IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***Hainsworth v. World Peace Forum Society,*** 2006 BCSC 809

Date: 20060523
Docket: S060195
Registry: Vancouver

Between:

Lynn Hainsworth

Plaintiff

And:

World Peace Forum Society

Defendant

Before: The Honourable Mr. Justice Warren

Reasons for Judgment
In Chambers

Counsel for the Plaintiff:	C.L. Nestibo
Counsel for the Defendant:	D.G. Crane
Date and Place of Hearing:	April 11 and April 25, 2006 Vancouver, B.C.

Introduction:

[1] The plaintiff has applied pursuant to Rule 18A claiming damages for wrongful dismissal from her employment with the defendant the World Peace Forum Society (the "Society").

Background:

[2] The Society was created in August 2004 for one, short-term purpose only; to provide an umbrella under which movements and organizations working on peace and sustainability issues could come together and participate in the "World Peace Forum 2006" which is a joint project between the Society and the City of Vancouver's Peace and Justice Committee. The conference, or forum, will take place in June and by the end of July 2006 at the latest, the Society will cease to exist. Most of the individuals involved in the Society are volunteers but there were some paid employees, including the plaintiff.

[3] In December 2004, or early January 2005, the plaintiff, who is a 55-year-old single parent and for many years an active participant in the peace and social justice movement, learned that the defendant was looking for an individual for the position of executive director. The position was open immediately and the employment would last only for the duration of the project - that is, until June or July 2006.

[4] The plaintiff promptly applied. She was interviewed in April 2005, and shortly thereafter, she was offered the position. There are no written terms of her contract of employment.

[5] The plaintiff's affidavit deposes that she understood that she would be one of two executive directors and that her role was to be Executive Director, Operations, and the other Executive Director, Jeff Keighley, was to be Executive Director, Outreach and Programme.

[6] The plaintiff moved to Vancouver in April 2005, entered into a one year lease on an apartment in Vancouver and started work on April 24, 2005. She deposed

that her duties included drafting policies, agendas for meetings, liaising and reporting to the various “decision-making structures”, the creation of job descriptions for subordinate positions, and “other duties normally expected of the most senior executive operational role at a non-profit society”.

[7] The plaintiff deposed that over the spring and early summer of 2005 tensions grew between senior staff Jeff Keighley and herself, and members of the Board of Directors (the “Board”) over appropriate work roles, structures and decision-making. These tensions were heightened considerably in September 2005. The plaintiff believed that one of the members of the Board of the Society was besmirching her reputation but she was determined to “push pass the insult”.

[8] The plaintiff deposed that at a meeting with another Board member in early October, she learned that people were unhappy with her performance. The plaintiff further deposed that at the Annual General Meeting (the “AGM”) of the Society on October 15, 2005, she felt marginalized. She said she had to manoeuvre to be included at the head table; that her written report was “languishing in the box” and was only included with other materials after difficulties; and that “it was increasingly difficult to inspire confidence in perspective [sic] volunteers and donors when I, too, was facing what seemed like constant affronts”.

[9] The plaintiff deposed that after the AGM, she met with Jane Turner and Karen Dean, both members of the Board and volunteers at the Society, and she was told that her title would be changed and she would now be reporting to Mr. Keighley. The plaintiff deposed that Ms. Dean told her that if she did not accept the decision then the Society would undertake a performance review and this would “harden opinion” against her. The plaintiff understood that this would mean she would voluntarily accept a significant reduction in status and instead of reporting directly to the Board of Directors, she would now be reporting to Mr. Keighley. The plaintiff deposed her belief that as “coordinator of operations” her role would have been “much diminished”. She would report to Mr. Keighley on an area that had formerly been her responsibility and although her responsibilities would not be much diminished, she felt and the new title

would have reflected badly on her reputation and ability "to actualize her vision of logistics". The plaintiff deposed that her "access to the Board would be limited and her ability to influence the direction of the forum would be vastly diminished".

[10] The plaintiff further deposed that she suggested to Ms. Dean and Ms. Turner that the problem was primarily a conflict between another Board member and herself and she suggested a process of mediation. Ms. Dean responded that the issue was not personal. The plaintiff said she did not respond one way or another at the meeting other than to say that she required time to consider the "implications of the change". She informed both Ms. Dean and Ms. Turner that she would take the weekend to ponder the development and give her decision on the following Tuesday.

[11] Before leaving for the weekend to visit with family in Saskatchewan, Ms. Hainsworth consulted with a solicitor. On November 1, 2005, following her return from Saskatchewan, she met with Mr. Keighley in the office, at which point she said he "ordered" her into his office. She deposed that this was rather unusual and he waited at her office door impatiently while she removed her coat.

[12] There was some discussion between the plaintiff and Mr. Keighley about a draft budget that had been leaked to the press. When Mr. Keighley inquired as to whether she had decided to accept the subordinate position the plaintiff said that she had not made up her mind and she needed to know more clearly what the new position involved. She deposed that Mr. Keighley told her there would be no further information and she had to decide whether she was accepting it right then. Ms. Hainsworth deposed that she believed that there was another option open to her, namely a performance review and she was confident that she would be able to pass the review. Accordingly, and since Mr. Keighley was telling her she had to choose, she decided not to accept the new role thinking she could carry on in her current position and undergo the performance review. She deposed:

> Then, to my surprise, Mr. Keighley told me to hand over my keys. By this, I understand Mr. Keighley to be telling me that he had sufficient authority from the Board to terminate my employment, and that he was doing so.

