

Citation: ☼

Date: ☼
File No: C-84329
Registry: Surrey

IN THE PROVINCIAL COURT OF BRITISH COLUMBIA
Small Claims

BETWEEN:

LISA MARION WEBB

CLAIMANT

AND:

SURREY GYMNASTIC SOCIETY

DEFENDANT

**REASONS FOR JUDGMENT
OF THE
HONOURABLE JUDGE R.J. BROWNING**

Appearing on her own behalf:

L. Webb

Counsel for the Defendant:

D. McWhinnie

Place of Hearing:

Surrey, B.C.

Dates of Hearing:

Oct. 28, 29; Dec. 13, 16, 2019; Jan. 20, 2020

Date of Judgment:

February 10, 2020

Introduction

[1] The claimant, Lisa Webb, worked as an administrative assistant for the defendant, Surrey Gymnastic Society (SGS), for 18 years.

[2] On September 5, 2018, Ms. Webb met with members of both the Board of Directors and management, where she was presented with a letter. The letter set out the employer's areas of concern in the way that Ms. Webb carried out her duties. It also contained a number of requests and directions in relation to her employment moving forward.

[3] Following this meeting, Ms. Webb did not return to work. She considered herself terminated.

[4] Ms. Webb brings her claim against the defendant asserting she was constructively dismissed from her employment. She seeks damages in lieu of notice.

[5] The defendant counterclaims asserting that Ms. Webb terminated her employment without providing notice. The defendant seeks damages.

Issues

1. Has Ms. Webb established that she was constructively dismissed by the defendant?
2. If so, what are the appropriate damages in lieu of notice?
3. If Ms. Webb has not established constructive dismissal, was the defendant entitled to notice?
4. If so, what are the appropriate damages in lieu of notice?

Evidence

Lisa Webb

[6] The claimant, Lisa Webb, worked as a part-time office administrator for the defendant for 18 years.

[7] She testified that over the course of her employment her work hours varied. At the time of leaving her employment, Ms. Webb worked approximately 25 hours per week. She testified that she did not work on Fridays.

[8] She testified that at the time she was hired she entered into a written agreement. Through the course of her employment she was on a year-to-year contract. This continued until 2008. Although other staff members entered into open ended contracts, she was not given one. Ms. Webb testified that the last year-to-year contract she signed was in 2004 or 2005.

[9] Ms. Webb identified Exhibit 1 as being her last employment contract. The term of this contract is set out as being September 1, 2005 through August 31, 2006.

[10] The contract also sets Ms. Webb's hours of employment at 20 hours per week, Tuesday through Friday. It notes:

“if the club wishes to dissolve this agreement, for any reason, it must be done in writing, with one month's notice. We ask the same of the employee if she wishes to end the agreement.”

[11] Ms. Webb testified that when she commenced her employment, her duties included bookkeeping, payroll entries and other administrative work on the recreation side of the defendant's operation. She testified that over time her duties changed. While she maintained her bookkeeping and payroll duties, she also assumed a role on the competitive side of the defendant's operation. In addition, she testified that over time, she also assumed responsibility for marketing and advertising for the defendant. While not explicitly stated, on the evidence, I find that both Ms. Webb and the defendant agreed to these changes to Ms. Webb's employment duties.

[12] Ms. Webb testified that as of the period 2016–2017, her duties and responsibilities had expanded substantially. Though some duties were shared with other staff members, Ms. Webb testified that she was responsible for tasks including:

1. implementing the policies set by the Board of Directors;

2. helping the programs stay within the constraints of the budget;
3. ensuring all offices were adequately stocked with office supplies;
4. controlling access to the buildings by maintaining a list of people with keys; and
5. introducing new members to SGS and explaining key policies to the new members.

[13] As noted previously, by 2016 or 2017, Ms. Webb became responsible for many more duties on the competitive side of SGS.

[14] In August 2018 Ms. Webb went on an extended vacation. On September 4, 2018 she returned to work.

[15] While she was absent the defendant hired a new CEO, Jocelyn Chua. By the time Ms. Webb returned to work Ms. Chua had already commenced her employment. Previously, Ms. Webb had been under the supervision of the club co-ordinator, George Burgoyne. Ms. Webb had worked under Ms. Burgoyne for 17 of the 18 years of her employment at SGS.

[16] On September 4, 2018, Ms. Webb first met Ms. Chua. She testified that they appeared to get along well.

