CITATION: McFarlane v. King Ursa Inc., 2025 ONSC 3553
COURT FILE NO.: CV-23-00698226-0000
DATE: 20250618

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
JOANNA S. MCFARLANE	)	
Plaintiff/Applicant	)	Mackenzie Irwin and Fiona Martyn, for the Plaintiff
– and –	)	
KING URSA INC.	)	Stephen F. Gleave, for the Defendant
Defendant/Respondent	)	
	)	**HEARD:** May 12 and 13, 2025

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AKAZAKI J.

REASONS FOR JUDGMENT

OVERVIEW

[1] Joanna McFarlane brought this constructive dismissal suit after she returned from extended maternity leave, and King Ursa asked her to accept a demotion and a cut in pay.

[2] During the Covid-19 pandemic, King Ursa Inc., an advertising company, reduced its workforce from forty or fifty employees to ten, including management. To ensure its survival and recovery, in March 2021, the company promoted its second-year Director of Analysis and Insights, Ms. McFarlane, to Associate Partner and Vice-President of Media & Analytics. In October 2021, it promoted her again to Executive Vice-President, Media & Analytics. The post came with a significant salary increase from $220,000 to $300,000, and a phantom share allocation of 5%, up from 2.5%. King Ursa did rebound somewhat. However, despite the hard work of its personnel, including Ms. McFarlane, the company's bottom line continued to slide further into the red in 2022-23, when the events at issue played out.

[3] After twice deferring Ms. McFarlane's return from leave, it provided her a letter agreement dated April 3, 2023, demoting her to her previous position and reducing her compensation to $210,000. She did not accept the demotion and pay cut and resigned.

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[4] The employer appeared to retreat to the defensive position that she had failed to mitigate her damages, but it never formally gave up the position that there was no constructive dismissal. Accordingly, the dispute entailed the resolution of the following issues in the pleadings:

1. Whether the plaintiff was constructively dismissed
2. Mitigation
3. Appropriate length of notice and calculation of damages
4. Discrimination
5. Punitive and/or moral damages

[5] For the reasons set out below, I find that King Ursa constructively dismissed Ms. McFarlane by presenting her with the new agreement demoting her back to her old position. The employer failed to prove she failed to mitigate her damages. Ms. McFarlane's tenure had not been so long as to warrant length of notice beyond twelve months for the calculation of her damages.

[6] Although there was some evidence from which one could infer that King Ursa pushed her out on account of her gender and maternity status, I could not conclude that these discriminatory factors met the persuasive burden of proof warranting punitive damages. Nevertheless, the attempt to demote her, separate from a reduction of her salary, had no economic basis and therefore could be construed as callous and unduly insensitive. The attempt to demote her struck the employee's vulnerability as a person who had built her professional identity and status through thought and industry. I will therefore award Ms. McFarlane moral damages.

[7] I now turn to each of the issues.

1. CONSTRUCTIVE DISMISSAL

[8] A demotion and a significant reduction in income independently amount to constructive dismissal: *Farber v. Royal Trust Co*., 1997 CanLII 387 (SCC), [1997] 1 SCR 846, at para. 36. A demotion generally means loss of prestige and status. A significant pay reduction breaches the fundamental bargain, exchanging work for money. The only real issue for determination is whether the April 3, 2023, letter agreement was King Ursa's attempt to impose a demotion and pay reduction.

[9] Before dealing with the events leading to the presentation of the letter agreement, I will address the evidence that the employer used coercive methods to create a toxic work environment for Ms. McFarlane. The target of these allegations was Paulo Salomao.

[10] Mr. Salomao arrived in Canada from his native Brazil in 1999. He trained and worked in advertising. Calling himself a product of the creative side of the business, his focus was always on pitching and developing clever ideas that caught attention and won over clients to send more work. He eventually started his own firm, King Ursa. The hiring of Ms. McFarlane in 2019 reflected market adaptation toward targeting electronic advertising through data analysis. Mr. Salomao's qualities as a creative director did not always lend themselves to management. Ms. McFarlane was instrumental in leading him through a course of anger management that made him a more empathetic and tolerant company CEO.

