COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Cressey Construction Corporation v. Parolin,* 2026 BCCA 199

Date: 20260511
Docket: CA50683

Between:

Cressey Construction Corporation

Appellant
(Defendant)

And

Tracy Parolin

Respondent
(Plaintiff)

Before: The Honourable Chief Justice Marchand
The Honourable Justice Fleming
The Honourable Justice Iyer

On appeal from: An order of the Supreme Court of British Columbia, dated April 23, 2025 (*Parolin v. Cressey Construction Corporation*, 2025 BCSC 741, Vancouver Docket S233938).

Counsel for the Appellant:	N.T. Mitha, K.C E.S. White
Counsel for the Respondent:	S. Gleave
Place and Date of Hearing:	Vancouver, British Columbia January 16, 2026
Place and Date of Judgment:	Vancouver, British Columbia May 11, 2026

Written Reasons by:
The Honourable Chief Justice Marchand

Concurred in by:
The Honourable Justice Fleming
The Honourable Justice Iyer

Summary:

The appellant appeals the trial judge's findings it (1) constructively dismissed the respondent and (2) did not establish the respondent failed to mitigate. Held: Appeal dismissed. The appellant has not demonstrated the judge erred in finding the respondent's employment contract permitted her to work from home. Nor has it shown the judge erred in concluding the respondent was constructively dismissed when she was directed to return to work full-time at the appellant's office without reasonable notice. Finally, it was open to the judge to conclude the respondent reasonably mitigated her loss by pursuing business ventures rather than alternative employment. In any event, the appellant failed to show the judge erred in concluding the respondent could not have obtained comparable employment had she looked.

Reasons for Judgment of the Honourable Chief Justice Marchand:

Introduction

[1] This appeal arises out of the appellant's constructive and wrongful dismissal of a longtime employee, the respondent.

[2] The appellant, Cressey Construction Corporation ("Cressey"), is a Vancouver-based real estate development and construction company. The respondent, Tracy Parolin, worked for Cressey for 18 years. She began her career there in 2005 as a Development Manager, and, in April 2018, was promoted to Director of Marketing. Her employment contract's terms were mostly oral, except for a job description of the Director of Marketing's role and responsibilities.

[3] Following the arrival of twins and an associated maternity leave, in 2013, Ms. Parolin began working reduced hours that enabled her to manage her childcare responsibilities. At the outset of the COVID-19 pandemic, Ms. Parolin, like other Cressey employees, began working from home. When her co-workers returned to work in the office in June 2020, Ms. Parolin did not join them. Due to health concerns related to one of her children, Ms. Parolin continued to work from home.

[4] In March 2023, Ms. Parolin began working full-time hours from home. On May 10, 2023, Ms. Parolin met with Cressey's Vice President of Development, Mr. Kendall, to discuss a pay increase she had been seeking since her promotion. Mr. Kendall advised Ms. Parolin she would receive a very modest salary increase,

which was far below her expectations. Mr. Kendall justified the increase on the basis her role was more aligned with that of a Marketing Manager rather than a Director of Marketing. Mr. Kendall also directed Ms. Parolin to return to in-office full-time work. As a result of the meeting, Ms. Parolin concluded she had been constructively dismissed. Her last day of work was May 17, 2023.

[5] Following her departure from Cressey, Ms. Parolin did not seek alternative employment. Instead, she began working on several business ventures. By the time of trial, her ventures had not yet generated any revenue.

[6] In written reasons for judgment indexed as 2025 BCSC 741, the judge found Ms. Parolin's flexible work hours, and work location, were oral terms of her employment contract that could only be changed with "reasonable discussion and/or notice": at para. 87. She further found "the combined effect of a direction to return to work at the office without notice, the provision of such a small salary increase, and Mr. Kendall's reference to a Marketing Manager position as the most comparable position established, in effect, a demotion for Ms. Parolin": at para. 90.

[7] In the judge's view, Ms. Parolin's "demotion" plus "the unilateral change in essential terms of her employment contract" established a breach of her employment contract and constructive dismissal: at para. 90.

[8] The judge then determined Ms. Parolin was entitled to 19 months pay in lieu of reasonable notice and concluded Ms. Parolin had not failed to mitigate her loss.

[9] Cressey raises several grounds of appeal. In essence, Cressey submits the judge:

1. made legal and factual errors in determining the terms of Ms. Parolin's employment contract;

2. made legal errors in determining Cressey breached Ms. Parolin's employment contract; and

3. made legal errors in finding Ms. Parolin had not failed to mitigate.

[10] For the reasons that follow, there is no need to fully address Cressey's first two grounds of appeal. Cressey does not challenge the trial judge's findings that Ms. Parolin's ability to work from home was an essential term of her employment contract and that Cressey unilaterally directed Ms. Parolin to return to work in the office without reasonable notice. In my view, this breach of Ms. Parolin's employment contract on its own amounted to a constructive dismissal which entitled Ms. Parolin to pay in lieu of reasonable notice.

[11] Regarding the remaining issue, in my view, the trial judge did not err in concluding Ms. Parolin did not fail to mitigate.

[12] I would therefore dismiss the appeal.

Background

[13] Ms. Parolin started working at Cressey in 2005 as a Development Manager.

[14] In June 2012, Ms. Parolin took a maternity leave. She had twins, one of whom had a significant health issue. In April 2013, at the request of Cressey's Executive Vice President, Mr. Lammam, Ms. Parolin returned to work early, working four days a week. Ms. Parolin's evidence was that Mr. Lammam agreed she could have flexibility in her working hours. Once her children started kindergarten in 2017, she was given flexibility to pick up and drop off her children five days a week, and her work schedule was approximately 8:45 am to 2:15 pm.

