SUPREME COURT OF NOVA SCOTIA
Citation: Gillis v. Sobeys Group Inc., 2011 NSSC 443

Date: 20111130
Docket: Tru.No. 311446
Registry: Truro

Between:

Deborah C. Gillis

Plaintiff

- and -

Sobeys Group Inc.

Defendant

DECISION

Judge:	The Honourable Justice Kevin Coady
Heard:	October 12 - 14, 2011, in Truro, Nova Scotia
Decision:	November 30, 2011
Counsel:	Lloyd Berliner, for the plaintiff Jeremy Smith Grant Machum, for the defendant Michelle McCann

By the Court:

BACKGROUND:

[1] The Plaintiff (Ms. Gillis) alleges she was constructively dismissed from her employment with the Defendant (Sobeys) after 28 years of continuous employment. It is Sobeys position that Ms. Gillis abandoned or resigned from her position. Sobeys alternative argument is that if there was a constructive dismissal, Ms. Gillis failed to meet her duty to mitigate as she did not accept another position in the company.

[2] Ms. Gillis's employment history is not in dispute. She started working as a store cashier when she was 17 years old (1981). Since that time she worked in continuously upwardly mobile positions. On March 30, 2009, when the employment relationship ended, she held the position of "food experience manager." Ms. Gillis held management level positions with Sobeys for 20 years. Her employment history included both operational positions (in-store) and management positions (head office).

[3] In April 2003 Ms. Gillis began working in the marketing department at Sobeys head office in Stellarton. The position of food experience manager involved developing programs designed to increase the volume of store sales. In 2009 Ms. Gillis's salary was $69,900.00. She was also eligible for a bonus of up to 20% of her salary. Her total income for 2008 was $77,266.61. It is noteworthy that Ms. Gillis was a store manager in Truro for the five (5) years preceding her appointment as food experience manager.

[4] In 2009 Ms. Gillis was part of the marketing management team. Cindy Stevens, Sobeys Vice President of Marketing, asked this team to provide her with plans for the restructuring of the marketing department. Ms. Stevens requested Ms. Gillis's management team adhere to four (4) key principles:

> - That restructuring will result in increased efficiency and stronger execution of all marketing initiatives.
>
> - That any proposal will be executed within the financial parameters of the proposed 2010 marketing budget and planned head count.
>
> - That any restructuring will not result in any net increase in management level positions, nor changes to the number of direct reports to Ms. Stevens.

> - That no individual will be negatively impacted by the changes, with only upward potential opportunity for the existing marketing team.

In February 2009 the team presented Ms. Stevens with a proposal for restructuring the marketing department. The proposal did not affect Ms. Gillis's position as food experience manager.

[5] On March 30, 2009, Ms. Stevens advised Ms. Gillis that the restructuring was done and requested they meet later that day to discuss same. That meeting involved Ms. Gillis, Ms. Stevens and Dave Fearon, Sobeys' vice-president of Human Resources. Mr. Fearon advised Ms. Gillis that her position had been eliminated. Ms. Stevens then spoke to Ms. Gillis about some performance issues. Ms. Gillis was upset and shortly left the meeting. She returned the following day for a period of time. She did not return to her office thereafter.

[6] There are two (2) points that are not in dispute concerning Ms. Gillis' long-term employment with Sobeys:

- Ms. Gillis was an exemplary employee throughout her employment and was valued by Sobeys for her dedication and hard work.

- Ms. Gillis had never been “written up” for any performance concerns throughout her work history.

In fact Ms. Gillis’s 2008 performance appraisal raised no complaints about her performance. She was described as a “solid contributor” who brought “great ideas to the table.” Her 2007 appraisal stated that she “exceeded expectations” and her 2006 stated that she “meets and exceeds expectations.” Ms. Gillis received her bonus in 2008 and in 2009 was selected for an employee testimonial on Sobeys’ website.

[7] At the March 30, 2009 meeting Ms. Gillis was provided with the following letter:

> March 31, 2009
>
> **PERSONAL & CONFIDENTIAL**
>
> Debbie Gillis
> Manager Demos
> Marketing Department
> Sobeys Atlantic
>
> Dear Debbie:
>
> This letter will confirm our discussion today advising you that the Company has finalized its realignment plans for the Marketing Department and the fact that your position as Manager Demos will be eliminated.

