**SUPREME COURT OF NOVA SCOTIA**

**Citation**: *Ogilvie v. Windsor Elms Village for Continuing Care Society*, 2021 NSSC 25

**Date:** 20210126
**Docket**: Ken No. 406961
**Registry:** Kentville

**Between:**

**Sharon Ogilvie**

Plaintiff

v.

**Windsor Elms Village for Continuing Care Society**

Defendant

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|---|---|
| **Judge:** | Justice John A. Keith |
| **Heard**: | September 28 to October 2, 2020 at Kentville Law Courts |
| **Counsel**: | Sharon Cochrane, counsel for the Plaintiff<br>Blair Mitchell, counsel for the Defendant |

**By the Court:**

## BRIEF BACKGROUND AND ISSUES

[1] The Defendant Windsor Elms Village for Continuing Care Society ("**Windsor Elms**") operates a not-for-profit seniors' residence in Windsor, Nova Scotia. The Plaintiff Sharon Ogilvie was Windsor Elms' Director of Finance.

[2] On May 24, 2012, Windsor Elms' CEO, Sherry Keen, advised Ms. Ogilvie that her employment was being terminated, without cause. At that time and among other things, Ms. Keen offered Ms. Ogilvie five months' working notice. If Ms. Ogilvie could not find alternate employment during those five months of working notice, Ms. Keen also offered an additional two months' pay in lieu of notice (salary only). By letter dated May 29, 2012, Windsor Elms confirmed Ms. Ogilvie's termination and repeated the severance offer.

[3] Ms. Ogilvie neither accepted Windsor Elms' offer nor returned to work. Nevertheless, she remained a Windsor Elms' employee for a period of time and, for example, she continued to accept sick pay benefits and vacation pay.

[4] Over the next two months (i.e. between May 24, 2012 and July 27, 2012), the relationship between Windsor Elms and Ms. Ogilvie fell apart. On July 27, 2012, Windsor Elms terminated her employment again – this time for cause and without notice.

[5] At trial, Ms. Ogilvie took the position that the July 27, 2012 termination for cause was both:

1. irrelevant because Windsor Elms' actions in the months leading up to July 27, 2012 amounted to constructive dismissal; and

2. improper because there was no just cause. Ms. Ogilvie states that she was terminated without cause as of May 24, 2012 and seeks damages in excess of what was offered by Windsor Elms, including aggravated and punitive damages.

[6] From a strictly legal perspective, the preliminary issue is whether Windsor Elms' severance offer of May 24, 2012 constituted a repudiatory breach of the employment contract. If so, Ms. Ogilvie clearly did not accept the breach. Instead, Ms. Ogilvie affirmed the contract to the extent that she continued to accept (and receive) the financial benefits associated with continued employment.

[7] Assuming a repudiatory breach which Ms. Ogilvie clearly did not accept, the questions then become: what risks, rights and obligations arose during the working notice period? And how did the parties' actions during the period of working notice (i.e. after the original termination without cause) affect their respective legal interests?

[8] The answers to these questions obviously turn on the specific circumstances of the case. Here, the facts begin with a healthy employment relationship which became infected with, and ultimately consumed by, mutual mistrust and suspicion. Both parties bear a varying degree of responsibility for the misunderstandings and acrimony which arose. In the end and for the reasons which follow, I conclude that:

1. Windsor Elms' severance offer of May 24, 2012 was unreasonable and constituted a repudiatory breach of the employment contract;

2. Ms. Ogilvie did not accept the breach which, again, would have brought the contract to an end. Rather, she decided to continue as an employee under a period of working notice;

3. Ms. Ogilvie's allegations of constructive dismissal are without merit. Pausing here, it must be said that while Ms. Ogilvie alleged constructive dismissal, at no time prior to July 27, 2012 did she communicate to Windsor Elms that she considered herself to have been constructively dismissed;

4. Windsor Elms' claim that Ms. Ogilvie's employment was terminated with cause on July 27, 2012 is similarly dismissed;

5. I do not find that Windsor Elms' actions justify a claim beyond contractual damages for terminating Ms. Ogilvie's employment without cause effective May 24, 2012. The claim for additional damages in the form of punitive or aggravated damages is dismissed;

6. Ms. Ogilvie is entitled to reasonable notice for the termination of her employment without cause as of May 24, 2012. Applying the factors enumerated in *Bardal v. Globe & Mail Ltd. (1960)*, 24 D.L.R. (2d) 140 (Ont. H.C.), Ms. Ogilvie is entitled to 12 months' notice effective May 24, 2012 until May 24, 2013 together with related relief in terms of pension contribution, vacation pay and statutory holidays. However, I do not grant Ms. Ogilvie's request for a retirement allowance; and

7. The amounts earned by Ms. Ogilvie during the 12-month notice period shall be deducted from the principal amount owing.

## FACTS

[9] The Plaintiff Sharon Ogilvie was born in 1952. Her education and work experience became centred around bookkeeping and basic accounting.

[10] On June 24, 2002, Ms. Ogilvie began working for Windsor Elms. She was 50 years old at the time. Her role was initially described as "Accountant". She rose to become the "Director of Financial Services" and a member of Windsor Elms' senior management team.

[11] By May, 2012, Ms. Ogilvie had worked at Windsor Elms for about 10 years. By all accounts, she was devoted to the organization and its residents. In addition to her accounting role, she volunteered many hours to offer programs for the residents in music and art.

[12] That said and also by May, 2012, it had become evident that Windsor Elms' accounting requirements had grown beyond Ms. Ogilvie's expertise and capacity. For example:

1. In 2008, Windsor Elms entered a new phase of change and expansion. In terms of its physical premises, Windsor Elms was awarded $34 million by the Department of Health to build a new facility. The new home would contain the same number of beds (108) but would be vastly improved and modernized. Construction began in 2009. It soon became apparent that Ms. Ogilvie lacked the specialized construction accounting knowledge to properly manage such a large project. Issues arose around such things as the unique HST reporting obligations which arise during construction. In addition, Ms. Ogilvie suddenly had to track millions of dollars of construction-related expenses, and she had never done that before. The resulting strain proved to be overwhelming. In 2009, Ms. Ogilvie's family doctor (Dr. Viji Nathan) recommended that she take three months off work for health reasons. Dr. Viji also prescribed medication to help Ms. Ogilvie cope with growing anxiety. Ms. Ogilvie took only one month but the situation remained stressful;

2. During 2008-2009, Windsor Elms also adopted a new operating philosophy called the "Eden Approach". The simple, underlying premise was that each resident should be treated and cared for as if they were in their

own homes. Transitioning to the "Eden Approach" required numerous meetings, as all staff members were called upon to completely re-envision how they interacted with the residents and how they performed their daily duties. The time commitment associated with this cultural shift reduced the time available for Ms. Ogilvie to fulfill her accounting duties;

3. Also, during 2008-2009, major changes were occurring with Windsor Elms' primary funder, Nova Scotia's Department of Health ("**DoH**"). In particular, DoH introduced a new accounting model which required much more precise tracking of revenues and expenses. Entering the required data to permit the transition to occur and then learning to work under the new model proved difficult. It placed additional strain upon Ms. Ogilvie who was not able to adapt quickly and easily;

4. By late 2011, Ms. Ogilvie was 61 years old. At this point, she began to discuss with Windsor Elms' CEO, Sherry Keen, the need for additional accounting support. Ms. Ogilvie also introduced the idea of reduced hours and/or "flex time";

5. Between January 2012 and May 2012, several other events would converge in a manner which impacted upon Ms. Ogilvie's employment at Windsor Elms:

> a. On January 1, 2012, in response to Ms. Ogilvie's request for help, Windsor Elms hired Kevin Matheson, C.A. (his C.A. designation has since been changed to CPA). Ms. Keen told Mr. Matheson that she had concerns about Ms. Ogilvie but lacked the professional experience to properly comment on her work. Ms. Keen asked Mr. Matheson to pass along any comments he might have regarding Ms. Ogilvie's accounting knowledge and job performance. For her part, Ms. Ogilvie was relieved to have Mr. Matheson's assistance.
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> b. Mr. Matheson testified at trial. He developed a positive view of Ms. Ogilvie and her commitment to the job. At the same time, he observed that Ms. Ogilvie was spending significant amounts of time in staff meetings and that this was taking away from the time she had for accounting. He felt these demands on her time were causing Ms. Ogilvie considerable stress. Mr. Matheson also observed that Ms. Ogilvie struggled with certain accounting issues, such as HST reconciliations and deferred revenue accounts. Mr. Matheson

commented that, by the time of Ms. Ogilvie's termination without cause on May 24, 2012, Windsor Elms' new auditors also raised concerns regarding how Ms. Ogilvie accounted for trust funds through certain deferred revenue accounts.