[15] From 2018 to 2021, Ms. Parolin reported to Mr. Jason Turcotte, Vice President of Development. She continued to work a flexible schedule which involved dropping off and picking up her children from school. Mr. Turcotte regularly approved her flexible schedule and knew she needed flexible working hours due to childcare.

[16] In 2018, Cressey advertised a Director of Marketing position and interviewed several candidates. Eventually, Mr. Turcotte spoke to Ms. Parolin about the position, explaining it would be a better fit for her flexible work schedule. As part of their discussions, in an email dated April 14, 2018, Mr. Turcotte sent Ms. Parolin the Director of Marketing job description.

[17] Ms. Parolin testified that when she accepted the Director of Marketing position, Mr. Turcotte told her he would consider a pay increase and bonus structure for her in that position. Ms. Parolin's evidence was that she performed all the Director of Marketing duties in the job description and consistently asked for a pay raise. The trial judge found as a fact Mr. Turcotte agreed Ms. Parolin's work warranted a salary increase: at para. 64.

[18] In March 2020, due to the COVID-19 pandemic, Cressey employees started working from home. Within a few months, they returned to the office. Ms. Parolin, however, spoke with Mr. Turcotte about continuing to work from home because she was concerned about the health of one of her children. Further, her children were not yet back at school. She testified Mr. Turcotte understood her concern about her child's health and agreed she could work from home.

[19] When Mr. Turcotte left Cressey in 2021, Ms. Parolin confirmed she could continue to work from home with Mr. Lammam. He told her that as long as the job was getting done, it did not matter where she worked. In June 2021, Mr. Lammam assisted Ms. Parolin in setting up her home office. While Mr. Lammam said his assumption was Ms. Parolin would return to the office when the pandemic was over, this was not communicated to her.

[20] In February 2023, Ms. Parolin sent Mr. Cressey an email requesting a meeting to discuss her wages and attaching a list of the duties she was performing as Director of Marketing.

[21] In March 2023, Ms. Parolin was reporting to Mr. Kendall and changed her working hours to a full-time schedule. Mr. Kendall approved Ms. Parolin being paid for full-time work. She continued working from home, eight hours a day. Ms. Parolin also continued to pick her children up at 3:00pm.

[22] On May 10, 2023, Ms. Parolin and Mr. Kendall met to discuss her salary increase request. At this meeting, Mr. Kendall directed her to return to working at the office, Monday to Friday from 9:00 am to 5:00pm. Mr. Kendall also told her she would receive a salary increase of $1,400 a year, bringing her salary from $93,600

to $95,000. He explained he had surveyed salaries for comparable positions, and her role was more akin to a Marketing Manager position than a Marketing Director position.

[23] Ms. Parolin testified Mr. Kendall told her she could take up any concerns with Mr. Cressey, but that Mr. Cressey had made the decision and was adamant she return to the office. While there was no evidence about the positions Mr. Kendall reviewed in his survey, there was evidence at trial that Marketing Directors at two other companies were being paid over $125,000, which was consistent with Ms. Parolin's request to be paid $130,000.

[24] As a result of the May 10 meeting, Ms. Parolin considered herself constructively dismissed. She informed Cressey of this, and her last day working for the company was May 17, 2023.

[25] After leaving Cressey, Ms. Parolin sought to start a business in the development sector called Sova Homes. On July 10, 2023, she applied to register the business's name. She planned to work on small residential developments on single family lots where she would develop the properties into two or more units. In August 2023, Ms. Parolin had a business partner and made an offer to purchase a property which was not successful.

[26] In October 2023, Ms. Parolin shifted her efforts to a second business called Maro Design which she incorporated in November 2023. The business idea was to develop an AI-based interior design product. After conducting research and consulting with industry experts, Ms. Parolin paused this venture because she concluded the necessary technology was not advanced enough.

[27] Ms. Parolin and a business partner then started a project called Tech Safe Kids, an interactive learning platform for young people designed to teach cell phone e-safety, digital etiquette and online security with an emphasis on mental health. A business plan was created in April 2024 and the business applied for several grants. In November 2024, the Centre for Digital Media accepted the product into a program where it would build the platform prototype at a significantly reduced cost compared

to estimates provided by private vendors. The projected soft-launch date at the time of trial was late 2025 or early 2026.

Trial Judgment

[28] In her reasons for judgment, the trial judge identified the issues as relating to: (1) constructive dismissal; (2) notice period and damages; (3) mitigation; and (4) punitive damages.

[29] The judge began by reviewing the applicable legal principles. She set out the definition of constructive dismissal and associated two-pronged test, citing the leading case of *Farber v. Royal Trust Co.*, [1997] 1 S.C.R. 846, 1997 CanLII 387, as well as *Potter v. New Brunswick Legal Aid Services Commission*, 2015 SCC 10, and a more recent summary of the principles in *Rampre v. Okanagan Halfway House Society*, 2018 BCSC 992: at paras. 9–11.

[30] She recognized constructive dismissal can take two forms: it can be a single unilateral act that breaches an essential term of the employment contract, or it can be a series of acts that, taken together, show the employer no longer intends to be bound by the contract. The fundamental question is whether the employer breached the contract by unilaterally changing it. If the contract has an express or implied term permitting the employer to make the change, or if the employee agrees to the change, it will not be a unilateral change and there will be no breach. This, the judge noted, is an objective test. Once a breach has been shown, the court must ask whether a reasonable person in the same situation would have felt an essential term was substantially changed: at paras. 12–13.

[31] The judge further recognized constructive dismissal is a claim for breach of contract, governed by the principles of contract law. Therefore, the plaintiff must prove on a balance of probabilities that the essential terms of the alleged contract are sufficiently clear on an objective assessment: at para. 14.

