with whom there had been acrimony involving her husband and herself.

[91] The principle of mitigation is a well-established concept not only in tort law and contract law, but specifically with respect to dismissed employees. The principle is based upon the rule that it is incumbent on an employee to reduce the damages payable to her by actively seeking comparable alternative employment. The extent to which an employee is to remain on a job with their former employer is a matter of some controversy. Justice Echlin in **Carscallen v. FRI Corp.**, 2005 CarswellOnt 2394, wrote at paragraph 107:

> "It was argued that the requirements of [*Mifsud*], required Carscallen to return to the workplace and that her failure to do so ought to disentitle her to any damages as a result of a failure to mitigate her damages. Notably, in subsequent decisions, the application of the *Mifsud* rationale has been dramatically limited. Where, as is the case here, the employee is presented with significantly changed working conditions, she will not be required to accept the altered position. Similarly, the employee is not forced work in a humiliating or demeaning atmosphere."

[92] The statement of Justice Echlin in **Carscallen** applies to the circumstances of this case.

[93] To this I add that the Defendants' December 11th letter closed the door to any opportunity Ms. Burns might have had thereafter to mitigate by remaining on the job. The Defendant's position was that Ms. Burns forfeited the opportunity to mitigate her damages when she turned in her pass and left on November 27th without, at that time, accepting the new position, either outright or as mitigation.

[94] The onus is on the Defendant to prove a failure to mitigate. It had the onus of producing sufficient evidence for this court to conclude, on a balance of probabilities, that the position they took in the December 11th letter would have been reversed, if the Plaintiff had asked to return to work.

[95] Ms. Burns may have acted hastily when she appeared in Mr. Rex's office early on the morning of the 27th, not having slept all night, and expressed her dissatisfaction with what the Defendant had done the night before, but it is not

reasonable for it to take the position in the December 11th letter that it was too late for Ms. Burns to accept the position thereafter while she looked for other employment, and thereby she failed to mitigate.

[96] I accept the evidence respecting the loss of self-confidence and self-esteem suffered by Ms. Burns as a result of the manner in which she was dealt by the Defendant. After some time, that was not established as unreasonable, she started making enquiries and reasonable attempts to obtain alternative employment. Eventually she obtained employment at much lower compensation than her employment with the Defendant. The Defendant has not shown that the Plaintiff acted unreasonably by not accepting, on the morning of November 27th, or at any time before her reasonable inquiry of November 28th was answered, the vague or ill-defined job offer with an undefined term. The haste with which the Defendant accepted that Ms. Burns' conduct on November 27th amounted to a resignation and its failure to respond reasonably to the November 28th inquiry from a valuable, loyal and long term employee, brings into doubt the *bona fides* of its conduct. This is a factor that affects the reasonableness of the argument that Ms. Burns' obligation to mitigate required her to have accepted the position offered on November 27th.

[97] The Defendant has not established that Ms. Burns did not reasonably mitigate her loss.

## E.2 Damages in lieu of notice

[98] The Defendant submits that, if it is liable for damages in lieu of notice, the appropriate notice period should be in the 10 to 12 month range, because Ms. Burns held a support role and not a management role. It refers the court to four decisions:

1. **Crowe v. Blaikies Dodge Chrysler Ltd.** [2000] NSJ 368 (NSCA), where an auto body technician of unknown age receiving 12 months salary after 16 years' employment;
2. **Potter v. Halliburton Group Canada Inc.** [2004] B.C.J. 2231 (BCSC), where a senior non-management employee, aged 48, received 12 months salary after 17 years employment;
3. **Szwez v. Allied Van Lines Ltd.** [1993] OJ 243 (O.J.D.), where a 50 year old manager received 11 months salary after almost 17 years of employment; and,
4. **Grant v. Allstate Insurance Co.** [1995] NSJ 566 (NSSC), where a 50 year old employee received 14 months notice after 26 years employment.

[99] The Plaintiff relies upon **Bardal v. The Globe and Mail** (1960) 24 DLR (2d) 140 at Page 145, and six other cases decided between 1982 and 1999, and seeks a notice period of 18 months.

[100] Several text writers enumerate factors and criteria for assessing the quantum of notice or damages in lieu of notice. They included the seminal text by Howard A. Levitt, **The Law of Dismissal**, Third Edition (2003) which lists 105 factors, and **Canadian Employment Law** by Stacey R. Ball (looseleaf) which lists 24 factors.

