

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Nunez-Shular v. Osoyoos Indian Band*,
2025 BCSC 491

Date: 20250319
Docket: S45277
Registry: Penticton

Between:

Melinda Nunez-Shular

Plaintiff

And

Osoyoos Indian Band

Defendant

Before: The Honourable Justice Gropper

Reasons for Judgment

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Place and Dates of Trial:

Penticton, B.C.
August 15-16 & 19-23, 2024
September 19-20, 2024

Place and Date of Judgment:

Penticton, B.C.
March 19, 2025

Table of Contents

INTRODUCTION 4

FACTUAL BACKGROUND..... 4

 Employment with the OIB 4

 Job Posting for Trainee 5

 Ms. Holmstrom is Hired 7

 Medical Leave in 2018 9

 Ms. Holmstrom is Appointed Tax Administrator..... 9

 Graduated Return to Work 9

 Attempts to Contact OIB Representative 10

 Commencement of GRTW..... 11

 Supervision and Work Duties..... 12

 Conclusion of the GRTW 16

 Aftermath of the GRTW 18

 Medical Evidence 19

ANALYSIS..... 21

 Credibility..... 21

 Ms. Lavallee 22

 Determination of Ms. Lavallee’s credibility 23

 Ms. Baptiste 24

 Determination of Ms. Baptiste’s Credibility 25

 Ms. Nunez-Shular 26

 Determination of Ms. Shular-Nunez’s Credibility 27

 The Non-disclosure of the OIB Band Council Resolution 27

 Ms. Nunez-Shular’s Performance as an Employee 29

 Constructive Dismissal 30

 Legal Framework 30

 Was Ms. Nunez-Shular Constructively Dismissed?..... 33

 First Branch of the Test 33

 Second Branch of the Test 36

 Damages 37

 Legal Framework 37

 What Constitutes Reasonable Notice in this Case?..... 39

Wallace Damages.....	40
Mitigation of Damages	41
SUMMARY AND CONCLUSION.....	41

Introduction

[1] The plaintiff, Melinda Nunez-Shular, seeks damages against the defendant, the Osoyoos Indian Band (OIB), her former employer, for constructive dismissal from her employment.

[2] To succeed in her claim, Ms. Nunez-Shular must prove, on a balance of probabilities, that the OIB, (a) committed a single unilateral act that breaches an essential term of the employment contract; or (b) through a pattern of conduct or series of acts, evidenced an intention to no longer be bound by the employment contract; and (c) caused her damages as a result. (see: *Potter v. New Brunswick Legal Aid Services Commission*, 2015 SCC 10.)

[3] The OIB asserts that Ms. Nunez-Shular was not constructively dismissed, but that she quit her job. As a result, she is not entitled to damages.

Factual Background

Employment with the OIB

[4] Ms. Nunez-Shular began her employment as a receptionist at the OIB on April 1, 1999. In 2004, she became an executive assistant to Chris Scott, the then band administrator and the OIB Chief Clarence Louie and Brian Titus, then CFO of the OIB.

[5] Ms. Nunez-Shular was directed by Brian Titus to learn about property tax matters. Under the sponsorship of the OIB, she attended Thompson Rivers University in Kamloops where she completed the first four-year program on First Nations property taxation. After completion, Ms. Nunez-Shular became certified as one of the First Nations tax administrators in Canada. On April 27, 2009, she became the first OIB First Nations tax administrator. Ms. Nunez-Shular was appointed retroactively in 2011 when the OIB enacted a Band Council Resolution, as required, and created the position.

[6] The tax administrator is one of three specified officers under the OIB financial laws, that are unique to the OIB. The tax administrator can assign his or her duties or functions to another officer, employee, contractor or agent of the First Nation.

[7] The work of the tax administrator increased over the years, due to the growing number of properties subject to property taxation on OIB lands. Ms. Nunez-Shular estimated that the number of properties subject to taxation doubled a few times after she first assumed the role as First Nations tax administrator in 2009. In 2015, Ms. Nunez-Shular emailed Leona Baptiste, the human resources director of the OIB, requesting that an employee be hired during the busy tax season (May through July of each year) when the tax notices are prepared and sent out and the payments are received and processed.

[8] In May 2016, a job posting was placed in the OIB newsletter. Jamie Louie was hired to assist Ms. Nunez-Shular in the Tax Department during the busy tax season from May through to the end of July of that year. Ms. Louie assisted Ms. Nunez-Shular again in 2017. Erica Louie was also seconded from the Lands Department of the OIB to assist in the Tax Department in 2016 and 2017. Ms. Nunez-Shular considered that their assistance was helpful and she expected them to help again in the busy tax season of 2018.

[9] Ms. Nunez-Shular unexpectedly went on medical leave in mid-July 2017 for emergency surgery. When she was fully recovered, she returned to work on September 25, 2017. She resumed her position as tax administrator at her usual desk in the Tax Department.

Job Posting for Trainee

[10] When she returned to work, Ms. Nunez-Shular learned of a job posting in the OIB newsletter for the position of tax administrator trainee. No one at the OIB had discussed the posting of this new position with her before or during her medical leave of absence in 2017. Ms. Nunez-Shular found this to be unusual as postings within the Tax Department were discussed with her as the head of the Tax Department. Ms. Baptiste confirmed that postings are usually discussed with the

head of the department before posting the job and that the head of the department would normally be asked to make suggestions to improve the details of the posting.

[11] On August 5, 2017 Ms. Baptiste first circulated the initial draft job posting for the trainee position to Chief Louie and Joyce Lavallee, who was at the time the controller of the OIB Development Corporation (OIBDC). She agreed that contrary to the usual process, she did not forward that initial draft job posting to Ms. Nunez-Shular. Ms. Nunez-Shular was also excluded from the related email discussion among Chief Louie, Ms. Lavallee, and Ms. Baptiste.

[12] On October 5, 2017, the job posting along with the job description and training package were finalized, and despite her having returned to work as the tax administrator and head of the Tax Department, Ms. Nunez-Shular did not receive these documents. They were sent by Ms. Baptiste to Chief Louie and Ms. Lavallee before the posting was placed in the OIB newsletter.

[13] When Ms. Nunez-Shular learned of the job posting for a trainee in her department, she spoke to her direct manager, Chief Louie. She asked whether the posting is for Jamie Louie's job or for hers, and began to wonder if the OIB's plan was to replace her. Chief Louie assured Ms. Nunez-Shular that the new employee would be "a floater, assisting her in her busy times and the accounting department during their busy times." Ms. Nunez-Shular accepted Chief Louie's explanation.

[14] On the day that the trainee interview was to take place in October 2017, Ms. Nunez-Shular was asked to participate. She was unable to participate on late notice as she had already committed to meeting with staff from the BC Assessment Authority, who had travelled from Kelowna to meet with her at the OIB offices and she had arranged for them to travel around the Reserve lands to identify potential new taxable leaseholds.

[15] One of the applicants to the job posting was Alanea Holmstrom, who is Ms. Baptiste's sister. Ms. Baptiste declared herself to be in a conflict of interest when Ms. Holmstrom applied for the job. In her place, Ms. Lavallee was hired as a part-time

employee in the Human Resources Department of the OIB to deal with Ms. Holmstrom and any issues arising from the Tax Department.

Ms. Holmstrom is Hired

[16] In November 2017, Ms. Nunez-Shular was advised that Ms. Holmstrom was hired for the trainee position. She began her employment with training at the OIB.

[17] Ms. Lavallee confirmed that she did not tell Ms. Holmstrom that she was a “floater”. She understood that Ms. Holmstrom was training to be a tax administrator and that Ms. Holmstrom shared that understanding.

[18] Ms. Lavallee enrolled Ms. Holmstrom in an accounting course two to three days a week. Ms. Holmstrom was also working with Dianne Kulyk and Elise Petersen in the accounting department for two days each week. Ms. Holmstrom had one day a week for training in the Tax Department with Ms. Nunez-Shular.

[19] Early in 2018, Chief Louie exerted pressure to “hurry up” and train Ms. Holmstrom on property tax related matters. Chief Louie emailed Ms. Petersen on March 16, 2018 asking her why she had not trained Ms. Holmstrom on taxation and suggested that they find a trainer from an outside source. In her March 2018 email responding to Chief Louie, Ms. Petersen said that she would do what she could to help train Ms. Holmstrom on tax matters; that Ms. Holmstrom will need to be available more than one day a week to work in the Tax Department; and that Ms. Nunez-Shular would need to train her in the Tax Department too. Ms. Petersen emphasized that OIB management needed to take steps to “reduce the tension” in the Tax Department.

