IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Farkas v. Island Lake Resort Group (2003) Inc.,* 2022 BCSC 1282

Date: 20220819
Docket: S240924
Registry: New Westminster

Between:

Keith Farkas

Plaintiff

And

Island Lake Resort Group (2003) Inc.

Defendant

Before: The Honourable Mr. Justice Gibb-Carsley

Reasons for Judgment

Counsel for the Plaintiff:	N. Chhina B. Locke, Articled Student
Counsel for the Defendant:	S. Hickey
Place and Dates of Hearing:	Port Coquitlam, B.C. June 13, 14 and 16, 2022
Place and Date of Judgment:	New Westminster, B.C. August 19, 2022

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I. INTRODUCTION

[1] The plaintiff, Keith Farkas, was formerly employed as the executive chef for the defendant, Island Lake Resort Group (2003) Inc., which owns a remote mountainside backcountry ski lodge with a fine-dining restaurant near Fernie, B.C. In this summary trial, the plaintiff claims he was constructively dismissed and seeks damages.

[2] The plaintiff alleges that in March 2020, just after he returned to work from a five-week medical leave, the defendant made unilateral changes to his job duties by forbidding him to attend the mountain lodge or speak to his kitchen staff. He says these two demands, as well as the defendant's systematic mistreatment of him since January 2020 showed the defendant no longer intended to be bound by the employment contract.

[3] The defendant says it had no intention of terminating the plaintiff's employment and did not alter the plaintiff's job duties. It says the requests it made of the plaintiff were temporary measures that did not change the plaintiff's employment contract. The defendant argues that it did not want the plaintiff to go to the mountain lodge on the days following his return from the medical leave because the defendant was in the process of removing clients and staff from the lodge and closing its operations in response to the onset of the COVID-19 pandemic. In respect of the defendant's request that the plaintiff not speak to his staff, the defendant says that too was a temporary measure and it only asked that the plaintiff delay speaking with his staff for three days to allow the plaintiff time to prepare and present a plan to address communication problems the plaintiff had with his staff.

[4] The defendant also says that a reasonable person in the place of the plaintiff would not objectively view the actions of the defendant has creating a toxic workplace or show that the defendant did not want to be bound by the employment contract.

[5] For the reasons that follow, I find the plaintiff has failed to discharge his burden to establish that he was constructively dismissed.

II. ISSUES

[6] A preliminary issue is whether this matter is properly suited for a summary trial brought under Rule 9-7 of the *Supreme Court Civil Rules*, B.C. Reg. 168/2009. If I conclude that the matter can properly be determined based on the evidence adduced in the summary trial, the issue is whether the defendant's actions can be objectively viewed as unilaterally and fundamentally changing the plaintiff's job duties such that they amounted to the plaintiff's constructive dismissal. If I find that the plaintiff was constructively dismissed, I must consider what damages, if any, are appropriate to compensate him.

III. FINDINGS OF FACT

A. The Defendant

[7] The defendant owns and operates two mountainside lodges in Fernie, British Columbia known as the Tamarack Lodge and the Bear Lodge (collectively, "Lodge"). In order to serve its clients, the Lodge contains restaurant and kitchen facilities.

[8] During winter, the Lodge is not accessible by car and guests and staff access the Lodge by parking at a lot ten minutes from Fernie and then taking a twenty-minute ride on a snowmobile or a larger snow machine known as a snowcat.

[9] The defendant also has an office in the town of Fernie for administrative business operations ("Office").

[10] Doug Feely was the CEO of the defendant between August 2010 and May 1, 2020, and was the plaintiff's direct supervisor at all times relevant to this litigation.

[11] Nancie Sanford is the defendant's accounting and human resources manager. Ms. Sanford has been employed by the defendant since approximately July 2011, and in her current role since 2014. In terms of corporate structure, at all

relevant times, Ms. Sanford held a role equivalent to the plaintiff as both were managers reporting to Mr. Feely.

B. The Plaintiff

[12] The defendant originally hired the plaintiff as a cook in December 2001. The plaintiff worked for the defendant until approximately 2007, during which time he rose from cook to sous-chef, and eventually, chef.

[13] The plaintiff stopped working for the defendant in 2007 to gain more experience and knowledge in the culinary field and to obtain a diploma in restaurant management.

[14] The plaintiff returned to work for the defendant in 2011 as the executive chef.

[15] The plaintiff's wife, Lauren Farkas, also worked for the defendant in a management role in the restaurant at the Lodge. Ms. Farkas also uses the first name "L'wren".

[16] As described in a document titled "Job Description", the plaintiff's job description as the executive chef included the following 17 duties:

a) provide leadership and direction to culinary staff;

b) instill a strong sense of team spirit, cooperation, and respect;

c) supervise and support the culinary team in daily duties;

d) ensure strong communications with the culinary team and other departments;

e) organize and conduct staff training as necessary;

f) ensure appropriate staffing and scheduling;

g) ensure performance evaluation of staff is completed on a regular basis;

h) supervise and participate in the hiring, termination, and layoff process;

i) create (with input from senior management), implement and update the culinary plan;

j) establish and maintain a relationship with suppliers;

k) develop and recommend department budgets and manage approved budgets to include forecasting, variances, and reconciliation;

l) approve and supervise all department purchasing;

m) ensure periodic inventories are completed;

n) ensure food, supplies, and cleaning products are properly ordered and stored;

o) investigate and resolve complaints regarding food quality and service;

p) ensure that food storage, preparation and subsequent cleanup are done in a safe manner consistent with health and safety standards and regulations; and

q) function as an active member of the senior management team

(collectively, “Job Duties”).

