MacBeth v. Heart and Stroke Foundation of New Brunswick

New Brunswick Court of Queen's Bench
Trial Division - Judicial District of Moncton
Moncton, New Brunswick

G.S. Rideout J.

Heard: November 30, December 16, 2011; March 7, 2012.
Judgment: March 8, 2012.

[Editor's note: The note "[Text deleted by LexisNexis Canada]" indicates the removal of information which may identify individuals protected under lexisnexis Canada's Guidelines for the Protection of Identites.]

DECISION

1 G.S. RIDEOUT J.:-- Utilizing Rule 80, Nisha Karen MacBeth has commenced an action against the Heart and Stroke Foundation of New Brunswick, claiming $29,217.57. Ms. MacBeth claims she was constructively dismissed from the Heart and Stroke Foundation of New Brunswick (Foundation). She goes on to state; "Damages are inclusive of severance owed, continuation of employee benefits to the end of severance period and "Wallace" damages due to egregious manner of termination". Subsequently, Ms. MacBeth amended the amount of her claim to $23,760.90 due to receiving overtime, final salary payment and vacation pay. This amount was again amended to $25,616.00.

2 The Foundation disputes Ms. MacBeth's claim and says; "the plaintiff resigned from her employment on February 10, 2011 and, as such, is entitled to no further compensation, further, and in the alternative, the defendant says the plaintiff has a duty to properly mitigate her damages". The Foundation subsequently filed an amended Dispute Note including a Schedule "A:" which reads as follows:

> "1. The Defendant, Heart and Stroke Foundation (hereinafter, the "Foundation") retracts the entirety of Part A of its original Dispute Note and replaces it with the foregoing.
>
> 2. The Foundation denies each and every allegation contained in Part A of the Plaintiff's Claim (Form 80A), and puts her to the strict proof thereof.
> 3. As to the whole of the Plaintiff's claim, the Foundation states that:
>
> a) The Plaintiff's employment with the Foundation was governed by a written and implicit agreement, which included the policies contained in the Employee Handbook, signed by the Plaintiff, and the Employee Acknowledgement of Responsibilities;
> b) The Plaintiff held the position of Senior Manager for Revenue Development Moncton. In this capacity, the Plaintiff's responsibilities included, but were not limited to, ensuring the Foundation's overall viability, administering and implementing all fundraising activities in the South Eastern New Brunswick region and carrying out duties as assigned by the Director of Revenue Development;

c) On February 10, 2011, the Plaintiff submitted a letter of resignation to the Foundation;
d) On February 28, 2011, the Plaintiff submitted a correspondence to the Foundation indicating that she had received multiple job offers and interviews.

4. The foundation states that the Plaintiff's claim should be dismissed as the Plaintiff quit her employment but did so without giving any notice.
5. The Foundation states that it did not breach the terms of the Plaintiff's employment and that the Plaintiff was not constructively dismissed.
6. In the alternative, the Foundation states that if the Plaintiff was constructively dismissed, which is denied, she has failed to mitigate her resulting damages.
7. The Foundation states that the Plaintiff's Statement of Claim should be dismissed, with costs."

FACTS

3 This matter has been heard on three separate days and a great deal of documentary evidence has also been introduced. Ms. MacBeth claims she was constructively dismissed. Before reviewing the evidence, I believe it may be beneficial to consider the definition of constructive dismissal and I have referenced Howard A. Levitt's looseleaf text, third edition, *The Law of Dismissal in Canada* at page 5-1:

> "In the absence of cause, any fundamental breach by the employer of a major term of the employment relationship allows the employee to take the position that a constructive dismissal has occurred. Even if the employer has never given the employee a formal discharge, there can be a dismissal at law. However, it must be a fundamental, rather than just a minor or incidental, term of the employment relationship which is breached in order for a constructive dismissal to exist and it must be a fundamental breach of such fundamental term of employment. In each case, it is a question of what are the terms of the contract, whether there has been a breach, and, if there has been a breach, whether it amounts to a fundamental breach. In other words, it must be a change that goes to the "root of the employment contract".

