IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***Borsato v. Atwater Insurance Agency Ltd.,***
2008 BCSC 724

Date: 20080606
Docket: S068291
Registry: Vancouver

Between:

Louise Borsato

Plaintiff

And

Atwater Insurance Agency Ltd.

Defendant

Before: The Honourable Madam Justice Fenlon

Reasons for Judgment

Counsel for the Plaintiff:	C.R. Forguson
Counsel for the Defendant:	T.J. Delaney
Date and Place of Trial:	March 18, 19, 20, and May 16, 2008 Vancouver, B.C.

I. INTRODUCTION

[1] The plaintiff, Ms. Borsato, was the long-time manager of the defendant, Atwater Insurance Agency Ltd. (the "Agency"). She claims that she was constructively dismissed when the Agency reduced her salary by 20%. The Agency says that Ms. Borsato unilaterally changed her work schedule from five days a week to four, and that the reduction in her salary that followed was simply a response to this change. The Agency asserts that Ms. Borsato's refusal to accept a reduction in pay to match her reduction in hours amounted to a "constructive resignation".

[2] The case turns on whether the terms of Ms. Borsato's employment contract gave her the right to work less than full-time. She seeks special damages for loss of income and benefits based on a notice period of 16 months.

II. BACKGROUND

[3] Ms. Borsato was 54 years old at the date of trial. She had worked at the Agency in some capacity since 1980. From 1980 to 1983 she was an insurance agent. In 1983 she took time off to raise a family, working only on a casual relief basis to maintain her insurance licence until about 1990 when she returned to work to manage the office.

[4] At that time the Agency was owned by a Mr. Dupuy. When Ms. Borsato returned to work in 1990, her employer agreed that she could work from 9:00 a.m. to 3:00 p.m. five days a week for a total of 30 hours each week so that she could take her young children to school and pick them up each day.

[5] In November of 1992 Mr. Dupuy passed away. Ms. Borsato continued to manage the Agency for his estate and agreed to take on some additional responsibility with respect to another office in North Vancouver. Ms. Borsato's terms of employment were set down in writing in a Memorandum of Employment dated January 2, 1992, which provided in part:

> **ADJUSTMENT IN SALARY**:
>
> To compensate for the change in job description, comes in the form of:
>
> **ANNUAL BONUS OF $15,000**. Warranted by the financial success of the business, in general.
>
> **WAGES** are to be paid on an hourly basis, calculated at $23/hr, averaging 30 hours per week. Regular 6 hour day, 9:00am-3:00pm.

[6] Although the contract referred to an hourly basis for compensation, Ms. Borsato was paid a salary based on that hourly wage multiplied by a 30 hour week, regardless of the precise number of hours she worked. Ms. Borsato and her employer agreed that the six hour day was a guideline, and that Ms. Borsato had flexibility with respect to the scheduling of those hours.

[7] In January of 1995, the retirement of the senior insurance agent at the North Vancouver office left Ms. Borsato with more responsibilities as the general manager. The Agency accordingly increased Ms. Borsato's salary to reflect a base rate of $26 per hour. All other terms of her employment contract remained the same.

[8] Prior to Mr. Dupuy's estate putting the Agency on the market in 1996, the Agency and Ms. Borsato negotiated a change to her terms of employment. Her compensation was changed from salary plus bonus to salary only. As a result, Ms. Borsato was to receive $55,000 per year: the $15,000 bonus she had been receiving plus compensation of about $40,000 based on 30 hours per week at $26 per hour over 52 weeks.

[9] Ms. Borsato's responsibilities as office manager included all aspects of the day-to-day operation of the Agency, such as scheduling her time and that of the five or six other employees. The office was open seven days a week. Although the plaintiff was required to work a minimum of 30 hours each week, as her children got older she tended to put in extra hours to meet her management responsibilities, and tried to schedule her hours over four days.

[10] In 1996 Mr. Meier purchased the Agency and the North Vancouver office from Mr. Dupuy's estate. It was one of the terms of his offer to purchase that Ms. Borsato was to continue as the manager of the Agency. He said at trial that the Agency was a successful one, and that he understood from the previous owner that Ms. Borsato was an integral part of that success.