As a result, the Company is prepared to provide you with the following alternatives:

1. Assistant Store Manager, Sobeys Store # 871, Truro

    a. Reporting to Store Manager Jason Helpard

    b. Salary will be $54,500.00 per year. Your next review will be conduct on July1, 2010 in line with Company policy.

    c. AMIP: 12.5% at-plan and 33.3% max.

    d. You will be required to undergo a Store Manager training program that will be designed to get you up-to-date on the more significant system and operational changes since you were last in the stores.

    e. Should you elect this option, you will be provided with a one time lump sum payment of $23,104.00 (less deductions required by law) to offset the reduction in salary. Future salary increases will occur based on performance and in accordance with company practice on above rate salaries.

2. Demo Coordinator - Sobeys Atlantic Head Office

    a. Reporting to the Director of Marketing Programs

    b. Salary $42,000

    c. Location: Head Office, Stellarton

    d. This position is not eligible for AMIP

    e. Should you elect this option, you will be provided with a one time lump sum payment of $41,854.00 (less deductions required by law) to offset the reduction in salary. Future salary increases will occur based on performance and in accordance with company practice on above rate salaries.

3. Your vacation entitlement will remain the same.

4. All group insurance benefits and pension will continue as per company policy.

Debbie, while we will be making these organizational changes as soon as possible, I will coordinate them once you provide me with your decision on the above two alternatives. With this in mind, I would ask that you provide me with your decision by close of business on Wednesday, April 1, 2009.

As well, while I realize that these organizational changes may be difficult, please understand that such decisions are made in support of the Company's on-going need to properly align all of our resources in support of our goal to be the best food retailer in the country.

Debbie, notwithstanding the organizational change as described above, it is my responsibility to address in writing certain concerns surrounding your performance while in your current role. As you are aware, I have spoken to you about these issues and bring them to your attention once again in an effort to help improve your skills as you assume future career challenges:

· Financial Results: the demo program will be roughly ($700,000) behind budget for the fiscal '09 year.

· Business judgment: On at least two separate occasions, your decision to with-hold the financial information from me until the last minute, put not only our department's reputation at risk, but left no time for the business to react. If you recall during our last conversation I expressed to you my dismay and made it quite clear that this type of judgment ands/or behavior was simple unacceptable.

· Prioritization: After our first conversation related to financial performance, you committed to a series of events that would occur in order to bring the financials back in line as well as finish the birthday club plan. When we had our second conversation, these activities had not occurred and consequently we found ourselves in a deeper hole financially. In addition, the birthday club plan was not completed as required.

Debbie, as discussed, these are all very serious matters that point to a lack of performance on your part. Irregardless of the choice you make concerning the above-mentioned jobs that are being offered to you as a result of the organizational changes, understand that, in the future, you will be held accountable to deliver against your objectives in a timely and effective manner. Failure to do so will result in further and more serious disciplinary measures

taken by the Company. I trust that you understand the seriousness of this matter and the need for you to adjust your performance accordingly.

Debbie, should you have any questions as you make your decision, please feel free to contact me. Until then, I would like to wish you all the best.

Yours truly,

Cindy Stevens
Vice President Marketing
Sobeys Atlantic

[8] Ms. Gillis was granted more time to make a decision. On April 1, 2009, she wrote to Ms. Stevens as follows:

April 01, 2009

Cindy Stevens
Vice President Marketing
Sobeys Atlantic

RE: Letter of March 31, 2009 PERSONAL & CONFIDENTIAL

This is response to your request for a decision on the two options that were outlined to me for the organizational changes being implemented in the Marketing Department.

I understand your need for a response by the imposed deadline of 17:00 today April 01, 2009. However, I believe in all fairness that this time limit is unfair and

unreasonable. After devoting 27 plus years of service to this company, I will need more than 24 hours to make a decision that will have a profound effect on my career and my family.