C. Problems Amongst Kitchen Personnel

[17] Starting in about October 2019, concerns regarding the kitchen were brought to the attention of Mr. Feely and Ms. Sanford. While the quality of food was high, staff members expressed concerns about the kitchen operations. The primary concern related to communication issues between the plaintiff and his staff. Mr. Feely initially raised these issues in the plaintiff’s October 2019 performance review which provided that while the food quality was high and “I know Keith and team will be there and we will put out a quality product”, the plaintiff needed to

improve his communication with the staff, and improve staff recruitment and retention.

[18] The defendant terminated the employment of the plaintiff's wife, Ms. Farkas, on January 21, 2020. On January 22, 2020, the announcement of Ms. Farkas's termination was made to the defendant's management team via email. Despite being part of the management team, the plaintiff was not included on that announcement email.

[19] Mr. Feely and the plaintiff met on January 21, 2020, regarding Ms. Farkas's termination. Both acknowledge: (1) the meeting concerned Ms. Farkas and her meeting with management regarding her employment; and (2) if the plaintiff wanted more information he should ask his wife. However, Mr. Feely and the plaintiff provide conflicting evidence as to whether Mr. Feely told the plaintiff that Ms. Farkas had been terminated or just communicated that she was having a meeting about her employment. Mr. Feely says he told the plaintiff that Ms. Farkas's employment had been terminated, while the plaintiff says he was told only that Ms. Farkas was meeting with management about her employment.

[20] On the affidavit evidence before me, I am unable to resolve whether during their brief meeting on January 21, 2020, Mr. Feely communicated to the plaintiff that Ms. Farkas had been fired. However, I find that this fact is not necessary for my analysis given I am able to conclude that Mr. Feely met with the plaintiff regarding Ms. Farkas; shared at least some details that a meeting occurred between management and Ms. Farkas; and, Mr. Feely told the plaintiff, if the plaintiff wanted more details, he should ask Ms. Farkas for that information.

[21] The plaintiff perceived that after the defendant terminated his wife's employment, the workplace became toxic for him. He experienced that his colleagues spoke to him less and, in his view, became cold and unfriendly towards him. The plaintiff expressed his concerns about his own job security in an email to Mr. Feely on January 28, 2020, shortly after his wife was fired:

> At this time I do not feel comfortable meeting with you in a one on one situation. My reasons for this are the following:
>
> - I fear that my job security is in jeopardy and am unsure of the direction of the F&B operations.
> - I feel like I may be bullied into doing something or saying something that I don't agree with.
> - I also feel that I will be the victim to an abuse of power from you.

D. The Medical Leave and Return to Work

[22] The plaintiff says that as a result of his feelings that his workplace was toxic, he took a medical leave of absence beginning February 6, 2020. He announced his leave via text message to Mr. Feely, Ms. Sanford and a member of the kitchen staff, Mark Butcher on February 6, 2020. Later that same day, the plaintiff received a text message from Ms. Sanford to the same group text message he had texted announcing his leave. Ms. Sanford's message stated the following:

> we have to do this very quickly, things are moving, I want to meet with you, then Mike, then Annabelle, today and just update where each of you are at. Keith is not up there so no need to worry about that.

[23] Ms. Sanford confirmed that she inadvertently included the plaintiff on this text message. The plaintiff felt this text showed that "something was happening at [his] workplace to further exclude [him]."

[24] The plaintiff was on medical leave from February 6, 2020 to March 16, 2020 ("Medical Leave").

[25] On or about March 14, 2020, the plaintiff sent an email to his staff announcing his return to work. On March 14, 2020, Ms. Sanford scheduled a meeting with the plaintiff and Mr. Feely for March 16, 2020.

E. The March 16, 2020 Meeting

[26] On March 16, 2020, the plaintiff met with Ms. Sanford and Mr. Feely to discuss the plaintiff's return to work. At the meeting, Mr. Feely stated that due to the COVID-19 pandemic, the Lodge was in the process of winding down operations and it would be closing on March 18, 2020. Further, Mr. Feely informed the plaintiff that

the kitchen shifts had already been filled for the next 48 hours, but that the plaintiff would be put on the payroll so he could be compensated.

[27] Mr. Feely instructed the plaintiff not to attend at the Lodge because the clients and non-essential staff were being removed from the Lodge due to the pandemic-caused closure. The plaintiff was instructed to work from the Office or from home. Mr. Feely also raised the kitchen staff's concerns about the plaintiff's communication style and instructed the plaintiff to "build" a communication plan to address the kitchen staff's concerns. The communication plan would be presented to the kitchen staff at a meeting scheduled for March 19, 2020, at the Lodge.

F. The March 17, 2020 Meeting

[28] By March 17, 2020, all guests and staff, except for the essential staff – shop and maintenance employees - had left the Lodge due to the COVID-19 pandemic. On March 17, the plaintiff met with Ms. Sanford and she informed him that he could work on three tasks until the kitchen staff meeting scheduled for March 19, 2020: (1) plan to engage culinary schools to recruit red seal chefs to work for the defendant; (2) draft the communication plan to present to the kitchen staff on March 19; and (3) prepare budgets and menus.

[29] I accept Ms. Sanford's evidence that she did not tell the plaintiff he could never return to the Lodge. Making such a statement is incongruous with the fact that the kitchen staff meeting was scheduled to occur at the Lodge on March 19, 2020. Further, I accept that Ms. Sanford did not tell the plaintiff that his role as executive chef with the defendant was changing.