[32] The judge then stated that, in the absence of a formal written agreement, the court is left to “imply” the agreement from the circumstances. The judge set out the

three circumstances in which a court will imply terms and noted a court will only imply a term if the court concludes the parties must have intended the term to be part of the contract: at para. 15.

[33] The judge indicated the goal of contractual interpretation is to objectively determine the parties' intention at the time the contract was made, and a key consideration is whether and to what extent the parties behaved as if they were bound by an enforceable agreement, citing *Eli Lilly & Co. v. Novopharm Ltd*., [1998] 2 S.C.R. 129, 1998 CanLII 791, and *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53: at para. 16.

[34] The judge observed the principles for interpreting a written contract apply equally to oral contracts, with the goal being to determine the objective intention of the parties at the time the contract was made. The question is whether a reasonable bystander would conclude, in light of the circumstances, that the parties intended to contract, "and if so what essential terms exist that are sufficiently certain": at para. 17.

[35] After reviewing the parties' positions, the judge indicated a key question in this case is: what are the terms of the plaintiff's employment contract? She then turned "to the pertinent facts that can be established in this case and whether they support the plaintiff's claim": at para. 26.

[36] Of note, the judge found Ms. Parolin was a credible witness and indicated she preferred Ms. Parolin's evidence to that of Cressey's witnesses who were "by and large defensive in critical areas which adversely affected their testimony": at paras. 78–79.

[37] After reviewing the facts, the judge turned to an application of the legal principles.

[38] The judge concluded Ms. Parolin had established that when she returned "from maternity leave in 2013, her employment contract included a term providing

flexibility in her work hours to accommodate her childcare commitments": at para. 48.

[39] The judge found Ms. Parolin worked these flexible hours until the events of May 2023, "as agreed to by her employer, for over ten years during which time she would fulfill her childcare responsibilities during her workday": at paras. 49–50.

[40] The judge found the company knew about Ms. Parolin's need for flexible hours "throughout her employment, which included picking up her children, over the years": at para. 51. The judge, therefore, agreed with Ms. Parolin that her flexible work arrangement was part of her employment contract: at para. 52.

[41] The judge further found this flexibility applied to Ms. Parolin working from home: at para. 52. Ms. Parolin remained working from home due to her childcare needs and her child's health concerns after the pandemic's onset. The judge found "[t]his arrangement was agreed to and supported by Mr. Lammam, who told her in 2021, after the departure of Mr. Turcotte, that she did not need to work at the office, as he knew she was getting the work done and the location did not matter": at para. 52. Further, Mr. Lammam supported Ms. Parolin in setting up her home office after other employees had returned to work at the head office: at para. 53. Therefore, there was "little doubt that it was an ongoing term of employment that Ms. Parolin could work from home, which Ms. Parolin relied-upon and the company accepted": at para. 53.

[42] Importantly, the judge held the following:

> [87] I have concluded that a term of Ms. Parolin's employment contract was her ability to work flexible hours at home, due to childcare commitments. This term was not indefinite, as it was tied to childcare commitments. While I accept that employers have the ability to manage their workforce, including the location of work, that is tempered where a binding term in an employment contract exists. In this case, while the term of flexible hours and location in employment contract is oral, I have concluded it exists, and thus can only be changed with reasonable discussion and/or notice. There is no question that Cressey knew of Ms. Parolin's flexible work arrangement, which she had for ten years, and her work from home arrangement, which she had for three years. The defendant authorized this, knew it existed, and supported it over

> that time. I have therefore found Ms. Parolin's flexible work hours and location to be oral terms in her contract of employment, as set out above.
>
> [Emphasis added.]

[43] The judge then stated the "combined effect of a direction to return to work at the office without notice, the provision of such a small salary increase, and Mr. Kendall's reference to a Marketing Manager position as the most comparable position, established, in effect, a demotion for Ms. Parolin, who had been working and treated all along as a Director of Marketing": at para. 90. "This demotion, along with the unilateral change in essential terms of her employment contract, is sufficient to establish a breach of her employment contract and ultimately her constructive dismissal": at para. 90.

[44] The judge determined "a unilateral breach" of Ms. Parolin's contract had been established on the evidence and the breach was not minor. A reasonable person in Ms. Parolin's situation would have felt the essential terms of the contract had been substantially changed, and "[i]t was clear as a result of the May 10, 2023 meeting that Cressey no longer intended to be bound by the essential terms of that contract" and had constructively dismissed Ms. Parolin: at para. 95.

[45] Based on Ms. Parolin's age (55), her 18-year work history at Cressey and her role as a director, the judge concluded 19-months' notice was a reasonable damage award.

[46] The judge then turned to the question of whether Ms. Parolin had failed to mitigate her damages.

[47] The judge stated she had to consider the reasonableness of Ms. Parolin's decision to start a business. She noted there was no doubt Ms. Parolin did not explore available positions in the development industry. However, the judge also stated the evidence showed other companies in the industry with comparable positions had in-office work policies with limited ability to work from home: at paras. 107–109.

[48] The judge acknowledged the case law that following a dismissal, an employee has a duty to take the steps a reasonable person would take in her own interest to maintain her income and position in her industry trade or profession. Citing *Forshaw v. Aluminex Extrusions Ltd.*, 39 B.C.L.R. (2d) 140, 1989 CanLII 234 (C.A.), she recognized the court will reduce wrongful dismissal damages if an employee fails to do so. She also cited *Goetz v. Instow Enterprises Ltd*., 2021 BCSC 709 at para. 79, where the court stated the duty to mitigate requires exploring what is available through all means: at para. 104.

[49] The judge considered several cases the defendants relied on, where courts found a former employee's choice to pursue part-time employment and studies, full-time studies or change industries not to be reasonable: at paras. 110–111.