[20] Ms. Nunez-Shular did not receive copies of Chief Louie’s or Ms. Petersen’s emails. Despite that, Ms. Nunez-Shular was aware of the pressure upon her to train Ms. Holmstrom that continued to build throughout March 2018. She and Ms. Holmstrom had a heated exchange on March 15, 2018.

[21] Ms. Nunez-Shular did not know that on March 17, 2018, Ms. Holmstrom sent an email to Ms. Lavallee complaining about Ms. Nunez-Shular. Specifically she complained about “lateral violence” with no repercussions; not receiving clear direction; not being an assistant at the beck and call of others; subject to derogatory comments and other complaints. These complaints were clearly about Ms. Nunez-Shular. Ms. Holmstrom said that she would not be dictated to by the tax administrator. She added that if Ms. Nunez-Shular is not able to train her, she will take her training elsewhere.

[22] Ms. Nunez-Shular was not copied on Ms. Holmstrom’s email. Ms. Holmstrom did not make her complaints known to Ms. Nunez-Shular. Ms. Lavallee did not discuss these complaints with Ms. Nunez-Shular or ask for her version of events. Ms. Lavallee continued to field complaints from Ms. Holmstrom about Ms. Nunez-Shular. None of these complaints were shared with Ms. Nunez-Shular.

[23] A meeting was held on March 25, 2018 among Ms. Nunez-Shular, Ms. Petersen and Ms. Lavallee. It did not resolve matters.

[24] Ms. Nunez-Shular said that the pressure to train Ms. Holmstrom on all aspects of taxation interfered with her ability to prepare for the upcoming tax season. It caused her an increasing amount of stress that became unbearable. Her doctor advised her to take a break from her employment, which she did. She went on medical leave at the beginning of April 2018.

[25] By that time, Ms. Nunez-Shular had occupied the position of First Nations tax administrator at the OIB for nine years. Throughout that nine-year period and for the ten years prior, Ms. Nunez-Shular worked at the OIB administrative offices. There is no evidence that she was a difficult employee or had any difficulty getting along with other staff in those offices. There were no complaints about her competence or capabilities as tax administrator. There is evidence, however, that she was capable, competent, friendly and kind.

Medical Leave in 2018

[26] At the time she went on medical leave at the end of March 2018, Ms. Nunez-Shular was earning \$27.25 per hour and roughly \$54,000 per annum.

[27] Shortly after going on medical leave, Chief Louie texted Ms. Nunez-Shular and demanded that she return her key fob. This had not happened before, although Ms. Nunez-Shular had taken previous medical leaves. He also sent a letter saying that Ms. Nunez-Shular had “gone on another stress leave after having another lengthy stress leave in the prior year” (2017). This was not the case: she had emergency surgery in 2017.

[28] Chief Louie demanded that Ms. Nunez-Shular provide details of her medical condition through her doctor.

[29] Ms. Nunez-Shular provided Chief Louie’s letter to her doctor, Dr. Steven Evans. Dr. Evans refused to provide the information to Chief Louie. He said that he does not respond to letters from employers asking for information about his patients. The information is private and is not appropriate to divulge.

[30] Dr. Evans placed Ms. Nunez-Shular on medical leave. She was placed on disability insurance benefits through Great-West Life (GWL).

Ms. Holmstrom is Appointed Tax Administrator

[31] The tax administrator must be appointed by Band Council Resolution, as Ms. Nunez-Shular was in 2011. Ms. Holmstrom said that she recalled her appointment being made in 2019, prior to April or May. The Resolution was not disclosed by the defendant either before the trial or during the evidentiary portion of the trial.

Graduated Return to Work

[32] GWL assigned Farooq Mian, a rehabilitation consultant, to Ms. Nunez-Shular’s file in November 2018. Among other things, his job was to focus on her rehabilitation and reintegration to the job that she was doing before her medical leave.

Attempts to Contact OIB Representative

[33] The OIB advised Mr. Mian that the employer's representative was Joyce Lavallee. On November 9, 2018, Mr. Mian attempted to contact Ms. Lavallee, by phone and email to discuss proceeding with Ms. Nunez-Shular's graduated return to work (GRTW). He did not get any response from Ms. Lavallee or anyone else from the OIB. Mr. Mian sent emails to Ms. Lavallee on February 1 and 27, April 5, May 7, June 10, June 13, and June 18, 2019. In the February 1 email, Mr. Mian advised that the goal was to return Ms. Nunez-Shular to her position in March on a GRTW. In the April 5 email Mr. Mian said that the GRTW would begin in mid- to late-May. In the May 7 email, Mr. Mian said that the GRTW can begin in mid-June. In the June 10 email, Mr. Mian said that the GRTW would begin on June 17.

[34] Because he had not received any responses to his calls and emails, on June 18, 2019, Mr. Mian called Mark Hayden, an OIB employee in the Human Resources Department. Mr. Hayden confirmed that Joyce Lavallee was the correct person to contact about the GRTW. Mr. Mian did not receive a response from Ms. Lavallee or anyone else from the OIB to any of his emails until June 24, 2019.

[35] Ms. Lavallee agreed that she had been given the task of managing Ms. Nunez-Shular's GRTW because of Ms. Baptiste's conflict of interest. She said she did so "off the corner of her desk". She agreed that she did not have experience in direct human resources management, but helped out from time-to-time over eleven years.

[36] In her evidence, Ms. Lavallee said that she did not respond to Mr. Mian's emails because they were not for her. She forwarded them to Jessica Kruger, who was not an employee of the OIB. She did not advise Mr. Mian that she forwarded the emails to Ms. Kruger. Mr. Mian was not asked during his evidence if he knew of Jessica Kruger or if she played any role in the GRTW.

[37] Ms. Lavallee agreed, on behalf of the OIB, to participate in the GRTW. The GRTW was confirmed on June 24, 2019 and began on July 10, 2019. As its name connotes, the program is eight weeks in length, with increasing hours of work and

responsibilities to enable the employee to resume the full responsibilities of her job at the end of the program.

[38] Mr. Mian provided the GRTW schedule to Ms. Lavallee before Ms. Nunez-Shular embarked on the program on July 10, 2018.

Commencement of GRTW

[39] That day, Ms. Nunez-Shular attended the OIB offices with Jon Przybyl, a registered occupational therapist who GWL assigned to ensure Ms. Nunez-Shular had a successful return to work.

[40] They first met with Ms. Baptiste who sent them to meet with Ms. Lavallee. When Ms. Lavallee arrived, Ms. Nunez-Shular considered her to be unwelcoming and unhappy to see them, despite Ms. Nunez-Shular having been away for over a year. Ms. Lavallee walked Ms. Nunez-Shular and Mr. Przybyl to the Tax Department. When they arrived, Ms. Holmstrom was sitting in Ms. Nunez-Shular's workspace. Mr. Przybyl was very familiar with GRTW programs, as he had done over 50 of them by July 2019. Generally, he said, the employee returning to work goes back to her workstation. It makes the returning employee comfortable to have that familiarity and he can modify the work station, as needed. Mr. Przybyl said that it is not feasible to do that at a temporary work station.

[41] Ms. Lavallee told them that Ms. Nunez-Shular could not sit at her desk but must sit at a small temporary table, while Ms. Holmstrom occupied her workstation. Ms. Lavallee told Ms. Nunez-Shular that she can only do filing, adding "you know what to do". Ms. Lavallee left.

[42] Ms. Lavallee reported to Mr. Mian that she informed Mr. Przybyl that Ms. Nunez-Shular would be working at the temporary table that Mr. Przybyl had approved, and her duties would be limited to filing. Mr. Przybyl said that he did not approve of the temporary table, or the duties that Ms. Lavallee proposed that Ms. Nunez-Shular perform. He expressed his concern about not knowing when she

would return to her workstation, as it was necessary to enable her to perform her job as tax administrator.

Supervision and Work Duties

[43] Another OIB employee, Joseph Linkevic, known to all at the OIB as “Banjo”, told Ms. Nunez-Shular that he would be supervising her during the GRTW. Before her medical leave in March 2018, Banjo was the director of lands and the head of the Lands Department. His status was equal to Ms. Nunez-Shular, who was head of the Tax Department. Ms. Nunez-Shular had never been supervised by anyone before and Banjo was a former colleague. Banjo agreed that he did not have any involvement in the day-to-day operations of the Tax Department.

[44] Ms. Nunez-Shular told Mr. Przybyl she was shocked and could not believe how she was being treated. He encouraged Ms. Nunez-Shular to persevere, and she agreed to do so.

[45] Ms. Nunez-Shular described the following weeks of the GRTW as equally terrible and extremely difficult.

