

SUPREME COURT OF NOVA SCOTIA

Citation: *Whalley v. Cape Breton Regional Municipality*, 2018 NSSC 325

Date: 20181217

Docket: Syd 451638

Registry: Sydney

Between:

John Whalley

Plaintiff

v.

Cape Breton Regional Municipality

Defendant

LIBRARY HEADING

Corrected Decision: The text of the original decision has been corrected according to the appended erratum dated January 7, 2019

Judge: The Honourable Justice Patrick J. Murray

Heard: August 20, 21, 22, 23, 24, 2018 in Sydney, Nova Scotia

Written Decision: December 17, 2018

Subject: Employment Law; Constructive Dismissal

Summary: Plaintiff was hired as the Economic Development Officer for the Municipality. Having served for 18 years, he was directed by the Chief Administrative Officer to take over a new assignment, which was a priority to the municipality. Plaintiff submitted his resignation the same day, and later claimed the reassignment amounted to constructive dismissal.

Issues: Was the Plaintiff constructively dismissed by the Municipality?

Result: Court found Plaintiff was not constructively dismissed. Failed to discharge the burden set out in leading case of *Potter*. Plaintiff not meeting either test. Reassignment not amounting to unilateral breach or breach of essential term of employment contract.

Further, the Municipality did not show an intention to no longer be bound by the terms of the employment contract.

Cases Cited: *Gillis v. Sobeys*, [2011] N.S.J. No. 646; *Potter v. New Brunswick Legal Aid Services Commission*, 2015 SCC 10; *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 S.C.C. 53; *Clarke v. Halifax Herald Ltd*, 2017 NSSC 337; *Cadenhead v. Unicorn Abrasives of Canada Ltd.*, (1984), 5 C.C.E.L. 241 (Ont. H.C.J.); *Giuliani v. Ontario (Ombudsman)*, (1989), 27 C.C.E.L. 13 (Ont. H.C.J.); *MacKinnon v. Acadia University*, 2009 NSSC 269.

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Counsel: Blair Mitchell, for the Plaintiff
Tony Mozvik, Q.C., for the Defendant

By the Court:

Introduction

[1] John Whalley had been the Economic Development Manager for the Cape Breton Regional Municipality, “CBRM”, for 18 years. By all accounts he was a dedicated employee, and had earned the respect and admiration of his peers.

[2] On May 28, 2015 Mr. Whalley was informed by Municipality’s Chief Administrative Officer, (CAO), Michael Merritt, that his duties on the “Port of Sydney” file, were being reassigned, and he would no longer work on that file.

[3] On the same day, Mr. Whalley resigned from his employment. He maintains the Port file was the major responsibility within his portfolio, and one he had nurtured and developed for 15 years.

[4] Mr. Whalley alleges that CBRM unilaterally and fundamentally breached the terms of his employment contract. As such, he claims he was constructively dismissed and is entitled to damages.

[5] A key issue is what constituted the employment contract between Mr. Whalley and CBRM. Mr. Whalley says there was a formal written employment contract with a provision for severance should he be dismissed without cause. CBRM maintains that as a manager, Mr. Whalley signed a hire letter that contained the terms of his employment. There was no provision for severance in the hire letter. CBRM says the contract that Mr. Whalley claims he had was given only to Directors (and the CAO), not to managers.

[6] CBRM claims that Mr. Whalley was not let go but instead he quit his employment. He was offered meaningful work that properly fell to the Economic Development Manager to complete. The responsibility for the Port file was being transferred to a separate body, the Port of Sydney Development Corporation.

[7] Mr. Whalley was aware of this, says CBRM. It was his decision to leave not theirs. They wanted him to stay.

Background

[8] In 1994 the Municipality was formed by the amalgamation of eight (8) Municipal Units, including former City of Sydney and the surrounding towns and municipalities, including the County of Cape Breton.

[9] Ms. Rhona Green was the Director of Human Resources for the newly amalgamated body. CBRM set out its objectives, strategy and policy in a document entitled, “Supplement to Application for CEO’s Position, Jerry Ryan, dated July 25, 1994, contained at Tab 1 of the Joint Exhibit Book (Exhibit 1). With respect to Economic Development, it states:

Economic Development:

This new regional government also has a major role to play in the development and implementation of a community-based strategic plan aimed at economic growth and stability. The newly created Cape Breton County Economic Development Authority (CBCEDA) was given a mandate by the Cape Breton Joint Expenditure Board to produce an economic action plan for Cape Breton County. This organization could be an important component for economic growth and recovery in the area. However, it will require the full endorsement and support of this new regional government, something which should only be given if the CBCEDA Board is restructured to give ownership of this effort to the community through a lessening of the present political domination of this process. The most important role of this new government has to play is in the area of economic development, but it is a role that requires grass roots participation – this is the challenge for this new government.

[10] The CBRM Council Minutes reflect that the position of manager of Economic Development was created by a resolution of Council passed on March 25, 1996. This is located at Tab 3 of Exhibit 1 and states:

1. Economic Development Manager:

MOTION:

Moved by Councillor Detheridge, seconded by Councillor MacDonald that the position of Economic Development Manager be approved for inclusion on the organizational chart at a salary level of \$50,000.00 per annum. **Motion carried.**

[11] Ms. Green was instrumental in creating the list of duties (the job description), for the position of Economic Development Manager. These responsibilities as set out in Tab 4 of Exhibit 1, include the following functions:

Main Functions:

In conjunction with other departments in a partnership with the community and its appropriate agencies and the public sector, develops an internal strategy that will enable the municipality to play a lead role in creating a self-sustaining, competitive economy in this region.

Manages the implementation of municipally approved recommendations of the Cape Breton County Economic Development Authority's economic development strategy. Manages the overall plan for the administration of municipally owned industrial parks and prepares studies, reports and related information for future management and rationalization of all industrial parks in the region.

Defines procedures and service levels for industrial (business) parks. Develops required marketing strategies for the recruitment of new investment and growth from within initiatives.

Initiates, directs and negotiates public private sector contractual agreements with business looking to establish or expand in the area.

Ensures that client enquiries are dealt with in a prompt and effective manner to meet the required level of service.