[50] The judge noted *Forshaw* and *Hetherington v. Saskatchewan Liquor and Gaming Authority*, 2020 SKQB 110, show a decision to go into business following dismissal does not necessarily mean an employee has failed to mitigate: at paras. 113–114.

[51] The judge also distinguished *Hart v. EM Plastic & Electric Products Ltd.*, 2008 BCSC 228, where the court found an employee failed to mitigate when he turned down two job offers in his industry in favour of embarking on a new and risky career in real estate. Unlike *Hart*, the judge found the evidence established Ms. Parolin made "fulsome efforts to start a business in an industry she is very familiar with in both of her first endeavours": at para. 116. The judge rejected the idea the case law requires an individual to have business training or a business degree before they start a business: at para. 116.

[52] Ultimately, the judge found Ms. Parolin's business endeavours were reasonable, holding:

> [117] I note that, while Ms. Parolin's initial efforts in small residential development were not successful due to a number of factors, none of these were issues alien to Ms. Parolin's experience. Ms. Parolin quickly moved to the creative interior design idea. She appears to have industriously explored this with professionalism. She ultimately received advice that the technology was not quite ready for the idea, and pivoted to the Tech Safe Kids venture.

> This venture appears robust, and while it is not at the stage of providing income, it is not an idle venture.
>
> [118] It is evident from all the above that it was reasonable, in these particular circumstances—which demonstrate robust efforts with a potential of success—for the plaintiff to start her own business.

[53] Finally, the judge declined to award punitive damages against Cressey. While she concluded Cressey treated Ms. Parolin "poorly" and with a "careless, dismissive attitude" the facts of the case were not "sufficiently egregious" to warrant a punitive damages award: at para. 122.

Standard of Review

[54] At a high level, appellate standards of review are well understood and easy to state. The standard of review on a question of law is correctness. The standard of review on questions of fact is palpable and overriding error. Unless there is an extricable legal question, the standard of review for questions of mixed fact and law is also palpable and overriding error: *Housen v. Nikolaisen*, 2002 SCC 33 at paras. 8, 10, 36. However, this appeal requires a consideration of standards of review at a more granular level.

[55] The identification of the correct legal standard is a question of law, but the application of a legal standard to a set of facts is a question of mixed fact and law: *Housen*, at paras. 27, 31. So, for example, whether an employer has constructively dismissed an employee is a question of mixed fact and law. A judge's statement of the law of constructive dismissal is a question of law but the judge's finding that the test was met in a particular case is a question of fact: *Alberta Computers.com Inc v. Thibert*, 2021 ABCA 213 at para. 47; *Costello v. ITB Marine Group Ltd.*, 2021 BCCA 154 at para. 4; *Allen v. Ainsworth Lumber Co. Ltd*., 2013 BCCA 271 at para. 27.

[56] A contract's interpretation is a question of mixed fact and law: *Sattva* at paras. 47–53.

[57] Issues concerning contract formation, rather than interpretation, are questions of fact: *Aubrey v. Teck Highland Valley Copper Partnership*, 2017 BCCA 144 at para. 22.

[58] Whether a plaintiff has made reasonable efforts to mitigate is a question of fact: *Hart* at para. 48; *Battell v. Canem Systems Ltd*., 31 B.C.L.R. 345, 1981 CanLII 664 (S.C.) at 349; *Brake v. PJ-M2R Restaurant Inc.,* 2017 ONCA 402 at para. 93; *Lake v. La Presse,* 2022 ONCA 742 at para. 13.

[59] Whether the employer has discharged its onus of proving a failure to mitigate is a question of mixed fact and law: *Evans v. Teamsters Local Union No. 31*, 2008 SCC 20 at para. 35.

Issue 1: Did the judge err in determining the terms of Ms. Parolin's employment contract?

[60] Cressey does not take issue with the judge's statement of the legal principles related to the determination of the terms of an employment contract. However, Cressey alleges a number of errors related to the judge's finding that Ms. Parolin's employment contract with Cressey contained an oral term allowing Ms. Parolin flexibility for her childcare obligations and that this flexibility extended to allow her to work from home.

[61] More specifically, Cressey alleges the trial judge erred in her interpretation of the employment contract by:

- finding implied terms of flexibility due to childcare commitments that were not pleaded;
- failing to apply the correct legal test to imply terms in a contract;
- failing to apply the principle that terms of a contract must be certain; and
- materially misapprehending the evidence relating to Ms. Parolin's work hours and flexibility.

[62] In my view, Ms. Parolin's employment contract, at minimum, contained an express, not an implied, oral term permitting her to work from home. This was an essential term of the employment contract: see *Potter* at para. 32. An essential term cannot be unilaterally changed without reasonable notice: *Farber* at paras. 33–34.

As I will discuss below, this term's existence is sufficient to resolve this ground of appeal. Any possible errors related to the judge's conclusion Ms. Parolin's employment contract included an oral term permitting her flexible hours to accommodate her childcare commitments are immaterial.

[63] The interpretation of oral contracts engages the same principles as the interpretation of written contracts. If an agreement is not in writing, the court must consider the parties' words and actions and assess, objectively, whether their words and actions show an intention to be bound: *Le Soleil Hotel & Suites Ltd. v. Le Soleil Management Inc.*, 2009 BCSC 1303 at para. 328.

[64] The test for determining an intention to be bound is whether the parties have indicated to an objective reasonable bystander their intention to contract and the terms of their contract: *Thomson v. Thomson Estate*, 2026 BCCA 142 at para. 47. An enforceable contract requires consensus between the parties on all essential terms and those terms must be sufficiently certain: *Thomson* at para. 51.

[65] The goal of contractual interpretation is "to ascertain the objective intentions of the parties" by applying legal principles of interpretation. The exercise "is inherently fact specific": *Sattva* at para. 55. Courts may consider the surrounding circumstances in interpreting a contract's terms in order to "deepen [its] understanding of the mutual and objective intentions of the parties": *Sattva* at para. 57.

