IN THE SUPREME COURT OF NOVA SCOTIA
Citation: Chambers v. Axia Netmedia Corporation, 2004 NSSC 24

Date: 2004/01/29
Docket: SH No. 173374
Registry: Halifax

Between:

Neil Chambers — Plaintiff

v.

Axia Netmedia Corporation — Defendant

D E C I S I O N

Judge: The Honourable Justice A. David MacAdam

Heard: December 16,17,18, 19 & 22, 2003, in Halifax, Nova Scotia

Counsel: Michael J. O'Hara, for the Plaintiff
Noella Martin, for the Defendant

By the Court:

BACKGROUND

[2] The plaintiff, Neil Chambers ("Mr. Chambers"), is 45 years old. He began employment with Atlantic Netcom Limited, ("Atlantic") in 1987 and continued with its successor company, Axia Netmedia Corporation ("Netricom") after it had acquired the shares of Atlantic in May 1999. Mr. Chambers held various positions with the two companies with his last position being Manager of Customer Service/Project Manager. Netricom is in the information technology industry, with its primary business being the designing, installation and management of communications networks, including the provision of computer and communication cabling, hardware, and related services.

[3] Chambers owned a minority share interest in Atlantic and received the final payment for his shares, by way of shares in Netricom, in May 2001. He continued in employment with Netricom until June 2001.

[4] In June 1999, Mr. Chambers met with Darryl Hill (" Mr. Hill"), the Vice President of the Atlantic Region of Netricom and the former majority owner of Atlantic. Mr. Hill informed Mr. Chambers that he was being placed on three months' probation for poor sales performance and warned him he was at risk of losing his job if his sales did not progress. Mr. Hill put this status in writing and Mr. Chambers signed the letter.

[5] In September 1999, John ("Mr. Gillis") became Netricom's Director of Operations. In that position, he was Mr. Chambers' direct supervisor. On November 16, 2000, Mr. Gillis wrote to Mr. Chambers telling him his sales performance was lacking. Mr. Gillis asked Mr. Chambers to create a three-month action plan that would establish monthly targets. Mr. Chambers was to suggest any support he required. Mr. Gillis requested the plan be ready by December 4, 2000, and subsequently gave Mr. Chambers reminders, as the date came closer, that the plan was due. Mr. Chambers never completed the plan.

[6] On February 28, 2001, Mr. Gillis again wrote to Mr. Chambers detailing a number of concerns and changes to his role as the Customer Service Manager and advising him that if there was "not a significant improvement

in achieving the budget targets, I will have no choice but to consider placing you on probation or dismissal".

[7] On May 7, 2001, Mr. Gillis wrote to Mr. Chambers informing him the method of calculating his compensation was being changed to 100% commission effective immediately. Mr. Chambers had previously been paid a base salary and car allowance. The letter stipulated, among other things, that he was free to sell project work, service work and hardware. Mr. Gillis and Mr. Chambers met and discussed the changes.

[8] On May 15, 2001, Mr. Chambers, by E-Mail, advised Mr. Gillis that although he was prepared to " try the changes for a few months (or whatever period is reasonable and appropriate), that should not be understood to mean that I accept or agree with what has been imposed. In fact, I advise that I do not accept, agree, or condone these significant changes in the terms of my employment". On May 18, 2001, Mr. Gillis wrote Mr. Chambers that Netricom was rescinding the change to 100% commission.

[9] Mr. Gillis and Mr. Chambers subsequently had further discussions and, on June 12, 2001, Netricom wrote to Mr. Chambers advising that, instead of changing his remuneration to 100% immediately, they would "continue" his probation for 12 months. Netricom specified Mr. Chambers would be continued on probation because they viewed they had already placed him on probation on May 7, 2001. Netricom informed Mr. Chambers that after the expiry of the probation period of 12 months', if he continued in employment, he would be put on a 100% commission-based salary. Netricom says it explained to Mr. Chambers what was expected of him and again specified that failing to meet his performance objectives could result in his dismissal at any time during the probation.

[10] The letter of June 12th contained the following:

> Based on our past discussions about your performance relative to your budget I am providing you with clear, concise, and unambiguous direction on what you are expected to do in order to resolve this issue. You will continue to be on probation for another 12 months. During that time you will be regularly provided feedback on your performance as outlined below. The goal is to be achieving your performance targets as soon as possible. If you succeed in meeting your performance objectives by the end of the probationary period you will be placed on commission based remuneration. Failure to do so will result in termination of your employment with Netricom at any point during your probation. During this probationary period your

> salary will remain unchanged at a base of $44,000 per year plus $400 per month Car Allowance.
>
> You are to continue to work as described in the letter of 1 Mar 2001. That still means that you no longer need to deal with the scheduling of the work or processing of any of the paper work associated with these work orders. All scheduling, issuing of work orders, purchase orders, and invoicing will be done by others. No commitments for delivery of work will be made sooner than 48 hours with out prior approval by the Director of Operations, or Dispatcher in his absence. Any work you bring in will be scheduled through Dispatch prior to confirming the date with the customer. You are expected to continue to attend sales meetings and operations meetings as scheduled or any other scheduled meetings from time to time as required. You may, from time to time, be required to perform walk-throughs for your accounts or any other accounts assigned to you during this probation period.

[11] Mr. Chambers informed Netricom he was seeking legal advice to consider his options, and on June 28, 2001, advised Netricom he considered himself constructively dismissed as of that date. He did not return to work. Mr. Chambers subsequently initiated this claim against Netricom for wrongful dismissal on the basis he had been constructively dismissed.

[12] Mr. Chambers remained out of work until he obtained employment with another company in the network cabling industry on May 21, 2002.

[13] Of most significance in respect to Mr. Chambers deciding not to return to work with the defendant, his counsel says, is the letter of June 12, 2003, wherein, among other things, it stipulated that Mr. Mr. Chambers would "continue" to be on probation for 12 months, and failure [to meet the requirements of the letter] would result in termination of his employment with Netricom at any point during the probation.

[14] Relevant terms of his employment contract with the defendant, counsel suggests, included that he was the Manager of Customer Service and, in accordance with the written job description, had responsibility to supervise the customer service staff and the dispatch function, as well as supervising and monitoring response time and developing policies and procedures. Other terms included the authority to issue quotes to customers and generally to work and maintain relationships with existing customers.

[15] In considering the impact on his position in Netricom, counsel says, it is important to bear in mind there was no agreement between the parties that the employer was entitled to impose probation. As well, there was no existing corporate policy that, in any way, could be construed, expressly or impliedly, as suggesting there was in place an understanding or agreement permitting the employer to impose probation. Netricom, on the other hand, noted in it's pre hearing submission that Mr. Chambers had been put on probation in June 1999 for poor sales performance and at the time Mr. Chambers had not registered any disagreement.

[16] The defendant says the plaintiff's job performance was unsatisfactory and as a result he was placed on probation to allow him to correct his deficiencies. Mr. Gillis, in responding to the Court as to the reason he placed Mr. Mr. Chambers on probation, cited as the two primary factors,

1. His failure to provide a call back strategy after multiple requests, and,
2. His lack of performance in not meeting budget figures and being far below expectation.

ISSUES

Issue # 1 Was the plaintiff constructively dismissed?
- (i) What is constructive dismissal?
- (ii) May probation be used to put an employee on notice or as a warning of work deficiencies?
- (iii) The Primary factors advanced for the Probation.
- (iv) Retention of the Right to Terminate at any Time.
- (v) The effect, if any, of the notice that future compensation would be on the basis of only commissions.

