

Timothy Comeau v. Valcom Consulting Ltd - 2025 NBKB 253
IN THE COURT OF KING'S BENCH OF NEW BRUNSWICK
TRIAL DIVISION
JUDICIAL DISTRICT OF FREDERICTON

File: FC-149-2024

BETWEEN:

TIMOTHY COMEAU,

Plaintiff

- and -

VALCOM CONSULTING LTD

Defendant

DECISION

BEFORE: Chief Justice Tracey K. DeWare
AT: Fredericton, New Brunswick
DATE OF HEARING: October 1 and 9, 2025
DATE OF DECISION: November 13, 2025
APPEARANCES: Jennifer E. Davis, for the Plaintiff
Eva M. Lane, for the Defendant

DEWARE, C.J.

INTRODUCTION

[1] This decision is made following a Binding Judicial Resolution Conference (BJRC) conducted on October 1, 2025. As the parties were unable to reach a resolution on October 1, 2025, and given the time constraints, arguments were heard on October 9, 2025, and this is the final decision on all issues. The BJRC process is by its nature a truncated procedure. The parties attempt to resolve the matter collaboratively and if that is not possible, the Court proceeds to determine the outstanding issues. In this particular matter, the seminal question is whether or not the Plaintiff was constructively dismissed. As this central question could not be resolved, nor could the other issues of a reasonable notice period or mitigation. Unusually, the Court is left to resolve all issues in the context of this BJRC.

FACTS

[2] The Plaintiff, Timothy Comeau, alleges he was constructively dismissed from his employment with the Defendant, Valcom Consulting Group Inc. The Defendant disputes this assertion and maintains the Plaintiff abandoned his employment.

[3] The Plaintiff was born on December 24, 1968 and is currently 56 years old. The Plaintiff first began working with the Defendant in 2009. Initially, the Plaintiff provided services to the Defendant through his own Corporation, TN consulting Inc. The Plaintiff provided services to the Defendant as a senior project manager both when working through his consulting business and later as an employee.

[4] In 2016, the Plaintiff transitioned from working with the Defendant through his own professional corporation and began work as an employee through a series of employment contracts. Between 2016 and 2024, the Plaintiff signed employment contracts with the Defendant which set out the terms of his employment for the upcoming period. The parties entered into evidence various employment contracts executed by the Plaintiff between 2016 and 2024:

- a) Fixed term contract from October 1, 2016 until March 31, 2019 with an annual salary commencing at \$103,000 with 2% increases in April 2017 and April 2018;
- b) Fixed term contract from June 3, 2019 to May 31, 2020 with optional extensions in May 2021 and May 2022 at a salary of \$106,765 and annual increases of 2%;
- c) Fixed term contract from May 2022 until March 2023 at a salary of \$116,632.20;
- d) Fixed term contract from April 2023 until March 2024 at a salary of \$122,463.81

[5] The Plaintiff's physical place of work was at CFB Gagetown as the Defendant had a contract with the Department of National Defence (DND) performing projects in the development of courseware. The Defendant would be advised by DND when their contracts were continued or extended following which the Defendant would enter into employment contracts with its employees who were working on the particular project.

[6] In February 2024, the Defendant had yet to secure confirmation from DND that its contracts would be renewed and therefore the Defendant had not yet provided employees with employment contracts. On February 21, 2024, the Defendant sent

to the Plaintiff, as well as its other employees, a letter advising his fixed term employment contract would expire on March 31, 2024 as the Defendant's contract with DND had yet to be extended. However, in the same correspondence, the Defendant noted they were optimistic the contract would be continued. On the same date the Defendant provided the Plaintiff with a new employment contract for the period of April 1, 2024 to March 31, 2025 at an annual salary of \$126,137.72. The salary level represented a 3% increase over the Plaintiff's previous annual salary.

- [7] The Plaintiff maintains his supervisor, Mr. Grant, had advised in conversation that his salary increase for the upcoming contract would be 5%. The Plaintiff did not agree with the proposed 3% set out in the employment contract as he maintained 5% had been negotiated between himself and Mr. Grant. The Plaintiff did not sign the February 21, 2024 agreement given his disagreement over the salary increase.
- [8] On March 21, 2024, the Defendant furnished to the Plaintiff a revised employment contract. This employment contract contained additional terms to that of the earlier contract including an indefinite duration, modified layoff and termination provisions and the same annual salary increase at 3% of \$126, 137.72. The Plaintiff discussed the new contract with Mr. Grant. The Plaintiff reiterated his position he would not sign the contract as it did not provide for the 5% salary increase he felt had been agreed upon. Both the Plaintiff and the Defendant agree the terms of the March 21, 2024 contract which were flagged by the Plaintiff as unacceptable were those solely related to salary, none of the other terms were mentioned nor discussed.