[11] I find that when Mr. Meier acquired the Agency he did not know the precise terms of Ms. Borsato's employment contract other than the amount she was to be paid. He assumed she was working full-time and made no further enquiries. Mr. Meier agrees that Ms. Borsato's hours and schedule were never specifically addressed. The only change he negotiated with Ms. Borsato to her terms of employment was a reduction in her salary to reflect the fact that she would no longer be responsible for the North Vancouver office. Ms. Borsato agreed to accept about $4,000 less and to continue in her position at a salary of $51,000 plus whatever additional income she could earn through selling insurance, which on average amounted to approximately $10,000 per year in commissions (an arrangement that had been in place under Mr. Dupuy's ownership as well).

[12] The parties agree that after Mr. Meier acquired the Agency in 1996, he gave Ms. Borsato complete autonomy to schedule the office and her time as she saw fit. By all accounts he was an exemplary employer and she was an exemplary employee. Over the next ten years the parties had a good professional relationship and Mr. Meier said that he was pleased with Ms. Borsato's performance and the performance of the Agency as a whole.

[13] The only issue that arose prior to the events giving rise to this litigation occurred in the fall of 2005 when Mr. Meier learned that Ms. Borsato was working from home one day a week doing accounting. Mr. Meier gave evidence that he did not like employees working from home because there was no way to really ensure that they

were working. In addition, he did not want Ms. Borsato spending time away from expensive retail space to do bookkeeping work that could be done by others when there was such a shortage of insurance agents to handle the clients walking into the office. He asked Ms. Borsato to concentrate on her duties as the office manager and on the insurance sales. Mr. Meier sent Ms. Borsato an email confirming his direction and she stopped working from home.

[14] In August and September of 2006 the Agency hired three employees from a competitor agency. Two of the new employees were assigned to work full-time in the Agency, and another worked one day per week. The addition of the new employees caused difficulties at the Agency. There were only five workstations for seven people, and one of the employees was described by all witnesses at trial as difficult or impossible to work with.

[15] In September of 2006 Mr. Meier reviewed the salaries of the original staff and the new employees, and gave a number of people raises, including Ms. Borsato.

[16] Early in October of 2006 it came to Mr. Meier's attention that Ms. Borsato was working four days per week and was taking Fridays off. He confronted Ms. Borsato with this information by way of a telephone call initially, and again at a meeting in his office in Vancouver on October 3, 2006. Mr. Meier said "What's this I hear about you working four days?" According to Ms. Borsato she told him that she was trying to get back to four days per week, and he said "you can't do that" to which Ms. Borsato replied "well I did". Mr. Meier's evidence was that he did not recall Ms. Borsato saying that she was "trying to get back to four days per week" but rather that she said she had been "doing this since August". Ms. Borsato's evidence was that she told Mr. Meier at the October 3 meeting that she had been doing this for quite some time and that he should check his payroll records.

[17] The parties agree that at some point during the October 3 meeting, Mr. Meier suggested that Ms. Borsato go for a coffee and consider what she wanted to do in terms of her future with the Agency. When she returned, they agree that she indicated that she had given some thought to the situation and wanted to make things work. The meeting ended on a relatively positive note, with Ms. Borsato expecting options to be put forward by Mr. Meier, and Mr. Meier expecting to further discuss and resolve the issues that had been raised at that meeting.

[18] Instead of further discussions, Mr. Meier, on October 4, 2006, wrote a letter to Ms. Borsato in which he said:

> You have arbitrarily changed your work week from 5 days to 4 days per week. I was very surprised that that had taken place and needless to say, you cannot arbitrarily change your income/working arrangements. We have a few managers working shorter weeks and in all cases, we have adjusted their incomes to reflect this change. We have accepted the reduction in your work week and have adjusted your salary. This will take effect October 1, 2006. The amount you were overpaid from August to September will be deducted at a rate of $500/mo. from your commission statement.

[19] The letter goes on to describe Ms. Borsato's "management style and interpersonal skills" as "quite antiquated". It suggests that her "compliance with the few head office requirements is also poor" and suggests that she take an on-line management course. The letter also advised that Mr. Meier's son would be coming out to assess the Agency and would be making "recommendations if changes are required i.e. to staffing, administrative procedures, training, etc.". The letter concludes with the words: "I hope we can work together and assist you in becoming a good, positive member of our team again."

[20] On October 5, 2006, Mr. Meier instructed his payroll staff to reduce Ms. Borsato's salary by 20% and to deduct $500 per month from her commission income to recover the 20% overpayment for August and September.