G. The Employment Relationship Ends

[30] On March 17, 2020, the plaintiff emailed the defendant advising that he viewed the defendant's actions as a repudiation of his employment contract and that he had no choice but to accept this repudiation and the resulting constructive dismissal. The complete text of the plaintiff's email is as follows:

> Doug,
>
> Recent developments, including a pattern of socially isolating me have amounted to a repudiation of my contact. Including for health-related reasons, I feel I have no option but to accept that repudiation, with the effect I have been constructively dismissed.
>
> You will hear from my lawyer in due course.
>
> Keith Farkas

[31] The plaintiff did not return to work after March 17, 2020. The defendant paid the plaintiff for his work up to and including March 17, 2020.

[32] Due to the COVID-19 pandemic, the defendant closed the Lodge and kitchen operations on March 18, 2020, to at least May 2020.

IV. POSITIONS OF THE PARTIES

A. Plaintiff's Position

[33] The plaintiff asserts that the defendant breached the employment contract. The plaintiff says that by preventing him from attending the Lodge and speaking with his staff, he was unable to perform the Job Duties. The plaintiff says that these two demands effectively made it impossible for him to complete 14 of his 17 Job Duties that were part of his employment contract. Specifically, he says the only three Job Duties he could continue to perform were (1) establish and retain a relationship with suppliers; (2) investigate and resolve food complaints; and (3) function as an active member of the senior management team. He argues that removing 82% of his previous duties was a fundamental breach of the employment contract. In short, the plaintiff says it was impossible for him, as the executive chef, to run the defendant's kitchen and restaurant if he could not attend the kitchen or speak with his staff. Instead of accepting the new terms, he chose to accept what he saw was the defendant's repudiation of the employment contract and left the defendant's employ.

[34] In addition to the removal of the Job Duties, the plaintiff also asserts that the defendant engaged in a systematic effort to alienate him and make his work environment toxic. As an example of the toxic and hostile environment he had to endure, he says the management team purposely excluded him from emails when

his wife's employment was terminated. He also asserts that the staff ignored him and were unfriendly after his wife was fired. He complains that during the Medical Leave the defendant did not call him to wish him well. Finally, he says on the day he returned to work from the Medical Leave, he was ambushed with a performance review and told that his Job Duties were going to change.

B. Defendant's Position

[35] The defendant argues that it had no intention of permanently changing the plaintiff's job duties or terminating his employment. The defendant says that the return of the plaintiff from the Medical Leave coincided with the defendant's closure of the Lodge and kitchen in response to the COVID-19 pandemic. The demands that the plaintiff not attend at the Lodge or speak to the kitchen staff were temporary measures that do not amount to a fundamental change to the plaintiff's employment contract.

[36] The defendant also disagrees with the plaintiff's allegations that the defendant created a hostile work environment for the plaintiff or showed him a lack of respect or decency.

V. LAW AND ANALYSIS

A. Is this Matter Suitable for a Summary Trial?

[37] The parties are in agreement that this matter is suitable for summary trial pursuant to Rule 9-7. However, rightfully in my view, they advised the court that, should there be issues of credibility needing *viva voce* evidence or cross-examination on affidavit evidence, it may be appropriate for the court to seek further evidence on those issues.

1. Determination

[38] The Court of Appeal in *Inspiration Mgmt. Ltd. v. McDermid St. Lawrence Ltd.*, [1989] 36 B.C.L.R. (2d) 202 (C.A.), 1989 CanLII 229 at para. 49, set out a number of factors the court should consider in determining if a matter is suitable for summary

trial. I am persuaded that the following factors make the case at bar appropriate for a summary trial:

a) the amount involved: The amount involved in this case is not insignificant in that the plaintiff claims damages of approximately $150,000, as such, this factor is neutral;

b) the complexity of the matter: The majority of the critical facts are not in dispute. This case requires the interpretation of those facts against the legal analysis for constructive dismissal to decide the issues;

c) the urgency of the matter: Both the plaintiff and defendant wish to have this matter resolved in a timely manner;

d) any prejudice likely to arise by reason of delay: While there would not be prejudice to the parties if this matter was not heard summarily, given the parties seek resolution of this matter promptly and in a cost-effective manner, I conclude that it is in both parties' interest to have the matter resolved by a summary trial; and

e) the cost of taking the case to a full trial, in relation to the amount of stake in the litigation: Given the amount of damages in issue as compared to the costs of a full trial, adjudication of this matter by summary trial is preferable.

[39] Even in cases where there is conflicting evidence, a summary trial may be suitable. The Court of Appeal in *MacMillan v. Kaiser Equipment Ltd.*, 2004 BCCA 270, provided guidance in respect of the suitability of a summary trial when issues of credibility arise:

> [22] The principles relating to the applicability of the summary trial procedure are not in dispute. It should be noted that the mere fact that there is a conflict in the evidence does not in and of itself preclude a chambers judge from proceeding under Rule 18A. A summary trial almost invariably involves the resolution of credibility issues for it is only in the rarest of cases that there will be a complete agreement on the evidence. The crucial question is whether the court is able to achieve a just and fair result by proceeding summarily.

[40] Considering the above factors, I am persuaded that this matter is appropriate to be decided summarily. Given the nature of the issues and the evidence before me, I am able to find the facts necessary to resolve the issues, and am of the opinion that it is in the interests of justice to hear this matter as a summary trial.

B. Was the Plaintiff Constructively Dismissed?

1. Law

[41] The parties agree that the leading authority in respect of whether an employee has been constructively dismissed is *Potter v. New Brunswick Legal Aid Services Commission*, 2015 SCC 10 [*Potter*]. As held by the Supreme Court in *Potter*, constructive dismissal applies in circumstances in which an employee has not been formally dismissed and so the dismissal is a legal construct: *Potter* at para. 30.