- [9] The February 2024 draft employment agreement contained the following terms regarding “Termination of Employment”:

Either party may terminate this Agreement by giving the other party the greater of **10** working days notice or the minimum notice prescribed by statute, in writing. The Employee is subject to immediate termination, without notice, for cause.

- [10] The March 21, 2024 draft employment agreement was amended to contain the following terms regarding Layoffs, Suspensions, Termination of Employment and Changes:

C.12 LAYOFFS

Due to economic, business or other conditions, Valcom may place the Employee on temporary lay-off. Any such temporary lay-off, so long as it is in accordance with the ESA, shall not constitute a termination of the Employee’s employment or constructive dismissal.

C.13 SUSPENSIONS

In circumstances where Valcom deems it to be reasonable, including in an effort to correct poor performance or unacceptable behavior, the Company may temporarily suspend the Employee from employment, with or without pay depending on the circumstances.

C.14 TERMINATION OF EMPLOYMENT

Following the probationary period, Valcom may terminate the employment of the Employee without cause by providing the Employee with only the minimum amount of notice, pay in lieu of notice (or a combination of both), severance pay, vacation pay and benefit continuation (if applicable) or any other entitlements required by the ESA. No further amounts of notice, compensation or benefit continuation will be provided to the Employee. Nothing in this paragraph shall be interpreted to lessen or eliminate the Employee’s duty to mitigate. Unless otherwise required by the ESA, the amounts earned by the Employee from employment or self-employment during the period for which the Employee is entitled to receive payment shall be deducted from the amounts payable to the Employee by the Company. This provision shall survive all changes to the Employee’s employment (including promotions) and shall apply notwithstanding the Employee’s length of service.

Subject only to providing the Employee with the minimum entitlements pursuant to the ESA, the Company may terminate the Employee’s employment at any time without notice or pay in lieu of notice if the Employee engages in wilful misconduct, disobedience, or wilful neglect of duty that is not trivial and has not been condoned by the Company.

C.15 CHANGES

Valcom may, as it deems necessary or advisable in its sole and absolute discretion, unilaterally alter the Employee's duties, responsibilities, hours of work and/or the location at which the Employee is to provide them, the Employee's title and/or to whom he/she reports, as well as amend any aspect or eliminate entirely any plans that may be in effect from time to time. Notwithstanding the foregoing, if the Company makes any material changes to the terms of the Employee's employment, the Employee will be provided with no less than eight (8) weeks' prior written notice of such change. The Employee expressly agrees that such reduction, alteration, amendment, elimination, or reassignment shall not constitute a termination of employment, a breach of this Agreement or constructive dismissal.

[11] The Plaintiff filed an affidavit prior to the Binding Judicial Resolution Conference where he set out his recollection of events from the time the second employment contract was presented on March 21, 2024 and the end of his existing contract on March 31, 2024. In his affidavit dated September 24, 2025, at paragraphs 21 through 29, the Plaintiff notes the following:

21. I received no further communication until March 21, 2024, when Steve proposed a meeting and gave me a revised contract (Tab 15) with a salary that did not reflect our agreed increases.

22. I was unaware of the planned changes to my employment contract, which were not explained by anyone at Valcom or Calian, nor did Ottawa head office contact me.

23. At our March 25, 2024 meeting, Steve said contracts were being changed "because of Larry," a former employee. I don't know the details of his situation or contract.

24. I was unsure how the new contract would affect me, especially in light of the termination notice. These changes were unprecedented, and I feared Valcom was introducing new layoff rights. I believed they no longer intended to honor our previous agreements, including the 5% raises.

25. I was concerned Valcom would use layoff provisions **to** reduce costs—e.g., over holidays or between contract renewals. Previously, employees weren't laid off during such gaps.

26. Due to lack of transparency and trust, I did not accept or sign the new contract.

27. Receiving a termination notice followed by two conflicting contracts made it clear Valcom no longer wished to employ me under previous terms.

DEPARTURE FROM WORKPLACE

28. My last workweek was March 25-29, 2024. With no communication about renewal, I used my remaining PTO on March 29 and submitted my Clicktime report on March 28 (Tab 16).

29. Given the termination notice and two rejected contracts, I reasonably believed I had no valid employment agreement with Valcom after March 31, 2024.