[21] On October 12, 2006, Ms. Borsato wrote to Mr. Meier, describing her original agreement with Mr. Dupuy to work 30 hours, and stating that during the nine years since Mr. Meier purchased the Agency she had continued to do so, but often worked more hours without pay in order to ensure that her work was completed. Ms. Borsato asked Mr. Meier to reinstate her full compensation and advised him that:

> Based on current work patterns and staff schedules, I consider working the 30 hours in 4 days to be optimum. However, if you wish I would certainly be open to discussing a change in schedule in order to work the 30 hour week over 5 days.

[22] Meetings took place between Ms. Borsato and Mr. Meier on October 31, 2006 and between Ms. Borsato and Mr. Meier's son, Alex Meier, on November 3, 2006. Following the latter meeting, Alex Meier, as directed by his

father, insisted on Ms. Borsato leaving the office that afternoon to begin a “stress leave”. The plaintiff never returned to work.

III. ANALYSIS

1. What were the terms of the employment contract?

[23] The defendant argues that Ms. Borsato’s contract of employment changed over time. The defendant accepts that Ms. Borsato was entitled to work 30 hours per week in 1990, but says that by 1996 when Mr. Meier purchased the Agency, she was clearly working more than 30 hours per week, and the 30 hours had ceased to be a term of Ms. Borsato's employment contract. The defendant argues that terms may be implied into an employment contract depending upon the reasonable expectations of the parties.

[24] In relation to the reasonable expectations of the Agency, the defendant submits that it is significant that Ms. Borsato never told Mr. Meier she was a part-time employee or that she had an arrangement to limit her work to 30 hours a week at any time before he purchased the Agency, or during the ten years they worked together. The defendant’s counsel asserts that Ms. Borsato was, in effect, “hiding her behaviour” from her employer and in so doing was abusing a position of trust.

[25] I do not accept the defendant’s submission that a contract of employment can change over time based simply on one party’s expectations, reasonable or otherwise. The defendant cited no case law in support of this proposition. Nor do I accept that Ms. Borsato had an obligation to ensure that Mr. Meier knew the precise terms of her contract when he acquired the Agency if she expected to continue her employment on those terms. I find nothing on the facts to suggest that Ms. Borsato was hiding her work schedule from her employer. The evidence is to the contrary.

[26] In March of 2004, a memo was sent out on behalf of Mr. Meier to the Agency directing Ms. Borsato to send in monthly schedules of hours worked by employees. The monthly schedules for December 2004 through December 2006 were put into evidence at trial. These schedules are the best evidence of the plaintiff’s weekly work schedule available to the Court. They show that Ms. Borsato frequently scheduled her time so that she worked four eight-hour shifts. The schedule for September of 2005 shows that Ms. Borsato worked three four-day weeks, and one five-day week. In October of 2005 she worked four four-day weeks.

[27] The defendant submitted that these schedules were not reliable because Ms. Borsato admitted in cross-examination that she often worked more than the hours recorded on the schedules. I find that while Ms. Borsato often worked longer hours than those set out on the schedule, the schedule tended to accurately reflect the days she worked each month.

[28] The second piece of evidence that supports Ms. Borsato’s position that she continued to work openly on a flexible part-time basis is the “employee profile card” which Ms. Borsato was asked to complete in June of 2006, before any dispute had arisen between the parties. That form clearly records Ms. Borsato’s hours of work per week as 32, consisting of eight hours per day, four days per week.

[29] In support of its argument that the plaintiff's position had evolved into a full-time, five day per week job, the defendant first relies on the evidence of a number of Agency staff who gave evidence at trial. They all agreed that Ms. Borsato worked very hard, would occasionally come in on weekends, often worked late into the evening, and would fill in when someone was sick or on holiday as needed. The tenor of this evidence was that Ms. Borsato was always in the office.

[30] Second, the defendant relies on Ms. Borsato's evidence that she worked hard and spent whatever time was necessary to get the job done, including filling in when people were away sick or the Agency was short-staffed, or when she had to catch up from being away on holiday. Ms. Borsato said that although she tried to schedule herself for four days a week, she generally worked “more five day weeks than four day weeks”.

[31] Third, the defendant relies on a letter drafted by Ms. Borsato to U.S. Immigration Authorities in the summer of 2005, and signed by Mr. Meier, confirming that she worked full-time for the Agency. Ms. Borsato’s explanation for this letter was that she considered her job to be full-time because she put in so many hours above and beyond

the minimum 30 that she was required to do.