c. In early May, 2012, Mr. Matheson told Ms. Keen that he believed Ms. Ogilvie to be dedicated but stressed. He also observed that the complexity of the accounting requirements at Windsor Elms had grown beyond Ms. Ogilvie. Ms. Keen told Mr. Matheson that she had decided to terminate Ms. Ogilvie's employment shortly before communicating the decision to Ms. Ogilvie;

d. In 2012, Windsor Elms reconstituted its Finance Committee. Kevin White was appointed as the new chair of the finance committee. Mr. White worked with Avon Valley Construction. It was Mr. White who introduced Kevin Matheson to Windsor Elms;

e. The reconstituted Finance Committee engaged a new auditor. Prior to 2012, Windsor Elms used Collins Barrow as its auditor. Now, they selected the accounting firm of Bishop & Company in Wolfville, Nova Scotia to serve as auditor. Bishop & Company completed some preliminary work in January 2012. However, the bulk of the new auditor's work would not begin until after March 31, 2012.[1] During the course of Bishop's first audit, concerns emerged regarding Ms. Ogilvie's accounting practices. I return to this issue below, as it provides important context around how Ms. Ogilvie's employment at Windsor Elms came to an end;

f. At the same time as these accounting concerns were emerging, issues regarding work hours and time management arose between Ms. Ogilvie and Ms. Keen. By email dated February 9, 2012, Ms. Ogilvie again raised the possibility of "flex hours" with Ms. Keen. Under Ms. Ogilvie's proposed model, she would work between 7:30 a.m. – 4:30 p.m. from Monday to Thursday and take every Friday off. Ms. Ogilvie concluded by saying that, "I breathed a sigh of relief when Kevin M. came aboard. This job outgrew me a bit this year but, once restructured, I'm sure it will flow better for the both of us." Ms. Keen did not approve this proposal. In her view, there was too much accounting work to be done on a daily basis. By email dated March 3,

[1] Windsor Elms' fiscal year-end was March 31 which coincided with the Department of Health's year-end.

> 2012, Ms. Keen summarized some of her concerns to Ms. Ogilvie. She stated, "Remember last year, finalizing year end was on hold and you were not able to catch up from the back log for months. You indicated that you were overwhelmed, etc. Long stretches off does not benefit you or the Elms. This concerns me and I cannot have that repeated. Spacing out breaks may be best." Ms. Ogilvie responded by recalling outstanding issues with the former auditor and that "payroll was an issue for the new system". However, she did not foresee any continuing issues, particularly with the support of Mr. Matheson. By email dated April 3, 2012, Ms. Keen raised another issue regarding Ms. Ogilvie's request for overtime in respect of a Donation and Fundraising Committee meeting, which occurred between 3:30 p.m. and 4:30 p.m. the day before. Ms. Ogilvie replied by noting that she was now working between 7:30 a.m. and 3:30 p.m. to "provide more quiet time in the morning as you and I had discussed."

[13] In early May 2012, Ms. Ogilvie was scheduled for an annual performance review. On Thursday, May 10, 2012, Ms. Keen repeated an earlier request for Ms. Ogilvie's self-evaluation. Ms. Ogilvie delivered her self-evaluation on May 14, 2012. In that document, Ms. Ogilvie acknowledged that "we needed the assistance of a CA which was thankfully approved by the Board." She also acknowledged certain problems which were now being identified by the new auditor. She attributed responsibility, at least in part, to the former auditor-who she said had not been much help in explaining or clarifying many aspects of fund accounting. She also noted that "there will be much more strategic planning with our new Audit Finance Committee that we did not have the support from in the past." She concluded with the overall comment, "I feel that there may be some changes needed to order to support not just myself, but the whole of the Business Office with some restructure in Office Hours; Flex Times of Work; Appointments; Interruptions; Environment Notice and congestion; Respect of quiet work and planning hours; Reporting Timelines; Policy Preparations; Planning of Monthly meetings; etc." She provided the self-evaluation to Ms. Keen in advance of their meeting on May 24, 2012.

[14] Ms. Ogilvie thought that the purpose of the meeting was to go over her self-evaluation and discuss future arrangements for accounting staff, including Kevin Matheson's ongoing assistance. However, in fact, Ms. Keen had already made the decision to terminate Ms. Ogilvie's employment.

[15] At the May 24, 2012 meeting, Ms. Keen communicated her decision to terminate Ms. Ogilvie's employment without cause. At the time, Ms. Ogilvie was approaching her 10th anniversary of employment with Windsor Elms (June 24, 2002).

[16] I accept that terminating Ms. Ogilvie's employment on May 24, 2012 was difficult but, based on the evidence before me, was a legitimate and understandable business decision. I make the following additional findings about this May 24, 2012 meeting:

1. Ms. Keen clearly communicated her decision to terminate Ms. Ogilvie's employment and, as well, offered terms of severance that included five months of working notice. In addition, if Ms. Ogilvie were unable to find alternate employment, Windsor Elms would pay a further two months' pay in lieu of notice (salary only);

2. Ms. Ogilvie testified that Ms. Keen seemed to be reading from a script and that this this "script" was then incorporated into a subsequent letter dated May 29, 2012, which formally confirmed the termination without cause. Ms. Keen did not testify at trial but Windsor Elms' external HR consultant at the time, Ivo Andriani of HR4Hire did testify. Mr. Andriani confirmed that he helped Ms. Keen prepare for the May 24, 2012 meeting and he also drafted the May 29, 2012 termination letter; and

3. The meeting was respectful. Ms. Keen neither disparaged nor humiliated Ms. Keen. For reasons which were both professional and personal, Ms. Keen was hopeful that Ms. Ogilvie would accept Windsor Elm's offer of working notice as a viable option.

[17] By letter dated May 29, 2012, as indicated, Windsor Elms repeated what was said during the May 24, 2012 meeting. Windsor Elms confirmed the decision to end Ms. Ogilvie's employment and offer a package intended to assist in the "transition away from Windsor Elms." Windsor Elms offered Ms. Ogilvie:

1. Five months' working notice or until October 28, 2012 to find alternate employment. During these five months, Ms. Ogilvie would be entitled to continue receiving a contribution to her pension and other employment benefits;

2. An additional two months' pay in lieu of notice if Ms. Ogilvie was unable to find alternate employment by October 28, 2012. During these two

months, Ms. Ogilvie would receive salary only. Windsor Elms would not continue to contribute to her RSP or provide other employment benefits; and

3. If Ms. Ogilvie found a new job at any time prior to December 28, 2012, Windsor Elms agreed to pay a lump sum payment equal to 50% of the salary otherwise payable to the end of December 27, 2012.

[18] At the time of the termination without cause, Ms. Ogilvie was 60 years old and, as indicated, had worked at Windsor Elms for a bit more than 10 years.

[19] Ms. Ogilvie was upset to discovered she was being let go. She felt betrayed and, in her words, "tricked". The nature of Windsor Elms' alleged "trickery" was not entirely clear, although it appears Ms. Ogilvie felt that her ongoing discussions around "flex time" leading up to her performance appraisal may have been used against her.

[20] I do not find that Ms. Keen tricked Ms. Ogilvie when she terminated her employment without cause. Nor do I find that Ms. Keen acted in a way which was deceitful or otherwise improper. On the contrary, the decision to terminate without cause was communicated to Ms. Ogilvie in a respectful, sympathetic, and appropriate way. Still, I accept that Ms. Ogilvie was caught off-guard and understandably emotional. She immediately left the workplace.

[21] What happened next lies at the heart of this dispute. Within two months (between May 24, 2012 and June 27, 2012), the relationship between the parties totally collapsed and ended with Windsor Elms taking the dramatic step of terminating Ms. Ogilvie for cause and without notice. The following chronology helps to illuminate how and why everything went wrong:

**Thursday, May 24, 2012 – Friday, June 29, 2012**

[22] As of May 24, 2012, the parties began to operate on the basis that Ms. Ogilvie remained an employee who was now under working notice. Ms. Ogilvie continued to be paid as an employee and took advantage of employee benefits such as sick leave. She kept her keys to Windsor Elms and her work phone.

[23] However, Ms. Ogilvie never actually returned to work. For the first five weeks following her termination without cause (May 24, 2012 – June 29, 2012), Ms. Ogilvie remained off work due to stress and anxiety. On Monday, May 28, 2012, she told her family doctor, Dr. Viji Nathan, that she was feeling pressure at work and unable to cope with the stress. She complained to Dr. Nathan of shakiness and continuing stress. Dr. Nathan diagnosed Ms. Ogilvie with anxiety.