Issue # 2 If the plaintiff was constructively dismissed, what would be reasonable notice?

Issue # 3 Has the plaintiff mitigated his damages?

Issue # 4 The claim for 8% of Gross Revenue of Project Work.

Issue # 5 Damages

1. Was Mr. Chambers constructively dismissed?

(i) **What is constructive dismissal?**

[17] The test for determining whether an employee has been constructively dismissed is an objective one and essentially a question of fact. The Court must decide whether, on a reasonable interpretation of the facts, the employee has established he was constructively dismissed, as a result of

conduct by the employer, that breaches a fundamental or essential term of the employment contract. The employee's perception of the employer's conduct is not determinative. Rather, the Court must ask whether a reasonable person, in a similar position as the employee, would have concluded the employer had substantially changed an essential term of the employment contract. [*Lane v. Carsen Group Inc.*, 2002 NSSC 218*; Miller v. Fetterly & Associates Inc.* (1999), 177 N.S.R. (2d) 44 (N.S.S.C.)]

[18] Both counsel have referenced the general principles respecting constructive dismissal outlined by Justice Gonthier in *Faber v. Royal Trust Co.*, [1997] 1 S.C.R. 846, at para. 24:

> Where an employee decides unilaterally to make substantial changes to the essential terms of an employee's contract of employment and the employee does not agree to the changes and leaves his or her job, the employee has not resigned, but has been dismissed. Since the employer has not formally dismissed the employee, this is referred to as "constructive dismissal". By unilaterally seeking to make substantial changes to the essential terms of the employment contract, the employer is ceasing to meet its obligations and is therefore terminating the contract. The employee can then treat the contract as resiliated for breach and can leave. In such circumstances, the employee is entitled to compensation in lieu of notice and, where appropriate, damages.

[19] And at para 26:

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

[20] In *Wrongful Dismissal*, by David Harris, (Thomson Canada Ltd., 1989, Volume I) the author, at p. 3-18.1, outlined as requirements for a constructive dismissal:

An employer may constructively dismiss an employee (whether or not it intends this result) by unilaterally changing a basic term or condition of employment. The burden is on the employee to prove that the term or condition was (a) part of the employment contract; and (b) fundamental to it. The loss of an employment "perk" or perquisite, or the elimination of an important area of responsibility may give rise to constructive dismissal; a negative critique of job performance probably does not.

Mr. Justice Sherstobitoff of the Saskatchewan Court of Appeal defined "constructive dismissal" as follows in an article entitled " Constructive Dismissal" in B.D. Bruce, ed. *Work, Unemployment and Justice* (1994):

> A constructive dismissal occurs when an employer makes a unilateral and fundamental change to a term or condition of an employment contract without providing reasonable notice of that change to the employee. Such action amounts to a repudiation of the contract of employment by the employer whether or not he intended to continue the employment relationship. Therefore, the employee can treat the contract as wrongfully terminated and resign which, in turn, gives rise to an obligation of the employer's part to provide damages in lieu of reasonable notice. (quoted at 27 C.C.E.L. (2d) 163, at p. 197)

This definition was cited with approved by Mr. Justice Gonthier, writing for a unanimous Supreme Court of Canada, in *Faber v. Royal Trust Co.* (1996), 27 C.C.E.L. (2d) 163, [1997] 1 S.C.R. 846, 145 D.L.R. (4th) 1, 97 C.L.L.C.

(ii) **May probation be used to put an employee on notice or as a warning of work deficiencies?**

[21] The plaintiff says it was the various changes instituted by the defendant, in altering essential terms of his contract of employment, which entitled him to treat himself as having been constructively dismissed.

[22] The defendant, on the other hand, responds that many of the changes and directions did not relate to his terms of employment, and were not, collectively nor individually, fundamental changes in the employment contract. The removal of some of his administrative functions was to enable him to focus on his primary responsibility, which was to increase the amount of customer service work. In fact, some of these functions were given to the person the plaintiff had recommended the company hire. The change in the monthly budgeted amounts was simply to recognize the shortfall in the previous months' sales measured against the relevant budget targets. The reduction in authority to do his own estimates, and its later reversal, was simply another step to enable Mr. Mr. Chambers to focus on customer service work sales.

[23] Inherent in the employment relationship, the defendant says, is the right to review and monitor employee performance. Similarly, an employer is entitled as part of management functions, absent a contractual agreement to the contrary, to establish and adjust budgets and gross profit margins. None of these, in the defendant's submission, are fundamental changes to the terms of employment.

Defence counsel adds that the decision he was to be paid on a commission only basis was rescinded after the plaintiff apparently indicated disagreement.

[24] On the evidence, it is clear, no steps were ever taken to implement this change in the manner of calculating Mr. Mr. Chambers' remuneration. It was proposed by the employer; it was rejected by the employee; it never happened; it is, therefore, not a change to any fundamental term of his employment contract . The expressed intention by the employer is, by itself, not a fundamental change.

[25] The litany of incidents, directions and changes identified by the plaintiff fail to recognize the distinction between management's right to manage the business, and the right of employees to expect their employers to abide by the fundamental terms of their contracts of employment. Although not fundamental changes in the terms of the plaintiff's contract of employment, they are, nevertheless, potentially relevant factors on whether the defendant was entitled to place the plaintiff, as an existing employee, on probation, and to set limits or conditions on the terms of the probation.

[26] The defendant, raises as justification for placing Mr. Mr. Chambers on probation, the issue of deficiencies in his performance. The defendant says the probationary period was part of a progressive-discipline program. In her pre-trial submission defence counsel then refers to *Brown v. Sears Ltd.*

1988 CarswellNS 15, where Justice Davison held that to dismiss an employee for incompetence, the employer must show that:

(1) It has established reasonable objective standards of performance;
(2) The employee has failed to meet those standards;
(3) The employee has had warning that he has failed to meet those standards and that the employee's position with the employer will be in jeopardy if he continues to fails (sic) to meet the standards; and,
(4) That reasonable time was afforded to correct the situation.

[27] Defence counsel submits Courts have accepted the concept of probationary periods resulting from performance problems in many cases, noting in *Teale v. United Church of Canada at Woodlawn,* 1980 CarswellNS 380, Justice Morrison canvassed the ability of an employer to put an employee on probation. The employee was employed with the defendant Church for over 13 years. Issues arose regarding the plaintiff's work. After discussing the performance issues with him, the Church placed him on probation for four months to determine whether he would make an effort to improve. The employment agreement did not specifically provide for the imposition of a probation period. The plaintiff adds, however, that there was apparently no objection by the plaintiff to being placed on probation. Shortly thereafter, the Church terminated the employee, who then started an action for wrongful dismissal.

[28] Justice Morrison, although allowing the plaintiff's claim for wrongful dismissal, at paras. 20-21 made the following observations:

> ... it seems to me that the proper way in which to deal with complaints of this kind would be to call them to the attention of Mr. Teale and ask that they be rectified. This is exactly what was done at the meeting of June 26th, 1978. This meeting and the discussion of the items of concern constituted a warning to Mr. Teale that his conduct with respect to these items did not meet with the approval of his employers. Once having done this then it should be called to the attention of the employee, in this case, Mr. Teale, that his employment would be in jeopardy if he did not comply to the satisfaction of the employer with the requests made. Again, the letter introduced into evidence as Exhibit 1, document # 8 seem to follow this pattern. Mr. Teale was advised that he would be placed on probation until a certain time in

> October, at which time a congregational meeting would be called to vote by secret ballot whether or not his services shall be retained.
>
> I find little to quarrel with the procedure followed up to that point. The employee was not summarily dismissed, his deficiencies were discussed with him and he was given a warning and a time period to meet the requirements set. That is, he was given until the congregational meeting which would be called in October of 1978. It is my opinion, that the proper procedure in these circumstances is that the employee be given a warning and an opportunity to correct his deficiencies before any drastic action such as dismissal is taken.