[32] Fourth, the defendant relies on a memo Mr. Meier sent to Ms. Borsato in September of 2005 after he found out that Ms. Borsato was working one day per week from home doing accounting work. He wrote to her asking her to work "full-time from the office". The defendant says that this was a clear expression of the understanding of both parties that Ms. Borsato was to be in the office five days per week.

[33] Taken in context, I find that the focus of the memo was where the work was being done. Ms. Borsato understood that when Mr. Meier referred to "full-time", he meant always working from the office and not doing any work from home. I find that when she received the memo Ms. Borsato did not turn her mind to whether "full-time" meant "five days per week" because that was not the issue at the time.

[34] The defendant points out that in cross-examination Ms. Borsato was asked "What do you think full-time means?" and she responded: "Five days per week." However, when asked what full-time meant to her when she read the September 2005 memo she replied "Full-time on task, doing the job."

[35] I accept the plaintiff's evidence that she scheduled herself for four day weeks when it was possible to do so, given the competing demands to fill in when the Agency was short-staffed, others were on holidays, or she had work to catch up on because she was returning from a holiday herself. Ms. Borsato was a hard worker and the 30 hour minimum was more often than not illusory in practice, given the demands of managing the Agency. However, I find that she strove to make use of the flexibility she had contracted for, and that she valued that flexibility, even though it was often the exception rather than the rule. She made no attempt to hide her schedule from her employer. To the contrary, she repeatedly reported it to head office.

[36] Counsel for the plaintiff contended that voluntary overtime provided by an employee, even a manager, cannot become the employee's obligation simply because the employee consistently works more hours than she is required to under the terms of her contract. I agree with that position. In my view the fundamental terms of an employment contract do not change over time just because an employee regularly exceeds her obligations and the employer comes to expect that level of performance. Amendments to an employment contract, as with any other contract, require mutual contractual intention and consideration.

[37] In ***Brode v. Fitzwright Co.*** (1992), 41 C.C.E.L. 289 (B.C.S.C.) an employer sought to enforce a 90 day termination provision contained in a letter delivered to the employee approximately nine years after he started working for the company. In analysing the requirement for a binding modification to an existing contract, the court stated (at pp. 295-296):

> When contracts are formed or contractual modifications are made, there must be an expression of agreement, express or implied. Arbitrary pronouncement will not suffice. In the telephone conversation there was no agreement between Robbins and Brode on the subject of notification of termination to Brode. Robbins tried to impose a term in his letter of December 16, but Brode did not answer or acknowledge that letter. The proposition was not accepted, acceded to, or acquiesced in by Brode. [Emphasis added]

[38] The court went on to cite with approval a passage from ***Rahemtulla v. Vanfed Credit Union***, 51 B.C.L.R. 200, [1984] 3 W.W.R. 296 (S.C.):

> ... if the terms of the policy manual are to be binding, it must be concluded that they have contractual force. The usual elements of a contract must be established: a concluded agreement, consideration, and contractual intention. [Emphasis added]

[39] In ***Brown v. OK Builders Supplies Ltd.*** (1987), 14 C.C.E.L. xxxi (B.C.C.A.) an employee negotiated with his employer to reduce his duties. The employer, without expressly raising a corresponding reduction to the employee's salary, assumed that was reasonable and unilaterally reduced the employee's salary by 25%. The Court of Appeal found that in the absence of an express agreement between the parties to reduce the employee's salary, such a term could not be implied into the contract.

[40] In the case at bar the parties agree that they did not discuss the number of hours or days of the week that Ms. Borsato was working at any time after Mr. Meier took over the Agency. The closest they came to the subject

was the memo in September 2005 when the issue of working in the office “full-time” came up. In the absence of the topic even being raised, I cannot find that there was an "expression of agreement, express or implied", that the original terms of Ms. Borsato’s employment contract with the Agency were to be modified to require her to work more than 30 hours per week over five days.

[41] Further, I find that there was no change to Ms. Borsato’s remuneration or other terms of employment that could constitute consideration for converting her minimum obligation to the Agency from 30 hours scheduled over four or five days, to 40 hours over five days.

[42] The salary of $51,000, which Mr. Meier and the Agency agreed to continue paying Ms. Borsato, was based on 30 hours at $26 per hour and a $15,000 bonus, less a few thousand dollars to reflect removal of the North Vancouver office responsibilities. That consideration did not change over the ten years of Ms. Borsato’s service to the Agency under Mr. Meier, except for a small raise in September of 2006.