[66] In my view, the parties' words and actions support the judge's finding Ms. Parolin made out her pleaded claim that her employment contract contained an express oral term permitting her to work from home. Cressey has not identified any extricable error of law or palpable and overriding error of fact in the judge's conclusion that this was an essential and express term of her employment contract.

[67] Ms. Parolin sought permission to work from home and as detailed above, Cressey agreed. Ms. Parolin then worked from home for three full years. In the circumstances, fresh consideration was not required to support the modification to Ms. Parolin's employment contract: *Rosas v. Toca*, 2018 BCCA 191 at para. 183. In

addition, the oral work from home term was not complicated, was clearly understood by the parties and was therefore sufficiently certain to be enforceable.

[68] Given the above, it is not necessary to address alleged errors related to the judge's finding Ms. Parolin's employment contract included a flexible work schedule. For reasons I explain in more detail below, by directing Ms. Parolin to return to work full-time in the office, Cressey breached an essential term of Ms. Parolin's employment contract and constructively dismissed her. Therefore, nothing turns on any alleged errors related to "flexibility".

[69] However, I will briefly address the allegation the judge failed to apply the correct law for finding an implied term of the employment contract.

[70] While it appears the judge mistakenly used the word "imply" rather than "infer" at certain points in her reasons for judgment, I do not agree the judge erred by failing to apply the test for implying terms. I say this for the simple reason the judge was not analyzing the existence of implied terms. Rather, she was assessing whether there was an express oral term permitting work from home and flexible hours. While Cressey argued there were no such express oral terms, and therefore, the judge could only find such terms if they were implied terms, it is apparent from the analysis the judge undertook that she did not accept this submission.

[71] I would not accede to this ground of appeal.

Issue 2: Did the judge err in determining Cressey breached Ms. Parolin's employment contract?

[72] Cressey alleges the judge erred in concluding Cressey had constructively dismissed Ms. Parolin by:

- failing to apply the correct legal test to what the judge held was "in effect" a demotion; and
- relying on irrelevant considerations in finding a demotion, such as the small salary increase, the reference to a marketing manager position, and the salaries of marketing managers at other companies.

[73] In my view, Cressey constructively dismissed Ms. Parolin when it mandated she return to the office full-time five days a week without providing her reasonable notice. In the circumstances of this case, Cressey's revocation of Ms. Parolin's ability to work from home was a unilateral change to an essential term of her employment contract and amounted to constructive dismissal. Nothing turns on the judge's findings regarding Ms. Parolin's "demotion".

[74] When an employer's conduct shows it no longer intends to be bound by an employment contract, an employee may either accept the conduct or changes by the employer, or they may treat the conduct or changes as the employer's repudiation of the contract and sue for wrongful dismissal: *Potter* at para. 30, citing *Farber* at para. 33. The employer's act is referred to as "constructive dismissal" since the employer has not formally dismissed the employee. Rather, the act is treated as a dismissal at law with the word "constructive" indicating the dismissal is a legal construct: *Potter* at 30.

[75] The employee bears the onus of proving constructive dismissal, and if successful, the employee is entitled to damages instead of reasonable notice of termination: *Potter* at para. 31.

[76] The purpose of the constructive dismissal inquiry "is to determine whether the employer's act evinced an intention no longer to be bound by the contract": *Potter* at para. 31.

[77] In *Potter*, the Supreme Court of Canada explained employment contracts are "dynamic" compared to commercial contracts, and as a result, courts have "properly taken a flexible approach" in determining whether an employer's conduct showed an intention to no longer be bound by the contract: at para. 32.

[78] The Court described how two tests have emerged for determining whether an employer's conduct showed an intention to no longer be bound by the contract.

[79] First, a constructive dismissal may occur when the court identifies an express or implied contract term the employer has breached and the breach is sufficiently

serious to constitute a constructive dismissal. Typically, the breach involves "changes to the employee's compensation, work assignments or places of work that are both unilateral and substantial": *Potter* at para. 32. "The question is ever one of degree": *Potter* at para. 32, citing *In re Rubel Bronze and Metal Co. and Vos*, [1918] 1 K.B. 315 at 323.

[80] This branch of the test requires the court to review the contract's specific terms and has two steps: first, the employer's unilateral change must be a breach of the employment contract, and second, the breach must alter an essential term of the contract: *Potter* at para. 34.

[81] At the first step of the analysis, the court must determine objectively if a breach occurred. This requires determining whether the employer unilaterally changed the contract. If an express or implied term gives the employer authority to make the change, or the employee consents or acquiesces, the change is not unilateral and will not constitute a breach: *Potter* at para. 37. Once it has been objectively shown a breach has occurred, the second step of the analysis is to ask whether, at the time of the breach, "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": *Potter* at para. 39, citing *Farber* at para. 26.

[82] The Supreme Court has explained, "The kinds of changes that meet these criteria will depend on the facts of the case" and cannot be generalized: *Potter* at para. 40. Determining whether there has been a constructive dismissal is a "highly fact-driven exercise" where the court determines if the changes are reasonable and within the scope of the employee's job description or contract: *Potter* at 40.

[83] Second, a constructive dismissal may occur if an employer's conduct "more generally shows" it did not intend to be bound by the contract: *Potter* at para. 33. This type of constructive dismissal can occur in the absence of breach of a specific term of contract and requires considering "the cumulative effect" of the employer's past actions to determine whether they show an intention to no longer be bound by the contract: *Potter* at para. 33.

