EMPLOYMENT UPDATE

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There have been a number of decisions of note in the past few months. Those include the Court of Appeal's consideration of a judicial review application on the basis of indirect discrimination and a number of decisions from the British Columbia Supreme Court including:

1. A decision relating to entitlement to bonus after termination;
2. A decision regarding the requirements for injunctive relief;
3. A claim relating to breach of confidence;
4. A claim of constructive dismissal; and
5. A decision laying out the principles of just cause and the application of the principle of condonation.

A summary of these decisions follows.

PROOF OF INDIRECT DISCRIMINATION

The British Columbia Court of Appeal considered the appeal of an employer from a decision denying its application for judicial review. The judicial review arose as a result of a decision of the Human Rights Tribunal denying the employer's application to dismiss a complaint on a preliminary basis. The complaint followed the firing of the employee when, shortly after the birth of his first child, he refused to accept an out-of-province assignment that required him to be away for eight to ten weeks. The indirect or adverse effect discrimination alleged was that there had been a change in a term or condition of his employment that resulted in a serious interference with a substantial parental or other family duty of obligation. The employee also alleged direct discrimination asserting that his employment was terminated because he had become a parent and a hearing was proceeding on that allegation. The employer in its application was seeking to limit the hearing to the direct discrimination aspect of the complaint.

The employer when terminating the employee took the position that in refusing to accept the out of town assignment the employee had refused to comply with a clear, lawful and repeated direction and had communicated with management in a flippant, disrespectful and unprofessional way and had been insubordinate. The employee filed his complaint with the Tribunal and the employer applied to have the complaint dismissed pursuant to section 27(1)(b), (c) and (c)(ii) of the *Code*. The Tribunal dismissed the application with respect to adverse discrimination.

In doing so the Tribunal applied *Moore*[1] and *Campbell River*.[2] The Tribunal's conclusions with respect to whether the request to work out of town resulted in a serious interference with a substantial parental or other family duty or obligation, the Tribunal said as follows:

> [37] On the second part of the *Campbell River* test, I note that this case is distinguishable form many of the family status cases that come before the Tribunal in that the work condition at issue is not a question of flexibility in timing of a regular work schedule, but rather a requirement to be physically absent for an extended period of time. *Mr. Suen's required absence from his wife and four month old infant for consecutive 24 hour periods over a number of weeks could be found to constitute serious interference with a substantial parental or other family duty or obligation.*

As is clear from the above, the Tribunal found that the absence itself satisfied the test of serious interference, without more.

Section 59 of the *Administrative Tribunals Act*[3] provides the standard of review to be applied in a judicial review proceeding. That section provides as follows:

> 59 (1) In a judicial review proceeding, the standard of review to be applied to a decision of the tribunal is correctness for all questions except those respecting the exercise of discretion, findings of fact and the application of the common law rules of natural justice and procedural fairness.
>
> (2) A court must not set aside a finding of fact by the tribunal unless there is no evidence to support it or if, in light of all of the evidence, the finding is otherwise unreasonable.
>
> (3) A court must not set aside a discretionary decision of the tribunal unless it is patently unreasonable.
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> (4) For the purposes of subsection (3), a discretionary decision is patently unreasonable if the discretion

(a) is exercised arbitrarily or in bad faith,
(b) is exercised for an improper purpose,
(c) is based entirely or predominantly on irrelevant factors, or
(d) fails to take statutory requirements into account.

(5) Questions about the application of common law rules of natural justice and procedural fairness must be decided having regard to whether, in all of the circumstances, the tribunal acted fairly.

The chambers judge reviewing the Tribunal's decision found that it was not patently unreasonable and dismissed the application for judicial review. The Court of Appeal disagreed, noting that *Campbell River* required satisfaction of a two-part test to establish discrimination on the basis of family status. The Court was asked by Mr. Suen to overrule to reconsider the *Campbell River* test and to apply a less restrictive test. The Court of Appeal declined to do so, noting that it was bound by that decision. It remains to be seen whether the Supreme Court of Canada will have an opportunity to comment on the appropriate test to be applied in family status cases. The *Campbell River* test requires the application to establish:

1. That there had been a change in a term or condition of employment; and
2. That such a change resulted in a serious interference with a substantial parental or other family duty of obligation.