[12] Mr. Grant attended at the workplace on March 31, 2024 to follow up with the Plaintiff on the last employment contract as he had not heard from him following their last conversation of March 25, 2024. The Plaintiff was not present and he had removed his belongings. Mr. Grant did not speak with nor communicate again with the Plaintiff following their discussion of March 25, 2024. The next communication the Defendant received from the Plaintiff was via his lawyer in April 2024 alleging the Plaintiff had been constructively dismissed and advising an action would be filed.

ISSUES

[13] The issues for the Court to resolve in this matter are the following:

- (1) Was the Plaintiff constructively dismissed from his employment with the Defendant?
- (2) If the Plaintiff was constructively dismissed what is the appropriate notice period?
- (3) If the Plaintiff was constructively dismissed did he fail to mitigate his damages?

POSITION OF THE PARTIES

[14] The Plaintiff suggests the Defendant unilaterally altered the terms of his employment without any prior notice or consultation. The Plaintiff asserts the contract of March 21, 2024 introduced layoff and suspension clauses along with a revised termination clause which would be considered by a reasonable person to create substantial alterations to the terms of the employment relationship. The Plaintiff suggests the changes incorporated in the March 2024 employment contract were adverse to his interest and substantially different from the terms in the previous employment contracts he had signed.

[15] The Defendant maintains the Plaintiff was not constructively dismissed but actually abandoned his employment on March 27, 2024. The Defendant suggests the revised terms set out in the employment contract were not significant enough to constitute constructive dismissal and at no time did the Defendant make fundamental changes that would result in a repudiation of the employment contract. The Defendant asserts in offering the Plaintiff an increased salary and an indefinite term employment contract the March 2024 employment contract was actually of greater benefit to the Plaintiff or the terms of employment were more favourable to the Plaintiff. Finally, the Defendant points out the only objection the Plaintiff raised with the Defendant concerning the March 2024 contract of employment was the 3% increase as opposed to the 5% increase he had requested.

LAW AND ANALYSIS

[16] The BJRC process is somewhat similar to a summary judgement motion in that the Court is called upon to resolve disputed issues based upon a limited evidentiary record. In the present matter, the evidence is limited to the affidavits filed by the parties. The issues are framed by the pleadings, and the arguments are well set out in the pre-hearing briefs and oral submissions of counsel. Significantly, there is very little dispute of fact in this matter, and the Court is able to make factual findings following which legal conclusions can be drawn.

[17] The evidence in this matter leads me to conclude as follows:

- 1) The Plaintiff worked continuously and uniquely for the Defendant as a Senior Project Manager from 2009 until March 2024;
- 2) The Plaintiff regularly and repeatedly signed employment contracts with the Defendant for fixed periods of time;
- 3) The Plaintiff informed the Defendant via Mr. Grant that he expected a salary increase of 5% for the next contract period of March 2024 to April 2025;
- 4) Mr. Grant advised the Plaintiff at the time the February 2024 and then March 2024 contracts of employment became available that the Defendant could only provide a 3% salary increase;

- 5) In conversations with Mr. Grant in February and March 2024, the Plaintiff maintained he would not sign the new employment contract unless the salary increase was 5%;
- 6) The Defendant did not inform or advise the Plaintiff of the altered terms of employment between the employment contract forwarded in February 2024 and the employment contract in March 2024;
- 7) The parties agree Mr. Grant would have told the Plaintiff to read and consider the March 2024 employment contract;
- 8) The Plaintiff did not raise with Mr. Grant the other changes to the contract and only reiterated his disagreement with the 3% salary increase;
- 9) The Plaintiff did not reach out to the Defendant between his last conversation with Mr. Grant on March 25th and when his lawyer, Ms. Davis, sent a letter to the Defendant on his behalf in early April;
- 10) The Defendant did not reach out to the Plaintiff via email or telephone after Mr. Grant attended the workplace on March 31, 2024 and determined the Plaintiff was not present; and
- 11) The parties did not engage in a discussion over the terms of the March 2024 contract of employment that were unacceptable to the Plaintiff.

[18] The Plaintiff submits he was constructively dismissed by the Defendant as defined by the Supreme Court of Canada in *Potter v. New Brunswick Legal Aid Services Commission*, 2015 SCC 10 where the Supreme Court of Canada set out the guiding principles on constructive dismissal at paragraphs 34 and 42 as follows:

[34] The first branch of the test for constructive dismissal, the one that requires a review of specific terms of the contract, has two steps: **first, the employer's unilateral change must be found to constitute a breach of the employment contract and, second, if it does constitute such a breach, it must be found to substantially alter an essential term of the contract** (see Sproat, at p. 5-5). Often, the first step of the test will require little analysis, as the breach will be obvious. Where the breach is less obvious, however, as is often the case with suspensions, a more careful analysis may be required.