[84] The approach to this branch of the test involves assessing whether the employer's conduct "when viewed in the light of all the circumstances, would lead a reasonable person to conclude that the employer no longer intended to be bound by the terms of the contract": at para. 42. The employee does not need "to point to an actual specific substantial change in compensation, work assignments, or so on, that on its own constitutes a substantial breach": at para. 42. Rather, the focus in on "whether a course of conduct" shows an intention to no longer be bound; if shown, such a course of conduct "amounts cumulatively to an actual breach" at para. 42.

[85] In my view, the trial judge did not err in finding Ms. Parolin was constructively dismissed. Reading the reasons holistically and generously, the judge appears to have concluded Ms. Parolin was constructively dismissed on both branches of the test.

[86] In my view, it is sufficient here to recognize a breach under the first branch based on the direction to return to work without notice. Objectively, this was a unilateral change to an essential term of Ms. Parolin's contract. Ms. Parolin's contract did not permit Cressey to make this change without notice and Ms. Parolin did not consent or acquiesce to the change. Therefore, there was a unilateral breach.

[87] The next step of the analysis is whether, at the time of the breach, a reasonable person in Ms. Parolin's situation would have felt the essential terms of the contract were being substantially changed. In my view, Cressey has not established any error in the judge's conclusion a reasonable person in Ms. Parolin's circumstances, would have seen this breach as a substantial change as it changed her work location.

[88] Ms. Parolin had been working from home with Cressey's approval for approximately three years. Her work from home situation allowed her to fulfil her childcare responsibilities and scale up her hours to full-time work. Cressey was aware of Ms. Parolin's ongoing childcare needs. A change to her location of work, without notice, would have had a significant impact on her ability to manage her childcare and work responsibilities, and it is reasonable to conclude, objectively, that

someone in her circumstances would have seen this as a substantial change to her contract.

[89] Therefore, it was open to the judge to conclude Ms. Parolin was constructively dismissed on this basis alone.

[90] I do not agree with Cressey that the judge's constructive dismissal finding can only be sustained on the basis of the breach of an essential term of the contract combined with a demotion. A unilateral and substantial change to an essential term of an employment contract, in this case the work from home term, is sufficient on its own to ground constructive dismissal.

[91] Although not necessary to resolve this appeal, I will briefly address Cressey's arguments the judge erred in finding Ms. Parolin was demoted when her job title and duties did not change and she was offered a raise.

[92] In my view, it was open to the judge to conclude the course of conduct related to Ms. Parolin's request for a raise and what took place at the May 10 meeting "more generally show[ed]" Cressey did not intend to be bound by the employment contract under the second branch of the *Potter* test: at para. 33. This may have been what the judge was expressing when she concluded the provision of a very modest salary increase, after years of Ms. Parolin asking for a raise, in a meeting where Ms. Parolin was told her role as Marketing Director was more akin to that of a Marketing Manager, was "in effect" a demotion.

[93] I do not read the reasons as saying Ms. Parolin was demoted at law, and therefore, there was a unilateral change to her contract amounting to a constructive dismissal. Rather, it appears the judge was considering the circumstances of the May 10 meeting and concluded there was a course of conduct showing an intention to no longer be bound, which according to *Potter*, may amount "cumulatively to an actual breach": at para. 42.

[94] In any event, even if the judge erred in finding a demotion, as I have explained above, that error was not material to the conclusion Ms. Parolin was constructively dismissed. I would, therefore, not accede to this ground of appeal.

Issue 3: Did the judge err in finding Ms. Parolin had not failed to mitigate?

Cressey's Position

[95] Cressey alleges the judge erred in concluding Ms. Parolin did not fail to mitigate. First, Cressey submits the judge did not apply an objective test to the question of mitigation as required. Second, Cressey says the judge erred by considering an irrelevant factor in her analysis, specifically the fact that other development companies with job openings had policies requiring staff to primarily work at the office.

[96] On the first issue, Cressey says the judge did not refer to the objective test in the context of mitigation. She did not address the core question of what steps a reasonable person in Ms. Parolin's circumstances would have taken, focusing instead on the "robustness of Ms. Parolin's efforts after she had started her business" rather than assessing whether a reasonable person "would have embarked on that path in the first place". Cressey submits there are "no exceptions" in this case that made it reasonable for Ms. Parolin to start a business instead of seeking alternative employment first. Finally, Cressey says the judge provided no analysis of why "after Sova Home[s] floundered" it was reasonable for Ms. Parolin to start another business rather than look for a job.

[97] On the second issue, Cressey says it was improper and irrelevant for the judge to consider that Mosaic Homes and Anthem Properties, two other development companies, had policies requiring employees to primarily work from home in assessing whether there were comparable alternative positions available to Ms. Parolin during the notice period. Ms. Parolin's evidence, according to Cressey, was she did not look for other jobs because she wanted control over her life, not that she considered any prospective employer's work locations or policies or that there were any barriers to re-employment after she left Cressey.

Legal Principles

[98] Following a wrongful dismissal, an employee has a “clear duty” to mitigate their damages. The duty to mitigate is not a duty owed to the employer. Rather, it is a duty an employee owes to conduct themselves as a reasonable person. “In most cases, this necessarily means that the employee must take reasonable steps to find alternative employment upon dismissal”: *Coutts v. Brian Jessel Autosports Inc.*, 2005 BCCA 224 at para. 22 [emphasis added].

[99] In this province, the classic statement of the duty to mitigate is set out in *Forshaw* at 143–44. There, this Court explained the duty to “act reasonably” in seeking and accepting alternate employment is a responsibility to take such steps as a reasonable person in the dismissed employee’s position would take in their own interests.