[29] And at para. 24, he further commented:

> What did exist were grounds for warning the employee of the dissatisfaction of his employers and giving him an opportunity to correct that which he was doing wrong. Consequently, up to this point I am satisfied that the actions of the Board as its meeting of June 29th were the correct actions, that is to warn Mr. Teale and to place him on probation. The subsequent dismissal at the meeting of July 10th was, in my opinion, unjustified at that time.

[30] Defence says, from the above passages, it is clear the Supreme Court viewed the imposition of a probationary period by the employer not only a permissible step, but also the correct step. *Shulman v. Xerox Canada Inc.* (1986), 75 N.S.R. (2d) 7 (N.S.S.C.,T.D.) counsel says, also supports the proposition that probationary periods for existing employees are acceptable in Nova Scotia.

[31] Other jurisdictions, counsel says, have also considered the issue of probationary periods resulting from performance problems. In her written pre-hearing submission, defence counsel refers to authorities from Ontario, British Columbia and Manitoba. In *Jeewa v. Med-Chem Laboratories Ltd.*, 1998 CarswellOnt. 750 (Ont. S.C.), the employee was a laboratory technologist. The employee's annual performance appraisals indicated there was an ongoing problem with his technical knowledge, as well as the quantity and quality of his work. The employee was given the option of being put on probation for three months in his current position with restricted duties while undergoing retraining, or taking a demotion to a position in a different department. The employee immediately retained counsel and did not return to work, considering himself to have been constructively dismissed.

[32] In the employee's subsequent wrongful dismissal action, the Court held that the employer's imposition of the probationary period did not result in constructive dismissal, as the employee's performance problems constituted just cause. Justice Mandel, at para. 31, said there were matters raised which could not succeed:

> It was the position of the plaintiff that the defendant could not put him on probation. As I have found, the plaintiff was not competent in reading and reporting on film blood and the health and safety of individuals was dependant on his competency. In that regard, what is set forth at paragraph 5.19 of Butterworth Wrongful Dismissal Practice Manual is appropos:
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> Para. 5.19 The imposition of a probation period without the employee's agreement may in some instances amount to a unilateral change constituting constructive dismissal, unless there is just cause for the change. Constructive dismissal is discussed in detail in Chapter 3. A probationary period which is subsequently imposed for cause will not necessarily being immediately, depending on the implications of the situation. For the probation to be valid, the employer may need to be very specific about when the period starts, how long it will last, and specifically what requirements must be met.
>
> The just cause was the plaintiff's incompetence. The period was three months starting immediately. The requirements was his retraining to bring him up to adequate level in such period so that he could read and report on film blood and do immunohematology. I do not accept the submission of the plaintiff. Instead of giving the plaintiff the option to be retrained and on probation for three months, the defendant was within its rights to do so without any input from the plaintiff. The granting of an option by the defendant to the plaintiff does not detract from the right of the defendant.

[33] In *Sui v. Westcoast Transmission Co.,* 1986 CarswellBC 736 (B.C.C.A.), the plaintiff was a professional engineer, employed by the defendant for three years. He was put on disciplinary probation because of performance problems. At the completion of the probation period, the defendant concluded no progress had been achieved and the plaintiff was offered two options: resign and receive two months' salary, or be fired and receive no

compensation. He initially accepted the former, but later brought a claim for wrongful dismissal

[34] The British Columbia Court of Appeal allowed an appeal, holding, on the issue of the alleged wrongful dismissal, the defendant acted reasonably by attempting to correct the deficiencies of the plaintiff by placing him on disciplinary probation, informing him of the problems and attempting to improve his performance. Regarding probation, the Court, at para. 20, commented:

> This course of dealings here by the employer does not indicate an attempt by the employer to take unfair advantage of the employee. As I have indicated, the employer started out with this relatively young engineer by attempting to overcome the deficiencies of his performance by placing him on probation, by informing him of the probation he faced, and by attempting to improve that performance. Then during the course of the probation period the employer reviewed the matter with the employee and indicated to the employee that he was not progressing in the performance of his work.

[35] The Manitoba Court of Queen's Bench, in *Boulet v. Federated Co-operatives Ltd.,* 2001 CarswellMan. 322,at para 42, stated the following, in regard to disciplinary probation:

> Counsel for Boulet argued that the defendant failed to take any formal disciplinary steps against Boulet and failed to go through each step of what is commonly known as "progressive discipline". This position fails to recognize the fact that, in addition to having matters brought to his attention verbally as they arose, Boulet received repeated warnings about his performance through his appraisals and was put on probation as a result. I accept that putting him on probation was a form of discipline. Common sense also suggests that a continuing failure to meet an objectively set standard of management and leadership will necessarily have a cumulative and potentially serious effect on overall performance even though, on a daily basis, the instances of poor performance may not in and of themselves be sufficient to attract a formal reprimand, suspension or other disciplinary action.

[36] Netricom, in its pre-hearing submission, says the foregoing decisions should be followed.

> The principles in those decision(s) (sic) are legally sound, specifically, the finding that probationary periods are a useful means of warning

> employees of performance concerns and allowing them to improve their performance before taking more drastic steps such as dismissal. By putting Chambers on probation, Netricom was attempting to do just that - give him warning of their concerns with his performance, give him clear directions as to what was expected of him, and give him time to correct the situation.

[37] Although acknowledging *Shulman,* supra, Justice Rogers was considering the dismissal of an employee who was on probation, plaintiff's counsel suggests, while finding in favour of the plaintiff, the issue of the probation did not directly arise and there was no argument or discussion on that issue.

[38] Counsel adds, in respect of *Teale,* supra, that Justice Morrison found against the plaintiff on the basis of his taking a secret commission. Counsel comments that at paras 24 and 25 Justice Morrison says his dismissal was otherwise unjustified, presumably on the basis the termination occurred before the expiry of the probationary period.

[39] In respect to the issue of incompetency as just cause for dismissal, the authorities are clear, the employee must be warned about their substandard performance and provided with an opportunity to rectify their deficiencies. Three authorities cited in *Just Cause, The Law of Summary Dismissal in Canada*, by Randall Scott Echlin and, Matthew L.O. Certosima, (Canada Law Book Inc., 2002) are illustrative of this. In *Manning v. Surey Memorial Hospital Society,* (1975), 54 D.L.R. 93rd) 312 at p. 315 a hospital administrator had been dismissed on the ground the hospital's accounts were inadequate:

> Notwithstanding the understandable frustration on the part of the members of the board of trustees, I am of the opinion that at the very least, the plaintiff ought to have received proper warning that his job was in jeopardy and have been give a reasonable opportunity thereafter to have corrected the deficiencies existing in the accounting department.