On June 7, 2012, Dr. Nathan signed a note confirming that Ms. Ogilvie "is advised off [*sic*.] for 2 weeks due to medical reasons". [2]

[24] Windsor Elms did not dispute that Ms. Ogilvie was justified in taking sick leave between May 24, 2012 and June 29, 2012. That said, during the month of June 2012, other issues and events converged and exposed a growing rift between the parties. In particular:

1. In early June, 2012, Ms. Ogilvie engaged legal counsel (Jonathan Cuming) to help negotiate the terms of her severance. Windsor Elms had already engaged their own professional consultant: Ivano Andriani of HR4Hire. The parties quickly began to communicate exclusively through their intermediaries. It quickly became clear that the intermediaries were pursuing different goals. For his part, Mr. Cuming was focussed on negotiating the details of Ms. Ogilvie's severance package. The details of these settlement negotiations were not put into evidence except to say that they began with a letter from Mr. Cuming dated June 15, 2012. By contrast, although willing to discuss severance, Mr. Andriani was primarily concerned with scheduling a meeting to address concerns raised by the Windsor Elms' new auditor regarding Ms. Ogilvie's accounting records and practices;

2. On June 12, 2012, Windsor Elms' new auditor had just released a "Management Report" dated June 12, 2012 which detailed a number of serious concerns around Ms. Ogilvie's accounting practices (the "**June 12, 2012 Report**"). For example, the June 12, 2012 Report began with the statement:

> Within a very short time after commencing the audit field work, it became evident that the risk of fraud and/or error was significantly higher than originally anticipated. As a result, we were required to resort to detailed substantive procedures, reconstruction of accounting data and schedules and ultimately numerous yearend adjustments in order to be able to conclude that the balances and transactions discussed in the financial statements are reasonable.

[2] On Wednesday, June 6, 2012, Ms. Keen wrote Ms. Ogilvie to say she respected the room Ms. Ogilvie required following the news of her termination but expected to connect with Ms. Ogilvie on Monday, June 11, 2012. On Friday, June 8, 2012, Ms. Ogilvie wrote to Ms. Keen to say that she had a note from her family doctor confirming the need to take two weeks off due to stress and anxiety and she would then begin two weeks' vacation. That said, Ms. Ogilvie said that she would come to Windsor Elms over the weekend to check the bank reconciliations for May~~,~~ 2012. Ms. Keen responded later that day to again confirm that they needed to talk and that, "The stress can be alleviated by us talking soon. Staying away will only make it much worse."

The June 12, 2012 Report continued by listing 14 more specific concerns including:

a. The absence of any file or working papers to support certain prior year balances;

b. Improper journal entries;

c. Corrections of errors or reallocations in accounts which the auditor described as "Perfect setting for fraud (a tangled web – confuse and conquer – difficult to audit)";

d. Inability on the part of Ms. Ogilvie to "provide a clear explanation of her work and adjustments"; and

e. "Implausible responses to questions related to expense or revenue variances."

[25] The June 12, 2012 Report described Ms. Ogilvie as "warm and kind" and apologetic for her flawed work. However, the auditor continued, Ms. Ogilvie proved unable to provide the answers for the questions being posed. The auditor recommended that Windsor Elms "hire a qualified CFO" with the "skills required to do the job correctly and efficiently".

[26] Overall, the June 12 Report gave the clear impression that Ms. Ogilvie was, at best, incapable of meeting Windsor Elms' needs and, at worst, fraudulent.

[27] Ms. Ogilvie was aware of (and sensitive to) concerns being raised by the auditor. By email dated June 14, 2012, the payroll clerk who worked under Ms. Ogilvie (Candace Lyons) responded to an email from Ms. Ogilvie. In the middle of trial, Ms. Ogilvie disclosed for the first time a digital photograph of a computer screen showing Ms. Lyons' responding email. Ms. Lyons provided Ms. Ogilvie with an update on the auditor's work. She wrote that the auditors:

> .. are questioning Trust and why we don't give residents interest every month…blah blah blah ..they didn't seem to like the fact that we are using an accounts receivable module for trust instead of an actual trust module.

[28] For reasons that are not clear, Ms. Ogilvie did not disclose the entire email string between herself and Ms. Lyons. She only disclosed an image of Ms. Lyons' response to Ms. Ogilvie's original emails. I find that Ms. Ogilvie was communicating with Ms. Lyons and, as such, was familiar with (and concerned about) the concerns being raised by the auditor.

[29] By letter dated Thursday, June 21, 2012, Windsor Elms requested a response from Ms. Ogilvie to the severance package but raised "an additional matter" related to the June 12, 2012 Report. Ms. Keen promised to provide the June 12, 2012 Report "as soon as you contact me". In this letter, Ms. Keen asked Ms. Ogilvie to call by no later than Monday, June 25, 2012 and she concluded that:

> if we do not hear from you in respect of this by that time, we reserve the right to take the position that by your actions and any failure to respond, you has resigned from your employment with the Elms, that you have deprived us of the opportunity to reasonably assess your health circumstances, and that we have no further obligation to you of any kind including in respect of any medical or health benefit you may be disqualified from obtaining by reason of the ending of your employment.

It is relevant to repeat that while the letter was signed by Ms. Keen, it was written by Windsor Elms' human resources consultant, Mr. Andriani.

[30] By letter dated June 22, 2012, the auditor released a further report to Kevin White, Chair of Windsor Elms' Finance Committee (the "**June 22, 2012 Report**"). The June 22 Report confirmed that the audit for fiscal year ending March 31, 2012 was "substantially complete". More importantly for present purposes, it suggested that many of the concerns contained in the June 12, 2012 Report were either resolved or not as serious as previously thought. The June 22, 2012 Report began by noting that it "does not necessarily disclose all weaknesses or inefficiencies in your system of internal control". However, for the purposes of the audit, the auditors expressly confirmed that it did **not** identify:

1. "Uncorrected misstatements that were determined to be material either individually or in the aggregate, to the financial statements taken as a whole";

2. "Fraud involving management or employees who have significant roles in internal controls";

3. "Errors that may cause future financial statements to be materially misstated";

4. "Illegal or possibly illegal acts";

5. "Related party transactions that are not in the normal course of operation; or"

6. "Significant weaknesses in internal control with respect to the prevention and detection of fraud"

[31] The June 22, 2012 Report went on to list a number of issues and related recommendations. None were considered sufficiently material as to preclude the auditor from completing its work. Moreover, the auditor acknowledged that "corrective measures have been taken with respect to a number of the weaknesses identified in this report".

[32] Unfortunately, the June 22, 2012 Report was not provided to Mr. Andriani, the external HR consultant negotiating on Windsor Elms' behalf. As such and as will be seen below, Mr. Andriani continued to operate on the basis of the issues and fears contained in the June 12, 2012 Report.

[33] On June 25, 2012, the auditor released Windsor Elms audited financial statements for year ending March 31, 2012. (the "**June 25, 2012 Audited Financial Statements**"). Similar to the June 22, 2012 Report, the June 25, 2012 Audited Financial Statements did not contain any of the heightened concerns or suspicions contained in the June 12, 2012 Report. The following two comments in the June 25, 2012 Audited Financial Statements are germane as they relate to prior concerns expressed regarding Ms. Ogilvie's work:

> 1. The auditor observed that verification of income derived through donations "was limited to accounting for the amounts recorded in the records of the Society". However, the auditor did not express any lingering concerns beyond an inability to "determine whether any adjustments might be necessary to donation revenues." (page 2 of the June 25, 2012 Audited Financial Statements); and
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> 2. With respect to accounting issues during the construction of the new facility, the auditor noted that contributions were previously "deferred and amortized on the same basis as related property and equipment". However, "the society now recognizes the contributions on the same basis as the related debt is serviced. This change in accounting policy was applied retroactively and the figures for 2011 have been restated." (Note 16, page 12 of the June 25, 2012 Audited Financial Statements).

[34] If the auditor harboured any significant concerns regarding Ms. Ogilvie after releasing the June 25, 2012 Audited Financial Statements, they were neither apparent in the financial statements nor before the Court. Notably, Windsor Elms did not call the author of either the June 12 Report or the June 22 Report or the June 25, 2012 Audited Financial Statements or any representative from their auditing firm to testify as to the nature of any ongoing issues with Ms. Ogilvie's accounting practices or the impact of any such issues.

[35] In short, by June 25, 2012:

1. The fact that the accounting position had grown beyond Ms. Ogilvie was clearly established. However, this fact was already known to the parties in any event and it led to the prior and justifiable business decision to terminate her employment without cause on May 24, 2012;

2. At the same time, it was equally clear that the serious concerns expressed by the auditor in the June 12, 2012 Report had been either resolved or corrected in a manner sufficient to issue audited financial statements. Moreover, there were no residual concerns around fraud involving Ms. Ogilvie;

3. Notably, neither Mr. Andriani (Windsor Elms' representative) nor Mr. Cuming (Ms. Ogilvie's lawyer) ever received a copy of the June 22, 2012 Report prior to Ms. Ogilvie being terminated with cause in July, 2012. Instead, the parties' representatives continued to clash over the allegations contained in the auditor's June 12, 2012 Report. As will be seen, Mr. Andriani's continued reliance on an outdated report caused the discussions to deteriorate. More specifically, Mr. Andriani's communications suggested a level of urgency and mistrust that was unwarranted given both the June 22, 2012 Report and June 25, 2012 Audited Financial Statements.