> I had no intention of voluntarily resigning my job… I was never given enough information about the new job to know for sure if I would have taken the new job. I do not think I would have, though, as it was a substantial demotion and from the treatment I had already received by Board members and Mr. Keighley, I knew that I was not wanted anymore, and things were not likely to get any better; they were going to get considerably worse.
>
> In response to Mr. Keighley's request for my keys, I handed them over, and I left the office.

[13] Ms. Hainsworth also deposed to the material benefits of her position, that she had effectively and faithfully served the society from April 24, 2005 until she was dismissed without notice on November 2, 2005; and that she has taken steps to try to find suitable replacement employment. She has not been successful in finding another position nor has she earned any income since her dismissal.

[14] The defendant filed four affidavits in response to the initial affidavit of the plaintiff. Jeff Keighley, the other Executive Director of the defendant society, deposed of a healthy, supportive and collegial relationship with the plaintiff during their tenure but he felt increasingly obliged to give her some direction and assistance. He also noted however, that the plaintiff's relationship with members of the Board and the Joint Steering Committee had become increasingly strained, "primarily over performance issues, in particular the slowness of insuring venues were identified and catalogued and the failure to implement an effective fund raising strategy".

[15] Mr. Keighley deposed that the plaintiff regularly sought his advice about her relationship with the Board and other concerns and perceptions. Mr. Keighley related that after the AGM, the Board held an *in camera* session from which both he and Ms. Hainsworth were excluded and approximately eleven days later Ms. Dean and Ms. Turner arrived at the office and spoke with the plaintiff and then met with Mr. Keighley. At the meeting with Ms. Dean and Ms. Turner he learned the Board had taken a decision to "revert back to the original model of a single executive director". Mr. Keighley was offered the position and told that the plaintiff would be continuing in her employment as "Coordinator of Operations with very similar areas of responsibility but that she would . . . report to me."

[16] Mr. Keighley was informed that the change in the plaintiff's position was not negotiable and was to be implemented. He was aware that the plaintiff had indicated that she wanted to think it over for a few days.

[17] He accepted the position of sole Executive Director and after meeting with Ms. Turner and Ms. Dean, he went to speak with Ms. Hainsworth only to learn that she had left the building. He expected that she would be in the next day, Thursday October 27th. Instead, Ms. Hainsworth did not return to work until the following Tuesday. In the meantime, Mr. Keighley spoke to another employee, inquiring as to the whereabouts of Ms. Hainsworth and learned that the plaintiff had asked the fellow employee to put a password on her computer. Mr. Keighley reversed that request and put in his own password.

[18] Over the weekend, the plaintiff called Mr. Keighley and they discussed the new arrangement. He deposed that Ms. Hainsworth said that she did not think she was prepared to accept the new position, and wanted and expected Mr. Keighley's solidarity. When Mr. Keighley informed her that he had accepted the position of sole Executive Director, he said that the plaintiff "did not appear prepared to discuss the situation". They agreed that they would talk when she returned to the office on Tuesday.

[19] Mr. Keighley's version of the events of the Tuesday meeting with the plaintiff differs significantly from that of the plaintiff. He deposed that the plaintiff arrived for work at 9:00 am and he asked her, and she agreed, to go to his office for a discussion. They spoke about the leaked draft budget and about the plaintiff asking the other worker to put a protective password on her computer. The plaintiff explained that she did not want anyone else having access to her computer while she was away. Mr. Keighley told her it was the Society's computer and not hers and that he had changed her password. When Mr. Keighley asked if she had made a decision about the offer from the Board, he deposed that

> Ms. Hainsworth said that she didn't think she wanted to accept their position and she wanted to negotiate an alternative arrangement and that she needed more time to think things over. I informed her that I had been instructed that the offer was not subject to negotiation and that the Board's

> expectation is that she would either accept or reject the offer and we couldn't move forward without an answer one way or the other.
>
> Ms. Hainsworth and I engaged in a somewhat free ranging conversation about the history of her difficulties with the Board and prominent society members...Ms. Hainsworth identified the problems as resting with Board members not herself and her performance. She said she had thought about the offer of continued employment, albeit with changed responsibilities and reporting to myself and probably not being tenable as she opined that it would only be a matter of time before there was something else she would be criticized for. I suggested that if the venues had been catalogued and that if there had been a flow of donations coming in, there would have been little criticism, and that if she did accept the offer of continuing employment and the venues were properly catalogued, booked and scheduled and the revenue stream did turn around there would be little to criticize and that she could count on me to be supportive of her as I had been to that point.
>
> …
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> Ms. Hainsworth then suggested that perhaps the best thing was that she be 'bought out'. I asked her what she meant by being 'bought out'. Ms. Hainsworth said words to the effect "Make me an offer to go away". I asked how much money she had in mind. She said "No, you make me an offer". I pointed out that I had spent a lifetime doing collective bargaining and if it was she who was seeking a 'buy out' it was incumbent on her to propose a dollar value. Ms. Hainsworth then suggested that if the society would provide four months pay, she would go away. I told her that was not going to happen. At that point Ms. Hainsworth said words to the effect "Well, in that case, I'm going to speak to my lawyer". In the context of her statement, I understood her to mean that she was intending to commence legal proceedings against the society. I replied that it was her right to retain a lawyer but that she should understand she was declining the Board's offer of continuing employment and that under the circumstances I had no choice but to ask her for her keys to the building and the office. Ms. Hainsworth gave me her keys.