[40] The authors then reference the decision of the Ontario Divisional Court in *Wood v. Canadian Marconi Co.*,(1995), 9 C.C.E. L. (2d) 174 at p. 178. The Divisional Court, in agreeing with the trial judge's finding the employee had been wrongfully dismissed because she had not been provided with a warning, stated:

> An employer is only entitled to dismiss an employee without notice or payment *in lieu* of notice whose performance it believes to be

> substandard after providing the employee with a warning which specifically informs the employee that his or her job is in jeopardy. It is insufficient if the employer is merely critical of the employee's performance or is merely urging improvement. The employer should not only bring home to the employee that his or her performance is inadequate but should inform the employee that improvements must be made within some specified time period. The employer must ensure that the employee understands the significance of any criticism and warnings.

[41] The authors, on the need for both a warning and a reasonable opportunity to improve, at pp. 15.-14 - 15-15 comment:

> As illustrated in *Babcock v. C. & R. Weickert Enterprises Ltd.*, where the general manager of a Canadian Tire store was warned in November and dismissed in January, for incompetence, it is generally held that an employee must be provided with a reasonable opportunity to improve, after a warning. While the defendant had expressed its concerns to the plaintiff, and met once a week to discuss the issue, it failed to establish guidelines or a time frame, and the Christmas rush made it impossible to satisfactorily resolve matters. The plaintiff was dismissed, following the Christmas season. Pugsley, J.A., on behalf o the Nova Scotia Court of Appeal, held that, in order (to) (sic) establish the defence of just cause, in these circumstances, the employer must show:
>
> (1) [the employee] was duly warned that his performance must improve or his services would be terminated;
> (2) [the employee] understood the warning;
> (3) [the employee] was given a reasonable opportunity to rectify his deficiencies..
>
> The Court of Appeal determined that the trial judge had erred in finding that the plaintiff had a reasonable opportunity to rectify the problem.

[42] Certainly the comments of Justice Morrison, in *Teale*, supra, support the use of probation as a management tool for placing an employee on notice that the employer had serious issues on the employee's performance, conduct and/or work and was looking for improvement, without which, the employee could or would be dismissed.

[43] Probation as a means of notifying an employee of performance concerns is clearly permissible. No authority cited has suggested, in appropriate circumstances, placing an existing employee on probation, as a means of providing a warning of performance deficiencies together with an opportunity to rectify them, represents such a fundamental change in the terms of the employment contract as to constitute a constructive dismissal of the employee. In *Teal*, supra and *Shulman*, supra, the placing of the employee on probation was not a basis to find against the employer. In fact, in *Teale*, supra, it was regarded as a positive step by Justice Morrison.

(iii) **The Primary factors advanced for the Probation**

[44] As earlier noted, Mr. Gillis testified that the two primary factors for placing Mr. Chambers on probation were his failure to provide a call back strategy, after multiple requests, and the fact his sales were far below budget expectations. At trial, although stating Mr. Chambers had never provided the call back strategy as requested, this did not appear to be seriously advanced by the defendant as justification for placing him on probation. Although some form of discipline might have been warranted, it certainly would not have included this serious step.

[45] The second primary factor referenced by Mr. Gillis was the failure of Mr. Chambers to meet his sales budget, including the fact his sales were far below expectations.

[46] As stated in *Just Cause, The Law of Summary Dismissal in Canada,* op.cit., at para. 15:130:

> A failure to meet targets, goals and quotas may provide evidence of substandard performance in relation to objective measurers, or amount to a breach of contract, assuming the failure amounts to more than mere dissatisfaction with performance.

[47] The authors citing *Brown*, supra, at p. 430 state:

> For employer standards to have effect, the employer must show that: the standards were reasonable objective standards of performance; the employee failed to meet those standards; the employee was warned that a failure to meet the standards would jeopardize continued employment; and a reasonable amount of time was provided to correct the situation.

[48] Then, referencing *Tabone v. Midas Canada Inc.* (1986), 46 Atla., L.R. (2d) 238 at pp. 244-5, they continue:

> ... In addition, where the employer's decisions (such as limiting staff resources or changing a geographic area) or poor economic conditions have contributed to or caused the weak performance, it cannot be said that the employee's incompetence was the cause or that the employee was capable of overcoming conditions beyond his or her control.

[49] Although there were different performance deficiencies advanced by the defendant, they primarily related to the failure of Mr. Chambers to meet the budget targets. As observed by the authors in *Just Cause, the Law of Summary Dismissal in Canada,*, op. cit., at 15:130;

> ..., the goals or targets cannot be arbitrary or unreasonable. In *Duffett v. Squibb Canada Inc.*, a sales representative for Newfoundland and Cape Breton, who had been through numerous training seminars and a probationary period, and who knew the importance of achieving marketing budgets, but had no sales experience, only once achieved the monthly budgeted sales figures assigned to her, in her second year of employment. While her manager expressed concern to the plaintiff about her performance, and did not increase her salary, the plaintiff was dismissed 'without any prior warnings'. The plaintiff claimed that sales were down due to a strike, involving many of her clients. The Newfoundland Supreme Court held that, where incompetency is alleged, the employer must prove that the employee's performance fell below an objective standard, and the Court rejected the defendant's submission that the objective standard should be measured against budgeted monthly sales figures, as the plaintiff had no input into the figures.

[50] Here, on more than one occasion, the plaintiff was asked whether he needed further resources to meet the budget goals. On the evidence, the only resource he requested was the hiring of a Consumer Service Representative/Dispatcher, and this person was in place by the middle of July. In fact, it was this person who assumed some of the administrative duties and responsibilities, that Mr. Chambers now says represent changes in the terms of his employment contract entitling him to take the position he was constructively dismissed.

[51] Although Mr. Chambers, in testifying, took exception to the raising of the budget from $50,000 to $100,000 per month, he, in fact, 'signed on' when he signed his Performance Appraisal on June 5, 2000. He made no written, nor

apparently any verbal, negative comment or disagreement with the stated goal of Consumer Service revenue of $100,000 per month by January, 01, nor to Mr. Hill's comment, in the Performance Appraisal:

> The budget goal for customer service in FY 2001 is to double the revenue from service work from $50,000 per month to $100,000 per month. In order to do so the above objectives will need to be worked at and implemented. Based on Neil's performance last year I think he is up for the challenge given the proper support. He has a very good report with our existing customers and should be able to apply that same style with success in attracting new service work

[52] Although there was evidence of an economic downturn in the year following Mr. Chambers leaving the plaintiff, no explanation was offered parallelling any of the circumstances outlined in *Duffett v. Squibb Canada Inc.*, 1992 CarswellNfld. 165.

[53] The plaintiff references a number of authorities, including *Sproat, Employment Law Manual*, and the summary and commentary at p. 4-62 on *Buckley v. Mother Parker's Foods Ltd., Lowery v. Calgary (City)* [2001] C.L.L.C. 21–026, and *Wallace v. Toronto Dominion Bank* (1981)39 O.R. (2d) as collectively standing for the proposition that " ... an employer may not unilaterally impose probation on a permanent employee", presumably absent agreement to the probation by the employee.

[54] The Defence says:

> Actions such as those Netricom took in dealing with Chambers do not constitute constructive dismissal. To hold otherwise would put Netricom in a catch-22 situation. If Netricom dismissed Chambers outright without using steps such as probationary periods and allowing time for improvement, then they could be liable for wrongfully dismissing him. But, if by taking the appropriate measures in *Brown*, Netricom becomes liable for constructively dismissing Chambers, then it would virtually have no means through which to work with Chambers to improve his performance. In such cases, employers would be forced to continue employing problem employees and would have no means of requiring improved job performance.
>
> ...
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> Netricom further submits that it was justified in placing Chambers on probation. The effect of the probation was to ensure Chambers was aware he was expected to improve his performance. Under the concept of progressive discipline outlined in the above cases, an employer is

> expected to make any performance issues known to employees and allow them to improve their performance before taking further steps such as termination. In this case, Netricom's purpose in implementing a probation period was to let Chambers know he needed to improve his sales performance during that time. In cases where probation has been used as proof of constructive dismissal, it is clear that the implementation of a probation period was the proverbial 'straw that broke the camel's back', and there were numerous other factors that warranted a finding of constructive dismissal. Those other factors are not present in this case.