[11] Mr. Salomao expressed dismay that Ms. McFarlane raised the episode of dealing with his anger issues in the litigation. He readily admitted that she helped him with his struggles. Indeed, the episode appears in Ms. McFarlane's evidence but there is no real logical connection to the constructive dismissal apart from a vague spectre that the experience (directed at a customer of the firm – not at her) loaded the presentation of the letter with a coercive element. I find the evidence did not establish that the workplace was "toxic," as the plaintiff characterized it. Companies undergoing financial stress tend to allow anxiety to absorb the atmosphere, but I did not find any grounds to hold that Mr. Salomao made it hard for Ms. McFarlane to continue working at King Ursa. Rather, she had just returned from maternity leave – this is the circumstance on which the court must focus.

[12] In July 2022, Ms. McFarlane took maternity leave. Before her leave, she trained the employee occupying her original post, now called the Director of Analytics, to cover her duties during her absence. About a week into her leave, Mr. Salomao alerted her to the company's extreme cash flow problem. He and the company President, Cheryl Gosling, were working out plans to keep the company afloat. Over the course of 2022 and early 2023, the company asked Ms. McFarlane twice to extend her leave, to relieve the cost of employing her. During these discussions, the parties openly discussed a severance package for Ms. McFarlane as one of the options.

[13] At this point in the chronology, the lack of year notations on a chart setting out Ms. McFarlane's networking for job opportunities became a contentious topic during closing submissions. By reviewing the dates and months, it was clear that a contextual reading started the list on November 3, 2022, with sending a dinner invitation to a marketing director at another company. This conflicted with her evidence that she applied to 73 jobs "Following my termination." This was not corrected during the evidence, and it is not the court's role to correct drafting errors. For this reason, I am unable to find that Ms. McFarlane started to look for other employment in November 2022, at about the time she and King Ursa talked about a severance package. Such a finding would be logical and make common sense, but the evidence of triangulating the calendar notations does not suffice.

[14] Whether Ms. McFarlane was actively looking for other work in the interval from November 2022, she remained on maternity leave at the company's request until April 2023. In February 2023, Ms. Gosling notified Ms. McFarlane that she and Mr. Salomao were on reduced compensation and expected Ms. McFarlane to accept a $90,000 reduction in base salary to help the company. Ms. McFarlane testified that, during these November discussions, Mr. Salomao told her that if she returned to work with a pay cut, others on the

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team would be let go. She also stated that Mr. Salomao and Ms. Gosling talked about her as being the "easiest to move," because her stand-in was coping.

[15] I accept the plaintiff's evidence and argument that King Ursa ensured that Ms. McFarlane ended her maternity leave and extended her absence by taking vacation, for the purpose of establishing that the company reinstated her after her leave. This was in technical compliance with s. 53 of the *Employment Standards Act, 2000*, S.O. 2000, c. 41.

[16] On April 3, 2023, Ms. Gosling presented Ms. McFarlane with a letter agreement reducing her salary to $210,000 and demoting her to Associate Partner and Vice-President of Media & Analytics. During his trial evidence, Mr. Salomao testified that he considered this to be a promotion, stating that a partner implied part-owner of the company. I did not find this evidence credible, since the objective evidence was that the new title was the same as Ms. McFarlane's previous one.

[17] In the email attaching the new contract, Ms. Gosling stated:

> Please don't feel that you're being dismissed. There's no executive here, including yourself that is not needed, valued or wanted. We have been doing what we can to rebuild the agency, culture and keeping all executive team members.

[18] A week later, Ms. McFarlane stated that she would not be signing the new contract. On April 15, 2023, she advised Ms. Gosling and Mr. Salomao that she would not be returning to work, and that she had consulted a lawyer.

[19] In my review of the April 3, 2023, letter, I have noted but do not give much weight to the plaintiff's submission that there were relevant terms beyond the change in title and salary. For example, it contained a reinstatement of probationary status. I read from this, and Mr. Salomao's explanation at trial, that they were advertising people and not very conversant in legal or human resources. Indeed, one might consider from his explanation of the change in title that Ms. Gosling had pulled the template for the letter from the previous employment letter and neglected to change anything but the proposed new salary.