I will provide you with a written response to your alternatives on or before April 07, 2009. This will allow me the proper amount of time needed for careful consideration of the options presented as well as an opportunity to address the concerns surrounding my performance outlined in the letter.

Sincerely,

Debbie Gillis
Food Experience Manager

cc Dave Fearon

[9] Ms. Gillis was provided with the following dated April 7, 2009:

April 7, 2009

Debbie Gillis
111 Chagford Place
Greenfield, NS
B6L 3C8 "Without Prejudice"

Dear Debbie,

We have received a letter from your lawyer. As your employer we prefer to continue to deal directly with you on employment matters. Based on the letter however I have placed you inactive without pay at present.

> Due to operational re-structuring in your area, the role you currently perform is being eliminated. We have provided you with two alternative positions and have offered to assist you financially through the transition. We are requesting that you give further consideration to the positions offered as Sobeys would like to maintain the employment relationship with you.
>
> We would ask that you confirm your acceptance of one of the new positions by Monday. If you require any additional information in relation to the position(s), let me know and it can be provided. Further, we are prepared to work with you to assist your transition to one of the new positions. We consider you to be a valuable employee and hope that you will decide to accept one of the positions offered.
>
> Debbie, the offer of two alternate positions fulfills our employment obligation to you. However, if you still choose not to return to work, effectively resigned from Sobeys, we will provide you, strictly on a gratuitous basis, a one time payment of $23,104. Such payment will require a signed full and final release from you.
>
> Sincerely,
>
> Dave Fearon
> Human Resources
> Sobeys Inc.

Ms. Gillis did not respond positively to any of these proposals and the employment relationship came to an end. Litigation was commenced shortly thereafter.

[10] Ms. Gillis sought alternative employment after her relationship with Sobeys came to an end. Fourteen months later she obtained a position with Stingray 360, a

satellite service provider. She was paid a salary of $40,000, a $6,000 car allowance and a bonus on all sales. Ms. Gillis' territory was Nova Scotia and New Brunswick and she could travel on her own schedule. She continued in this position until May, 2011.

[11] On April 26, 2011, Ms. Gillis was hired as a District Quality Manager by Consumer Impact Marketing Ltd. This is a company that is hired by the Loblaw's grocery chain to advance their promotions. She works 40 hours a week from mostly a home office. She earns $68,000 in salary, a $6,000 car allowance and is eligible to receive a 7.5% bonus.

[12] Early in 2009 Sobeys had an opening for a promotion's manager at their Stellarton office. Ms. Gillis was not offered this position. It was filled on April 17, 2009.

THE ISSUE OF CHILD CARE:

[13] In 2001 Ms. Gillis went on maternity leave. After this break she returned to her position as the Truro Store Manager. In 2003 she was transferred to head

office as food experience manager. It is Ms. Gillis' evidence that she took this position to accommodate her child care schedule. Her partner worked internationally on a three weeks on, three weeks off rotation. The new position offered her a Monday to Friday work week with, for the most part, 9:00am to 5:00pm hours. She applied for the position notwithstanding that the salary was $45,000, a decrease of approximately $15,000. Ms. Gillis testified that she took the lower paid position for the regular hours. She testified that she explained this to Ms. Stevens when she interviewed for the job. When Ms. Gillis received her acceptance letter, she was advised that Sobeys decided to pay her $59,982, the same salary she had been earning as store manager at Truro.

[14] Ms. Gillis submits that throughout her time as food experience manager she continually reminded Sobeys of her need for regular hours. She testified that she did not pursue advancement when it involved travel and irregular hours.

[15] The position of food experience manager did not carry a bonus. On June 27, 2008, Ms. Gillis received a letter from Sobeys stating as follows:

> "I am very pleased to announce that fiscal 2008 was a successful year for Sobeys Atlantic and your area of responsibility helped contribute to that success.

> With this, I am pleased to provide you with your Annual Management Incentive Plan award in the gross amount of $7,554.66."

Days before the employment relationship ended Ms. Gillis was advised that her 2009 bonus was imminent. Ms. Gillis testified that these events reinforced Sobeys commitment to recognize her personal situation and to provide her accommodation.