[55] Clearly, failure to meet budget targets, absent a contract term to this effect, is not grounds, by itself, for dismissal. It, however, in these circumstances, justified the employer putting him on notice by way of probation. Providing probation was not a mechanism or vehicle to reduce or eliminate the requirement for reasonable notice prior to dismissal, there was nothing wrong in the employer choosing to give the employee an opportunity to attempt to deal with the problem or deficiency as opposed to giving an immediate notice of future termination.

(iv) **Retention of the Right to Terminate at any Time**

[56] plaintiff's counsel in noting the letter of June 12 stated that failure of Mr. Chambers to meet his performance objectives, "will result in termination of your employment with Netricom at any point during your probation," says the defendant has:

> ... taken away the most central and most fundamental of the employee's right - the right to receive reasonable notice of termination of employment.

[57] Having in mind the stated purpose of the probation was to give the plaintiff notice of the employer's performance concerns and the consequence of dismissal on his failure to meet his performance objectives, it would not be a basis to find the plaintiff was "constructively dismissed." In the circumstance of a bona fide concern as to an employee's performance, the giving of notice for improvement, whether by way of a probationary period or by a formal notice on its own, would not seem to be determinative of any issue in this case. The issue, as formulated by plaintiff's counsel, is the effect or potential effect on the plaintiff of the defendant's apparent retention of an option to

terminate the plaintiff "at any time" during his probation, on his failure to meet his performance objectives.

[58] In *Buckle v. Mother Parker's Foods Ltd.* (1985) C.C.E.L. 119, the employee, after more than 18 months employment, was placed on probation for three months, on the understanding if his performance did not improve, his employment would be terminated. Before the expiry of the three months, he requested and was granted a vacation. On the day he was scheduled to leave on vacation, he was discharged.

[59] On Appeal to the Supreme Court of Ontario, Divisional Court, (1986) Carswell Ont. 577), Southly, J. in the judgment of the Court, said:

> As Mr. Dillon submitted, the employee plaintiff would have been entitled to treat the imposition of probationary status as a constructive dismissal, but he chose not to do so. In accepting the probation, he accepted its terms, but was entitled to rely on having the opportunity to show during the 3 month period that he was capable of doing the job. When he was terminated before the expiration of the 3 month period, because he asked for a vacation, he was denied that opportunity. This denial constituted a breach of the terms of the probationary employment, and the employee was then entitled to at least the same period of notice as that to which he would have been entitled if he had treated the relegation to probationary status as a constructive dismissal. The period of notice of 4 months imposed by the learned trial Judge appears a reasonable one to us and, accordingly, we are not disposed to interfere in any way with his judgment.

[60] Although Mr. Chambers was not dismissed "at any time during the probation period" because he, in fact, never agreed to work during this probationary period, nonetheless had he accepted this change to his terms of employment, he would have been faced with the prospect that his employment during the ensuing 12 months was little more than at the "will of the employer". Obviously the alleged substantial and serious deficiencies in his performance could not have been corrected overnight. The employer recognized as much by stating the probation period would be 12 months and yet, during the probation, at any time, the employer was reserving the right to immediately dismiss him.

[61] Notwithstanding, the distinction of the employee having been actually dismissed, the position of Mr. Chambers was not, in law, markedly dissimilar from the employee in *Teale*, supra. Mr. Teale, was dismissed, before the expiration of the probationary term, and if not for other issues would have

been found to have been unjustifiably dismissed. Also there is the employee in *Buckle,* supra, who similarly was dismissed before the expiration of the stated probationary period. The author of *Just Cause, The Law of Dismissal in Canada,* op cit., p. 15.15 suggests as to a similar effect the conclusion reached by the British Columbia Supreme Court in *Renwick v. MacMillan Bloedel Ltd.* (1995), 9 C.C.E. L. (2d) 255 at p. 261:

> ... where the employer failed to provide the employee an opportunity to improve, as identified in the warning letters, dismissing him in advance of its imposed time line for improvement.

[62] Where the employer offers a stated period of probation, combined with a specific warning as to the deficiencies in performance and the consequences of a failure to rectify them, and the employee accepts, it is not, absent the very clearest language to the contrary, for the employer to abrogate the stated period and earlier dismiss the employee. Absent any contrary language, and certainly in the presence of clear language, an employer would have the right to terminate during the period for just cause, but the just cause would have to be something other than that for which the employee has been offered, and accepted, the opportunity to correct. It is not open to the employer to give, on the one hand, and to take away with the other.

[63] The Defence says, as to the statement of the retention of an option to terminate "at any time" during the probation:

> Such a statement is legally valid and does not constitute a fundamental change to the employment contract. An employer can lawfully retain the ability to terminate an employee during a probationary period.[*Boulet,* supra, *Jeewa,* supra].
>
> Probation does not insulate an employee from termination if just cause exists, or for any other [legally legitimate] reason. ... Just cause can be based on an absence of any improvement in job performance during the probationary period or an independent action such as serious theft or gross insubordination. An employer, [counsel says, without authority and apparently in contradiction to the obiter in *Teale*], is not required to retain the employee for the full probationary term if there is no sign of improvement. Otherwise, employees could effectively treat their probationary periods as fixed term contracts under which they could not be dismissed. This would undermine the purpose of probationary

> periods. The evidence will show that Netricom was not attempting to subvert the requirement to give notice if just cause did not exist. What it was attempting to do was ensure that Chambers, upon being placed on probation, did not have the mistaken assumption that he was *guaranteed* to stay on with Netricom for the full probation period.

[64] The evidence does not support the factual content of counsel's submission unless the testimony of Mr. Gillis to the effect that the right at any time to terminate Mr. Chambers while on probation is to be read as restricted to if " just cause" should arise during the probation. Counsel says Netricom cannot be held liable if the plaintiff, in error, believed the statement as to the defendant's right to terminate him while on probation was grounds for him to consider he had been constructively dismissed.

[65] In my view, it is the defendant that is in error. The defendant drafted the letter. If it intended to convey some meaning other than the meaning attached by the plaintiff, and in our view, reasonably attached by the plaintiff, then the fault, and the consequences, are with the defendant, rather than the plaintiff.

[66] The plaintiff was put on probation for 12 months. The only way in which such probation will not be regarded as a sufficient basis for constructive dismissal is if, on all the circumstances, it is a bone fide attempt by the employer to provide the employee with a period of time to correct any performance deficiencies, and failing such correction, notice that dismissal would follow. Here, on the wording used by the defendant, the 12 months was subject to being reduced to whatever period of time the defendant might chose to grant. So long as he had not brought sales up to the budget, his continued employment was at the "will" of the defendant. If it was not intended to be such, the plaintiff could reasonably, on the words used by the defendant, have reached this conclusion.

