IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Molby v. Scotia Capital Inc.,*
2025 BCSC 1814

Date: 20250905
Docket: S183545
Registry: Vancouver

Between:

Donna Molby

Plaintiff

And

Scotia Capital Inc.

Defendant

Before: The Honourable Madam Justice Sukstorf

Oral Reasons for Judgment

Counsel for the Plaintiff:	P. Pulver
Counsel for Defendant:	S. Winder
Place and Date of Hearing:	Vancouver, B.C. September 3-5, 2025
Place and Date of Judgment:	Vancouver, B.C. September 5, 2025

Table of Contents

Background

[1] These reasons for judgment were delivered orally. They have since been edited for distribution and publication.

[2] This is a constructive dismissal action in which the plaintiff, Donna Molby, seeks to have her claim heard by summary trial.

[3] For present purposes only, the salient context is this. In early 2016, the defendant, Scotia Capital Inc. ("Scotia"), undertook a review of the fees paid by the plaintiff's clients. Although no clients had themselves raised complaints, Scotia initiated the review out of concern that some clients might have been paying unusually high costs. Its focus was on pricing suitability, ensuring that cost structures were appropriate, rather than on any concern for "churning" or broader investment suitability.

[4] During the review, the parties discussed two pathways to resolve Scotia's concerns on the amount of fees being charged to clients: moving clients to fee-based accounts or retaining transactional pricing subject to caps related to return-on-assets thresholds.

[5] Given her clients' resistance to the fee-based model, Ms. Molby's accounts were subsequently capped. She states that this unilateral change caused a substantial reduction in her compensation, rendered the transactional model illusory, and left her with no choice but to resign, which she did in June 2016. She subsequently worked at another firm before founding OmniVita Wealth.

[6] The plaintiff asserts that only her book of business was scrutinized and subjected to unilaterally imposed pricing model changes. She seeks damages at the upper end of reasonable notice, as well as punitive damages and compensation for loss of opportunity and increased tax liabilities. Given that her salary at the critical time was over $3.7 million, the damages sought are substantial.

[7] Scotia denies constructive dismissal, asserting that the changes were required to comply with the Client Relationship Model ("CRM"), which was introduced by the Investment Industry Regulatory Organization of Canada ("IIROC") to strengthen suitability obligations and client transparency. At the time, IIROC was the national self-regulatory organization recognized by the British Columbia Securities Commission to oversee investment dealers and trading activity. Scotia further argues that the changes were consistent with the plaintiff's contractual and regulatory obligations.

History of Proceedings

[8] This action was commenced in 2018. There have been multiple discoveries, including a recent third discovery in August 2025, which focused on damages. Shortly before this hearing, the plaintiff delivered a five-page supplementary affidavit appending additional documents and summarizing expenses and losses.

[9] The defendant submits that audits and other supporting documents remain outstanding, and that, at a full trial, it may summon Mr. Djurfeldt, the former head of Scotia Capital, as a witness. The defendant seeks an additional opportunity for discovery.

[10] The plaintiff maintains that she has produced all relevant evidence. She further argues that the defendant has neither brought a formal application to compel production of the documents said to be missing nor sought to examine Mr. Djurfeldt under Rule 7-5 of the *Supreme Court Civil Rules*.

Legal Authority

[11] Constructive dismissal arises where an employer makes a substantial, unilateral change to an essential term of the employment contract, the employee does not accept the change, and the employee resigns as a result: *Farber v. Royal Trust Co.*, [1997] 1 S.C.R. 846 at para. 24, 1997 CanLII 387; *Coutlee v. Apex Granite & Tile Inc.*, 2020 BCSC 315 at para. 176.

[12] The governing framework was confirmed by the Supreme Court of Canada in *Potter v. New Brunswick Legal Aid Services Commission*, 2015 SCC 10. The first step is to determine whether the employer breached the employment contract by making a unilateral change to an express or implied term. If the contract or an implied term authorized the change, there is no breach and no constructive dismissal: *Potter* at para. 37.

[13] Where no written agreement exists, terms may be implied from the surrounding circumstances to reflect the parties' intentions at the time of contracting: *Eli Lilly & Co. v. Novopharm Ltd.*, [1998] 2 S.C.R. 129 at para. 54, 1998 CanLII 791. In employment relationships, it is often implied that the employer will not unilaterally impose substantial changes to duties or status that would amount to a fundamental breach: *Orth v. MacDonald Dettwiler & Associates Ltd.*, 8 B.C.L.R. (2d) 1 at 13, 1986 CanLII 170 (B.C.C.A.).