[20] Mr. Keighley deposed that he did not intend to dismiss the plaintiff and indeed, he had no authority so to do; only the Board had the authority to dismiss Ms. Hainsworth.

[21] Ms. Herman is the co-chair of the Society's Board and had been involved as a volunteer in the World Peace Forum since its inception in 2004. In her affidavit she stated the World Peace Forum was designed as a major international undertaking

providing an umbrella under which movements and organizations working on peace and sustainability issues could come together and that it was planned for 3000-5000 participants, both international and local, who would be attending the forum. Ms. Herman was involved in the hiring that took place in April 2005 and it was she who recommended the hiring of the plaintiff as co-director with Jeff Keighley.

[22] Ms. Herman deposed that there was no commitment made to pay the plaintiff's moving expenses, that she was told "she would be co-director in charge of the logistics of the forum" but her specific job duties were not spelled out. Later it was agreed that the plaintiff's duties would include responsibility for all program logistics, to supervise all fundraising, to strengthen ties with the Peace and Justice Committee of the City of Vancouver and to liaise with other organizations regarding their tangible support. There was no written contract setting out the terms of the plaintiff's employment.

[23] It appears from Ms. Herman's affidavit that there was some probationary period for the plaintiff which was extended for one month. On June 22, 2005, the Coordinating Committee emailed the plaintiff extending her probationary period with the World Peace Forum for one more month. The reasons given were:

> as we need more time to do a full assessment of your abilities to do your job. While we have some reservations that we feel need to be discussed with you, we also believe that you have some very positive attributes that you've brought to your job—your engagement with people is very good, you have reached out to various people in the community in a constructive way and many of your specific tasks were well done. With respect to areas of challenge, we believe we need to talk about the amount of work you've accomplished in the past eight weeks and your grasp of the dynamics (political and personal) of the WPF. We would be interested in your thoughts on the job to date and what you considered to be the best areas for you to focus on during the next period of time.

[24] Ms. Herman deposed that throughout the plaintiff's employment, there were serious concerns with her ability to complete tasks and there was considerable communication regarding the plaintiff's failure to properly fulfill her job and see the duties assigned to her through to completion. Ms. Herman denied that there was any

attempt to marginalize the plaintiff at the AGM but at the first Board meeting following the AGM, there were discussions concerning her work performance. The Board agreed to restructure the staff to provide one executive director and "that Lynn Hainsworth continue her present duties as coordinator reporting to the Executive Director". Ms. Herman deposed that there would be no loss of pay. The Board felt that if the plaintiff had someone in her office to whom she reported on a daily basis, she would be more focused in competing her tasks.

[25] Ms. Herman learned of the meeting between Ms. Turner, Ms. Dean and Ms. Hainsworth on October 26th. Thereafter neither she nor any Board member had any contact with Ms. Hainsworth, particularly after the plaintiff's meeting with Mr. Keighley on November 2, 2005. Ms. Herman understood from her discussion with Mr. Keighley that the plaintiff had chosen to resign rather than accept the new reporting structure. Ms. Herman deposed that there was never a decision of the Board to terminate the plaintiff's employment; rather at all times the Board intended that the plaintiff would remain in the employment of the Society to the conclusion of the contract.

[26] Ms. Dean and Ms. Turner gave corresponding accounts of their meeting with the plaintiff on October 26th in the plaintiff's office. Ms. Dean deposed:

> Ms. Turner and I explained the decision of the Board to Ms. Hainsworth. We provided, as background to the decision, some examples of the concerns that were behind the Board's decision to restructure the management of the society. I stated specifically that this was a change in management structure, and that she would continue with her previous responsibilities and pay structure. Ms. Hainsworth stated that she did not accept this decision, and asked that we agree to some form of mediation. I replied that this was not a negotiation. The Board is charged with the responsibility of structuring its staff and had taken this decision after careful consideration.
>
> After hearing Ms. Hainsworth's response to our report, I suggested that she take a few days to consider her response. She agreed, and indicated that she was going to Saskatchewan for the weekend. I asked that she call or email me when the response on Tuesday.
>
> Ms. Hainsworth did not reply to me on Tuesday, or anytime.

[27] Ms. Dean and Ms. Turner then met with Mr. Keighley and advised him of the Board's decision to make him the sole Executive Director. Ms. Dean's next contact on this matter was when Mr. Keighley advised her that the plaintiff had returned to work on Tuesday November 1, 2005 and told him that she was not prepared to accept the new management structure. Ms. Dean deposed that Mr. Keighley advised her that Ms. Hainsworth had resigned and as a result, he asked that she turn in her keys.