[17] Ms. Webb testified the next day, September 5, 2018, she was called into a meeting with Ms. Chua, the President of SGS Ms. Sandra Piliotis, and Ms. Burgoyne. Ms. Webb was given a letter which she testified contained 27 negative points. She testified that she felt blindsided by the letter; that she did not expect it. Ms. Webb testified that Ms. Piliotis read the letter to her. Ms. Webb believed that there did not seem to be room for any discussion. She testified that ultimately she was left in the office by herself, as the others left to attend their next meeting.

[18] A copy of the letter dated September 5, 2018 was marked as Exhibit 3 on the trial. A signed copy was marked as Exhibit 3A.

[19] Ms. Webb testified that the final paragraph of the letter was very upsetting to her. It stated:

“Please be advised that a disciplinary action will be taken against you if you fail to comply with the foregoing. Failure to meet any of the above conditions may result in termination with cause.”

[20] In her view, there were directions contained in the letter that were impossible to accomplish. This, together with the presence of both the CEO and the President of SGS, left Ms. Webb believing she was being set up to be terminated or pressured to resign.

[21] On September 10, 2018, Ms. Webb received an email from Ms. Chua. It stated that she was required to be at work that day. It also included a work schedule that Ms. Webb testified was different than her past schedule. She testified that she had neither been consulted on, nor agreed to, the changes to her schedule. She noted the schedule required her to work on Fridays which previously had not been the case. A copy of this letter was marked as Exhibit 6 on the trial.

[22] Ms. Webb testified that following a consultation with legal counsel, she sent a written response to Ms. Chua dated September 14, 2018. Included in her response, Ms. Webb indicated that she considered herself to have been effectively dismissed from her employment. A copy of this letter was marked as Exhibit 5 on the trial.

[23] Ms. Webb testified that she believed the letter dated September 5, 2018 contained significant changes to her employment contract. These changes included a change of supervisor, a change in work hours and days of work, and the imposition of vacation restraints in the periods of August and September of each year.

[24] Ms. Webb further testified that because of the letter, the work environment had become unpleasant. She felt her credibility was put into question and her reputation had been damaged. She testified that the threat of termination went beyond what she felt was reasonable.

[25] Ms. Webb testified that she did not immediately respond to Ms. Chua's emails of September 7, 2018 and September 10, 2018 because she was upset and wanted to determine what steps she was going to take. Ms. Webb acknowledged that the

September 10, 2018 email requested the password for the defendant's accounting program. She did not respond to this request because she believed the password was written in the hardcopy financial files in the office or retrievable through to the defendant's accountants.

[26] Ms. Webb confirmed receiving the defendant's letter of October 1, 2018 terminating her employment. A copy of that letter was marked as Exhibit 8 on the trial.

[27] Ms. Webb testified of her need to mitigate her loss and stated that she began looking for new employment in October 2018. She testified to conducting a variety of job searches online and to attending job fairs in 2018 and 2019.

[28] In cross-examination, Ms. Webb confirmed that from 2002 through 2016, her duties changed from time to time and that her responsibilities increased. She confirmed that in some years during this period she worked 20 hours per week, and in other years she worked 25 hours per week.

[29] She confirmed that she did not object to any of the changes to her employment duties and responsibilities over this period of time.

[30] Ms. Webb confirmed that she understood her responsibilities as set out in the defendant's staff handbook. She understood that the Board of Directors had the authority to assign her other duties. She agreed that some of her responsibilities set out in the handbook changed while others remained the same. Ms. Webb confirmed that between 2016 and 2017 her job description changed.

[31] Ms. Webb testified that she understood if she was going to leave SGS the defendant wanted one month's notice.

[32] Ms. Webb conceded in cross-examination that the treasurer of SGS, Mr. Constantine Piliotis, had expressed concerns regarding Ms. Webb's tardiness in providing financial information to him in anticipation of board meetings. Ms. Webb did not agree with this criticism, attributing any delay to the timing of when she received bank statements.

[33] In cross-examination, Ms. Webb disagreed with the suggestion that there were any other criticisms to her job performance during the period of 2016 through 2017.

[34] Ms. Webb agreed that at the meeting on September 5, 2018, none of the other participants informed her that she was terminated, nor did she ask anyone if she was being terminated.