[42] A plaintiff bears the burden, on a balance of probabilities, of establishing that he or she has been constructively dismissed. In effect, the court's inquiry in a case concerning alleged constructive dismissal is to "determine whether the employer's act evinced an intention no longer to be bound by the contract": *Potter* at para. 31.

[43] When the conduct of an employer evinces such an intention to no longer be bound by the employment contract, the employee can either accept the changes or treat those changes as a repudiation of the contract and sue for wrongful dismissal: *Potter* at para. 30.

[44] There are two ways an employer's actions may constitute constructive dismissal. In *Potter*, the Supreme Court set out separate considerations for each of these forms of potential constructive dismissal, which the Court refers to as the two branches of the analysis. Either branch may ground an employee's claim that the employer's actions amount to constructive dismissal. The first branch applies when an employer takes a single unilateral act that breaches an essential term of the employment contract. The second branch is a series of acts by an employer that, taken cumulatively, would lead a reasonable person to conclude that the employer

no longer intended to be bound by the employment contract: *Potter* at paras. 43 and 45.

[45] The first branch of the *Potter* analysis has two steps and requires an analysis of the purported changes made by the employer to the specific employment contract or employee's job description. At the first step, the court is to determine whether, objectively, the employer has unilaterally changed the terms of the employment contract. Importantly, at para. 37, the Court held that if the employer has the authority to make the change, it is not unilateral and so there is no constructive dismissal. Further, the change "must be detrimental to the employee.": *Potter* at para. 39.

[46] The second step of the first branch of the *Potter* test requires the court to determine whether, at the time the breach occurred, a reasonable person in the same situation as the employee would have found that the essential terms of the employment contract were being substantially changed: *Potter* at 39. For the change to amount to constructive dismissal, the employer's change must be a "fundamental" or "substantial" breach of an essential term of the employment contract: at para. 35.

[47] The second branch of the *Potter* analysis engages a different approach and applies in circumstances when the employee argues that a series of acts taken by an employer "when viewed in light of all the circumstances, would lead a reasonable person to conclude that the employer no longer intended to be bound by the terms of the contract." Under the second branch, the employee is not required to point to any specific change that constitutes a substantial breach. The focus of the second branch analysis is whether the employer evinces an intention no longer to be bound by the contract: *Potter* at para. 42.

[48] Miller J.A. in *Chapman v. GPM Investment Management*, 2017 ONCA 227 at paras. 13-17 provides a helpful summary of the *Potter* analysis:

> [13] As the trial judge noted, there are two routes that a plaintiff can follow to establish constructive dismissal, as set out in *Potter v. New Brunswick Legal Aid Services Commission*, 2015 SCC 10, [2015] 1 S.C.R. 500.
>
> [14] The first branch is apt where an employer has, by a single unilateral act, breached an essential term of the contract of employment. The second

> branch allows for constructive dismissal to be made out where there has been "a series of acts that, taken together, show that the employer no longer intended to be bound by the contract". On both branches, it is "the employer's perceived intention no longer to be bound by the contract" that gives rise to the constructive dismissal: *Potter*, at para. 43.
>
> [15] The first branch – for a single unilateral act – has two steps: (1) the employer's conduct must be found to constitute a breach of the employment contract, and (2) the conduct "must be found to substantially alter an essential term of the contract": *Potter*, at para. 34.
>
> [16] In contrast, the focus of enquiry on the second branch is not on a single act of the employer, but on the "cumulative effect of past acts by the employer" that establish that the employer no longer intends to be bound by the contract: *Potter*, at para. 33.
>
> [17] The perspective shifts during the analysis. In ascertaining whether an employer's conduct has amounted to a breach of contract (the first step of the first branch), the test is objective: *Potter*, at para. 62. Thereafter, on both the second step of the first branch and on the second branch, the perspective shifts to "that of a reasonable person *in the same circumstances as the employee* …The question is whether, given the totality of the circumstances, a reasonable person in the employee's situation would have concluded that the employer's conduct evinced an intention to no longer be bound by [the contract]" (emphasis in original): *Potter*, at para. 63. In these parts of the analysis, the trial judge must conduct the enquiry from the perspective of the reasonable employee. This perspective excludes, for example, reliance on information that "the employee did not know about or could not be expected to have foreseen." *Potter* at paras. 62 and 66. Furthermore, the employee is not required to establish that the employer actually intended to no longer be bound by the contract, but only that a reasonable person in the employee's situation would have concluded that this was the employer's intention: *Potter*, at para. 63.

[49] The majority in *Potter* further explained that a determination of whether an employee was constructively dismissed is fact-specific and "[t]he question is ever one of degree":

> [40] … In each case, determining whether an employee has been constructively dismissed is a "highly fact-driven exercise" in which the court must determine whether the changes are reasonable and whether they are within the scope of the employee's job description or employment contract …. Although the test for constructive dismissal does not vary depending on the nature of the alleged breach, how it is applied will nevertheless reflect the distinct factual circumstances of each claim.

[50] The plaintiff argues that, in the circumstances of this case, the defendant's actions amount to constructive dismissal under either of the forms addressed by the

Court in *Potter*. In other words, the plaintiff says that the defendant unilaterally changed an essential term of his employment agreement. He also says that the defendant's actions, taken cumulatively, are such that a reasonable person in the position of the plaintiff would view the defendant's conduct as evincing an intention to no longer being bound by the employment contract.

2. Analysis

1) *Potter* Test – First Branch - Step One

[51] The plaintiff alleges that the defendant's unilateral act of preventing the plaintiff from attending the Lodge or speaking with his staff was a breach of the employment contract or, more specifically, a breach of his Job Duties.