[42] The second branch of the test for constructive dismissal necessarily requires a different approach. **In cases in which this branch of the test applies, constructive dismissal consists of conduct that, 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.** The employee is not required to point to an actual specific substantial change in compensation, work assignments, or so on, that on its own constitutes a substantial breach. The focus is on whether a course of conduct pursued by the employer "evinces an intention no longer to be bound by the contract": *Rubel Bronze*, at p. 322. A course of conduct that does evince such an intention amounts cumulatively to an actual breach. Gonthier J. said the following in this regard in *Farber*:

In cases of constructive dismissal, the courts in the common law provinces have applied **the general principle that where one party to a contract demonstrates an intention no longer to be bound by it, that party is committing a fundamental breach of the contract that results in its termination.** [para. 33]

[Emphasis mine]

[19] In the present matter, the Plaintiff's initial refusal to sign the February and the March 2024 employment contract was due to his displeasure over the 3% as opposed to the requested 5% salary increase. The Defendant's refusal to grant the Plaintiff's %5 salary increase cannot be considered a substantial alteration to an essential term of the employment contract. The Plaintiff's typical salary increases during the course of his employment with the Defendant was 2 to 3%. The Defendant's offer of the 3% salary increase was in keeping with the historical

pattern of salary increases and the Defendant's refusal to grant the 5% requested cannot be considered a valid basis to argue constructive dismissal. In fairness to the Plaintiff, he acknowledged this in his oral submissions.

[20] The Plaintiff refers the Court to the Ontario Court of Appeal's discussion on the alteration of terms of employment in *Holland v. Hostopia Inc.*, 2015 ONCA 762 at paragraphs 50, 52, 54 and 55 as follows:

[50] The Employment Agreement contained an inconsistent term. Instead of providing for reasonable notice, it limited the appellant's entitlement to notice of termination to the statutory minimum set out in the *ESA*. There was no evidence of any discussion of the subject prior to the appellant's acceptance of the Offer Letter, no evidence that he was told that the Employment Agreement would contain terms inconsistent with the Offer Letter and no evidence that he agreed to waive his right to reasonable notice of termination when he signed the Offer Letter. Accordingly, **the Employment Agreement introduced a new, very material term, into the existing contract of employment – a term to which the appellant had not previously consented and for which he received no consideration.**

[52] It is well-settled that a promise to perform an existing contract is not consideration: see e.g. *K.M.A. Caterers Ltd. v. Howie*, 1968 CanLII 172 (ON CA), [1969] 1 O.R. 131 (C.A.); *Hobbs; Braiden*. Fresh consideration was required: *Francis*.

[54] Juriansz J.A. noted the importance of fresh consideration where an employer seeks to amend the employment agreement. He stated, at para. 42:

The requirement of consideration to support an amended agreement is especially important in the employment context where, generally, there is inequality in bargaining power between employees and employers. Some employees may enjoy a measure of bargaining power when negotiating the terms of prospective employment, but once they have been hired and are dependent on the remuneration of the new job, they become more vulnerable. The law recognizes this vulnerability, and the courts should be careful to apply *Maguire [v. Northland Drug. Co.*, [1935] S.C.R. 32] and *Techniform Products [v. Wolder* (2001), 2001 CanLII 8604 (ON CA), 56 O.R. (3d) 1 (C.A.)] only when, on the facts of the case, the employee gains increased security of employment, or other consideration, for agreeing to the new terms of employment.

[55] Without fresh consideration, the Employment Agreement could not displace the implied term of reasonable notice contained in the Offer Letter. The result is that the appellant was entitled to reasonable notice of termination at common law. This impacts, potentially, his damages in lieu of notice and his entitlement to commissions that became payable after his termination.

[Emphasis mine]

[21] The Defendant suggests the Plaintiff is misinterpreting the application of **Holland** to the current case. The Defendant sets out their assessment of **Holland** at paragraphs 45 and 46 of their pre-hearing brief as follows:

45. Comeau relies on *Holland v. Hostopia.com Inc.*,¹⁵ in asserting that termination provisions that limited common law notice are a “material term” and alleges that, as the new language in the Revised Employment Agreement contained a similar termination provision, that change therefore constitutes constructive dismissal. *Holland*, however, was not a constructive dismissal case and the Court in *Holland* was concerned only with the imposition of such a material term after the employee had commenced work under the terms of an entirely different offer and whether the employer could subsequently rely on the material term.¹⁶ This is clearly distinguishable from the immediate case, as Comeau’s employment was due to end on March 31, 2024 in accordance with the 2023 Contract and the enforceability of the provisions of the Revised Employment Agreement at not at issue.