[35] In cross-examination, Ms. Webb agreed that she did not find being required to report to Ms. Chua as a demotion; she did not find being required to work from the office as unreasonable; she did not find the requirement to provide financial documents within specific timelines as unreasonable; she did not find the requirement to undergo training on new accounting software as unreasonable; she did not find vacation blackouts as unreasonable from a business perspective; and she did not find the other directions set out in the letter of September 5, 2018 as unreasonable.

[36] In cross-examination, Ms. Webb confirmed that she did not believe that the letter indicated that she was being terminated. While she denied that she made the decision not to return to work, but rather stated that she did not return to work because she wanted to calm down, she agreed that she knew that SGS was expecting her to come to work. She confirmed that she was aware Ms. Chua had attempted to contact her and she agreed that she made the decision not to respond.

[37] Ms. Webb testified that while she believed she was doing all of her duties to the best of her ability, she conceded, that the defendant had the right to criticize her performance if they chose to do so.

[38] Ultimately, Ms. Webb testified that she did not have any contact with Ms. Chua, or anyone else from SGS, because she was upset and shocked. She did not want to have any contact with the defendant.

Earl Ostrosser

[39] Mr. Earl Ostrosser was a member of the Board of Directors (BoD) of the defendant prior to, during, and after Ms. Webb was terminated.

[40] He testified that he joined the BoD in October 2017. He testified the BoD is constituted to implement policies and procedures for SGS. Those policies and procedures are to be carried out by staff.

[41] Mr. Ostrosser testified to being a member of the Personnel Committee. This is a committee of volunteers comprising of 6–7 people.

[42] He testified that the CEO is responsible for communication between the Personnel Committee and the staff concerning policies and procedures to be implemented.

[43] Other members of the Personnel Committee in September 2018 included Sandra Piliotis, Constantine Piliotis and George Burgoyne.

[44] Mr. Ostrosser testified that any issues with staff were handled either through a chain of command or by the full Board of Directors.

[45] Mr. Ostrosser testified that the BoD was not aware of the letter sent to Ms. Webb on September 5, 2018. He testified seeing the letter in December 2018. Mr. Ostrosser also testified that the BoD was not aware of the reply letter sent by Ms. Webb, received September 14, 2018.

[46] Mr. Ostrosser testified to a meeting with Constantine Piliotis in August 2018. At the meeting, Mr. Piliotis advised Mr. Ostrosser that he would be offering the position of CEO to Ms. Chua. Ms. Chua would be starting in this position August 20, 2018.

[47] Mr. Ostrosser testified that Mr. Piliotis expressed frustrations with office staff not doing what he requested, and specifically, his belief that Ms. Webb should be let go.

[48] Mr. Ostrosser testified that he advised Mr. Piliotis that a pattern of progressive discipline would be required. He testified that in response, Mr. Piliotis commented that “we would make her time here as difficult as possible so that she leaves us instead.”

[49] Mr. Ostrosser testified to an incident occurring prior to his testimony in these proceedings. He described Ms. Chua and Mr. Piliotis talking in the courthouse. Mr.

Piliotis expressed his displeasure with Mr. Ostrosser testifying and stated that Janie Ostrosser, his spouse, needed to be fired from her position. Ms. Ostrosser is a coach with the defendant.

[50] Mr. Ostrosser testified that he made his presence known and in response, Mr. Piliotis stated that Mr. Ostrosser “just heard everything we said but it would be fine it will be okay.”

[51] In cross-examination, Mr. Ostrosser confirmed that Mr. Piliotis was the Treasurer for SGS, and as such he did not have the sole authority to hire and fire staff.

[52] Mr. Ostrosser confirmed that he met with Ms. Webb in December 2018. One of the purposes of this meeting was to discuss her claim. He confirmed that he did not notify the BoD of this meeting, but disagreed with the suggestion that in doing so he was acting contrary to the best interests of the defendant.

[53] Mr. Ostrosser confirmed that he was not able to comment on Ms. Webb's job performance, however, his impression was that Mr. Piliotis was acting maliciously against Ms. Webb.

Jocelyn Chua

[54] Ms. Chua is a certified management accountant and a certified payroll manager.

[55] She testified to being the CEO of the defendant. She commenced her employment in August 2018 and ceased her employment on December 1, 2019. While employed, Ms. Chua's main role was to locate a new facility for the defendant's operations and oversee the day-to-day workings of SGS.

[56] Ms. Chua testified to first meeting Ms. Webb in September 2018. She met her upon Ms. Webb's return from vacation. Ms. Chua testified to having no negative impression of Ms. Webb and found her to be a very accommodating person.