[28] In Ms. Turner's affidavit setting out the events of October 26, 2005 meeting with the plaintiff she deposed that the purpose of the meeting was to offer Ms. Hainsworth continued employment with the Society but in a supervised position. This was because the Board did not believe that the plaintiff could complete the tasks assigned without supervision. At the end of the meeting, Ms. Hainsworth said she wanted to think about the situation and give her decision following her return from Saskatchewan. Ms. Turner deposed that Mr. Keighley did not have any direction to terminate Ms. Hainsworth's employment nor "did we expect that he would deal with the matter at all. I fully expected to hear from Ms. Hainsworth following her weekend away". Ms. Turner had no further contact with the plaintiff.

[29] In her affidavit in reply to Mr. Keighley's affidavit, the plaintiff disagreed with his assessment of her performance. Ms. Hainsworth deposed that she wanted a password on her computer because every staff person had a password and because she had communicated with her solicitor concerning the terms of her employment. Also, "I was quickly losing trust in the ethics of some of my colleagues. I felt like a scapegoat and like members of the Board were on a witchhunt".

[30] As to her meeting with Mr. Keighley that morning, she deposed that she felt humiliated that Mr. Keighley had searched her computer to determine if the source of the leaked budget had been from her station and she felt "betrayed by Mr. Keighley's words and actions and, I was deeply, deeply hurt".

[31] The plaintiff does not dispute Mr. Keighley's evidence of their discussion in his office and that she had suggested a buy-out. She did not recall Mr. Keighley telling her that she was declining the Board's offer of continued employment and she deposed

that she expected to have more input and choice and she wanted more and better particulars regarding the position before she could make a decision but that:

> Mr. Keighley said no particulars would be forthcoming and that I had to accept it or not, right then.
>
> I was very disappointed that nobody within the defendant was willing to listen to my concerns or provide me with details of the new position.
>
> I did not intend to quit. I understood that the performance review option Ms. Dean offered me on October 26, 2005, was still available to me even if I turn down the demotion of coordinator of operations. I believe that through the review my name could be cleared because I believed I was doing good work for the defendants, and I would insist that the assessment be conducted in the fair manner.
>
> I was very upset by Mr. Keighley asking me for my keys, and by the dismissal by the defendant.

[32] Finally, the plaintiff deposed that she did not know whether she had received Mr. Keighley's letter dated November 1, 2005, Exhibit B to his affidavit; she simply has no recollection of receiving it. The letter, written shortly after their meeting, set out the events of her meeting with Mr. Keighley confirming her "quit status". Mr. Keighley also repeated the events of the meeting between Ms. Dean and Ms. Turner, and Ms. Hainsworth on October 26th, the proposal put to the plaintiff, and the events that followed thereafter. He set out the details of the meeting between him and Ms. Hainsworth and the discussion whether the plaintiff was prepared to continue as an employee of the Society at the same salary but under his direction. Then he wrote,

> . . . at the end of our discussion you indicated that you were not prepared to continue as an employee. You said that you were convinced that it would be only a matter of time before additional criticisms were directed your way. You asked to be 'bought out' and asked that I make you 'an offer'. I asked you to iterate what your expectations were and you indicated that you would accept four months' salary. I indicated to you that was not in the cards. You then stated you would talk with your lawyer whom you said you had retained last week. I then asked for your keys to the building and you gave them to me.

He concluded by stating that the plaintiff had chosen to decline the offer of employment and voluntarily quit the Society.

Plaintiff's Submissions:

Termination of Employment

[33] There is no dispute that the contract of employment was a fixed term contract and that any right to terminate before the end of the term must be clearly stated. The plaintiff says that there was no termination clause clearly stated in the employment contract and accordingly the defendant had no power to terminate her employment contract before the end of the term.

[34] The plaintiff submits that the defendant wrongfully dismissed her and that the employer's actions constituted a repudiation of the employment agreement, therefore she was entitled to believe she had been fired. The particulars of the manner in which she was wrongfully dismissed include: the various feelings of marginalization or perception that the Board was unhappy with her performance; the meeting with Ms. Turner and Ms. Dean on October 26, 2005; and, the message to the plaintiff that if she did not accept the Board's decision they would undertake a performance review which would "harden opinion against her".

[35] Her counsel submits that on the evidence, Ms. Hainsworth did not accept or refuse the new role but required time to think about it and on November 1, 2005, Mr. Keighley ordered her into his office and confronted her with a false accusation of leaking the draft budget. When the plaintiff told Mr. Keighley that she would not agree to what she considered to be a demotion, she expected that she would carry on as Executive Director of Operations and that the Society would undertake a performance review as mentioned during the meeting with Ms. Turner and Ms. Dean. Instead, to her surprise, Mr. Keighley then told her to hand over the keys, which she did and left. The plaintiff submits that these actions and words are a repudiation of the employment agreement, which Ms. Hainsworth was entitled to believe was a dismissal.

[36] The plaintiff submits that dismissal is defined as an act or acts on the part of the master that amounts to repudiation by the employer of the essential obligations imposed on him by the contract. There may be a dismissal in law even though the master had never given the servant a formal discharge: see ***Re Rubel Bronze et al. v. Vos***, [1918] 1 K.B. 315. The plaintiff submits that the defendant intended to dismiss the plaintiff and in fact did so even though the defendant denies any intention to dismiss her. The courts have held that an employer's actions can constitute a repudiation of the agreement even if there was no intention to terminate the employment relationship: see ***Quist v. Masse***, 1998 ABPC 56.