[16] The first position offered to Ms. Gillis was as an assistant store manager in Truro. One of the reasons she gave for refusing the position was that she "could not manage the hours." She testified that she spoke to her existing babysitter about expanded hours but that was not a possibility. She said she did not look for another babysitter because the position was "still a demotion."

[17] Ms. Steven's testified that from 2003-2009 she knew that "hours" were important to Ms. Gillis. She testified that this was not unusual for Sobeys and that they accommodate parental schedules. She testified that if Ms. Gillis took the assistant store manager position she would be accommodated. It is her evidence that Ms. Gillis's abrupt departure precluded such accommodation.

[18] Dave Fearon testified that Sobeys have many employees who have child care requirements. He stated that Sobeys is committed to accommodate these individuals by rearranging days and hours. It was his evidence that if Ms. Gillis accepted the assistant store manager position, Sobeys would have no difficulty working with her on this issue. Mr. Fearon testified that no one told him in 2003 that Ms. Gillis was applying for the job because of her childcare responsibilities. He acknowledged that he knew she had child care requirements but he did not see them as any different from many other in-store employees.

THE PARTIES RELATIONSHIP:

[19] This case is different from most "dismissal" cases in that there was no animus between the parties during the employment relationship. Generally Ms. Gillis enjoyed her time at Sobeys and described the company as "a good place to work." She testified that Sobeys were always respectful of her and she knew that they liked her as an employee. She testified that she knew the restructuring was being done in the interests of Sobeys. She agreed that the restructuring was not

about “getting her.” She testified that there was no hostility directed toward her as food experience manager.

[20] Ms. Stevens testified that performance issues had nothing to do with eliminating Ms. Gillis’s position. The evidence disclosed that prior to March 30, 2009 Ms. Stevens and Ms. Gillis were on very friendly terms. Ms. Stevens acknowledged that there was no triggering event that led to the elimination of the food experience manager position. She testified that it was done to improve Sobeys’ efficiency through restructuring. Ms. Stevens testified that she was shocked upon learning that Ms. Gillis did not accept the assistant store manager position.

[21] Ms. Gillis testified that after the March 30, 2009 meeting she was “devastated, shocked and very angry.” She admits leaving the office after the meeting without discussion about the options presented to her. Ms. Gillis’s evidence was that she told Sobeys’ that she was not interested in the positions offered to her. She stated that “I was offered a position I could not take and a position I would not take.” She said she viewed both options as a demotion in status and salary. She testified that she was never told she could remain in the food

experience manager position until the restructuring was in place later in 2009. She acknowledged that she never asked Sobeys when the job would be eliminated. Ms. Gillis described her reaction to the letter as "all about trust." She obviously felt that Sobeys had breached a long-standing trust and she had no faith in their actions and offers thereafter.

[22] Sobeys takes the position that they valued Ms. Gillis as an employee and wanted to keep her in their employ. Subsequent to the March 30, 2009 meeting they told her this and encouraged her to accept the assistant store manager position. On April 1, 2009, when Ms. Gillis attended the office, this information was provided. On April 7, 2009 Ms. Fearon wrote to Ms. Gillis stating "we are requesting that you give further consideration to the positions offered as Sobeys would like to maintain the employment relationship with you." Mr. Machum, counsel for Sobeys, wrote a similar letter in May, 2009. Ms. Gillis did not respond and started this action.

THE DEMO COORDINATOR OPTION:

[23] The second option in Sobeys' March 31, 2009-letter was for a "demo coordinator" at their head offices at Stellarton. Sobeys now admit that this position represented a demotion and a significant drop in salary. This position did not offer a bonus. If Ms. Gillis had accepted this position, it would have resulted in her assistant losing her position. Ms. Gillis testified that accepting this position would be "humiliating and embarrassing." She testified that she felt Sobeys offered her this position so that she would be able to stay in head office working from 8:00am to 5:00pm, Monday through Friday, if that was her wish.

[24] Ms. Stevens acknowledged that this position would be a demotion for Ms. Gillis and she did not expect her to accept it. She stated that this position was offered only to give Ms. Gillis an option based on hours.

[25] The import of Sobeys' admission is that only option one, the assistant store manager position, should be viewed as a viable option in the constructive dismissal analysis.