[57] Ms. Chua testified to being involved in the creation of the letter dated September 5, 2018. She testified that the letter was created in order to remedy things that had been

done improperly in the past at SGS. The concerns were expressed to Ms. Webb because she was responsible for these areas as part of her duties.

[58] Ms. Chua testified that she believed the issues addressed in the letter were important to SGS and that the letter expressed valid concerns. She testified that the action steps were set out in the letter to effect changes. She testified that the concluding paragraph of the letter, setting out possible termination, was put in place to effect change as soon as possible.

[59] Ms. Chua testified to being part of a meeting on September 5, 2018. Others present at the meeting were George Burgoyne, Sandra Pilotis, as well as Lisa Webb. Ms. Chua described the meeting as difficult. She could see the meeting was difficult for Ms. Webb.

[60] At its conclusion, Ms. Chua believed the meeting had gone well. She testified that neither she, nor anyone else, told Ms. Webb she was terminated. Ms. Chua testified she did not intend to force Ms. Webb to resign.

[61] Ms. Chua testified that the next day Ms. Webb did not come to work. She testified to attempting to contact Ms. Webb, who did not respond.

[62] Ms. Chua testified she sought passwords for both the accounting software and the defendant's Facebook page. She was not aware of the accounting password located in a hardcopy file.

[63] Ms. Chua testified to having no contact with Ms. Webb subsequent to the September 5, 2018 team meeting. She testified that she believed the issues raised at the meeting were workable and resolvable. Ultimately, the defendant terminated Ms. Webb on October 1, 2018 for not returning to work.

[64] Ms. Chua testified that problems arose as a result of both Ms. Webb's departure and failure to communicate. Ms. Chua could not access the SGS accounting records or access the defendant's Facebook account. Ms. Chua was unable to quantify these problems.

[65] In cross-examination, Ms. Chua stated that on her first meeting with Ms. Webb she expressed concerns about tasks not being done correctly, but attributed this to possibly improper training. She stated that she found Ms. Webb to be a good person to work with.

[66] In cross-examination, Ms. Chua confirmed the letter of September 5, 2018 was a composite of information provided by Constantine Piliotis, Sandra Piliotis, George Burgoyne and herself.

Constantine Piliotis

[67] Constantine Piliotis testified to serving on the BoD for the defendant for 4 years. He joined the BoD in 2015 and left shortly before this trial commenced.

[68] Mr. Piliotis testified to being involved in the decision to hire Ms. Chua. He testified that the Personnel Committee recognized the need to bring someone into the organization to assist in the relocation of SGS. He testified that he did not have sole authority to hire or fire staff.

[69] Mr. Piliotis testified that in his capacity as Treasurer of SGS he had ongoing dealings with Ms. Webb. Ms. Webb handled bookkeeping, payroll and the competitive team registrations. Ms. Webb would provide Mr. Piliotis with financials for SGS in order to provide information to the BoD.

[70] Mr. Piliotis testified that before September 2018, he had concerns with respect to Ms. Webb's job performance. As an example, he identified Ms. Webb's delay in using a new email server. Mr. Piliotis also had concerns about receiving monthly financials late. He stated that this made providing financial information to the board difficult. Mr. Piliotis testified that he expressed his concerns to Ms. Webb. He also had concerns about how payroll was handled, and his concerns surrounding Ms. Webb's failure to implement an online membership registration system.

[71] Mr. Piliotis testified to a meeting with Mr. Ostrosser where Mr. Piliotis discussed what he viewed as insubordination by Ms. Webb. Mr. Piliotis testified to stating that "Ms.

Webb was going to be put on a performance plan and that the plan was going to be hell.” He characterized this to mean that it would be difficult, and that he knew this, as he had previously been the subject of a performance plan himself. Mr. Piliotis testified that he did not recall stating to Mr. Ostrosser that he was going to make Ms. Webb’s life miserable. He testified that he did not have the ability to do so.

[72] Mr. Piliotis testified that he recommended that Ms. Burgoyne issue a written warning to Ms. Webb. He stated that he offered to assist but emphasized that Ms. Burgoyne would have to deal with the consequences if Ms. Webb left her job.

[73] Mr. Piliotis confirmed that he was part of a group including Ms. Burgoyne and Ms. Chua that drafted the September 5, 2018 letter. He testified that his intention was to assist the SGS club coordinator (Ms. Burgoyne) and that it was his hope that Ms. Webb would address the concerns set out in the letter.