46. Further, this is an incorrect application of the law as the test for consideration (and for when fresh consideration is necessary) is an entirely separate legal test from the test for constructive dismissal. What constitutes a “material term” for the purposes of determining the adequacy of consideration is distinct from what is considered to be an “essential term” for the purposes of determining whether an employee was constructively dismissed. If the two are conflated, then every employer who requests that an employee execute a new agreement with updated termination provisions, layoff provisions or suspension provisions would be considered to have constructively dismissed its employee simply by making that request. This runs contrary to public policy. Employers are well within their rights to make such requests of their employees as a term of continued employment, and it is necessary for employers to continually update employment agreements in order to ensure that they are complying with constantly evolving case law.

[22] The Defendant refers the Court to **Tonkin v. Paris Kitchens**, 2022 ONSC 749 where the Plaintiff alleged a constructive dismissal based on a change in job title. The court rejected this assertion as the salary, benefits and core responsibilities remained unchanged. In explaining the decision, Justice Gibson noted at paragraph 20 the following:

[20] I find that the employer did not evince an intention not to be bound by the contract, and that a person viewing the matter from the perspective of a reasonable employee would not have concluded otherwise. **There were to be no de facto changes in respect of Mr. Tonkin.** He was not put in an untenable situation. His salary and benefits were to have been the same. He was asked to continue doing the same work that he had been doing for many years. But for the title, which was a chimera that only he understood to be in effect, everything would have continued as before. **The company entreated him to stay.** He did

not. Neither did he effectively mitigate his potential damages by an effective search for other employment.

[Emphasis mine]

[23] Returning to *Potter v. New Brunswick Legal Aid Services Commission* for a moment, Chief Justice Wagner's comments on the choice an employee has in either accepting the changes to an employment contract or repudiating the changes are important to the issues currently before the Court. At paragraph 30 of *Potter*, Chief Justice Wagner states as follows:

[30] When an employer's conduct evinces an intention no longer to be bound by the employment contract, **the employee has the choice of either accepting that conduct or changes made by the employer, or treating the conduct or changes as a repudiation of the contract by the employer and suing for wrongful dismissal.** This was clearly stated in *Farber*, at para. 33, the leading case on the law of constructive dismissal in Canada. See also *In re Rubel Bronze and Metal Co. and Vos*, [1918] 1 K.B. 315, at p. 322. Since the employee has not been formally dismissed, the employer's act is referred to as "constructive dismissal". **The word "constructive" indicates that the dismissal is a legal construct: the employer's act is treated as a dismissal because of the way it is characterized by the law** (J. A. Yogis and C. Cotter, *Barron's Canadian Law Dictionary* (6th ed. 2009), at p. 61; B. A. Garner, ed., *Black's Law Dictionary* (10th ed. 2014), at p. 380).

[Emphasis mine]

[24] In the present matter, the Plaintiff did not accept the changes to the employment contract. While the concerns raised by the Plaintiff with Mr. Grant were initially uniquely related to the dispute over the salary increase, the Plaintiff was subsequently advised of the other substantive changes when he met with Ms. Davis. The Defendant did not bring the substantive changes made to the March 2024 employment contract to the attention of the Plaintiff. There is no evidence before the Court the Defendant highlighted the changes to the March 2024 contract with the Plaintiff nor any suggestion there was an offer to discuss these additional terms with the Plaintiff.

[25] Chief Justice Wagner in *Potter* points out if an employee consents to or acquiesces to a change of the employment contract, they cannot then argue constructive dismissal. Chief Justice Wagner states at paragraph 37 as follows:

[37] At the first step of the analysis, the court must determine objectively whether a breach has occurred. To do so, **it must ascertain whether the employer has unilaterally changed the contract.** If an express or an implied term gives the employer the authority to make the change, or if the employee consents to or acquiesces in it, the change is not a unilateral act and therefore will not constitute a breach. If so, it does not amount to constructive dismissal. Moreover, **to qualify as a breach, the change must be detrimental to the employee.**

[Emphasis mine]

[26] In *Farber v. Royal Trust Co.*, 1997 CanLII 387 (SCC), Justice Gonthier discussed circumstances where an employee can treat an employer's unilateral change of terms of the employment contract as a dismissal. Justice Gonthier stated at paragraphs 33 and 34 of *Farber* as follows:

33. In cases of constructive dismissal, the courts in the common law provinces have applied the general principle that where one party to a contract demonstrates an intention no longer to be bound by it, that party is committing a fundamental breach of the contract that results in its termination. The leading case on this question is an English decision, *In re Rubel Bronze and Metal Co. and Vos*, [1918] 1 K.B. 315, in which the following was stated at pp. 321-22:

But if a claim for wrongful dismissal be founded on repudiation by the master, then I think that the general and recognized rules which apply in the case of ordinary contracts should apply also in the case of master and servant. It has been authoritatively stated that the question to be asked in cases of alleged repudiation is "whether the acts and conduct of the party evince an intention no longer to be bound by the contract". The doctrine of repudiation must of course be applied in a just and reasonable manner. A dispute as to one or several minor provisions in an elaborate contract or a refusal to act upon what is subsequently held to be the proper interpretation of such provisions should not, as a rule, be deemed to amount to repudiation. But a deliberate breach of a single provision of a contract may, under special circumstances, and particularly if the provision be important, amount to a repudiation of the whole bargain.

Thus, it has been established in a number of Canadian common law decisions that where an employer unilaterally makes a fundamental or substantial change to an employee's contract of employment -- a change that violates the contract's terms -- the employer is committing a fundamental breach of the contract that results in its termination and entitles the

employee to consider himself or herself constructively dismissed. The employee can then claim damages from the employer in lieu of reasonable notice. (See, for example, *Stewart v. MacMillan Bloedel Ltd.* (1992), 1992 CanLII 1224 (BC CA), 42 C.C.E.L. 225 (B.C.C.A.), aff'g (1991), 1991 CanLII 675 (BC SC), 37 C.C.E.L. 292 (B.C.S.C.); *Cox v. Royal Trust Corp. of Canada* (1989), 26 C.C.E.L. 203 (Ont. C.A.), leave to appeal refused, [1989] 2 S.C.R. x; *Mifsud v. MacMillan Bathurst Inc.* (1987), 1987 CanLII 4249 (ON SC), 60 O.R. (2d) 58 (H.C.); *Schwann v. Husky Oil Operations Ltd.* (1989), 1989 CanLII 4743 (SK CA), 27 C.C.E.L. 103 (Sask. C.A.); *Saint John Shipbuilding Ltd. v. Snyders* (1989), 1989 CanLII 210 (NB CA), 29 C.C.E.L. 26 (N.B.C.A.); *Farquhar v. Butler Bros. Supplies Ltd.* (1988), 1988 CanLII 185 (BC CA), 23 B.C.L.R. (2d) 89 (C.A.); *Baker v. Burns Foods Ltd.* (1977), 1977 CanLII 1763 (MB CA), 74 D.L.R. (3d) 762 (Man. C.A.). See also *Cayen v. Woodward's Stores Ltd.* (1993), 1993 CanLII 1416 (BC CA), 45 C.C.E.L. 264 (B.C.C.A.); *Poole v. Tomenson Saunders Whitehead Ltd.* (1987), 1987 CanLII 2647 (BC CA), 16 B.C.L.R. (2d) 349 (C.A.); *Orth v. MacDonald Dettwiler & Assoc. Ltd.* (1986), 1986 CanLII 170 (BC CA), 8 B.C.L.R. (2d) 1 (C.A.); *Reber v. Lloyds Bank International Canada* (1985), 1985 CanLII 153 (BC CA), 61 B.C.L.R. 361 (C.A.); although it was found in these cases that there had been no constructive dismissal.)

34. In an article entitled "Constructive Dismissal", in B. D. Bruce, ed., *Work, Unemployment and Justice* (1994), 127, Justice N. W. Sherstobitoff of the Saskatchewan Court of Appeal defined the concept of constructive dismissal as follows at p. 129:

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 on the employer's part to provide damages in lieu of reasonable notice.

[Emphasis mine]

[27] In the current circumstances, the Court must determine if the alterations to the March 2024 terms of employment were substantial. The alteration of the notice requirement upon termination is a substantial change to the previous terms of the relationship between the parties. It is difficult to conceive how this cannot be considered a substantial term of employment. The alteration to the terms of the contract surrounding layoff, suspension, and termination go to the heart of an employment contract. While the Defendant points out the Plaintiff never raised these terms with the Defendant but only expressed displeasure with the salary, the

Plaintiff wasn't aware of the other substantial changes to the employment contract until he reviewed it with his lawyer.