4 As one can no doubt appreciate, one of the important functions of the Foundation is fund-raising. Ms. MacBeth was hired full time in September, 2005 and she resigned on February 10, 2011. The evidence is also very clear that Ms. MacBeth was highly regarded by the Foundation. In the Foundation's Brief on Law at paragraph 5, the Foundation states:

> "5. During her [Ms. MacBeth] tenure with the HSFNB, the Plaintiff was considered to be a capable employee. She consistently met or exceeded fundraising targets."

5 Sprinkled amongst the numerous e-mails admitted into evidence is clear evidence that Ms. MacBeth was very highly thought of by the Foundation and its upper management. In an e-mail from Kurtis Sisk, Director of Revenue Development, dated March 3, 2010, he says things like:

> "[...] let's be honest, upon leaving a position you have been in for so long will have long-term negative implications to our Foundation [...]
>
> [...]
>
> [...] This year has been difficult, but you did the best you could under the circumstances you were given. You worked a lot of extra hours [...]
>
> [...]
>
> I agree, you cried enough and deserve a good year and no matter what you decide, I am hoping you will have that in the end. With that said, I also know you are not a quitter.

> Leaders are made by rising above challenging tides and not being overcome by them. We both know you are that leader and can do this, but I only want you to stay if you believe it and get a renewed sense of passion, revise the position to work for you and your family, start saying no, taking time off and being dedicated to us again.
>
> I will not be filling out a review as it is too impersonal - you know how I feel. I will also not lay you off ... sorry you'll have to quit.
>
> Let me know when you decide as I will not be bringing it up again.
>
> Your boss and friend in confidence."

6 I gather from the evidence before the Court that different fund-raising efforts occur at different times and in different parts of the Province of New Brunswick. Ms. MacBeth had been doing the "door-to-door" campaign in the Moncton area for a number of years. Simply put, I believe the evidence shows that she was tired and the stress of these yearly campaigns had taken a toll. It was agreed by Mr. Sisk that Ms. MacBeth would not manage the 2010 "door-to-door" campaign. There was an intent to hire a replacement person for this task. Mr. Sisk and Ms. MacBeth interviewed Rhonda O'Blenis. On September 17, 2010, Ms. MacBeth sent an e-mail to Mr. Sisk suggesting that Ms. O'Blenis be hired. She went on to say:

> "I am happily giving away campaign - but as you know will do what is needed to make HSF succeed-it is my baby but there are zero zero zero attachments. So a few calls a week will not kill me- to help her succeed.
>
> If I am to last here past age 50, ha!! It will be with you still here and me focusing solely on sponsorships after that age."

7 It would appear that in early January, 2011, the "door-to-door" campaign got into problems. As I understand Ms. MacBeth, there were numerous problems and Ms. O'Blenis could not or did not do the job properly. At first the Foundation thought only certain aspects were in trouble but as time passed, it became evident that everything was in trouble. Ms. MacBeth, along with Mr. Sisk, recognized that there were serious deficiencies in the campaign and everyone would have to jump in to rescue the campaign. Ms. MacBeth was prepared to help. She volunteered to do what she could by making phone calls, helping Ms. O'Blenis, delivering canvasser kits and the like.

8 On February 1, 2011, Ms. MacBeth and others were coming to the realization that Ms. O'Blenis had really not done very much and was not co-operating to help the campaign. Ms. O'Blenis resigned on February 7, 2011. Now the "door-to-door" campaign in the Moncton area was in serious trouble. Mr. Sisk testified that this was an important aspect of the total provincial fund-raising effort and now it was in serious trouble.

9 On February 9, 2011, Ms. MacBeth sent an e-mail to Mr. Sisk which reads as follows:

> * "Filling areas as much as I can without exhausting myself -- yet as much as I feel I should be trying to bring our campaign numbers up, I do not feel it is a responsibility I can go full out and have a balanced life at the same time. A lot of this has been majorly stressful only because I have to lie so much.
> * Last year I picked up the pieces because it was my responsibility as the manager. There was definitely no balance.
> * So though I do have a patient family, I have to choose them first one year.
> * Yes I have sorted out quite a bit thus far, it is draining me slowly as much as I am taking each day one at a time.
> * Yes, I am happy Ang is taking on Fredericton willingly but since September I have had a constant workload to be carried through until August and I do feel that my workload is very different even though my goals are less.
> * Counting $ is not my forte. Having kits in the house again is something I dread. Especially being responsible for a caller earning min wage from us and picking up

loads of $ from captains etc is a responsibility I do not want. If callers can not even give real canvassers names how can they collect $10k plus and be trusted?