ISSUES FOR TRIAL:

1. Did the Plaintiff resign and/or abandon her employment with Sobeys?

2. Was the Plaintiff constructively dismissed?

3. If constructively dismissed, did the Plaintiff fail to discharge her duty to mitigate damages; in particular, did the Plaintiff fail to mitigate her damages by refusing to accept one of the two positions offered by Sobeys?

4. If constructively dismissed, what reasonable notice is owed to the Plaintiff?

5. If constructively dismissed, did Sobeys act in bad faith and if so is the Plaintiff entitled any damages beyond reasonable notice?

RESIGNATION AND/OR ABANDONMENT:

[26] Ms. Gillis acknowledges that when she accepted the food service manager position, she was never told that her hours would remain the same. She further acknowledges that Sobeys employs many in-store staff who have child care responsibilities and that Sobeys takes steps to accommodate their schedules. Ms. Gillis knows this from her years as a store manager in Truro.

[27] The evidence is uncontradicted that after the March 30, 2009 meeting Ms. Gillis left the premises and never returned to her position as food experience manager. In the days that followed she did not raise any concerns about the

assistant store manager's option, she did not seek any information about that position and she did not advise Sobeys why she was rejecting the offer of continued employment. Within days she commenced the litigation process.

[28] I am satisfied that Sobeys goal on March 30, 2009 was to continue the employment relationship with Ms. Gillis. I am also satisfied that the assistant store manager position was enhanced to limit the impact on Ms. Gillis. I am also satisfied that Sobeys was willing to work with Ms. Gillis in relation to her child care responsibilities. I accept Sobeys submission that the assistant position was a temporary placement that would have led to store manager once Ms. Gillis was updated on that position. I find these to be facts.

[29] I also find as a fact that Ms. Gillis's emotional response to the performance issues raised in the March 30, 2009 meeting blinded her from assessing the events of that day. If she had taken the time to consider the assistant store manager option, she would have realized that it was neither a demotion nor a termination. I can come to no other conclusion but that Ms. Gillis resigned from her position. This conclusion is supported by Ms. Gillis's failure to respond to Sobeys communications offering continued employment. It is also supported by Ms.

Gillis's failure to advise Sobeys that their offer was unacceptable and to negotiate over any concerns about the assistant store manager position. I am satisfied that if Ms. Gillis had fully considered this option, she would have seen it as an opportunity for further advancement with Sobeys.

[30] I recognize that finding Ms. Gillis resigned from her position is sufficient to dismiss this action. However, it is important to assess the assistant store manager position as the terms of that offer of continued employment play into the resignation issue.

THE ASSISTANT STORE MANAGER POSITION:

[31] I find this position did not constitute a demotion for Ms. Gillis. I also find that accepting this option would not be humiliating or embarrassing and would not have subjected her to animosity in the workplace. There is much evidence to support these conclusions.

[32] First, it is important to recognize that the elimination of Ms. Gillis's position was the result of a legitimate corporate restructuring. She was not fired. I accept

Ms. Steven's evidence that from 2003 to 2009 the food experience manager position changed. I also accept her evidence that the programs administered by Ms. Gillis struggled from the beginning in terms of cost. In fact, in March 2009 the program was $700,000 over budget. I accept that as the years passed Ms. Gillis' position changed from a management role to a coordinator's role. I am satisfied that by 2009 the food experience position did not require a manager or as much staff.

[33] I find that Ms. Gillis was wrong to assume accepting the in-store position would be personally embarrassing for her, or would have been viewed as such by fellow employees. Ms. Gillis acknowledged that it was not unusual for Sobeys' employees to move from head office into store positions. Ms. Gillis never suggested that accepting this position would result in her experiencing any hostility. I accept Ms. Steven's evidence that the assistant store manager would be a desired position in the organization. I also accept that Ms. Gillis would have become a manager in "no time." The only reason advanced by Ms. Gillis as to why the position was unacceptable to her was that she had been a store manager prior to 2003. I also find that Sobeys recognizes the value of in-store managers. Management of a store would result in more employees, more responsibilities and

a competitive income. If Ms. Gillis had been able to put aside her emotional responses, she should have realized this would not be "a step back."