[37] Her counsel submits the evidence clearly shows that the plaintiff did not resign her employment as is maintained by the defendant. At no time did she ever say that she quit or resigned and in fact, until Mr. Keighley asked for her keys, she continued to perform the duties of her position and never threatened to withdraw her services. Her counsel submits that the test whether an employee has resigned is that set out in ***Assouline v. Ogibar Inc.*** (1991), 39 C.C.E.L. 100 (B.C.S.C.). In ***Assouline***, there was a heated disagreement between the worker and the employer and over the telephone the worker told the employer that if the employer did not honour its contractual commitments, he would no longer be able to work for them. The employer took the position that those words constituted a resignation but the court held:

> Given all the surrounding circumstances, would a reasonable man have understood the plaintiff's statement that he had just resigned? The test is an objective one. Having considered the parties' testimony, the context of the telephone conversation, the dispute over contractual terms, and the fact that other employees were questioning the contractual terms regarding commissions, a reasonable man would have interpreted the plaintiff's remarks as a statement as to future options.

[38] In ***Pollock v. First Heritage Financial Planning Ltd.***, 2002 BCSC 782, the employer asked a group of employees to sign new and revised employment contracts. The employees were unhappy with the new contract and exchanged correspondence with the employer which ultimately led to termination of the employment relationship. In the correspondence, the employees declined to accept the

changes in the employment contract but said they would continue to work in their jobs unchanged. In a second piece of correspondence, the employees said that if the matter were not resolved they would "proceed accordingly". The employer took the position that this amounted to a resignation and asked for the return of their keys. The court held that the plaintiffs had not resigned but were attempting to exert pressure to persuade the employer to change its decision and that the employer had dismissed the employees prematurely and without cause.

[39] As with ***Pollock***, the plaintiff before me argues that she was simply trying to exert pressure to persuade her employer to change its mind about changing her job and she did not accept the unilateral change in the fundamental terms of her contract.

[40] The plaintiff submits that her actions following her dismissal by Mr. Keighley were consistent with someone who thought they had been fired. She expressed surprise when Mr. Keighley asked for her keys; she was upset by Mr. Keighley's request; and she felt a considerable amount of shame following the dismissal. Further, she submits the defendant's own actions are consistent with a dismissal. Mr. Keighley ordered her into his office and escorted her there; he asked her to surrender her keys; and the Record of Employment prepared by the defendant clearly showed that the reason for leaving was dismissal rather than quit.

[41] In ***Danroth v. Farrell Holdings Ltd.***, 2005 BCCA 593 the Court held that to be effective, a resignation must be clear and unequivocal. There must be a clear statement of an intention to resign, or conduct from which that intention would clearly appear. In the case at bar, the plaintiff says that she gave no clear statement of an intention to resign, nor was there any clear conduct on her part to that effect. At no time did the plaintiff say she quit or resign, or even that she intended to quit or to resign. Her statements and conduct fall short of a clear statement to such an effect. Indeed, in her affidavit the plaintiff deposed that at the meeting on October 26, 2005, it was left open for her to reject the decision of the Board and undertake a performance review. Further, the plaintiff informed Ms. Dean and Ms. Turner that she would need to take the weekend to think about the implications of the change and in her meeting with

Mr. Keighley on November 1, 2005, the plaintiff said she needed more time and particulars about the position before she could choose. When Mr. Keighley told her none would be forthcoming, she was told to accept it or not. The plaintiff did not say she quit or resigned. Instead, Mr. Keighley was telling her she had to choose and she chose not to accept the new role thinking in her mind that she would carry on in her current role and her performance would be reviewed.

[42] As for the fact that the defendant's affidavits refer to the plaintiff asking that she be "bought out", the plaintiff says this in itself is inconsistent with an intention on her part to resign. As the Court of Appeal noted at ¶ 9 of ***Danroth***, "[a] claim of constructive dismissal and to severance pay is inconsistent with an intention to resign". Accordingly, the plaintiff submits that the evidence clearly establishes that she was fired.

[43] Alternatively, the plaintiff submits that if the Court concludes she was not fired, the changes proposed by the defendant constituted a fundamental breach of the employment contract amounting to her constructive dismissal. The plaintiff says that the offered position of Coordinator of Operations reporting to Mr. Keighley was a material change to "job title, reporting structure and duties, and a contract of employment did not justify the defendant to make unilateral changes to the contract". The plaintiff submits that she accepted the Society's repudiation of the contract when she did not accept the newly proposed position after the Society forced her to choose.

[44] Counsel submits that the proposed changes to the employment contract constituted fundamental breaches including a material change to her job title; material changes to the reporting structure; material changes to her duties; vagueness in the offer; a new requirement that she report to a person with whom she had an acrimonious relationship; and far less prestige to the new position: see ***McKilligan v. Pacific Vocational Institute*** (1981), 28 B.C.L.R. 324 (C.A.); ***Kidd v. Southern Press Ltd.*** (1981), 1 C.C.E.L. 167 (Ont. S.C. (H.C.J.)); ***Hamer-Jackson v. McCall Pontiac Buick Ltd.*** (1998), 38 C.C.E.L. (2d) 189 (B.C.S.C.); and ***Burton v. MacMillan Bloedel Ltd.***, [1976] 4 W.W.R. 267 (B.C.S.C.).