* I can not even sleep worrying about the extra kits Rhonda had not knowing where they are, am I to pick them up, were they sent out ...
* I am not sure what the solution is but I know I am needed to sort out some, just not sure how much.
* A kit was tried to be returned to St. George Scotia but no staff knew anything about it. I ended up picking it up. Is there a contact name other than the managers?"

10 Again, on February 10, 2011, Ms. MacBeth e-mailed Mr. Sisk responding to an e-mail from Mr. Sisk:

"From: Heart and Stroke Nisha K. MacBeth Date: 10/02/2011 2:24:13 PM

Subject: RE: campaign 2011

Less on my plate in terms of last year - 150 hours this year vs 300 plus hours?? Still unrealistic. I think I have more than done my share for campaign.

Yes, I did more school recruiting last March, BB sponsorships. If you need a breakdown of hours from this staff, I can provide it then.

I simply do not do paperwork well.

Saint John in my opinion delegates, does not help.

When you paid me this year it was on what my goals were, not on how I rise over and above. It was with the promise of no campaign. I was not the campaign manager.

---------Original Message -------

From: Kurtis Sisk
Date: 10/02/2011 1:46:36 PM
To: 'Heart and Stroke Nisha K. MacBeth'
Cc: 'Tina Etmanski'

Subject: RE: campaign 2011

Sounds like we need to talk ...

I don't know who was comparing you to Angie ... I thought you asked about the situation in Fredericton and I gave you the answer. By no means did I mean to compare your situation to hers or you to her in general.

As for counting money for JRFH in March, are you planning a lot of JRFH events for March? Either way, we can count money for JRFH in Saint John which is what I believe we discussed in the past.

As for calling canvassers being beneath you ... not sure how to respond to that.

As for you having too much on your plate, I agree it is a lot and frankly you already know how I feel about that. It is however less than last year and your sponsorships should be wrapped up now so you do have JRFH (a very small amount I suspect) and campaign (mess). Do you usually recruit many BB teams in March? Either way, sometimes crisis happens and our senior staff need to step in and reorganize/prioritize/delegate to make it happen the best way possible (ideally without stealing too much time away from their

family). We need to come up with solutions together ... how can we help from Saint John? i.e. counting, hiring a runner, etc.

Let's talk about this more later today ... I'm on a call now.

Rhonda, send her stuff to us, letter, hours, expenses, etc.

Kurtis Sisk

Heart and Stroke Foundation of New Brunswick"

11 Approximately a half hour later, Ms. MacBeth sent an e-mail to D. Connolly with copies to Kurtis Sisk and Cathy Densmore which was entitled "Subject" resignation Nisha MacBeth". The e-mail reads as follows:

"To whom it may concern,

Please do consider this my official resignation from employment with the Heart and Stroke Foundation of New Brunswick dated February 10th, 2010.

With over 300 hours of overtime yearly, an accruement of 150 hours already this year between carry over and overtime, I feel it is very unfair to ask any more time from me.

This fiscal year in setting goals, I asked to be removed from campaign. Because of unforeseen issues with other staff, I do not feel it is my responsibility to take away from more family time another year in a row. I have already done my part in delivering kits, taking forwarded calls, recruiting some of the best past canvassers and asking team captains to secure other canvassers in their areas to fill in the gaps - all to ensure a positive campaign outcome. I can not take on this added responsibility of (sic) so I resigning because of a change in job responsibilities.

Nisha MacBeth

[Text deleted by LexisNexis Canada]"

12 Again, later on February 10, 2011, a worker at head office wrote to Ms. MacBeth:

"Hi Nisha,

Kurtis called me and told me the sad news. I'm very sorry to hear that you will be leaving HSFNB. You will be greatly missed as a co-worker and a friend. It has been a pleasure and great fun to work with you all these years.

Kurtis also mentioned that you were not happy about the kick off yesterday and that you thought that I should be helping out with the calling.