[67] Granted, Mr. Chambers had not been terminated, at the time he decided to inform the defendant he regarded himself as having been constructively dismissed. He had, however, every right to conclude he had been constructively dismissed. To have returned to work, in the circumstances of the defendant's notice, would have effected a fundamental change in the terms of his employment contract. He would then, although technically on probation, be subject to termination at any time his sales did not meet the performance objectives. That would be a fundamental different term of employment than working in circumstances where the employer could only terminate on just cause or reasonable notice.

(v) The effect, if any, of the notice that future compensation would be on the basis of commissions only

[68] As commented on by Justice Sherstobitoff in the passages earlier referenced from the article entitled "Constructive Dismissal" by B.D. Bruce, a "constructive dismissal occurs when an employer makes a unilateral and fundamental change to a term or condition of an employment contract without providing reasonable notice of that change to the employee.

[69] In *Fellowes-Strike v. Co-operators Group Ltd.* 1998 Carswell Ont. 1606 (Ont. Gen. Div.), the employer gave its employee notice of changes to the employment arrangement that would begin to occur in three to five years, as a result of a reorganization plan. The employer told the employee she was expected to adapt to the changes or seek alternative employment. The employee alleged constructive dismissal and initiated a wrongful dismissal action.

[70] The Court dismissed the action, holding the notification was simply a warning of future changes to the employment arrangement. Giving notice of the future changes did not amount to a unilateral or fundamental change to her employer contract and, even if it did, the employer had provided ample notice of the change.

[71] Speaking for the court, Justice Weekes, at para. 13 noted:

> It is an implied term of a contract of indefinite hiring that the contract can be terminated upon reasonable notice... Therefore, if the conduct of the Co-operators amounted to a termination one must then consider whether reasonable notice was given. It is hard to see how a warning that the nature of the job would change within 3 to 5 years, and that Ms. Fellowes-Strike would have to adapt to the new regime or leave, did not amount to reasonable notice. If reasonable notice is given there is no breach of the contract, since it is a term of that very contract that it may be terminated on reasonable notice.

[72] And further at paras. 16-19:

> As I indicated earlier, Ms. Fellowes-Strike had simply received a warning that things were to change in the future. She was not expected to perform according to the new system in August 1993 nor at any time in the immediate future. There was, therefore, no unilateral and fundamental change to a term in her employment contract at the point when she delivered her letter of August 31, 1993 nor was it imminent. However,

> even if that analysis is wrong, she was given reasonable notice of the changes to her employment arrangement. As she acknowledged in her evidence, she understood that she could have continued to work as a sales representative well into 1994. A fundamental change that is accompanied by reasonable notice is not constructive dismissal.
>
> This is how it should be. An employer should not be punished for giving as much advance notice as it can to its employees of impending changes. Such notice gives an employee more opportunity to adapt or to structure his or her affairs to best advantage and is to be encouraged.
>
> I therefore conclude that Ms. Fellowes-Strike, not having been terminated nor constructively dismissed, simply jumped the gun in taking the position that she had been wrongfully dismissed.

[73] To similar effect, the B.C.C.A. in *Kussman v. AT & T Capital Canada Inc.* at para. 19-20 commented:

> …the appellant argues, based on certain comments in *Farber* v. *Royal Trust Co.* (1996), [1997] 1 S.C.R. 846 (S.C.C.), that it gave reasonable notice of the change of salary to the plaintiff and, accordingly, there was no breach of the employment contract.
>
> I must say that I am doubtful that the language pointed to in *Farber* can bear the interpretation suggested by the appellant. Certainly an employer can give notice of a fundamental change to the employment relationship, provided sufficient notice is provided to the employee. I should think generally such notice would have to be of the same order as that constituting reasonable notice of termination of the employment relationship. However, having regard to the communications between the parties in this case including the suggestion that there could be a "review" on March 1, 1997 of the plaintiff's salary, it does not seem to me that there was here the type of unequivocal notice required to successfully sustain such a plea or argument.

[74] The plaintiff was given 12 months notice that should he then continue to be employed by the defendant, his compensation would be based on commission rather than a salary as had previously been the case. The notice made it clear that during the probationary period his compensation would not be changed. The

notice of the future change was reasonable and in no way constituted a basis for the plaintiff to successfully allege he was constructively dismissed.

Issue # 2 **What would be reasonable notice?**

[75] Mr. Chambers at the time of his constructive dismissal was 43 years of age. He had worked for the defendant and its predecessor company for some 14 years.

[76] The often cited statement as to what constitutes reasonable notice is that in *Bardal v. The Globe & Mail Ltd.* (1960), 24 D.L.R. (2d) 140 at p. 145 (Ont. H.C.,), where McRuer, C.J.H.C. observed:

> There could be no catalogue laid down as to what is reasonable notice in particular classes of cases. The reasonableness of the notice must be decided with reference to each particular case, having regard to the character of employment, the length of service of the servant, the age of the servant, and the availability of similar employment, having regard to the experience, training and qualifications of the servant." (p. 145)

[77] This statement has been quoted with approval in numerous Nova Scotia cases, as well as the Supreme Court of Canada, as in the case of *Wallace v. United Grain Growers*, (1997), 152 D.L.R. (4th) 1 at para 81.

[78] Each case is, of course, different. However, a review of various of the authorities involving employees with circumstances of employment similar to Mr. Chambers would suggest a notice period of somewhere between 12 and 18 months. However, Mr. Chambers obtained new employment 11 months after leaving the defendant. He, therefore, only claimed pay, in lieu of notice, for this 11 month period.

Issue # 3 **Has the plaintiff mitigated his damages?**

[79] The plaintiff made significant efforts, albeit limited almost exclusively to communicating his resume to possible employers by way of the internet, to become re-employed. He was ultimately successful, and obtained employment by late May 2002, with Plexus Connectivity, a competitor of the defendant.

[80] The defence, although denying Mr. Chambers was constructively dismissed, says if he was, he failed to mitigate his loss. He could, counsel submits, have easily mitigated his losses by continuing to work at Netricom. He could have remained at the same salary level, while performing the same functions, until June, 2002. The defence suggests it would not have been "patently unreasonable" for the

plaintiff to remain with Netricom. He has, therefore, not suffered any loss and consequently is not entitled to any compensation.

[81] One of the earliest authorities outlining a dismissed employee's duty to mitigate, by continuing to work for the employer is in *Brace v. Calder and Others* [1895] 2 Q.B. 253, at p. 26, where Lord Justice Lopes said:

> It appears to me therefore that the plaintiff was discharged by the defendants and was entitled to damages either on the ground that he was wrongfully discharged, or that there was to a breach of contract to employ him for two years. But, in estimating the damages, it must be taken into consideration that the continuing partners were willing to keep him on in their service till the end of the two years at the same salary as before; but he declined to serve them, and therefore it was his own fault that he suffered any loss. Consequently, the damages resulting from the breach of contract would be nominal.

[82] In *Wrongful Dismissal*, op. cit., the authors describe the onus on the defendant as being the proof of "non-mitigation" by the plaintiff. At p. 4-270.1, the burden on the defendant is stated: The onus rests upon the defendant to assert the plaintiff's failure to mitigate (*Michaels v. Red Deer College* (1975), [1976] 2 S.C.R.324, [1975] 5 W.W.R. 575, 5 N.R. 99, 75 C.L.L.C. 14,280, 57 D.L.R. (3d) 86), 1975 CarswellAtla 57, 1975 CarswellAtla 142). The defendant must prove not only the plaintiff's failure to mitigate damages but also must show that had the plaintiff taken reasonable steps to mitigate, he or she could, in fact, have likely obtained alternative employment.