It was this second question that was the basis of the appeal. The Tribunal found that the fact that Mr. Suen had to be away from his wife and child for a number of months itself could be found to constitute serious interference with a substantial parental or other family duty of obligation. The Court of Appeal found this insufficient to satisfy the second aspect of the test, noting that there are many parents who are required to be away from home for extended periods of time due to work commitments and that these parents continue to meet their obligations to their children. There was no evidence led by Mr. Suen that indicated that he would be unable to meet his parental obligations. The only evidence led established that he would be absent, not that his child would not be well cared for in his absence. On this basis, the Court of Appeal allowed the appeal.

ENTITLEMENT TO BONUS

The decision in *Thoma v. Schaefer Elevator Components Inc.*[4] provides a great summary of the factors that will be taken into consideration in determining entitlement to a bonus after termination. Mr. Thoma was the most senior employee of Schaefer, being hired to set up and run one of their production facilities. He signed an employment contact on May 14, 2013. The employment agreement provided that in the event of termination he would be provided with "contractually agreed remuneration" for six months. He was terminated in October 2017 and was paid six months salary. He brought this action, which proceeded by way of summary trial, on the basis that the severance pay provided to him did not fully compensate him for all forms or remuneration to which he was entitled. He claimed:

(i) His annual bonus for the last year of employment, plus a pro-rated bonus for the severance period;
(ii) Outstanding or unpaid vehicle expenses;
(iii) Unpaid medical and dental expenses; and
(iv) Compensation for accrued vacation pay.

The employment agreement provided that he would receive an annual bonus based upon achievement of agreed upon targets. He was terminated in October 2017 and was not paid a bonus for 2017. Mr. Thoma claimed that he was entitled to the 2017 bonus because it was an integral part of his wage structure and, based on past conduct, he had a reasonable expectation that the employer would not exercise its discretion against him by declining to pay it.

The employer said that Mr. Thoma was responsible for putting forward a proposal each year after which targets or goals would be set. At the end of the year they would assess whether those targets and goals had been met and if they were a bonus would be paid out. The employer says that in 2016 they had concerns with Mr. Thoma's work performance and no goals were met or set but they exercised the discretion to pay the full bonus in hopes that 2017 would be a better year. They say that it then became apparent in 2017 that Mr. Thoma was not making any real progress towards making the production facility operational and that a decision was made to terminate his employment. They also made a decision to not pay a bonus in 2017 and to not included a pro-rate bonus as part of his severance payment. The court described the

question before it as being whether Mr. Thoma had established a contractual right to the bonus, with the burden being on Mr. Thoma to establish such a contractual right.

The court referred to the decision in *Gillies*[5] as setting out the four factors to be considered in deciding whether the employee could be said to have formed a reasonable expectation of entitlement to the bonus, and therefore a contractual right to the payment of the bonus. Those factors are as follows:

1. Whether a bonus was received in prior years;
2. Whether bonuses were required in order to remain competitive with other employers;
3. Whether bonuses were historically awarded and the employer had ever exercised discretion against the employee; and
4. Whether the bonus was a significant component of the employee's overall compensation.

The employer argued that the *Gillies* factors are not relevant when the terms of the bonus plan were in writing. The court noted that in cases where the terms of the bonus plan are not spelled out in writing, it is reasonable to look at the conduct of the parties in determining whether the employee has formed a reasonable expectation to receive the bonus as part of his or her remuneration. Further it is a reasonable expectation on the part of the employee that the manner in which the employer's discretion under the contract will be exercised will be fair and transparent.[6] The Court concluded that even when the terms of the bonus plan are formalized in writing, it is appropriate to consider the *Gillies* factors in determining entitlement to bonus.

From the analysis of the trial judge, it appears that the determinative factor in deciding that Mr. Thoma was entitled to payment of the bonus for 2017 was the payment that was made in 2016 despite Mr. Thoma not achieving set goals. With respect to this, the court said:

> [25]…This may be so, but from the perspective of the employee, the payment of the full amount of the bonus when no targets and goals were set sends the message that the employer will not exercise its discretion against the employee even where the parties have not worked together to set goals and targets. If the company had decided to exercise its discretion in favour of paying the full bonus despite the view that it had not been earned, with the expectation that Mr. Thoma would be held to a different standard in the following year, it would have been proper for this expectation to be formally communicated to Mr. Thoma, in writing, to make the process for determining entitlement to the bonus transparent and fair to Mr. Thoma. If the company had put in place a fair and transparent process of formally communicating its future expectations, then Mr. Thoma would have been on notice that if he wished to receive his bonus in 2017, he would have to press the employer for the establishment of clear performance markers, and then do his best to meet them. This did not happen.