[46] The work duties that Ms. Lavallee assigned to Ms. Nunez-Shular were not those of the tax administrator. She was assigned to filing, the work that the students who worked in her department in the summer had done previously.

[47] Ms. Nunez-Shular found it impossible to gradually resume her job duties without access to a proper workstation and a computer connected to the tax database and email and a working telephone. She raised this with Ms. Lavallee, who claimed that it was GWL that was not allowing her to return to her desk or a computer.

[48] Mr. Mian confirmed that he did not restrict Ms. Nunez-Shular’s duties to filing. He also assumed that she would be returned to her own workstation or something comparable.

[49] On July 11, 2019, Mr. Mian sent an email to Ms. Lavallee and told her that “Melinda needs a desk: preferably her own”. Ms. Lavallee responded: “not at this time as her desk is currently the only connection for taxation programs, phone calls from customers, taking payments, data input all that Melinda is unable to do.”

[50] Mr. Mian responded to Ms. Lavallee the same day, advising that Ms. Nunez-Shular was not there to observe; she should be doing her own job although she was supernumerary.

[51] Ms. Lavallee emailed Chief Louie that same day saying that “Melinda is causing turmoil for Alanea and myself.” She referred to Ms. Nunez-Shular’s complaints about the temporary table. She said that “Alanea was doing a great job in the Tax Department a better job than Melinda”. Ms. Baptiste was copied on the email, who responded by saying that she was in a conflict of interest.

[52] Ms. Nunez-Shular remained at the temporary table and Ms. Holmstrom remained in Ms. Nunez-Shular’s workspace. Ms. Nunez-Shular became increasingly concerned that this would be how she will be treated on an ongoing basis.

[53] On July 19, 2018, Mr. Mian followed-up with an email to Ms. Lavallee asking if a desk had been arranged for Ms. Nunez-Shular. He referred to her transitioning to four hours a day in accordance with the GRTW and suggested that she start doing retraining and tax work. He also suggested that her duties be increased.

[54] On July 22, 2018, Ms. Lavallee responded. She said that she had spoken to Ms. Nunez-Shular who told her that she was just there to observe. Ms. Nunez-Shular said that she did not say that to Ms. Lavallee, rather, she told Ms. Lavallee that she was ready to work on the tax laws, but needed a desk with a working computer connected to the OIB system containing the tax information to do so.

[55] Nathan McGinnis, another employee of the OIB called Ms. Nunez-Shular to his office. He asked her why she is seated at a temporary table. She said that she did not know why. Mr. McGinnis said that he would reach out to his mother, Ronnie McGinnis, who is the appointed liaison between the OIB and staff. Ms. McGinnis

contacted Ms. Nunez-Shular and told her that she would investigate and raise the matter with the Chief and Council.

[56] When she was cleared to work for four hours per day, on July 22, 2019, Ms. Nunez-Shular asked Ms. Lavallee if she could change her hours to start at 8:00 a.m. and leave after four hours, at noon. There was no response. When she told Banjo that she wanted to leave at noon, he was upset with her and demanded that she return at 1:00 p.m. and work a further half-hour. Frustrated but compliant, Ms. Nunez-Shular did so, working four and a half hours that day instead of four hours.

[57] Banjo called Ms. Nunez-Shular into his office at 1:25 p.m. that day and told her that she must work from 8:30 a.m. to 12:00 p.m. and then return at 1:00 p.m. for a half-hour for the remainder of the week. Banjo told her that Chief Louie has directed, via text message, that Ms. Lavallee will be Ms. Nunez-Shular's direct manager and Banjo will be her supervisor. Ms. Nunez-Shular asked for written confirmation of this. Banjo sent a copy of the text message to her personal email. The message does not disclose who sent it. Banjo told Ms. Nunez-Shular that she could not change her hours, even if she had to return at 1:00 p.m. for a half-hour.

[58] Banjo and Ms. Lavallee asked Ms. Nunez-Shular why she went to Nathan McGinnis' office. Ms. Nunez-Shular said that he asked her to come to his office. They challenged her. They also discussed increasing her duties to involve updating the tax laws. Ms. Nunez-Shular was happy to oversee the updating of the laws but she was concerned about how she would do this without a working computer or telephone or even a desk.

[59] Also on July 22, 2018, Mr. Mian emailed Ms. Lavallee. He said:

Melinda is not there to observe. She should be engaging in productive work. even though she is supernumerary (extra person at work with her benefit being covered by GRWL), she is an employee and her duties should be increasing. If any re-training is needed this should be assessed by the employer and acted upon. I would advise that the supervisor and Melinda meet to put in place an action plan of duties over the course of the GRTW and beyond.

[60] Mr. Mian followed-up with Ms. Lavallee on July 31, 2019, asking that Ms. Nunez-Shular be given a desk and again advising her that, as of August 2, 2019, “Ms. Nunez-Shular should be transitioning into her normal duties...”

[61] Ms. Lavallee responded to Mr. Mian on August 1, 2019 saying that “It has been observed that Melinda’s behaviour resembles that of an unwilling participant.” She goes on to describe what she meant by that comment:

Her expectations of having her former desk are unreasonable at this time given the fact that she is to start with more menial tasks and then progress to more active duties. The Tax Administrator’s desk is where the complex software is loaded into the computer station, and given the above, is not recommended for her use at this time. As well, the main telephone for taxation is at that station, so the interim Tax Administrator handles all the incoming calls regards tax issues from individuals, corporations, legal firms, government of British Columbia and Canada are all processed through this land line. Melinda has also indicated that she needs to be retrained in TAS which is a little confusing to me as she has been using TAS for several years and to my understanding nothing in the software has changed. As a tax administrator you need to retain a certain amount of information, if Melinda is having difficult retaining information, that is of concern.

Our request for her to engage with work related to the Tax Law is work she formerly was doing when Tax Administrator, and as this is a step up from the current recommended work would be well suited for her to begin doing when the current tasks are completed. This is where the comment came in from regarding her being here as “observer” does not mesh with anticipated active duties in the next phase of increased responsibility.

[62] On August 2, 2019, Mr. Mian emailed Ms. Lavallee advising that Ms. Nunez-Shular was able to perform her full duties and asked that she no longer be assigned filing.

[63] Mr. Mian reiterated that:

The purpose of the GRTW is for Ms. Nunez-Shular to become reintegrated back into the work force and the purpose of the GRTW is to result in Melinda being able to perform her full duties. At this time, we ask that Melinda is not assigned any filing duties due to a temporary issue with her arm.

Melinda will require a desk, a computer and access to all the programs she used to have prior to going off work to perform her job duties. It does not have to be her previous desk as long as she has access to all she needs to perform the regular duties of a Tax Administrator. Given the fact that Melinda has been off work for over a year, she will also benefit from having someone go over the TAS with her as a refresher.

[64] Mr. Mian also confirmed that Ms. Nunez-Shular is not an observer and that:

[T]he goal is to increase her job duties. Melinda agreed to this and advised that she is very much looking forward to having her duties increased and to perform the duties of her job as a Tax Administrator. As such, please continue to provide Melinda with increased duties as it pertains to her job as a Tax Administrator and offer Melinda any assistance that she may require.

On our end, we will continue to provide Melinda with services to facilitate a successful return to work and will also outline to her the expectations of the GRTW and that the purpose of the GRTW is not for her to be an observer, but rather slowly integrate back into performing the duties of her job.

[65] In early August 2019, Ms. Nunez-Shular was moved from the temporary table to a small desk. A computer was placed on the desk for her, but it was not connected to the OIB computer system, nor to any Tax Department programs. There was a phone, but it was not connected. She was not allowed to return to her workstation because Ms. Holmstrom was there. There was another desk available in the Tax Department, with a computer, phone, access to Tax Department programs and other necessary equipment, but it was occupied by an employee of the Lands Department.

[66] Ms. Nunez-Shular was shown photographs of another workstation that the OIB said that she was offered in the summer of 2019. Ms. Nunez-Shular was not familiar with that workstation. She said that she did not receive such an offer and she had never worked there.

[67] By August 16, 2019, Ms. Nunez-Shular was reaching the end of the GRTW program. Mr. Mian tried to coordinate a meeting among himself and other GWL representatives, Ms. Lavallee and Ms. Nunez-Shular. Ms. Nunez-Shular wanted Ms. McGinnis and Sammy Jo Louie to attend with her.

Conclusion of the GRTW

[68] The computer on Ms. Nunez-Shular's desk was connected on August 26, 2019.

[69] Because of Ms. Lavallee's schedule, the meeting that Mr. Mian had proposed occurred on August 27, 2019 by teleconference. Ms. Baptiste was present, in spite

of her declaring herself to be in a conflict of interest as Ms. Holmstrom is her sister. Also present were Ms. Lavallee, and Ms. McGinnis. The GWL representatives, including Mr. Mian, attended by telephone.