[43] I find that the terms of Ms. Borsato’s employment contract were as they had been prior to the Agency being sold to Mr. Meier in 1996: a minimum of 30 hours per week with additional hours as needed to meet the demands of the management position from time to time, and flexibility with respect to scheduling of those hours and days of work. I find that the only amendment to the terms of Ms. Borsato’s employment contract when Mr. Meier took over was a reduction in salary to reflect the end of Ms. Borsato's responsibility for the North Vancouver office.

[44] Both Mr. Meier and Ms. Borsato presented as frank and honest witnesses. I accept that Ms. Borsato proceeded on the basis that her employment terms had remained unchanged, and that Mr. Meier believed that Ms. Borsato was working five days and approximately 40 hours per week. But Mr. Meier's assumptions and expectations, however reasonable they may have been, cannot alter the terms of the employment contract.

[45] Even if the contract had been amended (which I do not find to be the case), on Mr. Meier’s understanding the key requirement was a commitment to be in the office "five days a week and get the job done." He said that it did not matter whether Ms. Borsato worked "thirty-four or thirty-eight or thirty-nine hours" as long as she fulfilled the five days per week and did her work. Ms. Borsato in fact agreed to do just that on October 12, 2006. Despite that concession, the defendant continued to pay the plaintiff a reduced salary.

[46] It was apparent from Mr. Meier’s evidence that he was satisfied and pleased with Ms. Borsato’s performance as a manager until he found out that she was working four days per week. What troubled Mr. Meier was that the plaintiff, in his view, had made a change to the way she was working without first seeking his permission. At trial Mr. Meier said:

> But what I don’t like is people doing things arbitrarily. If she had asked, it might be okay, I might have agreed.

2. Did the defendant unilaterally change a term of the contract?

[47] It follows from the findings I have made on the terms of the employment contract that Mr. Meier's decision on October 4, 2006 to reduce Ms. Borsato's salary by 20% was a unilateral change to the contract.

3. Did the plaintiff unilaterally change a term of the contract?

[48] The defendant says that when the plaintiff took the position in her October 12, 2006 letter that she would work 30 hours over five days, she converted the 30 hours per week from a minimum to a maximum.

[49] I do not accept the defendant’s characterization of the plaintiff’s proposal to work 30 hours over five days to be a declaration by the plaintiff that she would never work more than 30 hours in a week. I accept Ms. Borsato’s evidence that she intended to work as she always had, scheduling her minimum time over five days, but continuing to do what was required to get the job done.

4. Did the defendant’s change to the contract amount to a constructive dismissal?

[50] In ***Farber v. Royal Trust Co***., [1997] 1 S.C.R. 846 at para. 34, the court cited with approval the following passage from an article written by Sherstobitoff J.A., of the Saskatchewan Court of Appeal:

> A constructive dismissal occurs when an employer makes a unilateral and fundamental change to a term or condition of an employment contract without providing reasonable notice of that change to the employee. Such action amounts to a repudiation of the contract of employment by the employer whether or not he intended to continue the employment relationship. Therefore, the employee can treat the contract as wrongfully terminated and resign which, in turn, gives rise to an obligation on the employer's part to provide damages in lieu of reasonable notice.

[51] More recently in ***Hanni v. Western Road Rail***, 2002 BCSC 402, 17 C.C.E.L. (3d) 79 at para 52, Burnyeat J. stated:

> There are no circumstances, financial or otherwise, that justify an employer making unilateral and fundamental changes to the contract of employment of the employee, unless such changes are specifically permitted by the contract of employment.

[52] In ***Allison v. Amoco Production Co***. (1975), 58 D.L.R. (3d) 233 at 238 (Alta. S.C.), an allowance that made up approximately 25% of the employee's remuneration was withdrawn. The court held this to be a constructive dismissal and quoted from Labatt's ***Master & Servant***, 2nd ed. (1913), vol. 1, p. 587:

> A declaration by the master that he will no longer pay the stipulated amount of compensation, and that the servant, if he stays, must do so at a lower rate of wages, may be treated by the servant as equivalent to a dismissal. But the more correct theory with regard to these and other cases in which the servant is offered the alternative of leaving or of submitting to an essential alteration in the conditions of the service would rather seem to be this -- that the servant is justified in abandoning his work, and suing the master on the ground of a specific breach of duty in altering the conditions.

[53] Counsel for the defendant in this case conceded, quite properly, that a 20% reduction in an employee's salary amounts to a fundamental change to the employment contract.