I did not even think to ask for a microphone until you mentioned it at the school and you asked Lynne before I even had a chance. I'm use to working with Angie and you both do things very different. She never wanted a mic and always kept the prizes in a box until we were ready to show them to the children. It kept their focus. I had a copy of your presentation in hard form and on a drive, prizes were blown up and opened as asked. I'm sorry if you felt I was not there to help. As far as the questions go, I have no control over if a jump rope coordinator starts accepting questions. I did not worry too much about the questions, I knew Lynne would answer them also.

Campaign ... I'm very sorry if you felt I was not supporting you. Unfortunately there is only so much that I can do from the office. I offered to do the data entry, count money,

pick up money, send out kits and help call some of the English areas. Every time I spoke to you I asked you to let me know if I can help in any way. After yesterdays email, Kurtis and I came up with a few other ways that we could maybe help out and he was going to send you my email today with a few ideas on how we could take little more off of you.

I felt bad, that campaign landed on your plate again. I know it was the last thing that you wanted or needed. All our plates are full with our own responsibilities. I also know that the last you would want for the Moncton campaign is to see it fail after all the hard work you have done and I also know how much HSF means to you. You have been very passionate about your work.

With all this said, I'm sorry that you will be leaving and that you feel I have not offered you the support that you need.

Take care,

Tina"

13 On February 11, 2011, Mr. Sisk accepted Ms. MacBeth's resignation:

"Dear Nisha,

As per your letter below, we accept you (sic) resignation.

Thank you for everything you have done to make our Foundation a success.

I will be in touch soon to discuss the transition of materials and information.

Sincerely,

Kurtis Sisk"

14 Again, on February 11, 2011, there were further e-mails:

"From: Nisha K. MacBeth
Date: 2/11/2011 11:30:49 AM
To: Kurtis Sisk; office/D. Connolly
Cc: office/Cathy Densmore

Subject: Re: Transition

To whom it may concern,

I would like to be clear that a signed resignation will be sent in this afternoon, this was a forced resignation, not a choice one. It was never my intention not to give notice and not to tie up loose ends, but after yesterday's conversation with Kurtis, "there were no other options, I had to take over campaign, no choice in this matter" and he agreed it was "quit", take on campaign or "stress leave", I chose to quit.

After the last two weeks, sorting the campaign mess, calling canvassers and asking team captains to fill in areas to ensure that our campaign could be salvaged, I still raised it by another $9800. This year I took over securing schools in the North while handling my area schools as well, I have already raised $20K for the run, $23K for HT, $30 with Subway. I have done my part and always always welcomed a challenge. Simply the challenge of taking on campaign was not one that I was physically or mentally able to do this year.

Nisha MacBeth

[Text deleted by LexisNexis Canada]

--------Original Message --------

From: Kurtis Sisk
Date: 11/02/2011 11:07:59 AM
To: Nisha MacBeth

Subject: Transition

Hello Nisha,

First, let me say that I, along with the staff, was disappointed to receive your letter of resignation yesterday. You have accomplished a lot of great things during you (sic) time with our organization and I appreciate that very much. I know we have learned a lot from each other and it won't be the same here without you by my side. As I hope you already know, I do consider you, Rachel, Matt and Paul, friends of mine and will continue to do so in the future.

I'm writing today to discuss the transition of HSF materials and information. As with any resignation, we always hope the staff person involved would give us a few weeks' notice so we have time to prepare and properly transition. Unfortunately, that has not happened in this case, but I trust you still hold the staff, donors and volunteers in high enough regard that you would consider writing us a detailed report for all of your responsibilities. Ideally it would include contact information, and any other pertinent date i.e. how they like to be contacted, etc, for all of our current and past teams, schools, sponsors, etc.

[...]

As I said, this is going to (sic) a very difficult transition without you, but we hope we can rely on you to help provide a comprehensive report and hopefully even answer the odd question from time to time.

I look forward to talking to you soon."

15 The full, hard copy, signed resignation letter was more extensive and reads as follows:

"To whom it may concern,

Please do consider this my official resignation from employment with the Heart and Stroke Foundation of New Brunswick dated February 10th, 2010. This is not a voluntary resignation I have been forced to resign.

With over 300 hours of overtime yearly, an accruement of 150 hours already this year between carry over and overtime, I feel it is very unfair to ask any more time from me.