[36] That said, certain of Ms. Ogilvie's actions also contributed to the increasing levels of suspicion and mistrust. In particular:

1. On June 8, 2012, Ms. Ogilvie wrote to say that she would be attending at work over the weekend to complete certain bank reconciliations and was planning to return to work after her planned two weeks' vacation July, 2012. In doing so, Ms. Ogilvie gave at least the initial impression that she may be able to perform some aspects of her work;

2. On June 18, 2012, Ms. Ogilvie asked another Windsor Elms' employee, Linda Lavernois, for permission to attend at Windsor Elms for the purpose of retrieving certain personal items from Ms. Ogilvie's office. Ms. Ogilvie also asked Ms. Lavernois to accompany her when she did so. Ms. Lavernois said that she was uncomfortable with the situation and simply passed Ms. Ogilvie's request along to Windsor Elms' CEO, Ms. Keen. I accept the testimony of Ms. Lavernois. I find that Ms. Ogilvie was aware that Ms. Lavernois was not prepared to accompany her, and that Ms. Ogilvie decided to attend at her office on the evening of June 18, 2012 in any event.

By itself, Ms. Ogilvie's decision to attend at her office at night seems relatively innocuous. However, context is important, and I note the following:

a. By June 18, 2012, all parties (including Ms. Ogilvie) were aware of the concerns being raised by the auditors. Recall, for example, Ms. Ogilvie's email exchange with Candace Lyons on June 14, 2012 and described above;

b. Ms. Ogilvie did not disclose that the items she removed from her office on June 18, 2012 included her personal day timer. Instead, she said that only two personal pieces of artwork were removed. In response to Ms. Keen's June 19, 2012 email, Ms. Ogilvie wrote:

> SORRY, DID NOT KNOW THIS WAS GOING TO BE AN ISSUE. JUST WANTED TO MY TWO PAINTINGS. CERTAINLY MEANT NO HARM TO LIN [Linda Lavernois] OR ANYONE ELSE. I WOULDN'T DO THAT, WAS JUST USING MY OWN INTEGRITY
>
> (capitals in email)

Given the concerns being raised by the auditor, Windsor Elms became concerned that Ms. Ogilvie would suddenly remove her personal day timer and would not disclose that fact. Rightly or wrongly, all of these missteps and miscommunications served to cast further suspicion upon Ms. Ogilvie. Finally on this issue, it is relevant to note that by email dated June 19, 2012, Ms. Keen wrote to Ms. Ogilvie confirming her request for access and replied that she could not consent to Ms. Ogilvie attending at her office until they had communicated. Ms. Keen stated:

> If there is anything you need urgently such as medication etc. please let me know. It is my understanding that you are off sick to the 21st (2 weeks). I still expect to hear from you on your response to our letter of notice.

Ms. Keen obviously did not know that Ms. Ogilvie had already attended at her office and removed certain items;

[37] Overall, both parties acted in ways which unnecessarily heightened tensions. Under a cloud of mutual suspicion, mistrust grew and festered.

**June 29, 2012 – July 27, 2012**

[38] As of Friday, June 29, 2012, Ms. Ogilvie began a two-week vacation. Ms. Ogilvie typically took holiday time in the first two weeks of July and she had already advised Windsor Elms of her vacation plans well in advance of her termination on May 24, 2012. By email dated March 5, 2012, Ms. Ogilvie had scheduled this time off.

[39] While she was away on holiday, the break-down of the employment relationship began to accelerate. By Thursday, July 5, 2012, and at the end of her first week of vacation, Ms. Ogilvie received a copy of the June 12, 2012 Report. As stated previously, she did not receive the June 22, 2012 Report, although it was available. In any event, between July 5, 2012 and July 16, 2012, Mr. Andriani (on behalf of Windsor Elms) began to insist upon a meeting with Ms. Ogilvie immediately upon her return. Among other things, Mr. Andriani wanted to address the concerns contained in the auditor's June 12, 2012 Report.

[40] On Tuesday, July 10, 2012, and while still on vacation, Ms. Ogilvie returned to the doctor complaining of muscle aches and pains, which appeared about a week earlier. She said she went to a walk-in clinic and was diagnosed with an infection in her left ear. Antibiotics were prescribed.

[41] On Wednesday, July 11, 2012, Mr. Andriani wrote Mr. Cuming to confirm Windsor Elm's expectation that Ms. Ogilvie attend at a meeting with Windsor Elms' CEO, Ms. Keen. At this time, Windsor Elms began to suspect that Mr. Cuming might not be passing information along to Ms. Ogilvie. It is not clear how or why this suspicion arose. However, for the first time, Mr. Andriani took the position that the meeting was "pertaining to [Ms. Ogilvie's] employment and is not a matter for communicating with counsel." The suggestion that Ms. Ogilvie's legal counsel should not be present at the proposed meeting aggravated the growing impasse. Later that same day, Mr. Andriani wrote further to express that Windsor Elms was merely extending Ms. Ogilvie's counsel the "courtesy" of communicating their "requirements to the employee" – again suggesting that they might bypass legal counsel and communicate directly with Ms. Ogilvie.

[42] On that same day, Mr. Cuming asked that Windsor Elms provide any of the auditor's questions to him in writing so that Ms. Ogilvie might prepare a considered response.

[43] On Thursday, July 12, 2012, Windsor Elms insisted that Ms. Ogilvie attend work on Monday, July 16, 2012 to address "substantive employment matters of concern" and warned that failure to attend the meeting could result in termination.

[44] Mr. Cuming responded on July 15, advising that Ms. Ogilvie had not yet been cleared to return to work. He offered to provide Windsor Elms with the requisite medical information and confirmed his request that he be permitted to attend any meeting between Ms. Ogilvie and Windsor Elms. The implication was that Ms. Ogilvie would not be returning to work following her two-week vacation.

[45] On Monday, July 16, 2012, Ms. Ogilvie's two-week vacation was over, but she did not return to work. Instead, she went to the doctor, again complaining of an ear infection and anxiety. Later that day, Mr. Andriani confirmed that as far as the Home was concerned, Ms. Ogilvie was not on sick leave. He agreed to establish a new meeting date of Wednesday, July 18, 2012.

[46] On July 17, Mr. Cuming indicated that Ms. Ogilvie was still too sick to meet, and proposed a new meeting date of Thursday, July 26, 2012. Windsor Elms agreed.

[47] Once again, Ms. Ogilvie's actions while on sick leave did not help the situation. Between July 19 and July 21, 2012, while too ill to work and on paid sick leave, Ms. Ogilvie was seen attending the Kempt Shore Music Festival. Ms. Ogilvie testified as to her interest in music and did not deny attending the music festival. Ms. Ogilvie insisted the music festival was therapeutic and helped ease her ongoing anxiety. However, again, her decision to attend music festivals while off sick cast suspicion on the severity of her medical condition.

[48] In any event, on Tuesday, July 24, 2012, Ms. Ogilvie's doctor signed an Attending Physician's Report which referred to an examination on Monday, July 16. It stated, "Pt is having increase in anxiety stress" and "pt is unable to return to work". It said the condition began on May 28, 2012.

[49] Ms. Ogilvie's family doctor, Dr. Viji Nathan, testified at trial. Among other things, she expressed a concern that, given Ms. Ogilvie's anxiety and stress, she might not be able to provide accurate responses to accounting questions in a pressurized setting.

[50] Windsor Elms did not present any medical evidence at trial but observed that Ms. Ogilvie began taking medication to help alleviate her stress and anxiety in 2008. Windsor Elms argued that this medication was sufficient to enable Ms. Ogilvie to perform her job function from 2008 – May, 2012 and, in the

circumstances, should have been sufficient to at least accommodate Windsor Elms' request for a meeting to discuss accounting issues.

[51] On Wednesday, July 25, 2012, Windsor Elms took the position that the meeting, now scheduled for July 26, was required. Windsor Elms also took the position that the Windsor Elms' Attending Physician's Report which Dr. Nathan completed for Ms. Ogilvie was insufficient to avoid this meeting. I note that Windsor Elms' did not present any medical evidence to support this conclusion and it was unclear as to the basis for Windsor Elms' rejecting its own form despite the trial testimony of Ms. Ogilvie's family physician, Dr. Nathan, who completed that form.

[52] Ms. Ogilvie did not attend the meeting scheduled on Thursday July 26. Windsor Elms responded by sending another letter, rescheduling the meeting for 8:30 a.m. on July 27, 2012, and repeating that failure to attend could result in termination.

[53] Ms. Ogilvie did not attend the meeting scheduled for Friday, July 27, 2012. By letter dated July 31, 2012, Windsor Elms terminated her employment effective July 27, 2012. In this letter Windsor Elms listed a number of conclusions justifying Ms. Ogilvie's termination with cause. In reaching these conclusions, Windsor Elms relied heavily on (and attached) the June 12, 2012 Report. The first and primary reason given in support of her termination for cause was described as follows:

> Your failure to perform your functions as Director of Financial Services – in any event, those functions identified in paragraphs [c] to [h], page 3 of the [June 12, 2012 Report], set out above, and your failure to take or seek the opportunity to reasonably address those failures with the Elms in the context of the grave concerns as to the Elms financial position, each represent a fundamental failure to perform basic functions essential to the position of Director of Financial Services of the Windsor Elms. These were matters on which the Elms was required and entitled to rely on you to perform. The extent and gravity of these failures were known to the Elms only after May 29, 2012

[54] There were other reasons, but the seriousness of the concerns expressed in the June 12, 2012 Report and the failure of Ms. Ogilvie to meet and address these concerns clearly predominated as the basis for her termination with cause.