[70] During the meeting, Ms. Nunez-Shular was told that Ms. Lavallee was now her direct manager and that she was to continue to communicate with Banjo.

[71] Ms. Nunez-Shular asked about where her workstation would be, to which Ms. Lavallee responded that there was no permanent work station because they were unsure of Ms. Nunez-Shular's abilities. A GWL representative referred to the several emails that had been sent to her by Mr. Mian outlining the progress in Ms. Nunez-Shular's abilities and about a permanent work station (referring to her previous workstation) with all the required equipment needed to perform the tax administrator's job.

[72] Ms. Lavallee responded by saying that she did not receive any emails from GWL about setting up an appropriate work station for Ms. Nunez-Shular. This was surprising to Mr. Mian as Ms. Lavallee had responded to most of the emails that he sent while the GRTW was ongoing in July and August 2019.

[73] Ms. Lavallee confirmed during this meeting that Ms. Nunez-Shular remained the tax administrator and her role was the same as it was before her medical leave.

[74] That same day, following the meeting, Ms. Baptiste sent an email to Ms. Nunez-Shular in which she was advised to report directly to Ms. Lavallee, rather than Chief Louie, as she always had. She also said that "Lands and Taxation go hand in hand and a line of communication will be with the person in the head of the department which is Banjo." She also sent an updated organizational chart reflecting that Ms. Nunez-Shular and Ms. Holmstrom were now "Taxation Officers" with equal status and that these were now permanent changes.

[75] The GRTW concluded in early September 2019.

Aftermath of the GRTW

[76] On September 10, 2019, Ms. Lavallee told Ms. Nunez-Shular that other staff were filing written complaints about her. While she asked for copies of the complaints, she did not receive them. Ms. Lavallee followed-up with an email requesting Ms. Nunez-Shular's response. Ms. Nunez-Shular responded by asking for copies of the alleged complaints so she can properly respond in accordance with the OIB policy and procedure manual. She did not receive them.

[77] Unbeknownst to Ms. Nunez-Shular, on September 23, 2019, Ms. Holmstrom sent a lengthy email to Ms. Lavallee and Banjo, setting out the details of the complaints about Ms. Nunez-Shular.

[78] On September 24, 2019, Ms. Nunez-Shular was called into a meeting with Ms. Lavallee and Ms. Holmstrom. Ms. Lavallee advised her that her duties would now be split with Ms. Holmstrom. Ms. Holmstrom would be responsible for dealing with folios in the north and Ms. Nunez-Shular would be responsible for folios in the south. Ms. Holmstrom would also deal with budgeting and accounting matters and continue to deal with BC Assessment Authority, as she had done while Ms. Nunez-Shular was away on leave.

[79] Ms. Nunez-Shular said that she was upset about what she viewed as a further demotion and was unsure what to do.

[80] Despite asking where her personal items from her workstation were throughout the GRTW, on September 27, 2019, they showed up on her desk. No one offered an explanation about where they had been over the last three months. Ms. Holmstrom said that while Ms. Nunez-Shular was on leave, she put her personal items in a box that was likely placed in storage. Ms. Holmstrom said that she was not aware of who placed them on Ms. Nunez-Shular's desk. While Ms. Nunez-Shular was initially happy to have them returned, she was confused and upset that nobody stepped up to explain where they were and why these were withheld from her for so long. She left the office in tears and did not return.

[81] Ms. Nunez-Shular said that she did not intend to quit her job and she did not quit her job.

[82] Ms. Lavallee said that neither she nor the OIB were trying to build a case against Ms. Nunez-Shular for dismissal for cause. On the contrary, she said that Ms. Nunez-Shular was a treasured employee of the OIB and it never intended to fire her.

[83] Ms. Nunez-Shular sought legal advice. Her lawyer notified the OIB by letter of October 1, 2019, that she was constructively dismissed from her employment. On October 11, 2019, OIB's counsel denied that was the case. This litigation ensued.

Medical Evidence

[84] Dr. Steven Evans was qualified as a family physician to give opinion evidence in family medicine and on mental health issues, particularly post-traumatic stress disorder (PTSD). He was also called to give factual evidence regarding his interactions with Ms. Nunez-Shular.

[85] Dr. Evans said that Ms. Nunez-Shular was on medical leave for emergency surgery and recovery from July 2017 to September 2017. He testified that when she returned to work she reported that something was afoot, specifically that the employer was seeking to hire someone in her department without her input and that it was causing her some concern.

[86] In early 2018, Ms. Nunez-Shular reported symptoms consistent with a struggle with stress. She told Dr. Evans that she was having increasing difficulty managing her work environment. It was uncomfortable and she was having difficulty managing the interactions, along with the pressure to train an individual. The stress manifested itself in physical ailments. It was his opinion that her symptoms were similar to those arising from PTSD. In late-March/early-April 2018, Dr. Evans supported her in taking a leave of absence from work to address these symptoms. The physical manifestations of the stress arose from her experiences in the employment context. He confirmed that Melinda's symptoms worsened. By late-

March and/or early-April 2018 he recommended that she take a break from work. She followed his recommendation.

[87] Dr. Evans was asked about Ms. Nunez-Shular's presentation in the late-spring of 2018. He described the plaintiff as tearful, upset, anxious and reporting nightmares. She could not concentrate. She was experiencing heart, abdominal and chest pains. Dr. Evans prescribed medications including Ativan (Lorazepam) to help manage her anxiety and sleep issues.

[88] Dr. Evans described the origins of PTSD and how victims of the disorder often struggle with avoidant behaviour due to the fact that they continuously relive the traumatic event or events, sometimes through flashbacks and nightmares.

[89] At Dr. Evans' recommendation, Ms. Nunez-Shular attended counselling throughout 2018 and 2019.

[90] Dr. Evans observed Ms. Nunez-Shular's slow recovery from the PTSD-like symptoms, her efforts to work through the matter with a counsellor and her continued use of the techniques she learned from the counsellor. By November 2018, he was supportive of the GRTW as Ms. Nunez-Shular was recovering from her symptoms.

[91] Ms. Nunez-Shular continued to see Dr. Evans while the GRTW was ongoing. He described her as initially hopeful and positive but that she became increasingly concerned about her treatment when she started and during the GRTW.

[92] Dr. Evans considered that Ms. Nunez-Shular was capable of performing all duties of her usual work by the end of July 2019. She reported feeling capable but was not provided with access to the tools she needed to do her job. She said that she was unable to complete her normal work because she was not given the opportunity. Instead she was tasked with more subordinate duties that made her uncomfortable and less valued. Dr. Evans noted that the success of the GRTW was uncertain.

[93] By September 2019, Ms. Nunez-Shular presented PTSD-like symptoms but they were worse than before. She was tearful, crying, anxious and reporting nightmares. Dr. Evans was concerned about her ability to function in the employment environment at the OIB.

[94] When Dr. Evans saw Ms. Nunez-Shular on October 8, 2019, he recommended that she not return to work at the OIB, particularly after her experience in the summer and fall of 2019.

[95] Dr. Evans said that even after she stopped working at the OIB, Ms. Nunez-Shular continued to struggle significantly with PTSD-like symptoms during 2020 and 2021. While Ms. Nunez-Shular had started working with her husband, and that was good for her, Dr. Evans considered that she remained vulnerable due to her experiences in 2019.

[96] Ms. Nunez-Shular's symptoms arose periodically in this litigation and caused her PTSD-like symptoms to flare up again.

Analysis

Credibility

[97] In *Bradshaw v. Stenner*, 2010 BCSC 1398, aff'd 2012 BCCA 296, the Court provided a summary of factors to be considered in the assessment of credibility, at para. 186:

Credibility involves an assessment of the trustworthiness of a witness' testimony based upon the veracity or sincerity of a witness and the accuracy of the evidence that the witness provides. The art of assessment involves examination of various factors such as the ability and opportunity to observe events, the firmness of his memory, the ability to resist the influence of interest to modify his recollection, whether the witness' evidence harmonizes with independent evidence that has been accepted, whether the witness changes his testimony during direct and cross-examination, whether the witness' testimony seems unreasonable, impossible, or unlikely, whether a witness has a motive to lie, and the demeanour of a witness generally. Ultimately, the validity of the evidence depends on whether the evidence is consistent with the probabilities affecting the case as a whole and shown to be in existence at the time.

[Citations omitted.]

[98] In this case, both parties challenge the credibility of various witnesses. The plaintiff asserts that the evidence of several witnesses for the OIB have been untruthful in their evidence, notably Ms. Lavallee and Ms. Baptiste.