For the purpose of establishing growth for the region, develops and sustains liaison between CBRM and local economic development agencies, including but not limited to:

- Cape Breton Economic Development Authority
- Board of Trade
- Downtown Development organizations
- Community Development groups

[12] According to Mr. Whalley the job did not take shape as he had envisioned until 2 or 3 years after his hiring. His approach reflected his academic background. Economic issues were required to undergo a thorough and critical analysis. Policy creation and dedication was key.

[13] Mr. Whalley saw the need for the Municipality to be involved in issues outside of the region. The hiring committee, consisting of former CAO, Jerry Ryan, and Director of Corporate Services, Jim MacCormack, were impressed not only with Mr. Whalley's credentials but with his vision. "No plan is better than a bad plan", he told them.

[14] CBRM was anxious to recruit him and have him return to his native Cape Breton. Mr. Whalley left a secure job with the federal government in Halifax to take up the position.

[15] It is clear Mr. Whalley was expected to work on a broad range of issues. The Port became a prominent file that touched upon many aspects of economic development in the region. CBRM does not disagree with that proposition.

[16] Mr. Whalley had ethical and legal concerns with the direction a related file was headed (the McKeil lease of land at the Sydport Industrial Park). Clearly, he was candid in expressing those concerns, as contained in several of his emails, prior to his resignation. (See Tabs 16, 17, 20 of Exhibit 1)

[17] The Municipality admits he was entitled to raise these in good faith, stating however, while it was open for him to raise them, it was not open for him to decide the course taken to address them. CBRM says the issues were dealt with by the CAO following consultation with the Province and the Regional Solicitor. The suggestion is that Mr. Whalley was stepping beyond his role as Economic Development Officer.

Issues

1. Was Mr. Whalley constructively dismissed from his position as Economic Development Manager at CBRM?
2. If Mr. Whalley was constructively dismissed, does the duty of mitigation apply in assessing damages?
3. If Mr. Whalley was constructively dismissed, what is the proper measure of damages?

Position of Mr. Whalley

[18] Mr. Whalley claims he was constructively dismissed. In his legal brief his counsel submits that Mr. Whalley's entire role was virtually taken away with the removal of the Port file from his portfolio.

[19] In terms of context, Mr. Whalley felt an ethical and legal obligation to bring certain issues forward to the CAO. The evidence shows that these concerns were shared by acting CEO, Marie Walsh.

[20] The evidence consisting of emails on the so-called "McKeil deal" illustrate that Mr. Whalley had serious reservations. There were "serious flaws" as he described them, with the proposed lease. Things such as conveying a tax subsidy, protection from environmental liabilities, and a proper appraisal at fair market value were some of his concerns.

[21] In the result, Mr. Whalley says he was taken off the file. This prevented him from bringing these concerns to council. Mr. Whalley had lost confidence in the CEO, whom he felt was not forthcoming. He believed that Mr. Merritt was intending to withhold his concerns from council.

[22] This left him with no choice but to resign, because he would lose all credibility with council. The reassignment of his Port responsibilities in effect, prevented him, from carrying out his job. He needed to keep his dignity and integrity intact. He was therefore, pushed out.

Position of CBRM

[23] Mr. Whalley hastily and unnecessarily made the decision to quit his longstanding position as manager of economic development. This position encompassed more than the Port file, within the regional municipality. The job description and even Mr. Whalley's own evidence confirms this.

[24] Mr. Whalley's assessment of the future intention and motives of CBRM, as related to the agreements on the Port file, are his own speculation, and beyond his level of responsibility. The Port file was coming to an end. It was being replaced.

[25] It was up to the CAO to advise council and for it to decide whether an agreement is flawed or contrary to the *Municipal Government Act*. CBRM had advice from its legal department and government related to lease arrangements concerning the Port.

[26] Mr. Whalley was not pushed out or fired, he had his own opinions. He alone decided to act on them.

Resignation

[27] On May 28, 2015 following a meeting with Mr. Merritt and after an hour's deliberation, Mr. Whalley sent the following email to Mr. Merritt and Council: (Tab 21).

From: John Whalley
Sent: Thursday, May 28, 2015 2:54 PM
To: All Council; Michael J. Merritt
Cc: DIRECTORS
Subject: Economic Development

Hello,

Earlier this day I was advised by the CAO that I would be reassigned from any future involvement with the port file.

As many of you will know, I have worked on this issue for essentially the entire time I have worked with CBRM.

For me, virtually every aspect of economic development in this region touches the harbor in some form or fashion. In fact, we worked together on port development when many thought we were foolish and long before international experts confirmed the potential.

It is, in my opinion, unthinkable that an economic development manager for a region of this size would not be intimately involved on a daily basis with port development whether this is an external port agency or not.

The timing of my dismissal/reassignment to other responsibilities may be related to my recent expressions of concern related to a proposed commercial port development contract. I have expressed in recent days to the CAO my view that the proposal as presented has serious flaws. Specially, I believe there to be a serious conflict of interest involved and I believe the proposed agreement conveys a subsidy to a private firm or firms, which is contrary to the Municipal Government Act.

Regardless of the reasons why I have been reassigned, my feeling is that if I am not trusted to work on the port file on behalf of the CBRM, then CBRM needs to have an economic development manager who does have the trust of the CAO.

I am, therefore, resigning my position with the CBRM, effective today.

Finally, before leaving, I wanted to thank everyone for their kindness to me during my years with this organization, which I have enjoyed thoroughly.

John

[28] In direct evidence he described the May 28 meeting with the CAO as follows:

Q: Okay so when did you next have contact with the subject matter on May 28 with Mr. Merritt?

A: Just around lunchtime, he knocked on my door and asked me to come over to his office to have a discussion.

Q: Okay and I understand his office wasn't too far away from yours is that right?

A: No just right close yes.

Q: And you did so and what transpired in the course of that contact.

A: It was a very a very brief meeting probably lasting no more than two minutes. I was advised that I was being removed from all aspects of port development, I would have no further involvement in the file in any way. And that I was heretofore going to be responsible for the management of what he called the Marconi project.

Q: Okay.

A: That was effectively the conversation.

Q: Okay I'm going to come back to the Marconi project in a minute. During the course of the meeting were you standing or were you seated?