[45] In ***McKilligan***, the Court of Appeal held that requiring an employee to change the reporting relationship such that the employee would have to report to someone with whom they have an acrimonious relationship, has been viewed as a threat to job security and therefore amounted to constructive dismissal. The plaintiff submits that her circumstances are similar to those in the ***McKilligan*** case: the position proposed was vague, was of lower prestige and status, and would require her to report to someone with whom she had a conflict. As MacDonald J.A. noted in ***McKilligan***, the position offered to Mr. McKilligan was a demotion, and certainly one of lower prestige and status. The Court of Appeal upheld the trial decision that the change amounted to constructive dismissal. In ***Hamer-Jackson***, a change made by the employer effectively stripped the plaintiff of his decision making authority and gave his duties and responsibilities, authority and privileges to another employee. The court found that the loss of prestige and the change of position constituted a demotion justifying the employee to treat the contract as terminated.

[46] Plaintiff's counsel submits that the court in ***Leung v. Doppler Industries Inc.*** (1997), 27 C.C.E.L. (2d) 285 (B.C.C.A.) gave significant weight to the loss of prestige and embarrassment following a demotion. Finch J.A. (as he then was) held that there was a "significant loss of prestige and consequent embarrassment, arising from [the employer's] announcement to the staff of [the plaintiff's] reduced position". The reduced position also resulted in a limited and more directed sphere of activity, all of which amounted to constructive dismissal.

[47] However, even if the defendant is correct in its assertions that the move was not a demotion, the plaintiff submits that the courts have held that forcing unwanted terms of employment into an employment contract can constitute a fundamental breach of the employment contract. The plaintiff is not obliged to accept unilateral changes. In ***Hanni v. Western Road Rail Systems (1991) Inc.***, 2002 BCSC 402, Burnyeat J. held there were no circumstances, financial or otherwise, that justified an employer making unilateral and fundamental changes to the contract of employment, unless the changes are specifically permitted in the contract of employment. This principle applies even where the effect of the change would be a promotion. In ***Parks v. Vancouver***

International Airport Authority (July 14, 2005) Vancouver S041463 (B.C.S.C.), Gerow J. held:

> There is no evidence that changes to such fundamental terms were permitted by the employment contract. Mutuality is required for every change to the basic terms of a contract such as hours, salaries and duties, unless the contract itself gives the employer the right to make such unilateral changes: ***Farquhar v. Butler Brothers Supplies Ltd.*** (1988), 23 B.C.L.R. (2d) 89 (C.A.), at 93.

[48] The plaintiff argues that the defendant has proven no contractual right to make the changes in the new job proposal and she was justified in refusing to accept the proposed fundamental changes to her employment contract. In ***Hart v. Bogardus Wilson (1984) Ltd.*** (1987), 13 B.C.L.R. (2d) 269 at (C.A.), Seaton J.A. wrote:

> Counsel for the company suggested, and I agree with him, that employers must be free to reorganize and restructure. But it does not follow that they are freed from obligations to others. They are obliged to reach a new contract of employment with those employees fundamentally affected by a decision, or give adequate notice to them.

Mitigation

[49] The plaintiff submits it was obvious there were frayed relations between her and the defendant Society and accordingly, it would be unreasonable for her to continue to work with Mr. Keighley in any meaningful way following the events of November 1, 2005. She submits that it is unreasonable to expect her to continue to work at the office or in a lower position reporting to a former co-executive director.

[50] The leading pronouncement regarding the duty to mitigate by remaining with the employer who has constructively dismissed the employee is that of the Court of Appeal in ***Farquhar***. The plaintiff submits ***Farquhar*** holds that an employee is not acting unreasonably by not accepting an alternative position where change has sufficiently frayed the relationship such that a reasonable person would not think the transferred person could work in harmony with the employer or other employees. The Court of Appeal held that an employee has no obligation to remain in employment when it would have been humiliating for him to walk back in and work for that employer.

[51] The plaintiff submits that this was not one of those rare instances where she could have continued to work with the Board in harmony. She says that the defendant accused her of sabotage and blocked her access to her computer and suspected her of deleting important information from the computer. Further, she had been informed that members of the Board were talking behind her back and one member encouraged her to take the "lesser position" to Mr. Keighley. Mr. Keighley, in turn, "demanded her office keys" and she was hurt by his "callous actions" and her relationship, not just with Mr. Keighley but also with other members of the defendant, was becoming increasingly acrimonious. The plaintiff submits that the Society was clearly upset and angry with her after she challenged the decision to demote her and the defendant's conduct illustrates that it was not willing to tolerate the plaintiff continuing in the workforce. The plaintiff submits that the Society embarrassed and humiliated her and they had lost their mutual respect: see also ***Wood v. Owen De Bathe Ltd.***, 1999 BCCA 0029 an employee need not mitigate his damages by working for the employer, if an employee would feel such degree of humiliation that it would be unreasonable to expect him to stay.