[54] I find that the Agency's reduction of Ms. Borsato's compensation by 20% constituted a constructive dismissal.

5. What is the appropriate notice period?

[55] The primary factors to be taken into account when deciding the reasonable period of notice required on a dismissal are the length of service of the employee, the nature of the employment, the age of the employee, and the opportunities to find similar employment given the training, qualifications, and experience of the employee (***Bardal v. Globe & Mail Ltd.*** (1960) 24 D.L.R. (2d) 140 (Ont. H.C.J.)).

[56] Counsel for the plaintiff submitted that a notice period of 16 months is appropriate, based on the length of service from the plaintiff's return to work at the agency in 1990 until her constructive dismissal in 2006. The plaintiff relies on ***Allen v. CP Express and Transport Ltd.*** (1989), 29 C.C.E.L. 279 (B.C.S.C.). The plaintiff in that case was 54 years old. He had worked continuously for the defendant for 16 years and was a terminal manager supervising a staff of five. He was awarded 16 months' notice.

[57] The defendant argues that a notice period of 12 months is appropriate in the circumstances given that the maximum notice period is 24 months. The defendant also points to the high demand for insurance agency personnel with Ms. Borsato's training and experience, and relies on ***Lelievre v. Commerce and Industry Insurance Co. of Canada***, [2007] B.C.J. No. 366 (S.C.). In that case a sales manager who was 56 years of age and had worked for the employer for six years managing one other employee was found by the court to be entitled to a notice period of six months.

[58] I find that the plaintiff's situation more closely resembles the case of ***Allen***. Ms. Borsato worked with the Agency for an uninterrupted period of 16 years, with an earlier three year period of full-time employment from 1980

to 1983, and part-time involvement from 1983 to 1990.

[59] It was Mr. Meier's evidence that when he bought the Agency from Mr. Dupuy's estate, all employees were terminated and then rehired, a view supported by the purchase agreement. But there was no evidence that Ms. Borsato was aware of a termination at the time, and the Agency, on the employee profile card, recorded her original hire date as January 1, 1980. In any event, the parties agreed that in terms of determining the appropriate notice period, little turns on whether Ms. Borsato was employed continuously from 1990 to 2006, or from 1996 to 2006.

[60] I am of the view that a notice period of 16 months is appropriate in these circumstances.

6. Did Ms. Borsato fail to mitigate?

[61] The onus is on the defendant to prove that the plaintiff failed to mitigate her damages.

[62] The defendant raises two issues with respect to mitigation. First, the defendant submits that the plaintiff should have stayed with the Agency until she could find another job. Second, the defendant asserts that Ms. Borsato should have searched more diligently for work and been less selective after she left the Agency.

(a) Continuing to work at the Agency

[63] The defendant relies on ***Evans v. Teamsters Local Union No. 31***, 2008 SCC 20 as support for its argument that Ms. Borsato should have mitigated her losses by continuing to work at the Agency until she found another job. In that case Mr. Evans had worked as a business agent for the union for 23 years. A new president of the union was elected. Mr. Evans had supported the incumbent during the election. He was told his employment would be terminated and the union entered into negotiations with him concerning working notice and the amount of notice. The parties basically agreed Mr. Evans would receive 24 months' notice. The union wanted him to work 12 months and then receive 12 months' pay. Mr. Evans wanted other terms, including a requirement that his wife be given his job after he left. The negotiations broke down.

[64] The union told Mr. Evans he could keep working in his position. Mr. Evans refused to report back to work.

[65] The Supreme Court of Canada ruled that Mr. Evans failed to mitigate his loss by failing to report back to work. In doing so the court said at para. 29:

> There appears to be very little practical difference between informing an employee that his or her contract will be terminated in 12 months' time (i.e. giving 12 months of working notice) and terminating the contract immediately but offering the employee a new employment opportunity for a period of up to 12 months. In both situations, it is expected that the employee will be aware that the employment relationship is finite, and that he or she will be seeking alternate work during the 12-month period. It can also be expected that in both situations the employee will find that continuing to work may be difficult. Nonetheless, it is an accepted principle of employment law that employers are entitled (indeed encouraged) to give employees working notice and that, absent bad faith or other extenuating circumstances, they are not required to financially compensate an employee simply because they have terminated the employment contract. It is likewise appropriate to assume that in the absence of conditions rendering the return to work unreasonable, on an objective basis, an employee can be expected to mitigate damages by returning to work for the dismissing employer. Finding otherwise would create an artificial distinction between an employer who terminates and offers re-employment and one who gives notice of termination and offers working notice. In either case, the employee has an opportunity to continue working for the employer while he or she arranges other employment, and I believe it nonsensical to say that when this ongoing relationship is termed "working notice" it is acceptable but when it is termed "mitigation" it is not.