> That "duty"—to take reasonable steps to obtain equivalent employment elsewhere and to accept such employment if available—is not an obligation owed by the dismissed employee to the former employer to act in the employer's interests. It would indeed be strange that such a duty would arise where an employer has breached his contractual obligation to his employee, having in mind that no duty to seek other employment lies on an employee who receives proper notice.
>
> The duty to "act reasonably", in seeking and accepting alternate employment, cannot be a duty to take such steps as will reduce the claim against the defaulting former employer, but must be a duty to take such steps as a reasonable person in the dismissed employee's position would take *in his own interests*—to maintain his income and his position in his industry, trade or profession. The question whether or not the employee has acted reasonably must be judged in relation to his own position, and not in relation to that of the employer who has wrongfully dismissed him. The former employer cannot have any right to expect that the former employee will accept lower paying alternate employment with doubtful prospects, and then sue for the difference between what he makes in that work and what he would have made had he received the notice to which he was entitled.
>
> [Emphasis in original.]

[100] In *Forshaw*, this Court upheld a trial decision which concluded a former employee had not failed to mitigate after he rejected a job offer in his industry and went into business for himself.

[101] The employer has the onus of proving failure to mitigate. The burden is “by no means a light one” because of the fact the “party already in breach of contract

demands positive action from one who is often innocent of blame": *Red Deer College v. Michaels*, [1976] 2 S.C.R. 324 at 332, 1975 CanLII 15, quoting Cheshire and Fifoot's, *Law of Contract*, 8th ed. (1972) at 599.

[102] Where an employee seeks to reduce damages on the ground the employee failed to mitigate their losses, the employer has the onus to prove on a balance of probabilities the employee failed to mitigate by not acting reasonably: *Coutts* at para. 23.

[103] The employer must show the plaintiff "either found, or, by the exercise of proper industry in the search, could have procured other employment of an approximately similar kind reasonably adapted to his abilities, and that in absence of such proof the plaintiff is entitled to recover the salary fixed by the contract": *Red Deer College* at 332, quoting *Williston on Contracts*, vol. 11, 3rd ed. (1968) at 302 and 312.

[104] In discharging the onus to show the former employee could reasonably have avoided a loss or that they acted unreasonably in failing to do so, the employer must prove two elements: (1) the employee failed to take reasonable steps to mitigate their damages; and (2) had the employee done so they would have been expected to secure a comparable position reasonably adapted to their abilities: *Lake* at para. 12.

[105] "Comparable employment" does not mean "any employment". Rather, it encompasses "employment comparable to the dismissed employee's employment with his or her former employer in status, hours and renumeration": *Dussault v. Imperial Oil Limited*, 2019 ONCA 448 at para. 5, citing *Carter v. 1657593 Ontario Inc. (The Olde Angel Inn)*, 2015 ONCA 823 at para. 6.

[106] The duty to mitigate loss has also been framed as an employee's duty to make reasonable efforts to mitigate their loss by seeking an alternate source of income: *Evans* at para. 28 [emphasis added].

[107] There is “no magic formula” an employee must follow when making reasonable efforts to find comparable employment to mitigate their loss: *Brake* at para. 94. The question is whether the employee has “stood idly or unreasonably by, or has tried without success to obtain other employment”: *Brake* at para. 94, citing *Red Deer College* at 331. A dismissed employee is “entitled to consider her own long-term interests, so she will not fail to mitigate merely because she chooses to take some career risks that might not minimize the compensation that her former employer will owe to her”: *Brake* at para. 94, citing *Peet v. Babcock & Wilcox Industries Ltd.*, 53 O.R. (3d) 321, 2001 CanLII 24077 (C.A.) at para. 8.

[108] Establishing a business is a means of mitigation: *Peet* at para. 8. In *Peet*, the Court of Appeal for Ontario held “the fact that the early years of the respondent’s self-employment did not live up to his monetary expectations does not mean that this was an unreasonable attempt at mitigation. An employee who has been terminated is entitled to consider his or her own long-term interests when seeking another way of earning a living”: at para. 8. And the onus is on the former employer to show the employee “did not minimize his salary loss by a reasonable course of action designed to avoid the unreasonable accumulation of the loss”: *Peet* at para. 6.

[109] Finally, “[t]he mitigation inquiry is fact-driven and considers all the relevant circumstances. The question is whether the employee has made reasonable efforts in the circumstances to find comparable employment”: *Ariss v. NORR Limited Architects & Engineers*, 2019 ONCA 449 at para. 48, citing *Red Deer College* at pp. 331–32.

Analysis

[110] In my view, mitigation in this case turns on the following. First, did Ms. Parolin act unreasonably by going into business for herself after her constructive dismissal? And second, if so, were the two job postings Cressey tendered “comparable employment” even though they required primarily in-office work?

[111] In determining whether Ms. Parolin acted unreasonably, I do not agree the judge applied a subjective test. At para. 113 of her reasons, the judge cites the

statement on mitigation from *Forshaw* that sets out a modified objective test. It asks what “a reasonable person in the dismissed employee’s position” would do.

[112] At para. 115, the judge summarizes her understanding of the principles, noting correctly the question of mitigation is “evaluated from the perspective of the employee”, involves asking whether “the employee has acted reasonably” and is assessed in relation to the employee’s “own position”.

[113] I do not view the judge’s conclusion about the robustness of Ms. Parolin’s efforts to start her businesses as showing an application of a subjective test. In assessing the objective reasonableness of Ms. Parolin’s actions, it was entirely appropriate for the judge to consider the “fulsome efforts” of Ms. Parolin in starting two businesses “in an industry she is very familiar with”: at para. 116. The judge also correctly noted the case law does not require business training or a business degree before a wrongfully dismissed employee can start a business: at para. 116.

[114] Cressey points to *Hart* and *Nevin v. British Columbia Hazardous Waste Management Corp.*, 14 B.C.L.R. (3d) 314, 1995 CanLII 1814 (C.A.), in support of its argument it was not reasonable for Ms. Parolin to start a business without first having looked for employment. I disagree.