[52] I conclude that the defendant's demands did not breach the plaintiff's Job Duties because both demands were temporary measures taken by the defendant. I find that taking temporary steps regarding how work will be performed is an implicit term of an employment contract and so cannot amount to a unilateral breach of the plaintiff's employment contract. I will deal with each of the defendant's purported changes to the employment contract below.

Denial of Lodge Access

[53] In my view, the defendant's demand that the plaintiff not attend in person at the Lodge on March 16, 2020, and that he would perform work from home was a reasonable and temporary measure taken in good faith in response to the defendant's response to the COVID-19 pandemic. I accept the evidence of Mr. Feely in his affidavit and will reproduce his rationale for not having the plaintiff return to the Lodge on March 16, 2020:

> 44. There were multiple reasons that I did not want Mr. Farkas to the Lodge on that day. The reasons, which I expressed to Mr. Farkas during the March 16 Meeting, were as follows:
>
> > (a) we were in the process of removing staff and guests from the property because we were about to close the Lodge due to the COVID-19 pandemic, and it did not make sense to send him to the Lodge when we were trying to bring people down from the Lodge;

> (b) we had enough people in the Kitchens already to complete the work that needed to be accomplished relating to the Lodge closure;
>
> (c) I wanted him to work on the other tasks including budgets and creating a plan addressing the issues relating to communication which had been raised by staff prior to and during his Medical Leave. This plan would be required for the joint meeting with his staff.
>
> 45. Given that the Lodge is in a remote location which required a snowcat or snowmobile to access, I was trying to minimize the number of people going to the Lodge at the time.
>
> 46. I never told Mr. Farkas that he was permanently barred from attending the Lodge or speaking to his staff, and that was never my intention. I only told him that he could temporarily not attend the Lodge for the reasons as indicated in this affidavit.

[54] There is further evidence provided by Ms. Sanford which I accept as the steps the defendant was taking to close the Lodge and who was permitted to attend the Lodge. Ms. Sanford set out the information in her email to the plaintiff on March 17, 2020:

> Tomorrow afternoon we are shutting down all business operations including cat skiing, Winter Lunch and Spa and the wedding that were scheduled for the week of April 6, 2020. In addition, we will close the lodge to all but essential employees. At the moment essential are only specific shop/maintenance employees. Andrew and I are working through staff schedule and tasks for essential work. This lodge restriction will be in in [sic] place through March 30, 2020.
>
> Office staff will continue working with enhanced procedures in place including: staff working from home as necessary, doors locked so no public access, regular deep office cleans, work space cleans each morning and when staff leave and return to the office. The shop/maintenance staff will have to enter or retrieve any deliveries that need to go to lodge [sic]. Otherwise, only office staff are allowed in the office unless approved by Nancie or Doug.

[55] In my view, the defendant's demand of the plaintiff to not attend the Lodge does not amount to a unilateral change to the plaintiff's Job Duties because I find that it is implicit in the employment contract that the defendant can make decisions that temporarily change how the plaintiff does his work, without changing the core functions of that work. Generally speaking, employers are entitled to determine how the workplace will be organized and the work performed: *Costello v. ITB Marine Group Ltd.*, 2020 BCSC 438 at para. 18. Further, a change in the manner in which

an employee is to carry out his or her core duties does not constitute a constructive dismissal: *Baraty v. Wellons Canada Corp.*, 2019 BCSC 33 at para. 72 [*Baraty*]; and *Trueman v. Abbotsford (City),* 2006 BCSC 1820 at para. 99.

[56] While each case will be decided on its facts, I find that the defendant's decision to refuse the plaintiff access to the Lodge on a temporary basis is within its authority to organize how work will be performed by employees, not the essence of that work. To my thinking, the argument advanced by the plaintiff leads to a potentially absurd result. If accepted, it would mean that if an employer makes a request of an employee that prevents the employee from performing all of his or her job duties for a temporary period of time it would amount to constructive dismissal. For example, if an employer required an employee to leave the work premises for a temporary period of time due to an emergency and, in so doing, frustrated the ability of the employee to perform one or more of his or her job duties for that time, under the plaintiff's interpretation of constructive dismissal, the employee could treat the employer's act as breach of the employment contract and sue for constructive dismissal. In my view, such an outcome does not accord with the Court's view of constructive dismissal in *Potter*.

[57] As held by the Court in *Potter*, the analysis of a claim of constructive dismissal is a fact-driven exercise. While I conclude that, in the circumstances of the case at bar, the temporary changes demanded by the defendant do not amount to a breach of the plaintiff's employment contract, I acknowledge that there may be circumstances in which a temporary change is of such duration, despite not being permanent, or of such severity that it profoundly changes the terms of the employment contract and may amount to a breach. In my view, instances where truly temporary decisions by an employer amount to a breach would be rare. In this regard, I note that counsel for the defendant argued that the plaintiff was unable to provide a single case in which an employer's temporary direction to an employee amounted to constructive dismissal.

[58] I also note that the defendant requested that the plaintiff continue to perform his Job Duties including developing recruitment and retention plans for the kitchen staff, developing a communication plan and working on menus and budgets. The evidence supports that these particular Job Duties did not require the plaintiff to be physically at the Lodge or kitchens and the plaintiff had performed these duties from the Office in the past. Further, in my view, of the 17 Job Duties, only two appear to require the plaintiff to be physically in the kitchen: supervising the culinary team in daily duties; and, ensuring that food storage, preparation and clean up are done in a safe manner. I note that given the kitchen was closed due to the COVID-19 pandemic, it is reasonable to conclude that during that closure, these duties would not be required of the plaintiff.