[101] Geoffrey England's, **Employment Law in Canada**, Fourth Edition, at Chapter 14, categorizes its analysis into 10 criteria.

[102] England's analysis (beginning at Paragraph 14.106) is a comprehensive and clear review of the evolution in different Canadian jurisdictions of the relevant criteria. The multiplicity of factors and desire of employers and employees alike to have some certainty and predictability has lead at some times in some jurisdiction to "rules of thumb". The most common being one month for each year of employment. The Ontario Court of Appeal in **Minott v. O'Shanter Development Co.**, 1999 CarswellOnt 1, rejected the use of "rules of thumb" in Ontario and urged courts to use the more traditional analysis based on **Bardal**.

[103] The **Minott** analysis was endorsed by the Nova Scotia Court of Appeal in **Silvester v. Lloyd's Register North America Inc**., 2004 NSCA 17 at paragraph 20.

[104] The Nova Scotia Barristers Society website (Library, Quantum Tables) contains Michael J. O'Hara's updated (to February 2007) paper called: "Table of Reasonable Notice Periods". It contains a "quick reference", by position, age, length of service, and notice period, to 100 Nova Scotia Supreme Court and Court of Appeal decisions. O'Hara highlights the limitations on the use of his table. Seven decisions involved employment terms between 15 and 19 years:

| | | | |
|---|---|---|---|
| 1978 | Smith v. Dawson Mem. Hospital | 17 years (service) | - 6 months (notice) |
| 1991 | Mitchell v. Lorell Furs | 15 years | 18 months |
| 1996 | Swinimer v. Unitel | 17 years | 16 months |
| 1996 | Russell v. N.S. Power | 17 years | 18 months |
| 2000 | Crowe v. Blakes Dodge | 16 years | 12 months |
| 2000 | Wal-mart v. Day | 17 years | 17 months (plus) |

| | | | |
|---|---|---|---|
| 2003 | Silvester v. Lloyd's Register | 19 years | 24 months |

[105] The Plaintiff and the Defendant are not far apart in their analysis of reasonable notice. Applying the factors enumerated and discussed by Levitt, Ball and England, both 12 months and 18 months are within the range, although 12 months is at the lowest end of the range for factors similar to this case.

[106] Ms. Burns was 50 years of age at the time of her dismissal or resignation. She had worked in various positions within Sobeys for 17½ years and had been asked and had agreed to take on many different jobs according to the needs of the Defendant - some senior non-management jobs and at least one lower management job. She had worked in an office and travelled on the road as requested by the Defendant. She had excellent annual performance reviews. She was described by senior management as a "keeper". She had shown a disinclination to relocate to Stellarton head office, in informal discussions with her supervisor, but had never been made a formal offer or request to relocate. The functions she had been performing in late 2003, were not required by the Defendant until the Defendant finalized its commitment to the point of sale system updates at some of its other banners.

[107] In the late 1990's Ms. Burns had participated, as "key management personnel" in the "Management Incentive Compensation Program". She does not have appear to have been a part of management in 2003 but she was a senior employee and not an employee in a clerical or clerical-like position. She had performed many unique job descriptions that met the requirements of the Defendant and utilized the skill, dedication and loyalty that she showed to her employer. It is without doubt that she was humiliated by the manner in which her job was terminated and the vague alternative job she was offered which job was a clerical-type position.

[108] The text writers indicate that the assessment of damages is not a science but an art. There is no magic to the quantum to which the Plaintiff is entitled. Both counsel's submissions are within the range. Having considered all of the factors set out by the text writers, I have determined that 16 months is the appropriate period of reasonable notice.

[109] In closing argument, the Plaintiff submitted a written scenario for damages based on 18 months notice. It showed Ms. Burns' equivalent basic annual salary as $3,383.47 per month and showed Christmas bonuses which for December 2003 and December 2004 would, but for her constructive dismissal, have amounted to $780.36. I award damages in lieu of notice in the amount of $54,135.52 (16 months x $3,383.47) plus Christmas bonuses of $780.76 for a total of $54,916.28, less any salary paid to her by the Defendant for the notice period.

[110] Ms. Burns found alternative work commencing March 14th, 2005. This is after the 16 month notice. Therefore, there is no deduction for mitigation earnings.

[111] The Plaintiff is entitled to costs and reasonable disbursements. If the parties cannot agree, I will hear them.

[112] The Plaintiff is entitled to pre-judgment interest. If the parties cannot agree on the rate, I will hear them.