[74] Mr. Piliotis testified that he was aware that Ms. Webb did not return to work following the meeting of September 5, 2018. He testified that this caused difficulties for the defendant, including issues with passwords and keys, and an increase in work for Ms. Chua. He could not link this to any financial loss to the defendant.

[75] Mr. Piliotis testified that he felt it was inappropriate that Mr. Ostrosser gave evidence in these proceedings. Mr. Piliotis conceded that he expressed his feelings in a “more toxic way”.

[76] In cross-examination, Mr. Piliotis confirmed that he was not aware of the involvement of any other members of the Personnel Committee in Ms. Webb’s matters. He testified that in his view, this was because the matters were the duty of the club coordinator, Ms. Burgoyne. He testified that he understood the letter was supposed to be sent by Ms. Burgoyne.

[77] Mr. Piliotis denied a personal agenda to compel Ms. Webb’s departure from her employment with the defendant.

[78] It was suggested that in the meeting with Mr. Ostrosser in August 2018, Mr. Piliotis indicated he planned to terminate Ms. Webb. Mr. Piliotis testified that he did not remember.

[79] It was suggested that Mr. Piliotis stated to Mr. Ostrosser that he would make Ms. Webb's life a living hell. Mr. Piliotis testified he did not remember.

[80] Mr. Piliotis was asked whether other members of the BoD were made aware of the September 5, 2018 letter. Mr. Piliotis testified that he did not recall.

[81] Mr. Piliotis could not recall the substance of his comments to Ms. Chua, overheard by Mr. Ostrosser during these court proceedings.

The Law

[82] In this case, Ms. Webb asserts that she was constructively dismissed by the defendant.

[83] In *Potter and N. B. Legal Aid Services Commission*, [2015], 1 S.C.R. 500, the Supreme Court of Canada discussed constructive dismissal. At paragraph 30 Mr. Justice Wagner stated:

[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 in suing for wrongful dismissal... Since the employee has not been formally dismissed, the employer's act is referred to as "constructive dismissal"... The employer's act is treated as a dismissal because of the way it is characterized by the law.

[84] At paragraph 31 he stated:

[31] The burden rests on the employee to establish that he or she has been constructively dismissed. If the employee is successful, he or she is then entitled to damages in lieu of reasonable notice of termination.... The purpose of the inquiry is to determine whether the employer's act evinces an intention no longer to be bound by the contract.

[85] Other principles derived from *Potter* include the following:

1. Courts must take a flexible approach in determining whether the employer's conduct evinced an intention to no longer be bound by the contract (paragraph 32).
2. Two branches of the test for constructive dismissal exist. An employee is successful if either branch is satisfied:
 - a. After identifying either the breach of an expressed or implied contract term, the Court must then determine whether the breach is sufficiently serious to constitute constructive dismissal. This will typically involve changes in employee compensation, work assignments or place of work that are both unilateral and substantial (paragraph 32); or
 - b. The court identifies that the employer intended not to be bound by the contract by the employer's treatment of the employee making continued employment intolerable. This considers the cumulative effect of past acts by the employer in determining whether those acts evince an intention no longer to be bound by the contract. The court does not need to identify the breach of a specific term of the contract (paragraph 33).

[86] At paragraph 43 the Court states:

[43] Thus, constructive dismissal can take two forms: that of a single unilateral act that breaches an essential term of the contract, or that of a series of acts that, taken together, show that the employer no longer intended to be bound by the contract.... An employer's conduct may amount to constructive dismissal if it "shows that [he] no longer intends to be bound by one or more of the essential terms of the contract"... But the employer's conduct may also amount to constructive dismissal if it constitutes "significant breach going to the root of the contract of employment"... In either case, the employer's perceived intention no longer to be bound by the contract is taken to give rise to a breach.

Analysis

Claim

[87] On all the evidence, I find that the focal events to be considered in determining this claim center around the meeting of September 5, 2018, and the presentation of the letter dated September 5, 2018. This is clear in light of the actions of Ms. Webb, both in not returning to work after September 5, 2018 and in her response letter dated September 14, 2018. It was the events of September 5, 2018 that led to her belief that she had been constructively dismissed.

[88] As I understand the claimant's submission, Ms. Webb argues that either the contents of the September 5, 2018 letter, unilaterally and substantially changed her duties and responsibilities, or that the meeting and letter created an intolerable work environment.