[55] The July 31, 2012 letter was, once again, authored by Mr. Andriani but signed by Ms. Keen. And, once again, Mr. Andriani did not have the benefit of the auditor reports issued after the June 12, 2012 Report.

[56] After Ms. Ogilvie was terminated, ostensibly for cause, Mr. Andriani instructed accounting staff that 32 hours (four 8-hour workdays) be credited against Ms. Ogilvie's accrued vacation time – as opposed to sick leave. In effect, Mr. Andriani was confirming the belief that between July 24 and July 27, 2012, Ms. Ogilvie was not entitled to be off work due to illness and was, instead, deemed to have been taking vacation. As indicated, Windsor Elms did not present any medical evidence to contradict that of Dr. Nathan regarding Ms. Ogilvie's health at the time.

[57] On September 14, 2012, Ms. Ogilvie commenced this claim alleging wrongful dismissal and seeking damages. Ms. Ogilvie also says she was constructively dismissed during the working notice period, prior to the employer's attempt to terminate her for cause.

[58] On October 16, 2012, Windsor Elms filed its Statement of Defence denying any further liability to Ms. Ogilvie and taking the position it was justified in terminating Ms. Ogilvie for cause.

[59] Finally, following her termination on July 27, 2012, Ms. Ogilvie applied for, and received, Employment Insurance sick benefits for the full 15 weeks from approximately August 26, 2012 to December 9, 2012. Her employment insurance benefits continued until January, 2013 when she accepted a short-term contract position with Victoria Park Guest House, a residential care facility in Windsor, Nova Scotia. She worked at the Victoria Park Guest House between January, 2013 and June, 2013.

## ISSUES AND LEGAL PRINCIPLES

[60] The specific legal questions which arise from these facts may be summarized as follows:

1. Did Windsor Elms' dismissal without cause during the May 24, 2012 meeting (confirmed by letter dated May 29, 2012) constitute a repudiatory breach of the employment relationship?

2. If Windsor Elms' termination without cause on May 24, 2012 was a repudiatory breach of the employment contract, what are the legal implications having regard to the facts that:

    a. Ms. Ogilvie never accepted the severance package offered by Windsor Elms; and

b. Between May 24, 2012 and July 27, 2012, Ms. Ogilvie elected to remain as a Windsor Elms' employee, receiving (and accepting) sick-leave benefits and vacation-pay?

3. Was Ms. Ogilvie constructively dismissed prior to Windsor Elms' purported termination with cause effective July 27, 2012? If so, what are the legal consequences?

4. Was Ms. Ogilvie wrongfully dismissed effective July 27, 2012? If so, what are the legal consequences?

[61] In addressing these questions and in my view, the following legal principles apply:

1. Generally, the law of wrongful dismissal is grounded in the broader law of contract regarding repudiation and anticipatory breach while, at the same time, recognizing the more unique aspects of the employment relationship. (See *Potter v. New Brunswick Legal Aid and Services Commission*, 2015 SCC 10 ("***Potter***") at para 143).

2. Where one party commits a repudiatory breach, the non-breaching party has the right to treat the contract as over. This is known as "accepting" the repudiation. If the non-breaching party does not accept the repudiation, the contract remains alive (subject to various other doctrines). This is known as "affirming" the contract. In either case, the non-breaching party can pursue the available remedies. As will be seen below, those remedies may vary depending on whether that party has accepted the repudiation or affirmed the contract. In *Potter*, Cromwell, J. wrote at para 144:

> [144] The term repudiation refers to the situation in which a breach of contract by one party gives rise to the right of the other party to terminate the contract and pursue the available remedies for the breach: J.D. McCamus, *The Law of Contracts* (2nd ed. 2012), at pp. 676-78. This occurs when one party actually breaches the contract in some very important respect and is said to thereby repudiate the contract. If the other party "accepts" the repudiation, the contract is over. If the other party does not accept the repudiation, the contract continues (subject to various other doctrines). In either case, the non-breaching party can pursue the available remedies which may vary depending on whether that party has accepted the repudiation or affirmed the contract.

3. As indicated, the law also responds to the unique aspect of the employment relationship. Thus, in the context of an employment contract, each party to the contract has an implied obligation to give reasonable notice

of an intention to terminate the arrangement. Notice that a contract is to be terminated is not necessarily an immediate repudiation of that contract Whether an employer who gives notice of an intention to terminate has repudiated the contract depends on whether the proposed notice period is reasonable. In *Matthews v. Ocean Nutrition Canada Ltd.*, 2020 SCC 26, Kasirer J., for the court, wrote:

> [43] Neither party disputes that, at common law, an employer has the right to terminate the employment contract without cause — or, in this case, prompt the employee to choose to leave their job in circumstances that amount to a dismissal — subject to the duty to provide reasonable notice, a right which, as this Court noted in *Farber v. Royal Trust Co.*, [1997] 1 S.C.R. 846, at para. 23, is reciprocal in the contract of employment. When breached, the obligation to provide reasonable notice does not, in theory, turn on the presence or absence of good faith: it is, in a manner of speaking, a "good faith" wrongful dismissal (see *Machtinger*, at p. 990). The contractual breach that arises from the employer's choice in this regard is simply the failure to provide reasonable notice, which leads to an award of damages in lieu thereof (*Wallace*, at para. 115, per McLachlin J., as she then was, dissenting, but not on this point).
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> See also Peter Barnacle & Michael Lynk, *Employment Law in Canada*, 4th ed., vol. 2, loose-leaf ed. Toronto: LexisNexis Canada Inc. (updated to Feb. 2018), at §14.106.
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> The factors used to assess whether a proposed notice period is reasonable were described in *Bardal v. Globe & Mail Ltd.* (1960), 24 D.L.R. (2d) 140 (Ont. H.C.) and are often referred to as the "*Bardal* factors". In the circumstances of this case, however, it is first necessary to separate and analyse the two different components of Windsor Elms' proposed notice period: working notice and pay in lieu of notice.
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> As a practical matter, pay in lieu of notice seeks to achieve the same result as working notice. As such, "There is no functional difference at law between working notice and payment in lieu of notice". *Taylor v. Dyer Brown*, 2004 CarswellOnt 4703 (Ont. C.A.), at para. 14) However, there is an important conceptual difference between the two forms of providing notice to an employee. In particular:
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> **Working notice**: When considering the issue of "working notice", two primary issues emerge: is the employee's continued presence during the period of working notice reasonably tolerable in the circumstances? And what is a reasonable amount of working notice given the employee's unique circumstances? In this case, the second issue (quantum of working notice) predominates. In *Wrongful Dismissal*, vol. 2, loose-leaf ed. (online), Toronto: Thomson Carswell, 2020, David Harris wrote that: "…the quantum of "working notice" must be neither more nor less than that of reasonable notice upon termination of employment. In

effect, working notice is a calculation of notice by the employer. In order to be effective for its intended purpose, "working notice" must either (1) provide the amount of notice agreed upon in the parties' employment contract (provided that the latter was valid in the first place and continues to be enforceable at the date of the giving of notice); or (2) approximate the period of "reasonable notice" that courts have calculated in similar cases, having regard to the *Bardal* factors and other judicial guidance in this area. …" (at §3.1) Re-employment and any amounts earned by the employee during the period of working notice obviously influence the remedy and the calculation of damages. Thus, for example, employers receive credit for amounts paid to the employee during the working notice period because damages are available only in respect of those months that the employee was not permitted to work.

**Pay in lieu of notice**: Employment contracts include an implied term requiring reasonable notice in the event of termination. Where reasonable notice is provided, the terminating party is considered to have complied with this implied term. However, pay in lieu of notice is exactly what the phrase suggests: it is pay *in lieu of* (or "in the place of") notice. Legally speaking, it is not notice and, thus, cannot amount to compliance with an implied term of the employment contract. Rather, it is a pre-estimate of damages associated with a breach of (not compliance with) the employment contract. The employer's pre-estimate of damages may be more than sufficient to cover whatever amounts the employer would have otherwise paid if the employee been provided notice. In that case, there would be no residual claim for damages. Put slightly differently, as a practical matter, the financial implications associated with giving notice may the same as pay in lieu of notice. Nevertheless, there is an important legal distinction to be made. In *Dunlop v. B.C. Hydro & Power Authority*, 1988 CarswellBC 414 (C.A.) ("**Dunlop**"), Lambert, J.A. explains the distinction as follows:

There are a number of reasons why the latter term is not implied from the employment relationship as part of the contract of employment. It would be a more complicated term than can readily be implied by following the business efficacy and officious bystander rules. It would not operate in the same way with respect to the employee as it would with respect to the employer. It would mean that if an employer elected to give pay in lieu of notice, the employer would be complying with the contract and not breaking it. And the contract would require the full payment to be made immediately. The true nature of the implied term, namely, as being a term that each party must give the other reasonable notice of termination, is indicated by the customary application of the principle of mitigation. If the implied term were to be considered to contain a provision for pay in lieu of notice, and if the employer elected to invoke that term and gave no notice of termination, there would be no obligation on the part of the employee to mitigate damages by seeking other employment, even if the employer did not pay the full amount that such a term would have required, because such a term would require immediate payment of the full amount without regard to the measurement of any loss actually suffered by the employee. But the principle of mitigation is consistently applied, even where the employer elects to make a payment in lieu of