The Court then applied the *Gillies* factors and concluded that the bonus was an integral part of Mr. Thoma's remuneration and that the refusal to pay it in 2017 was a breach. The Court emphasized that this decision was not based on Mr. Thoma's subjective interpretation of the contract rather it was based on the reasonable expectation of the manner in which the employer would exercise its discretion under the contract to pay the bonus.

The Court concluded that although Mr. Thoma was entitled to a pro-rated bonus for the period of time that he was employed in 2017, he was not entitled to a pro-rated bonus for the notice period. The Court's conclusions with respect to entitlement to bonus during the notice period are as follows:

> [26]…And unlike the cases of wrongful dismissal or failure to give reasonable notice as discussed in the preceding section, in Mr. Thoma's case employment came to an end lawfully, in accordance with the terms of his written contract. Since he was not wrongfully terminated or terminated without reasonable notice, he was not wrongfully deprived of an opportunity to earn an annual bonus. Mr. Thoma had no contractual entitlement to a bonus beyond 31 October 2017.

When he was terminated, Mr. Thoma was paid six months' salary as required by the employment agreement. The trial judge relies on the fact of no breach of the employment agreement in termination as the basis for denying Mr. Thoma the bonus during the notice period. I would disagree with the conclusion of the trial judge that Mr. Thoma was not deprived of an opportunity to earn an annual bonus in 2018. He was not working and therefore had no opportunity to earn the bonus. Although this analysis and conclusion seems like one which should be appealed, given that the amount at issue is only approximately $8,000 it is unlikely that this aspect of the judgment will be appealed. I would have expected that the trial judge would apply the *Gillies* factors to the assessment of whether a bonus would be paid during the notice period rather than considering only the question of whether there was a breach of the employment agreement.

INJUNCTION

The Court's decision in *ADP Distributors Inc. v. Davidson*[7] provides an excellent summary of the requirements for obtaining an interim injunction in response to an alleged breach of a non- competition and non-solicitation clause. In *ADP* the employer alleged that its previous employee, Mr. Davidson, was in breach of the non-competition and non-solicitation clause in his employment agreement as he was competing with and soliciting customers of ADP. The Court said that the test for determining whether an interlocutory injunction will be granted is the test as set out in *RJR*.[8] That three-part test requires the applicant to show that:

a) There is a serious question to be tried;
b) The applicant will suffer irreparable harm if an injunction is not granted; and
c) The balance of convenience favours the granting of an injunction.

With respect to the first stage of the test, the threshold is low, however that threshold is modified when an injunction would in effect amount to a final determination of the action. This will be found to be the case "when the right the applicant seeks to protect can only be exercised immediately or not at all, or when the result of the application will impose such hardship on one party as to remove any potential benefit from proceeding to trial". In those cases the threshold is raised. In circumstances where the interlocutory injunction is sought on the basis of a restrictive covenant in an employment agreement and the injunction would inhibit the ability of the defendant to earn a living, the applicant must establish a strong prima facie case.[9]

In determining whether the applicant has established a strong prima facie case the court will consider the following questions:

1. whether there is evidence that the employee is competing and soliciting;
2. whether the applicant can establish a strong prima facie case that the restrictive covenant is enforceable.

With respect to the question of whether a restrictive covenant is enforceable there are several factors that will be taken into consideration. A restrictive covenant will be enforceable only if it is reasonable between the parties and with reference to the public interest.[10]

The party seeking to rely on a restrictive covenant in an employment contract must show that the restraint has the following characteristics:

a) it protects a legitimate proprietary interest of the employer;
b) the restraint is reasonable between the parties in terms of:
    (i) temporal length;
    (ii) spatial area covered;
    (iii) nature of the activities prohibited; and
    (iv) overall fairness;
c) the terms of the restraint are clear, certain and not vague; and
d) the restrain is reasonable in terms of the public interest with the onus on the party seeking to strike out the restraint.[11]

An ambiguous restrictive covenant is prima facie unenforceable because the party seeking enforcement will not be able to demonstrate the reasonableness of the covenant in the face of an ambiguity.[12]

The proprietary interest aspect of the test was satisfied in *ADP* on the basis that Mr. Davidson had knowledge of ADP's customer base, gained over his 24 year employment with ADP.