[34] I accept Mr. Fearon's evidence that it is common at Sobeys for employees to go back to the stores after a time in the head office. He stated that this occurs "quite frequently."

[35] While Ms. Gillis submits that she could not accept an in-store position because of child care, I find there was no foundation for this position. First, Ms. Gillis's child was older and in school. The demands for child care were less in 2009 than they were in 2003. Second, Ms. Gillis did not recognize that Sobeys was prepared to accommodate her child care requirements. If she had fully considered the in-store position, she would have realized from her own experience that such accommodation would have been forthcoming. I also note that Ms. Gillis did little to explore alternative child care arrangements.

[36] Ms. Gillis also failed to recognize that accepting the assistant store manager position would not result in a substantial drop in salary and benefits. The offer of March 31, 2009 carried a salary of $54,500 which was a decrease, but not a

substantial reduction. The likelihood of becoming store manager would have enhanced her income substantially. Additionally, Ms. Gillis would be eligible for between a 12.5% and 33.3% bonus. The in-store offer included the following benefit:

> (e) Should you elect this option, you will be provided with a one time lump sum payment of $23,104 (less deductions required by law) to offset the reduction in salary. Future salary increases will occur based on performance and in accordance with company practice on above rate salaries."

This offer would have kept Ms. Gillis's salary at her 2009 level for approximately one year following the elimination of her food experience manager position. It is likely that would have happened later in 2009. Additionally, vacation entitlement was to remain the same and pension and insurance programs would remain in place.

CONSTRUCTIVE DISMISSAL:

[37] The Supreme Court of Canada's decision in *Farber v. Royal Trust Co.*, [1997] 1 S.C.R. 846 sets forth the legal principles relating to a claim for

constructive dismissal. Gonthier J. at paragraph 24 provided the following definition of constructive dismissal:

> ... 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.

> 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.

I find that Sobeys had no intention to terminate Ms. Gillis. In fact it was anxious to maintain the employment relationship. I conclude that the in-store position amounted to a transfer and did not represent a substantial change in the essential terms of her employment contract.

[38] Ms. Gillis did not have a vested interest in the food experience manager position. In *Shillington v. Quebecor Inc.*, [1991] O.J. No. 1398 (Ont. Gen.Div.) Justice Blair discussed this principle at paragraph 24:

> What is the obligation of an employee to accept a new assignment by his or her employer?
>
> It has been held that an employee may be required to accept reassignment and may be discharged for refusing to do so. Whether this is so depends upon the nature of the reassignment and whether the employer is acting bona fide and for a reasonable business objective. If the employer is pursuing a legitimate business objective and is not acting in a manner which is simply a disguise for dismissal, and if the new assignment does not constitute a fundamental change or variation in the terms of employment, an employee may reasonably be required to accept the new task. As Dubin J.A. said, in *Canadian Bechtel Ltd. v. (1978)*, 1 C.C.E.L. 95 (Ont. H.C.J.), at page.98:
>
> > ... The plaintiff had no vested right in the particular job initially given to him. If the employer, ... acted in good faith and in the protection of its own business interests, the plaintiff would have had no right to refuse the transfer.
>
> ...
>
> Even a demotion involving some loss of prestige and position may not, in itself, be sufficient to justify the employee in declining to accept the re-assignment. ...

It is well established that Sobeys has the right to reorganize its business affairs.

[39] The test for constructive dismissal, that is whether an employer has breached a fundamental term of an employment contract, is objective. In *Chambers v. Axia Netmedia Corp.*, [2004] N.S.J. No. 26 (NSSC) MacAdam J. commented at paragraph 16:

> The test for determining whether an employee has been constructively dismissed is an objective one and essentially a question of fact. The Court must decide whether, on a reasonable interpretation of the facts, the employee has established he was constructively dismissed, as a result of conduct by the employer, that breaches a fundamental or essential term of the employment contract. The employee's perception of the employer's conduct is not determinative. Rather, the Court must ask whether a reasonable person, in a similar position as the employee, would have concluded the employer had substantially changed on essential term of the employment contract. [*Lane v. Carsen Group Inc*., [2002] N.S.J. No. 428, 2002 NSSC 218; *Miller v. Fetterly & Associates Inc.* (1999), 177 N.S.R. (2d) 44 (N.S.S.C.)]