[83] Beginning at page 4-272.2, the authors review some of the two lines of authority on whether a demoted employee is required, pursuant to the duty to mitigate, to accept a lessor position while endeavoring to locate new employment. Cited for the principle a plaintiff has no obligation to accept the new position, of a different character and of a lesser status is the decision by Callaghan, J. in *Henley v. Peeters Textile Mills Ltd.*, [1979] 1 A.C.W.S. 319 and *Yetton v. Eastwoods Froy Ltd.* [1966] 3 All E.R. 353 (Q.B.).

[84] Referenced as an example of a long line of cases to the contrary, is the holding by Halvorson, J. in *Boyes v. Saskatchewan Wheat Pool* (1982), 18 Sask. R. 361 at 366 where, in *obiter*, the following comments appear:

> Had the plaintiff succeeded I would have awarded only token damages for several reasons. Firstly, in the circumstances of this case he ought to have minimized his loss by temporarily accepting lesser employment with the

> defendant while he sought a more desirable job. Secondly, he expended little effort to find other work. ...
>
> As to the first point, I am aware of decisions such as *O'Grady v. Insurance Corporation of British Columbia* (1976), 63 D.L.R. (3d) 370, which state that the refusal by a wrongfully dismissed employee to accept a demotion is not a factor to be taken into account on the question of mitigation of his damages. Notwithstanding these decisions, I am of the opinion that there should not be an unyielding rule on this issue, and that each case should be viewed on its own facts. In some situations, of which *O'Grady* is a good example, it would be inappropriate to expect the employee to work at the lesser job while seeking another position. Other situations call for less sensitivity by the employee.
>
> In the case at bar the likelihood of the plaintiff quickly obtaining comparable employment was remote considering his age and reluctance to move, and this must have been well know to him. Given this, he should not be permitted to reject a lesser job and then sit around doing nothing expecting the defendant to eventually compensate him for his full former salary.

[85] It is clear that a number of authorities have held that an employee has an ongoing obligation to mitigate a constructive dismissal by continuing to work for the employer. In *Employment Law in Canada* (Butterworths, 3rd Ed., Volume 2) at page 16.59:

> …most courts now require employees who have been constructively dismissed to continue working under the new terms imposed by the employer while they search for another job unless he or she would suffer undue hardship as a result.

[86] Cited as a landmark authority for this proposition is *Mifsud* v. *MacMillan Bathurst Inc*., 1989 CarswellOnt 770 (Ont. C.A.). The plaintiff, a plant superintendent, was unilaterally transferred to the position of foreman at a different plant because of the company's dissatisfaction with his performance. The new position involved no loss of pay, although it did involve a diminution in status and responsibility and required shift work. The plaintiff worked in the new position for one week before he quit and successfully claimed at trial that he had been constructively dismissed. The Ontario Court of Appeal, however,

left the question of constructive dismissal unanswered and decided the appeal on the different ground that the plaintiff had failed to discharge his duty to mitigate by quitting his position as a foreman. The Court held that a constructively dismissed worker is bound to accept the changed terms as part of his or her duty to mitigate, so long as:

(1) There is no loss of pay;
(2) The working conditions are "substantially" similar;
(3) The new position is not "demeaning" to him/her; and
(4) The personal relations between the employee and his/her superior are not "acrimonious".

[87] Justice McKinlay, at paras. 30-31 stated:

> Is the situation substantially different [from giving notice of termination] when an employer does not wish to dismiss an employee but, being unsatisfied with his performance, or for some other valid reason, wishes to place him in a different position at the same salary? Why should it not be considered reasonable for the employee to mitigate his damages by working at the other position for the period of reasonable notice, or at least until he has found alternative employment which he accepts in mitigation?
>
> The fact that the transfer to a new position may constitute in law a constructive dismissal does not eliminate the obligation of the employee to look at the new position offered and evaluate it as a means of mitigating damages. In all cases, comparison should be made to the contractual entitlement of the employer to give reasonable notice and leave the employee in his current position while a search is made for alternative employment. Where the salary offered is the same, where the working conditions are not substantially different or the work demeaning, and where the personal relationships involved are not acrimonious (as in this case), it is reasonable to expect the employee to accept the position offered in mitigation of damages during a reasonable notice position, or until he finds acceptable employment elsewhere.

[88] And further, at para. 32:

> It must be kept in mind, of course, that there are many situations where the facts would substantiate a constructive dismissal, but where it would

> be patently unreasonable to expect an employee to accept continuing employment with the same employer in mitigation of his damages.

[89] The authors of *Employment Law in Canada*, op. cit., at page 16.60; state:

> Subsequent decisions have held that the test for determining whether the new work environment is demeaning is the objective standard of the reasonable person, not the subjective perception of the plaintiff himself or herself.

[90] The defence says none of the four factors listed in *Misfud*, supra, are here applicable. Counsel suggest the relationship was not acrmonious, the plaintiff could have continued to work at his same job, with the same title and salary. There was nothing, says counsel demeaning to him. There was nothing in the relationship that would make it unreasonable for the plaintiff to have continued to work for Netricom while he looked for alternative employment.

[91] Also referred to by counsel is the Ontario Court of Appeal decision in *McNeil v. Presstran,* 1992 CarswellOnt 972, where the plaintiff was notified he would be employed at a lesser position. The plaintiff declined to stay on with the company and brought an action for wrongful dismissal. The trial judge found for the plaintiff on the basis there had been a fundamental change in the terms of his employment, and that he was therefore, constructively dismissed. However, although deciding under normal conditions, he would have been entitled to 12 months notice, he only awarded six months, finding it would not have been unreasonable for the plaintiff to have remained for six months while seeking a new job.

[92] In *Fellowes-Strike,* supra, at para 21, Justice Weekes went on to conclude that if he was wrong in finding the employee was not constructively dismissed, he would have concluded the employee had failed to mitigate her damages by not continuing to work with the employer:

> I am not persuaded that it would have been unreasonable, patently or otherwise, for Ms. Fellowes-Strike to have continued working at the Co-operators until she had other employment. Nothing about her job had changed other than that she was being asked to acquire a computer to run the new universal life product being developed by the Co-operators… There was no acrimony between Ms. Fellowes-Strike and her supervisors. …In doing so, she would have maintained her income for the period that she was unemployed, being the months of September to December 1993, inclusive.

[93] The plaintiff refers to the case of *Anderson v. Tecsult Eduplus Inc.* (1999), 179 N.S.R. (2d) 284 (S.C.) where Justice Moir deals with the constructive dismissal of a demoted employee. He also references the case of *Mifsud*, supra, where the employer had, for economic reasons, changed the employee's job description with the result it was considered to be a demotion. While on the face it was arguably a constructive dismissal, the Court found that there was a requirement (in the absence of acrimony) to accept the demotion as part of the obligation to mitigate any loss.

[94] The defendant responds that the circumstances are clearly distinguishable from the present, in that here there was not a demotion.

[95] The plaintiff says we are here dealing with a fundamental abrogation of the most central of the employee's rights, i.e., the right to receive reasonable notice. Furthermore, *Misfud*, supra, the Court makes it clear that the requirement to accept the demotion as part of the duty to mitigate did not apply where the personal relationships had become acrimonious. In this case, counsel says the evidence shows a degree of acrimony had developed over the last several months. Counsel continues that it would not be reasonable to require an employee, in the situation that the plaintiff found himself, to remain in the employ of the employer where such a fundamental breach had been occasioned by the employer.