A: I went in and I was seated.

Q: Okay and did you describe Mr. Merritt's demeanour during the course of the meeting?

A: It was very serious. He was it was not a friendly meeting. This was not taken as a promotion or a new opportunity, this was taken as there was going to be a change. I was essentially being removed from all of the work that I had been doing to that point. And it just was not... it was a very, it was a very succinct brief here's what I've decided.

Q: Okay. What the opportunity extended to you to make any comment or make any attempt to have him reconsider?

A: He may have said it in the final sentence do you have any questions.

Q: Alright. Did he express any reason for having made this decision?

A: He did not.

Q: Okay. And you say that meeting occurred about what time about 12:30 on...

A: My recollection is that I was getting ready to head off for lunch, so it would have been somewhere 12 to 12:30, a little bit before 12 possibly, but it was around the lunch hour.

Q: Okay, alright so at that stage again we have Mr. Merritt and Mr. Merritt was the official to who whom your position responded, or reported, is that so?

A: Yes.

[29] In cross-examination he was asked about his decision and whether it was made in haste. It was a calm, rational decision, he said. He needed to get out of the office to ensure it was not an emotional response. Because of his long attachment he wanted to "get it set" in his mind. He was uncertain about the future, but knew he could not stay. He was asked if anyone asked him to leave. "Not formally", he replied.

[30] At the time, Mr. Whalley had an indication that the Municipality's role in the Port file was changing. At trial Mr. Merritt took issue with Mr. Whalley's assertion that he was being reassigned from the any future involvement stating, "most of the responsibilities had already been transferred over", to the Port development corporation. I shall refer to this again later.

[31] At this point, I am satisfied on the evidence that Mr. Whalley made a quick but conscious decision to resign his job. In short, he quit. The real question is did he have good reason. (*Gillis v. Sobey's*, [2011] N.S.J. No. 646, at para. 57)

[32] I now turn to the main issue of whether Mr. Whalley was constructively dismissed.

The Legal Test for Constructive Dismissal

[33] The test for constructive dismissal is an objective one. The leading case is *Potter v. New Brunswick Legal Aid Services Commission*, 2015 SCC 10. There are two branches to the test.

The first branch has two steps. The Supreme Court of Canada in *Potter* set out the test as follows:

31. The burden rests on the employee to establish that he or she has been constructively dismissed. If the employee is successful, he or she is then entitled to damages in lieu of reasonable notice of termination. ...

32. ... There are two branches of the test that have emerged. Most often, the court must first identify an express or implied contract term that has been breached, and then determine whether that breach was sufficiently serious to constitute constructive dismissal. ... Typically, the breach in question involves changes to the employee's compensation, work assignments or place of work that are both unilateral and substantial.

33. However, an employer's conduct will also constitute constructive dismissal if it more generally shows that the employer intended not to be bound by the contract. ...

34. The first branch of the test for constructive dismissal, the one that requires a review of specific terms of the contract, has two steps: first, the employer's unilateral change must be found to constitute a breach of the employment contract and, second, if it does constitute such a breach, it must be found to substantially alter an essential term of the contract (See *Sproat*, at p. 5-5). Often, the first step of the test will require little analysis, as the breach will be obvious. Where the breach is less obvious, however, as is often the case with suspensions, a more careful analysis may be required.

...

37. ... Moreover, to qualify as a breach, the change must be detrimental to the employee.

38. This first step of the analysis involves a distinct inquiry from the one that must be carried out to determine whether the breach is substantial, although the two have often been conflated by courts in the constructive dismissal context. Gonthier J. conducted this inquiry in *Farber*, in which an employee had been offered a new position that was found to constitute a demotion. He stated that "the issue of whether there has been a demotion must be determined objectively by comparing the positions in question and their attributes": *Farber*, at para. 46.

39. Once it has been objectively established that a breach has occurred, the court must turn to the second step of the analysis and ask whether, "at the time the [breach occurred], 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" (*Farber*, at para. 26). A breach that is minor in that it could not be perceived as having substantially changed an essential term of the contract does not amount to constructive dismissal.

[34] In order to apply the test the Court must determine the terms of the contract.

The “Missing” Employment Contract

[35] Mr. Jerry Ryan, was appointed the first CAO of CBRM on September 1, 1994. He had a written employment contract with the municipality, which is contained in Tab 2 of Exhibit 1. Mr. Ryan is now retired. He testified that a contract existed between John Whalley and CBRM similar to his own. The reason he explained, was because individuals in senior positions were employed in a political and often uncertain environment. It was for their protection.

[36] Mr. Ryan had been a longstanding and respected CAO. There is no doubt as to his credibility. In giving his evidence he was recalling circumstances at the time of amalgamation and the hiring of Mr. Whalley from years previous. Mr. Whalley is attempting to establish not only a written contract but its specific terms without producing anything in writing.

[37] He is asking the Court to infer the employment contract, including the same severance clause, stating that the clear reason has been given for it by Mr. Ryan. Mr. Ryan’s contract contains the following clause at paragraph 11.

11. In the event that the regional municipal council should terminate the employment of the employee in accordance with the *Cape Breton Regional Municipality Act*, without cause, the employee shall be paid twelve months salary in lieu of notice, together with an additional month’s salary for each year or part thereof during with the employee acted as chief administrative officer of the employer to a maximum of an additional six months.

[38] With respect, the evidence in support of the written evidence contract is based on best recollections of what had transpired 20 years previous. It is without independent corroboration, except Mr. Whalley’s evidence, that he never worried on the previous occasions that he felt his job was threatened or in imminent jeopardy. I refer to Mr. Ryan’s evidence that Mayor Clarke when elected did not favour retaining Mr. Whalley. The evidence of Ms. Walsh indicates that the Mayor’s position later changed in this regard.

[39] I must disagree there is ample evidence there was a contract and its terms included a severance provision. In my view, it is highly improbable there would be two separate documents, signed on same day containing terms and conditions of employment. The hire letter says the term of employment is probationary for a 6 month period. The template document (as per Mr. Ryan’s contract) guarantees severance of 18 months, right from the start of employment. I find this is inconsistent does not accord with common sense.