[20] Despite my inclination to construe the letter as not having intended to be harsh or vindictive, I do find that King Ursa owed a moral and legal duty to craft the agreement in a careful manner that did not go beyond Ms. Gosling and Mr. Salomao's stated intent of renegotiating the salary. By including a demotion in the letter, even if by accident, the employer must accept the consequence of having presented a document that did not invite further salary negotiation.

[21] The denizens of courts and law offices might acquire insensitivity to the receipt of legal letters, but most people receiving formal documents will experience a moment of anxiety. If the letter contains alarming information, a reasonable person will feel the heat of added hostility. In her evidence, Ms. McFarlane stated that she considered the letter as King Ursa's attempt to coerce her into taking a pay cut. She was in a vulnerable position, because she had a new baby and was purchasing a house.

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[22] I find that, in the overall context of events and discussions between November and April, the presentation of the letter exerted pressure on Ms. McFarlane to accept the new terms or leave the company. The fact that the company's circumstances made the conduct of Mr. Salomao and Ms. Gosling more understandable in real-world business context did not excuse them of their legal obligations as an employer. The business has legal obligations. If it cannot afford to keep an employee, it must provide notice or payment in lieu.

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[23] I therefore find that King Ursa constructively dismissed Ms. McFarlane from her employment.

2. MITIGATION

[24] At the opening of trial, I excluded from the evidence a brief of documents described to me as correspondence with prospective employers, employment applications, and other records documenting Ms. McFarlane's job search in 2023. The contents of the brief were disclosed long after the time limits under the *Rules of Civil Procedure* for disclosure of documents and inclusion in affidavits of documents. Given the patent unfairness to the defence, I directed the Registrar to mark it as a lettered exhibit but did not admit it as evidence.

[25] As stated earlier, the chart attached to Ms. McFarlane's affidavit could not be construed as evidence that she had started her job search in November 2022, when the discussions included severance. That said, I do not construe it as evidence that she sat around and did not start looking for work until November 2023, as the defence submitted. Such a conclusion would be inconsistent with her evidence that, in May 2023, she secured a consulting contract for marketing Arterra Wines. The value of the services performed from May to August was $24,108.55. She would not have received this contract work, if she had not been reaching out to her contacts at least from the time of her resignation.

[26] The employer bears the burden of proving the employee failed to mitigate the damages. This includes the proof that the employee "could have procured other employment of an approximately similar kind." The party in breach has a high onus, because the party in breach is demanding positive action from the sufferer of the breach: *Red Deer College v. Michaels*, 1975 CanLII 15 (SCC), [1976] 2 SCR 324, at pp. 331-32, and *Burton v. Aronovitch McCauley Rollo LLP*, 2018 ONSC 3018, at para. 73. Because the damages are already curtailed by the length of reasonable notice, any reduction of that amount requires cogent evidence proving not only the lack of effort but also the ability to secure comparable employment.

[27] The defence did not tender any material evidence that Ms. McFarlane could have secured a similar position, had she made sufficient efforts. I therefore decline to give effect to the mitigation defence.

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3. LENGTH OF NOTICE AND DAMAGES

[28] In Canadian employment law, the length of reasonable notice entails a contextual approach developed from *Bardal v. Globe & Mail Ltd.*, [1960] O.W.N. 253. Typically, the employee's age, length of service, nature of the position, and availability of similar employment, come into play. More prestigious positions tend to command longer notice periods, because they are less commoditized in the labour market.

[29] Ms. McFarlane's counsel cited various decisions providing twelve months' notice as the standard, for senior employees at the executive level despite relatively short tenure of 3-5 years. For example: *Humphrey v. Mene Inc*., 2022 ONCA 531, at para. 49.

[30] The employer's counsel cited various decisions supporting a lower notice period of about six months. For example, in *McCrea v. Conference Board of Canada*, 1993 CarswellOnt 926, at para. 32, the court awarded damages in lieu of six months' notice to a director of public relations of similar age and tenure as Ms. McFarlane. I did observe that Ms. McCrea's position was akin to the one to which Ms. McFarlane would have been demoted, had she accepted the demotion.