[59] The plaintiff has not met his burden of establishing that the defendant's temporary demand that he not attend the Lodge breached the terms of his employment contract.

Plaintiff Asked to Refrain from Communicating with Staff

[60] In respect of the defendant's demand that the plaintiff not speak with his staff, I find that this was also a temporary request, taken in good faith to allow the plaintiff time to develop a communication plan to present to his staff at a meeting scheduled for March 19, 2020, approximately 72 hours after the March 16, 2020 meeting when the demand was made.

[61] The evidence supports that the defendant had concerns about the plaintiff's communication style with staff and wanted the plaintiff to develop a communication plan to address the issue. There is no evidence that the plaintiff was permanently forbidden from speaking with his staff. The evidence is to the contrary. The plaintiff was asked to prepare a communication plan to present to his staff in a meeting on March 19, 2020. The evidence of Mr. Feely and the only reasonable inference from the defendant asking the plaintiff to create a communication plan for the kitchen staff was that there would be future communication between the plaintiff and his staff and the plaintiff was the one who would shape the form of the communication.

[62] Permanently forbidding a manager to speak with his or her staff might rise to the level of a breach of a term of an employment contract if it prevented a manager from managing employees. In the circumstances of this case, however, preventing the plaintiff's contact with his staff for a short period of time to allow the plaintiff to create a communication plan cannot amount to a fundamental breach of employment contract. In my view, by asking the plaintiff to create a communication plan for the kitchen staff that would be presented to the kitchen staff in three days demonstrates that the defendant intended to facilitate and improve the plaintiff's communication with the kitchen staff, not prevent it.

The Plaintiff Acted Precipitously

[63] I view the plaintiff's actions in concluding that the defendant repudiated his employment contract as precipitous. I understand that the plaintiff found himself in a difficult situation when his wife's employment was terminated by the defendant in January 2020, and he was required to continue working with the staff and managers responsible for that decision. However, in my view, the plaintiff took the demands the defendant made of him on March 16, 2020, as an opportunity to treat the employment contract as repudiated and to end his employment relationship with the defendant.

[64] Courts have considered whether an employee has allowed sufficient time to determine if changes to his or her employment would, in fact, affect the employee's responsibilities. In *Costello v. ITB Marine Group Ltd.*, 2021 BCCA 154, the Court of Appeal identified a number of cases in which an employee's actions in repudiating a contract of employment were considered premature and precipitous:

> [16] The court in *Robbins* also identified and reviewed a number of cases that involved actions for constructive dismissal and that occurred in the context of the restructuring of a business: see *Podas v. Pacific Press Ltd.*, [1990] B.C.J. No. 583 (S.C.), aff'd (1991), 5 B.C.A.C. 90; *Trueman v. City of Abbotsford*, 2006 BCSC 1820. In both *Podas* at para. 49 and *Trueman* at para. 112, the court concluded that the plaintiffs had acted prematurely or precipitously in leaving their employment before determining whether the changes would, in fact, affect their responsibilities. See also *Mate v. Laidlaw Environmental Services Inc.*, [1996] B.C.J. No. 199

> at para. 75 (S.C.); *Clark v. Gulf Canada Resources Ltd.* (1989), 102 A.R. 238 (Q.B.).

[65] I find that the plaintiff was precipitous in resigning without allowing time to determine how the changes might affect his responsibilities. In my view, this leaves the court with a choice between preferring the defendant's evidence that the measures were temporary and the plaintiff's speculation that the demands were permanent and would have a profound ongoing impact on his Job Duties. Based on the evidence before me, I prefer the evidence of the defendant that the measures were temporary. This conclusion is based not only on the evidence of Mr. Feely and Ms. Sanford, but also on the fact it accords with the evidence that a meeting was scheduled between the plaintiff and his staff at the Lodge for March 19, 2020. In my view, the fact the meeting was scheduled at the Lodge between the staff and the plaintiff demonstrates that the demands made by the defendant were of only a short duration. Put another way, within 72 hours of the demands being made, the plaintiff would be at the Lodge communicating with his kitchen staff.

2) *Potter* Test – First Branch – Step Two

[66] I have found the demands of the defendant did not breach the plaintiff's Job Duties because, in my view, there is an implicit term of an employment contract that an employer can make temporary decisions regarding how work is performed. As such, there is no unilateral change to the employment contract. However, if I am wrong in my assessment, I find that the plaintiff fails to meet the second step of the first branch of the *Potter* test, because a reasonable person in the same situation as the employee would not find that the essential terms of the employment contract were being substantially changed.

[67] Viewed objectively, the defendant was not demonstrating that it no longer wanted the plaintiff to continue to perform his duties as the defendant's executive chef. I accept that the plaintiff was informed of the temporary nature of the changes and provided a reason for the changes. In my view, the employer acted in good faith and their conduct would not make a reasonable person in the plaintiff's

circumstances believe that an essential term of his employment contract was being substantially altered.

[68] None of the temporary changes affected the plaintiff's salary, title, to whom the plaintiff reported, or the staff that reported to the plaintiff. In my view, the temporary changes cannot objectively be viewed as detrimental, which they must in order to amount to constructive dismissal: *Potter* at para. 37.