[66] The plaintiff counters by arguing that ***Evans*** does not require Ms. Borsato to continue working for her employer when the salary for her position has been significantly reduced. The plaintiff relies on para. 30 of the

Evans decision which provides:

> I do not mean to suggest with the above analysis that an employee should always be required to return to work for the dismissing employer and my qualification that this should only occur where there are no barriers to re-employment is significant. This Court has held that the employer bears the onus of demonstrating both that an employee has failed to make reasonable efforts to find work and that work could have been found (*Red Deer College v. Michaels*, [1976] 2 S.C.R. 324). Where the employer offers the employee a chance to mitigate damages by returning to work for him or her, the central issue is whether a reasonable person would accept such an opportunity. In 1989, the Ontario Court of Appeal held that a reasonable person should be expected to do so "[w]here the salary offered is the same, where the working conditions are not substantially different or the work demeaning, and where the personal relationships involved are not acrimonious" (*Mifsud v. MacMillan Bathurst Inc.* (1989), 70 O.R. (2d) 701). [Emphasis added]

[67] In my view it was not reasonable to expect Ms. Borsato in these circumstances to mitigate her damages by returning to work at a salary that was 20% lower than her previous compensation. In addition, the Supreme Court of Canada identified as relevant factors whether the employee was still working for the employer when the offer of re-employment was made or whether she had already left, as in the case at bar; and whether or not the employee has commenced litigation, as Ms. Borsato had by December 21, 2006.

(b) Searching more diligently for work and being less selective after she left the Agency

[68] The defendant argues that the notice period should be reduced by two months because Ms. Borsato did nothing more than “look at the internet and the newspapers for the first two months” after the Christmas break. The Agency notes that when Ms. Borsato sent her resume to recruitment agencies, she was offered a position within nine days.

[69] The defendant relies on ***Parks v. Vancouver International Airport Authority***, 2005 BCSC 1883, and ***Lelievre***.

[70] In ***Parks***, the court made the following comments (at paras. 52-54):

> The next issue is: did Mr. Parks fail to mitigate his damages by not seeking employment in a timely fashion? The Airport Authority asserts that Mr. Parks took no steps to pursue alternate employment until April 2004, as by his own admission he did not make any applications for jobs until then. On April 20th, he contacted the RCMP and on May 4, 2004 was offered employment. He began working for the RCMP on May 10th and is still employed there.
>
> Although Mr. Parks says he looked in newspapers, on the internet and had general conversations about possibilities of employment, there is minimal evidence that he made any efforts to seek employment until the beginning of April 2004. I accept Mr. Parks' submission that the onus is on the Airport Authority to establish that he failed to mitigate his damages; however, there must be some reasonable effort on the part of the employee. I agree that the timing of the termination would have inhibited Mr. Parks' ability to seek employment for at least a month. As well Mr. Parks states he was emotionally upset as a result of the manner in which he was terminated and says that, together with the timing of the termination (just before Christmas), delayed his ability to obtain alternative employment. However, there is no medical evidence to suggest that Mr. Parks was depressed or suffering from stress.
>
> Although I agree that there is no evidence that jobs were available, the evidence is that Mr. Parks obtained employment less than two months after he began looking in earnest. In these circumstances, it is reasonable to infer that if Mr. Parks had made efforts earlier he would have obtained employment somewhat sooner. In my view, it is appropriate to reduce the award to the equivalent of five months salary; two months due to the timing and upset Mr. Parks experienced from losing his job so abruptly and three months to seek appropriate alternate employment.

[71] In ***Lelievre*** the notice period of six months was reduced to three months because the plaintiff had failed to pursue employment opportunities in a timely way. It was submitted by the defendant that a similar approach should be taken in the case at bar.

[72] Ms. Borsato's last day at the Agency was November 3, 2006 when she went home on a stress leave. By December 6, 2006, Ms. Borsato was cleared by her doctor to return to work. Some negotiations between counsel for the parties took place in December, but by mid-December it was clear that Ms. Borsato was not returning to work. These proceedings were commenced on December 21, 2006.