[31] What struck me as the determining factor, aside from her age, length of tenure, and executive position, was the availability of comparable positions. King Ursa promoted the plaintiff rapidly into the senior position. Evidently, Ms. McFarlane acquitted herself both in terms of hard work and entrepreneurial energy. The fact that she could only secure contract work despite being an expert in marketing analytics meant she knew how to look for a comparable job but was unable to secure one. I appreciate there is a strong *ex post* logic to this reasoning, but I cannot ignore her inability to find comparable employment as a factor tipping the scales in favour of a longer term. I would therefore award damages based on a twelve-month notice period.

[32] Counsel have provided a calculation of the monthly amounts. They consist of $25,516.45 for total value of compensation, plus vacation of $923.08. This amounts to $317,274.36. I would deduct from this total the $26,658.55 earned from the contract work. The net calculation of damages is therefore $290,615.81.

[33] I would not make an award of the value of the phantom shares, because the cause of action has yet to accrue. The employment agreement provided that the phantom shares would be liquidated and paid to the employee upon sale of the company. That event has not yet occurred. It is not for the court to determine the logistics of the plaintiff finding out whether the company has been sold.

4. DISCRIMINATION

[34] Ms. McFarlane submitted that this case was a clear example of discrimination based on her gender and maternity status, and she has pleaded the Ontario *Human Rights Code*, R.S.O. 1990, c. H.19. How such a claim materializes in the facts is not so straightforward.

[35] The maternity leave here cannot be the basis for a reprisal claim, as the court interpreted the case in *Andrachuk v. Bell Globe Media Publishing Inc*., 2009 CanLII 3974 (ON SC), at para. 27. When Ms. McFarlane took maternity leave, King Ursa extended it, albeit to save money compared to her full salary. The fact that the other senior employees higher than her level were accepting reductions was evidence that Ms. McFarlane was asked to cut her pay because it was a large item on the payroll.

[36] King Ursa did take advantage of Ms. McFarlane's maternity leave to leverage the reduction of the payroll load. Based on the trial evidence, I did not glean from this circumstance that King Ursa pushed her out because she took maternity leave or because she could have more children later. I was unable to find on the evidence that King Ursa discriminated against Ms. McFarlane for the purpose of an independent claim under the *Code*. I have considered the possibility that there could have been indirect discrimination, but I could not find her status or gender as a factor. Rather, the fact that she was returning from leave – whatever the reason – was a defining fact in the employer's attempt to redefine the employment contract.

[37] The circumstances of her isolation from the company during the extended maternity leave contributed to a need for heightened sensitivity and professionalism in the negotiation or renegotiation of her compensation or severance, based on the company's undeniably poor financial performance. These facts lead the analysis away from a discrimination claim and into the handling of the employee, for the purposes of the punitive and moral damages inquiry.

5. PUNITIVE AND / OR MORAL DAMAGES

[38] The case law on punitive damages has evolved during the last few decades. However, there remains a requirement for malicious, high-hand, or oppressive conduct that offends the court's sense of decency: *Richard v. Time Inc*., 2012 SCC 8, [2012] 1 SCR 265, at para. 149. In contrast, moral damages are compensatory and are akin to aggravated damages and can be awarded where the employer's conduct is unduly insensitive: *Doyle v. Zochem Inc*., 2017 ONCA 130, at para. 12.

[39] I appreciate the attempt to impose a salary cut was not to push her out but to implement a cost reduction scheme. However, there was no justification of imposing a demotion. The fact that the demotion may have arisen from a word processing error does not excuse the employer from the impact on the employee. Any employee, especially one whose executive status is closely tied to her identity and self-esteem, would react negatively to a document containing a demotion.

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[40] As to the quantum of moral damages, *Doyle* provides some guidance in that the range in employment law has been quite wide. In the circumstances where the demotion appears to have resulted more from carelessness than malice, I would assess the quantum in the middle of the range, in the amount of $40,000.00.

CONCLUSION

[41] I therefore award damages for constructive dismissal, in the amount of $290,615.81 in lieu of notice, plus moral damages in the amount of $40,000.00.

[42] If the parties are unable to settle the costs of the proceeding, counsel may contact my judicial assistant with a mutually agreed schedule for the exchange of bills of costs and submissions.

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Akazaki J.

Released: June 18, 2025

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Akazaki, J.

Released: June 18, 2025