[69] In respect of the demand that the plaintiff not speak with his staff until he prepared the communication plan, a reasonable person would see this as a natural step taken by the defendant to ensure that the communication plan was developed before there was a meeting between the kitchen staff and the plaintiff. It is important for my conclusion that Mr. Feely asked that the plaintiff "build" the communication plan as opposed to stating that management would create the plan for the plaintiff. In my view, having the plaintiff draft the plan demonstrates that the defendant wanted a plan that worked for, and included, the plaintiff and was not a plan to be foisted upon him by management or the kitchen staff. A reasonable person, in the same circumstances as the plaintiff, would view that the defendant was taking steps to advance the relationship between the plaintiff and his staff, not to stifle or hinder that relationship. Further, no reasonable person would conclude that the plaintiff would be permanently prevented from communicating with his kitchen staff based on the evidence that a meeting was scheduled between the plaintiff and the kitchen staff for March 19, 2020.

[70] Based on the foregoing analysis under the first branch of the *Potter* test, I conclude that the demands made of the plaintiff to temporarily not attend the Lodge and to not speak to his kitchen staff for a period of 72 hours, do not substantially alter an essential term of the plaintiff's employment contract and, as such, fail to establish the plaintiff was constructively dismissal.

3) *Potter* Test – Second Branch

[71] The plaintiff argues that the defendant's series of actions against him demonstrate the defendant's intention to no longer be bound by the employment

contract. The plaintiff says the defendant did not treat the plaintiff with respect or dignity, and exposed him to a humiliating work environment from January 2020 up to the March 16 and 17, 2020 meetings. The plaintiff describes a pattern of isolation that commenced with his exclusion from the process and information regarding the termination of his wife's employment and continued when he returned from the Medical Leave. He says the defendant's failure to contact him during the Medical Leave shows a lack of caring and when he returned to work on March 16, 2022, he was told his duties would be changing significantly.

[72] This aspect of the plaintiff's argument engages the second branch of the *Potter* test and requires the court to assess, in light of all of the circumstances, whether a reasonable person would conclude that the employer no longer intended to be bound by the employment contract. The Court explains the second branch test as follows:

> [42] The second branch of the test for constructive dismissal necessarily requires a different approach. In cases in which this branch of the test applies, constructive dismissal consists of conduct that, when viewed in the light of all the circumstances, would lead a reasonable person to conclude that the employer no longer intended to be bound by the terms of the contract. The employee is not required to point to an actual specific substantial change in compensation, work assignments, or so on, that on its own constitutes a substantial breach. The focus is on whether a course of conduct pursued by the employer "evince[s] an intention no longer to be bound by the contract": *Rubel Bronze*, at p. 322. A course of conduct that does evince such an intention amounts cumulatively to an actual breach. Gonthier J. said the following in this regard in *Farber*:
>
> > In cases of constructive dismissal, the courts in the common law provinces have applied the general principle that where one party to a contract demonstrates an intention no longer to be bound by it, that party is committing a fundamental breach of the contract that results in its termination. [para. 33]

[73] I find that the totality of the evidence supports that a reasonable person in the place of the plaintiff would not conclude that the defendant wished to no longer be bound by the employment contract. The evidence supports a conclusion that the plaintiff was disgruntled by the defendant's treatment of his wife and the defendant's handling of that event. I accept that the plaintiff was in a difficult and uncomfortable position once his wife was fired. However, I do not find evidence that the defendant

acted in a manner that could reasonably be interpreted as showing an intention to no longer continue the employment relationship with the plaintiff.

[74] The evidence supporting the upset felt by the plaintiff after the defendant fired his wife is exemplified by his email to Mr. Feely of January 28, 2020, before he took his Medical Leave:

> Hi Doug,
>
> I would like it to be known that in regards to the future of the restaurants and their operations going forward, I do not wish to collaborate with any person(s) involved with the decision to terminate L'wren Farkas.
>
> The reasons for this I stated in our meeting today and are: in my professional opinion after nearly 25 years in the restaurant industry, Red seal certification and a diploma in Restaurant Management I feel that person(s) responsible for this does not understand restaurant operations in general, or the training and requirements to set and maintain a high level of fine dining service standards, or the development and maintenance behind a wine list, nor do they understand the intricacies and organization behind reservation management. I do not feel that his person(s) is capable of making accountable and reasonable sound decision regarding the direction and future of the restaurants that result in profitability and exceptional guest experiences.

[75] The statement that the plaintiff no longer wished to collaborate with anyone involved with the termination of his wife's employment, which would presumably include Mr. Feely and Ms. Sanford, in my view, supports a finding that the termination of Ms. Farkas tainted the plaintiff's objectivity regarding the defendant's conduct towards him. While it would be difficult for the plaintiff to remain objective, I conclude that an objective, reasonable, person in the same circumstances as the plaintiff would not view that the defendant's actions toward him showed its intention to no longer be bound by the employment contract.

[76] Courts have held that an implied term of employment is that an employer will treat an employee with civility, decency, respect, and dignity: *Evans v. Listel Canada Ltd.*, 2007 BCSC 299 at para. 69. On the evidence before me, I find that there is no evidence to support the plaintiff's claim that the defendant did not treat him with respect and dignity.

[77] The threshold for negative behaviour that an employer may express is sufficiently high to allow an employer to legitimately express frustration to an employee, make direct comments about performance, or require the employee to work in a workplace with a degree of discord and conflict. The analysis of what constitutes a hostile environment was summarized by Mr. Justice Wilson in *Baraty v. Wellons Canada Corp.*, 2019 BCSC 33 at paras. 131 and 132:

> [131] The test for whether a workplace has been rendered intolerable is a high one and is an objective one. In *Danielisz v. Hercules Forwarding Inc.,* 2012 BCSC 1155, Arnold-Bailey J. held the following at para. 78:
>
> > [78] It is clear that for negative behaviour towards an employee by an employer to constitute a constructive dismissal it must be such as to render continued employment beyond what an employee may reasonably be expected to bear. The threshold must be high enough to permit an employer to legitimately express frustration to an employee, make very direct comments about performance, or require the employee to work in a workplace with a degree of discord or conflict.
>
> [132] The court is required to assess whether, on the totality of the evidence, the abusive treatment of the employee is so obscene as to amount to repudiation of the employment contract. Unfriendliness, confrontations between co-workers or even some hostility and conflict will not amount to constructive dismissal where the employee is still able to perform his or her work. The threshold for a claim of constructive dismissal based on the employer's conduct in the workplace is whether a reasonable person in the circumstances should not be expected to persevere in the employment [*Danielisz*, paras. 81, 84-85].