I have already determined that Ms. Gillis' response to the elimination of her position was emotional rather than pragmatic. I am firmly of the view that a reasonable person, in a similar fact situation, would have accepted the assistant store manager position. I concur with Rutherford J.'s comments in *Tymrick v. Viking Helicopters Ltd.*, [1985] O.J. No. 296 at page 4:

> "I think it is clear law that an employer is to be allowed a certain degree of latitude with respect to upward and lateral promotions; not every change in the terms of employment constitutes constructive dismissal."

I find that the changes between the food experience manager position, and that of assistant store manager, did not fundamentally alter the terms of her long-standing employment. I find as a fact that Ms. Gillis was not constructively dismissed.

MITIGATION:

[40] If I were to be in error on the constructive dismissal issue, I would still find in favour of Sobeys on the basis of Ms. Gillis's failure to mitigate. In Quitting For Good Reasons (Echlin Canada Law Book, 2001) the authors discuss the duty to mitigate by remaining in the complained of position at page 63:

> The duty to mitigate imposed upon the constructively dismissed employee is somewhat unique in that it may require the employee to remain in the complained of position, for the period of reasonable notice, in order to minimize losses. This obligation is understandably limited. The employer has committed a fundamental breach justifying the employee in treating that contract at an end. Since the employee need only act reasonably in mitigating his or her damages, where the relationship has been irreparably harmed by the employer's wrongful conduct, continued employment will not be required. In such instances, the employee is still obliged to minimize his or her losses by seeking comparable employment elsewhere. Thus, in each case of constructive dismissal, the question is whether mitigation is to be achieved by remaining in the altered position with the same employer or by seeking other work outside the organization.

In this case mitigation only relates to Ms. Gillis's failure to accept the in-store position. I find that this decision by Ms. Gillis is of such significance that it would stand as a full defence to any damages.

[41] The Supreme Court of Canada addressed this issue in *Evans v. Teamsters Local Union No. 31*, [2008] 1 S.C.R. 661. The court stated at paragraph 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 [page 677] 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.

The corollary of this principle is that an employee is not required to mitigate by working in an atmosphere of hostility, embarrassment or humiliation. This objective analysis is discussed in *Evans v. Teamsters Local Union No. 31*, *supra,* at paragraph 31:

> 31 I note that the nature of this inquiry increases the likelihood that individuals who are dismissed as a result of a change to their position (motivated for example, by legitimate business needs rather than by concerns about performance) will be required to mitigate by returning to the same employer more often than those employees who are terminated for some other reason. This is not however, because these individuals have been constructively dismissed rather than wrongfully dismissed, but rather because the circumstances surrounding the termination of their contract may be far less personal than when dismissal relates more directly to the individuals themselves. This point is illustrated by Michaud in which a bank executive was constructively dismissed as a result of an organizational restructuring. The evidence showed that the bank offered the employee another executive position and was anxious to have him continue working for them. Importantly, there was no evidence that the relationship between the employee and the bank was acrimonious or that he would suffer any humiliation or loss of dignity by returning to work while he looked for new employment. As a result, mitigation was required.

This principle was also applied by Warner J. in *MacKinnon v. Acadia University*, 2009 NSSC 269.

PERFORMANCE ISSUES:

[42] In arriving at my decision I have considered the performance issues raised by Cindy Stevens in her March 31, 2009 letter. The evidence establishes that prior to this date, Ms. Gillis was never advised of these concerns, and all performance reviews were positive. I find that Sobeys used poor judgment in raising these issues at such a critical time. After all it was Sobeys wish that the employment relationship continue. It was these issues that caused Ms. Gillis's immediate

reaction. Nonetheless, the inclusion of these concerns do not justify Ms. Gillis' failure to consider the position she was offered as assistant store manager in Truro.

CONCLUSION:

[43] I dismiss Ms. Gillis's action. I will hear from the parties on costs should they be unable to agree.

J.