[99] Similarly, the defendant argues that the plaintiff is lacking in credibility.

Ms. Lavallee

[100] The plaintiff refers to several of Ms. Lavallee's statements that she asserts were untruthful. They are:

- Ms. Lavallee's assertion to Mr. Mian that she did not receive his emails about commencing the GRTW;
- Ms. Lavallee's assessment of Ms. Nunez-Shular's capabilities during the GRTW;
- Ms. Lavallee's assertion that she did not receive Mr. Mian's emails during the GRTW, particularly about Ms. Nunez-Shular's capabilities, her work station and the purpose and intent of the GRTW;
- Ms. Lavallee's assertion that she cared deeply about Ms. Nunez-Shular's wellbeing and her value as an employee;
- Ms. Lavallee's handling of the alleged complaints from employees about Ms. Nunez-Shular; and
- Ms. Lavallee's assertion about her role as Ms. Nunez-Shular's manager and the steps taken by her to divide the job of tax administrator.

[101] The defendant takes the opposite view. It asserts that Ms. Lavallee's evidence was truthful and consistent with the surrounding circumstances. It maintains that Ms. Lavallee took all reasonable steps before, during and after the GRTW, particularly that she had been assigned the task and was doing it in addition to her regular job with the OIBDC.

[102] Ms. Lavallee, the defence says, did the best she could in the circumstances, with Ms. Nunez-Shular's best interests in mind. She made every attempt to accommodate Ms. Nunez-Shular's capabilities during the GRTW including addressing her medical and cognitive restrictions, by providing her with an alternative work station, reducing stress by not providing her with a phone or a computer and by assigning her to perform filing.

Determination of Ms. Lavallee's credibility

[103] I must find that Ms. Lavallee's credibility is severely lacking. She professes to have a caring attitude toward Ms. Nunez-Shular, in spite of her active participation in creating the position of tax administrator trainee, including in preparing the posting and participating in the interview process and the hiring of Ms. Holmstrom, without reference to Ms. Nunez-Shular. She was involved in Ms. Holmstrom's training. She did not decline to field Ms. Holmstrom's complaints about Ms. Nunez-Shular personally and the training that she was receiving.

[104] Ms. Lavallee's actions relating to the GRTW were dishonest. She did not respond to Mr. Mian's emails about getting Ms. Nunez-Shular back to work for seven months thus delaying it for that period. She suggested to him that she did not receive his emails. Her evidence at trial was that she received them but forwarded them onto Jessica Kruger, which is contrary to what she told Mr. Mian, who was not asked if he had ever heard of Ms. Kruger or if he knew of her having any involvement in the GRTW. It also contradicts the information that Mr. Mian received from Mr. Hayden at the OIB that Ms. Lavallee was the OIB representative dealing with the GRTW for Ms. Nunez-Shular.

[105] In spite of Ms. Lavallee's agreement to it and the clarity of the GRTW program that was provided in writing to her before the GRTW began, including the particularity about hours of work, work station and duties, and the stated goal of the program to return the employee to her position, Ms. Lavelle chose a different route. As Ms. Holmstrom's supervisor, she knew that Ms. Holmstrom now occupied the position of tax administrator by Band Council Resolution and that Ms. Nunez-Shular

would not return to it. She relied on medical opinions that were written during the period of Ms. Nunez-Shular's leave, rather than those expressed at the time Ms. Nunez-Shular was cleared to return to work. In doing so, she diminished Ms. Nunez-Shular's capabilities by insisting that she perform filing duties, at a temporary desk, without a phone or computer that included access to the tax administrators' specialized programs. Ms. Lavallee went so far as to say that Mr. Przybyl approved of the temporary table when he did not.

[106] Mr. Mian wrote to Ms. Lavallee repeatedly about the workstation, the assigned duties and the goal of the GRTW program during July and August 2019. Despite his expertise, Ms. Lavallee did not take his direction about those matters. Then, when there was a meeting on August 27, 2019 to discuss the conclusion of the GRTW and the re-integration of Ms. Nunez-Shular into the work place as tax administrator, Ms. Lavallee again resorted to dishonesty by stating during the meeting that she did not get the emails from Mr. Mian, in spite of her having responded to them.

[107] Despite her claim that she was managing Ms. Nunez-Shular's GRTW "off the side of her desk", I find that Ms. Lavallee's conduct throughout to be more than benign. She was actively undermining Ms. Nunez-Shular's return to work throughout the program and after, when she brought up complaints about her by other employees but refused to provide her with copies of the complaints. When she became manager of the tax officers, the role of tax administrator was divided in half, to be shared by Ms. Nunez-Shular and Ms. Holmstrom. Ms. Lavallee then asserted that it was only a suggestion.

[108] My finding concerning Ms. Lavallee's credibility results in my preferring the evidence of the plaintiff, where it conflicts with that of Ms. Lavallee.

Ms. Baptiste

[109] The plaintiff says that Ms. Baptiste was unwilling to admit facts that were obvious in her testimony, and would do so only when documents were presented to her in cross-examination that contradicted her evidence.

[110] The plaintiff points to:

- Ms. Baptiste insisting that she followed her usual practice of involving the head of the department in determining if a job should be posted, involving them in the development of the job description, posting and interview process;
- Ms. Baptiste's claim that she was recusing herself due to a conflict of interest, and then continuing to be involved in the process;
- Ms. Baptiste preparing a new organizational chart where Ms. Nunez-Shular and Ms. Holmstrom are described as tax officers, are of equal status and report to Ms. Lavallee; and
- advising Ms. Lavallee to consult an HR lawyer concerning Ms. Nunez-Shular.

Determination of Ms. Baptiste's Credibility

[111] Ms. Baptiste's evidence was less than forthright.

[112] In her evidence, she claimed that she followed her usual procedure of involving the head of the department in the decision and preparation of new jobs within that department. When she was confronted with the fact the plan to hire a tax administrator trainee was made while Ms. Nunez-Shular was on medical leave in 2017, she reluctantly agreed in cross-examination that she did not forward the initial draft job posting for the trainee position to Ms. Nunez-Shular on August 5, 2017, when the posting was first circulated to Chief Louie and Joyce Lavallee. Ms. Nunez-Shular was excluded from the related email discussion amongst Chief Louie, Ms. Lavallee and Ms. Baptiste. When Ms. Nunez-Shular returned from her medical leave on October 5, 2017, the final version of the job posting, along with the job description and training package were not sent to her, but to Chief Louie and Ms. Lavallee before the job posting was placed in the OIB newsletter.

[113] When Ms. Nunez-Shular commenced her GRTW in July 2019, Ms. Baptiste was not welcoming in any way. Ms. Lavallee copied her on the July 11, 2019 email that spoke negatively about Ms. Nunez-Shular (causing turmoil) and positively about Ms. Holmstrom (better job than Melinda). Notably, Ms. Baptiste did assert her conflict of interest. Nonetheless, in her evidence, Ms. Baptiste agreed that she was always involved behind the scene with the Tax Department and was emailed or copied on emails throughout the GRTW from Ms. Lavallee and Banjo.

[114] Ms. Baptiste did not let her conflict of interest interfere with her attendance at the August 27, 2019 meeting with the GWL representative and Ms. Nunez-Shular. Following that meeting, Ms. Baptiste emailed Ms. Nunez-Shular about her change of status, urged Ms. Lavallee to hire an HR lawyer and directed her to divide up the tax administrator job between Ms. Holmstrom and Ms. Nunez-Shular.

[115] Ms. Baptiste's lack of forthrightness leads me to conclude that she was very involved in the changes to the Tax Department, the hiring and promotion of her sister, Ms. Holmstrom, to the position of tax administrator, and with the exclusion of Ms. Nunez-Shular to her previous role as tax administrator.

Ms. Nunez-Shular

[116] The defendant says that Ms. Nunez-Shular has recast the facts in several different ways throughout this case, but the theme is consistent in each: she is a victim and the wrongdoer is the OIB and a cast of characters alleged to be acting in concert, including Ms. Baptiste. The OIB says that the manner in which Ms. Nunez-Shular has recast the facts in each instance does not align with the evidence in this case.

[117] The defendant continues:

Ms. Nunez Schular (sic) accepts no responsibility whatsoever for the part she played in the breakdown of the employment relationship. This is demonstrative of a significant lack of insight on her role in creating the current situation.

[118] The defendant further argues that Ms. Nunez-Shular's belief that she was demoted or that her role changed focused largely on her preoccupation with Alanea Holmstrom. Ms. Nunez-Shular was more preoccupied with what Ms. Holmstrom's role would be in the Taxation department than what her role in fact was and what the OIB told her it was. The defendant asserts that "this drove a destructive and counter productive course of behaviour on [Ms. Nunez-Shular's] part that led her to conclude she had been demoted in the absence of any credible objective evidence that was the case".