[40] There is little doubt that Mr. Whalley is a credible witness, but I have difficulty accepting his evidence that he had contract similar to the CAO, Mr. Ryan. I am not satisfied the evidence rises to the level required to meet burden of proof. Without more, it does not clearly establish there was a written employment contract for Mr. Whalley, or what the terms would be.

[41] At the end of the day, the evidence on the written contract amounts to people’s recollection that there was one, and that it would contain certain provisions, most notably, a severance provision similar to Mr. Ryan’s contract.

[42] Mr. MacDougall's evidence is that there was no contract other than the employment letter (referred to as the hire letter). It was Mr. MacDougall who produced the file for Mr. Whalley in his capacity as HR Director. During the trial it was disclosed there were some documents that came to light in his file. None were introduced.

[43] Marie Walsh in her evidence was unsure whether managers were given a contract or provided with a hire letter. She confirmed that as a Director she had a contract but could not recall whether that contract had a severance provision.

[44] Even if I accept that the Ryan template was used to prepare an employment contract for Mr. Whalley, it still leaves open the question of what duties would have been contained in that contract. In the template, there is only the reference to the CAO's duties which are summarized in one sentence as follows:

7. The duties of the employee as Chief Administrative Officer shall be those specified in the Cape Breton Regional Municipality Act, and such other duties as may be prescribed in this agreement or in the policies or by-laws of the regional municipality.

[45] Unlike the position of Manager, the CAO's job description is essentially contained in that legislation. I conclude there was no written employment contract for Mr. Whalley similar to that of Mr. Ryan at Tab 2, Exhibit 1 of the evidence.

[46] I recognize this finding is pivotal in respect of damages. Without a severance provision in the contract, Mr. Whalley is left to claim damages at common law if he is proven to be constructively dismissed. Whereas Mr. Whalley obtained employment within a relatively short time, his common law damages, if any, would be restricted to that period.

Hire Letter and Job Description. Terms and Conditions of Contract

[47] Exhibit Book 1 contains an email dated November 24, 2014 by Mr. Whalley in reply to Mr. Merritt's request for an update on the status of files being managed by Mr. Whalley, as Manager of Economic Development. (See Tab 13)

[48] In his summary, Mr. Whalley raises a number of points with respect to the file as requested by Mr. Merritt in reply. Mr. Whalley states in part:

1. Our priority has been port development.
2. This could include a new approach... small business development as a component. *He indicated the Mayor was not in favour of that approach.*
3. Port Development leads into broader planning (and includes the rail issue). The configuration of business parks, are all closely connected to the Port.
4. Port development is closely tied to the Waterfront Development Strategy as well as the ongoing initiative to encourage the Nova Scotia Community College to consider the possibility of constructing a new campus in downtown Sydney.
5. Another important component is CBRM's sustainability fund.

6. The REN discussions, many of the CB Partnership initiatives, the prosperity framework lead by the partnership and the coordination efforts across Cape Breton's municipalities ...
7. In terms of infrastructure ... and so on.

[49] It is interesting to note Mr. Merritt's reply to this report:

Thank you for your response and you do raise a number of good points in regard to the overall file. I do need to bring this back to a coordinated and comprehensive strategy within budgets identified to ensure that we move forward with a plan that utilizes out limited dollars for the next few years.

[50] Mr. Merritt it seems, was emphasizing the need for a strategy for the "overall file", which included the discussion of a "reformed governance structure" for the Port, as pointed out by Mr. Whalley himself. By the overall file, I conclude the CAO meant the economic development file.

[51] In his submission, Mr. Whalley's counsel put this email forward as Mr. Whalley's "real job description".

"Three Pillars"

[52] The so called "three pillars" featured prominently in Mr. Whalley's testimony describing his main areas of responsibility: 1) demographics; 2) municipal financing; and 3) the port development.

[53] Much of the work being performed by Mr. Whalley started with the divestures that were occurring by government, related to the Sydney Harbour, a federal jurisdiction issue. Mr. Ryan testified to this in his evidence.

[54] During this period there were a number of significant events affecting the economy of Cape Breton, the closures of the Sydney Steel Corporation and the Cape Breton Development Corporation, the divesture of two federally owned wharfs, and the divesture by ECBC of the Sydport Industrial Park, a marine park within Sydney Harbour. This all occurred within an 18 month period.

[55] Mr. Whalley was asked about the substantive areas of his responsibility and his reporting responsibilities in regard to those three areas as follows:

Q: Okay, and throughout that you continued to report to... sorry at some stage you started to report to Mr. Ryan, is that right?

A: It is, I don't exactly remember when that is, my recollection is that Jim MacCormack had retired before Mayor Morgan came into office **which would be 2000** but it would have been around there a year or so either way.

Q: Okay.

A: So and then I had reported, even though I was reporting to Jim MacCormack, even from the very start I was actually reporting to Jerry Ryan.

Q: Yes.

A: Any, anything, any issue paper that I was doing, anything I was doing was going directly to Jerry Ryan, Jim MacCormack was in title the person that I was reporting to and I was, but Jerry Ryan was involved in all of these discussions and was made... and was ultimately the person making the decision in terms of how we would proceed.

Q: Okay.

A: Because all of these issues were so... in many cases, were so controversial right.

Q: Jerry Ryan was making all of these decisions in relation to all of these issues, how you would proceed in relation to demographics, port development, municipal financing.

A: And, and a few that were not as large, but still controversial so the administration of the economic development fund, because it tended to have a lot of political implications.

[56] The evidence disclosed that the “equalization file”, was a major file that required months and years of work. According to Mr. Whalley, it emanated from the municipal funding component of his work.

[57] Mr. Whalley confirmed these areas of responsibility dominated and were the three principle characteristics of his job from 2000 to his departure in 2015.

Q: Okay so Mr. Whalley, I’m sorry we stepped out of sort of the progression to get into issue paper and the issue of, of the kind of exposure that, that at least some of the officials of the municipality had because of the nature of the beast sort of speak, um, to come back, you indicated that another significant point, there were **three significant points of your responsibilities, demographics, the municipal finance and port development**, when would you say those became those the three principle characteristics of your functions. **During what period with your, with the municipality?**

A: **For me very early on. These were... these were the key issues for me.** But in the first year to two I had this economic development fund that I had to some how try to convey, transfer, so I would say certainly within the first two years these, these three issues became the dominant issues and they... **they remained the dominant issues until the end of my time with the municipality in 2015, they were, they were dominant.**

Hire Letter

[58] The hire letter dated March, 1997 is attached as Appendix “A”. It is instructive to some degree as to the work assignments and what was expected of the Economic Development Manager.