[14] If a breach is identified, the second step asks whether a reasonable person in the employee's position would view the change as substantially altering the essential terms of the contract. Minor or insubstantial changes are not enough: *Potter* at paras. 42, 63, 169; *Parolin v. Cressey Construction Corporation*, 2025 BCSC 741 at para. 13.

[15] It is against this framework that I must assess whether the plaintiff's constructive dismissal claim can properly be determined under Rule 9-7, which governs the use of summary trials.

Rule 9-7

[16] Rule 9-7(15)(a) permits the court to grant judgment on a summary trial if the evidence allows the necessary findings of fact and it is not unjust to do so.

[17] Whether a case is suitable for summary trial depends on its facts and legal issues. In *Inspiration Management Ltd. v. McDermid St. Lawrence Ltd*. (1989), 36 B.C.L.R. (2d) 202 at 214, 1989 CanLII 229 (C.A.), the Court of Appeal identified factors relevant to that assessment, including: the amount at stake, the complexity of

the matter, the urgency of the case, potential prejudice from delay, the cost of proceeding to a conventional trial, and the course of the proceedings.

[18] The critical question is whether the court can make the findings of fact necessary to resolve the dispute. Even where that is possible, the court must still consider whether it would be unjust to do so summarily, having regard to the *Inspiration Management* factors: see also *Gichuru v. Pallai*, 2013 BCCA 60 at paras. 30–31.

[19] The summary trial rule is intended to promote proportionality, access to justice, and the timely and affordable resolution of claims: *Hryniak v. Mauldin*, 2014 SCC 7. Cases may be decided summarily even if there are disputed issues of fact or law, provided credibility is not so central that the court cannot fairly resolve the matter on affidavits.

[20] Parties must “put their best foot forward” in a summary trial. They cannot hold back key evidence or assume that gaps will be filled at a later stage: *Gichuru* at para. 32.

[21] That said, a summary trial is generally not suitable when there are direct, “head-on” contradictions on material issues that cannot be resolved without assessing credibility. The court cannot sidestep such conflicts by simply preferring one version of events or by assuming the plaintiff’s case at its highest: *Axion Ventures Inc. v. Bonner*, 2021 BCSC 2644; *Saran v. Cartonio Inc*., 2020 BCSC 556, citing *Concord Pacific Acquisitions Inc. v. Oei*, 2017 BCSC 236 at para. 50.

[22] Where credibility lies at the heart of the case, or where proceeding summarily would create unnecessary complexity or risk injustice, the court may decline to decide the matter under Rule 9-7 and require that it proceed to trial.

Issues

[23] The issue is not whether the plaintiff was constructively dismissed, but whether that claim can be determined on the record by way of summary trial under Rule 9-7.

Positions of the Parties

Position of the Defendant

[24] The defendant argues the case cannot be determined without *viva voce* testimony. The central issue is whether the pricing change was a unilateral fundamental alteration or a permitted regulatory adjustment. They argue that the parties' evidence directly conflicts. Counsel for the defendant submits the following:

a) **Record gaps/timing:** There are outstanding discovery requests; the plaintiff's audits have not been produced; and a new affidavit outlining a summary of damages was served shortly before the hearing without providing the underlying source documents (receipts/invoices).

b) **Admissibility/weight:** The plaintiff's affidavits are replete with hearsay, unattributed statements, and speculation (e.g., client preferences, other advisers' practices, Scotia's motives). Large portions would need to be excised, leaving a thin and contested record.

c) **"Head-on" factual conflicts (credibility central):** Findings of fact which turn on credibility must be made, including what was actually said by two pivotal witnesses, Mr. Tiller, who was then the Vancouver, Scotia Branch Manager and Mr. Djurfeldt regarding where there was an IIROC "directive" or rather "increasing scrutiny"; whether clients had a real choice or if the caps rendered transactional pricing illusory; how the caps/thresholds were set and whether comparators were cherry-picked; whether the plaintiff was targeted; and whether any disparagement occurred post-departure.

d) **Complexity & quantum:** The claim may far exceed $3.7 million and includes loss of opportunity and tax components that will require detailed factual evidence unsuitable for a paper record.

e) **Process fairness:** A conventional trial permits *viva voce* evidence and more effective compulsion of non-party evidence (e.g., Mr. Djurfeldt).