> notice. The reason is that, when an employer gives pay in lieu of notice, he does so as an attempt to compensate for his breach of the contract of employment, not as an attempt to comply with an implied term of the contract of employment.
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> As such, again, pay in lieu of notice presumes a breach of the implied term around reasonable notice and represents a pre-estimate of damages in connection with that breach. Any remaining debate about whether pay in lieu amounts to a breach of the employment contract was recently settled in *Matthews v. Ocean Nutrition Canada Ltd.*, 2020 SCC 26. Adopting the reasoning in *Dunlop,* Kasirer J., for the court, wrote at paras 74-75:
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> "On my reading, this Court in *Sylvester* confirmed that "[d]amages for wrongful dismissal are designed to compensate the employee for the breach by the employer of the implied term in the employment contract to provide reasonable notice of termination" (para. 15). Authority elsewhere confirms this same idea: there is no such implied term of the contract to provide payment in lieu (see, e.g., *Love v. Acuity Investment Management Inc.*, 2011 ONCA 130, 277 O.A.C. 15, at para. 44)"
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> As explained by the Court of Appeal for British Columbia *in Dunlop v. B.C. Hydro & Power Authority* (1988), 32 B.C.L.R. (2d) 334, at pp. 338-39, there are three principal reasons why this is an important distinction. First, there are issues surrounding the complexity of an implied term to provide pay in lieu of notice, and whether such a term can readily be implied into an employment contract. Second, implying a term to provide pay in lieu of notice "would mean that if an employer elected to give pay in lieu of notice, the employer would be complying with the contract and not breaking it", and thus "the contract would require the full payment to be made immediately". Third, if the employer elected to invoke such an implied term and gave no notice of termination, "there would be no obligation on the part of the employee to mitigate damages by seeking other employment since the term requires a payment in full without regard to the employee's actual losses. Ensuring that courts and litigants properly understand this distinction is thus important as it can profoundly affect employees' financial lives. To the extent that some cases suggest otherwise, I respectfully disagree."

4. If the proposed working notice period is reasonable in all the circumstances, there is no breach of the contract. During the working notice period, the employment relationship, with its corresponding rights and obligations, continues until the date of termination. As such, the employer will be entitled to rely on any just cause that may arise during that time. In *Wrongful Dismissal Practice Manual*, 2d ed., vol. 1, loose-leaf ed. Toronto: LexisNexis Canada. Inc. (updated to March 2019) at §2.49, Ellen E. Mole writes:

> **Just cause during notice period** – Where an employer has given adequate working notice or pay in lieu and so has not repudiated the contract, one case has

> said that the contract will continue in effect until the working notice expires, so that the employer will still be entitled to rely on any just cause that may arise during that time. That same case stated that the situation might be different if inadequate notice had been given, so that the employer had repudiated the contract. In one case, an employee had been given six months' working notice of dismissal. Three months later, he was dismissed outright for alleged just cause, but the allegations were not accepted by the trial judge. Nevertheless, the judge ruled that the dismissal was effective as of the original notice date, giving credit for the three months' notice during which the employee had worked.

See also *Boutcher* v *Clearwater Seafoods Limited Partnership*, 2010 NSCA 12, *Aasgaard v. Harlequin Enterprises Ltd.*, [1993] O.J. No. 1484 (Ont. Ct. J. (Gen. Div.)) at paras 15 – 17; aff'd [1997] O.J. No. 1112 (Ont. C.A.); and the decision of Karakatsanis, J. (as she then was) in *Kontopidis v. Coventry Lane Automobiles Ltd.*, [2004] O.J. No. 1979 (Ont. Sup. Ct. J.) at para 33.

> Similarly, if the working notice period is unreasonable, the employee may treat the inadequate offer as a repudiation of the employment agreement and accept that repudiation, thus bringing the contract to an end. The employee could then sue for damages. On the other hand, the employee may elect to continue working through the proposed (unreasonable) notice period and then sue for wrongful dismissal. In that case, again, the employment relationship, with its corresponding rights and obligations, continues until the date of termination. As such, the employer will be entitled to rely on any future just cause for termination that may arise during the period of working notice. See, for example, *Restauronics Services Ltd. v. Forster*, 2004 BCCA 130 ("***Restauronics***") at paras 36 – 45.
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> Where an employer, acting in good faith, dismisses an employee for cause (even during a period of working notice), the employee is not entitled to additional damages merely because just cause is not made out at trial. Any additional damages would need to be grounded upon additional misconduct beyond the mere act of dismissing with cause during the period of working notice.

5. Any of the employee's earnings during the proposed notice period would be deducted from the damages.

6. The duty to mitigate does not arise until the employment contract comes to an end by some act of the employee. That is, the duty to mitigate does not arise until the employee communicates his or her intention to accept the employer's repudiation of the contract, bringing the agreement to an end. *Farquhar v. Butler Brothers Supplies Ltd*., 1988 CarswellBC 46 (C.A.), at para.18. See also, *Restauronics, supra*, at para. 41.

## ANALYSIS OF ISSUES AND APPLICATION TO THE FACTS

[62] I return to the specific issues identified in paragraph 59 above.

**Issue 1: Did Windsor Elms' dismissal without cause during the May 24, 2012 meeting (confirmed by letter dated May 29, 2012) constitute a repudiatory breach of the employment relationship?**

[63] There is no doubt that Windsor Elms' notice of termination originally given orally on May 24, 2012 and confirmed in writing on May 29, 2012 was effective. As of May 24, 2012, it was abundantly obvious to everyone involved, including Ms. Ogilvie, that her employment at Windsor Elms was being terminated. Ms. Ogilvie testified that the letter dated May 29, 2012 repeated what Ms. Keen said to her during the May 24, 2012 meeting. In reading that letter, the only reasonable, inescapable conclusion flowing from that letter is that Ms. Ogilvie's employment was coming to an end. The letter was specific, unequivocal and clearly communicated that Ms. Ogilvie's "last day of work will be October 26, 2012".

[64] The question becomes whether Windsor Elms' proposed severance package complied with the implied term to provided reasonable notice.

[65] At trial, Windsor Elms took the position that their severance package was within the range of reasonable outcomes and should be upheld.

[66] For her part, Ms. Ogilvie seeks 18 months' notice. She refers to *Moran* v. *Atlantic Co-operative Publishers*, (1988) 88 N.S.R. (2d) 117 (T.D.) ("***Moran***"), which she said in pre-trial submissions involved "a 61 -year-old plaintiff employed as a managing editor of a small monthly publication for nine years"; and *McKeough* v. *H.B. Nickerson & Sons Ltd*, (1985), 71 N.S.R. (2d) 134 (T.D.) ("***McKeough***"), which involved a 63-year-old senior executive with seven years' experience with the company and who was two years from retirement. The employee in that case was also awarded 18 months' salary in lieu of notice.

[67] Neither position achieves a just result, in my opinion. Five months' working notice and, if necessary, a further two months' pay in lieu of notice is clearly inappropriate and inadequate in the circumstances. As indicated above, pay in lieu of notice represents a presumptive breach of the implied contractual obligation to provide reasonable notice and, as such, is a pre-estimate of damages.

[68] As to the Plaintiff's claim for 18 months' notice, the cases she relies upon are distinguishable. *Moran* involves a businessperson with more specific skills than Ms. Ogilvie. *Moran* also included evidence of enticement. *McKeough* also

involved an employee with significantly more specific or unique skills and responsibilities.

[69] In my view and in the circumstances, the appropriate notice period was 12 months. Any assessment of reasonable notice begins with the *Bardal* factors, while taking into account the jurisprudence which followed that decision. Ms. Ogilvie had worked for Windsor Elms in a senior accounting position for 10 years. In fact, she was the sole Director of Finance reporting directly to Windsor Elms' CEO, Ms. Keen. Ms. Ogilvie was 60 years old at the time of her termination and had no immediate plans to retire. Finally, Ms. Ogilvie's age created barriers to locating new employment post-termination although, it should be noted, Ms. Ogilvie has never experienced significant difficulty in obtaining employment and, indeed, found employment almost immediately after recovering her health in January, 2013.

[70] 12 months' notice is also consistent with the range of outcomes in the following, more recent cases: *Ellerbeck v. KVI Reconnect Ventures Inc.*, 2013 BCSC 1253 ; *O'Neil v. Towers Perrin Inc.*, [2001] O.J. No. 3453 (S.C.J.), aff'd on other grounds [2003] O.J. No. 2507 (C.A.); *Ellis v. Prince Rupert Fisherman's Co-Operative Assoc.*, [1991] B.C.J. No. 11; *Black v. Robinson Group Ltd.*, [2002] O.J. No. 4011 (S.C.J.), aff'd on other grounds, [2004] O.J. No. 2042 (C.A.) ; *Fisher v. Lakeland Mills Ltd*., 2005 BCSC 64, aff'd 2008 BCCA 42; *Mitchell v. Universal Sales Ltd.*, 2003 NBQB 382; *Piresferreira v. Ayotte*, [2008] O.J. No. 5187, var'd on other issues, 2010 ONCA 384, leave to appeal denied [2010] S.C.C.A No. 283; *Smith v. Mistras Canada Inc*., 2015 ABQB 673).