Over the years I have gone over and beyond what was asked and required of me. In September 2010, my job responsibilities changed and D2D (Campaign) was removed. I was told at that time my salary raise was determined based on the fact I would not have the responsibility of Campaign. It was determined that I would not be involved in campaign and that it would be managed out of the Saint John office. Significant problems have occurred in the 2010/2011 campaign due to a lack of oversight. In the past 2

weeks I have done my best to try to facilitate the success of the campaign, securing an additional $9,800 in potential in canvassing. I did my part in delivering kits, taking forwarded calls, recruiting some of the best past canvassers and asking team captains to secure other canvassers in their areas to fill in the gaps - all to ensure a positive campaign outcome. All while continuing to do my fiscal 2011 responsibilities.

I do not feel that a coordinator leaving her 28/hr week position is my responsibility to fill in permanently this fiscal year with my already 35/hr week position.

Today I was told by Kurtis in our phone call at 2:30 pm there were no other options, I had to take over campaign. When asked to clarify this, he agreed that yes my choices were limited to quitting or yes as I pointed out, stress leave. Thus I was forced to leave Heart and Stroke Foundation of New Brunswick on February 10th, 2011.

I have exceeded all of my stated objectives for the year thus far, such that I cannot be dismissed for this cause. I have met and exceeded all goals to date while assisting with various staff issues this year up North and now in the South East of NB as well.

Since I am physically and mentally unable to take on the added responsibility of campaign, I am being forced to leave because of a change in job responsibilities and no choice as to whether or not I can accommodate this into my already busy work schedule. The forcing of these responsibilities forces one to give up their health.

Because of the years of dedication, success and professionalism that I have given to Heart and Stroke Foundation of New Brunswick, I am deserving of a compensation package.

Nisha MacBeth

[Text deleted by LexisNexis Canada]"

16 The evidence of Mr. Sisk was to the effect that Ms. MacBeth was a good employee, although she had "highs" and "lows" and was affected by the levels of stress she was facing. It is also not questioned that during the January-February, 2011 period there was a heightened level of stress. As I consider the facts of this matter, I find that initially in 2010 a decision was made to change Ms. MacBeth's position by removing the door-to-door campaign. Other aspects of her position remained. This was also important to Ms. MacBeth because of her other responsibilities. I am satisfied that management was aware of and agreed that the campaign was stressful and that she should have this task eliminated from her job description. I hasten to add that it was understood that Ms. MacBeth would be available to advise and assist the new person taking on these duties.

17 The Foundation adds that when the campaign got into trouble, it was understood that everyone, including Ms. MacBeth, were to help. It is also clear to me that when things got very bad, it was expected by the Foundation that Ms. MacBeth would, in effect, take over the Campaign and head office would assist. Ms. MacBeth did not agree to these changed and in the period just before her resignation, she made that clear. Mr. Sisk seems to have simply accepted the resignation without trying to get Ms. MacBeth to change her mind.

18 The final amended claim of $23,760.90 is calculated as follows:

"Total Claim summary

Severance owing	$23,187.02

Difference in Vacation Pay		344.88
Filing Fees Small Claims Court		103.00
Document Serving cost (300 km x $0.42 km)	126.00	

Total Claim		$23,760.90

19 Ms. MacBeth calculated the severance owing based on a monthly wage of $3,583.88 for 5.45 months or 19,532.16 plus vacation pay on severance of $1,171.93 plus statutory holiday (11 days) of $826.21 plus pension of $1,230.53 plus life and AD & D insurance $6.60 x 2 payments x 5.45 months or $71.94, finally there was a blackberry reimbursement and a fitness credit which were $40.00 and $25.00 respectively multiplied by 5.45 resulting in a total of $354.25. This results in the $23,187.02 of severance claimed.

ISSUES

20 Was Nisha Karen MacBeth constructively dismissed such that Nisha Karen MacBeth is entitled to the severance pay claimed or any severance pay? In addition, is Nisha Karen MacBeth entitled to punitive or "Wallace" damages? Did Nisha Karen MacBeth fail to mitigate her damages?