Position of the Plaintiff

[25] The plaintiff argues that it is appropriate to proceed by summary trial, and the onus is on the defendant to prove otherwise. She makes the following submissions:

a) **Discovery:** Discovery has been extensive**,** including a third discovery in August 2025. Additional documents were produced thereafter, and any remaining requests are irrelevant or disproportionate. Scotia has brought no motion to compel.

b) **Witnesses:** If Scotia considered Mr. Djurfeldt essential, it could have sought his evidence under Rule 7-5. In any event, contemporaneous emails and documents capture his views.

c) **Admissibility/weight:** Minor hearsay or generality goes to weight**,** not admissibility. Credibility findings may be made on affidavit records where appropriate (citing *Tolzmann v. Royal Bank of Canada*, 2023 BCCA 366).

d) **Core facts are not in dispute:** Scotia unilaterally imposed caps on the plaintiff's pricing model, knowing this would reduce her revenue, while continuing to permit transactional pricing as an approved model. Scotia's own documents attribute the change to regulatory considerations. The plaintiff argues that these points can be determined from the documents alone.

e) Finally, the plaintiff stresses proportionality. This is a wrongful dismissal case unfolding over six months with three witnesses and a lengthy procedural history since 2018. To require a conventional trial now would be disproportionate in time and cost.

Analysis of Issues

[26] Applying these principles, for the following reasons, I find the plaintiff's claims are not suitable for a summary trial.

[27] Applying the framework in *Potter*, the Court must first determine whether Scotia made a unilateral change to an express or implied term of the plaintiff's employment contract. If so, the Court must then consider whether that change was sufficiently serious that a reasonable person in the plaintiff's position would view it as a substantial alteration of an essential term**.** Minor or insubstantial breaches will not suffice.

[28] On the present record, I cannot resolve those questions. The fair and proper resolution of this matter involves nuanced regulatory issues and the consideration of the obligations of advisers and investment firms. The plaintiff says the pricing caps imposed on her fundamentally altered her compensation structure, rendering the transactional model illusory. Scotia says the measures were regulatory in nature, consistent with the plaintiff's contractual obligations, and left her with a genuine choice. Determining whether these changes were unilateral or contractually authorized depends on what was stated by Mr. Tiller and Mr. Djurfeldt, the options presented, and whether the changes reflected regulatory compulsion or business judgment. Those disputes go to the very first step of the *Potter* analysis and are credibility-laden.

[29] Even if a breach were established, the second step of the *Potter* inquiry requires the Court to determine whether a reasonable person in the plaintiff's position would regard the essential terms of her contract as having been substantially altered. The plaintiff says her earnings would have been gutted by the changes, leaving her to work without pay once the thresholds were met. Scotia characterizes the adjustments as consistent with industry standards and in the best interests of its clients. Assessing the magnitude and effect of the caps, the comparators used, and the viability of the transactional model requires fact-finding that cannot be reasonably undertaken based solely on affidavit evidence.

[30] The plaintiff also invokes implied contractual terms that Scotia would not substantially alter her duties, responsibilities, or compensation without agreement or notice. Scotia denies breaching any such implied terms, stating that the plaintiff's duties remained unchanged and only pricing adjustments were required. Determining whether those adjustments amounted to a fundamental breach of an implied term is fact-intensive and cannot be resolved without *viva voce* testimony. In fact, additional witnesses may be required on both sides.

[31] Even if liability were clear, the damages claimed add further complexity. The plaintiff seeks in excess of $3 million, including notice, punitive damages, loss of opportunity, and a tax gross-up. Scotia disputes that the plaintiff suffered any loss, citing her subsequent employment and earnings volatility. Quantifying these claims would require expert and documentary evidence not before the Court.

[32] Finally, applying the *Inspiration Management* factors, the amount at stake is substantial**,** the matter is factually and legally complex**,** and credibility is central**.** The plaintiff is employed and faces no urgent hardship. To attempt summary resolution would fragment the litigation and carry a real risk of injustice.

[33] For these reasons, although the plaintiff invokes proportionality and efficiency, the record does not permit a fair application of the constructive dismissal framework at this stage. This matter must proceed to a conventional trial where credibility can be tested and evidentiary gaps addressed.

Disposition and Orders

[34] The plaintiff's summary trial application is dismissed**.**

[35] Costs are ordered in the cause.

"Sukstorf J."