Determination of Ms. Shular-Nunez's Credibility

[119] For the reasons that I have expressed in relation to the credibility of Ms. Lavallee and Ms. Baptiste, I cannot prefer their evidence to that of Ms. Nunez-Shular.

[120] Ms. Nunez-Shular was pre-occupied with Ms. Holmstrom's role as tax administrator for obvious reasons. Ms. Holmstrom had Ms. Nunez-Shular's job and it was made clear to her, through the actions of Ms. Lavallee, Ms. Baptiste, Mr. Linkevic and Ms. Holmstrom that she was not going to resume that role. It was Ms. Holmstrom's position. The credible evidence is that Ms. Nunez-Shular was demoted. The destructive course of behavior was that of the OIB, though the individuals that I have listed.

The Non-disclosure of the OIB Band Council Resolution

[121] The OIB did not disclose the Band Council Resolution appointing Ms. Holmstrom as tax administrator. It was referred to often during the evidence. It was a clearly relevant document, as it would disclose the date and the circumstances of Ms. Holmstrom's appointment. Instead, there was vague evidence from Ms. Holmstrom that she was appointed in the early spring 2019. There was conjecture by both parties about the circumstances of the appointment during the trial and the argument. Was she appointed in addition to or in place of to Ms. Nunez-Shular? Was it temporary or permanent?

[122] The defendant maintained that the Band Council Resolution could not be found. That remained its position up to and including its submissions.

[123] The plaintiff in her argument and in her reply to the defendant's argument referred to the non-disclosure of this clearly relevant document. In her reply, she argued that an adverse inference ought to be made against the defendant's interest: that is, that the non-disclosure was deliberate because the OIB knew that it was determinative of the issue of Ms. Holmstrom's being appointed as tax administrator, replacing the 2011 appointment of Ms. Nunez-Shular, while Ms. Nunez-Shular was on leave and before she returned to work in July 2019.

[124] During the morning break of the last day of the trial, in the midst of the plaintiff's reply having just addressed the adverse inference that the plaintiff sought to have me make, defence counsel interrupted and said that the Band Council Resolution had been located, and the defendant wished to enter it as a business record as it was determinative of whether Ms. Holmstrom had replaced Ms. Nunez-Shular as tax administrator and it was therefore in the interests of justice. Plaintiff's counsel strenuously objected to its admissibility based on its late and surprising disclosure. The plaintiff also questioned the authenticity of the document.

[125] I did not admit the document into evidence at that time and invited the defendant to make submissions as to why it ought to be entered into evidence at this stage of the proceedings, particularly when the defendant maintained throughout trial and during its argument made an hour before, that the Band Council Resolution could not be found.

[126] Defence counsel advised that she would "leave it" and agreed that the facts should be found on the evidence admitted in the trial. Shortly after the trial concluded, I was advised that a submission had been received in the court registry from defence counsel. I refused to accept the submission based upon defence counsel's comment to me at the end of trial.

[127] The recently-located Band Council Resolution is not in evidence before me.

[128] In these circumstances, I am prepared to draw an adverse inference against the defendant for its non-disclosure of the Resolution. I find that it was not disclosed because the defendant considered it inconsistent with its position in this trial, that Ms. Nunez-Shular was not replaced by Ms. Holmstrom as tax administrator during her leave and before she returned to work, or at all.

[129] I find as a fact that Ms. Holmstrom was appointed to the position of the OIB's tax administrator at some time during Ms. Nunez-Shular's leave (April 1, 2018) and her return to work (July 10, 2019). She replaced Ms. Nunez-Shular in that position. When Ms. Nunez-Shular returned to work, she was no longer the tax administrator for the OIB; Ms. Holmstrom was.

Ms. Nunez-Shular's Performance as an Employee

[130] The defence in this case is that Ms. Nunez-Shular quit her job because she did not like it. All of the defence witnesses were called to express their negative assessment of Ms. Nunez-Shular's performance as an employee from the time of Ms. Holmstrom's written complaint to Chief Louie on March 17, 2018 to the conclusion of Ms. Nunez-Shular's employment in October 2019. Each complaint was canvassed thoroughly in the defence evidence. It was the basis of the defence argument that rather than being constructively dismissed, Ms. Nunez-Shular quit.

[131] The plaintiff argues that the complaints and comments about her negative performance were not put to her by the defence in cross-examination, and she did not have an opportunity to address them and present her side. She asserts that the instruction in *Browne v. Dunn* (1893), 6 R. 67 (U.K. H.L.) must be applied.

[132] That instruction was explained by in *R. v. Podolski*, 2018 BCCA 96 at para. 145: "The rule in [*Browne v. Dunn*], requires a party who intends to impeach a witness to provide the witness with an opportunity to explain or address the point on which their evidence is to be challenged later in the trial."

[133] I have not reviewed the evidence critical of Ms. Nunez-Shular's performance as an employee for reasons that I will provide later in this analysis. I find this

evidence to be irrelevant. As such, it is not necessary for me to apply the *Browne v. Dunn* instruction.

Constructive Dismissal

Legal Framework

[134] In his textbook, David Harris, *Wrongful Dismissal*, (Toronto: Thomson Reuters Canada, 2020). Online: Westlaw Canada (date accessed 15 December 2020), the author notes in his introduction:

While the subject of this work is “wrongful dismissal,” it should be noted at the outset that this nomenclature is less than precise. As Mr. Justice Cote of the Alberta Court of Appeal observed in *Soost v. Merrill Lynch Canada Inc.*, 2010 ABCA 251... rev'd in part by 2010 ABCA 251:

We speak of “wrongful dismissal”, or damages for that. But there is no such thing ... as wrongful dismissal (apart from federal legislation). Under [a contract of indefinite hiring], either side may validly end the contract at any time. The employee neither has tenure, nor is indentured. The employee and the employer both have the right to end the contract, and ending it is not a breach of contract, nor a tort.”

The “wrongful” element in wrongful dismissal actions is not the employer's act of ending the employment contract per se; it is the dismissal of an employee without cause, either summarily or without the measure of notice to which he or she is entitled at common law.

[135] In this case, Ms. Nunez-Shular asserts that the OIB constructively dismissed her. The employer says that it did not constructively dismiss Ms. Nunez-Shular, rather, she quit. The resolution of this determines whether Ms. Nunez-Shular is entitled to damages.

[136] The leading case regarding constructive dismissal is *Potter v. New Brunswick Legal Aid Services Commission*, 2015 SCC 10.

[137] Mr. Potter was employed as a lawyer by the New Brunswick Legal Aid Services Commission for a seven-year term. In the fourth year of that term, in the spring of 2009, Mr. Potter went on medical leave. Mr. Potter and the Board of the Commission commenced negotiations for a buy-out of the rest of his term. The negotiations were unsuccessful.

[138] In January 2010, just before the medical leave was to expire, the Board sent a letter to the Minister of Justice of the Province proposing that Mr. Potter be dismissed for cause. Mr. Potter was not aware that this letter had been sent. He was then informed by letter to his counsel that he was not to return to work until further notice (the “indefinite suspension”) but that he would continue to be paid his salary for 18 months.

[139] Mr. Potter commenced an action against the defendant legal aid commission for wrongful dismissal, claiming constructive dismissal. His action was dismissed by the New Brunswick Queen’s Bench (2011 NBQB 296) and by the Court of Appeal (2013 NBCA 27). The majority of the Supreme Court of Canada allowed the appeal and found that Mr. Potter had been constructively dismissed and awarded damages to him.

[140] In regard to the concept of constructive dismissal, the Court endorses para. 24 of *Farber v. Royal Trust Co.*, [1997] 1 S.C.R. 846:

Where an employer decides unilaterally to make substantial changes to the essential terms of an employee’s contract of employment and the employee does not agree to the changes and leaves his or her job, the employee has not resigned, but has been dismissed. Since the employer has not formally dismissed the employee, this is referred to as “constructive dismissal”. By unilaterally seeking to make substantial changes to the essential terms of the employment contract, the employer is ceasing to meet its obligations and is therefore terminating the contract. The employee can then treat the contract as resiliated for breach and can leave. In such circumstances, the employee is entitled to compensation in lieu of notice and, where appropriate, damages.

[141] The burden is on the employee to establish that she has been constructively dismissed (*Potter* at para. 31).

[142] The Court notes in *Potter* at paras. 32-33:

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. There are two branches of the test that have emerged. Most often, the court must first identify an express or implied contract term that has been breached, and then determine whether that breach was sufficiently serious to constitute constructive dismissal.