[52] The plaintiff points to the fact that her workplace was small and intimate with only a handful of employees, and accordingly, it was not reasonable to expect her to continue to work closely and report to Mr. Keighley, or to work with members of the Board after their accusations and actions.

[53] Finally, the plaintiff submits that she took reasonable steps to find alternative employment. In her affidavit sworn February 23, 2003, she deposed that she had taken steps to try to find suitable replacement employment. She had applied for several jobs and contracts but her job skills and history as a senior manager in the non-profit sector are quite specialized and as there were limited opportunities for her in her field in Vancouver she decided to return to Saskatoon. In her answer to interrogatories, the plaintiff set out the details of her efforts to find employment both in Vancouver and elsewhere.

[54] The plaintiff submits that the onus is on the employer to prove a failure to mitigate: see ***Michaels v. Red Deer College***, [1976] 2 S.C.R. 324. To meet that onus, the defendant has to prove not only that the plaintiff's efforts were unreasonable but also that with reasonable efforts, the employee would have been likely to obtain comparable employment: see ***Cook v. Royal Trust*** (1990), 31 C.C.E.L. 6 (B.C.S.C.). The defendant has led no evidence whatsoever as to the availability of comparable, alternate employment, and accordingly, the plaintiff submits the defendant has failed to satisfy the onus on it of a failure to mitigate either at large or by remaining in her employment with the defendant.

Damages

[55] It does not appear disputed that where a definite term contract is breached by the employer or terminated before the end of its term, damages will generally be calculated based on the unexpired portion of the term of employment regardless of whether it is greater or lesser than the period of reasonable notice: see *Wrongful Dismissal Practice Manual*, ¶ 2.10.

[56] The plaintiff claims lost income for the remaining 39 weeks of her employment, or $53,999.79, as well as vacation pay of $2,880.00 for two weeks of vacation, which accrued during the notice period. She also seeks to recover special damages of $793.00, made up of moving costs, bus fare and lost damage deposit for her apartment as well as costs and court ordered interest.

Defendant's Submissions:

[57] Counsel for the defendant had initially taken the position that the case was not a suitable for disposition under Rule 18A, but the defendant's counsel has received instructions that, "if at all possible, the court should try to make a determination of the issues".

[58] The Society's counsel says that the question to be determined is whether the defendant dismissed the plaintiff or she resigned, and based on her own evidence,

the plaintiff clearly resigned from her employment. The plaintiff's evidence was that on October 26, 2005, she was told by Ms. Turner and Ms. Dean that the Board had decided to change her title to "Coordinator of Operations" and henceforth she would report to Mr. Keighley. At that point, the plaintiff told Ms. Turner and Ms. Dean that she needed to take the weekend to think over the implications of the change. When she spoke with Mr. Keighley on the following Tuesday, she said she needed more information about the new position. When Mr. Keighley said she needed to commit to the new job right away, she chose not to accept the new role, deposing that she thought she had the option of a performance review. When Mr. Keighley asked her for her keys, she concluded from this that she had been dismissed, that there was nothing more to be said on the occasion and she left the building never to return. The defendant points to the fact that the plaintiff did not ask why she was being asked to hand over her keys, nor did she ever contact a Board member to assert that she was not resigning but wished to pursue the option of the performance review.

[59] On her own evidence it would have been obvious to any reasonable person in the plaintiff's position that she had the option of continuing with her employment provided she accept her new title and reporting arrangement. The plaintiff rejected that option but that does not make it a dismissal. A dismissal leaves the employee with no option to continue in his or her employment. In ***Re Rubel Bronze & Metal Co. Ltd.***, at 321—322, the court said:

> Now in the ordinary case of wrongful dismissal a master purports completely to terminate the contact. He refuses to accept further service. He wholly declines to pay further remuneration. The repudiation, as a rule, is undoubted, decisive and complete.

[60] There is a burden on the plaintiff to establish that she was dismissed. Where the evidence suggests that the plaintiff might have resigned, the burden remains on the plaintiff to prove to the contrary and there is no onus on the employer to show that the employee resigned: see ***Osachoff v. Interpac Packaging Systems Inc.*** (1992), 44 C.C.E.L. 156 (B.C.S.C.).

[61] Mr. Keighley's evidence concerning the meeting on November 1 reinforces the conclusion that the plaintiff resigned. In his affidavit, Mr. Keighley described how the plaintiff attempted to negotiate a buy-out and when that was not forthcoming, she announced that she would be speaking to her lawyer. Before he asked for her keys, Mr. Keighley informed her it was her right to seek legal advice but that she should understand she was declining the Board's offer of "continuing employment". Mr. Keighley sent the plaintiff a letter on November 1 confirming her decision to quit which he emailed her and mailed to her Vancouver and Saskatoon addresses and the plaintiff made no response. In fact, she deposed that she did not remember receiving it. The affidavits filed on behalf of the Society contradict the plaintiff's evidence that she thought the Board had given her the option of either taking the new position or remaining in the old position and having a performance review. The plaintiff's evidence is entirely inconsistent with the notes of the meeting taken by Ms. Turner and the later actions of Ms. Turner and Ms. Dean, who moved directly from their interview with the plaintiff to their meeting with Mr. Keighley.