The trial judge found that the employer failed to satisfy the court of the reasonableness of the restrictive covenants. The factors that led to this conclusion are summarized at paragraph 61 as follows:

> [61] I agree with Mr. Davidson that ADP has not satisfied the onus to show why the 150 km radius is reasonable. I agree that the "principal place of busi-

> ness" is ambiguous and there is no evidence to show why restrictions at other locations is reasonable. I agree the "business of the Corporation" Is not clearly defined and too broad. There is no evidence as to why it would be reasonable for Mr. Davidson to be prohibited from selling products that are not related to engines or engine parts. The biggest difficulty is the non-solicitation clause. I agree with Mr. Davidson that it is in effect a 12-month otherwise boundless non-competition clause and there is no evidence why that is reasonable. In my view, there are reasonable arguments as to why it would be against the public interest to enforce such a clause. I agree "products competitive with those of the Corporation" is not clear. Further, ADP has not established why it would be reasonable to restrict Mr. Davidson to all competitive products when he was only involved in engines and engine parts.

The final step in the analysis relates to public interest and the trial judge again concluded as noted above that there are reasonable arguments as to why it would be against the public interest to enforce the clause.

Although the Court found that ADP had not established a strong prima facie case and it was therefore not necessary to consider the other two criteria for an interlocutory injunction, the Court did make some comments that are of assistance in understanding the application of these two criteria. With respect to the irreparable harm criteria, the Court noted that this refers to the nature of the harm suffered, rather than its magnitude. Irreparable harm is harm which cannot be cured, usually because one party cannot collect damages from the other.[13] A clause in the employment agreement acknowledging that a breach of the non-competition and non-solicitation clause could lead to irreparable harm is not conclusive of the question. As noted in *Ipsos*:

> [85] The Ipsos plaintiffs rely heavily on Reid's acknowledgement in section 10.1 of the Employment Agreement that in the event of his breach of the covenants, damages would be inadequate. Nevertheless, a provision in an agreement that a breach will constitute irreparable harm is not conclusive of the question. The adequacy of the remedy is for the court to decide, having regard to all of the circumstances of the case. The provision in the agreement is only one of those circumstances. It does not obviate the need for the applicant to satisfy the court that it is entitled to the extraordinary equitable relief of an injunction: *Unisource Canada Inc. v. Network Paper and Packaging Ltd.,* 2000 BCSC 396; *Jet Print Inc. v. Cohen* (1999), 43 C.P.C. (4th) 123 (Ont. S.C.J.); *FCC Canada Inc. v. St. Lawrence Corp.,* [2000] O.J. No. 4387 (S.C.J.) [*FCC Canada].*

With respect to the balance of convenience criteria the Court quoted from the decision in *Corporate Images Holdings Partnership v. Satchell*[14] in which the court reviewed factors that should be considered under the balance of convenience stage of the injunction test:

> In *C.B.C. v. C.K.P.G Television Ltd.* (1992), 64 B.C.L.R. (2d) 96, the Court of Appeal listed the factors that should be considered in assessing the balance of convenience:
>
> (a) the adequacy of damages as a remedy for the applicant if the injunction is not granted, and for the respondent if the injunction is granted;
> (b) the likelihood that if damages are finally awarded they will be paid;
> (c) the preservation of contested property;
> (d) other factors affecting whether harm from the granting or refusal of the injunction would be irreparable;
> (e) which of the parties has acted to alter the balance of their relationship and so affect the status quo;
> (f) the strength of the applicant's case;
> (g) any factors affecting the public interest; and
> (h) any other factors affecting the balance of justice and convenience.

The Court found that with respect to Mr. Davidson, the balance of convenience did not favour an injunction. The factors that were taken into consideration in reaching that conclusion included the following:

- that ADP had not established that damages would not be an adequate remedy
- that ADP had not established that if damages are awarded they will not be paid;
- that Mr. Davidson will suffer significant harm if the injunction is granted;
- that ADP has not established a strong prima facie case;
- that the application for an injunction was not brought immediately after ADP became aware that Mr. Davidson had commenced work with Diesel;
- that there is no evidence of a compelling public interest in favour or against an injunction other than the general public interest in not restricting employment and competition, and respecting the rights of parties to make their contractual arrangements.