33. However, an employer's conduct will also constitute constructive dismissal if it more generally shows that the employer intended not to be bound by the contract. ... courts have held that an employee can be found to have been constructively dismissed without identifying a specific term that was breached if the employer's treatment of the employee made continued employment intolerable. This approach is necessarily retrospective, as it requires consideration of the cumulative effect of past acts by the employer and the determination of whether those acts evinced an intention no longer to be bound by the contract.

[Citations omitted.]

[143] The Court held that there are two branches to the test for constructive dismissal: the first branch requires the court to identify an express or implied contract term that has been breached and whether that breach was sufficiently serious to constitute constructive dismissal; the second branch applies where the employer's conduct, in the circumstances, would lead a reasonable person to conclude that the employer no longer intended to be bound by the terms of the contract. Where such an intention is demonstrated by the course of the employer's conduct, it discloses an intention that amounts cumulatively to an actual breach.

[144] At para. 43, the Court notes that the application of both branches of the test are highly fact-specific: "constructive dismissal can take two forms: that of a single unilateral act that breaches an essential term of the contract, or that of a series of acts that, taken together, show that the employer no longer intended to be bound by the contract." [Citations omitted.]

[145] The parties have provided numerous cases where constructive dismissal has been found or rejected. I do not find it necessary to address them, as they each turn on the facts found. The principles set out in *Potter* applied to the facts of this case provide a basis for my conclusion on whether Ms. Nunez-Shular has been constructively dismissed.

[146] As noted, I have found the defendant's evidence criticizing Ms. Nunez-Shular's performance as an employee to be irrelevant, as its position is that it did not dismiss Ms. Nunez-Shular for cause, or at all. In this regard, I refer to para. 71 of *Potter*:

Incidentally, given that cause was not alleged in the instant case, I question the relevance of the Court of Appeal's lengthy summary of what it calls the "deterioration" of Mr. Potter's relationship with the Board (paras. 2 and 21-26). Drapeau C.J.N.B. stated that he was including this evidence "to show the Board's revocation recommendation was *bona fide* and anything but frivolous" (para. 21). However, these facts had not been litigated at trial, and they consisted mostly of unproven allegations that had been made by the Commission. Unless they relate to the specific administrative reasons given by the Board for suspending Mr. Potter, they are not relevant.

Was Ms. Nunez-Shular Constructively Dismissed?

First Branch of the Test

[147] Ms. Nunez-Shular was constructively dismissed on the first branch of the test for constructive dismissal: an express or implied contract term was breached and it was sufficiently serious to constitute constructive dismissal. Ms. Nunez-Shular was removed from her position as tax administrator and replaced by Ms. Holmstrom while Ms. Nunez-Shular was on leave from March 2018 to July 2019. Ms. Nunez-Shular did not have the position as tax administrator when she returned to work. There is no more fundamental or substantial change to the contract of employment than removing an employee from her position and replacing her with another, significantly junior, employee.

[148] I base that finding on my application of an adverse inference on the non-disclosure of the Band Council Resolution appointing Ms. Holmstrom as the tax administrator of the OIB. However, that finding is amply corroborated by the conduct of the OIB, through the actions of Chief Louie, Ms. Lavallee and Ms. Baptiste.

[149] When Ms. Nunez-Shular returned from her medical leave in September 2017, she learned of the move by those three individuals to post a job for a tax administrator trainee. Despite the usual procedure of involving the head of the department in creating, posting and interviewing candidates for a job in her department, Ms. Baptiste agreed that it was not followed in this case. She did not explain why.

[150] This supports my view that the OIB decided to begin the process of replacing Ms. Nunez-Shular as the tax administrator as early as the fall of 2017.

[151] Ms. Holmstrom was the successful candidate. While she may have been the most qualified of the applicants to the trainee position, her sister, Ms. Baptiste was the human resources director of the OIB. Although she declared herself to be in a conflict of interest, I find that Ms. Holmstrom's relationship to Ms. Baptiste likely played a part in her being awarded the position. That is supported by the exclusion of Ms. Nunez-Shular from the process and by the fact that despite Ms. Baptiste stating that she was recusing herself from Tax Department matters, she was regularly updated by Ms. Lavallee, by email throughout Ms. Nunez-Shular's GRTW and after.

[152] Ms. Nunez-Shular was advised by Chief Louie that Ms. Holmstrom was to be a "floater". Ms. Lavallee confirmed that she did not tell Ms. Holmstrom that she was a "floater". She understood that Ms. Holmstrom was training for the position of tax administrator. Ms. Holmstrom shared that understanding. This explains why Ms. Holmstrom was irritated by Ms. Nunez-Shular during the training period, between November 2017 and March 2018. It explains the email that Ms. Holmstrom sent to Chief Louie in March 2019 that is highly critical of Ms. Nunez-Shular. She adamantly believed that she and Ms. Nunez-Shular were equals and that she was not an assistant. It was not unreasonable for her to think that, based on the understanding that she and Ms. Lavallee had of her role.

[153] Mr. Mian began to canvas a GRTW with Ms. Lavallee in November 2018. Despite sending regular emails to Ms. Lavallee to begin the process, there was no response. Ms. Lavallee was prepared to lie about why she did not respond to Mr. Mian. I find that she did not respond because Ms. Nunez-Shular had been replaced by Ms. Holmstrom and there was no position for Ms. Nunez-Shular to gradually return to.

[154] Ms. Lavallee's conduct throughout the GRTW, along with that of Ms. Baptiste and Mr. Linkevic, underscores that the view of the OIB was that Ms. Nunez-Shular was no longer the tax administrator and that she ought to be content with not returning to her position and her workstation, because it was now Ms. Holmstrom's.

The pretense that Ms. Nunez-Shular's capabilities were not sufficient to return to her position was just that. It was never the OIB's intention for Ms. Nunez-Shular to return. Ms. Lavallee did not accept Mr. Mian's directions regarding the GRTW in his regular emails to her (and then suggested that she did not receive them in the August 2019 meeting), because Ms. Nunez-Shular was not going to return to her position. Instead, the OIB clumsily went through the motions of participating in the GRTW, but never intended to participate. It did not share the goal of the program; to get Ms. Nunez-Shular back to her position as tax administrator.

[155] Finally, when the GRTW concluded, Ms. Baptiste directed that Ms. Nunez-Shular was now a tax officer along with Ms. Holmstrom. This was an obvious demotion. Ms. Lavallee's appointment as Ms. Nunez-Shular's manager was also a demotion. She was no longer the OIB tax administrator and no longer reported to Chief Louie. Ms. Nunez-Shular's responsibilities were cut in half.

[156] Ms. Nunez-Shular's fear that she was being dismissed was accurate, based upon the OIB's actions and the way it chose to treat her.

[157] The OIB submitted that Ms. Nunez-Shular performed poorly throughout the GRTW. I quote from its submission:

Unfortunately, in our submission, Ms. Nunez Schular (sic) was unwilling to accept any of this and responded very poorly to each and every instance in which she was confronted with change in the department.

Further, Ms. Nunez Schular (sic) unreasonably pushed OIB to return her to full duties during the GRTW period and refused to accept any reasoning or explanation as to why that could not take place right away.

To make matters worse, Ms. Nunez Schular (sic) demonstrated active and passive resistance to completing the tasks she was given to do and she demonstrated behaviour which indicated either a lack of ability to perform basic tasks or a refusal to do so.

Most problematically though, from her first day back, we submit that Ms. Nunez Schular (sic) immediately resumed her campaign of hostility toward Ms. Holmstrom and looked to discredit or undermine Ms. Holmstrom and make her life at work difficult. We submit that she continued engaging in this behaviour toward Ms. Holmstrom until the day of her departure in late September or early October.

[158] This argument is meant to support the defendant's position that Ms. Nunez-Shular quit her job and was not constructively dismissed.

[159] There is no evidence that Ms. Nunez-Shular quit her job, even if she was unhappy with it.

[160] I have determined that the evidence and argument criticizing Ms. Nunez-Shular's performance is irrelevant to my consideration of whether the plaintiff was constructively dismissed, based upon *Potter*. I only mention it here to explain the employer's position that she quit.

[161] The defence argument seems to be based on a notion of "constructive quitting". There is no such concept: an employee quits her job of her own volition.

[162] I return to my reference to the text *Wrongful Dismissal*. The employee and the employer both have the right to end the contract of employment, and ending it is not a breach of contract, nor a tort. If the employer considered that Ms. Nunez-Shular's performance was cause for dismissal, it could have exercised that option. Its other option was to dismiss Ms. Nunez-Shular from her employment without cause, by providing reasonable notice or pay in lieu of notice. It did not choose that option either.