Constructive Dismissal

Issue 1: Has the claimant established any breaches of express or implied terms of the contract sufficiently serious to constitute constructive dismissal?

[89] In considering this issue, I must first determine whether the defendant was motivated to compel Ms. Webb to resign in its actions towards her. This would provide a context or lens through which the letter and meeting of September 5, 2018 should be viewed.

[90] This determination necessarily involves considering the motivation of Constantine Piliotis, but also involves determining the extent to which the defendant's motivation can be derived through Constantine Piliotis.

[91] Ms. Webb submits that the evidence suggests that Mr. Piliotis had an agenda to terminate her. To support this position, she points to the evidence of a discussion between Mr. Piliotis and Mr. Ostrosser that occurred during their meeting in August 2018.

[92] Mr. Ostrosser testified that Mr. Piliotis expressed frustrations with office staff not responding to his requests and specifically expressed a belief that Ms. Webb should be let go. Mr. Ostrosser testified that in following his advice a pattern of progressive discipline would be required. Mr. Piliotis commented that, "we would make her time here as difficult as possible so that she leaves us instead."

[93] In his evidence, Mr. Piliotis testified that in the discussion in August 2018 with Mr. Ostrosser, he indicated that Ms. Webb would be put on a performance plan and the plan was going to be hell. In his evidence, Mr. Piliotis testified that he meant the plan would be difficult and that he knew this from previous personal experience. He testified that he did not recall telling Mr. Ostrosser that he was going to make Ms. Webb's life miserable. When suggested that he discussed a plan to terminate Ms. Webb, Mr. Piliotis testified he did not remember this discussion. When suggested that he told Mr. Ostrosser he would make Ms. Webb's "life a living hell" he testified that he did not remember making this statement.

[94] In my view, Mr. Piliotis's evidence on this point is problematic. I find his specific recollection of telling Mr. Ostrosser that Ms. Webb would be placed on a performance plan, and that it "was going to be hell", demonstrates an apparent clear recollection of the meeting with Mr. Ostrosser and the specific conversation concerning Ms. Webb during this meeting. This is inconsistent with his testimony that he is unable to recall making a statement about making Ms. Webb's life miserable and a plan to terminate her.

[95] I find that rather than giving his evidence as a recitation of the conversation with Mr. Ostrosser, Mr. Piliotis testified in a manner intended to protect himself (i.e. "I do not recall") and in a manner intended to persuade the court of his sincerity (i.e. "a

performance plan personally being hell"). On this evidence, I reject the testimony of Mr. Piliotis.

[96] I am mindful, however, that Mr. Ostrosser had an acknowledged challenging, personal relationship with Mr. Piliotis. That does not suggest that Mr. Ostrosser's credibility is compromised, but I must be mindful to this when ascertaining the reliability of his testimony.

[97] I am suspicious that Mr. Piliotis did have a personal agenda to have Ms. Webb terminated. However, on all of the evidence, I cannot find that Ms. Webb has established on a balance of probabilities that agenda.

[98] When viewing my suspicion together with the evidence of Mr. Piliotis, confirmed by Mr. Ostrosser, that Mr. Piliotis lacked the authority on his own to terminate Ms. Webb, I cannot find that my suspicion of Mr. Piliotis raises sufficient evidence of motivation to terminate Ms. Webb that can be attributed to the defendant.

[99] In considering whether or not the claimant has established the letter of September 5, 2018 contained unilateral and substantial changes, I find on the evidence that Ms. Webb's duties and responsibilities had changed over the years of her employment at SGS. This included changes to both her hours of work and days of work.

[100] In some instances the changes benefited the defendant. For example, Ms. Webb took on increased duties and responsibilities over time. Ms. Webb testified that she accepted those changes.

[101] In other instances, the changes benefited Ms. Webb. For example, the written agreement for the period September 1, 2005 through August 31, 2006, sets out Ms. Webb's days of work to be Tuesday through Friday. At some point, this changed to a schedule where Ms. Webb no longer worked on Fridays.

[102] In my view, over time, both parties operated within the flexible business environment recognized by the Supreme Court of Canada in *Potter*.

[103] On her evidence, Ms. Webb agreed that the requests for change made by the defendant in the letter of September 5, 2018 were either reasonable, or at least reasonable from a business perspective.

[104] In my view, it has not been established that the requests for changes to Ms. Webb's duties and responsibilities set out in September 5, 2018 letter rise to the level required under the first branch of the test set out in *Potter*.