[71] As to Ms. Ogilvie's complaints regarding the manner in which her employment was terminated without cause on May 24, 2012, Ms. Ogilvie testified that she felt embarrassed and believed she may have been "tricked". However, she conceded that Windsor Elms did not act in an abusive or malicious manner. I am entirely satisfied that there was no misconduct or bad faith in the way Windsor Elms approached Ms. Ogilvie's termination on May 24, 2012. Based on the evidence I read and heard, Ms. Ogilvie was treated in a respectful and sympathetic manner. I am similarly satisfied that Windsor Elms made every reasonable attempt to ensure that the environment in which Ms. Ogilvie was being asked to operate during the period of working notice was neither hostile, demeaning nor intolerable. Indeed, it was in Windsor Elms' best interest to ensure a smooth transition between Ms. Ogilvie and whoever was ultimately hired as her replacement.

**Issue 2: Given that Windsor Elms' termination without cause on May 24, 2012 was a repudiatory breach of the employment contract, what are the legal implications having regard to the facts that:**

**1. Ms. Ogilvie never accepted the severance package offered by Windsor Elms; and**

2. **Between May 24, 2012 and July 27, 2012, Ms. Ogilvie elected to remain as a Windsor Elms' employee, receiving (and accepting) sick-leave benefits and vacation-pay?**

[72] Ms. Ogilvie did not elect to bring the employment contract to an end. In other words, she did not treat the employer's severance proposal as a repudiatory breach of the contract (either on the basis that working notice was not viable or that the notice period was inadequate) and terminate her employment contract. Thus, the employment contract remained alive. To state the obvious, this means that the rights and obligations created under that contract also remained alive.

[73] Because the employment contract continued after May 24, 2012, Windsor Elms was entitled to rely on any just cause that arose during that time to terminate Ms. Ogilvie without notice. Likewise, Windsor Elms remained vulnerable to a finding that it had constructively dismissed Ms. Ogilvie if its conduct during the notice period amounted to a significant breach of the employment contract, or otherwise showed that it no longer intended to be bound by the terms of the agreement.

**Issue 3: Was Ms. Ogilvie constructively dismissed prior to Windsor Elms' purported termination with cause effective July 27, 2012? If so, what are the legal consequences?**

[74] Ms. Ogilvie argues that Windsor Elms constructively dismissed her when it decided to limit her access to the facility. For example, on June 19, 2012, Windsor Elms told Ms. Ogilvie that she was not permitted to attend at Windsor Elms without first seeking approval. This decision was communicated to Ms. Ogilvie immediately after Ms. Ogilvie decided to attend at Windsor Elms one evening to remove certain items, including her personal diary. Given the concerns being expressed by the auditor at the time, Ms. Ogilvie's actions served to unnecessarily heighten tensions and triggered the response which she now claims to constitute constructive dismissal.

[75] I do not find that Windsor Elms constructively dismissed Ms. Ogilvie prior to the purported termination with cause effective July 27, 2012.

[76] In *Potter*, Cromwell J., wrote:

> [153] Constructive dismissals may be the result of repudiatory breach — that is, an actual breach of a condition or other sufficiently significant term of the employee's contract. As McCardie J. put it in *Rubel Bronze*, "If the conduct of the employer amounts to a basic refusal to continue the servant on the agreed terms of the employment, then there is at once a wrongful dismissal and a repudiation of the contract": p. 323. These sorts of breaches relate to unilateral and important changes to the employee's terms of employment; the question of how significant the change must be is one of degree: England, at pp. 348-56; *Rubel Bronze*, at p. 323.
>
> [154] Constructive dismissal may also occur even if the employee cannot point to an actual, specific, important change in compensation, work assignments, etc., that on its own constitutes a repudiatory breach. This occurs, for example, where the employer, through a course of conduct, "evince[s] an intention no longer to be bound by the contract": *Rubel Bronze*, at p. 322, citing *General Billposting Co. v. Atkinson*, [1909] A.C. 118 (H.L.), at p. 122, per Lord Collins, quoting *Freeth v. Burr* (1874), L.R. 9 C.P. 208, at p. 213. The focus in these sorts of anticipatory repudiation cases is not simply on the seriousness of any actual breach, but on what the employer's intent is with respect to *future* adherence to the contract of employment.
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> [155] Thus, an employee is constructively dismissed in two situations: where the employer's conduct is "a significant breach going to the root of the contract of employment" and where the employer's conduct otherwise "shows that the employer no longer intends to be bound by one or more of the essential terms of the contract": *Western Excavating (ECC) Ltd. v. Sharp*, [1978] 1 All E.R. 713 (C.A.), at p. 717.

[77] I do not accept that Windsor Elms' actions prior to July 27, 2012 rise to a "significant breach going to the root of the employment contract" or revealed "an intention to no longer be bound by the contract". First, Ms. Ogilvie's own actions triggered Windsor Elms' response. While Ms. Ogilvie insists that removing personal items was entirely innocent and wonders why Windsor Elms was not prepared to be more trusting, I accept the evidence that she attended her office unaccompanied, at night, and in the midst of the auditor's investigation into her own work. Her explanation as to why it became suddenly necessary to remove these items was not compelling, given her illness and the fact that she was expressly told that Windsor Elms requested that she be accompanied. While I am not prepared to infer any malice or misconduct, I do find that Ms. Ogilvie's actions unnecessarily raised suspicions and that Windsor Elms' reaction was justifiable in the circumstances.

[78] Second, Ms. Ogilvie's responsibilities did not change and, indeed, Windsor Elms continued to expect that Ms. Ogilvie would return to work to fulfill those responsibilities. That is, Windsor Elms hoped the employment contract would

continue and, in the interim, it properly complied with the terms of the employment contract.

[79] Third, and perhaps most importantly, Ms. Ogilvie never treated (or provided notice that she considered) Windsor Elms' actions as amounting to constructive dismissal. On the contrary, while she remained absent, she continued to expect and receive vacation pay and sick pay. In short, Ms. Ogilvie did not accept any alleged repudiation based on constructive dismissal and, instead, continued to accept and receive the benefits of her ongoing employment. (*Restauronics, supra,* at paras 41 - 44 and *Farquhar v. Butler Brothers Supplies Ltd., supra,* at paras 15 and 18. *Farquhar* was also cited by the Supreme Court of Canada in *Evans v. Teamsters, Local 31*, 2008 SCC 20.)

**Issue 4: Was Ms. Ogilvie wrongfully dismissed for cause effective July 27, 2012? If so, what are the legal consequences?**

[80] As to Windsor Elms' subsequent decision to terminate Ms. Ogilvie's employment effective July 27, 2012, I do not agree that Windsor Elms had grounds to terminate Ms. Ogilvie with cause.

[81] Ms. Ogilvie was the sole Director of Financial Services and, as such, the chief employee responsible for the facility's financial affairs. Windsor Elms points out that Ms. Ogilvie had a copy of the auditor's June 12, 2012 Report. As indicated above, that report contained a number of troubling allegations regarding Ms. Ogilvie's accounting practices. Windsor Elms states that, in the circumstances, Ms. Ogilvie owed a duty of fidelity and an obligation to either:

1. Meet with Windsor Elms as soon as reasonably possible to discuss the concerns raised in the June 12, 2012 Report; or

2. Prove, on the balance of probabilities, that she was unable to meet and address these concerns.

[82] Windsor Elms says that Ms. Ogilvie did neither. Windsor Elms notes that it made numerous efforts to meet with Ms. Ogilvie after her holidays were over. And that it consistently warned her that failure to meet could result in termination. Notwithstanding, and in breach of her obligations as a senior employee, Windsor Elms argues Ms. Ogilvie rebuffed every attempt to schedule a meeting. Given the serious, underlying accounting problems, Windsor Elms argues that Ms. Ogilvie's repeated refusal to meet justified Windsor Elms' decision to terminate her employment with cause effective July 27, 2012.

[83] As to Ms. Ogilvie's statement that she was too ill to meet due to ongoing anxiety, Windsor Elms' responds that the medical evidence was insufficient. As indicated, Windsor Elms observes that Ms. Ogilvie suffered from anxiety well before her termination on May 24, 2012 and, in fact, was on the same anti-anxiety medication for years before being terminated, and throughout July, 2012. Windsor Elms questions why the same medication which allowed Ms. Ogilvie to regularly attend work before the termination without cause on May 24, 2012 was insufficient to accommodate their request for a meeting.

[84] I agree that Ms. Ogilvie owed a duty of fidelity to take every reasonable step to meet and discuss significant accounting issues prior to her termination with cause effective July 27, 2012. An employee's duty of fidelity is generally discussed in *Restauronics, supra*, at paragraphs 45 to 47. Ms. Ogilvie was the organization's highest-ranking financial employee and, as such, had a unique understanding of, and responsibility for, Windsor Elms' accounting records.