[115] While it is true, as stated by this Court in *Coutts*, in most cases the reasonable course of conduct will be to seek alternative employment, there may be more than one reasonable course of action. The question is whether the course of action taken by the plaintiff is reasonable in the circumstances. The fact this element of the test is often expressed as whether the employee failed to take reasonable steps to find employment is a reflection of the fact most cases deal with a former employee looking for employment rather than starting a business.

[116] *Hart* and *Nevin* do not contradict the case law that starting a business may be a reasonable form of mitigation as shown in cases such as *Forshaw*; *Battel*; *Peet* at paras. 8–9; *Hetherington* at paras. 123–126; *Scamurra v. Scamurra Contracting*, 2022 ONSC 4222 at paras. 100–104.

[117] In *Hart*, the trial judge found it unreasonable for Mr. Hart to reject two full-time comparable job offers in his industry and embark on “a new career in a completely unrelated field”: at para. 40. Mr. Hart sought to become a real estate agent, and there was evidence this was a risky line of work. As the court in *Hart* noted, each case turns on its particular facts: at para. 44.

[118] Further, *Hart* explained, “[i]n assessing mitigation efforts, personal preferences are a factor to consider and no one is compelled ‘to pursue one life-time career’”: at para. 48, citing *Battel*. “Even where the new career takes time to establish and has costs associated with retraining, a dismissed employee may be held to have properly mitigated in the circumstances if the evidence as a whole establishes he or she acted reasonably. In each case it is a question of fact”: at para. 48 [emphasis added].

[119] Accordingly, *Hart* cannot be read as establishing a requirement that all wrongfully dismissed employees, in every case, must first seek employment to mitigate their loss. It is a case that turned very much on its particular facts.

[120] In *Nevin*, the former employee attempted to find a job for some time before deciding to start a business. In finding her mitigation efforts reasonable, the Court observed, “at some point it becomes reasonable for a person who has lost her job and made extensive efforts to find another, to decide to start rebuilding her future by going into business for herself, even through a profit or other return in the short-term may be unlikely”: at para. 17. However, this statement did not establish a rule of law that starting a business is only reasonable if a wrongfully dismissed employee has first made extensive efforts to find alternate employment.

[121] In my view, Cressey has not demonstrated the judge made any reviewable error in concluding Ms. Parolin’s business ventures were a reasonable form of mitigation in the circumstances of this case. Whether Ms. Parolin’s conduct was reasonable is a question of fact. This Court will only interfere if the judge made palpable and overriding error in concluding her conduct was reasonable. I see none.

[122] Ms. Parolin has extensive experience in the development sector. She worked at Cressey for nearly two decades, and before that, she worked for other real estate development companies in Vancouver, Toronto and Vienna, Austria. The evidence at trial about Ms. Parolin's work experience at Cressey showed as a Development Manager and then Director of Marketing she had experience related to municipal rezoning and permitting, construction and budgeting, working with consultants, interior design, assisting in leasing and selling properties, and marketing development projects. These roles involved significant responsibility and multimillion dollar projects. She had also built two family homes.

[123] Ms. Parolin's first business venture, Sova Homes, involved purchasing residential single-family properties and redeveloping them into two or more units. Ms. Parolin testified she had a business partner experienced in interior design and advisors including a real estate lawyer and individuals who could assist with appraisals, taxes and accounting. While her first attempt to purchase a property was not successful, her evidence at trial was that the business was still operational and looking at properties to purchase.

[124] Ms. Parolin's second business, Maro Design, involved a plan to develop an AI interior design app. After research, Ms. Parolin and her business partner determined their plan was not viable because of technological limitations.

[125] Ms. Parolin's third business involved developing a "gamified" online digital literacy course for young people. She partnered with a clinician in child development and their proposal was accepted, at the time of trial, for development by the Centre for Digital Media which would assist in creating the game at reduced cost.

[126] Ms. Parolin dedicated significant effort to these businesses. For example, she testified she worked 40–60 hours per week when she was working on both Sova Homes and Maro Design.

[127] While aspects of Ms. Parolin's first two ventures may have been somewhat outside her areas of expertise, they drew significantly on her professional experience. Although Ms. Parolin had no direct experience related to her third

business venture, she partnered with an expert and applied her general business acumen to achieve a certain degree of success by the time of trial.

[128] Considering Ms. Parolin's professional experience, effort, and the circumstances in which she left Cressey—where the flexibility afforded by working at home that allowed her to balance work and childcare responsibilities was taken away—it was open to the judge to conclude her mitigation efforts were, on the whole of the evidence, reasonable.

[129] In any event, Cressey has failed to satisfy the second element to prove Ms. Parolin failed to mitigate by demonstrating the judge erred in concluding Ms. Parolin could not have obtained comparable employment had she looked. The positions Cressey pointed to were not comparable because they required in-office work. In my view, it would be unfair to require Ms. Parolin to seek out and accept full-time in-office work when she had bargained with her employer to work from home, because of her childcare-related needs, and it was the unilateral breach of that term that constituted her constructive dismissal.

[130] On a case-specific, evidence-based analysis, I cannot conclude the judge made palpable and overriding error in finding Ms. Parolin's conduct reasonable in the circumstances. I would, therefore, not accede to this ground of appeal.

Conclusion and Disposition

[131] In my view, Cressey has not demonstrated the judge erred in finding Ms. Parolin's employment contract permitted her to work from home. Nor has it shown the judge erred in concluding Ms. Parolin was constructively dismissed and did not fail to mitigate.

[132] I would therefore dismiss the appeal.

"The Honourable Chief Justice Marchand"

I AGREE:

"The Honourable Justice Fleming"

I AGREE:

"The Honourable Justice Iyer"