This case serves as a road map for both employers seeking to obtain injunctions and for employees seeking to avoid them. It also demonstrates the high bar that must be satisfied to have a restraint on an individual's ability to work enforced.

BREACH OF CONFIDENCE

The Court also had the opportunity to consider the requirements for a claim of breach of confidence, which arose as a result of the lack of contractually defined post-employment obligations and resulted in the previous employer seeking injunctive relief to prevent their past employee from competing. The decision involved an application on the part of the employee to dismiss the plaintiff employer's claim on a summary basis, so did not involve a decision on the merits of the case itself. The decision however provided a summary of the law with respect to this type of claim.

The plaintiff employer alleged that the defendant made impermissible use of a customer list to prospect for work for his new enterprise. The defendant's position was that the plaintiff was bound to lose as he owed no duty of any sort that would prevent him from competing with his former employer. The employer sought an injunction preventing the use of confidential information and in the alternative an accounting of profits and damages. The case was based on an allegation that the defendant had breached a duty of confidence owed to his former employer.

The starting point for the analysis is the proposition that an employee is free to compete against a former employer, subject to the continuing duty to not misuse confidential information, as well as any duties arising out of fiduciary duty or restrictive covenant. Our Courts are hesitant to restrict former employees because of societal values of free competition and the freedom to pursue new opportunities. That principle was enunciated and explained by Hall. J.A., in *Barton,* as follows:

> Clearly, an employee has duties to a present employer not to divulge trade secrets or to work against the interests of his or her employer but the duty is not just limited to current employment. After leaving employment, an employee may be obligated not to pursued certain activities to the detriment of the former employer. For instance, it has bene usually reckoned to be unfair conduct to permit a former employee to take with him or her customer lists to use for solicitation of business or to divulge trade secrets or to see to appropriate maturing business opportunities of the former employer. On the other hand, I suppose to avoid what might otherwise be a condition of almost involuntary servitude, it has long been held that an employee is free to compete for custom with a former employer. As usual in human affairs, the difficulty in in the details and it is often difficult to know where to draw the line.

The Court commented that in this particular case, the impression is that the breach of confidence case is thin. However, given that it is a close call, the Court concluded that this was not a case that deserved to be screened out by summary judgment. Again this decision demonstrates the reluctance of our Courts to curtail employment opportunities.

CONSTRUCTIVE DISMISSAL

The British Columbia Supreme Court had the opportunity to review the law of constructive dismissal in the case of *Baraty v. Wellons Canada Corp.*[17] Mr. Baraty alleged that he had been constructively dismissed for two reasons:

1. He considered his position of chief estimator and head of the estimating department was eroded to the point where he was no longer a manager and the department no longer existed; and
2. That the work environment had been rendered intolerable as a result of bullying and harassment with another employee of Wellons and the employer's failure to deal with the workplace difficulties between the two men.

The leading case on the law of constructive dismissal is the Supreme Court of Canada's decision in *Potter.*[18] In *Potter,* Wagner J. described the legal principles underlying a claim for constructive dismissal as follows:

> [30] When an employer's conduct evinces an intention no longer to be bound by the employment contract, the employee has the choice of either accepting that conduct or changes made by the employer, or treating the conduct or changes as a repudiation of the contract by the employer and suing for wrongful dismissal…Since the employee has not been formally dismissed, the employer's act is referred to as "constructive dismissal". The word "constructive" indicates that the dismissal is a legal construct: the employer's act is treated as a dismissal because of the way it is characterized by the law…
>
> [31] The burden rests on the employee to establish that he or she has been constructively dismissed. If the employee is successful, he or she is then entitled to damages in lieu of reasonable notice of termination… the purpose of the inquire is to determine whether the employer's act evinced an intention no longer to be bound by the contract.
>
> [32] Given that employment contracts are dynamic

> in comparison with commercial contracts, courts have properly taken a flexible approach in determining whether the employer's conduct evinced an intention no longer to be bound by the contract…

The Supreme Court in *Potter* identified two different types of constructive dismissal:

> 1. That of a single unilateral act that breaches an essential term of the contract. The test is whether there has been a breach of the employment contract and whether that breach of was such a nature that it substantially altered the contract; and
> 2. A series of acts that, taken together, show that the employer no longer intends to be bound by the contract. The test is whether there has been "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". Rather, "the focus is on whether a course of conduct pursued by the employer evinces an intention no longer to be bound by the contract."