[59] The first paragraph refers to “the position of Manager, Economic Development with Cape Breton Regional Municipality”. The fourth paragraph refers to hours of work (35) and states “... you may be required to work additional hours to fulfil the duties and responsibilities of the position”. The seventh paragraph refers to the probationary period (six months) and states following successful completion, “your performance will be evaluated by your department head”.

[60] At the bottom, under Mr. Ryan's signature is a place for Mr. Whalley's signature. He wrote in the date of March 17, 1997 and signed it, agreeing to accept the position. He further "acknowledged and agreed" to the terms and conditions as specified above.

Develop Strategy, Initiate and Direct

[61] The job description in Tab 4 lists as main function, "develops an internal strategy". This relates back to Mr. Merritt's reference to an overall strategy.

[62] Further, the "main functions" refer to the managers duty and states: "initiates, directs and negotiates public and private sector contractual agreements with business looking to establish or expand in the area".

"Bullets" of HR Job Description

[63] In his testimony Mr. Whalley stated initially that only the "last bullet" was applicable to the duties he was performing. That reads, "Ensures that client enquires are dealt with in a prompt and effective manner to meet the required level of service". In cross-examination however, he admitted there were other tasks that fit under Tab 4 such as the equalization file.

[64] I note also there is a reference to "service levels for industrial (business parks)". This was one of the areas referred to by HR director, Gordon MacDougall, along with "the Farmer's market" file, when asked about Mr. Whalley's functions.

Blank Canvass - Port at Center of Economic Activity

[65] Mr. Whalley's evidence is that there was no real precedent for his job. He said he was starting from a "blank canvas".

[66] The parol evidence rule does not apply to preclude evidence of surrounding circumstances when interpreting the words of a written contract. The surrounding circumstances are facts known to both parties at or before the date of contracting, therefore, the concern of reliability does not arise. *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 S.C.C. 53.

[67] What was known at the time of contracting, according to Mr. Ryan, was that the issues are often broad and varied. The general nature of the "job scope" at Tab 4, bears that out. The job scope at Tab 4 reads as follows:

Job Scope

Under the general direction of the Corporate Services Administrator, manages the implementation of economic plans, programs, and services for the municipality.

[68] I find the reasonable inference to be drawn from the evidence is that the parameters of Mr. Whalley's job were defined by: 1) the position he accepted in the hire letter; 2) the three main areas as described by him during the last 15 years of his employment; and 3) the job description prepared by Ms. Green at Tab 4 (aspects of which Mr. Whalley agreed formed part of

the duties he performed). In addition, he was required to accept direction, and have input on the overall file in developing a coordinated and comprehensive strategy for Economic Development.

[69] The notion that his position was inextricably tied to one file, the Port, must be weighed and considered in the context of all of the evidence.

Was Mr. Whalley Constructively Dismissed?

[70] The leading authority in Canada on constructive dismissal is the Supreme Court of Canada Case of *Potter v. New Brunswick Legal Aid Services Commission*, 215 S.C.C. 10. The burden rests on the employee to establish that he or she has been constructively dismissed. If the employee is successful he or she is then entitled to damages in lieu of reasonable notice. (See also *Clarke v. Halifax Herald Ltd*, 2017 NSSC 337)

[71] It must be first established under step one that a breach has occurred and once that has been done it must be determined whether an essential term of the employment contract was being substantially changed.

[72] Under the second branch, an employer's conduct will also constitute constructive dismissal if it more generally shows that the employer intended not to be bound by the employment contract.

Branch 1 – Step 1, Unilateral Change resulting in breach.

[73] Under this step the employer's unilateral change must be found to constitute a breach of the employment contract. As stated, the Court must first identify an express or implied term that has been breached. As stated in *Potter* this typically involves changes to the employee's compensation, work assignments or place of work that are both unilateral and substantial.

[74] Further in *Potter* the court stated this step will often require little analysis. A more careful analysis will be required where the breach is less obvious. In my view, a more careful analysis is required here.

[75] In his brief Mr. Whalley's counsel submits at page 18:

In this case, CBRM's unilateral, blunt categorical removal of final, substantive responsibilities from Mr. Whalley took away the virtual entirety of his role at the forefront of economic development through port development with CBRM. Given that he had been employed in that capacity throughout his 18 years with the Municipality, it thus exercised not only his essential responsibilities but also demonstrated no conception for any intention to locate replacement responsibilities for him.

[76] Mr. Whalley has argued that port development was at the forefront of economic development in the region. The term which they identified was breached was that CBRM took away his entire role as economic development manager "through the Port file". With respect, I do not concur. Mr. Whalley himself in his resignation letter referred to the other responsibilities

held by him. It was a challenging position. He agreed to the terms and conditions of his employment which are outlined in the job description and the letter of hire.

[77] In *Potter* the court stated, “to qualify as a breach the change must be detrimental to the employee”. In the case of Mr. Whalley, the Court must consider whether he had good reason to resign his position. As his own counsel has pointed out, an employment contract is a dynamic contract involving a change in responsibility from time to time. The weight of the evidence demonstrates that the position of Economic Development Officer required Mr. Whalley to exercise a number of responsibilities. It was a new assignment he was being given and one which was of obvious importance to the Municipality, related to future downtown growth and development.

[78] Mr. Whalley himself recognized that the Port responsibility was headed in a new direction when he said in his direct evidence.

Q: Okay, and up to the point where you actually resigned, May 28, 2015, did you raise the possibility of resignation with anybody otherwise during your tenure with the CBRM?

A: The, the closest I came I guess was in the months prior to May, six weeks, I had two discussions, I had one with Michael Merritt, which was a private discussion that I thought the direction of economic development within the municipality was, was coming to a point where the position that I held was so fundamentally changed that I was no longer the appropriate person. In that discussion he agreed and I had asked him given the circumstances if he would ask, my expression was that I wanted to continue on the Port file if possible and was that... so the Port file at that point had been, was being transferred to what was called the Port of Sydney Development Corporation. It was municipally owned 100% but it was...