[78] While the plaintiff appears to have perceived a pattern of negative events targeting him, his assertions do not withstand objective review. There is no evidence that the defendant created a toxic, intolerable or poisoned work environment for the plaintiff. To the contrary, the evidence supports that the defendant's proposed approach to the tensions in the kitchen between the plaintiff and his staff seems prompt, professional and reasonable. Despite being in the midst of closing its business operations due to the COVID-19 pandemic, the defendant immediately met with the plaintiff when he returned from the Medical Leave and requested that he prepare a communication plan for a meeting that was to occur on March 19, 2020, within 72 hours of the plaintiff's return to work from the Medical Leave.

[79] In respect to the plaintiff's assertion that the defendant excluded him from the process of terminating his wife's employment, I do not find the defendant's management acted unreasonably. According to the plaintiff, on January 21, 2020, Mr. Feely approached the plaintiff in a quiet place at the Lodge and informed him that Ms. Farkas was having a meeting about her employment at the Office and if the plaintiff wanted more information he should ask Ms. Farkas. In my view, Mr. Feely was attempting to balance consideration of the plaintiff's feelings as both the spouse of Ms. Farkas and the plaintiff's role on the management team against respecting the privacy of Ms. Farkas. In my view, this is a reasonable and professional approach to a difficult situation where personal and professional relationships are comingled. I do not find that Mr. Feely's handling of communicating Ms. Farkas's firing to the plaintiff could objectively be viewed creating an intolerable work environment for the plaintiff.

[80] In respect of the plaintiff's complaint that he was not "wished well" by the defendant during his Medical Leave, I find that this cannot provide evidence of the defendant's hostility towards him. In find this is an example of how the plaintiff's view of the circumstances was skewed through a subjective lens of negativity. The defendant says it did not call the plaintiff during the Medical Leave because it wanted to respect the plaintiff's privacy as he recovered. It could very well be that if the defendant had called the plaintiff during the Medical Leave, the plaintiff might now be arguing that during his leave the defendant disturbed him with communication while he was unwell. I find no merit to the plaintiff's claim that the defendant's failure to contact the plaintiff while he was on Medical Leave showed a lack of decency or hostility toward the plaintiff, or provides evidence of an intolerable workplace.

4) COVID-19 As Context

[81] I wish to make a final comment regarding the impact of the COVID-19 pandemic in this case. Given that constructive dismissal is a highly fact-driven exercise, in my view, it is important to ground the events surrounding the defendant's temporary changes to the plaintiff's work arrangements in the context of

the uncertainty in Canada at the start of the COVID-19 pandemic. This is especially so, given the nature of the defendant's business – a backcountry tourist ski lodge and restaurant. The pandemic required the defendant to remove clients and staff from the Lodge and shut down restaurant operations. I find the plaintiff's argument ignores or minimizes the uncertainty facing the defendant at the beginning of the COVID-19 pandemic. In my view, the context cannot be ignored, particularly because the plaintiff returned from his Medical Leave on March 16, 2020, at precisely the time the defendant was closing the Lodge due to COVID-19.

[82] The plaintiff argues that the COVID-19 pandemic cannot be used by an employer to unilaterally make changes to an employee's employment contract citing *Andrews v. Allnorth Consultants Limited*, 2021 BCSC 1246 [*Andrews*]. In *Andrews*, the court held that an employer who unilaterally extended a temporary layoff resulting from the pandemic amounted to a fundamental breach of the employee's contract. I accept that COVID-19 cannot be used to allow an employer unbridled latitude in altering the terms of an employment contract; however, in the circumstances of this case, the defendant did not terminate the plaintiff's employment due to COVID-19 or permanently change the contract. To the contrary, the defendant made specific arrangements for the plaintiff to return to work from the Medical Leave as the defendant's executive chef.

VI. CONCLUSION

[83] Given I have concluded that demands the defendant made of the plaintiff were temporary measures, thus, not breaching terms of the employment contract, and that a reasonable person in the same circumstances of the plaintiff would not take the acts of the defendant to show that the defendant no longer intended to be bound by the employment contract, the plaintiff has failed to discharge the burden of establishing either form of constructive dismissal set out in *Potter*. As such, I find that the plaintiff effectively resigned on March 17, 2020.

[84] Given my conclusion that the plaintiff was not constructively dismissed, there is no need for me to consider the issue of damages.

VII. COSTS

[85] The defendant has been successful in this summary trial. This action was advanced under the "Fast Track Litigation Proceedings" provisions of Rule 15-1 of the *Supreme Court Civil Rules*. I see no special circumstances in this case that warrant deviating from the cost awards established under Rule 15-1(15). The defendant will have costs pursuant to Rule 15-1(15), plus disbursements and taxes.

[86] Should the parties wish to make submissions on costs, they may make arrangements through the Registry within 30 days of this order to appear before me.

[87] I wish to express my thanks to counsel for their able and well-prepared arguments.

"Gibb-Carsley J."