ANALYSIS

CONSTRUCTIVE DISMISSAL

21 I reference Farber v. Royal Trust Co. [1997] 1 S.C.R. 846 at paragraphs 24-27:

> "24 Where an employer decides unilaterally to make substantial changes to the essential terms of an employee's contract of employment and the employee does not agree to the changes and leaves his or her job, the employee has not resigned, but has been dismissed. Since the employer has not formally dismissed the employee, this is referred to as "constructive dismissal". By unilaterally seeking to make substantial changes to the essential terms of the employment contract, the employer is ceasing to meet its obligations and is therefore terminating the contract. The employee can then treat the contract as resiliated for breach and can leave. In such circumstances, the employee is entitled to compensation in lieu of notice and, where appropriate, damages.
>
> 25 On the other hand, an employer can make any changes to an employee's position that are allowed by the contract, inter alia as part of the employer's managerial authority. Such changes to the employee's position will not be changes to the employment contract, but rather applications thereof. The extent of the employer's discretion to make changes will depend on what the parties agreed when they entered into the contract. R. P. Gagnon made the following comment on this point in Le droit du travail du Québec: pratiques et théories (3rd ed. 1996), at p. 66:
>
> * [Translation] Moreover, to what extent can the employer change the nature of the employee's work or the employee's duties and responsibilities? This issue is increasingly important, inter alia because it is often an essential consideration for employees in their employment that they be able to do the job for which they were hired, given both the satisfaction they legiti-

> mately wish to derive from it and their concern to maintain and develop their qualifications and skills in their field of work. The answer takes into account the form of and circumstances surrounding the hiring of the employee and thus how much discretion the employer explicitly or implicitly has to exercise managerial authority in this regard. [Citation omitted.]
>
> 26 To reach the conclusion that an employee has been constructively dismissed, the court must therefore determine whether the unilateral changes imposed by the employer substantially altered the essential terms of the employee's contract of employment. For this purpose, the judge must ask whether, at the time the offer was made, a reasonable person in the same situation as the employee would have felt that the essential terms of the employment contract were being substantially changed. The fact that the employee may have been prepared to accept some of the changes is not conclusive, because there might be other reasons for the employee's willingness to accept less than what he or she was entitled to have.
>
> 27 Moreover, for the employment contract to be resiliated, it is not necessary for the employer to have intended to force the employee to leave his or her employment or to have been acting in bad faith when making substantial changes to the contract's essential terms. However, if the employer was acting in bad faith, this would have an impact on the damages awarded to the employee. In the case at bar, there is no question of bad faith by the respondent, which was acting in good faith in reorganizing its hierarchical structure. Thus, the only damages in issue are those that would be awarded in lieu of notice."

22 The Foundation relies heavily on a decision of the Supreme Court of Nova Scotia -- Gillis v. Sobeys [2011] N.S.J. No. 646; 2011 NSSC 443. Ms. Gillis was part of the marketing management team of Sobeys. She was advised on March 30, 2009 that her position was to be eliminated. She was offered two alternative positions; assistant sales manager at Sobeys Store #871, Truro or demo coordinator -- Sobeys Atlantic Head Office. Nothing was agreed to by Ms. Gillis and she subsequently left her employment with Sobeys. Paragraph 22 summarizes the facts and paragraph 28 sets out the findings of the court. Finally, I set out paragraphs 38 and 39 of the decision:

> "22 Sobeys takes the position that they valued Ms. Gillis as an employee and wanted to keep her in their employ. Subsequent to the March 30, 2009 meeting they told her this and encouraged her to accept the assistant store manager position. On April 1, 2009, when Ms. Gillis attended the office, this information was provided. On April 7, 2009 Ms. Fearon wrote to Ms. Gillis stating Awe are requesting that you give further consideration to the positions offered as Sobeys would like to maintain the employment relationship with you." Mr. Machum, counsel for Sobeys, wrote a similar letter in May, 2009. Ms. Gillis did not respond and started this action.
>
> [...]
>
> 28 I am satisfied that Sobeys goal on March 30, 2009 was to continue the employment relationship with Ms. Gillis. I am also satisfied that the assistant store manager position was enhanced to limit the impact on Ms. Gillis. I am also satisfied that Sobeys was willing to work with Ms. Gillis in relation to her child care responsibilities. I accept Sobeys submission that the assistant position was a temporary placement that would have led to store manager once Ms. Gillis was updated on that position. I find these to be facts.
>
> [...]
>
> 38 Ms. Gillis did not have a vested interest in the food experience manager position. In *Shillington v. Quebecor Inc*., [1991] O.J. No. 1398 (Ont. Gen. Div.) Justice Blair discussed this principle at paragraph 24:

* What is the obligation of an employee to accept a new assignment by his or her employer?
* It has been held that an employee may be required to accept reassignment and may be discharged for refusing to do so. Whether this is so depends upon the nature of the reassignment and whether the employer is acting bona fide and for a reasonable business objective. If the employer is pursuing a legitimate business objective and is not acting in a manner which is simply a disguise for dismissal, and if the new assignment does not constitute a fundamental change or variation in the terms of employment, an employee may reasonably be required to accept the new task. As Dubin J.A. said, in *Canadian Bechtel Ltd. v. (1978)*, 1 C.C.E.L. 95 (Ont. H.C.J.), at page 98:

    * ... The plaintiff had no vested right in the particular job initially given to him. If the employer, ... acted in good faith and in the protection of its own business interests, the plaintiff would have had no right to refuse the transfer.
    * ...

* Even a demotion involving some loss of prestige and position may not, in itself, be sufficient to justify the employee in declining to accept the re-assignment. ...

It is well established that Sobeys has the right to reorganize its business affairs.

39 The test for constructive dismissal, that is whether an employer has breached a fundamental term of an employment contract, is objective. In *Chambers v. Axia Netmedia Corp.*, [2004] N.S.J. No. 26 (N.S.S.C.) MacAdam J. commented at paragraph 16:

* The test for determining whether an employee has been constructively dismissed is an objective one and essentially a question of fact. The Court must decide whether, on a reasonable interpretation of the facts, the employee has established he was constructively dismissed, as a result of conduct by the employer, that breaches a fundamental or essential term of the employment contract. The employee's perception of the employer's conduct is not determinative. Rather, the Court must ask whether a reasonable person, in a similar position as the employee, would have concluded the employer had substantially changed on essential term of the employment contract. [*Lane v. Carsen Group Inc*., [2002] N.S.J. No. 428, 2002 NSSC 218; *Miller v. Fetterly & Associates Inc.* (1999), 177 N.S.R. (2d) 44 (N.S.S.C.)]

I have already determined that Ms. Gillis' response to the elimination of her position was emotional rather than pragmatic. I am firmly of the view that a reasonable person, in a similar fact situation, would have accepted the assistant store manager position. I concur with Rutherford J.'s comments in *Tymrick v. Viking Helicopters Ltd.*, [1985] O.J. No. 296 at page 4:

* "I think it is clear law that an employer is to be allowed a certain degree of latitude with respect to upward and lateral promotions; not every change in the terms of employment constitutes constructive dismissal."

> I find that the changes between the food experience manager position, and that of assistant store manager, did not fundamentally alter the terms of her long-standing employment. I find as a fact that Ms. Gillis was not constructively dismissed."

23 In some respects the Gillis decision is somewhat similar. But, with respect, I believe the fact situations are different. While the Foundation says that Ms. MacBeth was a good employee and they wanted her to stay, they knew she would be stressed by the reversal of the earlier decision but they continued requiring her to carry out the campaign. These important facts are different from the Gillis decision.

24 It is well accepted that a determination of the issue of constructive dismissal is a fact driven analysis.

25 In the case before the Court, we have a situation in which Ms. MacBeth could not take the stress of continuing as a manager of the "door-to-door" campaign in the Moncton area. After discussion with her supervisor, it was agreed that she would be relieved of this responsibility. Subsequently, the campaign got into trouble and everyone was asked to help out. Ms. MacBeth agreed to help out but the stress clearly became too great. During attempts to resolve some of the problems, the discussions seem to have gone off "the rails".

26 I accept that Ms. MacBeth had an agreed change in her employment contract to the effect that she would no longer be responsible for the "door-to-door" campaign in the Moncton region. Shortly thereafter, she was thrust back into those very same duties. I believe it was also clear that this was due to the problems with the person who replaced Ms. MacBeth. None of these problems were the fault of Ms. MacBeth.

27 The Foundation was fully aware of Ms. MacBeth's views on the "door-to-door" campaign. They were aware that this campaign had a high stress level for Ms. MacBeth. As well, knowing all of this, they made her take on the responsibilities she wanted to relinquish and had, in effect, relinquished.

28 I must at this stage add that the facts of this matter present the Court with a difficult decision. There is sympathy for both sides in this matter. But at the end of the day I believe Ms. MacBeth was constructively dismissed.