[79] This is also acknowledged in his brief at page 21 as follows:

In this case, on the establishment of the Port of Sydney Development Corporation, John Whalley lost and was isolated from virtually the entire content of employment responsibility that he had exercised for a decade and a half or longer.

[80] Mr. Merritt in his evidence explained that the remaining task to be completed on the Port file was what he referred to as the aboriginal consultation file. In cross-examination he stated:

Q: Okay now he used the term reassigned and specifically my focus is on that. am I correct in understanding that you used the term reassigned?

A: On the aboriginal file that he would no longer be involved with this, that would be done by Mr. Morris, Mr. Gogan, Mr. Kachafanas, myself and the CEO of the port of Sydney development corporation, Marlene Usher.

[81] While the Marconi file was a new assignment, there was no loss in pay, no change in title, no loss of status, prestige or humiliation. The factors alone are not determinative. Mr. Whalley told the Court what his reasons were, “I knew I had to leave”, he said, “If council found out what was being discussed and I remain silent I would forever lose the confidence of council”. Loss of trust and confidence are extremely integral and important in any employment situation.

There are avenues to deal with those issues internally. These were also issues that were personal to Mr. Whalley.

[82] Mr. Whalley's evidence was there was not enough work on the Marconi file to occupy anyone's time. In the organizational structure, however, Mr. Whalley reported to and took direction from Mr. Merritt, who did consider the Marconi file to be important and meaningful work. He was Mr. Whalley's boss and directed him to this new project.

[83] On May 14, 2015, Mayor Cecil B. Clarke wrote a letter to the Honourable Geoff MacLellan, Department of Transportation and Infrastructure Renewal requesting a "pre-feasibility" of locating the NSSC Marconi Campus Provincial Building and Central Library on the Sydney Waterfront. The letter included the following paragraph: (Tab 18).

The project has the potential to be a transformative, one-in-a-generation development in the downtown core. As seen in other cities, these central public facilities are engines of growth for local economies.

[84] The timing of this request coincides with Mr. Merritt's assignment of the Marconi file to Mr. Whalley. In terms of the work to be done in future the letter concludes by stating:

Pre-feasibility would include site location(s), spatial planning and requirements, technical, environmental and regulatory requirements, parking and initial phase costing. All of this would be factored into a Terms of Reference for next step development into a feasibility Study which I hope could be prepared for review and consideration for Fall 2015.

[85] The change was unilateral in the sense that the Port aspect of his responsibilities were changing not by him, but at the behest of his employer. However, according to *Potter*, the change is not unilateral if an express or implied term gives the employer the authority to make the change, in which case the change will not constitute a breach.

[86] It is clear Mr. Whalley was expected to work on a broad range of issues and responsibilities of which the Port was one. His own evidence confirms there was more than this particular project. Even though it came to be the more prominent file during his tenure, there could come a time when that was going to change and it did. That did not warrant or call for his resignation. He should have been open to new responsibilities that were being assigned to him without judging them prematurely.

[87] I find there was no term express or implied that required Mr. Whalley as manager to work on any particular file, to the exclusion of others, or on the Port file itself.

[88] I have considered whether the inability to work on the Port file would be detrimental to Mr. Whalley, and make it impossible to do his job.

[89] I find however, it was not reasonable for Mr. Whalley to refuse the change requested of him. I do not find that his authority was seriously undermined or compromised. In Mr. Whalley's evidence he said he had a part in shaping the job and role he would play in economic

development. He stated it took 2-3 years before the job became what he envisioned. The fact that the port development took on greater significance during his 15 years did not mean it would never end. There would come a time when the Municipality would need to turn its attention to other matters and that time had come for the Port file. Unfortunately and regrettably, Mr. Whalley chose not to move on.

[90] There is the argument that the removal of the Port file contravenes the contract and amounts to a breach because Mr. Whalley was responsible for industrial parks, “Sydport”, for example is an industrial park. Further, Mr. Mozvik, as counsel for the Municipality, did not take issue with the third paragraph in Mr. Whalley’s resignation letter which stated:

For me, virtually every aspect of economic development in this region touches the harbor in some form or fashion.

[91] Mr. Whalley was not hired to perform a specific function. His duties were broad in scope as shown in the job description. Because there was a job description, no duties were listed in the hire letter.

[92] I have been persuaded that in some circumstances an employee’s job description is not “frozen” at the time it is prepared but open to reasonable variation as required. In these circumstances, I reject the notion that the position of Economic Development Manager was inextricably tied to the Port file. (See *Cadenhead v. Unicorn Abrasives of Canada Ltd.*, (1984), 5 C.C.E.L. 241 (Ont. H.C.J.); *Giuliani v. Ontario (Ombudsman)*, (1989), 27 C.C.E.L. 13 (Ont. H.C.J.))

[93] In the result and on the whole of the evidence, I do not find that Mr. Whalley’s decision to quit was reasonable. Moreover, I do not find it resulted in a breach of his employment contract under the first step of the test.

[94] In the event I am in error and the actions of the Municipality objectively constituted a unilateral breach of the employment contract, I will address step two as to whether at the time the breach occurred, a reasonable person in the same position as Mr. Whalley would have felt the essential terms of the employment contract were being substantially changed. (*Potter* at para. 39)

Branch 1 - Step 2, Substantial Change to Essential Term

[95] The test is whether a reasonable person in the position of Mr. Whalley would have felt that the essential terms of the employment contract were being substantially changed. The full context of the facts play a role in whether the employer has made a substantial change to a term of the employment contract, or whether the employer has evidenced an intention to no longer be bound by the employment contract.

[96] The Plaintiff advances a strong argument that the Port was at the centre of economic activity. However, it would not be a breach of an essential term if the contract allowed for or

recognized that files would change as priorities change, within the sphere of economic development.

[97] The inquiry under the first step is distinct in that it focusses on a breach and not whether a change is such that a reasonable person, in the same position would find that the essential terms of the employment contract were being substantially changed.