Mr. Baraty argued that he was constructively dismissed under both categories. He argued that an email advising of changes coming to his department substantially changed his employment. He also argued that the employer failing to take steps to prevent him from being subject to an intolerable working environment and a demonstrated desire to have him retire earlier than anticipated combined to make him feel unwelcome, which he alleged as conduct evincing an intention on the part of the employer that it no longer intended to be bound by the employment contract.

With respect to the first allegation, as the change had not yet occurred, the Court considered the law of anticipatory breach, confirming that it applies to employment contracts. The Court noted that the employee does not have to wait until the breach has actually occurred to allege breach. As noted in *Potter*:

> [149]…An anticipatory breach "occurs when one party manifests, through words or conduct, an intention not to perform or not to be bound by provisions of the agreement that require performance in the future"….When the anticipated future non observance relates to important terms of the contract or shows an intention not to be bound in the future, the anticipatory breach gives rise to anticipatory repudiation. The focus in such cases is on what the party's words and/or conduct say about future performance of the contract. For example, there will be an anticipatory repudiation if the words and conduct evince an intention to breach a term of the contract which, if actually breached, would constitute repudiation of the contract.

In analyzing whether the change to Mr. Baraty's role amounted to constructive dismissal, the Court reviewed four previous decisions.

1. *Rampre v. Okanagan Halfway House Society*[19] - the employer had discussions with the employee about amending his salary and/or changing his position or even retirement as due to budget constraints it had to reduce operational costs. On the day prior to the changes coming into effect, the employee claimed that he had been constructively dismissed. The employer responded by putting the changes on hold and attempting to find a resolution with the employee. The Court found that although the employer had announced its intention to make fundamental changes, it reversed this and ultimately made no changes and therefore there was no constructive dismissal. The Court found that when the employer reversed its decision the employee should have returned to work.
2. *MacGregor v. Lethbridge College*[20] - the employee claimed constructive dismissal when an announcement was made that his department was being restructured. The employee was not told the details of his new role, rather was told that the role would be determined at a future time. The Court found that the announcement of the changes amounted to an anticipatory breach because they were presented as a *fait accompli.* The Court concluded that the announced restructure demonstrated that the employer no longer intended to be bound by the employment contract.
3. *Trueman v. Abbotsford (City)*[21] – at issue in this case was a change in the manner in which an employee is to carry out his or her core duties. The Court concluded that this does not amount to a constructive dismissal. The Court considered whether the changes amounted to "substantial changes to essential terms" of the employment contract and concluded as follows:

   > [99]…a change in the manner in which Mr. Trueman is to carry out his employment responsibilities, as opposed to a change in those employment responsibilities themselves, cannot constitute a fundament change to his contract of employment.

   The claim of constructive dismissal was dismissed.
4. *Robbins v. Vancouver (City)*[22] – at issue was a reduction in some of the employee's activities that she enjoyed, and which she perceived as giving her some "status" but were not a primary function of her role. The Court found that the changes did not constitute a fundamental breach of the employment contract and concluded that the plaintiff had acted "precipitously" by leaving her employment without waiting to see how the restructuring played out and the role she would continue to play.

From these cases it is clear that for anticipatory breach to have occurred there has to be a clear indication that the employer does not intend to perform or be bound by the contract. Contemplation or discussion of a reorganization or a restructuring prior to a decision being made is not sufficient to give rise to anticipatory breach and constructive dismissal. As well the changes must amount to substantial changes to the essential terms of the employment contract. With respect to Mr. Baraty the Court found that his role as chief estimator was not eliminated, nor was it fundamentally changed. Mr. Baraty was therefore not entitled to treat his contract of employment as having been breached by the employer.