[73] The plaintiff's evidence was that she did not begin looking for work until January of 2007. While the defendant concedes that this was a reasonable start date given the intervening Christmas break, he says that the plaintiff did not do enough. In January, Ms. Borsato talked to people, studied opportunities for work, and looked at employment postings on an internet job board for the industry. Ms. Borsato agreed that she did not actually apply for any jobs until early March 2007.

[74] At the beginning of March Ms. Borsato registered with three recruitment companies. By March 12, she had accepted a three month position with Jardine Lloyd based on an annual salary of $48,000 per year. When that ended on May 31, 2007, she began looking for other opportunities. By July 2, 2007, she advised the recruitment agencies that she was open to moving anywhere to get a management position, including the Okanagan.

[75] In August Ms. Borsato concluded an employment contract with an insurance agency in Penticton where she began working on September 10, 2007, moving from White Rock to Penticton to take up the position. In her current employment in Penticton, Ms. Borsato is earning $52,000 as of March 1, 2008. Prior to that she was earning $49,010.

[76] In addition to these efforts to find employment, Ms. Borsato renewed her licence and attached it to another White Rock agency, and tried doing insurance commission work in March, April and May of 2007. She also did relief work for a manager at Pacific Rim Insurance with her last day of employment for Pacific Rim occurring on September 1, 2007, when she left to take up the permanent position in Penticton.

[77] In the circumstances, I am of the view that it was appropriate for Ms. Borsato to take part of December and the month of January to recover from the stress of the dismissal, but that she should have begun pursuing employment opportunities more diligently by February of 2007, rather than waiting until March 2007. On that basis, I would reduce the notice period by one month from 16 to 15 months.

[78] The defendant also asserts that Ms. Borsato was "picky" about where she would work, and did not pursue opportunities in North Burnaby, Aldergrove and Chilliwack.

[79] With respect to the North Burnaby opportunity, Ms. Borsato said she was concerned about the commute from White Rock to North Burnaby and noted that the position paid $23 per hour, which was what she was earning in 1992.

[80] In relation to an opportunity in Aldergrove, Ms. Borsato could not recall if she had applied for the position, but there was no evidence led as to the terms of employment. Ms. Borsato indicated that she did not apply for a management position with a Chilliwack agency because it would have been too far to commute every day from White Rock.

[81] I find that Ms. Borsato's decision not to pursue the North Burnaby, Aldergrove and Chilliwack positions was a reasonable one, and does not amount to a failure to mitigate.

7. Damages

[82] Ms. Borsato is entitled to damages based on a notice period of 15 months. Those damages should be calculated based on her salary with the Agency prior to the reduction imposed as of October 1, 2006, plus $10,000 in annual commission earnings. From that sum should be deducted all monies she earned from her mitigation efforts during the notice period.

[83] In addition Ms. Borsato is entitled to recover the money the Agency withheld from her commission payments to recover what it perceived to be overpayments to the plaintiff in August and September of 2006.

[84] The defendant submitted that the plaintiff received a bonus from her current employer in March of 2008 that related to work done in the previous fiscal year. The defendant says this effectively increased Ms. Borsato's salary as of her start date on September 10, 2007, and accordingly should form part of the plaintiff's earnings during the notice period. The plaintiff did not concede that the bonus applied to 2007, and there is no evidence before the Court upon which to make that finding.

[85] Ms. Borsato also claims for the cost of dental work for her husband which would have been covered by her group plan with the Agency had those benefits not been terminated along with her employment. The dental claim is for $2,432.90.

[86] The defendant relies on James G. Knight et al, ***Employment Litigation Manual***, 2d ed., looseleaf (Markham, Ont: LexisNexis, 2007) at p. 7-56 for the proposition that the Agency's liability should be limited to the cost of premiums that Ms. Borsato could have paid for replacement insurance coverage.

[87] In my view this authority as well as David Harris, ***Wrongful Dismissal***, looseleaf (Don Mills, Ont.: Carswell, 1990) at p. 4-116.4 support the principle that the dismissing employer is responsible for actual costs incurred by the employee, including costs of dental work incurred by a dependent who had been covered under the employee's plan. Ms. Borsato is therefore entitled to recover from the defendant that portion of the dental work claim that would have been covered under her dental plan with the Agency.

[88] Counsel advised that they are in a position to calculate the precise amount of the damages payable to Ms. Borsato. If they are unable to agree on the amount, they are at liberty to speak to the issue.

[89] Ms. Borsato is entitled to her costs on Scale B.

"The Honourable Madam Justice Fenlon"