[62] Accordingly, and more importantly, because of the plaintiff's failure to prove on a balance of probabilities that she was dismissed or had not resigned, the action should be dismissed.

[63] In answer to the plaintiff's alternative ground that she was constructively dismissed, the defendant says that the plaintiff did not, prior to abandoning her position, elect to accept the alleged repudiation of the employment contract by the defendant, and accordingly, there can be no claim for constructive dismissal. The employment contract only ends upon the election by the employee to accept the changes as amounting to the employer's repudiation of the contract and communicating that election to the employer, either by word or deed: see ***Farquhar*** and ***Restauronics Services Ltd. v. Forster***, 2004 BCCA 130. In the present case, the plaintiff abandoned her position and not because of a decision to accept the employer's repudiation. In fact, her pleading and evidence are both to the effect that the plaintiff had not decided whether to accept the changes or not. The plaintiff deposed that: "I had no intention of

voluntarily resigning my job … I was never given enough information about the new job to know for sure if I would have taken the new job."

[64] The plaintiff abandoned her job, according to her, because she believed she had been fired, not as the result of the changes to her job. The alternative conclusion which emerges from the evidence, and is more probable, is that the plaintiff abandoned her employment because of the negative evaluation she had received from the Board and the feeling that if she stayed, things would, as she put it, "get considerably worse".

Conclusion:

[65] Counsel have urged me to make a decision on the material but in my view a trial would have been preferable in order to properly assess the reliability of the competing versions of the discussions between the plaintiff and Ms. Dean and Ms. Turner and Mr. Keighley and to arrive at a properly considered conclusion on the viva voce evidence.

[66] On my interpretation of the description of the meeting between Mr. Keighley and Ms. Hainsworth, although there was no clear evidence that Mr. Keighley fired the plaintiff and the uncontradicted evidence is that he did not have the authority to fire the plaintiff, nevertheless it was open to the plaintiff to assume he did fire her and that he had the authority to do so.

[67] It is clear the plaintiff was unhappy with the changes made by the Board, she sought legal advice as to her remedies, and she took the weekend to consider her position. Although her later meeting with Mr. Keighley was an attempt to negotiate the favourable terms of her departure, when Mr. Keighley told her there was no alternative but "to accept it or not", the plaintiff's response that she would see her lawyer was not a clear act of resignation as required by ***Danroth*** but an attempt to find out her legal rights or exert pressure. It may simply have been the plaintiff recognizing that she had been fired. When Mr. Keighley asked for her keys the plaintiff was entitled to assume he had the authority to fire her because she had been told that she would be reporting to him.

[68] Certainly, the Board was unhappy with the performance of the plaintiff and that was clear to the plaintiff. The Board clearly felt the plaintiff was not up to the task her position demanded and likely the plaintiff knew this. There was but a limited time available to complete the arrangements and the Board felt the plaintiff needed some additional assistance and supervision. In my view, while the Board was entitled to rearrange the reporting hierarchy and attempt to ease the burdens on the plaintiff, but in so doing the Board created new arrangements which represented a fundamental change to the contract of employment as in ***Hanni***. The plaintiff's responsibilities only appeared to remain the same but she now reported to Mr. Keighley, a change which was in fact a demotion with concomitant embarrassment and loss of prestige as in ***Burton*** or ***Leung*** but more so in the tightly knit community of social activists.

[69] There is further evidence to support the view that the plaintiff was dismissed and that is in the Record of Employment showing the plaintiff had been dismissed. Mr. Keighley explained this entry as the unauthorized act of a former bookkeeper who started work after the departure of Ms. Hainsworth. He deposed in his final affidavit that to the best of his "knowledge and belief" no one instructed the bookkeeper on the completion of the form. Nevertheless, it is a record maintained by the defendant and as such it is unlikely the reason was invented by the bookkeeper.

[70] Accordingly, I find that the actions of the defendant's Board in altering the fundamental conditions of the employment contract amounted to constructive dismissal. Further, whether Mr. Keighley had the authority to dismiss the plaintiff, she believed that he did and that when he asked for her keys she believed she had been fired. Whether actual or constructive, the plaintiff is entitled to damages for wrongful dismissal.

[71] I turn now to consider the issue of mitigation. The Court of Appeal in ***Farquhar*** held that an employee is not required to mitigate by remaining with an employer in a position of hostility, embarrassment or humiliation. I agree with her counsel's submissions that the plaintiff could not reasonably be expected to remain in her employment given the attitude of the Board and her unpleasant meeting with Mr. Keighley. She has presented some evidence of her efforts to mitigate and the

defendant has not met the burden on it of establishing that she failed to take all reasonable steps: ***Michaels***. I find the plaintiff is entitled to damages as set out in ¶ 55 above as well as costs.

[72] Accordingly, I award the plaintiff damages equivalent to her salary for the remaining term of her employment, which I set as June 30, 2006, as well as her special damages arising out of her broken lease. I do not award the plaintiff her costs of moving from Saskatchewan, which were her expense in any event of the termination of her contract of employment. She is entitled to her costs at Scale 3, as a matter of ordinary importance.

"The Honourable Mr. Justice Warren"