[28] Unlike the situation in ***Tonkin v. Paris Kitchens***, there is no evidence here the Defendant discussed the changes to the contract with the Plaintiff or “*entreated*” the Plaintiff to stay. There was radio silence from the Defendant concerning the March 21, 2024 contract of employment. In my view, considering the guidance provided in ***Potter*** and ***Farber***, the Plaintiff was constructively dismissed in March 2024 by the Defendant.

[29] The Defendant maintains the Plaintiff abandoned his employment on March 27, 2024 when he left the premises and did not communicate further with his employer. The Defendant refers the Court to the Ontario Court of Appeal’s statement at paragraph 32 in ***Nagpal v. IBM Canada Ltd.***, 2021 ONCA 274 on abandonment as follows:

[32] The test for abandonment by contrast, is whether the statements or actions of an employee, viewed objectively by a reasonable person, clearly and unequivocally indicate an intention to no longer be bound by the employment contract and, in particular, the implied term of every employment contract that the employee must attend work unless excused or unable: *Betts v. IBM Canada Ltd.*, 2015 ONSC 5298, 2016 C.L.L.C. 210-003 (“*Betts (ONSC)*”), at para. 57, aff’d 2016 ONSC 2496, 31 C.C.E.L. (4th) 60 (Div. Ct.) (“*Betts (Div. Ct.)*”); *Pereira v. The Business Depot Ltd.*, 2009 BCSC 1178, at para. 29, rev’d on other grounds, 2011 BCCA 361, 20 B.C.L.R. (5th) 295.

[30] The question of abandonment must be considered in light of the circumstances. As the Court has concluded the unilateral changes to the termination, suspension and layoff provisions in the March 2024 employment contract amounted to constructive dismissal, it cannot then be concluded the Plaintiff abandoned his position.

[31] The Defendant further asserts the Plaintiff failed to mitigate his damages. The Defendant suggests in the circumstances of this case the Plaintiff could have fully mitigated his potential loss by accepting the terms of the Revised Employment Contract. The Defendant refers the Court to the Supreme Court of Canada's guidance on this point in *Evans v. Teamsters Local Union No. 31*, 2008 SCC 20 at paragraphs 28, 30 and 33 as follows:

[28] In my view, the courts have correctly determined that in some circumstances it will be necessary for a dismissed employee to mitigate his or her damages by returning to work for the same employer. Assuming there are no barriers to re-employment (potential barriers to be discussed below), requiring an employee to mitigate by taking temporary work with the dismissing employer is consistent with the notion that damages are meant to compensate for lack of notice, and *not* to penalize the employer for the dismissal itself. The notice period is meant to provide employees with sufficient opportunity to seek new employment and arrange their personal affairs, and employers who provide sufficient working notice are not required to pay an employee just because they have chosen to terminate the contract. Where notice is not given, the employer is required to pay damages in lieu of notice, but that requirement is subject to the employee making a reasonable effort to mitigate the damages by seeking an alternate source of income.

[30] I do not mean to suggest with the above analysis that an employee should always be required to return to work for the dismissing employer and my qualification that this should only occur where there are no barriers to re-employment is significant. This Court has held that the employer bears the onus of demonstrating both that an employee has failed to make reasonable efforts to find work and that work could have been found (*Red Deer College v. Michaels*, 1975 CanLII 15 (SCC), [1976] 2 S.C.R. 324). Where the employer offers the employee a chance to mitigate damages by returning to work for him or her, the central issue is whether a reasonable person would accept such an opportunity. **In 1989, the Ontario Court of Appeal held that a reasonable person should be expected to do so "[w]here 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" (*Mifsud v. MacMillan Bathurst Inc. (1989)*, 1989 CanLII 260 (ON CA), 70 O.R. (2d) 701, at p. 710).** In *Cox*, the British Columbia Court of Appeal held that other relevant factors include the history and nature of the employment, whether or not the employee has commenced litigation, and whether the offer of re-employment was made while the employee was still working for the employer or only after he or she had already left (paras. 12-18). In my view, the foregoing elements all underline the importance of a multi-factored and contextual analysis. **The critical element is that an employee "not [be] obliged to mitigate by working in an atmosphere of hostility, embarrassment or humiliation" (*Farquhar*, at p. 94), and it is that factor which must be at the forefront of the inquiry into what is reasonable.** Thus, although an objective standard must be used to evaluate whether a reasonable person in the employee's position would have accepted the employer's offer (*Reibl v. Hughes*, 1980 CanLII

23 (SCC), [1980] 2 S.C.R. 880), it is extremely important that the non-tangible elements of the situation — including work atmosphere, stigma and loss of dignity, as well as nature and conditions of employment, the tangible elements — be included in the evaluation.