Issue 2: Has the claimant established acts by the employer making continued employment intolerable?

[105] Other than the meeting and letter of September 5, 2018, the claimant proffered no evidence from which this Court could find that the defendant engaged in treatment of the claimant that made her continued employment intolerable.

[106] Ms. Webb testified that she worked for the defendant for some 18 years. While she testified to events that may have been unpleasant, this did not rise to the level required by the test.

[107] Ms. Webb argues that the criticisms contained in the September 5, 2018 letter, and the September 5, 2018 meeting itself, made the work environment "unpleasant". She argued that she felt her credibility was put into question and that her reputation had been damaged. She argued that the "threat" of termination contained in the final paragraph of the letter went beyond what she felt was reasonable.

[108] In her evidence, Ms. Webb did not agree with the criticisms contained in the letter. She did not dispute that the defendant had the right to critique her.

[109] In her evidence, Ms. Webb provided to the court, answers to the defendant's critique. In her letter of September 14, 2018, Ms. Webb both answered the defendant's critiques and relied on these critiques as the reason for her belief that she had been constructively dismissed as a result of an intolerable work environment.

[110] There is no doubt that Ms. Webb subjectively felt wronged by the defendant's criticisms of her. Mr. McWhinnie, counsel on behalf of the defendant does not dispute

this. However, he submits that the subjective belief of the employee in these circumstances is not determinative. Rather, the court must look to whether, on an objective basis, the employer's treatment of the employee has made continued employment intolerable.

[111] In my view, Ms. Webb has been unable to establish, on an objective basis, an intolerable employment environment. There is no evidence of actions prior to September 2018 by the employer to consider. While I also do not question the effect of the letter on Ms. Webb, in my view, I cannot find that it constitutes treatment by the defendant of Ms. Webb that would in and of itself, make the work environment intolerable. Finally, there is no evidence of the work environment subsequent to September 5, 2018, because Ms. Webb did not return to work.

[112] In my view, the claimant has not established constructive dismissal on the basis of an intolerable environment created by the defendant.

[113] As a result, the claim by Ms. Webb is dismissed.

[114] Having dismissed Ms. Webb's claim, I need not determine damages.

Counterclaim

[115] The defendant counterclaims in damages against Ms. Webb, for her failing to provide notice of termination of her employment.

[116] Having found that Ms. Webb has not established that she was constructively dismissed, her termination arose as a result of her failure to return to work. This was recognized by Ms. Chua on behalf of the defendant in her letter of October 1, 2018.

[117] Counsel on behalf of the defendant notes that Ms. Webb recognized an obligation to provide notice in her testimony. Mr. McWhinnie however, concedes that there is limited evidence from which to quantify any loss by the defendant. He submits that this Court could impose an award of damages, in a nominal amount.

[118] For the following reasons I dismiss the defendant's counterclaim.

[119] First, I agree that the defendant has been unable to provide evidence from which an economic loss resulting from Ms. Webb failing to provide notice can be determined. Both Mr. Piliotis and Ms. Chua testified to this.

[120] The defendant is required to prove both the delict and the damages. In this case there is simply no evidence from which to determine damages. In these circumstances any award, nominal or otherwise would be speculation.

[121] More fundamentally, even though Ms. Webb testified that she believed she was required to provide the defendant notice, neither Ms. Chua, nor Mr. Piliotis gave evidence on this issue.

[122] Ms. Webb testified that Exhibit 1 was the last written employment contract that she signed. Since then she had worked on the belief that this document remained operable and enforceable. Again, no evidence was led on the defendant's understanding of Ms. Webb's employment contract. The document itself contemplates a fixed term.

[123] The clause in Exhibit 1 addressing termination of services reads:

If the club wishes to dissolve this agreement, for any reason, it must be done in writing, with one month's notice. We ask the same of the employee if she wishes to end the agreement.

[124] In my view, while there is a positive obligation on the defendant to provide one month's written notice it simply requests of Ms. Webb to do the same. In my view this is distinct from a contractual obligation on Ms. Webb. The defendant may request notice but nothing in this clause obligates Ms. Webb to provide it.

[125] In my view, Ms. Webb was not required to provide contractual notice.

[126] Having dismissed the counterclaim, I would need not determine damages.

Summary

[127] In summary, both the claim and the counterclaim are dismissed.



The Honourable Judge R.J. Browning
Provincial Court of British Columbia