[163] Because I have found that the OIB's unilateral change in appointing Ms. Holmstrom as tax administrator, replacing Ms. Nunez-Shular in that position during Ms. Nunez-Shular's leave in 2018-2019, I need not proceed to the second step. However, for completeness, I will do so.

Second Branch of the Test

[164] The second branch of the test is whether, at the time that the breach occurred, a reasonable person in the same situation as the employee would have felt that the essential terms of the employment contract were being substantially changed.

[165] Based on my findings regarding the conduct of the OIB toward Ms. Nunez-Shular before the job of tax administrator trainee was posted in October 2017, during the period when Ms. Holmstrom was hired and until Ms. Nunez-Shular went on leave in April 2018, and during and after the GRTW, I am satisfied that a reasonable person in Ms. Nunez-Shular's situation would have felt that the essential terms of the employment contract were being substantially changed.

[166] The OIB's pattern of conduct evincing its intention in that regard, includes choosing not to respond to the request to commence a GRTW for seven months, subjecting the plaintiff to demeaning and disrespectful treatment when she returned to work by refusing to allow her to return to the workstation she previously occupied for several years, directing her to sit at a temporary table for three weeks while her former trainee occupied her workstation and refusing to follow the directions of GWL to provide Ms. Nunez-Shular with a proper workstation, preferably her own, with a proper working computer connected to email, the tax administration database and programs and a working telephone. The OIB demoted the plaintiff from her position as tax administrator reporting to the Chief, to a tax officer reporting to Ms. Lavallee, the OIBDC Controller, without disclosing that Ms. Holmstrom had actually been appointed to the position of tax administrator by Band Council Resolution. The OIB made the plaintiff's demotion permanent by directing her to divide her responsibilities with Ms. Holmstrom.

[167] Most significantly, the OIB removed her from her position as tax administrator and awarded it to Ms. Holmstrom, and refused to inform her of that. It also refused to acknowledge that during these proceedings.

Damages

Legal Framework

[168] The relevant factors to the assessment of reasonable notice were set out by McRuer, C.J.H.C. in *Bardal v. Globe & Mail Ltd.* (1960), 24 D.L.R. (2d) 140 (Ont. H.C.) at 145, approved in *Machtiger v. HOJ Industries Ltd.*, [1992] 1 S.C.R. 986 (S.C.C.), at pp. 998-99:

There can be no catalogue laid down as to what is reasonable notice in particular classes of cases. The reasonableness of the notice must be decided with reference to each particular case, having regard to the character of the employment, the length of service of the servant, the age of the servant and the availability of similar employment, having regard to the experience, training and qualifications of the servant.

[169] Where circumstances justify it, the plaintiff may be entitled to aggravated damages. In *Wallace v. United Grain Growers Ltd. (c.o.b. Public Press)*, [1997] 3 S.C.R. 701, the Court set out the basis for such an award. Iacobucci J. on behalf of the majority, noted that the wrongful dismissal cases awarded damages for breach of contract, but did not consider the manner of the dismissal in light of the power imbalance between the employer and the employee. The Court's reasons for doing do bear repeating (at paras. 90-95):

90. Although these decisions are grounded in general principles of contract law, I believe, with respect, that they have all failed to take into account the unique characteristics of the particular type of contract with which they were concerned, namely, a contract of employment. Similarly, there was not an appropriate recognition of the special relationship which these contracts govern. In my view, both are relevant considerations.

91. The contract of employment has many characteristics that set it apart from the ordinary commercial contract. Some of the views on this subject that have already been approved of in previous decisions of this Court (see e.g. *Machtiger*, supra) bear repeating. As K. Swinton noted in "Contract Law and the Employment Relationship: The Proper Forum for Reform" in B.J. Reiter and J. Swan, eds., *Studies in Contract Law* (1980), 357, at p. 363:

...the terms of the employment contract rarely result from an exercise of free bargaining power in the way that the paradigm commercial exchange between two traders does. Individual employees on the whole lack both the bargaining power and the information necessary to achieve more favourable contract provisions than those offered by the employer, particularly with regard to tenure.

92. This power imbalance is not limited to the employment contract itself. Rather, it informs virtually all facets of the employment relationship. ...

93. This unequal balance of power led the majority of the Court in [*Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038] to describe employees as a vulnerable group in society: see p. 1051. The vulnerability of employees is underscored by the level of importance which our society attaches to employment. As Dickson C.J. noted in *Reference re Public Service Employee Relations Act (Alberta)*, [1987] 1 S.C.R. 313 (S.C.C.), at p. 368:

Work is one of the most fundamental aspects in a person's life, providing the individual with a means of financial support and, as

importantly, a contributory role in society. A person's employment is an essential component of his or her sense of identity, self-worth and emotional well-being.

94. Thus, for most people, work is one of the defining features of their lives. Accordingly, any change in a person's employment status is bound to have far-reaching repercussions. ...

95. The point at which the employment relationship ruptures is the time when the employee is most vulnerable and hence, most in need of protection. In recognition of this need, the law ought to encourage conduct that minimizes the damage and dislocation (both economic and personal) that result from dismissal. In *Machtinger, supra*, it was noted that the manner in which employment can be terminated is equally important to an individual's identity as the work itself (at p. 1002). By way of expanding upon this statement, I note that the loss of one's job is always a traumatic event. However, when termination is accompanied by acts of bad faith in the manner of discharge, the results can be especially devastating. In my opinion, to ensure that employees receive adequate protection, employers ought to be held to an obligation of good faith and fair dealing in the manner of dismissal, the breach of which will be compensated for by adding to the length of the notice period.

[170] The Court continues at para. 98:

The obligation of good faith and fair dealing is incapable of precise definition. However, at a minimum, I believe that in the course of dismissal employers ought to be. ...

[171] I find that Ms. Nunez-Shular has proven that she is entitled to aggravated damages.

What Constitutes Reasonable Notice in this Case?

[172] Ms. Nunez-Shular commenced her employment at the OIB in April 1999. Her last day was September 27, 2019.

[173] In 2009, Ms. Nunez-Shular assumed the role of tax administrator, a specialized position as an officer under the OIB financial laws. The appointment requires a Band Council Resolution. She was specifically trained for that position. She held that position for ten years, or until Ms. Holmstrom replaced her, the date of which is uncertain.

[174] At the time of her constructive dismissal, Ms. Nunez-Shular was 52 years old.

[175] There are limited opportunities for work as a First Nations Tax Administrator.

[176] In this case, I find that 24 months' notice is an appropriate period of notice. Ms. Nunez-Shular is entitled to damages reflecting the amount she would have received had she had reasonable notice of dismissal.

Wallace Damages

[177] I have described the conduct of the OIB. In all the circumstances, I find that the OIB's conduct toward Ms. Nunez-Shular was not candid, reasonable, honest or forthright and that it engaged in conduct that is unfair and in bad faith by being untruthful, misleading and unduly insensitive.

[178] As the OIB did not meet its obligation of good faith and fair dealing in the manner of dismissal, breach must be compensated for by providing aggravated or "Wallace" damages.

[179] Ms. Nunez-Shular described what she experienced as a result of the OIB's conduct toward her as I have already outlined. It was especially devastating. She suffered from and continues to struggle with anxiety and emotional dysregulation, particularly when she has to revisit the events that led to this claim.

[180] Dr. Evans' evidence is that Ms. Nunez-Shular experienced symptoms consistent with stress and physical manifestations of that stress arising from her experiences in the employment context. He confirmed that her symptoms were PTSD-like. When asked about the plaintiff's presentation in the late-spring of 2018 he described the plaintiff as tearful, upset, anxious and reporting nightmares arising from her experiences in the workplace, from which she continues to make a slow recovery. Those continued throughout her leave and resurfaced during her GRTW.

[181] In all of the circumstances, I award Ms. Nunez-Shular aggravated damages of \$50,000 in addition to the damages she is entitled to as reasonable notice.

Mitigation of Damages

[182] The OIB argues that Ms. Nunez-Shular has not mitigated her damages. It bears the onus of proving that she did not do so. Ms. Nunez-Shular gave some evidence as to what she is doing for work at the moment. She was not cross-examined about her efforts to mitigate.

[183] There is no evidentiary basis to find that Ms. Nunez-Shular breached her obligation to mitigate her damages.

Summary and Conclusion

[184] Ms. Nunez-Shular is entitled to damages representing 24 months of notice. She is also entitled to aggravated damages of \$50,000.

[185] Based upon her success in this action, Ms. Nunez-Shular is entitled to her costs. If there are specific matters that either party wants me to address regarding costs, arrangements may be made through Supreme Court Scheduling for a hearing.

“Gropper J.”