[33] In sum, I believe that although both constructively dismissed and wrongfully dismissed employees may be required to mitigate their damages by returning to work for the dismissing employer, they are only required to do so where the conditions discussed in para. 30 above are met and the factors mentioned in *Cox* are considered. This kind of mitigation requires “a situation of mutual understanding and respect, and a situation where neither the employer nor the employee is likely to put the other’s interests in jeopardy” (*Farquhar*, at p. 95). **Further, the reasonableness of an employee’s decision not to mitigate will be assessed on an objective standard.**

[Emphasis mine]

[32] In the present matter, the Court is left with the impression there was a bit of a game of “*chicken*” going on between the parties. The Plaintiff made it clear he would not accept a 3% salary increase and did not attempt to further negotiate with the Defendant. The Defendant likewise did not reach out to the Plaintiff and seemed content to let the clock run out on the Plaintiff’s existing contract of employment. While the Defendant suggests the Plaintiff could have fully mitigated his damages by continuing on with his employment, the Defendant never made it known to the Plaintiff his position was still available. Further, the Defendant never discussed nor even highlighted the changes to the march 2024 employment contract to the Plaintiff.

[33] In all of the circumstances, I accept the alteration of the terms of the March 2024 employment contract were sufficiently substantial to amount to a constructive dismissal. Further, I do not accept the Defendant’s assertion the Plaintiff could have fully mitigated his loss by continuing the employment relationship because as of the date of the BJRC, the Defendant had not made it known to the Plaintiff the position was still open and available to him. Finally, there were substantial

changes made to the employment contract resulting in a determination of constructive dismissal which was not the situation in *Evans*.

[34] In all of the circumstances, the remaining question is what is the appropriate notice period. The Plaintiff suggests a reasonable notice period is 17 to 28 months. The Defendant maintains the Plaintiff would not be entitled to a notice period beyond eight months.

[35] In assessing a reasonable notice period, it is necessary to look at the circumstances of the Plaintiff. The Plaintiff worked uniquely for the Defendant as a Senior Project Manager from 2009 to 2024. The initial years of his work was as an independent contractor and then beginning in 2016, he was an employee. As a Senior Project Manager, the Plaintiff clearly possesses a wide range of skills.

[36] The Plaintiff has furnished limited evidence to the Court as to his attempts to secure alternate employment or challenges encountered securing such employment. The Plaintiff's evidence pertinent to the question of a reasonable notice period are set out at paragraphs 30 to 32 of his affidavit as follows:

30. Since termination, I've applied for dozens of jobs without success. I've had interviews and passed screenings but haven't secured employment.

31. I've actively searched public listings and applied via LinkedIn for remote, on-site, contract, and permanent roles. My applications are at Tab 19; my resume is at Tab 18.

32. I received EI benefits from March 31 to December 14, 2024 (Tab 20).

[37] While the Court has found in favour of the Plaintiff concluding the alterations to the March 2024 employment contract in the absence of any consultation with the

Plaintiff, is constructive dismissal, the Court is also left with the distinct impression the Plaintiff was no longer interested in working for the Defendant. The Plaintiff was constructively dismissed and therefore cannot be considered to have abandoned his employment nor under such circumstances can the Court conclude he failed to mitigate his damages by continuing to work for the Defendant. However, it cannot be overlooked the Plaintiff made no attempt to discuss the concerns with the Defendant when resolutions could have been available. That said, in fairness to the Plaintiff, the Defendant likewise made no attempts to retain the services of the Plaintiff nor to negotiate the concerns of the March 2024 employment contract. Again, the Court is left with the clear impression all parties were content to let this relationship come to an end. The Court's determination of a reasonable notice period is highly influenced by these circumstances.

[38] In all of the circumstances, the Court concludes a reasonable notice period for the Plaintiff is ten months. The Court arrives at the conclusion of ten months based upon the breadth of the Plaintiff's work experience as a result of his employment as a Senior Project Manager as well as his inability as of yet to secure alternate employment. The Plaintiff is entitled to payment by the Defendant of ten months salary and benefits in lieu of reasonable notice following his constructive dismissal.

[39] The Plaintiff has been successful in his action and is entitled to costs which I fix at \$5,000.00 plus all taxable disbursements.

DATED at Moncton, New Brunswick, this 13th day of November 2025.

Tracey K. DeWare
Chief Justice of the Court of King's Bench
New Brunswick, Trial Division