[85] However, respectfully, Windsor Elms' position fails to take into account the following facts:

> 1. The accounting concerns identified in the June 12, 2012 Report were largely and almost immediately resolved in the June 22, 2012 Report and June 25, 2012 Audited Financial Statements. The seriousness of the concerns was certainly muted. Based on the evidence, the auditor was not prevented from completing its work and Windsor Elms did not suffer any ongoing operational or reputational damage. Unfortunately, Mr. Andriani was never provided with a copy of all the subsequent reports which served to diminish the seriousness of the problems raised in the June 12, 2012 Report. He continued to operate under the June 12, 2012 Report where the language was clearly more severe and suggested problems that were potentially very troubling – including the possibility of accounting fraud. As a result, the parties' representatives became locked in an atmosphere of suspicion and mistrust which the June 22, 2012 Report might have helped dissipate. For the purposes of this proceeding, suffice it to say that Windsor Elms was insisting upon a meeting to discuss problems that were overstated in terms of their continuing impact on Windsor Elms. In these circumstances, it is difficult to conclude that Ms. Ogilvie breached a duty of fidelity in failing to meet and discuss exaggerated concerns and outdated information;
>
> 2. Similarly, any alleged urgency was overstated. While Windsor Elms may have been frustrated by Ms. Ogilvie's refusal to meet shortly after her vacation, the June 22, 2012 Report and the June 25, 2012 Audited Financial

> Statements suggest that there was nothing particularly urgent about meeting. Again, Mr. Andriani was working from incomplete information and so, again, his concerns over urgency were unnecessarily exaggerated.
>
> 3. Ms. Ogilvie tendered evidence in the form of her medical records and the testimony of her family physician, Dr. Nathan. They support her decision not to attend further meetings leading up to the July 27, 2012 termination. As indicated, Dr. Nathan expressed concerns around Ms. Ogilvie's ability at the time to safely provide accurate answers to accounting questions and that Ms. Ogilvie may be prone to mistakes given her levels of stress and anxiety. There were other medical issues as well. Windsor Elms did not present any medical evidence. I accept Dr. Nathan's evidence as sufficient to justify Ms. Ogilvie's decision not to attend a meeting where Windsor Elms sought to press for answers to accounting questions which were said to be extremely serious based on the June 12, 2012 Report but, in fact, had been largely resolved or at least significantly diminished in terms of both severity and urgency.

[86] In all the circumstances, Ms. Ogilvie's failure to meet with Windsor Elms was supported by medical evidence before the Court and, in any event, did not constitute a breach of her fiduciary obligations. The fact of the matter was that Mr. Andriani was operating from incomplete information. The evidence before the Court did not establish, on the balance of probabilities, that the accounting issues originally raised by the auditor were as grave or severe or fundamental as the letters drafted by Mr. Andriani suggested.

[87] In summary, Ms. Ogilvie was terminated without cause effective May 24, 2012. Windsor Elms' severance package at that time was inadequate and unreasonable. Ms. Ogilvie was entitled to 12 months' notice effective May 24, 2012 and continuing until May 24, 2013.

[88] The conflict which arose between the parties was certainly aggravated by the fact that Windsor Elms did not provide its human resources representative, Mr. Andriani, with complete information regarding the ongoing efforts of the auditor. However, I do not attribute any malice or bad faith to this miscommunication. Moreover, as indicated, both parties share some responsibility for the unfortunate tensions which arose. I am not satisfied that the conduct of Windsor Elms was such as to justify additional damages in the form of, for example, aggravated or punitive damages. None of the subsequent events either increased or decreased Ms. Ogilvie's entitlement to 12 months' notice.

[89] In determining the amounts owing to Ms. Ogilvie, the following additional directions apply:

> 1. Ms. Ogilvie shall be reimbursed and paid for any additional, proven amounts paid by Ms. Ogilvie to purchase private health and dental benefits to replace that which was lost during the 12-month notice period and following her termination on July 29, 2012;
>
> 2. Ms. Ogilvie shall be paid her accrued vacation time and the time accrued for statutory holidays. The accrued vacation time shall include the 32 hours which were deducted for the period July 24 – 27, 2012 following Windsor Elms' decision to terminate Ms. Ogilvie's employment with cause as of July 27, 2012;
>
> 3. Ms. Ogilvie is not entitled to be paid for "time in lieu" as this was based entirely on the honour system and could not be converted into cash;
>
> 4. Ms. Ogilvie shall be paid the proven and accrued pension contributions that Windsor Elms would have made during the 12-months' notice period but that have yet to be paid;
>
> 5. Those employment-related amounts paid to Ms. Ogilvie during the 12-month notice period shall be deducted from the principal amount otherwise owing by Windsor Elms. These amounts would include for example, sick pay benefits, employment insurance benefits and her employment earnings at Victoria Park Guest House.

[90] There is a further issue regarding a retirement allowance. Ms. Ogilvie claims entitlement to an additional $6,000 representing a retirement allowance of $600 for each year of employment at Windsor Elms. Windsor Elms disputes entitlement and, alternatively, claims that any entitlement would be limited to $500 for each year of employment.

[91] In my view, the evidence before me is insufficient to demonstrate an entitlement to the retirement allowance and I am not prepared to order that it be paid.

[92] First, Ms. Ogilvie testified that Windsor Elms' decision to terminate her employment without cause effective July 27, 2012 improperly deprived her of the opportunity to retire and, thus, also deprived her of the opportunity to apply for a retirement allowance. However, the evidence before me established that Ms. Ogilvie did not retire during the 12-month notice period. Indeed, Ms. Ogilvie

testified that she had no such intention of retiring at that time. Her work history since leaving Windsor Elms bears this out. Ms. Ogilvie found alternate employment at the Victoria Guest House as of January, 2013. She then received financial assistance to retrain in another field and found employment in that field until she had to leave for cancer treatment. After having recovered from cancer treatment, she returned to bookkeeping and has found consistent, steady employment to the date of trial in 2020, eight years after her employment at Windsor Elms was terminated.

Also consistent with the conclusion that Ms. Ogilvie did not intend to retire during the 12-month notice period is the fact that Ms. Ogilvie did not begin to draw her retirement benefits. On this issue, I also note that Ms. Ogilvie's oral testimony as to when she actually began receiving her retirement benefits was ambiguous. At one point, she stated that it was 2014. However, she also indicated that it might have been sometime in 2013 but it was unclear as to whether it would have been during (or after) the 12-month notice period. No documents were presented to clarify the issue.

[93] Second, the actual documentary evidence presented in support of this claim was deficient. I was only provided with two pages from the Collective Agreement between Windsor Elms and the Nova Scotia Nurses' Union for the period November 1, 2012 – October 31, 2014. I was specifically directed to Article 19 of this agreement which states:

> **ARTICLE 19: RETIREMENT ALLOWANCE AND PENSION BENEFITS**
>
> 19.00 **Effective the date of signing**, a Nurse with a minimum of ten (10) years of service with the Employer [Windsor Elms] who retires in accordance with the provisions of the Employers' Pension Plan or the Canada Pension Plan shall be entitled to the payment of the sum of **six** hundred dollars **($600)** per year of service to a maximum of **fifteen thousand** dollars **($15,000)**.
>
> (emphasis is original)

[94] In response to the problem that Ms. Ogilvie was not a member of the Nova Scotia Nurses' Union (and therefore not eligible to benefits created under the Collective Agreement), Windsor Elms' current CEO, Susan Hayes, testified that Nova Scotia's Department of Health decided this retirement allowance would be equally extended to senior management or non-union employees such as Ms. Ogilvie. Ms. Ogilvie provided similar evidence. Nevertheless, problems remained. For example:

1. The specific terms under which the retirement allowance was extended to senior management were not clarified. Ms. Ogilvie testified that this particular provision regarding a retirement allowance was incorporated into a document she described as the "Department Head Management Contract" established through Windsor Elms CEO, Sherry Keen. However, the "Department Head Management Contract" was not put into evidence. The absence of this document became more significant when Ms. Ogilvie testified that this document contained specific terms which precluded her from applying for the retirement allowance because she had been terminated purportedly for cause effective July 27, 2012;

2. Even if I assumed Article 19 of the Collective Agreement (copied above) was copied directly into the Department Head Management Contract and made available to Windsor Elms' senior management, I was not provided with any evidence as to specifically how Ms. Ogilvie might "retire in accordance with the provisions of the Employers' Pension Plan or the Canada Pension Plan" and thus become eligible for the retirement allowance.

[95] In sum, the evidence before me was insufficient to safely conclude on the balance of probabilities that Ms. Ogilvie was also entitled to receive a $6,000 retirement allowance, as claimed.

[96] If the parties are unable to agree on the specific amounts payable in respect of damages or any component of the damages, I will accept further submissions in writing.

[97] Finally, if the parties are unable to agree on either prejudgment interest or costs, I will accept written submissions on these issues within 30 days of receiving these reasons.

Keith, J.