[98] In this case, I find that the change was substantial in that the Port was clearly one of Mr. Whalley's major responsibilities. As he said it was occupying a major part of his time, in addition to the other areas he spoke about, those being demographics and municipal financing.

[99] However, I have difficulty finding objectively that the change in duties, substantial as it was, amounted to a breach of an essential term of the employment contract, as viewed by a reasonable person in the same situation as Mr. Whalley.

[100] In *Potter* the court said at paragraphs 39 and 40:

39 Once it has been objectively established that a breach has occurred, the court must turn to the second step of the analysis and ask whether, "at the time the [breach occurred], 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" (*Farber*, at para. 26). A breach that is minor in that it could not be perceived as having substantially changed an essential term of the contract does not amount to constructive dismissal.

40 The kinds of changes that meet these criteria will depend on the facts of the case being considered, so "one cannot generalize": Sproat, at p. 5-6.5. In each case, determining whether an employee has been constructively dismissed is a "highly fact-driven exercise" in which the court must determine whether the changes are reasonable and whether they are within the scope of the employee's job description or employment contract: R. S. Echlin and J. M. Fantini, *Quitting for Good Reason: The Law of Constructive Dismissal in Canada* (2001), at pp. 4-5. Although the test for constructive dismissal does not vary depending on the nature of the alleged breach, how it is applied will nevertheless reflect the distinct factual circumstances of each claim.

[101] Simply pointing out that the Port was at the forefront of activity does not of itself establish a breach of an essential term. In fact, the Plaintiff has not directly pointed to which essential term, expressed or implied has been breached, other than saying the email in Tab 13 is his real job description.

[102] Mr. Whalley gave compelling evidence about the change in his duties, its abruptness and fundamental importance to his role as Manager as follows.

Q: Okay and I want to just talk briefly for a moment about the significance on your role in Port development to you as a professionalized economist.

A: Right.

Q: What was the significance of this this work to John Whalley?

A: It was the vast majority of my time, it was everything. It was all my work.

Q: Okay.

A: Yeah.

Q: And what significance if any did you place on it for the... on the subject matter for the further economic development of the region?

A: It was crit... it was critical. In my opinion it was critical, the work was critical and I can't over emphasize that it was really fundamental.

Q: Okay. And Mr. Whalley you were, you were born in Cape Breton, is that right?

A: Yes.

Q: And you were born in Sydney oh sorry, in the in bars of Sydney, is that so?

A: Yes.

Q: And you'd been away from Sydney for the purposes of your educat... which included your education is that right?

A: Yes.

Q: And for the period of 4 years that you had been employed in Halifax with the federal government correct?

A: Yes.

Q: Okay. And you returned to Cape Breton, what role did the possibility of contributing to economic development in this region play in against an incentive to come back to Sydney?

A: It was the only reason.

[103] He further stated that Mr. Merritt emphasized the word "any" in relieving him of his port duties. Mr. Whalley described the Marconi file as merely a "shell", while making the point, "there was no work to be done on it by an economist" or words to that effect.

[104] Mr. Whalley did not allege a loss of prestige or that he was humiliated. He may have been but, as he said he wanted time to clear his head because he had a long attachment. Once he did, he made a calm rational decision.

[105] CBRM relies heavily on *MacKinnon v. Acadia University*, 2009 NSSC 269. The decision in *MacKinnon* is instructive and has similarities to the present case.

[106] In *MacKinnon*, the university president decided to assume responsibility for enrollment and admissions from the Plaintiff Ms. Cook MacKinnon who had been Provost/Vice president. She alleged that removal of two key functions eroded her responsibilities as vice president of student affairs and functionally changed the duties and responsibilities of her position.

[107] The court held at paragraph 107 as follows:

[107] While I find that the removal of enrollment and admissions from the Plaintiff's portfolio was a change in her job, it was not a fundamental change to an essential term of her employment contract. It was implicit in her job that responsibilities would be subject to changes - additions and deletions. The Plaintiff was not demoted.

[108] In *MacKinnon*, Justice Warner noted that the university was a dynamic institution, and that the portfolios of service administrators was not static. Further, they were given new spheres of responsibility, while others were deleted, and reallocated. I find these are same factors present here in the case of CBRM and Mr. Whalley. His position required him to play a lead role in creating a competitive economy for the entire region.

[109] I have found that Mr. Whalley's duties were broad in scope as shown in the work actually performed by him. I found also that because there was a job description the duties were not listed in the hire letter. I do not accept that his email at Tab 13 represented his job description.

[110] It was neither an express or implied term of his employment that he would always maintain the same portfolio of files. Mr. Whalley's counsel has argued the key difference between Ms. Cook MacKinnon and Mr. Whalley are that his responsibilities did not change. With respect, I do not agree. As was the case for all senior managers and administrators, I find that Mr. Whalley's job description was not static.

[111] A common theme in the evidence is that priorities changed and consequently files and duties change. In the result, while a change may be substantial it does not automatically follow that the essential terms of the employment contract have been substantially altered.

[112] Thus, in *MacGregor v Lethbridge College*, 2016 ABPC 72, [2016] AJ No 304, the court said:

86 In my view, the law is clear that it is certainly open for any organization to restructure for *bona fide* business reasons, but if it makes fundamental changes to the essential terms of a specific employee's long term and unchanging employment duties in doing so, unless otherwise agreed, then reasonable notice must be given. [Emphasis added.]

[113] Although the Port file was closely aligned with other issues, I am not satisfied that Mr. Whalley being reassigned from the Port file constituted a substantial change to the contract's essential terms. A change in files, substantial or not was implicit, it was part of his job.

[114] Therefore, even if the first step of the test had been met (and I have found it has not been), I find that the Plaintiff has not met the burden of establishing that Mr. Whalley has been constructively dismissed under step two.

Branch 2 - Has the employer evidenced an intention to no longer be bound by the terms of the employment contract?

[115] The Plaintiff has broadly stated that under either branch of the test, Mr. Whalley has been constructively dismissed. The two branches as set out in *Potter* are alternatives. Given that I have not found constructive dismissal on the first branch, I propose to analyze the second branch. This is largely a factual determination.

[116] This branch takes into account the scenario where constructive dismissal is found on the ground that the employer's treatment of the employee makes continued employment intolerable, even without identifying a breach of a specific essential term: *Potter* at para 33.