29 Ms. MacBeth had been a loyal hard-working employee for the Foundation and the Foundation knew and acknowledged this fact. The Foundation also knew that the campaign in question had been quite stressful to Ms. MacBeth and the Foundation, knowing this, changed her duties and gave her a new role. She was no longer responsible for the campaign and a new person was hired in her place. Therefore, I determine that Ms. MacBeth's employment had been changed such that she had no responsibilities associated with the campaign.

30 When the campaign got into problems, it was as they say "all hands on deck". Ms. MacBeth was no exception, acknowledging that this campaign had been "her baby". In a relatively short period of time it was clear that Ms. MacBeth was becoming very stressed about the situation and more matters were having to be corrected by her. Just the thing she had been relieved of before the campaign commenced and a new person hired.

31 In that stressful situation I do not believe the Foundation handled Ms. MacBeth properly. They, in effect, said that she had very little choice and gave her a message in my view that they did not care about their previous commitment and the toll their decision had on Ms. MacBeth. I believe that the unilateral decisions taken by the Foundation in and around February 7-10, 2010 substantially altered an essential term of the contract of employment. The Foundation changed a term of the employment and then sent an implied message to Ms. MacBeth that her concerns and stresses could not be accommodated and she would have to live with the situation.

32 That being said, I saw nothing which would suggest that the Foundation's conduct was so egregious as to warrant "Wallace damages". I believe the law requires a marked departure or egregious conduct before such damages are awarded. I saw nothing in the evidence which would warrant such an award of damages.

33 The Foundation has claimed that Ms. MacBeth has failed to mitigate her damages. It is settled law that a dismissed employee, wrongfully, constructively or otherwise, has an obligation to mitigate their damages by attempting to mitigate or find other employment.

34 The courts have held that a plaintiff, in a wrongful dismissal case, is entitled to recover damages provided the plaintiff has taken reasonable steps to avoid unreasonable accumulation of losses. In Red Deer College v. Michaels [1976] 2 S.C.R. 324; 1975 CarswellAlta 57 the Supreme Court of Canada commented at paragraph 9:

> "9 None of the three cases in this Court can be taken to settle the question of the burden of proof as it arises in a claim for damages for wrongful dismissal and as it relates to the question of mitigation. It is, of course, for a wronged plaintiff to prove his damages, and there is therefore a burden upon him to establish on a balance of probabilities what his loss is. The parameters of loss are governed by legal principle. The primary rule in breach of contract cases, that a wronged plaintiff is entitled to be put in as good a position as he would have been in if there had been proper performance by the defendant, is subject to the qualification that the defendant cannot be called upon to pay for avoidable losses which would result in an increase in the quantum of damages payable to the plaintiff. The reference in the case law to a "duty" to mitigate should be understood in this sense."

35 The evidence indicates that the Foundation took approximately 7 weeks to forward a letter of reference and it was only sent after Ms. MacBeth's lawyer sent a letter requesting same. At the same time, there are documents and emails which suggest that Ms. MacBeth had numerous offers and job opportunities, including a position in Newfoundland, but she did not avail herself of them. The position in Newfoundland was not feasible because her family would have to move; consequently, the failure to take this position is not a factor in the failure to mitigate.

36 It is my opinion that Ms. MacBeth did not mitigate her damages based on the evidence before the Court. I believe that she could have finalized a position two months after she received her letter of reference. Consequently, she is entitled to 4 months' notice.

37 I calculate her damages as follows:

a)	$3,583.88 x 4 months	$14,335.52
b)	vacation pay on severance $215.03 x 4	860.12
c)	vacation pay $151.60 x 4	606.40
d)	pension $225.79 x 4	903.16
e)	life and AD & D insurance $13.20 x 4	52.80
f)	Blackberry and fitness $65.00 x 4	260.00

$17,018.00

DISPOSITION

38 The Plaintiff, Nisha Karen MacBeth, shall have judgment against Heart and Stroke Foundation of New Brunswick in the amount of $17,018.00, plus interest of 5% for one year, or $850.90, plus cost inclusive of disbursements based on Tariff "A", Scale 1 on $20,000.00 or $1,575.00 for a total of $19,443.90.

G.S. RIDEOUT J.