With respect to the second ground of constructive dismissal claimed, that the actions of the employer were such that a reasonable person would conclude that the defendant no longer intended to be bound by the terms of the aggregation of actions that led him to conclude that he was no longer wanted, the Court provided a thorough analysis of the application of the applicable test. The starting point of that analysis is the decision of the Ontario Court in *Stamos*.[23] This decision discussed the employer's obligations regarding the workplace. The court held that an employer is not only "obliged not to treat an employee in a manner that renders competent work performance impossible or continued employment intolerable" but also that an "employer has a broader responsibility to ensure that the work environment does not become so hostile, embarrassing or forbidding as to have the same effect". An employer has a duty to "see that the work atmosphere is conducive to the well being of its employees". The Court went on to hold that the failure to comply with this duty can result in a repudiation of the employment contract, or constructive dismissal.

In *Danielisz*[24] the Court made clear that the test for establishing that a workplace has been rendered intolerable is a high one and an objective one. At para. 78 the Court said as follows:

> [78] It is clear that for negative behavior 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.

The Court described the application of the test in *Baraty* as follows at paragraph 132:

> [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].

The Court concluded that Mr. Baraty had failed to establish that the employer had subjected him to working conditions that evinced an intention on their part to not be bound by the employment contract. This conclusion was based on the following:

1. The mere fact of disagreements between Mr. Baraty and another estimator does not render the workplace to be intolerable;
2. Mr. Baraty's frequent demands for formal discipline of his co-worker were disproportionate to the alleged transgressions;
3. The employer did not rationalize or condone behavior on the part of the co-worker that was inappropriate;
4. Inquiring as to Mr. Baraty's plans regarding retirement was not inappropriate given the significant difficulty they had experienced in finding an appropriate employee when Mr. Baraty was hired and because the employer wanted to ensure that it had a plan in place once Mr. Baraty did retire, not because they wanted him to leave sooner;
5. Both Mr. Baraty and his co-worker bore some responsibility for their difficult relationship. The Court concluded that while the working environment was strained due to the antagonisms between the two of them, it had not deteriorated to the point that it rendered performance of Mr. Baraty's job objectively intolerable.

JUST CAUSE

The Court considered a claim by an employer of just cause when it terminated an employee on the basis of an alleged breach of its "Side Jobs and Conflict of Interest Policy". In *Booton v. Synergy Plumbing and Heating Ltd.*[25] the 42 year old dismissed employee was a plumber. The evidence included that in general in the plumbing business it was not unusual to do "side job" or work after regular hours for someone who was not a customer of the company. The plaintiff had done side jobs and the employer was aware of this. There was no evidence that the Conflict of Interest Policy was brought to the plaintiff's attention or that he was warned in any way to not do side jobs. The termination was a result of the employer finding out that the plaintiff had done a significant of "side work" for an existing customer of the company, and included the plaintiff's use of the company to obtain permits.

The principles applicable to assessing whether just cause exists are well known. They involve examining the circumstances surrounding the misconduct that purportedly constitute cause and an examination of the degree of misconduct using a contextual approach including examination of the particular employment contract and the status of the employee.[26] Proportionality between the disciplinary action and the severity of the alleged misconduct is of particular importance.[27]

With respect to an allegation that breach of a company policy constitutes cause for dismissal, Griffin J. (as she then was) in *Hawkes* listed the facts that must be established for the breach to constitute cause at para. 71.

In *Poirier v. Wal-Mart Canada Corp.,* 2006 BCSC 1138 (CanLII), at para. 61, the court cited *Roney v. Knowlton Realty Ltd.* (1995), 1995 CanLII 3132 (BCSC), 11 C.C.E.L. (2d) 205 (B.C.S.C.) at para. 8 for the proposition that an employer must establish certain facts about a company policy in order to rely on an allegation that the employee breached the policy as cause for dismissal, namely:

(1) it has been distributed to employees;
(2) it is known to the employee affected;
(3) it is unambiguous;
(4) it is consistently enforced by the company;
(5) employees are warned that they will be dismissed should they breach the rule or policy;
(6) it is reasonable; and
(7) the breach thereof is sufficiently serious to justify dismissal.