[96] Cowan, C.J.T.D. in *Gould v. Hermes Electronics Ltd.* (1978), 34 N.S.R. (2d) 321, 59 A.P.R. 321 (T.D.), was concerned with a 43 year old plaintiff who was programme manager and who had been employed by the defendant and its predecessor for 23 years. He was rejected in his request for a salary increase. After some acrimonious meetings he was discharged. Later the defendant offered him a job as plant services manager at the same salary as his former job. This he refused with the statement that 'He was trained as a production man and not as a maintenance man'. Chief Justice Cowan found he had repudiated the contract of employment and in *obiter*, at p. 335 N.S.R., stated:

> Even if it were to be found that the plaintiff was dismissed from his job as Manager of Production of Sonabuoys, he has, in my opinion, not proved that he has suffered any damage. There is a duty on a person dismissed, with or without notice, to mitigate his damages. In this case, I find that the plaintiff was offered the job of Plant Services Manager at $20,000.00 per annum.

[97] And later:

> While it is true that, in order to discharge the duty to mitigate damages, an employee who is dismissed is not bound to accept employment of a different kind, or at a lower position in a similar kind of employment, in my opinion, the plaintiff was offered a position of comparable status at a higher salary, and in the same department, that is, production, as that in which he was previously employed. In my opinion, he was not justified in refusing to accept the offer of such employment.

[98] The authors of *Wrongful Dismissal*, op.cit, at pp. 4-272.3-273, then refer to *O'Grady v. Insurance Corporation of British Columbia* (1976), 63 D.L.R. (3d) 370, and comment as follows:

> The *O'Grady* case to which Mr. Justice Halvorson referred supra (*O'Grady v. Insurance Corp. of British Columbia* (1975), 63 D.L.R. (3d) 370 (B.C.S.C.) involved the general counsel of a government insurance company (I.C.B.C.) whose position was abolished and whose responsibilities were divided between himself and a second senior lawyer. O'Grady was assigned responsibility for motor vehicle accident litigation; the other lawyer was given conduct of other litigation matters. Anderson, J. held that the plaintiff had been constructively dismissed in that 'a person seeking the position of general counsel would anticipate that he would have complete supervisory control over all legal affairs of the corporation, and would be the chief advisor in respect of all legal problems. He could also anticipate that he would be required to meet new challenges and new problems as the business of the corporation expanded into new lines of endeavour.' (p. 377)
>
> The court held that I.C.B.C.'s alteration of the terms of O'Grady's employment amounted to constructive dismissal, thereby absolving O'Grady of any duty to mitigate by continuing his employment in the newly created position. The test by Anderson, J. was whether the average lawyer would think that O'Grady had suffered a serious loss of status and prestige if he had continued employment in the newly created position.
>
> It is difficult to grasp the distinction drawn by Mr. Justice Halvorson in *Boyes* between the facts of the *O'Grady* case and 'other situations [which] call for less sensitivity by the employee'. If, in the view of the 'average elevator agent,' *Boyes* would have suffered a serious loss of status and

> prestige by remaining in the defendant's employ in the lessor position, presumably the same 'sensitivity' factor would arise in both cases.

[99] The present case does not involve an occasion where the employee has been constructively discharged because of any demotion. He was offered the same title, and the same compensation and benefits. It is the retention, or apparent retention by the employer of the right to terminate the employee during the course of the probation period that entitles the plaintiff to regard himself as having been constructively dismissed. Following notification to the employer to this effect, no offers of temporary work were made to the plaintiff. If he had returned, he would have had to accept employment with the same risk of immediate termination. He would, therefore, have had to accept employment with the same condition that had permitted him to have treated the employment relationship as rescinded or terminated by the employer. He was never offered any other terms of work while he pursued other employment opportunities. To require him to return to the employer while he searched for employment, would, in this unusual circumstance, have been patently unreasonable and was not required.

[100] On the other hand, there are two aspects of his search for work that weigh on whether he has fully mitigated his loss. He stated that for some time he avoided looking for work in the same industry in which he had been employed with the defendant. It appears there was no reason for this choice, other than a desire to try something new.

[101] Also, his efforts to find work were largely, on his own evidence, confined to using the internet to transmit his resume to various employees. Although the emerging use of the internet as a vehicle in searching for employment opportunities and contacting potential employers has become more common, I am not satisfied it is the only avenue to be pursued. Clearly, the efforts of Mr. Chambers were to a large extent confined to reading the local newspaper and forwarding his resume to employers. Although commendable, I am satisfied, by restricting his search to this one vehicle, the effort was too limited. Although there is no evidence as to whether these other efforts would necessarily have produced a positive result, earlier than he was able to find the employment he did, I am satisfied there was, to some extent at least, a failure to take all reasonable steps to mitigate.

[102] In *McNeil,* supra, the period of compensation awarded was reduced from 12 months to 6 months because of the failure of the plaintiff to properly mitigate his

loss. In the present circumstance, a reduction of 3 months from the 11 months otherwise awarded would appear reasonable.

Issue # 4 **The claim for 8% of Gross Revenue of Project Work**

[103] The undated Customer Service Budget, apparently prepared for the year 2000 contained the following:

> Projects
>
> Commission payable at 8% of gross margin
>
> Projects are not considered part of CS revenue budget

[104] Mr. Chambers was never paid this commission. It is his position that this was part of an agreement on remuneration reached in the Summer of 2000. However, on the evidence, I am satisfied the payment of this commission was simply one option or alternative method of compensation discussed between the parties, but without any agreement being finalized. The commission was never paid, and on his evidence, only became an issue when Mr. Chambers decided to advance this claim for compensation for having been constructively dismissed. He, in fact, testified that at the time he had not decided to pursue any claim for this commission. On a balance of probabilities, I am satisfied there never was an agreement finalized between the parties for the payment of this commission. It was simply one aspect of broader discussions and negotiations, that did not conclude with an agreement to vary the terms of Mr. Chambers then compensation.

Issue # 5 Damages

[105] As earlier noted, the plaintiff says the appropriate period of notice is 11 months, in that Mr. Chambers was successful in obtaining a new position after 11 months. However, the period of notice for which the plaintiff may claim compensation is to be is reduced from 11months to 8 months for the reasons earlier outlined.

[106] The other items of compensation claimed, in addition to salary, include a lost car allowance benefit, a lost group plan for life insurance, a lost stock plan benefit

and mitigation expenses. The plaintiff claims pre-judgment interest and costs. There is also the claim for the 8% commission on Gross Revenue for project work.

[107] The plaintiff is awarded the cost of replacing equivalent life insurance, less the cost he would have had to pay for the insurance he held while employed by the defendant.

[108] The car allowance was a benefit to offset the expense of using his own vehicle on behalf of his employer. In the circumstances, it is not a recoverable benefit.

[109] The plaintiff is entitled to the expenses he incurred in mitigating his loss by looking for new employment.

[110] There was no evidence of a financial loss relating to the employee ‘s stock plan. On the evidence the value of shares in the defendant went down. Notwithstanding any obligation on the defendant to contribute to the plan, either directly or indirectly, there was no evidence as to any financial loss occasioned to the plaintiff.

[111] The plaintiff is entitled, subject to hearing counsel to the contrary, to pre-judgment interest and costs. If counsel are unable to agree on either or both the rate of pre-judgment interest and the period for which it is payable, I will hear them further.

[112] I am not satisfied, on the balance of probabilities, there ever was a concluded agreement to pay the plaintiff a 8% commission on Gross Revenue for project work and no award is made in respect of this claim.

J.