[117] In my earlier reasons I found CBRM did not unilaterally or substantially change the essential terms of its employment contract with the Plaintiff. This branch of the test as set out in *Potter* requires a different approach. That is, whether the course of conduct of CBRM, in light of all the circumstances, would lead a reasonable person in the same circumstances of the employee to conclude that the municipality no longer intended to be bound by the employment agreement.

If so, CBRM will have committed a breach that resulted in the constructive dismissal of Mr. Whalley. (Para. 42 *Potter*)

[118] The Court in *Potter* explained the two forms constructive dismissal can take:

43. Thus, constructive dismissal can take two forms: that of a single unilateral act that breaches an essential term of the contract, or that a serious of acts that, taken together, show that the employer no longer intended to be bound by the contract.

[119] In terms of a series of acts, it is clear on the evidence that CBRM had taken steps to transfer the responsibilities for the Port file to an independent body. Mr. Merritt was acting chairman of that corporation pending the complete transfer. As previously stated, there is evidence that Mr. Whalley felt the direction of economic development was changing and he wondered whether he was the appropriate person for the job. (para. 77 herein)

[120] On the facts here it is questionable whether the second branch of the test is applicable. It is clear what prompted Mr. Whalley's resignation was the single meeting he had with Mr. Merritt just prior to his resignation. Applying the second branch however, these provisions suggest there is a right for an organization to restructure provided it does not rise to the level of making further employment intolerable. Mr. Whalley had himself been involved in the transfer to the Port of Sydney Development Corporation.

[121] On this branch of the test, I conclude that the course of conduct of CBRM, in light of all the circumstances, would not lead a reasonable person in the same circumstances of the employee to conclude that the municipality no longer intended to be bound by the employment agreement.

[122] As stated, there is some evidence that it was Mr. Whalley who had earlier considered resigning from his position. I accept Mr. Merritt's evidence that the work to be done on the Marconi file was meaningful and important work. There was replacement work for Mr. Whalley. He chose not to take it.

[123] It is true Mr. Merritt readily accepted his resignation, but there is also the evidence of Ms. Walsh who was asked to convey a message from the mayor that the "door was still open". Once Mr. Whalley made his decision, it was final.

[124] On these facts, I find this branch of the test has not been satisfied by the Plaintiff, whose burden it is, to prove on a balance of probabilities that CBRM evidenced an intention to no longer be bound by the terms of the employment contract.

Issues 2 and 3

[125] Given my ruling that Mr. Whalley has not been constructively dismissed, it is not necessary for me to address Issues 2 and 3 as earlier set out in this decision.

Conclusion

[126] On the whole of the evidence, I am satisfied on a balance of probabilities that Mr. Whalley left the job of his own accord. In the result, I have concluded that Mr. Whalley was not constructively dismissed for the reasons given. His action against CBRM is dismissed.

[127] With respect to costs, I will ask the parties to enter into discussions and if agreement cannot be reached, then written submissions would be made within 60 days.

Murray, J.

Appendix "A"

Dear Mr. Whalley:

I am pleased to confirm your appointment to the position of Manager, Economic Development with the Cape Breton Regional Municipality ("CBRM") effective March 17, 1997. On that day, you should report to Jim MacCormack's office, 4th floor, 320 Esplanade at 8:30 a.m.

Your salary will be at the rate of \$50,000 per annum and will be paid bi-weekly by direct deposit to a financial institution of your choice.

Your vacation entitlement will be four (4) weeks per annum in accordance with the CBRM's Vacation Policy. The vacation year will be January 1 to December 31. During the prior from March 17, 1997 to December 31, 1997 you will be entitled to 15 days vacation.

Hours of work will normally be 35 hours per week, however, you may be required to work additional hours to fulfill the duties and responsibilities of the position.

Sick Leave will be earned at a rate of one and one half (1.5) days per month worked, to a maximum accumulation of eight-five (85) days. Group benefits will be in accordance with the Regional Group Benefit Plan for Managerial and Confidential employees. Current rates and plan details will be reviewed with you on your commencement. Rates and details are subject to change. In the event that premiums are increased by the insurance company in accordance with CBRM Policy for Group Benefits, it is understood that there will be no automatic renewal of the Group Benefit Plan.

You are required to become and remain a member of the CBRM's Pension Plan. Contributions effective March 1, 1997 will be 5% of regular earnings, employee and 5% of regular earnings, employer.

You will be required to serve a probationary period of six (6) months. Following successful completion of the probationary period, our performance will be evaluated at least annually by your Department Head.

I am enclosing two copies of this letter. You are required to sign both retaining one for your files and returning the second letter to the undersigned.

Finally, I would like to welcome you to the staff of the CBRM and look forward to working with you in this challenging position.

Yours truly

Jerry Ryan,
CAO
:KMS

C: Jim MacCormack, Corporate Service Administrator

Position: Manager Economic Development

I, John Alexander Whalley, acknowledge and agree to the terms and conditions of employment as specified above.

Date: March 17, 1997 Signed: John A. Whalley.

SUPREME COURT OF NOVA SCOTIA

Citation: *Whalley v. Cape Breton Regional Municipality*, 2018 NSSC 325

Date: 20181217

Docket: Syd 451638

Registry: Sydney

Between:

John Whalley

Plaintiff

v.

Cape Breton Regional Municipality

Defendant

ERRATA TO DECISION DATED DECEMBER 17, 2018

Judge: The Honourable Justice Patrick J. Murray

Heard: August 20, 21, 22, 23, 24, 2018, in Sydney, Nova Scotia

Written Release: December 17, 2018

Date of Erratum to January 7, 2019

Decision:

PLEASE NOTE

Erratum:

1. Paragraph 10 the word “to” should be deleted as it did not appear in the minutes contained in Tab 3 of Exhibit 1, such that it reads “be approved” rather than “to be approved”.
2. Paragraph 28 there is a spacing issue with the words “here to foregoing to” such that it should read “heretofore going to”.
3. Paragraph 44 the reference to “b-laws” should read “by-laws”.
4. Paragraph 66, the word “relatability” shall be replaced with the word “reliability”.