The Court found that Mr. Booton's breach of the Conflict of Interest policy did not constitute just cause because the policy was not given to Mr. Booton, nor was it discussed with him although at the time that he was hired it was contained in a binder that was kept by his desk together with many other binders

Just cause can be rebutted by evidence of condonation by an employer. In *Poirier,*[28] the Court wrote:

> [48] Just cause may be rebutted by evidence of condonation by an employer. In *McIntyre v. Hockin* (1989), 16 O.A.R. 498 (Ont. C.A.) the principle of condonation was explained at paragraph 13:
>
> > When an employer becomes aware of misconduct on the part of his servant, sufficient to justify dismissal, he may adopt either of two courses. He may dismiss, or he may overlook the fault. But he cannot retain the servant in his employment, and afterwards at any distance of time turn him away…If he retains the servant in his employment for any considerable time after discovering his fault, that is condonation, and he cannot afterwards dismiss for that fault without anything new.
>
> [49] Condonation may take various forms, such as a failure to address alleged misconduct. In *Jalan v. Institute of Indigenous Government,* 2005 BCSC 590 at 78, the employer's failure to investigate the alleged misconduct was found to constitute condonation, and the employer was accordingly unable to establish just cause.
>
> [50] Condonation has also been found where, the employer fails to discipline other employees engaging in similar conduct (*Varsity Plymouth Chry=sler (1994) Ltd.*

v. Pomerleau (2002) 5 Alta. L.R. (4th) 187, 2002 ABQB 512); the employer provides the employee in question with favorable performance reviews (*Van Aggelen v. I.C.G. Gas Ltd.,* [1998] B.C.J. No. 2066 (S.C.)(Q.L.)*; Geluch v. Rosedale Golf Assn., supra)* or, the employer fails to warn the employee in question (*Baumgartner v. Jamieson* (2004), 37 C.C.E.L. (3d) 120, 2004 BCSC 1540; *Geluch v. Rosedale Golf Assn., supra).*

The Court concluded that condonation had occurred in the case at bar. There was no evidence that the conflict of interest policy was consistently applied or that other employees who had done side jobs had been disciplined for breaching the policy. As well, the court found a requirement to warn of dismissal in the event of breach because the policy stated "may be subject to immediate dismissal". This decision demonstrates the difficulties employers will face when they allege just cause on the basis of breach of a company policy.

1. Moore v. British Columbia, 2012 SCC 61, [2012] 3 S.C.R. 360
2. *Health Sciences Assoc. of BC v. Campbell River and North Island Transition Society,* 2004 BCCA 260, 240 D.L.R. (4th) 479
3. S.B.C. 2004, c. 45
4. 2019 BCSC 100
5. *Gillies v. Goldman Sachs Canada Inc.,* 2000 BCSC 355
6. *Bains v. UBS Securities Inc.,* 2016 ONSC 5362 (affirmed 2018 ONCA 190)
7. 2019 BCSC 219
8. *RJR-MacDonald Inc. v. Canada (Attorney General),* [1994] 1 S.C.R. 311 at 334.
9. *Ipsos S.A. et al. v. Angus Reid et al,* 2005 BCSC 1114 at para. 69.
10. *Valley First Financial Services Ltd., v. Trach,* 2004 BCCA 312 at para. 44.
11. *Aurum Ceramic Dental Laboratories Ltd. v. Hwang,* [1998] B.C.J. No. 190 (S.C.) at para. 11
12. *Sahfron v. KRG Insurance Brokers (Western) Inc.,* 2009 SCC 6 at para. 27
13. *RJR* at para. 341
14. 2008 BCSC 525 at para. 49
15. *RBC Dominion Securities Inc. v. Merrill Lynch Canada Inc.,* 2008 SCC 54
16. *Barton Insurance Brokers Ltd. v. Irwin,* 1999 BCCA 73 at para. 39
17. 2019 BCSC 33
18. *Potter v. New Brunswick Legal Aid Commission,* [2015] 1 S.C.R. 500.
19. 2018 BCSC 992
20. 2016 ABPC 72
21. 2006 BCSC 1820
22. 2014 BCSC 872
23. *Stamos v. Annuity Research & Marketing Service Ltd.,* [2002], O.J. No. 1865
24. *Danielsiz v. Hercules Forwarding Inc.,* 2012 BCSC 1155
25. 2019 BCSC 276
26. *McKinley v. BC Tel,* 2001 SCC 38 at paras. 33 – 34 and *Hawkes v. Levelton Holdings Ltd.,* 2012 BCSC 1219 (CanLII), aff'd 2013 BCCA 306.
27. *McKinley,* para. 53
28. *Poirier v. Wal-Mart Canada,* 2006 BCSC 1138 at paras. 48 - 50